Legal Reimaginations – Notes from the North on engaging with Indigenous Legal Orders

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James Boyd White's *The Legal Imagination* sits within reaching distance on my bookshelf. It is the original 1973 yellow hardcover version. The spine is a bit ripped, the binding loose in places, there are scribbles in the margins, and post-it notes are liberally scattered throughout the book. Some pages (oh, the horror!) even bear witness to an inappropriately close encounter with a coffee cup. It has the look of a book that has spent time in the hands of a student. And that is exactly what it is.

That book became my companion back in 1994, sitting in a full lecture hall in Ann Arbour. I was a Canadian, stepping over the border for the first time, thinking that there were things I might learn about my own legal system by spending some time in another one. Just fresh out of a year as a law clerk at the Supreme Court of Canada, I was starting my LLM with a mind spinning (perhaps a bit chaotically) with questions about identity, equality, justice, legal process, and institutional structures. I was trying to make sense of the place of "choice" or "responsibility" in both law's promise, and law's failures.[1] Like generations of students before me, I was trying to understand how the law might be better brought to bear in resolving challenging struggles over the conduct of life.

And I was right to think that there were important things to be learned by stepping into another legal order, particularly one that, in some ways, seems quite similar. Both Canada and the US share a language, began as settler

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1. The court was engaging that year with a series of cases rooted in questions about choice and responsibility: the right to life (R v. Morgentaler, [1988] 1 S.C.R. 30 (Can.)), the right to death (Rodriguez v. British Columbia, [1993] 3 S.C.R. (Can.)); obscenity and indecency (R v. Butler, [1992] 1 S.C.R. 452 (Can.), Tremblay v. Daigle, [1989] 2 S.C.R. 530 (Can.)); the rights of non-heterosexual couples to access family benefits (Canada v. Mossop, [1993] 1 S.C.R. 554 (Can.)); the tax treatment of women's child care expenses (Symes v. Canada, [1993] 4 S.C.R. 695 (Can.)); the meaning of "choice" in patients' exchange of sex for drugs from their doctor (Norberg v. Weinrib, [1992] 2 S.C.R. 226 (Can.)); governmental "choices" to hold or refuse to hold referenda on constitutional amendments (Haig v. Canada, [1993] 2 S.C.R. 995 (Can.)). I take up the common themes about that year's structuring of the legal imaginary in Rebecca Johnson, "Reflections on Intersections: Some Post-Game Comments." Review of Rebecca Johnson, *Taxing Choices*, 15 CANADIAN TAX JOURNAL 1967 (2003).

colonies of England, are largely rooted in the English common law tradition, and have had closely tied economies. And yet, there are of course differences, differences that were sometimes related to substantive law, but other times related to differences in history, culture, and experience.[2] I began to appreciate differences in thought that were not always so visible in legal texts alone; I was conscious of how much was learned through living inside the legal order, through becoming attuned to how not only the case law, and Faculty, but also fellow students, and citizens discussed, engaged with, and lived law.

Every course that I took was a gift, and each gave me space to think about substantive law, comparative law, legal theory, and law in context. The things I learned in each of those classrooms have been carried forward in different ways. But I don't generally find myself returning to the class materials themselves. It has, after all, been 30 years, and the law continues to move.

But the yellow book? A different story. No dust has gathered on the spine. The book has not been assigned reading for one of my classes, and yet, my copy of *The Legal Imagination* is frequently picked up, referred to, put into the hands of students. The book remains significantly relevant and alive, both in my practice of teaching and learning and in the pathways it offers for engaging with important ongoing efforts in my home country to re-imagine and re-build very different relationships between Canadian and Indigenous Legal Orders. In what follows, I reflect on lines of connection between what Jim White offers us in *The Legal Imagination,* and some current efforts in Canada to change how educators, judges, and lawyers imagine and act on our responsibilities in a world of deep legal pluralism. In particular, I consider how the book asks us to think deeply about three things: the materials of law, the questions we ask, and the importance of acting together.

SPENDING TIME WITH THE LEGAL IMAGINATION

Let me begin by reflecting a bit more on my relationship to both the yellow book, and the time I spent with it back in 1994. In an early conversation with my sister about this paper, she asked me what kind of a book the *Legal Imagination* was. I stumbled for a concise description, first telling her that it was a bit like the Norton Anthology of English Literature, but for law. You know, a classic text. But that wasn't quite right. I tried again, telling her it was a collection of legal and non-legal materials, curated

2. One might head in the direction of comparative constitutional law, or in the direction of much smaller studies of how this is visible even in the place of humor in law. For a belly laugh, see Florence Ashley, *Humorous Styles of Cause in in Rem Actions: A Comparison of Canada and the United States* 24 GREEN BAG 2D 15 (2020).

with an amazing variety of questions to organize engagement, coupled with a range of powerful writing exercises. But again, that didn't quite grab the heart of my attachment to the book. I was reminded, as Jim himself notes in the preface to the fifth printing, that the book does not easily lend itself to categorization. But at the heart of the book is the insight that law is less a set of rules than an imaginative and intellectual activity, a way of imagining a shared history.[3] And this insight was supported in three ways: through the materials gathered together, by a focus on the questions we ask, and through practices pointing in the direction of acting together. Let me elaborate.

First, materials. In the book, Jim says, "law has its own materials, its own life, its own way of being."[4] The book gathered a wide diversity of texts and readings. Some were legal resources in forms that I expected to see: judgements, statutes, regulations, addresses, letters, opinions, memoranda, legislative debates. But there were other texts that were unexpected: novels, plays, poems, histories, sermons, biographies, philosophical treatises, literary theory and criticism. It was not that these were unfamiliar texts. What was unfamiliar was the ways that they sat alongside each other and were made part of the same conversation about law. And further, the texts reached back and forward over time, jurisdiction, and genre. In this gathering, the book offered a practice of learning to see the materiality of law in many more places, of approaching unfamiliar texts with curiosity rather than fear, and of seeing the material of law as part of a shifting and living project. My thinking was destabilized (in productive ways) by the experience of engaging with "law" by looking not only at texts I expected to see, but also at texts that I was unaccustomed to considering as resources for law.[5] In this gathering of diverse texts, the book leans us towards a richer appreciation of how we might imagine and speak of law. A kind of legal pluralism in materials.

Second, questions. As Jim points out, the book is not "full of assertions, but full of questions."[6] Many, many questions. The questions in the book are not posed objectively to the universe, but subjectively to the reader. The pronouns "you" and "your" swirl past in ways that disrupt the impulse to respond with generalities. The questions are addressed to an individual mind, an individual experience, and individual responsibility. The questions

3. JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION
xi (1999).

4. JAMES BOYD WHITE, THE LEGAL IMAGINATION xxii (45th Anniversary ed.).

5. These ideas (which centre both imagination and narrative) are articulated a decade later in Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). Cover says, "law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative -- that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative"(at 9); and "no law or institution exists apart from the narratives that locate it and give it meaning" (at 4).

6. JAMES BOYD WHITE, THE LEGAL IMAGINATION xxiii (1973).

ask for deep engagement and invite the reader to draw themselves into the conversation. The invitation is to look closely at the gathered materials of law, to consider the problems their authors were grappling with, and then to engage with those problems against the context of one's own experience. The aim is not to determine the correctness or accuracy or authority of any particular text but to open up space for reflection. One can step back from the immediacy of the particular demands of justice and the seemingly settled waters of a legal resolution, and spend time with the principles, challenges and values that flow like undercurrents below. The reader is invited to engage with law as "an activity of the imagination."[7] As Jim White summarizes it himself,

"The effort of the book is not to reach conclusions, even tentative ones, but to define responsibilities. The hope is not that a systematic view of life will be exposed, but that the student will come to some new awareness of their place in the world, of their powers and obligations."[8]

This aspect of *The Legal Imagination* often re-grounded me in the questions of choice and responsibility that pressed me in the direction of grad school in the first place. The questions we ask can help us retain space for not only "the judging mind" but also "the tasting mind."[9] That is, even in the face of all that drives us to find answers, it is important to return to the questions that invite us to step back from the immediacy of demands to deliver what one might call Solomonic justice (the threat of the mighty sword of justice cleaving the baby in half).[10] It is important to retain space where one can imagine a broader range of obligations and possibilities. This is a move away from the ones and zeros of the binaries of justice (particularly those delivered in Courtrooms), to "open up diverse and competing lines of thought among which choices can be made."[11]

Third, acting together. In *The Legal Imagination,* Jim White models the insight that law is a verb, an *activity*, something we *do,* and that we do

7. *Id.* at xxi.

8. *Id*. One may note that I have taken the liberty of changing the pronouns here, emboldened in this action by Jim White's own observation, "one embarrassment I have not been able to remove is the remorseless use of the male pronouns to refer to all human beings, and I wish I could change them all to include women as well as men" (at xxiii). While he was unable to change this for the book as a whole, I am happy to give the gift of simply making the change in the quote above, honouring the spirit of his insight, without adding editorial comments like [sic] in the text.

9. I draw this insight from J.K. GIBSON-GRAHAM, POSTCAPITALIST POLITICS (2006). At xxvii they say: "Many years ago a favorite teacher said to one of us: "Your mind is a judging rather than a tasting mind." We took the comment as a reminder that the mind has the capacity for both." They go on to note that the capability for a tasting mind can be cultivated, in the spirit of cultivating the self as a theorist of possibility. In this, their focus in on working against the impulses to "squelch and limit." Something similar (the need to defer the race to decision) is visible in Austin Sarat & Susan Silbey, *The Pull of the Policy Audience* 10 *L. & Policy* 10 97 (1988). In both these works, as in *The Legal Imagination,* there is a reminder of the importance of slow thought.

10. Here, I am reminded of the powerful exploration of the violence of the word/sword in Marie Ashe, *Abortion of Narrative: A Reading of the Judgment of Solomon,* 4 YALE J.L. & FEMINISM 81 (1991).

11. WHITE, *supra* note 5, at xx.

together. He offers us a workbook full of writing exercises. In them, one is not simply listening into a conversation; one is asked to actively enter into a relationship. The questions posed in *The Legal Imagination* are followed by exercises that open space for the reader to do the *work* of building relationships to the legal imaginary. In the process of trying to organize my answers into written text, I came to appreciate the difficulties of language: I could better see all that slipped incompletely between mind and pen. The experience of writing made visible how much fell outside the scope of our words alone. It became easier to read the words of others with greater curiosity, less certainly, and more generosity. The work of first writing and then sharing (modeled as it was through the text) provided opportunities for the practices of *building* trust. In the classroom, we were shifted towards the activity of collectively engaging with a cluster of related questions, attempting to answer them in the context of our own life experiences, and sharing those experiences with others. Through engagement with diverse texts and new questions, we had robust opportunities to engage in deep practices of listening to self and other.[12] The classroom space reinforced this understanding, as we could collectively see how the processes of keeping law alive are wrapped up in collaboration, in the practices of working "with." While we as students were doing the writing exercises individually, we also engaged with what other students had done. I had so many moments of surprise, seeing the ways my fellow students responded to the shared writing exercises. Again and again, I noted how much more I could see and hear, which shifted as I considered pathways for working together with those whose experience and insight differed, and sometimes in quite profound ways. The experience made visible how much power there was in a space where difficult questions were explored, together, through shared action. What we shared was not an understanding, but a process of using different texts and questions to *work* together. And what became visible to me was the ways in which the legal imagination is necessarily a collective imagination. Both in the book, and in the pedagogies that were modeled, we as students were drawn into a shared experience of thinking *together*, of thinking *with.* We were invited to engage in meaningful conversations about our place in a world of lawfulness. I was reminded that Jim White describes law as "a system of expression, a language and a set of practices that can be learned and used-- and must be transformed in large ways and small ways if justice is to be done."[13] I came away understanding how many verbs underpin the work of law, and of the importance of spaces for experimenting together.

12. This relationship of learning to listen is at the heart of Richard Dawson's engagement with JB White's work. *See* RICHARD DAWSON, JUSTICE AS ATUNEMENT: TRANSFORMING CONSTITUTIONS IN LAW, LITERATURE, ECONOMICS AND THE REST OF LIFE (2013).

13. JAMES BOYD WHITE, THE LEGAL IMAGINATION xxiii (45th Anniversary ed.).

REIMAGINING LEGAL RESPONSIBILITIES AND OBLIGATIONS IN POST-TRC CANADA

Let us return, then, to Canada. The most pressing legal problems in contemporary Canada centre on the legal status of Canada itself, as a settler state. At issue are questions about the fragility of legal foundations in Canada's assertion of jurisdiction over Indigenous lands and peoples.[14] In the Canadian context, an unevenness in the time horizon of settlement has generated unevenness in the shape of legal assertions about Crown sovereignty. There was never a declaration of war, which would underpin justifications based on conquest. For the most part, the British Crown engaged in the process of treaty making with Indigenous peoples, acknowledging a kind of nation-to-nation relationship.[15] But it is also true that in British Columbia, the province I call home, the State grounded its assertions of sovereignty in the now firmly discredited Doctrine of Discovery,[16] and of *terra nullius*.[17] Stepping back from justifications rooted in a deep and racist history in Western thought of seeing Indigenous peoples as occupying lower rungs on the ladder of civilization, both the Federal and Provincial governments are engaged in (complicated and contested) modern treaty-making processes with Indigenous nations.[18] New national histories are needed for these times.[19]

Canada and the US certainly share some common experiences as nation states founding themselves in already occupied Indigenous territories. In each country, law has been deeply implicated in diverse and well documented practices of dispossession, violence and genocide.[20] It is also

14. This is particularly so in the face of the reality of the many pre-existing Indigenous legal orders and traditions. *See CANADA, ROYAL COMMISSION ON ABORIGINAL PEOPLES, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES* (5 vols, 1996).

15. As one might imagine, there are many ongoing discussions about the State's failures to honour and maintain its treaty obligations. For more on this front, *see* MICHAEL ASCH, ON BEING HERE TO STAY: TREATIES AND ABORIGINAL RIGHTS IN CANADA (2014).

16. Though the Doctrine of Discovery has been officially disavowed, one can catch moments of spectral after-life in many places in our culture. As one small example, my youngest son's high school Social Studies textbook had a section on the early history of settlement in BC titled, "Colonies in the Wilderness." *See* MICHAEL CRANNY ET AL., HORIZONS: CANADA MOVES WEST (1st ed.,1999). In the context of a province that has a documented history of more than 17,000 years of continuous occupation by Indigenous peoples, the decision to refer to the land as "wilderness" needs to be understood as linked to understandings of *terra nullius* and the Doctrine of Discovery: the lands in question were *never* wilderness or unknown to Indigenous peoples.

17. *See* Tsilhqot'in Nation v. British Columbia, [2014] 2 SCR 257 (Can.). The court said, "the doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763." See also Nicholas XemŦoltW̱ Claxton & John Price, *Whose Land Is It? Rethinking Sovereignty in British Columbia* 204 BC STUDIES 125 (2019-2020).

18. On the processes in British Columbia, *see* THE BC TREATY COMMISSION, https://bctreaty.ca/.

19. MYTH AND MEMORY: STORIES OF INDIGENOUS-EUROPEAN CONTACT (John Lutz ed., 2007). On the public necessity of such work, *see* Kathleen Mahoney, *Canada's Origin Story*, *Big Thinking (Lectures organized by the Federation for the Humanities and Social Sciences)*, YOUTUBE (May 25, 2016) https://www.youtube.com/watch?v=aaw5_8UuiBM.

20. In Canada, see the ROYAL COMMISSION ON ABORIGINAL PEOPLES (1996) and the TRUTH AND

clear that, in each country, Indigenous peoples and their allies worked in many different ways to maintain and sustain Indigenous communities and their legal orders in the face of the specific conditions of possibility they confronted.[21] Part of that work has involved an unsettling of inherited beliefs that Indigenous peoples were a vanishing people, a people governed by custom rather than by law.[22]

This also involves taking up a different understanding of the ways that Indigenous law is part of the fabric of life in Canada, both for Indigenous and non-Indigenous people. These new questions have been ascendant over the past 50 years. I chose 50 years here as that marks both the publication of *The Legal Imagination,* and the judgement of the Canadian Supreme Court in *Calder v. British Columbia.*[23] In *Calder*, the Court acknowledged for the first time that Aboriginal title to land existed prior to colonization, and was not derived from Canadian statutory law. This pointed to something beyond Canadian law and its assertions of sovereignty. Indigenous presence and legality began to be visible to the Court, if not yet fully realized. What was called for (called forth?) was a re-engagement of the Canadian legal imaginary, to acknowledge that Indigenous legal orders were part of the fabric of a shared legality. But to make that real, there would need to be some shifts: shifts in the materials of law, the questions asked, and the work done together.

We have begun to see some of these shifts over the past 50 years in Canada, as the legal profession has begun to engage with Indigenous legal orders. Coast Salish lawyer Doug White (Kwulasultun), speaking to the relationship between Canadian law and Indigenous legal orders, put it thus:

"Indigenous law is the great project of Canada and it is the essential work of our time. It is not for the faint of heart, it is hard work. We need to create meaningful opportunities for Indigenous and non-Indigenous people to critically engage in this work because all our futures depend on it."[24]

RECONCILIATION COMMISSION ON INDIAN RESIDENTIAL SCHOOLS (2015).

21. For an exploration of the different practices of freedom and citizenship that have been pursued by different communities, see James Tully, PUBLIC PHILOSOPHY IN A NEW KEY (2008).

22. These claims that Indigenous peoples had no law were buttressed in Canada by practices of rendering Indigenous legality "illegal" within the framework of Canadian law. The anti-Potlach and Sundance legislation is perhaps the most visibly jurispathic of these moves. *See* Christopher Bracken, THE POTLATCH PAPERS: A COLONIAL CASE HISTORY (1997). These histories are well canvassed inJAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995). *See also* DAVID GRAEBER & DAVID WENGROW, THE DAWN OF EVERYTHING: A NEW HISTORY OF HUMANITY (2021), and THOMAS KING, THE INCONVENIENT INDIAN: A CURIOUS ACCOUNT OF NATIVE PEOPLE IN NORTH AMERICA (2012) (in particular, see King's discussion of the stereotypes of "Dead Indians, Live Indians, and Legal Indians" existing in the collective imagination of North Americans).

23. Calder v. British Columbia (AG), [1973] SCR 313 (Can). I reflect on the relationship between *The Legal Imagination* and the *Calder* case in Rebecca Johnson, *Reimagining "The Truth North Strong and Free": Reflections on Going to the Movies with James Boyd White, in* LIVING IN A LAW TRANSFORMED: ENCOUNTERS WITH THE WORKS OF JAMES BOYD WHITE 173 (J. Etxabe & G. Watt eds., 2014).

24. Doug White says, "Indigenous law is the great project of Canada and it is the essential work of our time. It is not for the faint of heart, it is hard work. We need to create meaningful opportunities for

All legal traditions reflect deeply rooted historically conditioned attitudes about the nature of law, the role of law in society, the proper organization of a legal system, and an understanding about how law should be made, applied, studied, fixed or taught. In Canada (as in many other common and civil law traditions), law operates in a kind of centralizing way, as a system in which the relationships that matter are often hierarchically organized (as is the case with our systems of precedent). In such systems, there are formally centralized state processes to decide what law is and how to apply it. Law is managed by legal professionals (with specialized training), in institutions that are often separate from other social or political institutions.

As Val Napoleon notes, many Indigenous legal orders operate with a much greater degree of decentralization, where horizontally organized relationships take on greater significance.[25] In decentralized orders, law is often embedded in different non-state societal, political, economic and spiritual institutions. As there are more people involved in decision-making, legal education also has to be more widely distributed, and becomes a more significant part of community life. One looks in additional places to identify resources for teaching law. As Hadley Friedland notes, this can create challenges for those unaccustomed to engaging with decentralized legal orders: when people think that law is largely something that the government or police make or do, it can be hard to *see* Indigenous law.[26] Nonetheless, the operating assumption is that we can learn how to see law across cultures and societies, and we can agree to recognize other people's law through

Indigenous and non-Indigenous people to critically engage in this work because all our futures depend on it." Quoted inVAL NAPOLEON, REVITALIZING INDIGENOUS LAW AND CHANGING THE LAWSCAPE OF CANADA: A REPORT ON THE ACCESSING JUSTICE AND RECONCILIATION PROJECT (2014).

25. Val Napoleon, *Thinking About Indigenous Legal Orders in* DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM 229 (René Provost & Colleen Sheppard eds., 2013).

26. Hadley Louise Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies - Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* 15 (LLM Thesis, University of Alberta, 2009). While Friedland points to the failure to *see* law, one might note here also a persistent failure to *hear* law. An infamous contemporary example of this failure occurred in 1991 at the trial level during the ground-breaking *Delagamuukw* trial: *Delgamuukw v. British Columbia*, 79 DLR (4th) 185 (Can.). Gitxsan elders, asked to provide evidence of their law, asserted that the law (*adaawk* in their language) was carried in song, and had to be sung. The trial judge, Justice McEachern, in response to the assertion that this law be sung for the Court, argued that he could not *hear* the songs as evidence, asserting that he had a "tin ear." In this context, what was at issue was the judge's incapacity to see songs, crests, stories, masks, or dances as not simply "representations" of law, but as law itself. For a powerful narrative response to Justice McEachern, written by one of the lawyers in the case, see Leslie Hall Pinder, *The Carriers of No* 4 INDEX ON CENSORSHIP 65 (1999). As an example of the ways that Justice McEachern's failure has entered into legal discourse, see also Robert Hamilton & Joshua Nichols, *The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult*, 56 ALBERTA L. REV. 729 (2019). Importantly, the trial decision in this case was overturned by the Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 (Can.). The decision set new precedent for Indigenous rights and affirmed the use of oral testimony in Canadian courts. Nevertheless, one notes there is distance to go in order to understand the *adaawk* as *law* itself, and not just as *evidence* that the Gitxsan had pre-colonial-contact connections to the land. For more on Gitxsan law, see VAL NAPOLEON, AYOOK: GITKSAN LEGAL ORDER, LAW, AND LEGAL THEORY (PhD Thesis, University of Victoria, 2009).

various international arrangements.[27] One of the primary challenges has been to increase our capacity to engage in what Indigenous scholars have described as "two-eyed seeing," or "walking on two legs."[28]

Legal imagination is needed for this work. How do we respond to the reality of multiple and co-existing legal orders? Can we do it in ways that will support the conditions for living well together? It means asking new questions about legal responsibilities, legal obligations, and the institutions through which obligations are given form in the world. What is it, for example, to think and speak like a lawyer, or a legislative drafter or a judge when the functions of a legal order are distributed in different ways? What are the languages in which law and legality (and even legal actors) are understood and described? How do we understand (and change) the institutional structures through which we do law? Can we imagine otherwise the places of education through which law is taught and learned? These questions can and must be articulated in the context of interactions with decentralized Indigenous legal orders. And this brings me back to the yellow book, and its reminder that the legal imagination requires us to pay attention to the *materials of law, the questions we ask, and processes for acting together.*

The first challenge is to begin learning both about and from the materials of Indigenous legal orders. And this means materials in their fullness. The materials of law within a given Indigenous legal order may include stories, dreams, songs, histories, crests, names, language, petroglyphs, land, band council decisions, agreements, and more. In encountering these materials, it is not a matter of determining or posing questions about "authority" or "accuracy" or "evidentiary status." Such questions are determined *within* a legal order. The point here is simply to begin engaging with them *as* the materials of law. In the context of the legal imagination, what is being nourished is an ability to appreciate the wide variety of materials through which a legal order articulates, records and transforms law and lawful relations. While I have used the term "Indigenous" throughout this paper as a kind of short-hand, I hope it is clear that the materials of law also need to be voiced with specificity: they emerge from *specific* legal orders (such as Secwépemc, Kwakwaka'wakw, Anishinabek, Migmaw or Inuit).

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27. Former BC Chief Justice Lance Finch spoke to this in his now widely cited speech. Lance Finch, *The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice,* Paper 2.1 (Indigenous Legal Orders and the Common Law, Nov. 2012) https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf.

28. Robin Kimmerer does this in BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS (2013). *See also* Mi'kmaq elders Aberta and Murdena Marshall. For the Secwepemc context, *see* Ronald E. Ignace et al., Walking on Two Legs: a Pathway of Indigenous Restoration and Reconciliation in Fire-adapted Landscapes, 30 Restoration Ecology 1 (2021).

Second, there is a need to reformulate the questions we ask of law. At this juncture, some of the most important questions focus attention on how we might begin to build relationships over difference through these materials of law. I note the importance within most Indigenous legal orders of 'storywork' as one pathway to learning one's legal obligations.[29] In storywork, the central focus must be on the questions that we bring to our processes of engagement with those resources. I also reflect on Omushkego historian Louis Bird's comment that stories are tools for thinking.[30] At least in this time of reimagining the forms of relationship, attention must be focused on deep questions of relations and responsibility. This includes what Chief Justice Lance Finch referred to as "the duty to learn," which is a responsibility carried by all those living in a given Indigenous territory, whether settlers, visitors, or Indigenous people from other Indigenous legal orders.[31] At the heart of this duty is the need to pay attention to the questions we ask.[32]

Third, I reflect on the ways that acting together is so crucial. In the present moment, there are so many examples that make visible the importance of collaboration and collective *doing* in this work. The building of new relations, of new competencies, requires action, and not just thought. Just as the yellow book offered many writing exercises, one might attend to the kinds of exercises, or practices, that are needed to begin to bring about change. I find myself reflecting on the iterativeness, or repetition needed to shift old pathways, and bring new ones into existence. The workbook language also helps to make visible that the point is the practice, and not necessarily the outcome.[33]

But to this point, I am speaking at the level of generalities. Let me make this concrete by sharing a few examples of what this looks like in practice, where these three insights (about the importance of the *materials of law*, the *question asked*, and *acting together*) have been drawn upon in current projects of legal reimagination in Canada. One takes us in the direction of

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29. JO-ANN ARCHIBALD (Q'UM Q'UM XIIEM), INDIGENOUS STORYWORK: EDUCATING THE HEART, MIND, BODY, AND SPIRIT (2008).

30. LOUIS BIRD, TELLING OUR STORIES: OMUSHKEGO LEGENDS AND HISTORIES FROM THE HUDSON BAY (2005).

31. Finch, *supra* note 27.

32. Rebecca Johnson, *Questions About Questions: Law and Film Reflections on the Duty to Learn* 50 NORTHERN REV. 83 (2020).

33. Let me provide a (partial and incomplete) example of what this iterative process means for me. In this regard, I sometimes find myself thinking back to the years when my child was first learning to walk. I think a more "accurate" description would be "the years when my child was first learning to fall." It was a time of 365 degrees of wiping out, fall after fall after fall, as he gradually developed the balance and musculature necessary to move in the world. I would never have thought of describing any of his tumbles as "a failure," nor would I have seen any particular moment of balance as "an achievement." The goal was always for him to have the ability to move in the world and make connections. There was no way for him to "think" himself into that ability. The only way through was through practice. And there was no way for me to do the work for him. But there was learning happening for us both as part of the collective acting together.

legal education, another in the direction of judicial (institutional) innovation.

TWO EXPERIMENTS IN ACTING OTHERWISE

Education

Let me begin with legal education.[34] What kind of legal education is needed to respond to this shift in the Canadian legal imagination, one in which Indigenous legal orders are understood as requiring the same amount of political, social and theoretical energy as the Common law and Civil law traditions? This is not a new question, and there have been significant efforts over the past 50 years to create new spaces in legal education. But we are in the midst of a very new and more far-reaching experiment in legal education. At the University of Victoria, where I teach, there is a new law program, the JD/JID (or the Combined Program in Canadian Common Law and Indigenous Legal Orders).[35] Students in this four-year program graduate with both their JD, and a new degree in Indigenous Legal Orders.

Each of the required core courses is taught in a transsystemic (or intersocietal) fashion, in the context of a specific Indigenous legal order. So, for example, Canadian and Anishinabek constitutional law; Canadian and Gitxsan property law; Canadian and Cree criminal law; Canadian and Hulqu'melem tort law. There is a required course in a Salish language, given the deep importance of language as vehicles through which law is taught and learned. In our program, given the law school's location in Salish territories, a Salish language is the focus. The students also take courses in Intersocietal Administrative Law and Intersocietal Business Associations. The students spend two terms during their program in field schools, working in collaboration with different Nations and their community experts, engaging with land, law and legal questions emerging in that legal order.[36]

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34. Chapter 7 of *The Legal Imagination* takes us to the heart of the matter, with a wonderful series of questions and exercises inviting us to consider how we ought to approach the education of the lawyer. I have long taken inspiration from the inclusion of an interview with Morris Abram, proposing a new kind of law school that would focus on educating the lawyer as policy-maker, *see* WHITE, *supra* note 5, at 938. However one imagines what the ideal law school might look like, there is great power in a visioning that takes seriously both the needs of a legal order, and the institutional structures needed to bring it into reality.

35. *Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID)*, UNIVERSITY OF VICTORIA LAW https://www.uvic.ca/law/admissions/jidadmissions/index.php. (listing the program description and requirements for admission).

36. There is significant work involved in building relationships with the different communities who have participated in the field schools. The field school experience both advances the community's needs and enables the program to engage more actively with the ways in which land and place is so central in Indigenous legalities. To date, field schools have taken place in collaboration with Secwépemc, Cowichan, Nu-chah-nulth, and Dene communities. For a discussion of the W̱SÁNEĆ field school, *see* Darcy Lindberg, *Canadian Law Schools Trade Moot Courts for Indigenous Land-Based Learning*, MACLEAN'S (Nov. 15, 2018), https://macleans.ca/education/university/canadian-law-schools-trade-moot-courts-for-indigenous-land-based-learning/ (last visited Mar 5, 2024).

The JD/JID program began in the fall of 2018, and we are on the cusp of graduating the fourth cohort of students. The program is open to both Indigenous and non-Indigenous students, and students in the program take courses taught by both Indigenous and non-Indigenous professors. This program, still in its early stages, is a product of the Canadian legal profession as a whole. It was generated through significant collaboration and consultation with Indigenous and non-Indigenous people and institutions both in Canada, and internationally. It also takes seriously 'dreaming' as a legal resource. I reflect back to an afternoon in 2009, when our law faculty first gathered together, to listen to my Anishinaabek colleague John Borrows tell us about a dream he had, in which students were learning Canadian and Indigenous legal orders alongside each other in the law school; the sources and resources and pedagogies of Indigenous law were an accepted part of life in a law school. Fifteen years after those preliminary conversations, a few important insights remain. One is that dreams belong to the 'materials of law' within the Anishinabek legal world. Another is about the legal importance of a dream shared.[37] In the public sharing of John's dream, space was opened for asking different questions about how we, as a legal community, might work to bring that dream into reality. The dream was one built on the generations of dreaming that came before, and required significant conversations about the collective resources that might be brought to bear in bringing the dream into existence.

In our engagements with the dream, we were moved towards a host of new questions about possibility (and indeed, about the desirability of the dream itself). We were also moved into significant processes of *acting together.* It was a very real challenge to consider the work that would need to be done by non-Indigenous folks to work in collaboration on this project – to begin to learn and unlearn in order to create the conditions for next steps (that is, to take up our own responsibilities in this work, rather than leaving the burden on the shoulders of our Indigenous colleagues). Over the next decade, there were many conversations. People gathered in the Cowichan Valley, drawing together Indigenous and settler lawyers, academics, judges, and community members to ask the hard questions, and to collectively imagine the risks and possibilities. This involved many conversations and explorations with the legal profession, with the Bar Associations, with the Federation of Law Societies, with the federal and provincial judiciaries, with Indigenous colleagues and law schools in other countries.

37. I take seriously here the insight that there are sometimes very real legal obligations around the sharing of dreams. *See, e.g.*, Hadley Friedland, THE WETIKO LEGAL PRINCIPLES: CREE AND ANISHINABEK RESPONSES TO VIOLENCE AND VICTIMIZATION 61 (2018). *See also* the graphic novel VAL NAPOLEON, JIM HENSHAW, KEN STEACY, JANINE JOHNSTON, AND SIMON ROY, MIKOMOSIS AND THE WETIKO (2013).

One set of questions required conversation with faculty across the country who might be willing and able to teach in such a program. This meant working with colleagues across the country who had some level of expertise within their own legal order, or some level of expertise within a legal order that was not their own. Could we draw colleagues from other law schools, or would this be a practice of 'cannibalizing' colleagues from other schools, and creating challenges for other institutions? Were there ways to begin supporting our own colleagues to do the learning necessary to support them in this new form of teaching? There were questions about how to harness the needed resources to support graduate students (Indigenous and non-Indigenous) working on questions related to Indigenous laws. What resources and time would be needed to develop the resources for such a program? Were there publicly available materials, produced from within different Indigenous legal orders, that could support people from outside that legal order in learning about basic obligations within that legal order? We would also want to draw on new bodies of case law being produced by judges who were engaging with Indigenous law arguments being made in their courtrooms.

Along the way, there were opportunities to create pilot projects, including field schools, and to learn from experiences with land-based Indigenous law camps in other parts of the country.[38] In the development of teaching materials, the program would benefit from collaborations with a number of new research units whose focus was on work with (as opposed to 'on' or 'about') Indigenous communities involved in the active rebuilding of their own legal orders. The Indigenous Law Research Unit at the University of Victoria[39], the Wahkohtowin Law and Governance Lodge at the University of Alberta,[40] and the Indigenous Legal Orders Institute at the University of Windsor[41]are a few examples.

What has been visible in these efforts to reconsider the shape of legal

38. Since 2014, there has been a highly successful land-based Anishinaabe Law Camp at Osgoode Hall Law School. Anishinaabe Law Camp, OSGOODE HALL LAW SCHOOL, https://www.osgoode.yorku.ca/programs/juris-doctor/experiential-education/anishinaabe-law-camp/ (last visited Mar 5, 2024). The University of Windsor has also hosted an Anishinaabe Law Camp with the Walpole Island First Nation. Anishinaabe Law Camp 2019, UNIVERSITY OF WINDSOr, https://www.uwindsor.ca/law/2087/anishinaabe-law-camp-2019 (last visited Mar 5, 2024).
Another important series of collaborations have emerged at Windsor law school, which developed a range of course offerings in Indigenous Law. Indigenous Law Courses, UNIVERSITY OF WINDSOR, https://www.uwindsor.ca/law/2449/indigenous-courses (last visited Mar 5, 2024). They also developed the relationships needed to support externship placements with the Six Nations of the Grand River Justice Department.

39. Indigenous Law Research Unit, UNIVERSITY OF VICTORIA'S FACULTY OF LAW, https://ilru.ca/ (last visited Mar 5, 2024).

40. Wahkohtowin Law and Governance Lodge, UNIVERSITY OF ALBERTA, https://www.ualberta.ca/wahkohtowin/index.html (last visited Mar 5, 2024).

41. Indigenous Legal Orders Institute, UNIVERSITY OF WINDSOR, https://www.uwindsor.ca/law/Indigenous-Legal-Orders-Institute (last visited Mar 5, 2024).

education are the three insights in *The Legal Imagination* about a diversification of the *materials of law,* a focus on the *questions we ask* (and not only the answers we seek), and the absolute importance of acting together, as we learn from the processes of *doing,* which open us up to new experiments with the real. We can see in these efforts to think differently about legal education that our questions about the legal imagination need to both turn inwards (as we pose questions of ourselves) and also turn out (as we invite others to share in projects we seek to construct).

Judges and Courts

Let us turn next to judicial decision-making, and the institutional structures through which the work of judging is done. White reminds us that "the law is not merely a system for expressing judgements but for telling others how to judge."[42] But judicial creativity is limited in some ways by the materials and arguments that come before it. This is part of how the system of precedent works. Efforts by judges to re-imagine law either become guiding precedent or are over-turned by higher courts; or, those spaces of noetic possibility are held in spaces of judicial dissent until they are more widely drawn on as new authority.[43] But aside from focusing on the substance of law, a great deal of the work of judging involves the language through which reasons are given. To whom does the judge speak? A victim? An offender? What community is to be addressed or comforted?[44]

These questions are particularly challenging in the context of contemporary Canada. Indigenous people continue to be disproportionately represented in the criminal justice system, at levels that are scandalous.[45] This is also visible in the child welfare system, where Indigenous children are removed from their families and communities at levels even higher than during the residential school eras.[46] Both these criminal justice and child

42. WHITE, *supra* note 5, at 413.

43. There is a rich body of scholarship on dissent as a crucial space of judicial legal reimagination. *See* Marie-Claire Belleau & Rebecca Johnson, *Ten Theses on Dissent*, 67 THE UNIVERSITY OF TORONTO LAW JOURNAL 156 (2017).

44. Chapter 5 in *The Legal Imagination* offers great scope for exploring the processes of judgement and explanation at the heart of what judges are called upon to do in the common law world. It also focuses attention in Chapter 3 on 'Institutional Dispositions', and the challenges of sentencing judgements in particular.

45. This is particularly true for Indigenous women. Stats Canada documents that Indigenous women are incarcerated at a rate 15.4 times higher than non-Indigenous women. Over-Representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021, STATISTICS CANADA (2023), https://www150.statcan.gc.ca/n1/daily-quotidien/230712/dq230712a-eng.htm (last visited Mar 5, 2024).

46. The overrepresentation of Indigenous, Metis and Inuit children in care has been described as a humanitarian crisis. Frances Rosner, *Canada's Response to the Overrepresentation of Indigenous Children in Care*, BARTALK (2020), https://www.cbabc.org/BarTalk/Articles/2020/February/Columns/Canada%E2%80%99s-Response-to-the-Overrepresentation-of-Ind (last visited Mar 5, 2024). (2016 Census documents that Indigenous children are 7.7% of the population under 15 years of age, but account for 52.2% of children in foster care).

welfare systems are profoundly shaped by histories of colonization. What space of reimagination is open to the judge in contexts so woven through with particular histories of colonization? How do judges do this work in a context where Indigenous people are so disproportionately over-represented? How are judges taking up the spaces of legal imagination within the context of their institutional structures? Some judges have taken up this challenge by focusing on *how* they talk to the offenders before them. One might say that part of this involves judgements that understand how different legal orders would describe the people before the Court. While one might note that it is reliant on the language skills/voice of the judge, it is certainly true that some of this work is profoundly inspiring.[47] It is also the case that it remains somewhat contained within the boundaries of available Canadian legal processes.

For judges, the question is not only the languages in which they will describe an outcome. Judges also work with and through the processes and procedures in place for coming to decisions. Some of the legal re-imagining required has taken place within the existing "process" spaces of the criminal justice system. One big shift happened in 1992, when Judge Barry Stuart made use of a sentencing circle within a criminal justice trial in 1992.[48] In his reasons, he explained why and how the conventional process was changed to involve the community (from the Na-cho-Ny'ak Dun First Nation) in the sentencing process and decision. In the reasons given, the judge listed a number of effects of the change, one of which was to "merge First Nation's and Western government's values."[49] Put otherwise, to think Indigenous law and common law together. The process in the case is one that shows all three aspects present in the Legal Imagination: the judge and the community acted together, with a focus on different questions about sentencing, and drawing on different materials (including the community)

47. In the context of my criminal class classroom, I often have students read the judgements of Judge Shawn Nakatsuru, a Canadian judge who has taken up these questions of language, in the context of difficult cases, the kinds of cases that are the lifeblood of the trial judge, working on the frontlines. Of his writing, a journalist noted: "Nakatsuru made headlines two years ago after writing what some described as a "poetic" and "inspiring" sentencing ruling in the case of another aboriginal man, convicted of theft. The decision was widely praised in the legal community for its clarity and empathy. "I have tried to say what I wanted to say in very plain language," he wrote then. "I believe that this is very important for judges to do in every decision." Michael Friscolanti, *Ontario's "poetic" Judge Is Back with Another Ruling*, MACLEANS (Mar. 17, 2017), https://macleans.ca/news/canada/ontarios-poetic-judge-is-back-with-another-ruling/ (last visited Mar 6, 2024). *See R. v. Armitage*, 2015 ONCJ 64, https://www.canlii.org/en/on/oncj/doc/2015/2015oncj64/2015oncj64.html.

48. *R. v. Moses* (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) http://ilclegalpleadings.usask.ca/islandora/object/legal%3A685, (Judge Stuart outlines in his reasons that "the process was changed to permit community involvement").

49. *R. v. Moses, id.* at 2.The effect of the circle was to: challenge the monopoly of professionals, encourage lay participation, enhance information, create a search for new options, promote the sharing of responsibility, encourage the offender's participation, involve victims in sentencing, create a constructive environment, provide a greater understanding of the justice system's limits, extend the focus of the criminal justice system, mobilize community resources, and merge First Nation's and Western government's values.

as resources.

The case generated significant attention and conversation in the legal community. By 1996, the federal government had developed an Indigenous Justice strategy which included funding for sentencing circles.[50] One might note here that this shift was still not 'structural' in a deep way. There was space to fund such processes, but this alternative process for sentencing was still reliant on judges and communities agreeing to its use in individual cases. In this same period of time, the federal government passed an important amendment to the *Criminal Code* (s.718.2)(e)), directing judges to take "the circumstances of aboriginal offenders" into account in crafting sentencing outcomes and reasons. Following the Supreme Court's interpretation of this provision in *R v. Gladue*, [1999] 1 SCR 688, there was a direction to produce "Gladue Reports" to assist judges in making the necessary shifts in sentencing practice.[51]

During this time, there was an increase in ongoing conversations between the courts and Indigenous communities, and an increasing availability of judges (Indigenous and non-Indigenous) with experience in both Canadian and Indigenous legal orders. In 2006, there was another moment of judicial reimagining and innovation in British Columbia: the opening of a First Nations Court in New Westminster (metro Vancouver).[52] This Court still operated in some ways within the structure of the criminal justice system, making use of existing processes for the "diversion" of cases into alternative dispute resolutions modes. But it moved significantly beyond the idea of circle sentencing, to draw extensively on protocols, principles and practices from relevant Indigenous legal orders. The focus in this specialized court shifted away from the language of "appropriate sentence" (which is linked to a discourse of guilt). The goal instead waa a "healing plan", to be developed in conjunction with the offender, the victim, family members,

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50. For an exploration of the tensions emerging as the different world views interacted in the space of sentencing circles, *see* Toby Goldbach, *Sentencing Circles, Clashing Worldviews, and the Case of Christopher Pauchay*, 10 ILLUMINE: JOURNAL OF THE CENTRE FOR STUDIES IN RELIGION AND SOCIETY 53 (2011).

51. *See,* https://www.cba.org/Truth-and-Reconciliation/Gladue-Beyond/Gladue-Courts-and-Guides for a gathering of resource guides and materials gathered by the Canadian Bar Association to assist lawyers and judges in implementing this change. Of course, not all judges have fully taken this direction on board. *See,* Marie-Eve Sylvestre & Marie-Andrée Denis-Boileau, *Les rapports Gladue, une expérience concluante?*, RELATIONS 24-25 (2019). For an exploration of the current challenges of *Gladue* work within the existing structures, see DAVID MILWARD, *Reconciliation and Indigenous Justice: A Search for Ways Forward* (2022).

52. There is a video produced by then BC Chief Judge Tom Crabtree, and Judge Marion Buller (the first woman First Nations judge in BC), setting out the operations and structure of the First Nations Court in New Westminster. Justice Education Society, *First Nations Court*, VIMEO (2014), https://vimeo.com/103739279 (last visited Mar 6, 2024). With the consent of the parties, viewers can follow a case from start to finish, to see what the procedures and protocols look like in this space of creating something that blends together Canadian institutional court structures with principles, protocols and legal obligations applicable in an Indigenous legal order context. As Judge Crabtree says, it is an attempt to capture what is being done and what can be done. The video is also a form of conversation between the judiciary and wider public about the legal imaginary.

elders and the community. It would involve additional supports being put in place, attending to physical, mental, emotional and spiritual wellness as articulated with the Indigenous legal order. It would also include a different set of obligations for reporting on success, and for modifying the plan as needed. The process would include the active involvement of elders, and could include elements of ceremony, including prayer or blanketing.[53] The innovations moved beyond the language of a sentencing decision (what a judge says), to include changes in the process, the parties, and the forms of participation.

In the First Nations Court one sees a form of re-imagining within the existing judicial structures, an imagining that makes space for the emergence of something new. And with the success of the first of these Courts, others followed. There are now 8 Indigenous Courts in BC, in territories of different Indigenous legal orders.[54] There is also now an Indigenous Family Court in New Westminster. Here again, the Provincial Court worked for several years with a group of Elders and representatives from government to create a new process for aboriginal families in child protection cases.[55] This is another structural change, and a way of imagining spaces where judges from each tradition can work within the other, as well as spaces designed around different legal challenges and materials. It involved work by the government and First Nations, to support judicial institutions in these new collaborations. There was also significant work by the judiciary itself, and by the National Judicial Institute (which has worked internally on providing training for judges by judges to enable them to respond to the increasing demands for judges to more productively engage with Indigenous legal orders).[56] That is to say, judges have been part of this process of creative imagination, at individual and structural levels.

53. In the video "Restoring Elders in Justice", you hear the elders talk about Cknúcwentn First Nations Court in Kamloops (in Secwepemc territory), incorporating the principle of Knucwentwecw being drawn into the First Nations Courts in Secwepemcúl'ecw. ACJC, *Restoring Elders in Justice*, (2016), https://vimeo.com/182504836 (last visited Mar 6, 2024). Again, one can see how the videos are being produced collaboratively with the courts, and the communities, to explain things like a blanket ceremony at the end, the place of prayer along the way.

54. For a list of innovations over the past 4 decades, *see* Court Innovation, PROVINCIAL COURT OF BRITISH COLUMBIA, https://www.provincialcourt.bc.ca/about-the-court/court-innovation (last visited Mar 6, 2024). . Here is a video in which judge Raymond Phillips (Nlaka'pamux, and a member of the Lytton First Nation) explains the workings of the Indigenous and First Nations Courts in BC. Provincial Court of British Columbia, *A Judge Explains BC's Indigenous and First Nations Courts*, VIMEO (2022), https://vimeo.com/714611703 (last visited Mar 6, 2024). The videos make visible how different principles are woven in to take up the physical, mental, emotional and spiritual dimensions of healing. It also has a richer involvement of victims, family members, and the community.

55. Specialized Courts | Provincial Court of British Columbia, PROVINCIAL COURT OF BRITISH COLUMBIA, https://www.provincialcourt.bc.ca/about-the-court/specialized-courts (last visited Mar 5, 2024).

56. Thomas Crabtree, *Judicial Education in Canada: Lessons Learned from a Pandemic and a Path Forward*, 26 COMMONWEALTH JUDICIAL JOURNAL 30-40. (He speaks here to 30 years of programming by the judiciary, including the slow but forward moving process of creating spaces for judges to begin working with Indigenous legal materials, asking different questions, and working in collaboration with Indigenous communities).

In the spaces of the First Nations courts, other intersocietal legal work began to find shape. This was facilitated through an increase in the number of lawyers, judges and Crown prosecutors with increased exposure to the materials of Indigenous law, greater experience at shifting the questions asked, and practice at working together to respond to challenges before them in new ways. This included examples of the judicial system (both judges and the crown) finding ways to 'step back', acknowledging the better placement of Indigenous legal orders to describe and respond to the problem before them.

A particularly striking example of this happened in 2016 in the case of *R v. Brown; R v. Thomas*.[57] The accused, members of the Esquimalt Nation (fully contained within Victoria, and with no access to hunting lands) had taken their young men out to hunt elk in unoccupied land in Ditidaht territory, and were charged with a number of offences under the provincial *Wildlife Act*. The hunters admitted they had not sought permission from the Ditidaht, but believed that, as members of the Douglas Treaty, they were entitled to hunt on unoccupied land. All parties (including the Crown) agreed that the matter would be heard by the First Nations Court, following protocols appropriate in Salish territories.[58] In this way, the hearing made space for not only the hunters and the Crown, but also included participation of representatives from three Indigenous nations in the area: Esquimalt and Ditidaht and Cowichan. To make visible the shift in materials and questions, let me provide an extended quote from the case report (in which substantive Indigenous law takes centre stage):

Crown counsel described the events and underscored the vulnerability of the Roosevelt Elk herd. Many Elders and other leaders emphasized the importance of adhering to traditional laws relating to hunting. The Ditidaht Chief made it clear that the hunting was on Ditidaht traditional territory and no permission to hunt had been sought. The Ditidaht had worked with conservation officers in developing hunting regulations to preserve the Roosevelt Elk herd. Of particular concern was leaving much of the Elk killed to rot. Much was said about the dangers of shooting in an area where people's lives were put in danger. Such a poor example for the young people present was a great concern and subject to severe criticism. One Elder reminded those present that, in little more than three generations past, the penalty for a second incident of unauthorized hunting would have been

57. A summary of the case is posted on the ReconciliationSyllabus website, available here: In the Matter of R. v. Joseph Thomas and R. v. Christopher Brown and Esquimalt and Ditidaht Nations, (2015), https://reconciliationsyllabus.files.wordpress.com/2016/10/i-5-sentencing-dec-11-15-signed-chiefs-case-comment.pdf.

58. *Id.* at 2. ("Proceeded over by Judge Buller, the proceeding commenced in the ordinary way with a Cowichan Elder leading the Court with a Salish prayer. Of the approximately 25 persons in attendance, the Ditidaht, Esquimalt and Cowichan Nations were represented by Elders, Chiefs, Councillors and other interested members.")

death. It was acknowledged that the Douglas Treaty confirmed certain hunting rights but it was unanimously agreed that the laws between Nations existed long before Douglas and took precedence and that permission to hunt on another Tribe's territory was a fundamental law that had force today. The two hunters spoke acknowledging their conduct, they apologized to the Ditidaht and agreed to accept the resolution of the matter as would be determined under the laws of the Nations.[59]

Pausing here, we see in the report attention to different materials of law, and very different questions being posed. Whether this example of hunting did or did not conform with the Provincial *Wildlife Act* is largely beside the point. The violations in question are described in terms of traditional law; they point to deeper treaty-like obligations that exist in Salish law between people and non-human relatives (for example, deer, salmon, islands, trees), as well as to legal relations between the Equimalt (as a Nation) and the Ditidaht (as a Nation). We see here also the agreement of the hunters to accept the resolution of the law of the Nations. Not Nation, but Nations. Note the plural here.

And so, the judge and Crown stepped back to enable the Nations to define the harm in terms cognizable within their own legal orders, grounding themselves in a different set of processes, a different set of decision-makers, a different set of responses. The responses in this case make visible how differently the Canadian state and the two Indigenous legal orders understood the problem. In a conventional Canadian sentencing process, one might expect, for example, fines, and a weapons ban (and perhaps a period of incarceration in some cases). And an element of that is present: the Esquimalt Nation required the hunters to deposit their guns with the Band Office for a year, and to refrain from hunting for that period.[60] The hunters were also required to attend at the Esquimalt longhouse for at least two days a week for a year, to assist with cleaning and maintenance. While this might sound like the kind of community service requirement that often follows in conventional settings, the Nation reported, "It was emphasized that this was not punishment but an opportunity to be a model for the youth of the community and reminder to all that the laws of their Nation are in force."[61]

And here, greater familiarity with the materials of law makes visible the more radical nature of the case, and the work of once again holding up Indigenous laws that had been undermined by the Canadian state for generations. The formal resolution of the problem happened not inside the space of the Court House, but the space of the Esquimalt long house. Here,

59. *Id.* at 2.

60. Significantly, note the jurisdictional shift. The First Nations Court (and the State) is agreeing here that it is the Esquimalt and not the State who will implement and enforce the ban.

61. *Id.* at 3.

a meeting was held with 180 people present, including the Esquimalt Chief and Council, many members of the Esquimalt Nation, and representatives of the Ditidaht, Malahat, Cowichan and Huu-ay-aht Nations.[62] At this meeting:

The Ditidaht were wrapped in blankets and given valuable gifts. Many speakers spoke of what the hunters had done and how hunting had been done by their ancestors and how those laws must never be forgotten. It was acknowledged that they had brought shame on the Esquimalt Nation. The hunters themselves offered their apologies to the Ditidaht and to the members of their own Nation. The Chiefs confirmed the re-establishment of the balance between the Nations and committed to developing protocols to govern hunting in Ditidaht territory.[63]

First Nations Court reconvened to hear the report on what had happened. Here, the Chief of the Equimalt described to the judge all that had been done, both with respect to the individual hunters and with respect to the relations between the Equimalt and Ditidaht Nations. Judge Buller considered applicable Canadian case law that might apply to a case like this, and noted that it was both ineffective and unhelpful.[64] She wrote, "It was generally acknowledged that First Nations law working with the Court system produced a much better result"; Crown Counsel agreed, acknowledging "the wisdom of the thoughts expressed in this process and the value of the two legal systems working together for the common good."[65] As a result, the charges under the *Wildlife Act* were terminated. Again, here, the Court system worked by producing space for the Nations themselves to resolve the matter in accordance with their own legal orders. This required Judge and Crown counsel to have an appreciation of different materials of law, different processes, different questions, and different ways of acting together to uphold law. They stepped out of the way. So much so, that the case summary is signed *not* by the Judge or the Crown, but by the Chiefs of the two First Nations involved. This is an example of the Canadian Court understanding that part of its job might be to *not* judge – to trust that there are other ways to support the integrity of law, and to enable movement

62. To make visible just how different this is from expectations under Canadian law, in advance of this meeting, the hunters, "in the company of an Esquimalt Elder, had visited every home on the Esquimalt Reserve to explain to the Members what they had done and to invite them to the public meeting." *Id.* at 2. There is simply no analogue in Canadian law for an obligation of this nature.

63. *Id.* at 3-4.

64. Referring to one other reported case involving the killing of an elk by a member of one Indigenous nation in the territory of another, Judge Buller said: "the trial spanned three years with lawyers and Court costs in the hundreds of thousands of dollars. It resulted in a great deal of ill-will between the First Nations involved and ill-will toward Conservation authorities and the prosecution services as well. It produced a judgement which did not further the cause of reconciliation and the fines imposed are unpaid to this day. As the matter now before the Court clearly illustrates, it did nothing to protect the Roosevelt Elk." *Id.* at 3.

65. *Id.* at 3.

in the direction of institutional rebuilding.[66]

This experience of creating spaces for intersocietal justice, for patterns of successful collaboration, found further elaboration in the development of the BC First Nations Justice Strategy (BCFNJS). Here, the BC First Nations, and the provincial and federal governments worked together to provide "an ambitious roadmap to transform the justice system." [67] It involves a two-pronged approach to justice. The first involves innovations and shifts to reduce harm to Indigenous peoples within the existing judicial structures (by, for example, supporting the extension of First Nations Courts within the existing justice structures). A second prong focuses on the work to support the *creation* of Indigenous legal institutions, ones which are grounded in different materials of law, different questions, and different ways of working in collaboration on the justice issues of the specific Indigenous legal orders. This attends to different ways of organizing the institutional structures themselves. The hunting case discussed above provides an example of what might be needed. In short, this second avenue involves work on rebuilding of Indigenous legal structures and institutions which had been dismantled over the past 100 years.

CONCLUSION

As I approach the end of these reflections, I find myself thinking of Donna Haraway, with her reminders of the imaginaries needed for the work of building kin in these times.[68] She points to Anna Tsing, who speaks to the arts of living on a damaged planet. This requires, she says, that we learn to "stitch together improbable collaborations without worrying overmuch about conventional ontological kinds."[69] Such work may involve mistakes, and so we must practice generous suspicion. But she invites us to be creatively active in "a pilot project, a model, a work and play objects, for composing collective projects, not just in the imagination but also in actual story writing. And on and under the ground."[70]

While Haraway is speaking to spaces of imaginary in the context of collaborative writing projects, I feel echoes to the ongoing work of law in these times. Reading her words, thinking about acts of imagination, I find myself returning to those moments of inspiration that grabbed me back in

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66. One of the other outcomes of this process was the pathway it opened for the work by First Nations of re-establishing important relationships and agreements between *themselves*. The final page of the case report notes: "The Chiefs and Councillors of the Ditidaht and Esquimalt First Nations have commenced discussions towards developing protocols to govern hunting in Ditidaht territory by Esquimalt members." *Id.* at 4.

67. Doug White, Boyd Peters, Rosalie Yazzie, Tracy Downey, Annita McPhee, Michael Farnworth, & David R. Eby, *BC First Nations Justice Strategy*, Ministry of Attorney General (2020), https://bcfnjc.com/landing-page/justice-strategy/.

68. DONNA HARAWAY, STAYING WITH THE TROUBLE: MAKING KIN IN THE CHTHULUCENE (2016).

69. *Id.*at 136.

70. *Id.*

1994, sitting in that classroom in Michigan, the yellow book in front of me. In the introduction to anniversary edition of the book Jim White opined that

"this book may be of wider relevance now than when it was first published, for its central concern is with integrity – integrity of the law, of language, of the individual person – at a time when integrity itself sometimes seems to be threatened as a value."[71]

Grappling with the integrity of law is perhaps the work of every generation. I do not need convincing that this book remains relevant. I see reminders of its relevance in the work of legal imagination that I see going on all around me. On February 9, 2024, as I was finishing this article, the Supreme Court of Canada released its decision in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families,* 2024 SCC 5.[72] In this much awaited decision, in a conflict between Canada and Quebec, the Supreme Court upheld the constitutionality of a federal statute affirming Indigenous peoples' right of self-government with respect to child and family services. In its discussion of the limits of federal law-making power, the Court spoke explicitly about the ways that legislation can play a pedagogical function, serving to shift the Canadian legal imaginary.

"In a pedagogical spirit, Parliament has used the Act to communicate to the courts and society its position that the law must recognize the importance of Indigenous self-government in relation to child and family services. Thus, the "unusual" use of affirmations of the right of self-government can be explained in part by the fact that Parliament is attempting to persuade other institutions to adopt the position it has now embraced. In areas where Parliament cannot order, direct or command institutions to adopt its position, this pedagogical function may nevertheless, in time, help to inculcate new attitudes or approaches that will further promote a culture of respect for and reconciliation with Indigenous peoples in Canada." [at para 81]

What is interesting for the purposes of this chapter, is that, in its discussion of the nature of law, the Court cited James Boyd White.[73] The Court acknowledges the importance of this understanding of the rich possibilities of law, of the richness of our capacity to work with it in ways that enable new solutions, that let us draw different materials and different questions together in the processes of collaborating in new ways on not only outcomes, but also on the processes of building new worlds.

In some ways, this work of stitching together seems an example of what

71. White, *supra* note 5, at xxii.

72. Available at https://decisions.scc-csc.ca/scc-csc/scc-csc/en/20264/1/document.do.

73. At paragraph 80, with this pedagogical function in mind, the Court says: "it is plain that legislation does not simply lay down a "set of orders or directions or commands"; it also establishes "a set of topics, a set of terms in which those topics can be discussed, and some general directions as to the process of thought and argument by which the statute is to be applied." JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW 41 (1985).

Donna Haraway might refer to as improbable collaborations. It may still seem improbable to imagine the Canadian state or legal order engaging with Indigenous legal orders in ways that are not jurispathic (given the history of law's deployment in precisely such ways). And yet, as the discussion above suggests, there are good reasons to be hopeful, and to imagine that these intersocietal spaces might be collaboratively developed in ways that nourish the ability of law to help us live together well. The work is not easy. But as my colleague Val Napoleon often says, "the hard work of law is never done." It is this same hard work, this same imaginary that Jim White invited us into, 50 years ago, turning to texts both fictional and real, to think about models of the past and their application to present and futures, and we continue to engage in the work of law. The world continues to offer us many examples of people working at the margins in the now to create different ways of living law. It asks us to continue to consider the materials of law, the questions we ask, and to return to the process of acting together. *The Legal Imagination* retains its place on my bookshelf, its place in my heart.