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by John Borrows

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SEVEN GIFTS: REVITALIZING LIVING LAWS THROUGH INDIGENOUS LEGAL PRACTICE*

by John Borrows†

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Boozhoo nindinawemaaganidoog. Nigig indoodem. Kegedonce nindizhinikaaz. Neyaashiinigmiing indoonjibaa. Niminwendam ayaawaan omaa noongom. Miigwech bi-ezhaayeg noongom. Niwii-dazhindaan chi-inaakonigewin. Anishinaabe izhitwaawinan gaye.

I am very grateful for the opportunity to be with you today. I am grateful to be amongst friends. I am thankful to have so many supportive colleagues with us and to know that I am amongst my Elders. Justice Harry LaForme taught me at Osgoode Hall Law School when I was a doctoral student there in the early '90s. I am also very grateful for the introductions we received from the Elders, the Chief, and representatives of the Métis Nation.

I am thankful we live in a beautiful world. Standing in this room this morning, looking out over the water and seeing Nanaboozhoo, the Sleeping Giant, is a reminder of the power of this place. It was also great to be in the Fort William First Nation's sugar bush yesterday, nestled between those two escarpments, as the light snow fell on us. It was a reminder of the beauty of the stories that can swirl around us this time of year.

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* This article is based upon a talk by John Borrows, "Anishinaabe Law and Constitutionalism" (Paper delivered at the Aboriginal Law Student Conference, Bora Laskin Faculty of Law, Lakehead University, 7 November 2014) [unpublished].

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MAAJITAADAA (AN INTRODUCTION)

Today, I want to talk about being practice-ready lawyers. I also want to talk about professional responsibility. My hope is that we see law as something that we practice here and now. We should not wait until we graduate from law school to develop professional responsibility. We saw an example of good ethical behaviour yesterday when we were in the sugar bush, as Damien[1] and his friends from the reserve taught us, fed us, and showed us hospitality. They did so much good in a very short time. They illustrated how we can be responsible lawyers. They showed us how we can practice law in a community setting. Their example of wise stewardship over the land demonstrated that law is about regulating our own behaviour in a good way. It's about how we manage our affairs responsibly and with a good heart. This knowledge, that law is lived and practiced relationally, should help us see professional responsibility in a new light.

A well-functioning legal system is built through good living. The Anishinaabe call this mino-bimaadiziwin.[2] The truth of this statement is demonstrated in other countries where good living is not present. There are many examples in the world where large numbers of people are not living well. This diminishes the rule of law. We can observe many countries where wide swaths of society live in poverty and turn away from ethical living. Of course, when people's lives are materially degraded this does not automatically lead to disorder. People without much money and few resources can live happy, peaceful, and well-ordered lives. Rich people and nations also engage in widespread unprincipled behaviour. Chaos results when social belonging is compromised by unethical behaviour. When people fail to live principled, decent lives, black letter law will not generally generate peace, order and good governance. It is not enough to have well-designed laws sitting on the books. Something more has to happen. The broader culture, and most especially lawyers' culture, must cultivate the internalization of ethical behaviour. Law is ultimately planted within us, and we can do more to develop this ethos before we work with our first client post-law school.

I am heartened to know that this law school teaches "Indigenous Legal Traditions" as a required part of your development of professional responsibility. From what I know of Indigenous peoples' laws, they cultivate the sense that law should be within you; law is not just an idea—it is also a personal practice. How you apply what you learn is just as important as what you read in your classrooms. Law is more than an intellectual exercise. It is not merely about developing legal skills. It requires more than doctrinal competency. Lawyers and law students need to obtain something more than theoretical acumen. While we *must* be doctrinally competent, acquire excellent skills, and find ways to mingle theory with practice, we must do much more. Anishinaabe law speaks about applying the seven grandfather/grandmother teachings: we must learn to treat each other with wisdom, respect, love, bravery, truth, humility, and honesty.

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1. See Damien Lee, "Adoption is (not) a Dirty Word: Towards an Adoption-centric Theory of Anishinaabeg Citizenship" (2015) 10:1 First Peoples Child & Fam Rev 86, online: <journals.sfu.ca/fpcfr/index.php/FPCFR/article/view/242/234>.

2. See D'Arcy Rheault, *Anishinaabe Mino-Bimaadiziwin: The Way of a Good Life* (Peterborough: Debwewin Press, 1999).

DIBAAJIMOWIN (A STORY)

Today I will talk about what I've learned about Anishinaabe law in the last few years. My reflections flow from what I learned from teaching at the University of Minnesota Law School for the past five years, before I returned to Victoria. I want to share what I learned by recounting a brief story.[3] It's a story about a young boy. He was born in a time of great turmoil and grief. He found there was much confusion and frustration in the world. But it was also a time of beauty and wonder, and the young boy was born into a good family. His mother and father wanted to facilitate his good living, and so, they started to introduce him to the teachers that surrounded him.

The young boy learned how to live well by observing the winds, the waters, the rocks, and the plants. Later, he understood that the birds, the insects and the animals could also teach him lessons. The young boy discovered these things with his parents' guidance; he had many good teachers. The young boy was immersed in the process you heard about yesterday in the Fort William First Nation. Remember what Damien taught us in the sugar bush: the maple trees have been working all through the years, flowing with power, even though people had neglected them. All it took to revitalize Anishinaabe law was the community's decision to tap that energy once again. The trees stood ready to give in the moment the Anishinaabe sought lessons from their use. This young boy and his family learned in a similar way. They studied the earth. They drew analogies from what they observed in the natural world and applied these principles in their lives.

As he grew older, the young boy was introduced to some of the wise ones in the community. He was given human teachers. These wise ones included Elders, along with his aunties and uncles. They helped him to see much good. But, he also noticed all was not well. There were moments of destructiveness. Alcoholism, acquisitiveness, materialism, and greed marked many lives. Raw violence was a part of his community's experience. Yet he learned from this too; not by mimicking it, but by distinguishing it—rejecting it. He saw the harm such violence created. He decided he did not want such dysfunction to be part of his life.

As the young boy grew, his parents helped him to learn from his wider community. After he gained comfort in this setting his parents encouraged him to broaden his scope. Good living requires more than understanding our home communities. He was encouraged to search outside of his community. He was taught that no single place has a monopoly on goodness. So the boy started on small journeys. Incrementally he would venture further as each season passed. He developed a pattern; he would travel outward and then return, always letting his parents know where he was. He walked between worlds. His parents counselled him to seek the wisest and the best teachers. They encouraged him to find a mentor, someone from whom

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3. This story is also told in other words on a PBS affiliate radio station in Duluth, Minnesota: WDSE-WRPT - PBS 8 & 31, "Waasa-Inaabidaa: We Look in All Directions, Episode Two, Making Decisions the Right Way," online: WDSE-WRPT - PBS 8 & 31 <www.ojibwe.org/home/episode2.html>. See also Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (St. Paul: Red School House, 1988). My story is drawn from many sources, including these sources plus those from my daughter in Lindsay Borrows, *Otter's Journeys: Revitalizing Indigenous Languages and Laws*, University of British Columbia Press [forthcoming], the oral teachings of Elder Basil Johnston from my reserve, from Michael Pomedli, *Living with Animals: Ojibwe Spirit Powers* (Toronto: University of Toronto Press, 2014) at 80–93, and from my own experiences. I am of the otter clan (Nigig indoodem) and have long heard and told otter stories.

he could learn by serving. So he watched people come and go. He watched the elements around him. He took to heart what he saw and experienced.

One day the boy was out walking by a river. He noticed a "little one" going in and out of the waves. It would climb up the side of the river, to the top of the bank. Then it would slide down the bank into the water. It would repeat this behaviour, up to the top of the bank and back into the water. The young boy saw playfulness. He laughed as the "little one" was in the water; he saw it roll on itself. It would flip, slide, and glide in the stream. This was Nigig: Otter. He saw that Nigig was schooling him, teaching him law.

The boy determined that Nigig would be his mentor. This was who he'd been seeking. He admired how Otter took care of himself and provided for the rest of his kin, but he also appreciated that Nigig took time to play; he saw that life was more than physical sustenance. And so, with this determination, the boy returned to talk to his family. He told his mother and father about what he was learning. He asked permission to follow Otter and they agreed. They said, "Yes, it sounds like you found your teacher, go ahead and follow him." And so the boy started to spend more time with Otter. At first the boy merely observed. He stood still; he was patient. He didn't want to disturb Nigig's routine. As the weeks passed, Nigig reciprocated. He began to pay closer attention to the boy. They developed comfort in one another's presence. They became a silent part of each other's lives; they started to make closer relations.

One day, when the boy arrived at the river he found a small fish on the side of the bank. It was at the place where he usually stood. He knew that Nigig must have left the fish for him. The boy reciprocated. He left offerings too. As their relationship developed the two of them began venturing even further afield.

The boy and Otter made their way towards the east and eventually came to a large sea. On the shores of that sea they saw an old woman. She was sitting by a fire; she was very still and very quiet. She was watching the waves roll in from the ocean. Otter and the young boy hid behind a tree and watched what the old woman would do; she was ever so still. The sounds of the winds and the waves were hypnotic. They were entranced by the sound of the elements around them, and they slumbered and fell asleep. When they finally awoke they noticed a bundle was beside them. It was beautifully sewn with beads and flowers and plants and leaves. Beside the bundle were medicines of cedar, sweetgrass, sage, and tobacco. Then they looked up at the old woman. They saw, as she turned herself slightly, that a smile crossed her face. They didn't quite know what to do, but they eventually took that smile as an invitation. Nevertheless, they watched the old woman a little while longer. They knew they had to be careful with strangers.

When they felt they would be safe they took the bundle and the medicines and they sat beside the old woman. She smiled. She said, "Boozhoo gwiiwizens, boozhoo Nigig. Miigwech bi-ezhaayeg noongom. I'm glad you're here. What took you so long? We've been waiting for you. We wanted you to visit us. We're glad you're here." With these words, the old woman took a little pinch of tobacco from her pouch. She held it in her left hand, close to her heart. The clutch of tobacco was the size of the earth that the diver pulled up from the waters at the time of creation. After holding it against her heart, the old woman raised her hand with the tobacco in it. She held it up to the sky. After speaking a few words, she lowered that same hand to the earth and said a few more words. When she finished speaking she placed the tobacco in the fire. All three watched as the tobacco was transformed and taken skyward once again, this time as smoke.

When the tobacco had vanished the old woman picked up a drum that was beside her and she started to sing. As she sang, Nigig and the boy recognized it as the Seven Directions song. Then this old woman, in the east, by the ocean, sang to the other directions.

After some time had passed, while she was singing, an old man appeared out of the bush. He came from the south. He walked across the beach and sat down at the southern axis of the fire. The old woman kept singing. After some time, two more Elders appeared: one from the west and another from the north. They were also old women. They too sat beside the fire in the cardinal directions. The old woman kept singing. As she sang they watched tendrils of smoke gather and swirl over the fire. The vapours coalesced. Suddenly another old woman materialized in the smoke. She gradually descended and joined them around the fire. The old woman continued singing. After some time, the earth began shaking. The ground trembled, causing the rocks in the fire to split in two. A small fissure appeared in the earth. As they watched it grow, a hand appeared from under the earth. Soon another was visible, before arms, a head, a torso and legs scrambled out of the seam. An old man pushed himself up out of the ground. He also sat by the fire. The old woman in the east kept singing. A spark cracked at the centre of the fire. From its eruption a seventh old woman appeared. She sat with the others around the fire.

When the old woman finally stopped singing, the boy and Otter looked around them. Seven Elders sat at the fire's edge. They teased one another with familiarity and started to laugh. Their humour was contagious. Before long the boy and Otter were laughing too. They all relaxed into one another's company.

The seven Elders eventually turned their full attention to the two young visitors. The old woman from the east spoke first:

> We've been watching you. We've been waiting for you. We have a gift here. See this bundle—take it. Your parents and Elders have taught you well. The contents of this pouch will help you on your journeys. As you have seen, wisdom is not only found within our communities. It is found all around us. What you have learned, and the gifts in this medicine bag, will help you on your way. But rest assured, it will not be easy. Many people will challenge you. They will provoke you. They will encourage you to ignore or reject what you have learned at home. The gifts in this bundle can help when this happens. Sometimes your opponents will be correct, but sometimes they will deceive you. You need these gifts for balance. They will remind you of the power of goodness as a companion through life.

Each of the Elders taught Nigig and the young boy about the gifts they brought from the seven different directions. They learned of wisdom, respect, love, bravery, truth, humility, and honesty—the grandmother and grandfather teachings. As they taught, the day melted into the evening. Dusk gathered around them and the sun sank into the horizon.

The Elders continued their work. They stoked the fire and prepared food. They began feasting. They feasted the bundle, the feathers, the drums, the songs, and the medicines. They feasted the words spoken that day. After their spirit-helpers were fed, they fed themselves before reclining around the fire. And their teaching continued. As the stars appeared the two young guests were taught more lessons about their territory. No matter where you are, if you look up into the sky, they were told they would see the Elders' stories written across the sky.

In fact, they were told, the sky was part of their territory—the place we came from and the place we would return. As the stories piled on one another, Nigig and the young boy fell asleep under their weight. In sleeping they were taught further gifts. Dreams clarified and deepened their experiences.

When Nigig and the boy awoke, their guests were gone. They were by themselves against the sea. They picked up the bundle with those seven different gifts and they started walking. Through the years they visited the four directions. As they walked and encountered difficulties, they would open these gifts. This gave them strength to meet the world:

> To cherish knowledge is to know WISDOM. To know LOVE is to know peace. To honour all of the Creations is to have RESPECT. BRAVERY is to face the foe with integrity. HONESTY in facing a situation is to be brave. HUMILITY is to know yourself as a sacred part of Creation. TRUTH is to know all these things.[4]

These teachings can be accessed by all—if they are actively cultivated by teachers and fellow students. They can generate wise practices and develop professional responsibility. They can help you practice law. As you go into the profession and continue through school these principles can guide your decision-making processes. In so doing you will be learning and applying Anishinaabe law. Wisdom, love, bravery, respect, honesty, humility, and truth can be your standards for making judgments. They can help you be practice-ready lawyers when you graduate because you are already practicing these laws in this setting.

NIIZHWAASWI MIIGIWEWINAN (SEVEN GIFTS)

With this story as a prologue I will now discuss the development of professional responsibility in seven vignettes. While each point is related to my experience and reflections in revitalizing Anishinaabe law, they also have relevance for revitalizing Canadian law more generally. Each reflection further develops my opening point that law is best lived and practiced relationally. When we see law as a verb, not a noun, we understand it is something we do. Law is not an inanimate force that magically works without active human engagement. Learning and practicing law is about action. It is done in communities and in groups, like in the sugar bush or in the story. We need good teachers, and we need good principles to guide us along our journeys.

We never act alone as lawyers, even though we may think this is the case. Every action is enabled or constrained by others. We are part of a legal *system*. Law school graduation and law society accreditation are part of an elaborate group process. The cases we study and the statutes we interpret arise from collective action. The adversarial system is also a cooperative system because it presumes relationality in complex ways.

I am not diminishing the importance of individual agency as we interact in this system; individual agency is vital, essential, key, fundamental, and necessary to the practice of law. But our individual actions are also shaped by others. *We interact—we don't just act*. In law we act in concert with others, in tension with them, or in distinct opposition to them. We are

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4. Benton-Banai, *supra* note 3 at 64.

entangled with others as lawyers, and this should help us see professional responsibility in a new light.

In considering the revitalization of both Anishinaabe and Canadian law in this light I will discuss seven other opportunities that could be further developed to expand professional responsibility. Remembering that "goodness" is a goal of Anishinaabe law, I hope Canadian legal practitioners might also find ways to advance this as a goal more generally too. Like Otter and the boy, legal practitioners, professors, and students are on learning journeys. Our terrain is varied; it traverses Indigenous and non-Indigenous legal orders. No matter where we travel, we can do more to learn from the natural world, Elders, and the intellectual gifts transferred to us by prior generations. The following seven reflections are small steps in considering how we might more actively regenerate goodness as a focus of legal thought and action.

I NITAM-MIIGIWEWIN: GII'IGOSHIMO (GIFT ONE: VISION)

First. Anishinaabe people have long encouraged active inner reflection after periods of intense instruction as a preparation for further growth. This was apparent in the foregoing story. Principles were identified to guide future action. Other legal traditions encourage reflection through different means. In provincial law societies students often apprentice and write exams after law school. Principles are identified to guide future practice. An important Anishinaabe practice which both follows and precedes active practice is the Vision Quest. This is a four-day reflective period, often accompanied by fasting, which, for interested students, can complement conventional practice-ready preparations like law school, articling, and bar admission tests. Vision Quests have been crudely stereotyped in popular culture. Yet in my own teaching experience they have a role to play for certain students who want to digest what they have learned in school before undertaking other roles.

I am not suggesting law students must go into ceremonial modes prior to practicing law; in fact, I would strongly resist this. At the same time, I hope we can reason by analogy. Maybe we can see reflective processes embodied in Anishinaabe practices as something that could be developed in widely diverse ways in many other settings. This may help law students who desire a period of reflection which is not as frenetic, as marked by experiences in law school and bar admission processes. Again, I am not suggesting that intense testing and high-stakes examinations should be jettisoned. They have an important role to play in legal education. At the same time, I also believe we have not achieved a proper balance in cultivating ethical practices which often require other modes of testing and learning.

In the last year, two Anishinaabe graduate students approached me on their own initiative to learn in this way. They offered tobacco and asked me to help them in their academic, professional, and personal quest to be "good" students. We talked about the preparations involved in getting ready for this reflection. We discussed the seriousness of their purpose. We considered how they would demonstrate their readiness. We examined the responsibilities they would assume as they prepared. We agreed on common goals. As a result, over the last twelve to fourteen months, I guided these students in their preparations. We discussed many Anishinaabe stories; we deepened our work in the Anishinaabe language; we shared old songs, teachings, and principles. We considered what they had learned in legal practice or as students. We discussed the seven grandfather/grandmother teachings. This process had its own kind

of intensity as we met frequently throughout the year. It was a rewarding experience. At the end of our year together, one of the students camped on Mount Tuam, on Salt Spring Island. He received permission from the Elders—traditional and contemporarily concurrent owners of the site—to fast in their territory. He had a very meaningful experience. The other person went to Neyaashiinigmiing (Cape Croker), my home reserve. He was placed in a remote site on the edge of the peninsula. He could look out across Georgian Bay and watch the sunrise every day. The abundance of life was at his back within the forest. He also had a meaningful experience out on the land. To reiterate: I hope we can see analogies in these experiences. Other students, with different goals, could find other ways to be guided through contemplative experiential learning processes, if that is their hope. I am merely suggesting that law schools and law societies could do more to cultivate ethical learning, using Anishinaabe law as one modest example.

II NIIZHO-MIIGIWEWIN: GIKINOO'AMAAGE AKIING (GIFT TWO: LAND)

Second. Another example of how the revitalization of Anishinaabe law might contain insight for the revitalization of Canadian law comes from my own experience with Osgoode Hall Law School in the past year. I have long dreamed about inviting law students to my reserve to help them see how law cannot ultimately be separated from the land. This past September my dream was realized, as forty-three students and seven professors from Osgoode Hall Law School joined me and my family at Neyaashiinigmiing to learn and practice Anishinaabe law. We enjoyed four days on the land, learning Anishinaabe law from the Elders, band councilors, and other professionals in the community. Like Otter and the young boy in the earlier story, students also learned from the earth. They gathered around a fire in the evenings. During the day we went out on the land and waters. We experienced what Anishinaabe people know about law from observations and stories related to the trees, plants, rocks, and animals. My daughter, who herself is a law student, was one of my teaching companions. As we were teaching in the forest a dragonfly circled around the group. Its brilliant colours caught our eye as it flew away. The dragonfly soon returned and landed on my daughter's vest. It rested on her heart as she was teaching. She taught for ten minutes with this little insect on her jacket. In Anishinaabemowin, the Ojibway language, we call insects manidoosag—little spirits. Nature was constantly being drawn upon to illustrate the seven grandmother and grandfather teachings. Students were able to experience a legal tradition that does not rely on written texts to transmit professional responsibility. Law is embodied in the earth, and we helped expose students to another legal literacy as they learned on my reserve. The University of Victoria and the University of British Columbia both have Indigenous land-based experiences for law students. Given our experience at the Fort William First Nation sugar bush yesterday, I encourage you to consider developing an Anishinaabe Law Camp at the Bora Laskin Faculty of Law too.

III NISO-MIIGIWEWIN: ANISHINAABEMOWIN (GIFT THREE: LANGUAGE)

Third. There is value in learning, or being exposed to, an Indigenous language in developing professional responsibility as future lawyers. Practice-ready lawyers who aim to

live good lives understand that making decisions for future clients requires an appreciation of different points of view. Language encodes worldviews. For the last three or so years, I have run an Anishinaabe language table at the University of Victoria. I teach four law classes in Minnesota from September to December, which compresses my full-year load into one semester. I return to Victoria in late December and run an Anishinaabe language table on the West Coast with my friend and colleague Heidi Stark. Last Tuesday, we had twenty people attend, both Anishinaabe and from other communities. Participants come from all walks of life. None of us speak an Indigenous language as our first language; in fact, we "butcher" the language. We constantly laugh at our mistakes, and in laughing, we learn the language. My mother says "if you're not laughing, you're not learning the language." Aside from our lessons, sometimes we sing drum songs in Anishinaabemowin, and at other times we feast and enjoy food with one another. At the end we usually take fifteen minutes (sometimes it becomes forty-five minutes) where we tell stories: old stories, new stories, and speculative stories about our futures. In that setting we are practicing Anishinaabe law. We are using the principles found in the stories, language and teachings to help us live better lives and make better decisions. Of course, the revitalization of Canadian law does not require law students to learn Indigenous languages—there are many fine traditions that could be studied through different languages at each law school across the country. At the same time, Indigenous languages record the local ecology of our country. They can provide additional insight about the character of the natural world we live in.

IV NIIYO-MIIGIWEWIN: DIBAAKONIGEWIGAMIG (GIFT FOUR: TRIBAL COURTS)

Fourth. It is important to learn from, and with, local First Nations in our territories as we attend law school and work to become practice-ready lawyers. Working in Minnesota has been an amazing experience for me. As you may know, just across the border, not far from Thunder Bay, there are many Anishinaabe nations, some with huge reservations. Leech Lake, Red Lake, Grand Portage, White Earth, and Nett Lake are relatively close by. One of the things that I most enjoyed about teaching in Minnesota was learning about their tribal courts. They try to connect their values with the land, language, and stories. They do this through the categories of administrative law, property law, tort, and contract, etc. I recently read a case from Nottawaseppi Huron Band of the Potawatomi.[5] This is an Anishinaabe community in Michigan which had an election dispute. Their tribe has statutes, regulations, and a constitutional provision that deals with elections, and they have an administrative tribunal that works through challenges in election disputes. The tribal court decision cited many legal principles familiar to anyone who studied election law in the United States. At the same time, there was an important difference: the court kept returning to the principle of mino-bimaadiziwin—good living. They identified this principle as a key in trying to resolve the election dispute. These are not perfect institutions because some of them still have a very assimilatory reach, and some of them are frankly "too Western" to be persuasive to their people. But in other instances, tribal courts decide cases which strike a better balance between legal systems in a very helpful way.

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5. *Nathaniel W Spurr v NHBP Tribal Council, Plante Moran LLP & Tribal Election Board* (21 February 2012), 12-005APP (Huron Potawatomi Tribal Court), online: NHBP Tribal Court <//nhbpi.org/wp-content/uploads/2012/12/12-005APP-Opinion-of-SC-in-Spurr-v-TC-et-al1.pdf>.

To give you an example of how and why tribal courts are not perfect, I recall one case which concerned a judge who was in a car accident and made a fraudulent insurance claim.[6] He affirmed his accident occurred while he was on tribal business when it was clear he was on his own personal errand. He was charged by the tribal police, and had to answer to this charge in tribal court. He argued there is no such thing as the crime of attempted fraud in Anishinaabe law. The tribal court rejected his argument. Although it is true that Anishinaabe people did not use that exact word in historical terms, there were good reasons to consider it Anishinaabe law today. The tribe had adopted and adapted a statute from Michigan concerning attempted fraud, and through their own sovereign authority the tribe used that term. The tribal court also recounted a trickster story from the past that illustrated analogies to attempted fraud. Our old stories tell us it is wrong to take something that is not yours and misrepresent your interests in the process. The court cited and applied this historical legal story. The court's trickster story tells of deceitfulness and deception and "burning oneself" when a person does wrong. So while this case shows tribal courts are not perfect, the decision also demonstrates that they have ways to deal with their challenges. There are lessons for us in the Canadian context as we find innovation and creativity as part of our journey towards living better lives. There are many gifts waiting to be accessed in this process.

V NAANO-MIIGIWEWIN: ANISHINAABE IZHITWAAWINAN (GIFT FIVE: CUSTOMS)

Fifth. My experience with tribal courts prompted me to wonder why we do not have Anishinaabe dispute resolution procedures in Canada today. Anishinaabe people are divided by an artificial US/Canadian border—what we used to call the medicine line. Our insights need to travel across these false borders. I believe Anishinaabe and other Indigenous legal systems should be part of the fabric of decision-making in formal adjudicative processes. As I experienced in the United States, there is a significant place for Indigenous law in legal practice. It adds value and it adds values. It could help revitalize both Indigenous and Canadian law as it focusses on good living. This past summer I've been talking with lawyers in Ontario about how such an initiative might be started. We discussed how an adjudicative structure could be created which operates by consent, if parties acceded to the forum's voluntary jurisdiction. This is what often happens in commercial settings and there is no reason why this might not develop in an Indigenous context. Of course, more formal recognition of Indigenous adjudicative forums would be preferable, but we cannot wait for official avenues for recognition to materialize. It might take decades for this to occur.

In our discussions, we have considered the staffing of Indigenous peacemaking or chambers-like bodies. We have talked about judges, Elders, lawyers, clerks, and administrators, all using Anishinaabe analogies. We have also spoken about these roles in an Anishinaabe-specific context using our own language and conceptual frameworks. No one in our group wants to create tribal forums in the image of Western courts. At the same time, there is much to learn by way of analogy.

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6. *Ryan L Champagne v Little River Band of Indians* (June 2007), 06-178-AP (Little River Band of Indians Court of Appeal), online: <https://rezjudicata.files.wordpress.com/2008/01/lrb-v-champagne-final-opinion.doc>. See also Matthew LM Fletcher, *American Indian Tribal Law* (New York: Aspen Publishers, 2011) at 405–12.

Of course, once an Anishinaabe adjudicative forum is available, we would have to invite people to bring their disputes to this forum. It would also be necessary to consider how the decisions of this forum would relate to provincial and superior courts. As mentioned, as an initial matter, participation by "disputants" would occur on a willing basis. Acting by consent is consistent with broader Anishinaabe legal traditions (though coercion also has precedent within our system). Voluntariness has its drawbacks but it also has its advantages. Forums can be run in a manner which makes consent more meaningful. I can imagine disputants agreeing to abide by Anishinaabe ethical and procedural principles by oath. They could pledge this in their statements of fact, claim, and defense. Love, wisdom, respect, bravery, honesty, humility, and truth could form the touchstones of this process. Drums and song could animate such gatherings at their start. Elders might offer their counsel and words as a sign of respect for the participants. Results could be woven into wampum, set to song, or recorded in detailed contractual language if that was the parties' wish. In some instance the decisions would parallel the broader system and in others they would be quite distinct. The context of each dispute would dictate how each matter unfolds. Furthermore, decisions could be written, which would create a formal record of what Anishinaabe law requires in particular disputes. A case law record could be formed. These judgments could be publically available on websites and in books. They could be accessible to others for study and further insight about the practice of Indigenous law in specific contexts. Like the Anishinaabe, other Indigenous communities could engage in their own terms, with their own laws, in creating or revitalizing dispute resolution systems.

VI NINGODWAASO-MIIGIWEWIN: CHI-INAAKONIGEWINAN (GIFT SIX: CONSTITUTIONS)

Sixth. In the last few years I have seen Anishinaabe communities work towards the development of their own constitutions. There are over thirty Anishinaabe communities in Ontario that are contemplating or have implemented a written constitution. These constitutions identify heads of power with very broad authorities. They deal with issues like language, culture, remedies, jurisdiction, rights, freedoms, and governance. They empower communities to make decisions in regard to issues like wildlife, conservation, education, housing, economic development, membership, and child welfare. The list of jurisdictional powers is extensive and related to matters which directly impact the health and welfare of communities.

I have also directly worked with communities in their own constitution drafting process. My advice has highlighted the fact that written words alone cannot implement a constitution. As noted earlier, law is a verb—an action—and not merely a category identifying authority and responsibility. Anishinaabe people sometimes use the word chi-inaakonige to describe laws which organize a community's governance relationships. "Chi" can mean great or large, and "inaakonige" means to act through making a judgment or deciding to proceed in a certain way. Chi-inaakonigewin means that a constitution describes a set of guided actions that are future-oriented, yet take guidance from the past. Actions are fluid and always in motion. Therefore, I have counselled that Anishinaabe constitutional law cannot be compressed into a single idea, nor can it be summarized in a single sentence, paragraph, or document. The writing can be very important; in my view a constitution creates a *framework* for agreement *and* disputation. It provides for orderly and organized ways to agree *and* disagree with one another in the

future. Most Anishinaabe constitutions I have worked with place the seven grandmother and grandfather teachings at their heart; these principles were identified by communities as guiding principles long before my engagement with them.

Another distinctive element of these constitutions is that they are designed to "promote, advance and strengthen the philosophy of *mino-bimaadiziwin*, to live a good life; teach and encourage the use of *Anishinaabemwin* and the practice of *Anishinaabe aadzowin*."[7] This is an excerpt from a proposed constitution. As you can see, this clause fits with the theme of this talk. Good living is identified as a constitutional principle to help create ethical Anishinaabe communities. Anishinaabe language is encouraged as a means to facilitate this kind of living. At the same time the provision is not coercive, it is encouraging. The proposed constitution recognizes that citizens have the freedom to do what they want in relation to Anishinaabe tradition, even if the council is charged with encouraging its development. This stance advances Anishinaabe culture while leaving with individuals the freedom to live the life they choose. Law students who are preparing to be practice-ready lawyers might take guidance from this approach. They might likewise actively pick-and-choose from different traditions in their own preparations for self-governance as they internalize values to direct their lives in their legal careers and beyond.

VII NIIZHWAASO-MIIGEWEWIN: ANISHINAABE INAAKONIGEWIGAMIG (GIFT SEVEN: INDIGENOUS LEGAL EDUCATION)

Seventh. In concluding this talk, I think back to my experience at the University of Victoria Law School. My colleague Val Napoleon created an Indigenous Law Research Unit (ILRU) to revitalize Indigenous law. Their "vision is to honour the internal strengths and resiliencies present in Indigenous societies and in their legal traditions, and to identify legal principles that may be accessed and applied today—to governance, lands and waters, environment and resources, justice and safety, and building Indigenous economies."[8] ILRU has worked with students across the country and from sea to sea to sea. It has also engaged with Indigenous communities widely and helped them further learn and apply their own laws. In conjunction with this Unit, we have also developed an Indigenous Law degree. It has approval from our Faculty Council. It is designed to teach the common law alongside Indigenous people's law. When it is fully operational a student could receive a joint JD/JID at the end of a four-year period of study. I have written about this elsewhere; the point is that Indigenous law could be more formally recognized in the legal profession if it was taught in law schools. Furthermore, law schools can be a greater resource for Indigenous communities if they took direction from them in developing practical tools that assisted them (when called upon) in the revitalization process.

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7. *Chippewas of the Thames First Nation Deshkan Ziibiing Anishinaabeg Constitution*, 18 March 2014, Article 2.2, online: Chippewas of the Thames First Nation <cottfn.com/wp-content/uploads/2014/03/COTTFN-Constitution.pdf>.

8. See the University of Victoria Faculty of Law's Indigenous Law Research Unit (ILRU) website, online: University of Victoria Law Indigenous Initiatives <www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/>.

So, I'm about finished. Remember your trip to the Fort William First Nation sugar bush. Remember the young boy, Otter, and the journey. Remember the teachings and the gifts identified in the story. Then, think about your own journey. I have attempted to describe my journey over the past few years. Through the seven vignettes, I have sought to describe some modest areas where both Anishinaabe and Canadian law can be revitalized, and aimed at good living. I hope you hear these as analogies. While they have specific application in the contexts where I work, I hope you regard them as invitations for further innovation in your varied contexts. Perhaps they spark ideas which you will adapt for your own future practice.

I hope you find rich gifts on your journey. I hope you find ideas, principles, and practices which lead to good living. You have a bright future. I am grateful to have raised a few possibilities about how that future might include the application of Indigenous law to your personal and professional lives. Be creative. Live your law.

Miigwech. Thank you for listening.

THE PRESUMPTION OF ADVANCEMENT: IS IT TIME TO RELEGATE THIS DOCTRINE TO THE ANNALS OF HISTORY?

*by Juliet Chevalier-Watts**

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I ABSTRACT

While the doctrine of the presumption of advancement and its applicability have been the subject of much judicial and academic criticism, this article reviews judicial approaches from Australasia and Canada and argues that the doctrine is still relevant in contemporary times. While it is evident that Canadian courts are not willing to support the place of the presumption of advancement in relation to gratuitous gifts by parents to adult children, Australasian jurisprudence supports a more expansive view, which is consistent with the basis of the doctrine. The more expansive view is that the natural bond of love and affection flows from a parent to child, irrespective of the age of the child, and this does not change, regardless of social, political, or economic constraints or changes. Therefore, it is argued that the doctrine is still a useful tool in the judicial toolbox for resolving family disputes today. As a result, the author does not support the relegation of this doctrine to the annals of history, because to do so would be to ignore the realities of contemporary economic pressures.

II INTRODUCTION

It is a truism that much as nature abhors a vacuum, so indeed does equity. Thus, where there is a transfer of property without consideration, the presumption of a resulting trust applies, and the transferor's intention is presumed to transfer only the legal title to the transferee.[1] Lord Browne-Wilkinson in *Tinsley v. Milligan* stated that:

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1. Archie J Rabinowitz, "Gratuitous Transfers of Assets from Parent to Child: *Pecore v Pecore* [2007], 279 DLR (4th) 513 *and Madsen Estate v Saylor* [2007], 279 DLR (4th) 547" (2008) 14:7 Trusts & Trustees 497.

> It is a development of the old law of resulting trust under which, where two parties have provided the purchase money to buy a property which is conveyed into the name of one them alone, the latter is presumed to hold the property on a resulting trust for both parties in shares proportionate to their contributions to the purchase price.[2]

A useful description of a resulting trust and the two circumstances in which it arises is provided by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*:

> …(A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption*, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer […] (B) Where A transfers property to B *on express trusts*, but the trusts declared do not exhaust the whole beneficial interest.[3]

The presumption to which Lord Browne-Wilkinson refers above is the pillar of the presumption of advancement. Therefore, in cases where property is bought in the name of another, or where property is transferred to another without consideration, such an apparent gift "does not raise equity's suspicions."[4]

Historically, the presumption of advancement has applied in three situations:

1. Where a husband transfers property to a wife;
2. Where a father transfers property to his child; and
3. Where the transferor transfers property to a child to whom he has standing in *loco parentis*.[5]

The case of *Dullow v. Dullow* sets out in some detail the historical background to the presumption of advancement:

> This principle, which denied a resulting trust and left the beneficial title with the legal title, seems to have had its origin in what was regarded as the moral or other obligation of a father to advance a child who had not earlier been adequately advanced. The same principle applied to a grandfather making a gift to a grandchild, the father being dead, and the grandfather standing in loco parentis to the grandchild…A like presumption was made in the case where

2. *Tinsley v Milligan* (1993), [1994] 1 AC 340 at 371, 3 All ER 65 (HL Eng).

3. *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996), [1996] AC 669 at 708, [1996] 2 All ER 961 (HL) [emphasis in original].

4. Tsun Hang Tey, "Singapore's Muddled Presumption of Advancement" (2007) Sing JLS 240 at 240.

5. *Ibid* at 240–41.

> the transferee was the wife of the transferor or of the person providing the consideration.[6]

Justice Hope in *Dullow* prefaces that historical commentary by noting that the presumption "has its origin in a social situation different from that of the present time."[7] While this is indeed correct, I am of the view that, despite its outdated historical origins, as a common law doctrine, the presumption of advancement is capable of evolving with social demands of society. Thus, the old fashioned ethos can sit alongside today's contemporary moral and social obligations.

Judicial and academic discussions relating to the presumption of advancement seem to occur in conjunction with discussions regarding the presumption of resulting trusts as "[b]oth are seen as a means of identifying the beneficial owner of property acquired in the name of one person but using the assets of another."[8] So in the context of this article, "the presumption of advancement is spoken of as displacing the presumption of resulting trust."[9] Therefore, the two presumptions assist courts in identifying the true beneficial owner of the disputed property.[10]

The doctrine of the presumption of advancement has been subject to "an extraordinary catalogue of complaints"[11] and indeed, one author went so far as to say "[e]very writer of sufficient intelligence to appreciate the difficulties of the subject- matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair."[12]

This article seeks to give some hope to those who might despair of the applicability of the doctrine of the presumption of advancement. This article critically addresses a number of key judicial approaches to this doctrine, arguing that, while there may be judicial and academic uncertainty and confusion, the underlying ethos of the doctrine can still be recognized. In the early days of this doctrine, it was said that the "natural consideration of blood and affection" justified the presumption between a father and a son. In more recent times, parental affection, and not just an obligation to maintain, is the rationale, and, therefore, the underlying ethos for the presumption.[13] It is submitted that this underlying ethos is still valid in contemporary times, and should still be acknowledged, particularly in circumstances where parents gift property to children. While the author does concede that criticisms of the doctrine are well-founded, it is not yet time to relegate it to the annals of history. This article therefore now turns to an examination of a number of jurisdictions to assess whether it is time to relegate this presumption relating to parents and children to the annals of history.

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6. *Dullow v Dullow* (1985), 3 NSWLR 531 at 535–36 (Aust CA) [*Dullow*].

7. *Ibid* at 535.

8. *Young v Young*, [2000] NZFLR 128 at 132.

9. *Ibid*.

10. *Ibid*.

11. *Ibid* at 131.

12. *Ibid*, citing Edmund M Morgan, "Presumptions" (1937) 12:4 Wash L Rev & State Bar J 255 at 255.

13. James Brightwell, "Good Riddance to the Presumption of Advancement?" (2010) 16:8 Trusts & Trustees 627 at 632, referring to *Grey (Lord) v Grey (Lady)* (1677), 36 ER 742, [1677] 2 Swans 594 (Ct Com Pl) and *Cho Ki Yau Trust (Trustee of) v Yau Estate* (1999), 29 ETR (2d) 204, [1999] OTC 106 (Sup Ct J), respectively.

III CANADA

A number of cases have arisen out of Canadian courts where the relevance of the presumption of advancement in contemporary times has been considered in some detail. While the presumption has been subject to great scrutiny, it is clear that there is still judicial division as to its applicability, and, indeed, as to what evidence is needed to rebut the presumption.

The case of *Dagle v. Dagle Estate*[14] illustrates the challenges facing the courts in addressing this presumption, although it is clear from the evidence presented by the court that the historical presumption is actually flexible enough to be able to cope with the social demands of contemporary society.

Both the common law and Canadian statutes speak eloquently of the abolishment of the presumption of advancement between husbands and wives.[15] However, the significance of the presumption in relation to parents towards their children "appears to have retained all its original vigour."[16] This particular reference was made in the context of father and son relationships, which have traditionally been recognized by courts as giving rise to the presumption of advancement because "the natural Consideration of Blood, and the Obligation which lies on the Father in Conscience to provide for his Son, are predominant."[17] While the Court in this ancient case did not explicitly refer to this obligation arising because of the assumed natural affection that will arise between a father and child, it is not unreasonable to infer that this obligation has its basis in such a bond and therefore it is natural that any father should wish to support his child. The trial judge in *Dagle* recognized that, while the presumption between a father and child still had considerable weight, there was little evidence to support the same notion applying as between mothers and their children. However, it was noted that the presumption should arise on a gift between mother and child because there is no reason for it not to.[18] Once again, no explicit reference is made as to how this obligation arises, but if one considers the principle of natural affection as held between a father and son, it is not unreasonable to infer that very same bond will arise between a mother and child. Statutes are clear that every parent has an obligation to provide support for their child, regardless of the parental gender, and indeed that any spouse may be required to provide support for a child of the marriage.[19] However, while statutes may provide some clarity, the common law has been less than clear on whether the presumption should apply between a mother and child and Canadian courts have reached divergent outcomes on this matter. In *Lattimer v. Lattimer*,[20] the Ontario High Court of Justice stated that the presumption should not apply. On the other hand, in *Dagle*, the Prince Edward Island Supreme Court determined that it should.[21]

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14. *Dagle v Dagle Estate* (1990), 70 DLR (4th) 201, [1990] PEIJ No 54 [*Dagle* cited to DLR].

15. *Ibid* at 207, referring to *Family Law Reform Act*, RSPEI 1988, c. F-3, s 12(1); *Rathwell v Rathwell* [1978] 2 SCR 436 at 452, 83 DLR (3d) 289.

16. *Ibid* at 208.

17. *Grey (Lord) v Grey (Lady)* (1678), 23 ER 185 at 187, Rep t Finch 338 (Ch).

18. *Dagle*, *supra* note 14 at 208.

19. *Ibid*, citing *Family Law Reform Act*, RSPEI 1988, c F-3, s 17(1), (repealed) and *Divorce Act, 1985*, SC 1986, c 4, s 15(2).

20. *Lattimer v Lattimer* (1978), 82 DLR (3d) 587, 18 OR (2d) 375 (HCJ), relying on *Edwards v Bradley* [1957] SCR 599, 9 DLR (2d) 673.

21. *Dagle*, *supra* note 14, relying on *Rupar v Rupar* (1964), 46 DLR (2d) 553, 49 WWR 226 (BCSC).

The case of *Dagle* amply supports the view that the presumption of advancement is a doctrine that sits as comfortably in modern times as it did at the time of its inception because:

> [t]he common law has never been held to be fixed in time. As times changed, so did the common law. There is no reason at this point in time where women play such an important role in the work-place that they cannot make a gift to a child resulting in the presumption of advancement. The flexibility of the law… has not disappeared.[22]

The Court rejected the appellant's submission that it should be writing the demise of the presumption. Instead, the Court stated that the grounds for the presumption's existence between father and child, and the broadened grounds for the presumption's existence between mother and child, have not changed, thus reflecting the value of such a doctrine in modern times.[23]

Courts have also deemed it "necessary to determine what evidence will rebut the presumption of advancement to show that no gift was intended."[24] Much of this evidence relies on the special relationship between the parties, strengthening the concept of blood ties and notions of love and affection causing an obligation to gift property to a child by a parent. The Court in *Dagle* commented that, while the presumption of advancement may be rebutted, it "should not…give way to slight circumstances,"[25] emphasizing the strength of obligations that flow from blood relationships, which are no different in contemporary times. Therefore, the special relationship giving rise to a presumption of advancement will be treated as *prima facie* evidence that the person who paid the money or transferred the property into the other party's name intended it to be a gift.

Purchasing property in the name of a child is evidence of an intention to make a gift to a child and, *prima facie*, rebuts the presumption of a resulting trust. This evidence may be strengthened or undermined by other evidence that would give a true explanation of the transaction.[26] This evidence "may be written, parol, direct or circumstantial"[27] and must meet the following criteria:

> [t]he acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour.[28]

It is apparent, therefore, from *Dagle*, that while the doctrine of this presumption has its foundations in the ancient, its application in modern times is not out of place because once a

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22. *Ibid* at 209.

23. *Ibid*.

24. *Ibid* at 210.

25. *Ibid*, citing *Shephard v Cartwright*, [1955] AC 431 at 445, [1954] UKHL 2 [*Shephard*].

26. *Ibid* at 210, citing *Walsh v Walsh*, [1948] 1 DLR 630 at 640, [1947] OJ No 562.

27. *Ibid* at 211.

28. *Ibid*, citing *Shephard*, *supra* note 25 at 445, citing Robert Megarry & Paul Vivan Baker, *Snell's Principles of Equity*, 22nd ed (London, UK: Sweet & Maxwell, 1954) at 122.

special relationship has been established, as it would between parent and child, a *prima facie* presumption is raised. The rebuttal of such a presumption is assessed stringently by the above criteria, suggesting that the presumption of advancement is still a valuable doctrine to uphold, no doubt because it gives credence to natural bonds between parents and children.

While *Dagle* is of assistance in emphasizing the value of the presumption of advancement in modern times in relation to parents and children, it does not explicitly address the issue of whether this presumption should only be favourably valued in respect to parents and gifts to adult children, as opposed to gifts from parents to minors. The more recent case of *Pecore v. Pecore*[29] was groundbreaking in addressing this issue, among others.

The starting point for the Court in *Pecore* was to state the value of the presumption of advancement because it plays a role in disputes over gratuitous transfers "where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive."[30] As a result, this presumption, along with the presumption of the resulting trust, provide a "measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers."[31] While the Court made clear that the presumption of advancement is far from being an outdated relic, it was more reticent with the doctrine's application to gifts from parents to adult children, which was the central issue in the case.

The Court noted that the issue as to whether the presumption should apply between parents and adult independent children has been the subject of some judicial disparity. The Court initially referred to the case of *McLear v. McLear Estate*,[32] which focussed predominantly on the contemporary practice of elderly parents adding adult children to joint bank accounts so that the children can assist in the managing of their parents' finances. In applying the presumption of advancement, the Ontario Superior Court in *McLear* paid great attention to modern social conditions:

> …[A] consideration of the present social conditions of an elderly parent presents an equally compelling case for doing away with the presumption of advancement between parent and adult child. We are living in an increasingly complex world. People are living longer, and it is commonplace that an ageing parent requires assistance in managing his or her daily affairs. This is particularly so given the complexities involved in managing investments to provide retirement income, paying income tax on those investments, and so on. Almost invariably, the duty of assisting the ageing parent falls to the child who is closest in geographic proximity. In such cases, Powers of Attorney are routinely given. Names are "put on" bank accounts and other assets, so that the child can freely manage the assets of the parent.[33]

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29. *Pecore v Pecore*, 2007 SCC 17, [2007] 1 SCR 795 [*Pecore*].

30. *Ibid* at para 23.

31. *Ibid*.

32. *McLear v McLear Estate* (2000), 33 ETR (2d) 272, [2000] OTC 505 (Sup Ct J) [*McLear*].

33. *Pecore, supra* note 29 at para 34, citing *McLear*, *ibid* at paras 40–41.

In light of these circumstances, the Court in *McLear* believed that the social reality was that the child was holding the property in trust for the aging parents, and thus the true presumption should be that of a presumption of a resulting trust.[34]

The Supreme Court in *Pecore* also referred to the case of *Cooper v. Cooper Estate*. In that case, the Court could find no reason to presume that a parent, who transfers property to an adult child living apart from the parent, intends to gift that property to the adult child.[35] Therefore, the presumption of advancement holds little weight as between a parent and an independent, adult child.

The Supreme Court was of the opinion that this was the correct approach because the principal justification for the presumption of advancement is the parental obligation to support dependent children. Not only do legal parental obligations end when children reach adulthood, in contemporary times it is quite often the case that adult children become obliged to support their parents in managing their finances and property.[36]

However, such an argument only considers one of the justifications for the presumption of advancement. It ignores that a parent should have an obligation to support a dependent child because of the underlying basis of the parental affection assumed between a parent and a child. The Supreme Court does refer to this issue,[37] but provides a confused commentary that does little to support its argument that the presumption of advancement should not have any place in transfers between parents and adult, independent children.

The Court categorically states that affection is not "a basis upon which to apply the presumption of advancement to the transfer" because "the factor of affection applies in other relationships as well, such as between siblings," but no such presumption applies in those situations.[38] However, this is a limited argument because the two factors that underpin the presumption of advancement are first, the bond of love and affection between a parent and child, and second, leading naturally from the first is the obligation to support a child because of that bond of love and affection. Thus, the two factors cannot be considered independently; otherwise, the doctrine has little basis and thus little meaning. The argument also ignores the fact that the bond of love and affection between parent and child does not diminish merely because the child reaches adulthood. Nor does the desire to assist and support an adult child necessarily diminish. Indeed, to provide just one example of contemporary social issues in this respect, "[i]n these times of high property prices and restrictive criteria for mortgage lending, is it not the natural consideration of blood and affection which causes a parent to provide his or her adult child with the deposit with which to buy a house?"[39]

So, although *Pecore* states that the presumption of advancement should not apply in transfers from parents to adult independent children, I argue that modern financial complexities evidence the need to still recognize the presumption of advancement between a

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34. *Ibid*.

35. *Ibid* at para 35, citing *Cooper v Cooper Estate* (1999), 27 ETR (2d) 170 at para 19, [1999] 11 WWR 592 (Sask QB).

36. *Ibid* at para 36.

37. *Ibid* at para 37.

38. *Ibid*.

39. Brightwell, *supra* note 13 at 632.

parent and an adult independent child. The presumption as it stands is well-placed to provide some certainty in such circumstances.

The Court in *Pecore* turned its attention to the question of whether the presumption should apply to cases of adult dependent children. In *Pecore*, the daughter, Paula, was a married adult with her own family, but she was nevertheless dependent upon her father and endeavoured to justify the presumption of advancement on that basis. The Court determined that the question of whether the presumption applies to adult dependent children turns on what constitutes dependency.[40] It stated that:

> Dependency is a term susceptible to an enormous variety of circumstances. The extent or degree of dependency can be very wide ranging. While it may be rational to presume advancement as a result of dependency in some cases, in others it will not. For example, it is not difficult to accept that in some cases a parent would feel a moral, if not legal, obligation to provide for the quality of life for an adult disabled child. This might especially be the case where the disabled adult child is under the charge and care of the parent.[41]

As compelling as such a case may be to find such a presumption, the Court was reluctant to apply the presumption of advancement in cases of dependent adult children because "it would be impossible to list the wide variety of the circumstances that make someone 'dependent' for the purpose of applying the presumption."[42] This could then lead to uncertainty and unpredictability in trying to determine this issue, and courts would have to decide such matters on a case-by-case basis. As a result, the Court felt it best to limit the presumption to transfers as between parents and minor children.

I respectfully submit that the presumption of judicial uncertainty being created if courts had to decide on a case-by-case basis in relation to gifts from parents to adult dependent children is flawed. There is nothing new about courts reaching decisions on a case-by-case basis. The law of charitable trusts is one such example where there is no statutory definition of "charitable" in many jurisdictions and where new charitable purposes arise, a court has to address this on a case-by-case basis.[43] There is no reason why courts should not decide issues relating to gratuitous gifts to adult children in the same way as new charitable purposes. Indeed, the Court in *Pecore* states that there will be circumstances when parents deliberately transfer property to adult, dependent children and the property is intended to be a gift. And it will be for a court to determine whether the degree of the dependency of the child is sufficient to rebut the presumption of a resulting trust.[44]

If a court is able to make that determination on a case-by-case basis, then a court is surely able to determine whether or not an adult child is dependent on a case-by-case basis for the purposes of establishing the presumption of advancement; there is no difference between the two principles. I, however, argue that a simpler and more justifiable approach is to retain

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40. *Pecore*, *supra* note 29 at para 39.

41. *Ibid*.

42. *Ibid* at para 40.

43. See Dr Donald Poirier, *Charity Law in New Zealand* (New Zealand: Department of Internal Affairs, 2013), online: *Charities Service Ngã Rātonga Kaupapa Atawhai* <www.charities.govt.nz/assets/Uploads/Resources/Charity-Law-in-New-Zealand.pdf>.

44. *Pecore*, *supra* note 29 at para 41.

the presumption of advancement between parents and adult children, regardless of their dependency. To do so would respect the ancient rationale for the presumption of advancement and would create less judicial uncertainty. The concurring judgment of Justice Abella in *Pecore* supports this approach. Abella J. notes that "[h]istorically, the presumption of advancement has been applied to gratuitous transfers to children, regardless of the child's age"[45] and that, "[i]f we are to continue to retain the presumption of advancement for parent-child transfers, I see no reason…to limit its application to non-adult children."[46] The presumption of advancement may be ancient, but its philosophy and its application are just as valid in contemporary times as they were in times gone by.

While Abella J. acknowledges that there is a judicial call for the removal of these presumptions, she argues that there is strong evidence to support the retention of these presumptions. If a person has made a gift to transfer title, is it reasonable to presume that the person intended for the transferee to hold that title on trust? Or, is it not more sensible to presume that the transferor who intends to create a trust would have "taken steps to expressly create the trust and document it"?[47] In fact, "[i]t is more plausible to presume the opposite to that which equity presumed"[48] because in contemporary times, "it is at least as likely that he intended a gift as that they intended to create some type of trust."[49] Further evidence of this approach is given by Abella J. from *Nelson v. Nelson*, a case in which a mother bought a house and transferred it into the names of her children. Justice McHugh, in delivering a concurring judgment, acknowledged the foundations of the presumption of resulting trust, being that, "the practices and modes of thought of the property owning classes made it more probable than not that, when a person transferred property in such circumstances, the transferor did not intend the transferee to have the beneficial as well as the legal interest in the property."[50] So the presumption of a resulting trust arose as a means to avoid paying feudal taxes when land passed from landowner to his heir and the presumption of advancement arose as a limited exception to the presumption of a resulting trust.[51] There should be no reason, therefore, to limit the application of the presumption of advancement because its ethos is just as relevant today as it was when it was first expressed.

Indeed, Abella J. asserts that her learned colleague Justice Rothstein's rejection of parental affection as the basis for the presumption of advancement actually "narrows and somewhat contradicts the historical rationale for the presumption" because "[p]arental affection, no less than parental obligation, has always grounded the presumption of advancement."[52] Parental affection is the basis for the presumption, which is why the presumption cannot exist in a relationship between strangers, or, indeed, siblings and grandparents. Writing for the majority, Rothstein J. noted that the factor of affection exists between siblings but the presumption of advancement does not apply in those circumstances, thus supporting his Honour's argument

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45. *Ibid* at para 79.

46. *Ibid*.

47. *Ibid* at para 82, citing Eileen E Gillese & Martha Milczynski, *The Law of Trusts,* 2nd ed (Toronto: Irwin Law, 2005) at 109–10.

48. *Ibid*.

49. *Ibid*.

50. *Ibid* at para 83, citing *Nelson v Nelson* (1995), 184 CLR 538 at 602, [1995] HCA 25 [*Nelson*].

51. *Ibid* at paras 84, 86.

52. *Ibid* at para 89.

that the factors of love and affection should be rejected when assessing the presumption of advancement.[53] Like Abella J., I assert that it is the bond between a parent and child which is the source of the presumption, and that this bond is fundamentally different from a bond in any other type of relationship. Therefore, "parental affection grounds the presumption and is the greatest indicator of the probable intent of the transferor."[54] Certainly bonds of affection do arise between siblings, relatives and friends, and these could be used to assess a transferor's intentions. But "none of these other relationships has ever inspired a legal presumption… because, as a matter of common sense, none is as predictable of intention."[55]

On this basis, therefore, I argue that the presumption of advancement should not be rejected in cases of parents and adult children because the bond between parents and children does not diminish just because the children reach adulthood. The evidence suggests that this is the favourable approach to take, and it supports the notion that the presumption of advancement is not ready to be relegated to the annals of history anytime soon. Abella J. in *Pecore* refers to the case *Sidmouth v. Sidmouth*, wherein the Court applied the presumption to a parent who transferred property to an adult son, explaining that "[t]he circumstance that the son was adult does not appear to me to be material."[56] This is because a "parent may judge for himself when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him."[57]

The actual age, and therefore, the state of independence of a child, should be of no consequence when considering the presumption of advancement. In *Madsen Estate v. Saylor*, the Ontario Court of Appeal concluded that the presumption can apply to transfers of property to an adult independent child.[58] In my view, the Court of Appeal correctly acknowledged that "[t]he origin and persistence of the presumption of advancement in gratuitous transfers to children cannot, therefore, be attributed only to the financial dependency of children"[59] because natural affection also underpins the presumption. Thus, the presumption should apply irrespective of the financial dependence of a child.

In *Pecore*, Abella J. rejects the majority's argument against applying the presumption to adult children. The argument is that, because people live longer and, as such, there are more aging parents who will require adult children to assist them in managing daily affairs, it would be dangerous to presume that an elderly parent is making a gift to a child each time the child's name is placed on an asset.[60] I respectfully concur with Abella J.'s submission that this is a "flawed syllogism"[61] because parents will generally wish to assist their children, no matter what age, and having a child assist a parent with their financial affairs will not negate the desire of the parent to financially assist that child. It would not create a dangerous precedent

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53. *Ibid* at para 37.

54. *Ibid* at para 93, citing CD Freedman, "Gratuitous Transfers by Parents to Adult Children" (2006) 25 Est Tr & Pensions J 174 at 196.

55. *Ibid* at para 103.

56. *Ibid* at para 94, citing *Sidmouth v Sidmouth* (1840), 2 Beav 447 (Ct Ch) at 1258, 48 ER 1254.

57. *Ibid*.

58. *Ibid* at para 96, citing *Saylor v Madsen Estate* (2005), 261 DLR (4th) 597 at para 21, 20 ETR (3d) 171.

59. *Ibid* at para 98.

60. *Ibid* at para 99.

61. *Ibid* at para 100.

to presume that a parent who gratuitously places an adult child's name on a bank account intended to make a gift to that child in gratitude for that assistance; this recognizes the ethos of the doctrine of the presumption and allows its true meaning to be expressed in equity. It is true that there may be limited circumstances where "some parents may enter into joint bank accounts because of the undue influence of an adult child" but this is "no reason to attribute the same impropriety to the majority of parent-child transfers."[62]

Therefore, to give full effect to the presumption of advancement in a contemporary context, "[t]he operative paradigm should be based on the norm of mutual affection, rather than on the exceptional exploitation of that affection by an adult child."[63] This approach offers judicial certainty because the presumption of advancement flows from the inherent nature of the relationship between a parent and child, and not from their financial dependency. The presumption "should logically apply to all gratuitous transfers from parents to any of their children," regardless of their ages or dependency.[64] Given this approach, the doctrine, while ancient, is applicable in a contemporary context. Nonetheless, the recent Canadian case of *Geisbrecht v. Slovinsky* certainly suggests that the majority views in *Pecore* prevail, regardless of the well-reasoned and logical arguments set out by Abella J. in *Pecore*. So, while the presumption of advancement could be a valuable tool in determining a transferor's intention, it cannot be applied in parent to adult child transfers.[65]

The Australasian approach, however, appears to be much more flexible than that of Canada. It appears to give full effect to the underlying ethos of the presumption of advancement in a positive and logical manner, and it supports the author's view that the doctrine is far from ready to be excluded from the judicial tool box.

It is to these jurisdictions that this article now turns.

IV AUSTRALASIA

The Australian case of *Nelson v. Nelson* is particularly important in the assessment of the contemporary relevance of the doctrine of presumption of advancement.[66] This case addressed the issue that, while the existence of the doctrine between a father and a child has never been questioned, "its existence in the case of mother and child and particularly in the case of mother and adult child has been questioned over many years."[67] In the Court's view, there is no longer any justification for maintaining a distinction between a father and a mother and Australia should follow the lead of the United States, and apply the presumption of advancement to mothers as well as fathers.[68]

In considering whether the presumption of advancement still has a place in contemporary times and particularly in relation to adult children and parents, *Nelson* offers an interesting

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62. *Ibid* at para 101.

63. *Ibid*.

64. *Ibid* at para 102.

65. *Geisbrecht v Slovinsky*, 2013 SKPC 18 at para 22, [2013] SJ No 30.

66. *Nelson*, *supra* note 50.

67. *Ibid* at para 10, Toohey J.

68. *Ibid* at para 12, Dawson J.

example. The Court considered "the very clear relationship of mother and children, albeit adult children" and "whether the governing consideration is said to be a duty to support or a lifetime relationship."[69] The Court found that, in either situation, the presumption of advancement should apply.[70] In coming to this conclusion, the Court referred to section 66B(1) of Australia's *Family Law Act 1975*, which imposes a primary duty on the parents to maintain the child, with no distinction made between the gender of the parents. Further, the definition of "child" has no age limitation in the *Act*, although factors including income, earning capacity, and financial resources should be taken into account.[71]

The Court notes that that statute clearly imposes an obligation on parents to maintain their children, and that the obligation derives from the obligation of support that exists under the presumption of advancement, and equally so, from the implied lifetime relationship that flows from parents to their children.[72] The Court therefore does not distinguish, at this stage, between the two possible aspects of the presumption. Instead, the Court acknowledges that the doctrine will apply regardless of the age of the child, although obviously it may be rebutted with evidence of a contrary intention of the donor. Interestingly, the Court later implies that the terms of the presumption may indeed be derived from the lifetime relationship between a parent and child, or, in other words, from the bond of love and affection.

The appellant in *Nelson* contended that the presumption should only apply when there is no evidence of intention. In other words, "the presumption does not arise unless the circumstances surrounding the bare relationship of the parties are consistent with the presumption."[73] If the presumption applied only in these circumstances, the effect would be, for example, that where:

> "a widowed mother, of modest means, makes a payment of substantially the whole of her assets to contribute to the purchase of real estate, and legal title is vested in her adult, able-bodied sons" […] no presumption of advancement would arise because the mother had no moral obligation to give her assets to her adult and able-bodied sons.[74]

This is an untenable position because it undermines the ethos of the presumption of advancement: that it derives from the bond of love and affection between a parent and child. A parent who lacks assets and a child who is an adult with bodily integrity, does not negate the natural desire of a parent to support a child. My view finds support in the Court's assessment of this submission by the appellant because the Court found that "the appellant's contention would seriously undermine the operation of the presumption of advancement" and would lead to "increasing the uncertainty of property titles and promoting litigation."[75] The Court is quite clear that so long as the presumption continues to apply to property matters, "it should apply whenever the parties stand in a relationship that has been held to give rise to the

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69. *Ibid* at para 14, Toohey J.

70. *Ibid*.

71. *Ibid*, referring to *Family Law Act 1975* (Cth), pt VII s 66B.

72. *Ibid* at para 15, Toohey J.

73. *Ibid* at para 13, McHugh J.

74. *Ibid*, citing *Brown v Brown* (1993), 31 NSWLR 582 at 59.

75. *Nelson*, *supra* note 50 at para 14, McHugh J.

presumption."[76] The presumption of advancement in relation to adult children and parents therefore provides certainty relating to property transactions. Thus, surely the presumption has a place in contemporary times and should not be relegated to the annals of history.

In the more recent Australian case of *Re Tien Ti Mak v. Commissioner of State Revenue*, again, the Court was unwilling to determine the exact origins of the presumption of advancement. Further, *Tien Ti Mak* does not comment on its applicability between parents and adult children. However, relying on *Nelson*, it found that the presumption should apply in the case, which involved a mother and her adult independent son.[77] Rather unusually, the son in *Tien Ti Mak* was trying to rebut the presumption. In most cases, a child is trying to persuade the court to apply the presumption of advancement to prevent a resulting trust from denying the child his or her property rights. The question for the Court in *Tien Ti Mak*, however, was whether there was sufficient evidence to rebut the presumption. The Court assessed this issue by considering the evidence of the mother's intention at the time of the purchase in providing the purchase money. Relying on *Nelson*, the Court in *Tien Ti Mak* affirmed that the appropriate consideration is the moral obligation of a parent to provide for a child, and the mother therefore must explain why she did not intend to make a gift to her son in order to rebut that presumption.[78] In the Court's view, unfortunately—at least for the son—there was little doubt that the mother intended the son to have the beneficial and legal rights to the properties and, thus, the presumption of advancement was not rebutted.

The Court in *Tien Ti Mak* did not consider the age, financial independence, or any other factor relating to the status of the son. This implies that the presumption of advancement is relevant to addressing property disputes between parents and adult children, and supports my assertion that the ethos of the doctrine is found in the bond of love and affection between parents and children. This bond is not negated by the age or independence of a child, and thus these should be irrelevant factors in determining whether the presumption of advancement applies in a particular case.[79] Australian case law states that the presumption should apply wherever a relationship gives rise to it, and contrary to Canadian law, this includes cases involving parents and adult independent children. The presumption can only be rebutted with evidence of a contrary intention of the parent who provided the money.[80]

While Australia takes a positive approach to the application of the presumption of advancement between parents and adult children in a contemporary context, some early New Zealand cases reflect a more reticent approach to the doctrine. However, recent New Zealand cases support the argument that the doctrine is fully applicable to contemporary times.

The 1999 case of *Collie v. Collie*[81] shows some sympathy for the view expressed in *Dullow*, namely that, regardless of the origins of the doctrine, a number of factors ought to be considered in determining the intention of the person arranging the transaction, along with all other evidence, and, as such, reform of the presumption was long overdue. However, Justice

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76. *Ibid*.

77. *Re Tien Ti Mak v Commissioner of State Revenue*, [2004] VCAT 109.

78. *Ibid* at para 19, citing *Nelson*, *supra* note 50 at para 16, Toohey J.

79. See also *Brown v New South Wales Trustee and Guardian*, [2012] NSWCA 431 [*Brown*]; *Birtwell v Sands*, [2012] QSC 396.

80. *Brown*, *supra* note 79 at para 67.

81. *Collie v Collie* [1999] BCL 749 at para 11, referring to *Dullow*, *supra* note 6 at 535–36.

Randerson in *Collie* preferred a more simplistic approach than that of his learned colleague in *Dullow*. His Honour, instead, determined that the presumption should be established by considering the parties' intentions in light of the evidence at the time because it is more logical and simplistic. In *Collie*, Randerson J. concluded that the presumption had been rebutted and the sons held the legal interest in trust for their father. So while the Court felt it pertinent to comment on the possible complexities of the presumption of advancement, at no stage did the Court consider it pertinent to comment on whether the presumption applies when parents transfer property to adult children, whether independent or not. Indeed, all Randerson J. confirmed was that "it is common ground that a transfer of shares from father to son is presumed to transfer both the legal and beneficial interest."[82]

Therefore, *Collie* supports the notion that the presumption of advancement is entirely applicable when parents transfer gratuitously to adult children. The result in turn implicitly supports the idea that the social origins of the presumption are based on the bonds of love and affection. If this is correct, then contemporary situations will not negate those natural ties, and as mentioned earlier, increasing modern financial pressures may mean that parents will wish to provide as much financial support as is possible for their children.

The more recent New Zealand case of *Reeves v. Lord* gives much support to the relevance and applicability of the presumption of advancement in contemporary times, and eloquently expresses the reality of the doctrine:

> It needs to be kept in mind that the presumption of advancement is not some dry legal doctrine divorced from the realities of the human existence. It expresses some of the most fundamental of those realities which, although readily susceptible to logical exposition, ultimately flow from biological fundamentals. The urge to care for and protect one's partner, to provide now and in the future for one's children, are, in a species such as ours, biological imperatives. They can dominate a person's outlook (and thus explain their actions) without having flowed from conscious analysis. Political correctness notwithstanding, that underlying impetus will often be expressed at its strongest when there is only one person who can perpetuate the combination of a blood line and a name. The authorities take such matters for granted. In this area the law recognises, indeed flows from, the realities of the human situation.[83]

This *dicta* clearly supports the notion that the presumption of advancement finds its foundations in the biological love and affection a parent has for his or her child, and thus flowing from that, the obligation to support that child. The two bases are inextricably linked and perhaps cannot be considered independently because, without the natural bond, no obligation to support can arise. The law, while ancient in origin, is a reflection of the realities of human nature, in this case that of parental love for a child. As such, the need for the doctrine of presumption of advancement does not diminish; parents continue to love and support their children.

The presumption of advancement therefore has great relevance in contemporary times, not least because it can provide certainty with regard to gratuitous transfers of title to property

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82. *Ibid* at para 10. See also *Teng v Teng,* (1999), CP 92/98 (NZHC), Cartwright J.

83. *Reeves v Lord*, [2005] DCR 183 at para 23, Moore J (DCNZ).

from parents to adult children and thereby reduce litigation. Indeed, Justice Wylie in *Narayan v. Narayan* noted that it would be "premature to conclude that the presumption of advancement is a legal anachronism," even though other jurisdictions have expressed such views. Wylie J. did not comment on whether the age of the child should be a consideration for the Court, thereby confirming that the presumption should apply to transfers of property to adult children today.[84] There appeared to be no issue for the Court in *Narayan* in determining whether the presumption was rebutted. The Court assessed evidence of the donor's intention, which could include contemporaneous acts or declarations by the donor, but not acts done, or declarations made, subsequent to the purchase or the transfer. The case of *KBM v. RM*[85] affirmed the approach of *Narayan* and ignored any considerations of age and independence of the children.

New Zealand, like its Tasman cousin Australia, shows a progressive and insightful approach to the presumption of advancement. Both jurisdictions recognize the applicability of the doctrine, which takes into consideration the underlying ethos and objective of the presumption and which has as much applicability today as it did at its inception. While times may change, a parent's obligation toward his or her offspring flowing from a natural bond does not diminish with time, nor with the age or independence of the child.

V CONCLUSION

The presumption of advancement sits alongside its sister presumption, that of the presumption of the resulting trust. While both have ancient roots, the presumption of advancement has borne much of the criticism. The criticisms stem mostly from the notion that the presumption originates in social contexts that no longer exist and that have shown the doctrine to be irrelevant in contemporary times. This article confirms that the presumption does indeed have its origins in ancient times. However, the underlying ethos of the presumption that has its foundations in ancient times actually have not changed with the passing of time. I assert that the basis of the doctrine is found in the natural bond of love and affection by a parent to a child, and flowing from that is the desire to support and maintain a child. This innate human desire to love and support a child remains, regardless of social, political, or economic changes. A review of comparative jurisdictions shows that courts still see the relevance of the doctrine with the exception of Canadian authorities. The Canadian approach undermines the rationale for the presumption, and sets out arguments that support the idea that the presumption applies both to situations involving gratuitous transfers from parents to sub-adult children and from parents to adult children. It is unlikely, however, that Canada will follow this approach; recent Canadian case law confirms that the presumption of advancement does not apply to transfers from parent to adult child.

On the other hand, Australasian jurisprudence reflects a more positive standpoint on the contemporary application of the doctrine in relation to parents and adult children. Both Australia and New Zealand are of the view that, regardless of the age of the child, the presumption is a useful method of determining property titles. Australia has not yet set out its position on whether it views the presumption as having its origins in the bond of love and affection, or in an implied obligation of a parent to a child. However, its jurisprudence is

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84. *Narayan v Narayan*, [2009] NZHC 1973, at para 46, [2010] NZFLR 161 (HC).

85. *KBM v RM*, [2012] NZFC 2070 at para 48.

compelling evidence of the applicability of the presumption for resolving family disputes in contemporary times.

New Zealand's jurisprudence suggests that it favours the idea that the origins of the presumption lie in the notion of the bonds of love and affection of a parent for a child. This flows from the obligation to support that child, and while the doctrine is ancient, modern times do not change these human emotions. Therefore, New Zealand is clear that the presumption of advancement is a doctrine of absolute relevance in ascertaining property rights of adult children.

In conclusion, I see continuing relevance for the presumption of advancement and see no good reason to relegate this doctrine to the annals of history. To do so would ignore the realities of human nature and undermine the desire of parents to support their children. This is especially so in light of today's economic climate, where mortgages and employment can be difficult to obtain. It is now more important to maintain the presumption of advancement in order to ensure that adult children are not disadvantaged in an environment when support from parents may be at its most needed.

WHY COYWOLF GOES TO COURT

*by Signa A. Daum Shanks**

It's the winter. So I can tell you now.[1]

There's been so many times, and so many different reasons why.

That a creature has found ways to keep on going.

That this creature is here—and doesn't just barely make it. The creature has gotten tougher so that it will *really* make it. So whether you know it or not, the creature is *really* here! And it's tough. Real tough. This creature is not trying to find a place to live tonight—though that is hard enough. S/he is figuring out how to make it for the long haul. And why shouldn't s/he?[2] After all, it's not like s/he is hurting anyone (well, okay, maybe *some* hurt can happen). But whatever you think as the creature shows up in front of you, you need to know: s/he's not looking for attention just for the sake of it, or asking for more than any other creature. S/he's just looking for a way to make it through the day, the harsh times, the cold nights. Just finding ways to make sure s/he learns what to do and not do wherever s/he is. Don't you want that too?

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* BA, MA, LLB, LLM, PhD. Daum Shanks is Assistant Professor and Director of Indigenous Outreach at Osgoode Hall Law School. This written effort originates from an oral presentation given to Osgoode Hall Law School faculty in January 2014. Marilyn Poitras, Mary Eberts, Patricia Hania, and Lorne Sossin provided thoughtful reflections about the presentation before it happened, and Jeffery Hewitt, Kent McNeil, and Sonia Lawrence kindly offered their thoughts after it was completed. For this version, Jennifer Wong has provided terrific research assistance. I also want to thank the editors at the *Lakehead Law Journal* and the anonymous reviewers for their insight. This presentation is inspired by what are often called "trickster stories." Though they have many functions, trickster stories can be helpful in how they introduce subjects and methods that have received scant attention. In that way, they are constructed as a way to speak with those arguably *less* familiar with information from Indigenous sources. As an effect of that role, they also have the ability to produce discomfort for those wondering if they can be considered an example of "research scholarship" rather than merely versions of "alternative" or "creative" presentations. See the chapter entitled "Comic Liberators and Word-Healers" in Jeanna Rosier Smith, *Writing Tricksters: Mythic Gambols in American Ethnic Literature* (Los Angeles: University of California Press, 1997) at 71–111. For this article, I also have created a type of parallel citation method to reflect that tension. Should a physical description be used that has potential metaphorical abilities, I have included a reference for any literal details first and a reference for any metaphorical or more juridical connections second. When that occurs, a "⠿"separates the references.

1. For details of how "it was only during the winter nights that stories were told" see Lau Young, "First Nations Weather" (2003) Saskatchewan Indian Cultural Centre and the Western Development Museum Working Paper, online: Western Development Museum <www.wdm.ca/skteacherguide/SICCResearch/FNWeather_TeacherGuide.pdf>.

2. I thank Maria Campbell for reminding me of how the syllable "coy" can be interpreted as a way to notice the female presence in some Indigenous languages. This guidance has also inspired me to use "s/he" instead of "he/she" while I emphasize a character's dual gender role prevalent in Indigenous stories and methodologies. As more details are provided, mentioning the woman first also parallels how, almost all the time, the first generation of a Métis family had its mother as culturally First Nations (and hence from the West). For another presentation where a trickster character has the "s/he" reference see John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 Const Forum Const 27 [Borrows, "The Trickster"].

But when s/he does try to live, what do others do in return? Sometimes they are really mean.[3] But—and maybe even worse—sometimes they act like Coywolf doesn't deserve to be noticed. You know, it's one thing to figure out how to survive when others treat you meanly, but it's another thing to suffer because no one cares.[4] And sometimes it's the not caring that hurts even more.

How did this creature begin its being? Well, in the woods, and by the streams, something happened when some different creatures met. The stories about these moments, well, they are not all the same. Sometimes, the storytellers think there was a big problem that the creature's families had and then these problems continue through the creature.[5] Others think, well, if some different creatures keep crossing paths, what do you expect to happen as a result? Whatever the reasons, different creatures roaming found each other. And then this creature came to be.

Sometimes the creature is big and sometimes s/he is mangy. Sometimes s/he is darker in colour, and sometimes the creature is light. Sometimes you see her/him in the bush, and sometimes the creature is in an open field. Sometimes you might think s/he looks scary. But even if that's what you see, you can't deny s/he's a beautiful runner. The creature has a coat that is as thick as you need for the coldest day, and teeth that you need to chomp, rip and get into things. And s/he knows how to get from here to there quicker than you or me will ever figure out—with a few meals on the side to boot. S/he makes everything out of nothing—or at least something out of stuff you gave up on.

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3. For research on the concern that mistreating animals suggests larger social ignorance, see Miranda Spindel & Lila Miller, "Animal Abuse, Cruelty, Neglect (and the Connection to Human Violence)" in Radford G Davis, ed, *Animals, Diseases, and Human Health: Shaping Our Lives Now and in the Future* (Santa Barbara, CA: Praeger, 2011) 51 at 53. ⁙ See also the Statement by the UN Special Rapporteur issued after his visit to Canada on 15 October 2013. His statement addresses the social stresses of being abused as part of a larger group: James Anaya, "Statement upon conclusion of the visit to Canada" 15 October 2013, (Former UN Special Rapporteur on the Rights of Indigenous Peoples), online: James Anaya, UNSR <unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada>.

4. Ignoring threatened animals can be at the domineering species' peril. Norman Maclean, *A Less Green and Pleasant Land: Our Threatened Wildlife* (Cambridge, UK: Cambridge University Press, 2015) at 12. ⁙ For reflections on how exclusion can damage a culture but also, with the existence of other conditions, actually stimulate survival, see Chapter 7 entitled "Ethnogenesis" in James Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven, CT: Yale University Press, 2009) at 238–82. See also Francis B Nyamnjoh, "Globalization and the Cultural Economy: Africa" in Helmut K Anheier and Yudhishthir Raj Isar, eds, *Cultures and Globalization* (New York: Sage Publications, 2008) 123 at 124.

5. Guillaume de Lavigne writes "coyotes are solitary by nature, a trait carried over to coydog hybrids. This can result in problematic and unsociable behaviour that makes them generally unsuitable…" Guillaume de Lavigne, *Free Ranging Dogs – Stray, Feral or Wild?* (San Francisco: Lulu Press, 2015). ⁙ Some scholars have considered Métis community protest as an extension of social unrest between First Nations and settlers. See Manfred Mossmann, "The Charismatic Pattern: Canada's Riel Rebellion of 1885 as a Millenarian Protest Movement" in Patrick C Douaud, ed, *The Western Métis: Profile of a People* (Regina: University of Regina Press, 2007) 185 at 186.

And s/he is called Coywolf.[6]

So like I said, Coywolf has become Coywolf because some creatures have really got along, and sometimes when others learn about Coywolf they like to be super concerned—like the getting along was a bad thing![7] Coywolf remembers all the time how her/his oldest family members might have been from way different places, and that a long time ago one of them came from super far away—really, really, really east.[8] On the other side, family members are from where Coywolf is right now and then even further west.[9] And like I said,[10] some good times must have happened so that the ones from the east and the ones from the west got along.[11] And out of those good times—surprise!—little ones soon came around. Those early days, well, things were never perfect. But for the very first start of Coywolf, it's not like disagreements happened for the sake of disagreements. All could find ways to get along in this more western space.

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6. Note that many First Nations stories refer to a trickster character as "Coyote." See Borrows, "The Trickster", *supra* note 2; John Borrows, "Re-Living the Present: Titles, Treaties, and the Trickster in British Columbia" (1998-99) 120 BC Studies/BC Q 100; Thomas King, "The One about Coyote Going West" in Thomas King, ed, *One Good Story, That One* (Toronto: Harper Perennial, 1993) 67. As I explain in this article, however, using a First Nations understanding of a trickster would be less appropriate here given how a theme is the imposition of understandings about First Nations people upon the Métis. As a result, it is vital to also propose other trickster-type roles that are a more accurate portrayal of Métis distinctiveness.

7. Katrina Clarke, "Coyote and coywolf attacks worry local pet owners", *The Hamilton Spectator* (10 November 2014), online: The Hamilton Spectator <www.thespec.com/news-story/4978999-coyote-and-coywolf-attacks-worry-local-pet-owners/>. ⠿ For an example of news coverage on the matter of an overemphasis of concern, see Leaders of the Aboriginal Peoples of Canada, Media Release "National Aboriginal Leaders Call on Stephen Harper to Explain Position on Offensive Writing of Tom Flanagan, Conservative Party of Canada's National Campaign Chair" (7 June 2004), online: Inuit Tapiriit Kanatami <https://www.niyc.ca/media/media-release/national-aboriginal-leaders-want-stephen-harper-explain-writings-tom-flanagan>.

8. See generally Sonya K Grewal et al, "A Genetic Assessment of the Eastern Wolf (Canis Lycaon) in Algonquin Provincial Park" (2004) 85:4 J Mammalogy 625. ⠿ Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (Boston: Beacon Press, 2014) at 1–14.

9. While called "Coyote and Coywolf attacks are on the rise," the reporters write how the coyotes (and coywolves) keep to themselves together and have not been known to attack any human. Jasmine Kabatay & Jacob Wilson-Hajdu, "Coyote and Coywolf attacks are on the rise," *Humber News*, online: Humber News <humbernews.ca/coyote-and-coywolf-attacks-are-on-the-rise>. ⠿ See Donald B Smith, "Aboriginal Ontario: An Overview of 10,000 Years of History" in Edward S Rogers & Donald B Smith, eds, *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994) 418.

10. Repetition is a common technique in Indigenous storytelling. Steffi Retzlaff, "'The Elders Have Said'—Projecting Aboriginal Cultural Values into Contemporary News Discourse" in Kerstin Knopf, ed, *Aboriginal Canada Revisited* (Ottawa: University of Ottawa Press, 2008) 330 at 332.

11. These moments are not considered automatic. In fact, wolves and coyotes are often considered "ecological competitors." Niles Lehman et al, "Introgression of Coyote Mitochondrial DNA into Sympatric North American Gray Wolf Populations" (1991) 45:1 Evolution 104 [Lehman et al, "Introgression"]. When in the same space, "[t]he coyote is a more flexible predator" than the wolf in North America. *Ibid*. ⠿ See generally Arthur J Ray, *Indians in the Fur Trade: Their Role as Trappers, Hunters, and Middlemen in the Lands Southwest of Hudson Bay, 1660-1870* (Toronto: University of Toronto Press, 1998) at 62.

Every once in a while the family ways that came from that Eastern Wolf tried to take over.[12] But most of the time those ways were just from too far away to really work.[13] So when that point—that local knowing was based on years of experience—was remembered, lots of good times happened. And when those good times happened—yip-howl! koosh!—Coywolf really liked to be there.[14]

In those good times, especially when Coywolf's mother Coyote was close, it could be hard on Coywolf. Lots of times, Coyote was treated really badly—as if Coyote did not belong where Coyote lived. And then, during those moments, sometimes others thought Coywolf must be Coyote as well, so Coywolf was also treated poorly. Sometimes Coyote would be upset at any Wolf that appeared, and Coyote got Coywolf mixed up and thought s/he was a Wolf as well![15]

With all of these mix-ups and bad views, Coywolf had to get really good at disappearing from view or showing Coywolf was something different than what others first thought.[16] Sometimes, hiding meant others forgot about Coywolf. And being forgotten has its good and bad sides. You can plan without getting bothered. But you have to work harder to get attention

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12. US Department of the Interior Fish and Wildlife Service, "The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho: Final Environmental Impact Statement", by Edward E Bangs & Steven H Fritts (Washington, DC: US Department of the Interior Fish and Wildlife Service, 1994) at 2. ⠿ Samuel Hearne, one of the first explorers of Canada's North West, was renowned for his mistakes and presumptions about how British processes would succeed on a different continent and in a different geography. Canada, Library and Archives Canada, *Mapping the North West: Samuel Hearne and Matonabbee*, online: Library and Archives Canada <www.bac-lac.gc.ca/eng/discover/exploration-settlement/pathfinders-passageways/Pages/mapping-northwest.aspx>.

13. *Ibid*, "Appendix 6", 102. ⠿ JR Miller, "Canada's Historic Treaties" in Terry Fenge & Jim Aldridge, eds, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (Montréal: McGill-Queen's University Press, 2015) 81 at 83.

14. The "yip-howl" is for "a love that no one thought could happen" and that eventually led to the "rare thing" known as a coywolf. Mary Beth Hartill, "The yip-howl of the coywolf", *North Bay Nipissing News* (19 February 2013), online: North Bay Nipissing News <www.northbaynipissing.com/news-story/4214624-the-yip-howl-of-the-coywolf/>. ⠿ "Koosh" is a Michif (the Métis language) shorthand for "surprise."

15. Ryan Wolstat, "Education, not panic needed over coyote-wolf hybrids", *The Toronto Sun*, (13 February 2013), online: The Toronto Sun <www.torontosun.com/2013/02/13/education-not-panic-needed-over-coyote-wolf-hybrids>. ⠿ The early stages of Indigenous-settler socializing are explained generally in Sylvia Van Kirk, ""Women in Between": Indian Women in Fur Trade Society in Western Canada" (1977) 12:1 Historical Papers/Communications historiques 30. This interaction, while often officially announced as dangerous, very regularly occurred and was, ultimately and of course, a choice of the white men who travelled to North America.

16. Coywolves are tending to stick to what appear to be coyote habitat. Lehman et al, "Introgression", *supra* note 11 at 108. See Steven M Chambers, "A Perspective on the Genetic Composition of Eastern Coyotes" (2010) 17:2 Northeastern Naturalist 205 at 206. ⠿ First Nations regularly welcomed Métis into their own cultural circles, and those relationships solidified as years passed. Paul LAH Chartrand, "Niw_Hk_M_Kanak ("All My Relations"): Metis-First Nations" (2007) National Centre for First Nations Governance Research Paper, online: Centre for First Nations Governance <fngovernance.org/ncfng_research/paul_chartrand.pdf> at 6.

when you need it![17] Coywolf learned to scrounge for food, knowledge, and places to live. That became Coywolf's way to survive on what others considered nothing. Those moments of surviving were hard, but they were also golden because they made Coywolf what Coywolf is.

As more time passed, and Coywolf kept to Coywolf's (and often Coyote's) spaces, more creatures came into those great spaces. Whatever their reasons, Coywolf had to keep the arrivals in mind as Coywolf thought about her/his happenings and space. Should Coywolf stay in the same place? Move without any notice? Plan and then show up somewhere else? Coywolf could do any of these possibilities. After all, Coywolf was Coywolf and Coywolf could shift like no creature![18]

Sometimes Coywolf stayed. And sometimes Coywolf went! And sometimes Coywolf went somewhere without any other creature catching on to that. Coywolf hung around. Or left. Or went far. Or came back. Coywolf did whatever it took to live. Coywolf might come, and Coywolf might go. And who knows how long that coming and going might be. Whatever would make Coywolf make it.[19] Because making it was still such a problem, as others kept showing how mean they could be by saying things like:

Coywolf is just a Wolf, so don't have any special ideas about Coywolf![20]

Coywolf is a Coyote, so don't expect Coywolf to be good or smart![21]

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17. Emily Chung, "Coyotes are moose killers, study finds: Study reports 4 confirmed cases of adult moose killed by coyotes and coyote-wolf-hybrids", *CBC News (*24 October 2013), online: CBC News <www.cbc.ca/news/technology/coyotes-are-moose-killers-study-finds-1.2224256>. ⠿ Jennifer Brown, "Isaac report provides 'road map' to reconciliation with Métis", *Legal Feeds* (21 July 2016), online: The Blog of Canadian Lawyer & Law Times <www.canadianlawyermag.com/legalfeeds/3361/isaac-report-provides-road-map-to-reconciliation-with-metis.html>.

18. Research has confirmed coywolves in New York, Virginia and the Appalachian mountains. Christine Dell'Amore, "Coyote-Wolf Hybrids Have Spread Across U.S. East", *National Geographic News* (8 November 2011), online: National Geographic <news.nationalgeographic.com/news/2011/11/111107-hybrids-coyotes-wolf-virginia-dna-animals-science/>. ⠿ For good descriptions of how far that travelling could be, see Nicole St-Onge & Carolyn Podruchny, "Scuttling Along a Spider's Web: Mobility and Kinship in Metis Ethnogenesis" in Nicole St-Onge, Carolyn Podruchny & Brenda Macdougall, eds, *Contours of a People: Metis Family, Mobility, and History* (Norman, OK: University of Oklahoma Press, 2012) 64.

19. Lehman et al, "Introgression", *supra* note 11 at 107, 113. ⠿ Métis had both the ability to stay in an area for a long period of time but also to pack up and go at a moment's notice. Brenda Macdougall, "'The Comforts of Married Life': Metis Family Life, Labour, and the Hudson's Bay Company" (2008) 61 Labour/Le Travail J Can Labour Studies 9 at 16.

20. Live Science Staff, "Eastern Wolves Deemed Separate Species", *Live Science* (26 November 2012), online: Live Science <www.livescience.com/25043-eastern-wolves-separate-species.html>.

21. Repeatedly, coywolves are referred to as "eastern coyotes" and written about as a hybrid rather than focusing on a new species of animal that would be better understood as an animal on its own accord. Marissa Fessenden, "Coywolves are Taking Over Eastern North America", *Smithsonian* (3 November 2015), online: Smithsonian <www.smithsonianmag.com/smart-news/coywolves-are-taking-over-eastern-north-america-180957141/?no-ist>. See how the term is also often interchanged with "coyote". For references about how a coywolf should be called an "eastern coyote" see Chris Halliday, "If you've seen a coyote, it's probably a coywolf", *Orangeville Banner* (25 January 2015), online: Orangeville Banner <www.orangeville.com/news-story/5277595-if-you-ve-seen-a-coyote-it-s-probably-a-coywolf/>. ⠿ The Métis have faced similar classification histories. As an example, for the history of not considering the Métis language its own language rather than a dialect of Cree, see Judy Iseke, "Negotiating Métis Culture in Michif: Disrupting Indigenous language shift" (2013) 2:2 Decolonization: Indigeneity, Education & Society 92 at 105–06.

Coywolf will always be a problem![22]

And so many times when these things were said by another creature, that same creature hadn't even seen Coywolf!

So there Coywolf was, getting through the day, and being considered lots of things except the right (and good) thing. This getting through things, then, was about Coywolf being right there but not being there to the eye. Or being there, but having to be a little louder to say how s/he was Coywolf. And some of that being there happened in the places no other creature seemed to care about or dare be. Like on the side of golf courses or cemeteries,[23] on road allowances[24] or in a rambling, almost dangerous ravine![25] Or you know those "clover leaf" places where people drive? And there's grassy space that if you were a bird you'd see what looks like two infinity signs? Right there![26]

What with so many seeing Coywolf and thinking s/he isn't worth much, or not seeing Coywolf and not caring either way, or even claiming to care but getting Coywolf mixed up with Wolf or Coyote, it could've been no surprise that Coywolf might disappear altogether.

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22. Clarke, *supra* note 7. ⠿ See Mary Agnes Welch, "The Métis Question: Defining the uniquely Canadian people who founded Manitoba is No Easy Task", *Winnipeg Free Press* (14 February 2015), online: Winnipeg Free Press <www.winnipegfreepress.com/local/The-Metis-question-291731281.html>.

23. Susan Fleming, "Meet the Coywolf" (August 31, 2014) (video) at 00h:16m:35s, online: CBC <www.cbc.ca/natureofthings/episodes/meet-the-coywolf> [Meet the Coywolf]. A study about the use of cemetery space pertained to a coywolf pack in greater Boston. Jonathan G Way, "Record Pack-density of Eastern Coyotes/Coywolves (*Canis latrans* X *lycaon*)" (2011) 165:1 The American Midland Naturalist 201. ⠿ For reflections of Métis living in a space officially constructed or understood as having a function that is not about creating a residency, see Katheleen Orth, "Road Allowance People's History Shared in Toronto" (2002) 1:12 Ontario Birchbark 11.

24. Sharon Levy, "Rise of the Coyote: The New Top Dog", online: (2012) 485 Nature: Intl Weekly J of Science 296, online: Nature <www.nature.com/polopoly_fs/1.10635!/menu/main/topColumns/topLeftColumn/pdf/485296a.pdf>. ⠿ For years, and as an effect of neither provincial nor federal governments agreeing to aid Métis in social housing matters, some Métis families lived in tents located in road allowances close to an intersection of a provincial and federal highway. The space in which they resided had been ignored by each government level and, as a result, these families were often left alone and not ejected from the space. Mareike Neuhaus, "The Marriage of Mother and Father: Michif Influences as Expressions of Métis Intellectual Sovereignty in *Stories of the Road Allowance People*" (2010) 22:1 Studies in American Indian Literatures 20 at 26. Meet the Coywolf, *supra* note 23 at 00h:08m:37s-00h:09m:30s.

25. Meet the Coywolf, *supra* note 23 at 00h:35m:10s-00h:37m:40s. ⠿ For details about an area where Métis resided in difficult conditions that others chose not to live in, see Carson Hammond, "Rooster Town: The Winnipeg Community that Nobody Remembered", *The Uniter* (31 October 2012) 3, online: The Uniter <uniter.ca/view/rooster-town-the-winnipeg-community-that-nobody-remembers>.

26. Meet the Coywolf, *supra* note 23. ⠿ Murray Dobbin, *The One-and-A-Half Men: The Story of Jim Brady and Malcolm Norris, Metis Patriots of the Twentieth Century* (Regina: New Star Books, 1987) at 16. An infinity symbol has had a significant role in public symbolism used by Métis families, political groups and governance for at least two-hundred years. Cynthia Sugars, *The Oxford Handbook of Canadian Literature* (Toronto: Oxford University Press, 2015) at 130.

But Coywolf didn't.[27] Still, even with that "but," Coywolf knew something new had to happen. With all of the moments of hurt, and because no one bothered to ask Coywolf:

> Where did you come from?
>
> What do you need?
>
> What do you think of what we do?

Coywolf just had to find a way for others to realize they could count on Coywolf for ideas or they should count Coywolf as worth being kind to. Others, well, they didn't have to make Coywolf *more* important than others, but since Coywolf was treated so much worse for so long, something had to be done right away just so Coywolf was on the same ground as others. But better off than now because Coywolf was treated so much worse.

As more time passed, and as Coywolf still lived in places no one else cared about and lived off stuff no one else wanted, Coywolf got frustrated enough to decide something should be done to make sure Coywolf wasn't any better or worse off than others and the way Coywolf survived deserved better respect. It was time to take on those who were okay with Coywolf's place, and it was really important to take on those who thought Coywolf had *no* place! So after too many times of living in places nobody cared about, and too many moments of trying so much harder than others to just make it through a day,[28] and too many times of being thought of as something but then not getting the treatment that this same something normally got, Coywolf thought a moment had come.[29] Enough of the times of being thought of as only "in between," different creatures,[30] or not even being remembered at all. Enough of

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27. Danielle Marr, "Those Aren't Coyotes roaming Caledon, They're Coywolves: expert", Caledon Enterprise (21 January 2015), online: Caledon Enterprise <www.caledonenterprise.com/news-story/5267816-those-aren-t-coyotes-roaming-caledon-they-re-coywolves-expert/>. The first sentence reads "A string of deadly attacks on dogs in Caledon might not be the work of coyotes after all but rather a larger and more dangerous related species." ⁝⁝ During public talks, Jim Sinclair explained this idea that Métis could be justifiably aggressive but have chosen different strategies. Ruth Gruber, "Pope backs Metis in Native Rights Fight", *The Toronto Star* (7 March 1987) A3.

28. Gary Mason, "Premier Says Meeting Clarified Metis Issues", *The Vancouver Sun* (25 June 1987) A15.

29. For an argument that coywolves are not worthy of being distinguished as their own species, see Roland Kays, "Yes Eastern Coyotes are Hybrids, But the 'Coywolf' is Not a Thing", The Conversation (16 November 2015), online: The Conversation <theconversation.com/yes-eastern-coyotes-are-hybrids-but-the-coywolf-is-not-a-thing-50368>. ⁝⁝ As they have experienced a history of being excluded from mainstream Canadian society, Métis "experienced the same or similar limitations imposed by the federal government, and suffered the same burdens and discriminations" as First Nations. *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6, [2013] FCJ No 4 at para 25 [*Daniels FC*].

30. For commentary about how it would be biologically shortsighted to consider a coywolf a "hybrid" (as many sources do) instead of deeming it a species, see "Greater than the Sum of its Parts", *The Economist* (31 October 2015) 74–75, online: The Economist <www.economist.com/news/science-and-technology/21677188-it-rare-new-animal-species-emerge-front-scientists-eyes>. ⁝⁝ See also Maria Campbell, *Halfbreed* (Lincoln, NB: University of Nebraska Press, 1973) at 26–28.

the times of being a halfbreed. Enough of being a no breed.[31] Enough of being considered too pesky all the time.[32]

Coywolf went back up north a little to a spot that was a little further than Coywolf's very first home. Then up a few steps.[33] And past these thick straight uprights.[34] All this travelling to tell those who could see the whole land in more of a fell swoop than Coywolf and could perch above the rest while doing so. This spot was, much to Coywolf's regular annoyance, a favourite place of Magpie. Magpie could look over a lot. But Magpie *really* liked to look down at others and even thought that Magpie's ideas were good for all.

For Coywolf, this belief of Magpie's was regularly so, so frustrating. Like when Magpie squawked that taking little ones from others was better for all those concerned,[35] or when Magpie took others' items without doing enough to find out to whom they belonged.[36] Or when Magpie didn't even care when little ones were stolen.[37] Somehow Magpie kept getting away with claiming it knew what was best for the land, and what was best for Coywolf (so

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31. Rarely are coywolves considered worthy of rescue programs or of a special protective classification. See The Fur Bearers, "Algonquin Coywolf Goes Home" (August 10, 2014), online: The Fur Bearers <thefurbearers.com/blog/episode-143-algonquin-coywolf-goes-home>. ∷ Infrequently, Métis families received attention for their own difficult circumstances. Patrick C Douaud, "Canadian Metis Identity: A Pattern of Evolution" (1983) 78 Anthropos 71. See also Jean Teillet, *Métis Law in Canada* (Vancouver: Pape Salter Teillet, 2013) at 4–5, online: Pape Salter Teillet LLP <www.pstlaw.ca/resources/Metis-Law-in-Canada-2013.pdf>. See also the Supreme Court of Canada's decision in *Daniels v Canada (Indian Affairs and Northern Development)* where the court calls the Métis "a large population of collaterally damaged" people. 2016 SCC 12 at para 14, 395 DLR (4th) 381 [*Daniels SCC*] (citing *Daniels FC*, *supra* note 29 at para 108).

32. Bethany Augliere, "Effort to Prevent 'Coywolf' Hybrids is Working, Study Finds", *Science AAAS* (10 December 2015), online: Science AAAS <www.sciencemag.org/news/2015/12/effort-prevent-coywolf-hybrids-working-study-finds>. ∷ For a descriptive of Métis peoples considered "pesky halfbreeds" by others, see Aritha van Herk, *Mavericks: An Incorrigible History of Alberta* (Toronto: Penguin Books, 2001) at 33.

33. As the criminal "trigger" for charging being laid in a trial, Steve and Roddy Powley shot a bull moose in 1993. Neither man had a valid Ontario Outdoor Card or valid hunting licence to hunt moose. See David Helwig, "Sault Moose-hunting Case Goes to Supreme Court today", *SooToday* (17 March 2003), online: SooToday <https://www.sootoday.com/local-news/sault-moose-hunting-case-goes-to-supreme-court-today-89065>.

34. Heather Ingram, *Views of the Sault* (Burnstown, ON: General Store Publishing, 1995) at 77. ∷ For details about the Powley trial, see Arthur J Ray, *Telling it to the Judge: Taking Native History to Court* (Montréal: McGill-Queen's University Press, 2011) at 97.

35. DW Broom, "Magpie *Pica pica* Predation on Blackbird *Turdus Merula* Nests in Urban Areas" (1993) 40:1 Bird Study 55. ∷ For justification of the Crown apprehending children it claims are in crisis, see Philip Burge, "Prevalence of Mental Disorders and Associated Service Variables Among Ontario Children Who Are Permanent Wards" (2007) 52:5 Can J of Psychiatry 305.

36. TV Shephard, SEG Lea & N Hempel de Ibarra, "'The Thieving Magpie?' No Evidence for Attraction to Shiny Objects" (2015) 18:1 Animal Cognition 393. ∷ For the Crown's ability to take property, see Canada's *Escheats Act*, RSC 1985, c E-13 and Ontario's *Escheats Act*, RSO 1990, c E-20 and *Expropriation Act*, RSO 1990, c E-26.

37. Francisco Díaz-Ruiz et al, "Feeding Habits of Black-billed Magpie During the Breeding Season in Mediterranean Iberia: The Role of Birds and Eggs" (2015) 62:4 *Bird Study* 517. ∷ Métis Nation of Ontario, "Métis Victims of Sixties Scoop Eligible to Participate in Civil Lawsuit," online: Métis Nation of Ontario <www.metisnation.org/news-media/news/m%C3%A9tis-victims-of-sixties-scoop-eligible-to-participate-in-civil-lawsuit/>.

long as it didn't cost anything Magpie valued).[38] So now, Coywolf thought, I need to find a way to get Magpie to leave Coywolf be. So why not get the ones who Magpie admires to tell Magpie that? Since Magpie wouldn't listen to Coywolf, maybe Coywolf could get other perchers and other high fliers to learn of Coywolf's hard times. Instead of giving up and paying any dues, Coywolf would court those perchers who Magpie claimed to respect. And guess what? Magpie was fine with that. Magpie's cousin, Blue Jay, would be the first flyer to learn about Coywolf and Magpie's disagreement.[39] And Magpie thought that would surely make things more difficult for Coywolf. But little did Magpie know that maybe Coywolf would have to squawk like Magpie did when both of them saw Blue Jay, and maybe Coywolf would not like doing so, but if any creature could change their ways for a little while to make it to the next day, it was Coywolf.[40] So Coywolf was at peace with acting a little like Magpie in front of Magpie's cousin, if that's what it took to let Coywolf be Coywolf.

So in front of Blue Jay, and back and forth and back and forth, Coywolf and Magpie squawked. Every once in a while during this fight, Coywolf would say things s/he thought Blue Jay would already know. But Coywolf also brought up things Blue Jay didn't know, like how the land was known to Coywolf, or that the way Coywolf learned to survive had a lot to do with how Coyote lived, or that Coywolf's ways could also be different from Coyote's ways too.[41] And, of course, such a claim did not go over with Magpie well, since Magpie liked to fly over all ways of living. Magpie squawked that it was just doing what other creatures expected—to tell other creatures that Coywolf couldn't just act in a way Magpie (and Blue Jay) didn't agree to. But Coywolf wouldn't back down and neither would Magpie, so after all their squawking they waited for Blue Jay to see what Blue Jay thought. Magpie kept fearing—or so Magpie told Blue Jay—that if Coywolf got others thinking Coywolf could live as Coywolf wanted, where would it end? Would other creatures want the same? And then how would Blue Jay keep track of all these different ways? Coywolf kept squawking (back in a way that sounded like Magpie's squawks so Magpie could follow) that the *only* matter important to Coywolf was *Coywolf's* ways. And, if Magpie could just admit it, if Magpie looked out for others like it claimed it did, Coywolf likely wouldn't need to do so much arguing today anyway. After all, Coywolf kept squawking, Coywolf was just trying to make it through a day or season—not take over any space from others.[42]

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38. The provinces have a long history of denying any responsibility toward Métis. Chris Coppin, "How the Métis Confront the Challenges of the Canadian Legal System" *Legal Current* (14 October 2014), online: Legal Current <www.legalcurrent.com/how-the-metis-confront-the-challenges-of-the-canadian-legal-system/>.

39. Blue Jays and Magpies are, in biological terms, "cousins". Norman Charles Conrad, *Reading the Entrails: An Alberta Ecohistory* (Calgary: University of Calgary Press, 1999) at xv. ⁘ For how judges in Canada have "a bird's-eye view of the whole scheme," see *The Canada Law Journal IX*: New Series (Toronto: Willing & Williamson, April 1973) at 103.

40. The trickster is considered flexible enough to "change shape at any time." Susan R Bowers, "The Trickster Discourse in *House Made of Dawn*" in Harold Bloom, ed, *The Trickster* (New York: Infobase Publishing, 2010) 89 at 91. For commentary about the compromises Indigenous lawyers often make while being within a (largely) non-Indigenous legal regime, see page xx of Jean Teillet's forward in Ray, *supra* note 34.

41. For discussion of a "distinctive and cohesive Métis community," see *R v Powley* [1998] OJ No 5310 at para 22, 58 CRR (2d) 149.

42. The Powleys hunted in an area traditional to their specific family. Their argument, in that way, could be said to apply only to those in their historic location rather than anywhere in Canada for any and all Métis. Ontario Justice Education Network, ""*The Métis Hunting Rights Case*"*: R. v. Powley",* online: Ontario Justice Education Network <ojen.ca/sites/ojen.ca/files/sites/default/files/resources/Powley%20English.pdf>.

After the squawking back and forth was all done, Blue Jay looked down at both Coywolf and Magpie and told them they needed to wait a while. Magpie and Coywolf weren't surprised with having to wait. So they waited.

After (what seemed like) many hours and many days, Blue Jay was ready to chirp about all Blue Jay had seen and been told about Coywolf's claim of just wanting to be left be. Magpie and Coywolf came back to where they argued in front of Blue Jay and Blue Jay told both of them:

> You know, Coywolf has to live like the rest of us, and Coywolf has explained *how* s/he has to live, and it's not hurting anyone so why don't we tell others that we will let Coywolf live how Coywolf explained? While we can be sure the rest of us might not agree with how it's done, it doesn't mean it's any more wrong than what the rest of us do.[43] So today, Coywolf's story sounds okay! Let's get to know Coywolf, and let Coywolf do what Coywolf has told us about here![44]

Right away, Coywolf knew Magpie would be mad. After all, Magpie did not get Magpie's way here. And, Magpie did have a history of flying away in anger—especially about Coywolf's and Coyote's ways.[45] But this time, not only was Magpie furious, Magpie had to tell lots of others he was mad and that Blue Jay could not possibly be right. Moreover, Magpie would not even hear about figuring out some way to talk more about Coywolf's ways being what needed to be accepted.[46] Instead, and as Coywolf thought Magpie wanted to do, Magpie wanted to go to a higher perch. After all, Magpie suddenly told others, it's not like Blue Jay knows all.

The next perch was one that Grosbeak looked down from. Sometimes getting to know the ground like Blue Jay did, but capable of observing from more branches than Blue Jay could,[47] Grosbeak thought it would be of interest to hear from Magpie about how Magpie thought Blue Jay was wrong. After all, it was interesting to learn about Coywolf since hardly any stories were around about Coywolf for Old Grosbeak to go to and remember again.[48] Magpie

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43. Coywolves are known to kill moose when desperate for food. Chung, *supra* note 17.

44. Blue jays have an urge to supplant others' efforts. As well, a subset of blue jays labeled as "New World Jays" dominates more than blue jays residing in an area for a longer period of time. Keith A Tarvin & Glen E Woolfenden, "Patterns of Dominance and Aggressive Behavior in Blue Jays at a Feeder" (1997) 99:2 *The Condor* 434 at 443. *R v Powley,* 2003 SCC 43, [2003] 2 SCR 207 [*Powley SCC*].

45. Ian Urquhart, "Exoneration of Mike Harris? Not in the Least", *The Toronto Star* (1 June 2007), online: The Toronto Star <https://www.thestar.com/opinion/2007/06/01/exoneration_of_mike_harris_not_in_the_least.html>.

46. For remarks about the (then) premier's refusal to negotiate during his time in office, see Richard Brennan, "Harris Won't Apologize for Policies: Ontario Government Did What Was Best Despite Opposition, Premier Says", *The Ottawa Citizen* (17 October 1998) A4.

47. Audubon, "Rose-breasted Grosbeak *Pheucticus ludovicianus*", *Guide to North American Birds,* online: Audubon <www.audubon.org/field-guide/bird/rose-breasted-grosbeak> [Audubon]. Ontario's Superior Court hears matters on appeal from the Ontario Divisional Court and acts as a trial court for more serious criminal charges. Province of Ontario, "About the Superior Court", *Superior Court of Justice*, online: Ontario Courts <www.ontariocourts.ca/scj/>.

48. For how a judge can be a "tough old bird", see Mark Worth, "Judge Vows to Scrutinize Richardson case", *Ocala Star-Banner* (10 April 1989) 3B.

might care too much,[49] but what would the harm be in hearing about Magpie's views and then chirping about it later?

Coywolf wasn't surprised by all this; and because Coywolf wasn't surprised, Coywolf got ready to see Grosbeak without much protest. Coywolf got ready to yelp "Blue Jay's vision is good with me! Leave it to Magpie to think we should be here!"[50] Grosbeak would find out what Blue Jay considered, what Blue Jay decided to tell Magpie and Coywolf and what the effects of those tellings were. It wasn't up to Grosbeak to search—it was up to Coywolf and Magpie to show Grosbeak.

So Grosbeak heard from Magpie. And then Grosbeak heard from Coywolf. And then Grosbeak heard from Magpie again—since it was Magpie that had to get the attention here.

And then Magpie and Coywolf waited. Not as long as they waited for Blue Jay to see them again. But a little while. Deeper into the winter.

One day that winter Magpie and Coywolf found out Grosbeak was ready to explain Grosbeak's view of this matter. The eye's view of Grosbeak was, well, pretty much like what Blue Jay saw:

> What Blue Jay saw is what I see. So we can then know about Coywolf like Blue Jay knows. Coywolf, you're a Coywolf and you have your own ways that need respect! And you're not Coyote and you're definitely not Wolf, so there should be no arguing with you having your own ways that are different from either of those fellow creatures.[51]

Well if earlier times, even if recent, show habits that turn into repeated patterns—I bet you can just see it—Magpie was infuriated and squawked even louder than when it had learned of Blue Jay's view. How could Grosbeak think that supporting Blue Jay was a good idea? Wouldn't more birds now find out and more birds think about Blue Jay having a good eye? Now Grosbeak had to be stopped! And Grosbeak had to be stopped by more than one creature to make sure this view of Blue Jay's could be stopped altogether and others would learn Coywolf's ways were not good to learn about and support. Clearly, thought Magpie, Grosbeak did not know enough of what happened on the ground.[52] So to make things clear, thought Magpie, a whole flock would be needed to tell Grosbeak (and Blue Jay) who's who in the scheme of things. So Magpie would just go to the Cardinals instead! Maybe those Cardinals

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49. For analysis of argumentative parties becoming obsessed with issues that ultimately matter little, see the description of "Magpie syndrome" in Edmund R Arnold & Robert T Bottle, "Let's Get the Most Out of Comprehensive Examinations" (1970) 11: 2 J of Education for Librarianship 111 at 116.

50. The appeal for the trial occurred in the same building. Canada, Sault Ste Marie Municipal Heritage Committee, *A Report and Recommendation on the Sault Ste Marie Courthouse* (City of Sault Ste Marie: Community Development and Enterprise Services, 2003) at 2.

51. Grosbeaks regularly pronounce their views loudly—as compared to being more silent—as a form of protection. Curtis S Adkisson, "Geographic Variation in Vocalizations and Evolution of North American Pine Grosbeaks" (1981) 83:4 The Condor 278. ⠿ See *R v Powley* [2000] OJ No 99 (ONSC) (Factum of the Appellant), online: <www.usask.ca/nativelaw/factums/view.php?id=60>. The hearing occurred in mid-October 1999 and this decision was released January 19, 2000.

52. See Lyndsay A Smith et al, "Nest-Site Selection of Rose-Breasted Grosbeaks in Southern Ontario" (2007) 119:2 The Wilson J of Ornithology 158 at 159. ⠿ Harry J Glasbeek, "Class War: Ontario Teachers and the Courts" (1999) 37:4 Osgoode Hall LJ 805.

were a little far away, but, thought Magpie, they were so much more "in the know" and they could tell Grosbeak and Blue Jay what was what! And, even better, they would take those other two birds to task as a flock of three![53]

Given how Magpie had acted already, Coywolf wasn't really surprised that Magpie got a hold of Cardinals. And, well, if Coywolf was honest Coywolf would've likely done the same if Blue Jay and Grosbeak hadn't been so agreeable. But still, so much time and yelping just for the hope of getting respect! It wasn't like Coywolf was saying Coywolf's ways were better than any other ways. It was about showing pride in tradition and survival in ways that didn't hurt any other creature's own living. And since so many events showed how Coywolf was worse off, why wouldn't it be good to support those ways? Earlier, Coywolf had watched other birds not quite realise the poor surroundings Coywolf (and Coyote) had.[54] So if it took meeting Cardinals— who were related to Grosbeak—to get things known about more, it took meeting Cardinals.[55] And if it took getting ready to take on everything mad Magpie would squawk, that's what it would take.

So for three days, in front of Cardinals, Magpie kept squawking "Blue Jay got it wrong and Grosbeak got it wrong and Coywolf *is* wrong!"[56] And as Cardinals said they also wanted to hear from Coywolf, Coywolf had to explain how Coywolf's story had to survive, and that story was just about having food, not about taking over any other creature in a harmful way. And that Magpie was as wrong as Magpie accused Blue Jay and Grosbeak of being.

And this time, other creatures were watching and even interested in telling what they saw because of all this. Because, after all, if Magpie was so concerned about Coywolf's role, maybe Cardinals would have something pretty big to say.[57]

Like Grosbeak and Blue Jay, Cardinals told all those there that they couldn't just say their thoughts right away. So, all concerned would need to wait for a while—again.[58]

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53. Cardinals often fly in small groups and communicate while other animals witness. See Gertrude Fay Harvey, "The Diary of a Cardinal's Nest" (1903) 20:1 The Auk 54. ⁞⁞ See also Tom Blackwell, "Ontario Metis Win Right to Hunt Without Licence", *Sudbury Star* (21 January 2000) A7.

54. For Indigenous peoples, the standards of what Indigenous conditions are guaranteed by the Constitution are detailed in *R v Van der Peet* [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]. For examples of some of the many responses that argue *Van der Peet* standards are unjust and inconsistent with other tenets in Canadian legal discourse, see Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993. See also John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997-98) 22:1 American Indian L Rev 37.

55. Grosbeaks are considered biological "cousins" of the cardinal. Audubon, *supra* note 47. ⁞⁞ Both Superior Court justices and provincial appeal court justices are appointed through a federally created system. Office of the Commissioner for Federal Judicial Affairs Canada, "Federal Judicial Appointments - Consider Which Apply to an Application for Appointment", online: Office of the Commissioner for Federal Judicial Affairs Canada <www.fja-cmf.gc.ca/appointments-nominations/considerations-eng.html>.

56. For the Crown's argument at the Court of Appeal, see *R v Powley*, 53 OR (3d) 35 (ONCA) (Factum of the Appellant), online: <www.usask.ca/nativelaw/factums/view.php?id=15>. The hearing lasted three days and took place on 10, 11, 12 January 2001.

57. At the Court of Appeal's hearing, Aboriginal Legal Services of Toronto, Métis National Council, and the Ontario Métis Aboriginal Association had intervenor status. *Ibid* at 2–3.

58. The Ontario Court of Appeal released a unanimous decision on February 23, 2001. *R v Powley*, (2001), 53 OR (3d) 35, [2001] OJ No 607 [*Powley CA*].

After a little while, Cardinals made it known they were ready to tell others what they saw and heard. After all, Cardinals had a role to show how lots of ways could be considered altogether and they needed to do so here.[59] All Cardinals have their own eyes and ears, but as Magpie and Coywolf learned, Cardinals decided they saw and heard all the same about Coywolf:

> If Coywolf says Coywolf has her/his own ways, that's okay with us too. And why wouldn't Coywolf have Coywolf ways? Coywolf is not Coyote, and sure isn't Wolf, so certain ways will be Coywolf-only. Sometimes, they might be similar or even the same to Coyote of Wolf ways. But that's fine. And, we need to remember that if some of those ways are part of making Coywolf what Coywolf is, those ways deserve to be respected! Why are we looking for something—like people look so hard for gold—that will show us what to do when we get to know Coywolf? Those moments will never happen![60] We can think of Coywolf today by learning how Coywolf became Coywolf a long time ago—and that can be when Wolf was around.[61] But until Wolf truly moved in to where Coywolf lived—and Magpie took over in a way all of us would keep to—Coywolf's ways prevailed in Coywolf's life.[62] Those ways, like our ways, keep us where we are and keep us going. Contact is never enough to figure out what or who has the lay of the land. When we control ourselves, or when others' claim of control is shown, that's when Magpie might be able to start flapping about what Magpie and Coywolf can and can't do.[63] Coywolf is just trying to be, and that being is not harming us and is letting us keep to our rules in the meantime.[64] Every story should be heard for what that story is.[65] And Coywolf's story is that Coywolf has a story we do not know as well as we should and Coywolf can't cope in the meantime.

You'd think Magpie would take Cardinals' song as a sign that Magpie was just too loud and stubborn and unaware—but no! Cardinals' must be wrong too, thought Magpie. What to do next, then, instead of letting Coywolf be? On another perch, considered the strongest and

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59. Cardinals are known to have the ability to cooperate more easily at difficult moments, even living in the same nest and then raising young together. Alexander F Skutch, "Helpers among Birds" (1961) 63:3 The Condor 204. ⁝⁝ See *Powley CA*, *ibid*.

60. Any evolution, so differences amongst coywolves, is simply part of how the animal adapts to its imposed environmental conditions and "should not be viewed as a negative influence." Jonathan G Way et al, "Genetic Characterization of Eastern "Coyotes" in Eastern Massachusetts" (2010) 17:2 Northeastern Naturalist 189 at 198 [Way]. ⁝⁝ The Court of Appeal writes about how there is no "golden moment" when Métis suddenly came to be. See *Powley CA*, *supra* note 58 at 99.

61. Coywolf creation likely "occurred also in the distant past." Lehman et al, "Introgression", *supra* note 11 at 115.

62. The Court of Appeal begins to address the matter of how to reconcile Métis constitutionalism within *Van der Peet*'s construction at *Powley CA*, *supra* note 58 at para 98. See generally *Van der Peet*, *supra* note 54.

63. The Appeal Court uses the 1850-1851 implementation of the Robinson Treaties as the date to officially observe Crown sovereignty. By doing so, the Court allows Métis peoples to exist in a "pre-control" way that the court writes is the same as "pre-contact" standards required in *Van der Peet*. See that analysis in *Powley CA*, *supra* note 58 at paras 77–102. See generally *Van der Peet*, *supra* note 54.

64. *Powley CA*, *supra* note 58 at 90.

65. *Ibid* at 75.

most stretching branch of all places to see, were Woodpeckers. They were more east, and going to see them and get their views would mean Coywolf's story would get even more attention. But Magpie thought Coywolf's story needed to be dismissed more than Magpie fretted about getting more attention about this whole mess. But Magpie believed Woodpeckers, who could look black and white one day and more red and white the next, were the brilliant ones.[66] They would get it right. And, after all, if any branch spoke of basing a new story on the qualities of older stories, it was Woodpeckers who pecked that point into everything they understood and stood on.[67] While going to see Woodpeckers was yet another event to get ready for, Coywolf wasn't really that surprised. So getting more prepared for a different branch was all part of this whole idea of getting more respect. It's not like Coywolf didn't imagine the meeting with Blue Jay would be the end of it, after all. Coywolf had been so forgotten for such a long time, getting ready for more than one part of a change was simply what happened—over and over again.[68]

So there Coywolf was, again having to hear Magpie's squawks and having to squawk after that Blue Jay's understanding and Grosbeak's understanding and (especially) Cardinals' understandings were just fine thankyouverymuch. And no surprise here, lots of others wanted to see this whole back and forth in front of Cardinals. And some of them wanted to do a little squawking themselves. Some relatives of Magpie and some of Coywolf. Some who sometimes liked Magpie one day, and then shared something in common with Coywolf the next.[69] Woodpeckers decided they could listen for a little longer than Cardinals did, but not too much more. Like Cardinals, Woodpeckers also told all those watching and fighting that they needed some time to think about all that was told to them. So all those watching and fighting had to wait around again to learn what this branch believed about Coywolf's dream to be respected as Coywolf and to be let be.[70]

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66. Woodpeckers have the ability to "orient…in precise positions…even when positioned incorrectly" by another bird or condition. Xianfeng Yi, Michael A Steele & Zhen Shen, "Manipulation of Walnuts to Facilitate Opening by the Great Spotted Woodpecker (Picoides Major): is it Tool Use?" (2014) 17:1 Animal Cognition 157 at 160. ⁙ For remarks about how an appeal justice's skills must include "superior intellectual ability" that helps a justice sift through complicated argumentation that might be improperly constructed, see Matthew Shoemaker, "Bilingualism and Bijuralism at the Supreme Court of Canada" (2012) Can Parliamentary Rev 30 at 31.

67. *Powley CA*, *supra* note 58 at 90.

68. In the Supreme Court's analysis in *Powley,* the Court writes "the Métis as a group were explicitly excluded." *Powley SCC*, *supra* note 44 at 46.

69. During the Supreme Court of Canada's oral hearing of *Powley*, Canada, Quebec, New Brunswick, Manitoba, British Columbia, Saskatchewan, Alberta and Newfoundland and Labrador all appeared as intervenors. In addition, the Labrador Métis Nation, the Congress of Aboriginal Peoples, the Métis National Council, the Métis Nation of Ontario, the Ontario Métis and Aboriginal Association, the Red Sky Métis Independent Nation and the North Slave Métis Alliance all also received intervenor status. *Powley SCC*, *supra* note 44.

70. Approximately six months passed between the hearing and the Supreme Court releasing its decision. The hearing occurred March 17, 2003 and the decision was released September 19, 2003.

As Coywolf waited, Coywolf remembered how once s/he had to yelp really really loud: "We know who we are!"[71]

And Coywolf also remembered how lots of times, Coywolf's life was about thinking so smartly about how to do something with stuff that others thought was worth nothing.[72] Sometimes Coywolf made mistakes. And sometimes the effects of those mistakes were huge.[73] But Coywolf kept thinking Coywolf's mistakes seemed so much more significant to others than if they had made the same mistake themselves.

Sometimes, others had let Coywolf be.[74] So Coywolf knew it was possible for others to notice Coywolf, respect Coywolf's life, and go on with their own lives in the meantime. But Magpie seemed obsessed with ending Coywolf's ways—even the ones that helped Coywolf be less of a burden to Magpie.[75] And what was logical about that? Didn't that mean then, at (almost) any cost, Magpie still wanted to get rid of Coywolf's ways for good, because they belonged to Coywolf and not because those ways worked? So in having to take Magpie on, get all ready for Blue Jay and then Grosbeak and then Cardinals and then Woodpeckers, Coywolf knew it was just right to yelp up! Maybe all Magpie needed was to hear from others that Coywolf was nothing to be scared of and everything to be proud of. And if it took all of those birds to tell Magpie that, well, Coywolf would be alright with that.[76]

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71. A study that imagined the coywolf as its own species that evolved on its own while "only minimally influenced by either parental species" appears in Steven M Chambers, "A Perspective on the Genetic Composition of Eastern Coyotes" (2010) 17:2 Northeastern Naturalist 205 at 210. He also notably denotes the species having a "hybrid origin" but no longer hybrid in primary form. Indeed, he later writes how the coywolf represents an "emerging new species". *Ibid* at 207. ⁞⁞ This phrase ("We know who we are!") was stated by Harry Daniels during a presentation in 1980 in front of both Members of Parliament and Senators. Senate, House of Commons, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 17: 2-12-1980, 132.

72. Meet the Coywolf, *supra* note 23 at 00h:30m:45s-00h:32m:00s. To survive, the animal eats cat food at night after it has trained itself to become nocturnal.

73. Duane Champagne, "Colonialism as Trickster", *Indian Country Today* (20 April 2015), online: Indian Country Today <indiancountrytodaymedianetwork.com/2015/04/20/colonialism-trickster-159959>. For remarks about the negative impact of litigation, including the effects any poor results have on future negotiations, see generally Shin Imai, "Creating Disincentives to Negotiate: *Mitchell v. M.N.R.*'s Potential Effect on Dispute Resolution" (2003) 22 Windsor YB Access Just 309. For a particular example of Métis litigation that has received mixed responses in Métis circles, see *R v Blais*, 2003 SCC 14, [2003] 2 SCR 236.

74. Shari Narine, "Fishing Without License Charges Dropped Against Saskatchewan Métis" *Alberta Sweetgrass* (1 August 2009), online: The Free Library <www.thefreelibrary.com/Fishing+without+license+charges+dropped+against+Saskatchewan+Metis.-a0206867067>.

75. Divya Rao, "The Genesis of 'Coywolves': A Story of Survival", *EarthJustice* (9 December 2015), online: EarthJustice <earthjustice.org/blog/2015-december/the-genesis-of-coywolves-a-story-of-survival/>. See Corwyn Friesen, "Province to Create Flexible Marketing Options for Commercial Fishers", *MySteinbach* (21 August 2016), online: MySteinbach <www.mysteinbach.ca/news/179/province-to-create-flexible-marketing-options-for-commercial-fishers>. ⁞⁞ Note how it is reported the provincial Minister of Sustainable Development Cathy Cox used the terms "Indigenous and Métis fishers" which suggests Métis are not considered Indigenous.

76. For a more recent commentary on how efficiency is achieved by learning more about earlier relationships that were assumed to be oppositional, see Brigitte C Madrian, "Applying Insights from Behavioral Economics to Policy Design" (2014) 6 Annual Rev of Economics 663.

When the waiting time had passed, all who wanted to learn about the Coywolf-Magpie dispute found out the Woodpeckers drummed altogether.[77] The Woodpeckers announced to everyone:

> We wanted to think about what Cardinals decided. And *how* Cardinals found it. And we think what Cardinals found was right. And how they found—that was even more correct! Think about how they noticed we can't have one magic event to show when Coywolf started to be part of the land.[78] And even if Magpie squawks that we showed Coywolf's existence was impossible earlier, so what? We have more knowledge now![79] And we need to thank Cardinals for showing such a golden way to explain to Magpie why that is the case. Magpie, do you really think what you squawk about is really the case? The case to bring before us? The case to stop Coywolf? Not this story today! And not here!

So, Magpie had gone to a place where he claimed Blue Jay was the wisest. And then Magpie decided Blue Jay wasn't as smart as Grosbeak. And then Cardinals had to be met to show Grosbeak how to be proper. And then, Woodpeckers had to be met to show all of those other old birds what's what. And then Woodpeckers heard what Magpie told them, except the what's-what ended up being all for Coywolf! Magpie had to squawk and squawk to try and get Coywolf's ways stopped, and now more knew about the squawking and more knew about Coywolf! And, as important to Coywolf, more knew about Coywolf's *ways*. Sometimes, Coywolf thought, it's not about squawking. The loudest aren't the rightest. The most respectful, to the land and then to themselves, show what's right. And that's all Coywolf had shown in being Coywolf.

Even after all this having to get noticed by the highest perches, it's still hard for Coywolf. Coywolf's life still seems to be made up of ways that others sometimes don't know or don't like. Lots of times, others are trying to stop Coywolf whether they know it or not. Like when they take a forest down, or when a rule is made that is about Coywolf without taking Coywolf's life ways into account—so then the rule doesn't even do what it was supposed to do![80] And during those hard times, those others make Coywolf do all this work to prove that Coywolf's ideas matter, rather than just trusting Coywolf's ideas should be respected.[81]

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77. The strong cognitive ability of woodpeckers is called "drumming", where they demonstrate their abilities for other birds and animals to observe by sound and impact. Richard N Conner & Daniel Saenz, "Woodpecker Excavation and Use of Cavities in Polystyrene Bags" (1996) 108:3 Wilson Bull 449 at 455. See generally *Powley SCC*, *supra* note 44.

78. *Powley SCC*, *supra* note 44 at para 38.

79. The Supreme Court in *Powley* also uses *Van der Peet* in a way to have Métis issues still fit into the 1996 decision's structure. *Ibid* at para 15. See generally *Van der Peet*, *supra* note 54.

80. For responses to coywolves, see Jennifer O'Brien, "Wild in the City", *The London Free Press* (19 February 2013), online: The London Free Press <www.lfpress.com/2013/02/19/wild-in-the-city>. ⁞⁞ Other circumstances have led to litigation about Métis peoples. Some of those cases eventually were evaluated by the Supreme Court of Canada. See e.g. *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670; *Manitoba Metis Foundation Inc v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623; *Peavine Métis Settlement v Alberta (Minister of Aboriginal Affairs & Northern Development)*, 2007 ABQB 517, [2007] AJ No 913.

81. "Métis Nation Finally Coming of Age", *Fort Frances Times* (22 October 2003) A1 & A6.

Some others keep thinking Coywolf is just two halves rather than a whole creature.[82] Other creatures, trying to make their lives easier and then making Coywolf's life harder, work really hard to get Coywolf called a Coyote or Wolf to make some other problem disappear.[83]

But they shouldn't do that. And, as Coywolf has shown, Coywolf will make sure they can't. If it takes going to Blue Jay, and going to Grosbeak, and going to Cardinals, and going to Woodpeckers, Coywolf will go. Coywolf will have this first story of going to all of these old birds, and that story will be one no one will be able to forget!

Who knows what will happen to Coywolf tomorrow, or even in the spring or summer?[84] Or even next year? Who knows when Coywolf will have to go to Court?

One thing is for sure—you might think it's alright to forget about Coywolf. But Coywolf has been treated wrongly, or not even treated in some way at all. And that is not kind. And it might even make Coywolf stronger. Maybe, just maybe, we can think Coywolf has something to teach us about survival, and getting along, and shifting ways that can make all creatures do better, now *and* later. And that Coywolf shows how to make it when times are good but how to make it even in the hardest times?[85] And that making it through the hardest times is what we need to be really good at? That isn't pesky.[86] Or nothing. Or half of one thing and half of another.[87] It just is Coywolf. Coywolf *is*. Right in front of you. Whether you see Coywolf or not.[88] What you've told Coywolf to do in the past, if it's not very Coywolf in nature, you

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82. For commentary about how such a belief has been perpetuated by academic analysis, see generally Philip J Deloria, "What is the Middle Ground, Anyway?" (2006) 63:1 The William and Mary Q 15.

83. Arguments by Métis that rely upon cases involving other Indigenous peoples will likely increase as more agreements between the Crown and various Métis groups are considered "treaties"; arguing along the lines of other Indigenous groups could be a matter of interpretation when learning more about how Métis were included in historic treaties. Shari Narine, "Métis Treaties, Agreements, Focus of Five-Year Study" (2015) 22:2 Alberta Sweetgrass 4.

84. Way, *supra* note 60 at 199. �𝄆 In the spring of 2016, the Supreme Court of Canada released the unanimous *Daniels v Canada (Indian Affairs and Northern Development)*. *Daniels SCC*, *supra* note 31. Reactions to the decision are mixed. See Bruce McIvor, "What Does the Daniels Decision Mean?" (20 April 2016), First People's Law (blog), online: First Peoples Law <www.firstpeopleslaw.com/index/articles/248.php>.

85. Coywolves form important "social groups" of unrelated but familiar individuals. Way, *supra* note 60 at 190. As well, even when facing a law that allows "unlimited killing…it does not greatly affect their overall population sizes." *Ibid* at 199. In fact, wolves are more impacted by exploitation. *Ibid* at 200. Notably, in this article, the authors disagreed with the publication and wanted "coywolf" used throughout, but the publisher stated that unless recognized in professional zoological classifications, the publishers would not use the term. ⁝ For an argument that Métis families often have the strongest and oldest examples of sustainable development, see Signa AK Daum Shanks, *Searching for Sakitawak: Place and People in Northern Saskatchewan's Île-à-la-Crosse* (PhD Dissertation, Western University, 2015) [unpublished] at 7.

86. The idea that Coywolves are considered pesky continues. See Matt Hickman, "Is the Coyote Takeover of New York City Imminent?", *Mother Nature Network* (26 January 2015), online: Mother Nature Network <www.mnn.com/earth-matters/animals/blogs/is-the-coyote-takeover-of-new-york-city-imminent>. For the Métis being pesky, see *supra* note 32.

87. Darren O'Toole, "Thomas Flanagan on the Stand: Revisiting Métis Land Claims and the *List of Rights* in Manitoba" (2010) 41:1 J of Can Studies/Revue international d'études canadiennes 137.

88. Jonathan G Way, "Why the Eastern Coyote Should be a Separate Species: The 'Coywolf'", IFL Science (13 May 2016), online: IFL Science <www.iflscience.com/plants-and-animals/why-eastern-coyote-should-be-separate-species-coywolf>.

might think it'll work, but let me tell you now it will never last.[89] Because Coywolf has to live, just like you. And because *your* rules *you* made—without taking Coywolf's life ways into account—are rarely good for how the land works anyway.[90] That, in the end, is what you need to know. *That.* Coywolf's ways can work for you too.

So that is why Coywolf goes to court.[91] To tell you *that*—Coywolf should be Coywolf and Coywolf knows how to let the land, and you, be. And I wanted to tell you now, any mistakes and all, so then you and I will know each other better now and later and realise how much better it is to just welcome Coywolf to the neighbourhood.[92] Just like Coywolf wants, and just as all deserve.[93]

That's all for now—until we meet again.

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89. Abella J writes for the Supreme Court in *Daniels*: "There is no consensus on who is considered Métis...nor need there be. Cultural and ethnic labels do not lend themselves to neat boundaries." *Daniels SCC*, *supra* note 31 at para 17.

90. Jason Madden, "Simple Ruling, Profound Impact", *Edmonton Journal* (23 April 2016) A13.

91. Thomas King writes that when learning a story, the next stage is to realize how "it's yours. Do with it what you will. Tell it to friends. Turn it into a television movie. Forget it. But don't say in the years to come that you would have lived your life differently if you have heard this story. You've heard it now." Thomas King, *The Truth about Stories: A Native Narrative* (Toronto: House of Anansi Press, 2003) at 29. See Bartosz Brożek, "Analogy in Legal Discourse" (2008) 94:2 Archives for Philosophy of L & Social Philosophy 188.

92. Rob Wile, "There Are Now Millions of Coywolves roaming America", Fusion (30 October 2015), online: Fusion <fusion.net/story/224645/coywolf-combination-dog-coyote-wolf-roams-america/.

93. The author is Métis. In my own struggles for familial self-identity along with learning more about Indigenous cultural heritage as time passes, I appreciate the observation that "there are good reasons—largely occupationally based and kinship based—to think that the connections between Red River and parts of Ontario warrant at the very least a discussion about their (Ontario families') inclusion within the Métis Nation." Chris Andersen, *Métis: Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014) at 53. I consider the fact pattern of the Powley family's courtroom struggle one of those histories that can illustrate a connection between Ontario communities and those Métis communities in western Canada. For additional information about projects delving into the matter of a long history and specific territoriality impacting who is Métis, see the efforts that are part of The Métis Treaties Research Project, online: <www.metistreatiesproject.ca/>.

RECONCILIATION IN THE CORPORATE COMMERCIAL CLASSROOM

by Anna Lund, Gail Henderson, Clayton Bangsund, Freya Kodar, Carol Liao & Shanthi Senthe

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I INTRODUCTION

The 28th Call to Action of the Truth and Reconciliation Commission ("TRC") is for law schools to "require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations."[1] A number of Canadian law schools have developed institutional responses, offering dedicated courses in Aboriginal people and the law, and examining their admissions policies, faculty appointments, and student culture.[2] Professors have responded too.[3] Faculty have significant scope to select the materials to include in their courses, and many have experimented, or are looking to experiment, with new ways to cover topics relevant to Aboriginal people and the law.

Professors teaching corporate and commercial law may want to respond to the TRC's Call to Action, but the connection between Aboriginal people and the law in these courses is less obvious than in public law courses. Although less obvious, making the connection is important in order to graduate students who are competent and comfortable advising First Nation, Métis, and Inuit clients, as well as clients entering into transactions or otherwise doing business with or in First Nations, Métis, or Inuit communities.[4]

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1. Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada, Volume 1: Summary* (Toronto: James Lorimer & Company, 2015) at 323 [Truth and Reconciliation Commission of Canada].

2. For example in February 2016, faculty at the University of Saskatchewan, College of Law, committed to the development and delivery of a first year course in Aboriginal people and the law. Scheduled to launch in 2017–18, the course will be equal in credits to other first year courses, and will play a foundational role in the greater law school curriculum.

3. See especially Reconciliation Syllabus–a TRC-Inspired Gathering of Materials for Teaching Law (blog) (moderated by Gillian Calder & Rebecca Johnson, Faculty of Law, University of Victoria), online: ReconciliationSyllabus <https://reconciliationsyllabus.wordpress.com>.

4. Truth and Reconciliation Commission of Canada, *supra* note 1 at 336–37 (Call to Action 92).

Indigenizing the corporate-commercial curriculum is not only an act of deconstructing the legacy of colonialism, but also an opportunity to engage in legal education reform. We wanted to provide space for professors working in these areas to share ideas about how to draw these connections and to better prepare students for practice. To this end, we organized a roundtable of corporate and commercial law faculty members, held as part of the 2016 annual meeting of Canadian Association of Law Teachers (CALT) in Calgary. Participants were invited to describe their own efforts to integrate reconciliation and other issues relevant to Aboriginal peoples into the corporate commercial curriculum, the obstacles they faced, and the resources they found helpful. The participants were Clayton Bangsund from the University of Saskatchewan, Gail Henderson from the University of Alberta (now at Queen's University), Anna Lund from the University of Alberta, Shanthi Senthe from Thompson Rivers University, and Rebecca Johnson, Freya Kodar, and Carol Liao from the University of Victoria.[5]

This article aims to continue the conversation that began in Calgary. It is divided into two sections. First, the roundtable participants describe their own innovations and experiments at their respective law faculties. Second, themes emerging from the perspectives of participants and from the roundtable at CALT are identified. We do not claim to have definitive—or even entirely correct—answers about how to respond to Call to Action 28. This article instead is intended to promote the sharing of ideas, experimentation by law professors across the country, and ultimately, reflection on how corporate and commercial law professors as individuals can advance the project of reconciliation.

II INDIVIDUAL CONTRIBUTIONS: INNOVATING AND EXPERIMENTING IN THE CORPORATE COMMERCIAL CLASSROOM

Personal Property Security Law
Clayton Bangsund (University of Saskatchewan)[6]

At the University of Saskatchewan, Personal Property Security Law ("PPSL") is an optional, upper-year course that teaches students the law of secured lending, including how to grant a lender a security interest in collateral to secure a debt, how to decide priority disputes between multiple parties with interests in the same collateral, and how to enforce on a security interest when a borrower defaults. To gain comprehension of personal property security law, one must entertain—though not necessarily embrace or accept—the capitalist ideal as well as a series of foundational "PPSL values." These values include facility, transparency, flexibility, simplicity, efficiency, predictability, certainty, clarity, equality, balance, comprehensiveness, uniformity, and coherence.[7] The basic assumption underlying the *Personal Property Security Act*[8] ("*PPSA*") is that market-based secured credit activity serves a useful societal purpose, and that a personal property security regime ought to facilitate secured transactions under which debtors grant,

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[5] Douglas Sanderson from the University of Toronto had planned to attend, but unfortunately was unable to.

[6] BEd, JD, LLM. Bangsund is Assistant Professor at University of Saskatchewan, College of Law.

[7] Clayton Bangsund, "PPSL Values" (2015) 57:2 Can Business LJ 184.

[8] RSO 1990, c P-10 [PPSL].

and secured creditors acquire, proprietary interests in debtors' personal property.[9] The PPSA enables debtors to "use the full value inherent in their assets to support credit,"[10] thereby embracing the classical liberal philosophy that one ought to be free to deal with his or her property as one sees fit.[11]

But the PPSA's basic premise is not universally embraced. Tensions arise, for instance, in the PPSA's interaction with provisions of the *Indian Act*.[12] Among other things, subsection 89(1) of the *Indian Act* constrains a creditor who is not an Indian or a band (a "non-indigenous creditor") from taking security in property of an Indian or a band that is situated on a reserve.[13] One aim of this statutory provision is to protect the property of Indians and bands.[14] However, by shielding reserve property from non-Indigenous creditor recourse, subsection 89(1) runs directly counter to the PPSL values, making it more difficult for status Indians and bands to access affordable credit. Can a status Indian living on reserve subject herself and her property to general standards of personal property security law? Or must she live by different standards and in a more expensive credit market? Some provincial courts have held that she may "opt in" to general commercial standards.[15] By explicitly waiving the protection of subsection 89(1), an Indigenous person covered by the provision can counteract its protective effect thereby gaining access to the same level playing field enjoyed by everyone else in Canada—an apparent victory for PPSL values.

The substantive law described in the preceding paragraphs, and covered in my survey course on personal property security law, is important because it impacts commercial relationships between status Indians, bands, and non-Indigenous creditors.[16] I wonder, though, whether the TRC had content of this sort in mind when it declared its calls to action on law school curricula reform. Indeed, I am troubled that the Aboriginal component of my course focusses on circumvention of a statutory scheme aimed, ostensibly,

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9. This assumption is explicitly stated at the outset of my course in personal property security law. I invite and encourage students to question and even challenge the assumption, in the form of a minor paper, for example. But, given time constraints and curricular volume, I only afford several minutes of class time to discussion of the secured credit utility question, which, incidentally, remains an open one. See Bangsund, *supra* note 7 at 188.

10. UNCITRAL, *Legislative Guide on Secured Transactions, 2010, United Nations Commission on International Trade Law* (Vienna: UNCITRAL, 2010) at 19, online: UNCITRAL <https://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf>.

11. See Steven L Harris & Charles W Mooney Jr, "A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously" (1994) 80:8 Va L Rev 2021 at 2022. See also Friedrich A Hayek, *The Road to Serfdom* (London: The Institute of Economic Affairs, 2005) at 41.

12. RSC, c I-15.

13. The prohibition is not absolute. Subsection 89(2) of the *Indian Act* furnishes an exemption for a non-Indigenous seller who grants purchase money credit to an Indian or a band, allowing such a seller to acquire an effective security interest in the sales item despite its being situated on a reserve.

14. Truth and Reconciliation Commission of Canada, *supra* note 1 at 55.

15. See e.g. *Brooks (JE) and Associates Ltd v Kingsclear Indian Band et al* [1991] NBJ No 816, 118 NBR (2d) 290. See also *Tribal Wi-Chi-Way-Win Capital Corp v Stevenson*, 2009 MBQB 32, [2009] MJ No 53 (aff'd 2009 MBCA 72, [2009] MJ No 232).

16. Indigenous creditors are treated differently than non-Indigenous creditors. Section 89 of the *Indian Act* contemplates that Indians and bands can take security in and enforce against on-reserve property owned by other Indians or bands.

at protecting reserve property and resources. It strikes me that the TRC calls for deeper, more meaningful engagement.

In response to the TRC, the University of Saskatchewan, College of Law is developing a first-year course in Aboriginal people and the law. Building on this institutional response, Aboriginal content will continue to play an important role in commercial law courses at the University of Saskatchewan. For instance, I will continue to cover section 89 of the *Indian Act* in my course on personal property security law. My hope is that the knowledge and skills students acquire in their first-year course in Aboriginal people and the law will better enable them to critically engage with this legislative provision. For example, students should develop the tools to approach the subject from the perspective of critical race theory. They should recognize that even if a status Indian can gain equal access to credit markets by waiving her section 89 protection, she only realizes theoretical equality. Section 89's opt-out feature, while perhaps serving a worthwhile purpose, leaves unaddressed the impact of latent, subconscious, or even overt racism and stereotyping that informs the credit granting decisions of non-Indigenous creditors. Empirical data may be available to help students understand, from a law and economics perspective, the actual impact section 89 has had on credit availability for Indians and bands. These perspectives can be introduced as part of the pedagogy of a first-year course in Aboriginal people and the law and further developed and applied in upper-year courses such as personal property security law.

Judgment Enforcement Law
Anna Lund (University of Alberta)[17]

At the University of Alberta Faculty of Law, Judgment Enforcement Law is an optional, upper-year course that teaches students about how to collect a judgment once a litigant has succeeded in a lawsuit. The course covers different collection mechanisms (seizure and sale of personal property, sale of real property, garnishment, receivers), the priorities amongst creditors with competing interests, the enforcement of foreign judgments, impeachment powers under provincial fraudulent conveyance and preference legislation, and exemptions.

Exemptions are the rules specifying what property a creditor cannot seize during enforcement proceedings. Many exemptions are set out in provincial legislation; however, as discussed by Clayton Bangsund, above, the *Indian Act* contains exemptions specific to status Indians and bands.[18] Traditionally, these exemptions have been taught alongside the other exemptions. I wanted to respond to the TRC's Call to Action by including more coverage of Aboriginal people and the law in my course, and I decided to do this by expanding the coverage of the *Indian Act* exemptions. I dedicated a class to discussing them in-depth.

We reviewed a number of cases that have interpreted the application of the *Indian Act* exemptions, culminating in a lengthy discussion of the 2006 Supreme Court of Canada decision in *McDiarmid Lumber Ltd v. God's Lake First Nation*.[19] The issue in the case was whether a payment made by the federal government to an Indian band could be garnished. The answer turned on the interpretation of the breadth of an exemption covering some types of

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17. BA, LLB, LLM, PhD. Lund is Assistant Professor at the University of Alberta, Faculty of Law.

18. *Indian Act*, *supra* note 12, s 89–90.

19. 2006 SCC 58, [2006] 2 SCR 846 [*McDiarmid*].

funds paid to a band by the federal government. If the Court interpreted the provision broadly, the fund would be exempt. If the Court interpreted it narrowly, the fund could be garnished.

Chief Justice McLachlin, writing for the majority, interpreted the provision narrowly, and held that the funds were subject to being garnished. In so deciding, she voiced concern that a broader interpretation would make creditors unwilling to extend credit to Indian bands, because the creditors would have recourse to fewer assets if the bands defaulted. She further noted that access to credit is an important tool for Indian bands to develop their economies and provide their members with greater financial prosperity.

Justice Binnie wrote a lengthy dissent. He would have interpreted the provision more broadly, and held that the funds were exempt from garnishment. He acknowledged the importance of enabling Aboriginal economic development, but he was more concerned with the situation immediately facing the God's Lake Band. Moreover, Binnie J. viewed the promise of financial prosperity as being more speculative than real. The government funds were needed to provide for basic social services on reserve. The Band was located in a remote part of Northern Manitoba, and had few foreseeable opportunities to engage in economic development.

McLachlin C.J. and Binnie J.'s reasons present students with an invitation to consider the competing policies implicated by the exemptions in the *Indian Act*: paternalism, self-determination, self-government, and protection of vulnerable people. It is a rich starting point for considering how settler commercial law shapes the economic lives of Indigenous peoples in Canada. At the same time, a class on *Indian Act* exemptions is limited to settler commercial laws. It does not ask students to engage with Indigenous law, one of the topics specifically mentioned by the TRC in Call to Action 28. As I continue to pursue the project of reconciliation in the commercial classroom, I am interested in learning more about Indigenous law and exploring how to incorporate it into my classroom.

Debtor and Creditor Relations
Freya Kodar (University of Victoria)[20]

I teach two courses in the University of Victoria Faculty of Law's corporate commercial curriculum: Debtor and Creditor Relations and Pension Law and Policy. It is in the former that I have most consciously looked at the ways colonial commercial law impacts Indigenous communities. "Debtor-Creditor," as it is known around the law school, currently does triple duty in the curriculum. While at its core a judgment enforcement course, it also covers the regulation of consumer credit and concludes with an overview of the bankruptcy and insolvency process.

Like Anna Lund, I spend a full class on the question of enforcing money judgments on reserve land, and the interplay of provincial judgment enforcement legislation and the *Indian Act*.[21] Like Clayton Bangsund, I discuss the challenges that section 89 of the *Indian Act* creates for Indigenous people, businesses, and governments on reserve in accessing credit because on-reserve property and land cannot be given as security for loans, nor can be seized during

[20] BA, LLB, LLM. Kodar is Associate Professor and Associate Dean, Administration and Research at the University of Victoria, Faculty of Law.

[21] In British Columbia, the enforcement legislation is the *Court Order Enforcement Act*, RSBC 1996, c 78. See also *Indian Act*, *supra* note 12, s 89–90.

enforcement proceedings.[22] We then turn our attention to section 90, which deems certain personal property purchased or given by the federal Crown to be situated on reserve and therefore exempt from judgment enforcement proceedings.[23]

After reviewing the provincial case law on the question of whether sections 89 and 90 exempt federal government funding held in off-reserve bank accounts from garnishment,[24] we discuss the Supreme Court of Canada's decision in *McDiarmid Lumber Ltd v. God's Lake First Nation*.[25] The decision canvasses the history of the *Indian Act* exemptions, discusses the ways in which the colonial history of dispossession disrupted Indigenous economies and reduced the land and resource base, and considers how the exemptions constrain Indigenous economic development. As Anna notes above, it is a "rich starting point for considering how settler commercial law shapes the economic lives of Aboriginal people."

In the fall, I will be teaching "Debtor-Creditor" for the first time since the TRC's Final Report and Calls to Action came out, and in teaching this section of the course I plan to draw on the TRC's discussion of the fact that the "the scope of reconciliation must extend beyond residential schools to encompass all aspects of Aboriginal and non-Aboriginal relations and connections to the land" and in particular the TRC's discussion of what reconciliation means for the corporate sector.[26]

I would like to provide more material on current Indigenous economic development initiatives and how businesses and governments navigate the financing constraints created by the *Indian Act*. As mentioned in the roundtable discussion, it is challenging to find introductory-level material on Indigenous economic development and business structures, and I have been thinking about inviting a speaker involved in Indigenous economic development initiatives to discuss their work with the class.[27]

And finally, I want to think carefully about responding to TRC Call to Action 28's challenge to bring Indigenous law into "Debtor-Creditor," and indeed into all of my courses. I am both conscious of my lack of knowledge of Indigenous understandings of debt, credit, markets, business, and economic development, and Indigenous laws that regulate them. At the same time, I am anxious about the dangers of seeking to map colonial concepts and laws onto Indigenous concepts and laws

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22. The section provides that "the real and personal property of an Indian or band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour … of any person other than an Indian or a band."

23. Section 90(1) of the *Indian Act* states that, for the purposes of sections 87 and 89, personal property that was

    (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

    (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

    shall be deemed always to be situated on a reserve.

24. See e.g. *Fricke v Moricetown Indian Band* [1985] BCJ No 2825, 67 BCLR 227.

25. *McDiarmid*, *supra* note 19.

26. Truth and Reconciliation Commission of Canada, *supra* note 1 at 190, 300–06.

27. In the 2015 fall term, Gail Henderson invited Edmonton lawyer Scott Watson of Field Law LLP to speak to her University of Alberta Corporations class about serving the corporate needs of First Nations clients. She received positive feedback from her students, who found the lecture to be accessible and engaging, while still conveying the complexity of the topic.

Business Associations, Corporate Governance, Secured Transactions & Remedies Shanthi Senthe (Thompson Rivers University)[28]

I have worked to bring Indigenous legal topics into each of the courses I teach.[29] I teach upper-level courses, such as Business Associations, Corporate Governance, Secured Transactions, and Remedies (with a corporate-commercial focus). All courses are rooted in private law principles, and are based primarily on a casebook methodology, which does not specifically address Indigenous legal perspectives or transactional legal considerations. I address this potential gap in the course coverage by using materials from other disciplines, as well as Indigenous experts and guest speakers to integrate reconciliation and other topics related to Aboriginal people and the law. As our university is situated on unceded Secwepemc Territory,[30] I can use local issues to help illustrate the topics covered in class and engage students.[31] The primary struggle for me personally to achieve this type of pedagogical diversity is finding "time" in the semester to cover materials, create case studies and problems, as well as to ensure that the course objectives, which include corporate-commercial transactions in an Indigenous context, have been met.

In all of my courses, I aim to enhance critical thinking and engagement. A method that has been successful is the use of group presentations as an evaluation tool. Twenty to thirty percent of each student's final grade is assessed based on the student's participation in a group presentation. Depending on the course, the group presentations are based on business case studies or legal issues surrounding commercial relationships, in which each group must design and develop specific legal remedies and business strategies while considering divergent stakeholder interests. Students receive their group allocation, case study, or problem by the second week of the course and are expected to work on the case study for the entire semester. Towards the end of the course, all groups present their findings. Students are also expected to submit a one-page reflection piece describing their personal views on the process, team dynamics, as well as objections to substantive legal issues raised by group members or the problem, or my pedagogical approach. The problem-solving component serves as an opportunity for me to include relevant Indigenous legal topics, thereby allowing students to gain a more thorough understanding of Canadian commercial issues.

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28. BA, JD, LLM, PhD Candidate. Senthe is Assistant Professor at Thompson Rivers University, Faculty of Law.

29. Professors Janna Promislow and Nicole Schabus have graciously guided me along the way in attempting to include Indigenous content in my courses.

30. See Emma Cunliffe, "General Principles of Reconciliation Syllabus" (27 June 2015), ReconciliationSyllabus (blog), online: ReconciliationSyllabus <https://reconciliationsyllabus.wordpress.com/2015/06/27/general-principles-of-reconciliation-syllabus/>. In this article, Professor Cunliffe articulates how local geography can reconfigure and influence our pedagogical approaches.

31. In my Corporate Governance course, students are encouraged to explore issues surrounding the Economic and Community Development Agreement (ECDA) mine revenue-sharing agreement between the Province of British Columbia with Tk'emlúps te Secwepemc and Skeetchestn Indian Band of the Stk'emlúpsemc te Secwepemc Nation (SSN) as a result of the New Gold Mine Inc. operations. See Ministry of Aboriginal Relations and Reconciliation, News Release, 2013ARR0047-001565, "Mining revenues flow to First Nations following first-ever agreement" (17 October 2013), online: BC Ministry of Aboriginal Relations and Reconciliation <https://archive.news.gov.bc.ca/releases/news_releases_2013-2017/2013arr0047-001565.htm>.

Business Associations, a mandatory upper-year course, aims to provide students with a basic understanding of the legal regulation of business structures in Canada and the ability to articulate and place legal rules in their historical, social, and economic context. I use conceptual frames and excerpts from *Legal Aspects of Aboriginal Business Development* by Dwight Dorey and Joseph Magnet.[32]

Secured Transactions is an optional upper-year course, akin to Clayton Bangsund's PPSL course. In this course, I assign Douglas Sanderson's article, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, but How Do You Build It in Canada?"[33] as required reading; in addition, I have students tackle a legal problem involving a secured transaction on reserve land.

Remedies is an optional upper-year course that covers the various and diverse legal remedies available to commercial and individual litigants in response to a violation of that party's legal rights. These "legal remedies" represent the juridical response to a legal wrong or injury. It is this concrete response that is ultimately most valued by the client. This course surveys the available remedies, including equitable remedies, by examining their scope, purposes, and limitations. The ultimate aim of the course is to provide students with a broad overview of the most significant legal remedies available in the Canadian legal system. I developed a section within the syllabus to explore the inclusion of cultural evidence with respect to commercial litigation strategies and whether this can be applicable to contractual issues.[34] During this portion of the syllabus, I facilitate a discussion on Indigenous issues surrounding residential school litigation.

Corporate Governance is an optional, upper-year course, where I have had the luxury of creating my own course materials. This course attempts to explore Indigenous shareholder activism, the business case for and against mining and oil and gas development in Indigenous communities, board accountability from various viewpoints, and the tensions between business objectives, and Indigenous political and social objectives.[35] These specific considerations are examined through law review articles, case law, newspaper articles, and local media highlights and guest speakers. For instance, in examining the Equator Principles, class discussions centre on international and domestic indigenous stakeholder rights.[36]

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32. Dwight Dorey & Joseph Magnet, *Legal Aspects of Aboriginal Business Development* (Toronto: LexisNexis Butterworths, 2005).

33. Douglas Sanderson, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, but How Do You Build It in Canada?" (2011) 53:1 Can Bus LJ 92.

34. See Vaughan Black, "Cultural Thin Skulls" (2009) 60 UNBLJ 186. See also Jerry Berryman, "Accommodating Ethnic and Cultural Factors in Damages for Personal Injury" (2007) 40 UBC L Rev 1.

35. For more resources, see Tulo Centre of Indigenous Economics, which is about development on reserve land, online: Tulo Centre of Indigenous Economics <www.tulo.ca/textbook/>. See also Chief Reuben George's shareholder activism, Dan Fumano, "B.C. First Nations Take Kinder Morgan Pipeline Opposition from Coast to Coast", *The Vancouver Sun* (16 June 2016), online: The Vancouver Sun <vancouversun.com/news/local-news/b-c-first-nations-take-kinder-morgan-pipeline-opposition-from-coast-to-coast>. See also Tsleil-Waututh Nation, Media Release, "Tsleil-Waututh Chief Carries Message of Opposition to Kinder Morgan Expansion From Ottawa to New York City" (16 June 2016), online: Market Wired<www.marketwired.com/press-release/tsleil-waututh-chief-carries-message-opposition-kinder-morgan-expansion-from-ottawa-2135078.htm>. See also Sacred Trust Initiative, online: TWN Sacred Trust <twnsacredtrust.ca/>.

36. I use Benjamin J Richardson's work as a starting point. Benjamin J Richardson, "Protecting Indigenous Peoples through Socially Responsible Investment" (2007) Indigenous LJ 6:1 205.

Business Associations
Carol Liao (University of Victoria)[37]

Business Associations is an upper-year, mandatory course at the University of Victoria's law school that introduces students to the foundational legal principles of agency, partnerships, corporations, and other forms of association for carrying on business in Canada. The class size is approximately 50 students. I find it important at the outset of the course to convey to my students that Aboriginal legal issues are not counter to what the course is about, but reflective of where the future is headed. Learning the basics of business law enables one to be conversant with those who hold the majority of capital in our society. I emphasize that corporate law and social justice are not mutually exclusive concepts. I believe a serious disservice is committed to corporate reform efforts when we suggest to students that social justice is incompatible with corporate legal practice.

I have raised the importance of Indigenous rights in topics such as stakeholder interests, corporate social responsibility (CSR), and board diversity. Regarding stakeholder interests and CSR, throughout the course I discuss the growing imperative for directors to consider non-shareholder stakeholders in their corporate decision-making, first in accordance with their fiduciary duties to act in the "best interests of the corporation"[38] and under the oppression remedy,[39] and more recently in light of the Supreme Court of Canada's interpretation of directors' duties in *Peoples Department Store Inc (Trustee of) v. Wise*[40] and *BCE Inc v. 1976 Debentureholders*.[41] I discuss the different challenges facing closely-held corporations in comparison to widely-held corporations, and ask students to consider the competing interests directors face in scenarios where Aboriginal rights are at risk (for example, energy companies with pipelines running through Aboriginal land), as well as other challenges where social and economic interests are at odds. I also incorporate the *United Nations Guiding Principles for Business and Human Rights*,[42] the *United Nations Declaration on the Rights of Indigenous Peoples*,[43] and the recent case of *Choc v. Hudbay Minerals*,[44] which involved a suit by Guatemalan Indigenous plaintiffs against a Canadian mining company for human rights violations. I provide the students with a hypothetical scenario similar to *Choc* in which they represent a competing mining company. I ask if they would recommend that their client adopt a public policy commitment to respect human rights in accordance with s. 15(a) of the voluntary *UN Guiding Principles*. The class is split into small groups, with different sides outlining the risks in adopting and not adopting such a public policy commitment. Each side also provides recommendations on how to mitigate such risks. While it might be assumed that a company should automatically adopt such a policy, there are implications if there is not a

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37. BA (Hons), LLB, LLM, PhD/SJD. Liao is Assistant Professor at University of Victoria, Faculty of Law.

38. *Canada Business Corporations Act,* RSC 1985, c C-44, s 122.

39. *Ibid*, s 241.

40. 2004 SCC 68, 3 SCR 461.

41. 2008 SCC 69, [2008] 3 SCR 560.

42. *United Nations Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"*, OHCR, 2011, UN Doc HR/PUB/11/04, (2011).

43. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 107th Plen Mtg, UN Doc A/61/295 (2007).

44. 2013 ONSC 1414, [2013] OJ No 3375.

system in place to support it. The discussion has implications for the enforcement of Aboriginal rights and the complexities surrounding competing stakeholder interests.

With respect to board diversity, I address how, in 2014, most Canadian provincial securities commissions passed regulations requiring public companies to disclose their policies and approach to gender diversity on their boards of directors and in senior management. While arguments for including women on boards are well established, other kinds of diversity, particularly visible minorities and Aboriginal peoples, have not received the same attention. In 2015, visible minorities held 7.3% of FP500[45] board seats–Aboriginal peoples held 1.3%.[46] I discuss with my students how representation on boards may be particularly important in companies where certain stakeholders are highly relevant to corporate decision-making. For example, engaging with Indigenous peoples is essential for project development by resource companies, particularly in light of the Supreme Court of Canada's decision in *Tsilhqot'in Nation v. British Columbia*,[47] and companies should be responding to this reality by having Indigenous representation on their boards.

The integration of Aboriginal legal issues into this mandatory business course is a work in progress. Among other things, I plan on inviting a guest speaker (as others have recommended) to discuss forms of business associations specific to, or used frequently by, Aboriginal communities, such as Indian bands. I have also invited students to suggest other ways to improve the curriculum to better respond to Call to Action 28. I found the discussions from students who approached me to be immensely helpful in gaining a better understanding of the issues affecting Indigenous communities today.

Business Associations & the Story of Professional Native Indian Artists, Inc.
Gail Henderson (Queen's University)[48]

Representations matter. Part of my job as a law professor is to ensure that students see themselves represented in the course materials in as many different roles as possible. In the introductory Business Associations course,[49] the "characters" in the cases taught[50] continue to be majority male and white. Recently, I have been thinking about how to ensure that students who identify as First Nations, Inuit, and Métis see themselves represented in my course materials.

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45. FP 500 refers to the 500 largest Canadian companies by revenue.

46. Canadian Board Diversity Council, "2015 Annual Report Card," online: Canadian Board Diversity Council <boarddiversity.ca/sites/default/files/2015-Annual-Report-Card.pdf> at 9.

47. 2014 SCC 44, [2014] 2 SCR 257. See also *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] FCJ No 705.

48. BA (Hons), LLB, LLM, SJD. Henderson is Assistant Professor at Queen's University Faculty of Law.

49. The introductory class to forms of business organization, focusing on corporations, goes by different names across the country. At the University of Alberta, where I taught the class for four years, the class is called "Corporations", although the syllabus always incorporates sole proprietorships and partnerships. At Queen's University, the class is titled Business Associations.

50. Mary Joe Frug, "Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985) 34 Am U L Rev 1065 at 1077.

This thinking was prompted in part by a visit to the Art Gallery of Alberta to see the exhibit "7: Professional Native Indian Artists Inc.", a collection of works by Potawatomi, Ojibway, Dene, Cree, and Pueblo artists, sometimes referred to as either the Native or the Indian Group of Seven,[51] who came together in the early 1970s. The group included Norval Morrisseau and Alex Janvier, names familiar to Canadian art gallery-goers. The exhibit was beautiful and exhilarating, but I fixated on the "Inc." in Professional Native Indian Artists Inc. ("PNIAI").

The artists were frustrated with curators treating contemporary art by Indigenous artists as "craft" or as relic, and excluding their work from galleries.[52] The idea for PNIAI grew out of conversations among artists who sold their works through Odjig Indian Prints of Canada Limited in downtown Winnipeg, owned by artist Daphne Odjig. Indeed, PNIAI eventually became a corporation.[53] As member Joseph Sanchez describes, "We had no intention of creating a corporation, it just happened over a period of years of showing in Daphne's house and gallery."[54] The more senior artists–Odjig, Morrisseau, and Janvier–used the group to force galleries to exhibit works of the other members.[55] Exhibitions in Toronto, Ottawa, Vancouver, and a particularly important exhibition at the influential Dominion Gallery in Montreal, the latter with the aid of Indian Affairs,[56] led to more interest in Indian art as *art*.[57]

The group was legally incorporated on April 1, 1975, with the help of law firm Martens and Dennehy, after Consumer and Corporate Affairs required revisions to their original incorporation documents submitted in 1974.[58] The name on the incorporation documents was Anisinabe Professional Native Indian Artists Incorporated. The objectives of the corporation included in the articles of incorporation were:

> …to facilitate, aid, publicize, and promote Native Indian art and culture and create incentives for young artists;
>
> …to provide for the holding of art displays, education lectures, exhibitions, public meetings, workshops, classes and conferences on Native Indian art and culture both nationally and internationally.

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51. Michelle LaVallee, "7: Professional Native Indian Artists Inc" in Michelle LaVallee, ed, *7: Professional Native Indian Artists Inc* (MacKenzie Art Gallery, 2014) 45 at 63 [7].

52. Joseph Sanchez, "The Formation of Professional Native Artists Inc, The Indian Group of Seven" in Bonnie Devine, ed, *Witness* (Aboriginal Curatorial Collective and Witness, 2009) 20 at 21, online: Aboriginal Curatorial Collective and Witness <www.aboriginalcuratorialcollective.org/wordpress/wp-content/uploads/2013/01/ACC-witness.pdf>. ("We wanted acceptance as artists in our own right and spoke to the fact that Native arts were relegated to craft stores and tourist shops but not museum exhibitions.").

53. Thanks to Carolyn Jervis of the Art Gallery of Alberta in Edmonton for confirming this fact and for pointing me in the direction of the excellent exhibit catalogue.

54. Sanchez, *supra* note 52 at 22.

55. 7, *supra* note 51 at 52–53.

56. Lee-Ann Martin, "Early Adventures in the Mainstream: Alex Janvier, Norval Morrisseau, and Daphne Odjig 1962-1975" in 7, *supra* note 51 at 216–17.

57. Vivane Gray, "The New Group of Seven: A Reaction to the State of Indian Art in Canada in the Sixties and Seventies" in 7, *supra* note 51, 233 at 242.

58. 7, *supra* note 51 at 58.

> …to establish, construct, provide, endow, equip, operate, maintain and manage, all without pecuniary gain to any of its members, educational activities and facilities for the study of Native Indian art and culture.
>
> …to establish bursaries, awards, scholarship funds and other forms of incentive programs to assist in the development of amateur Indian Artists.[59]

PNIAI was, in the words of member Joseph Sanchez, "a western-named corporation with an Indigenous heart."[60]

Hopes for government funding for the group were unfulfilled; on one occasion, the Canada Council turned them down on the basis that the Council dealt only with individuals.[61] The fact that its members lived in different cities also strained their ability to keep the group together. PNIAI was dissolved as a legal entity in 1979, for failing to file documents in the previous two years.[62]

The story of PNIAI could serve several purposes in a Business Associations class. First, the formation of PNIAI can be viewed as an exercise of "rhetorical sovereignty",[63] which allowed the artists to act together to challenge the racism facing Indigenous artists. Second, the story of PNIAI represents Indigenous people as agents in their own business venture. Odjig also represents an important example of a woman as a business actor.[64] Finally, it provides a concrete historical example of the type of social enterprise now formalized in the British Columbia *Business Corporations Act*[65] establishing "community contribution companies" ("C3") as a new type of corporate entity. For students, PNIAI illustrates what a social enterprise is and to what ends it might be used. Students might be asked to explore whether the C3 is more compatible with Indigenous laws and traditions than traditional forms of business organization.[66]

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59. *Ibid* at 59.

60. Joseph Sanchez, "The Native Group of Seven aka Professional Native Indian Artists Inc" in 7, *supra* note 51, 187 at 189. On the other hand, Odjig found the corporate structure constraining: "We didn't want a president, a secretary…We just wanted to meet together."

61. 7, *supra* note 51 at 61.

62. *Ibid* at 62. There is no certificate of dissolution.

63. Cathy Mattes, "'Winnipeg, Where it All Began' – Rhetorical and Visual Sovereignty and the Formation of the Professional Native Indian Artists Incorporated" in 7, *supra* note 51, 219 at 219–22 (defining "rhetorical sovereignty" as actions aimed at determining the public discourse about one's people, which is interconnected with "visual sovereignty", the "creative act of self-representation."). See also 7, *supra* note 51 at 57 ("Self-determination and self-definition were at the heart of the PNIAI.").

64. Carmen Robertson, "Paper Trail: PNIAI Artists in Winnipeg Newspapers, 1966-1977" in 7, *supra* note 51, 225 at 230.

65. SBC 2002, c 57, Part 2.2. See also Nova Scotia's *Act Respecting Community Interest Companies*, SNS 2012, c 38.

66. See e.g. Truth and Reconciliation Commission of Canada, *supra* note 1 at 18 (briefly discussing Indigenous laws regarding their relationship with nature).

III THEMES AND TENTATIVE CONCLUSIONS

In attempting to respond to Call to Action 28, many of us started with what might be considered basic concepts, but concepts that are not always covered in the traditional course materials, namely how corporate and commercial statutes interact with relevant provisions of the *Indian Act*. Specifically, faculty teaching commercial law courses dealing with secured debt, or corporate law courses dealing with corporate finance, might cover restrictions on taking security in property on reserve and how this affects individuals living on reserve as well as Aboriginal businesses and Aboriginal economic development. As some of the contributions above discuss, this seems only to scratch the surface and perhaps insufficiently challenges the status quo. These interventions and innovations are best viewed as a starting point, with a real awareness that more needs to be done.

Nevertheless, one of the important themes of the roundtable discussion was the need to incorporate this basic material into our courses to ensure that students are able to help their clients–-whether they are First Nations, Indigenous business people, governments, corporations or nonprofit organizations–-respond to the other Calls to Action. Graduating students who lack knowledge about these topics restricts the supply of lawyers who can competently advise clients in this area, and makes it more difficult, or at least more expensive, for Indigenous communities to engage in corporate and commercial ventures.

One of the important questions raised in the roundtable discussion was how to frame material on reconciliation and other issues in the context of the course as a whole; specifically, how to do this so that it is viewed by the students as essential, rather than peripheral. Not all students understand the importance or relevance of the TRC, and some may be skeptical and frustrated that coverage of Aboriginal people and the law is taking time away from "real" issues in a course. It is important to signal from the start of the course that Indigenous legal issues are not a separate silo from corporate and commercial issues.

One tactic was to emphasize the usefulness of the information, by reminding students that they may act for, or opposite, Aboriginal clients, and would need to understand the special laws that can apply to corporate and commercial dealings on reserve. Such a framing tactic appeals to learners' instrumental motivations, even if they do not come to the class with an interest in Indigenous legal issues. Additionally, for those students who are interested in Aboriginal people and the law, it invites them to think more broadly about the practice areas in which they can pursue this interest.

A second framing tactic was to draw an explicit connection between the course content and the TRC report, for example, by explaining that the TRC has called on the entire legal profession to be part of the project of reconciliation, and that coverage of Aboriginal people and the law was a small part of that project. The creation of a mandatory first year course in Aboriginal people and the law may help to ensure that students coming into upper year corporate commercial courses already have an understanding of the TRC and its Calls to Action.

A difficulty professors face is to explain what reconciliation is, and how education on topics of Aboriginal law advances the project.[67] Lawyers like definitions, and law students

67. The TRC "defines reconciliation as an ongoing process of establishing and maintaining respectful relationships." Truth and Reconciliation Commission of Canada, *supra* note 1 at 16.

in particular are eager for conceptual clarity, but reconciliation is a term that defies precise delineation. Rather than attempt to create artificial certainty around what reconciliation means, faculty might instead invite students to engage with the inherent ambiguity of the project. The legal profession and the broader Canadian society have been called on to respond, and have been offered a number of discrete suggestions about what form responses should take, but much remains to be determined as we work individually, and together as communities, to implement the TRC's recommendations.

Art can be an effective tool for inviting students to engage with ambiguity, and to "explore their own worldviews, values, beliefs and attitudes."[68] For example, Alex Janvier's painting "Blood Tears" can be used to make inroads into a discussion on reconciliation. Mr. Janvier painted "Blood Tears" while he was in his sixties, reflecting back on his experiences as a student at the Blue Quill Indian Residential School: it is both "a statement of [his] sense of loss, and a celebration of his resilience."[69] On the back of the painting, Mr. Janvier lists the losses he experienced.[70] One of the roundtable participants described a student beginning a class presentation by reading part of this list to the class. It was an evocative opener, which reasserted the incredible need for healing at the level of the individual and the community.

Another theme emerging from the roundtable discussion and the contributions is that the TRC's Call to Action may be an invitation to think more broadly and creatively about the content of a course. For instance, professors teaching business associations may wish to provide detailed instruction on forms of organization other than the corporation, such as cooperatives and partnerships. This broadened approach may encourage law students to imagine new ways of doing business, which ultimately will benefit all future clients, including Indigenous ones.

A final theme that emerged repeatedly at the roundtable, and throughout the TRC-focussed sessions at the CALT conference, was that many non-Aboriginal professors feel fear—or at least anxiety—at the prospect of providing greater coverage of Aboriginal people and the law in their courses. The fear seems to stem from a concern that professors might unknowingly make a serious misstep, say something unintentionally insensitive, or even racist, or respond in a way that reifies, rather than challenges colonial power dynamics.

Fear can be paralyzing, and there is a real risk that professors may allow their fear of making mistakes to translate into complacency with the status quo. As professors respond to the TRC's Calls to Action it is necessary to undertake the personal work of understanding colonialism, the history behind the residential school system, and the meaning of reconciliation with Indigenous communities. For many professors, developing an adequate response to the TRC will require them to educate themselves about new areas of law, and new legal traditions that may have very different epistemological and ontological bases than Anglo common law.

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68. Truth and Reconciliation Commission of Canada, *supra* note 1 at 280. See also Benjamin Berger, "Building Negative Capability–The Task of Legal Education" (Presentation delivered at the Canadian Association of Law Teachers Annual Conference, Winnipeg, 8 June 2014) [unpublished].

69. Marlene Brant Castellano, Linda Archibald & Mike DeGangé, "From Truth to Reconciliation: Transforming the Legacy of Residential Schools" (2008) Aboriginal Healing Foundation, online: Aboriginal Healing Foundation <www.ahf.ca/downloads/from-truth-to-reconciliation-transforming-the-legacy-of-residential-schools.pdf>.

70. See *ibid* at xi where the list is recreated.

This is a daunting challenge, and we have a lot of learning to do. Faculty may teach themselves by undertaking new research projects on the intersection of Indigenous law and corporate commercial topics. But reconciliation is about (re)building relationships, and at least some of this learning will only be possible if professors foster relationships.[71] They can engage with Indigenous communities. They can reach out to people with expertise on, or experience with, corporate commercial law's impact on Aboriginal people. They also can consult, collaborate and share ideas with each other, as we have done here.

[71] Truth and Reconciliation Commission of Canada, *supra* note 1.