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Tsilhqot'in Nation v. British Columbia: Is It a Game Changer in Canadian Aboriginal Title Law and Crown-Indigenous Relations?

by Bradford W. Morse

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TSILHQOT'IN NATION v. BRITISH COLUMBIA: IS IT A GAME CHANGER IN CANADIAN ABORIGINAL TITLE LAW AND CROWN-INDIGENOUS RELATIONS?

*by Bradford W. Morse**

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I INTRODUCTION

The Supreme Court of Canada (SCC) rendered an absolutely groundbreaking decision on June 26, 2014 in the case *Tsilhqot'in Nation v. British Columbia* (*Tsilhqot'in Nation*).[1] The decision quickly attracted massive publicity[2] as it is the first time in Canadian history in which the highest court issued a specific declaration that Aboriginal title continues to exist today. The ruling effectively removes the power of the province to authorize logging without the consent of the Aboriginal title holders unless it can justify its actions under s. 35(1) of the *Constitution Act, 1982*. It is worth noting that the Government of British Columbia (B.C.) has yet to seek to do this since the Court unanimously pronounced that the Tsilhqot'in Nation held Aboriginal title over 1700 km^2 of land in a relatively remote area of south central British Columbia 200 km west of the town of Williams Lake. This land forms a significant part of the traditional territory of the Tsilhqot'in Nation, which consists of six distinct First Nations recognized as "bands" under the *Indian Act* with approximately 3000 members.

II BACKGROUND TO THE DECISION

The Tsilhqot'in Nation (previously called "Chilcotin" by outsiders) constitutes a distinct people who have occupied a valley bounded by mountains and blessed with rivers in the Chilcotin Plateau region of B.C. since time immemorial. It is an area that has been somewhat isolated and difficult to access since long before Europeans arrived. While possessing fish, animals, forests, and other resources, it is an arduous terrain relatively far from major trading routes and has never supported a large population. Like most First Nations in B.C., the Tsilhqot'in Nation never entered into a treaty with either Britain or the government of Canada. Unlike many B.C. First Nations, however, they faced little interference of settler migration into their territory wanting quality farmland, nor major resource developers seeking mineral or timber wealth. Given the remoteness of the Tsilhqot'in Nation, there was little pressure on the Crown to extinguish their Aboriginal title to their traditional territory by purchase or treaty so as to smooth the path for outside interests to transform their valley.[3]

A. The Beginning of the Dispute

On December 9, 1983, the government of B.C. granted a forest licence to Carrier Lumber Ltd. to cut five-million cubic metres of timber over a ten-year period without any prior discussion or consultation with the Tsilhqot'in Nation. Complaints from Tsilhqot'in people to the B.C. government were ignored and proposals for a more sustainable approach to logging were rejected by Carrier. The company proceeded with the creation of modular lumber mills, road improvement and logging plans. Carrier's actions were met with resistance, with the first

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1. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in* SCC].

2. The significance of the decision is evident by the Wikipedia page for the decision. Further, a Google search of the case name generates 52 100 hits in 0.40 seconds. See "Tsilhqot'in Nation v British Columbia", online: Wikipedia <en.wikipedia.org/wiki/Tsilhqot'in_Nation_v._British_Columbia>.

3. *Tsilhqot'in* SCC, *supra* note 1 at paras 3–6. See also Robert B Lane, "Tsilhqot'in (Chilcotin)" in *Canadian Encyclopedia*, online: Historica Canada <www.thecanadianencyclopedia.ca/en/article/chilcotin-tsilhqotin/>.

road blockade established by the Ulkatcho Indian Band on July 17, 1989.[4] A second blockade was launched three years later by the Xeni Gwet'in First Nation to block a bridge that the company needed to use to access a major logging site. The Xeni Gwet'in, one of the six First Nations that comprise the Tsilhqot'in National Government, took a lead role in protesting what they saw as an unauthorized invasion of their homeland. The B.C. Premier stepped in on May 13, 1992 to defuse the situation and promised that no further logging would occur without the consent of the Xeni Gwet'in.[5] The province subsequently terminated Carrier's licence. Negotiations ensued between parts of the Tsilhqot'in Nation and the Ministry of Forests over several years but ultimately broke down when the government refused to grant a right of first refusal over any logging.

The Xeni Gwet'in, under Chief Roger William's guidance, launched litigation in the B.C. Supreme Court (BCSC) on April 17, 1990 to block any timber harvesting that would negatively impact their traplines. This claim was later amended in 1998 to include an assertion of Aboriginal title on behalf of the entire Tsilhqot'in Nation covering 4381 km^2, roughly five percent of their traditional territory. The pre-trial process was prolonged and expensive. Fundraising efforts by the Tsilhqot'in Nation were quickly proven to be inadequate as the bills mounted.[6] As an example, Chief Roger William was asked 11 042 questions over twenty-eight days of cross-examination in pre-trial discoveries (none of the answers were used during his forty-six days on the witness stand).[7] Justice Vickers of the BCSC granted a motion filed by the Nation on November 27, 2001 directing the province to pay "all reasonable disbursements" and to share equally all future costs of the plaintiffs.[8] The decision was appealed all the way to the SCC but was sustained.[9] This still left the Tsilhqot'in with significant financial pressures and it is believed that their lawyers generally worked for fifty-percent of their normal fees.[10]

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4. The Ulkatcho Indian Band are comprised of members of the Ulkatchot'en ethnic group, which is a subgroup of the Carrier (Dakelh) Nation, and are neighbours of the Tsilhqot'in Nation at the western edge of the Chilcotin District. Some members are Tsilhqot'in people. See Ulkatcho First Nation, online: <carrierchilcotin.org/ulkatcho-first-nation/>.

5. See *Carrier Lumber Ltd v British Columbia*, 47 BLR (2d) 50, [1999] BCJ No 1812 (for details of the blockades, government promises, terms of the licence that was issued and later cancelled by the Crown, and the lumber company's successful lawsuit against the provincial government for damages).

6. CLEBC, "Rejection of the 'Postage Stamp' Approach to Aboriginal Title: The Tsilhqot'in Nation Decision", online: CLEBC <https://www.cle.bc.ca/PracticePoints/REAL/01%2030%20Tsilhqotin.pdf> at 15.

7. Aboriginal Mapping Network, "Decision Reached in Historical Land Claim Case: Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700" (21 November 2007), online: Aboriginal Mapping Network <nativemaps.org/node/2809>. Chief William spent a further forty-six days giving evidence during the trial. Night sittings were held in Victoria so Elders could share sacred knowledge through stories that could only be told after dark.

8. *Nemaiah Valley Indian Band v Riverside Forest Products Ltd*, 2001 BCSC 1641 at para 35, 95 BCLR (3d) 371.

9. *Tsilhqot'in Nation v Canada (Attorney General)*, [2002] SCCA No 295, relying on the earlier decision in *British Columbia (Minister of Forests) v Okanagan Indian Band,* 2003 SCC 71, [2003] 3 SCR 371.

10. A series of actions were brought seeking an order for prepayment of the plaintiffs' interim legal fees and disbursements, culminating in *William et al v HMTQ et al*, 2004 BCSC 610. The order was for the Crown to pay 100% of disbursements and legal fees at 50% of special costs.

B. Decisions of the Lower Courts

The trial began in 2002 and continued over a five-year period involving three hundred and thirty-nine days of court time and an estimated cost of approximately thirty-million dollars.[11] Those court days do not include the ten pre-trial motions brought by the federal and provincial Crowns to have the case dismissed. Vickers J. devoted a major part of his judicial life to this case, including visits to many places within the lands claimed and hearing evidence in the traditional territory. He listened to extensive oral testimony over many days from Tsilhqot'in elders, as well as other experts, and saw first-hand both the rugged nature of the terrain as well as the visible evidence of usage of specific sites.[12]

In November 2007, Vickers J. concluded that the evidence in support of Aboriginal title was compelling for roughly thirty-percent of the territory sought, along with a small area within their traditional territory but not claimed in the lawsuit.[13] He ultimately decided that he could not issue a declaration confirming that title for procedural reasons (based on arguments later dropped by the Crown on appeal); however, he provided extensive comments about the nature of Aboriginal title, the legal test required to be met, the evidence submitted, and his assessment of the strength of the claim. He further declared that the Tsilhqot'in people have "an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses."[14] In his view, their Aboriginal rights were protected by s. 35 of the *Constitution Act, 1982*,[15] which included a commercial right to earn a moderate livelihood through hunting and trapping.[16]

Members of the Tsilhqot'in Nation were pleased overall with the comments made by Vickers J. about their proof of Aboriginal title over part of their territory; however, they appealed in order to obtain a final ruling that pertained to their entire territory. They did not want to start again with another protracted trial and the Court had still only confirmed evidence for thirty-percent of their land. Both the federal and B.C. governments also appealed as they were unhappy with the Aboriginal rights finding along with the permission granted to the plaintiffs to relaunch their lawsuit for damages and title, among various other rulings.

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11. Aboriginal Law Group, "The Tsilhqot'in Nation v. British Columbia Case: What It Means and What It Doesn't Mean", Case Comment by Lawson Lundell LLP, online: World Services Group <www.worldservicesgroup.com/publications.asp?action=article&artid=2189> [Aboriginal Law Group]. See also Blake, Cassels & Graydon, "The Tsilhqot'in Nation Decision on Aboriginal Title and Right", Case Comment on *Tsilhqot'in Nation v British Columbia*, online: NationTalk <nationtalk.ca/story/the-tsilhqotin-nation-decision-on-aboriginal-title-and-right>.

12. *Tsilhqot'in* SCC, *supra* note 1 at para 7.

13. *Tsilhqot'in Nation v British Columbia,* 2007 BCSC 1700, [2007] BCJ No 2465 [*Tsilhqot'in* BCSC]. For a detailed review of this trial decision, see Dwight G Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v British Columbia*" (2008) 41 UBC L Rev 249.

14. *Tsilhqot'in* BCSC, *supra* note 13 at para 1240. In the Executive Summary of the decision at p vi, Vickers J adds to this statement by saying, "This right is inclusive of a right to capture and use horses for transportation and work."

15. *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the section states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed").

16. *Tsilhqot'in* BCSC, *supra* note 13 at paras 1242–65.

The formal decision on Aboriginal rights and title was upheld by the B.C. Court of Appeal (BCCA) in 2012; however, that Court took a markedly narrower view on the legal test for Aboriginal title.[17] It concluded that previous Canadian law indicated Aboriginal title only existed at specific locales where the occupation of the land that existed pre-Crown sovereignty assertions was used so intensely as to be similar in nature to permanent usage. The Court cited examples such as village sites, "salt licks" and "particular rocks or promontories used for netting salmon."[18] The national political voice of federally recognized First Nations in Canada, the Assembly of First Nations, commented on the decision in these words:

> The BCCA justified its "postage stamp" approach expressly because of its stated desire to avoid "unnecessarily interfering with Crown sovereignty and the well-being of all Canadians." This justification is not consistent with the principles of reconciliation but is instead a denial of First Nations' rights, including Aboriginal title.[19]

The BCCA upheld all aspects of the trial judge's rulings on the scope of Aboriginal rights possessed by the plaintiffs, including that the provincial government had breached them. However, neither Court provided an explicit remedy for that breach. The Tsilhqot'in Nation appealed again as their goal of obtaining recognition that this was their land and that they should have significant power in determining its usage remained unachieved.

C. The Evolution of the Aboriginal Title Doctrine in Canada

Canadian law has flip-flopped over the generations when it has come to addressing the major legal questions regarding the nature of Indigenous-settler relations. Our courts have yet to declare definitively what rights the original peoples of Turtle Island still retain over their historic lands and waters, although it has been making some significant steps in this regard in recent years. Similarly, resolving which governments among the three competing ones have what precise jurisdiction in relation to the peoples and territories within Canada remains unresolved. At the same time, our society has yet to clarify under whose legal system—Indigenous or imported—that these critical issues should be decided. On the one hand, Canada has never been as regressive as Australia was from settlement in 1788 through asserting that the continent was *terra nullius*, or effectively vacant, when the British arrived. Despite the fact that Aboriginal peoples had resided there for over forty-thousand years, they were viewed as possessing no sense of land ownership, no government, and no legal system.[20] On the other hand, Canadian governments and courts did not adopt the approach of the Supreme Court

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17. *Tsilhqot'in v British Columbia*, 2012 BCCA 285, 33 BCLR (5th) 260 [*Tsilhqot'in* BCCA].

18. *Ibid* at para 221.

19. Assembly of First Nations, Background Information, "Backgrounder: William Case" (30 October 2013), online: Assembly of First Nations <www.afn.ca/uploads/files/13-10-30_backgrounder_tsilhqotin_nation_fe.pdf>.

20. This situation only changed when the Australian High Court decisively rejected the application of the doctrine of *terra nullius* in *Mabo v Queensland (No 2)*, (1992) 107 ALR 1, (1992) ALJR 408 (Aus HC) [*Mabo No* 2]. The Court instead recognized the common law doctrine of Aboriginal title, as developed in the United States and Canada, along with recognizing that Indigenous Australians had long standing legal systems of their own.

of the United States (SCOTUS) in its trilogy of decisions from 1823-32.[21] American law recognized Indian title as being different from but "as sacred as the fee simple of the whites."[22] Indian Nations were described by the SCOTUS as previously independent nations who had been transformed into "domestic dependent nations"[23] by the tides of history washing over the land through the superior size and might of the immigrants.

Instead, our courts have shied away from addressing the toughest issues, such that the sovereign status of First Nations and the legal status of the right to Aboriginal self-government remain effectively untouched by judicial scrutiny. In 1888, the Judicial Committee of the Privy Council in London ruled that Aboriginal title was merely "a personal and usufructuary right, dependent upon the goodwill of the Sovereign",[24] whose good will has frequently been absent. As the SCC declared in 1990, there "can be no doubt that over the years the rights of the Indians were often honoured in the breach."[25] Subsequently, in *R. v. Pamajewon*,[26] the SCC dodged addressing the substantive argument as to whether s. 35(1) included the inherent right of self-government on the basis of insufficient evidence in the case at hand. As a result, the Canadian courts have ignored analyzing the legality of the Crown's bold assertion of its overarching sovereignty and its underlying title to all of Canada. It naturally then flows from this that our judiciary has not questioned the legitimacy of the prevailing legal system's imposition on top of pre-existing longstanding legal regimes.

The SCC did dramatically change the legal landscape beginning with its decision in the *Calder* case in 1973, in which six of seven judges declared that "aboriginal title" was recognized by the common law as it existed in Canada, although they split evenly on whether general colonial legislation had indirectly extinguished the title of the Nisga'a Nation that had brought the appeal.[27] The existence of Aboriginal title in Canadian common law was reaffirmed by the same court in *Guerin*, where the federal government was held to be in a fiduciary relationship with Aboriginal peoples and had breached its obligations so that it was liable for ten-million dollars in damages to the Musqueam First Nation.[28] The *Delgamuukw* decision[29] in 1997 was even more important as it articulated a clear and reasonably straightforward three-part conjunctive test for establishing Aboriginal title:

> [T]he aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity

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21. *Johnson v M'Intosh*, 21 US (Wheat) 543 (1823); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) [*Cherokee Nation*]; *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

22. *Mitchel v United States*, 34 US (9 Pet) 711 (1835) at 746.

23. *Cherokee Nation*, *supra* note 21 at 17.

24. *St Catharines Milling and Lumber Company v The Queen*, (1889) LR 14 App Cas 46 at para 7, 1888 CarswellOnt 22, Watson LJ.

25. *R v Sparrow*, [1990] 1 SCR 1075 at 1103, 70 DLR (4th) 385 [*Sparrow* cited to SCR].

26. [1996] 2 SCR 821, 138 DLR (4th) 204.

27. *Calder v British Columbia (Attorney-General)*, [1973] SCR 313, 34 DLR (3d) 145. The Nisga'a Nation ultimately lost its appeal as the seventh judge, Justice Pigeon, concluded that the appeal must be dismissed on procedural grounds without ruling on the merits of the Aboriginal title claim.

28. *Guerin v Canada,* [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*].

29. *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

> between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[30]

The *Delgamuukw* judgment reversed a decision of the BCSC that had confined Aboriginal title solely to village sites and other locations of very intensive and ongoing use.

In 2005, the same SCC, in its judgment in *Marshall and Bernard*,[31] seemed to embrace the view espoused by the trial judge which was rejected by the Court in *Delgamuukw*. Chief Justice McLachlin, for the majority, reinstated the convictions previously reversed by the Nova Scotia and New Brunswick Courts of Appeal. She declared that proving Aboriginal title required the claimant to demonstrate "possession similar to that associated with title at common law."[32] She concluded that there was inadequate proof of sufficient occupation to meet the test for title on the facts of the two separate cases joined on appeal. This conclusion was despite the evidence in *Bernard* that clearly showed the Mi'kmaq had been present in the area for 2500 years and the logging site in question in New Brunswick was near an existing reserve that itself reflected a longstanding semi-permanent village with a burial site nearby. At the very least, the strong impression left by the decision was that possession required a level of intensity analogous to villages and enclosed farms as required at common law for adverse possession claims. Both governments heavily emphasized such a reading before the BCCA and Justice Groberman, for the unanimous Court, relied on her statements when he said:

> While...there is no reason that semi-nomadic or nomadic groups would be disqualified from proving title, their traditional use of land will often have included large regions in which they did not have an adequate regular presence to support a title claim. That is not to say, of course, that such groups will be unable to prove title to specific sites within their traditional territories.[33]

III THE STAGE IS SET AT THE SUPREME COURT OF CANADA

Oral argument was presented before the SCC on November 7, 2013. The appeal attracted a large number of interveners including five provincial governments (Alberta, Saskatchewan, Manitoba, Ontario, and Quebec), many regional and national First Nations organizations and individual First Nations, five associations of natural resource companies, and two other non-governmental organizations. The journey by Tsilhqot'in elders from their traditional lands to the SCC building in Ottawa was captured on film and is available on the Internet.[34] The judgment, authored by McLachlin C.J., can definitely be seen as an answer to their prayers.

The unanimous judgment really concentrates on three main issues: (1) identifying the proper test for Aboriginal title in Canada in 2014 and whether it was met by the evidence

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30. *Ibid* at para 143, Lamer CJC.

31. *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall and Bernard*].

32. *Ibid* at para 54.

33. *Tsilhqot'in* BCCA, *supra* note 17 at para 222.

34. Jeremy Williams, "Tsilhqot'in Journey for Justice (part 1 of 3)" (October 31, 2013), online: YouTube <www.youtube.com/watch?v=QbjIPGqOaMs&feature=youtu.be> (subsequent parts to this video have also been posted on YouTube).

adduced at trial; (2) what rights do titleholders possess; and (3) what is the impact of existing Aboriginal title rights on provincial government jurisdiction and legal interests in those lands. The Court reversed the BCCA's view of the Aboriginal title doctrine and largely agreed with Vickers J. except that the SCC was freed of the procedural shackles that had restrained the trial judge from granting the declaration sought.

IV CHANGING THE LEGAL LANDSCAPE

A. Test for Aboriginal Title

After briefly reviewing the historical record, key prior decisions, and providing pleading guidance for future Aboriginal title cases all in twenty-three paragraphs, McLachlin C.J. turned her attention to the question of how to apply the three-part Aboriginal title test from *Delgamuukw*[35] into assessing the claim of a "semi-nomadic indigenous group."[36] The specific stress on the Tsilhqot'in Nation as semi-nomadic could have led to a simple reaffirmation of the *Marshall and Bernard*[37] cases, or their reconsideration, as the Mi'kmaq peoples involved in those two cases were described as "moderately nomadic" and "semi-nomadic." Instead, she stated this question had never previously been directly answered by this Court, thereby opening the field for a first consideration.[38] McLachlin C.J. concluded that the BCCA's approach would result "in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping"[39] in contrast to the trial judge's recognition of beneficial rights to the much larger territory that had been traditionally and exclusively used.

The distinction between the two extremes turned on the aspect of "sufficiency of occupation." In other words, how *intensively* must the land have been used before the Crown claimed sovereignty? Relying upon a decision of the High Court of Australia,[40] she concluded that the three characteristics of necessary occupation (being (1) sufficient; (2) continuous; and (3) exclusive) should be viewed together, but in a way that does not lose the Aboriginal perspective through focussing solely on "common law concepts."[41] The Indigenous nation looks to its own system of "laws, practices, customs and traditions of the group"[42] while European views stress possession and control of territory. The *Delgamuukw* Court stated that the search for the appropriate answer in any particular case must consider the particular group's circumstances in relation to its size, technology, lifestyle, resources available in their traditional territory and its natural geography, as these factors will affect the degree to which they could intensively use any portions of their land. The evidence indicated that the Chilcotin Plateau's weather and resources were such that only one hundred to one thousand people could

35. *Delgamuukw*, *supra* note 29 at para 143.

36. *Tsilhqot'in* SCC, *supra* note 1 at para 24.

37. *Marshall and Bernard*, *supra* note 31.

38. *Tsilhqot'in* SCC, *supra* note 1 at para 24.

39. *Ibid* at para 29.

40. *Western Australia v Ward*, [2002] HCA 28, (2002) 191 ALR 1.

41. *Tsilhqot'in* SCC, *supra* note 1 at para 32.

42. *Ibid* at para 35, citing *Delgamuukw*, *supra* note 29 at para 148.

be supported there, and thus less intense use was to be expected. Less intensity does not mean invisibility, however, as McLachlin C.J. stressed that the presence on the land must be obvious to any outsiders who would conclude the territory was occupied by some group of people.[43]

Ironically, in doing so in *Tsilhqot'in Nation* the Chief Justice adopted Justice Cromwell's reasoning in *Marshall* from the Nova Scotia Court of Appeal,[44] which the SCC had previously reversed on appeal through her majority judgment on the wide range of acceptable forms of possession recognizable at common law that could be accepted as proof of Aboriginal title.[45] In *Tsilhqot'in Nation* she advocated for a "culturally sensitive approach" that would reflect the importance of embracing both common law views of sufficient possession for its purposes but also Aboriginal perceptions of what constituted possession of land under their legal systems.[46] The latter would include recognition of subsistence harvesting over a broad swath of land so long as it was regularly possessed in a way that displayed the intention to control the behaviour or access of any outside users.[47]

The second element that must be proven is to show the occupation of current Aboriginal residents is connected to those people who were residents when the Crown asserted its sovereignty over the lands. This does not necessitate having to demonstrate "an unbroken chain of continuity" but the extent and nature of any break in time is left undiscussed.[48]

The final requisite is that exclusive occupation must be proven. As the Court stated in *Delgamuukw*, "exclusive" does not equal "sole" as that Court indicated shared exclusivity could occur. In other words, the jurisprudence suggests two things: (1) that the Indigenous occupation prior to the arrival of colonization must not have co-existed with non-Aboriginal peoples; and (2) the Aboriginal group must have viewed itself as being both in control of the land and capable of excluding others whenever they wished. This latter aspect meant that they could also choose to share some of their territory with other Indigenous peoples and allow passage through their territory on whatever terms they set.

The Court concluded that the trial judge was correct in his assessment of the evidence as proving sufficiency of occupation, continuity, and exclusivity to warrant Aboriginal title over some parts of the territory. The SCC upheld the appeal on the basis that Vickers J. was correct in his interpretation of the sufficiency of occupation element in relation to the evidence, which thereby meant title was awarded over large areas of traditional territory rather than small islands of villages and other sites. McLachlin C.J. declared that proof solely of intensive presence on and usage of the land was in error as a "territorial use-based approach to Aboriginal title"[49] was the correct standard.

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43. *Tsilhqot'in* SCC, *supra* note 1 at para 38.

44. *R v Marshall*, 2003 NSCA 105, 218 NSR (2d) 78.

45. *Marshall and Bernard*, *supra* note 31 at para 41.

46. *Tsilhqot'in* SCC, *supra* note 1 at paras 41–42.

47. *Ibid* at para 50.

48. *Ibid* at para 46.

49. *Tsilhqot'in* SCC, *supra* note 1 at para 56, citing *Delgamuukw*, *supra* note 29.

B. Rights Conferred Before Title Proven

The SCC in *Tsilhqot'in Nation* reiterated principles from *Haida Nation*[50] and other key cases that stressed the spectrum analysis when considering what obligations are on the Crown when faced with an assertion that Aboriginal or treaty rights existed. Aboriginal title, like other Aboriginal rights, can exist prior to their official declaration by a Canadian court.[51] The onus is initially on the Aboriginal party to declare that they have rights protected by s. 35 *and* to offer enough evidence to raise a *prima facie* case such that the onus shifts to the Crown to respond. The government then "owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases."[52]

The Crown faces a clear risk in these circumstances if it does *not* obtain formal consent in writing from the Indigenous communities concerned. If it proceeds in a way that may damage the ability to exercise the Aboriginal or treaty rights in the future, or to enjoy fully any Aboriginal title that may be later proven to exist, then it is vulnerable to being sued for breaching its fiduciary duties, violating the honour of the Crown, and acting contrary to s. 35. The only salvation for the Crown could be if it can prove (1) the rights have been extinguished prior to April 17, 1982; (2) the Indigenous party surrendered or amended the rights willingly by agreement; or (3) the *Sparrow* justification test can be met. As the Court suggested, "appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim."[53] The balance of power shifts significantly once title is proven to remain in existence.

C. Rights Conferred When Title Proven

The SCC has reaffirmed in *Tsilhqot'in Nation* that the nature of the subsisting Aboriginal interest that burdens the Crown's underlying, or radical, title is an independent legal interest. Aboriginal title not only generates a fiduciary duty on the part of the Crown—as the Crown unilaterally claimed sovereignty and imposed itself as the only legal buyer of that interest, that had been first articulated in *Guerin*—but it also means that the Crown's authority is limited to circumstances where it can justify its encroachment. As McLachlin C.J. wrote: "In simple terms, the title holders have the right to the benefits associated with the land—to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land."[54]

This reflects a far, far more significant change in the law than a mere refinement to the test for Aboriginal title; it renders the legal import of a declaration that title exists potentially massive. The holders of continuing Aboriginal title have "ownership rights" that the judgment

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50. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 245 DLR (4th) 33 [*Haida Nation*].

51. This well-established principle was recently confirmed in *Saik'uz First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 at para 61, 76 BCLR (5th) 221.

52. *Tsilhqot'in* SCC, *supra* note 1 at para 91.

53. *Ibid*.

54. *Tsilhqot'in* SCC, *supra* note 1 at para 70, referencing *Guerin*, *supra* note 28.

states are "similar to those associated with fee simple" except that it is a communal or collective title.[55] These incidents of Aboriginal title include:

- "the right to decide how the land will be used;"
- "the right of enjoyment and occupancy of the land;"
- "the right to possess the land;"
- "the right to the economic benefits of the land;"
- "and the right to pro-actively use and manage the land."[56]

The latter incident is also framed as "the right to control how the land is used."[57] While this right, and the title itself, flows from the reality that First Nations were in full possession of the land as sovereign peoples before the Crown came along, their uses of their traditional territory is *not* limited to how they lived at the time of European contact. Instead, the Court declared that their position is effectively the same as that of any other Canadian. All landowners have the ability to alter land use patterns over time as technology, personal preferences, and economic factors change. It must be noted though that landowners in Canada are subject to local government land use bylaws as well as federal and provincial legislation that can impose limits on the full usage of land. Recognition of Indigenous governmental jurisdiction over Aboriginal title territory can create a significant difference in this regard.

A further key distinction, as hinted in *Delgamuukw* but made more explicit here, is that Aboriginal title is not just for the living members of the peoples or First Nations concerned; rather it is for the present *and all future generations*. This appears to impose a restriction on the manner in which the territory can be developed, as it may not be "misused in a way that would substantially deprive future generations of the benefit of the land."[58] Who will decide whether a potential use of the land would violate the rights of future generations is left unaddressed. Does such a question fall within the purview of the Canadian courts for decision, or is it to be left to culturally appropriate methods of Indigenous decision making as established by the traditional Aboriginal title holders?

It is also unclear if this is a matter that is solely to be raised among the present beneficiaries who must keep an eye on the interests of their descendants. Does the Crown, in its capacity as fiduciary, have a right—and perhaps even be subject to an enforceable obligation—to ensure that any proposal being promoted by the Aboriginal leadership of today to alter the land significantly has been assessed with proper consideration of the beneficial interests of the future generations?[59] If so, is this right or obligation one possessed by either the federal or provincial Crown, or by both?

What is clear, though, is that anyone, including non-Aboriginal local or territorial governments, seeking to make use of land subject to Aboriginal title must first "obtain the consent of the Aboriginal title holders."[60] No private person, corporation or local government

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55. *Ibid* at para 73.

56. *Ibid*.

57. *Ibid* at para 75.

58. *Ibid* at para 74.

59. For a discussion about the difficulties with the inherent limits of common law Aboriginal title see Nigel Bankes, Sharon Mascher & Jonnette Watson Hamilton, "The Recognition of Aboriginal Title and Its Relationship with Settler State Land Titles Systems" (2014) 47:3 UBC L Rev 829 at 871–72.

60. *Tsilhqot'in* SCC, *supra* note 1 at para 76.

can proceed in a way that would affect that land where that consent is denied or has not been validly obtained.

In the view of the SCC, however, federal and provincial governments are treated differently. Superior governments can act in the name of the Crown and have the ability to proceed even where consent is withheld *if* it can meet the s. 35 constitutional justification test. The Court stated:

> To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.[61]

The duty to consult has largely been regarded in Canada as a procedural rather than a substantive duty triggered by the expectation that the Crown will always act honourably. This judicially articulated concept has caused all federal, provincial, and territorial governments to change their behaviour in interacting with First Nations, Inuit, and Métis wherever there is the prospect that a s. 35 right might be affected. Consultation policies, departmental processes and civil servant training has all become commonplace since the *Haida Nation*[62] decision in 2004. The SCC in *Tsilhqot'in Nation* is reframing this somewhat when Aboriginal title has been confirmed. Not only must the Crown in fact have fulfilled its procedural obligation, but it "must also ensure that the proposed government action is substantively consistent with the requirements of s. 35."[63]

While this second element was first articulated in *Sparrow* in 1990 in the context of Aboriginal rights to fish for food, social, and ceremonial purposes, I believe the Court in *Tsilhqot'in Nation* has recast it when title has been judicially declared. The Crown must now prove by conclusive evidence that there is a "compelling and substantial objective" that justifies its actions in violating that title, rather than merely proposing a justification that could theoretically be "compelling and substantial." In *Sparrow* itself the Department of Fisheries and Oceans (DFO) had argued that its regulations controlling the length of fish nets and the times for the open season were essential for conservation purposes.[64] The SCC in response made clear that conservation of a species would meet this test but only if the government did in fact prove, by clear and convincing evidence, that the method of regulation was essential to achieve that compelling and substantial objective *and* it involved the least interference possible with the s. 35 right. DFO's own evidence was that the total Aboriginal fishery reflected less than five percent of the Fraser River salmon catch and that its conservation goal could easily be met if it chose to regulate sport or commercial fishing more actively.

In *Tsilhqot'in Nation* the Court emphasized that the government's objective must be canvassed from both the Aboriginal and the broader public's perspective.[65] It drew upon the train of SCC cases in the 1990s that declared the goal of s. 35 is to aid in bringing about

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61. *Ibid* at para 77, referencing *Sparrow*, *supra* note 25.

62. *Haida Nation*, *supra* note 50.

63. *Tsilhqot'in* SCC, *supra* note 1 at para 80.

64. *Sparrow*, *supra* note 25.

65. *Tsilhqot'in* SCC, *supra* note 1 at para 81.

"reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown."[66] The government purporting to serve the "broader public goal…must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective"[67] with its proposal if it seeks to justify violating the constitutionally protected Aboriginal title. Reconciliation is a "two-way street" because the Crown must act honourably in asserting its rights, while First Nations must accept infringements on their rights that can meet this justification test.[68]

The Court drew upon *Delgamuukw* to answer its own question as to what interests might justify such an incursion on a constitutionally protected right by quoting with emphasis:

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.[69]

Turning to this language in *Delgamuukw* seems to open a very wide door through which federal and provincial governments can steam roll in pursuing their goals for economic development that largely seem to benefit mainstream rather than Indigenous interests.

The final element is the Crown demonstrating that even though it seeks to infringe upon a proven s. 35 right it has still acted in a way that respects its role as fiduciary. At the very least this entails avoiding any hint of favouring its own interests at the expense of the Aboriginal party. Given that the federal or provincial Crown is frequently proposing such significant changes to occur on its "own" Crown land for larger public or private sector economic development purposes, it can easily place itself in a position of conflict of interest if it favours outcomes that generate royalty, leasehold, stumpage, or other forms of revenue from private parties or enhanced revenue for Crown corporations, like B.C. Hydro. One way to address that conflict of interest is for the Crown to enter into full, genuine partnerships with the traditional owners of the territory in question who could be the sole recipient of the revenue derived from the land itself while the Crown received increased tax revenue. Even this compromise is predicated on the situation that the Aboriginal title recognition of the Indigenous ownership of the territory in question has not also been accompanied by the assertion of the inherent right of self-government.

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66. *Ibid*, citing *R v Gladstone*, [1996] 2 SCR 723 at para 72, 137 DLR (4th) 648, Lamer CJC (emphasis added in *Tsilhqot'in* SCC, *supra* note 1 by McLachlin CJC).

67. *Tsilhqot'in* SCC, *supra* note 1 at para 82.

68. *First Nation of Nacho Nyak Dun v Yukon*, 2015 YKCA 18 at para 173, [2015] YJ No 80, citing *Haida Nation*, *supra* note 50 at para 32 (Crown duty to act honourably in asserting its right); *Sparrow*, *supra* note 25 at 1109; *Tsilhqot'in* SCC, *supra* note 1 at para 139 (Aboriginal group must accept justifiable infringement on its rights).

69. *Tsilhqot'in* SCC, *supra* note 1 at para 83, citing *Delgamuukw*, *supra* note 29 at para 165 (emphasis in original).

The Crown must, however, do far more than avoid self-interest. It also carries an obligation to the Aboriginal title-holders to respect and advance the interests of both the current generation as well as *all* the future ones.[70] This means that the justification argument must now meet a test of "proportionality" by including proof that the infringement is necessary to achieve the goal ("rational connection"); constitutes the least possible incursion ("minimal impairment"); and the benefits anticipated from achieving "that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact)."[71] The assessment process may reach very different results if one recasts the three elements from the common short term political and economic horizons of dominant western societies into a timeframe that transcends even the somewhat common First Nations philosophy of weighing decisions in a context of concern for the next seven generations. Arguably, this places a more robust version of the precautionary principle from environmental law as the determinative standard against which proposed Crown conduct must be graded.

V REMEDIES

Prior to proof of s. 35 rights, any breach by the Crown of its duty to consult can give rise to the court granting injunctive relief, damages or orders to carry out the duty properly.[72] On the other hand, the courts will rarely order a specific form of accommodation upon finding a breach.[73] The situation is starkly changed, however, when title has been proven as the Crown simply cannot proceed to infringe unless it obtains consent or can meet the justification test. Failing either, the Crown is subject to the "usual remedies that lie for breach of interests in land…adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title."[74]

Here the provincial government was found to have breached its duty to consult with the Tsilhqot'in Nation and accommodate its collective interest in their traditional territory when it issued a licence to Carrier Lumber Ltd. in 1983. Although no such duty had been fully articulated by the courts at that time and the Tsilhqot'in's title had obviously not been proven, the B.C. government was aware that the member First Nations of the Tsilhqot'in Nation continued to exist on the lands subject to the timber licence and that they expressly asserted their Aboriginal title. Thus, the provincial government could have—and should have—consulted before authorizing the building of infrastructure and allocation of cutting permits. It did consult at a later point; however, it decided ultimately to proceed without consent, thereby rendering itself vulnerable if future Aboriginal title was proven, as occurred here.

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70. *Tsilhqot'in* SCC, *supra* note 1 at para 87.

71. *Ibid*.

72. *Ibid* at para 89, citing *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, at para 37.

73. *Da'naxda'xw/Awaetlala First Nation v British Columbia (Minister of Energy, Mines and Natural Gas)*, 2015 BCSC 16 at para 258, [2015] BCJ No 18.

74. *Tsilhqot'in* SCC, *supra* note 1 at para 90.

VI IMPACT UPON PROVINCIAL LEGISLATION

Although unnecessary to dispose of the case after deciding to grant a declaration of Aboriginal title (and therefore arguably *obiter dicta* and not binding), the Court concluded that it was important to give added guidance to all parties "and other Aboriginal groups" in Canada on the status of provincial legislation once title had been declared. The extensive argument before the lower courts, and no doubt in acknowledgement of interventions by five provincial governments, led the Court to advise that "provincial laws of general application apply to lands held under Aboriginal title."[75] This general proposition reflects the authority of provincial legislatures to pass laws regulating "property and civil rights" under s. 92(13) of the *Constitution Act, 1867*. On the other hand, provincial authority over land subject to continuing Aboriginal title is constitutionally limited by: (1) s. 35, which brings us back to the fiduciary relationship, and specifically the requirement that the Crown proves a compelling and substantial objective if it wishes to infringe; and (2) Parliamentary power over "Indians, and Lands reserved for the Indians" in s. 91(24). The first limit was described in *Sparrow* regarding Aboriginal rights as meaning that the statute or regulation must not be unreasonable, impose undue hardship or deny the rights holder its preferred method of exercising the right.[76] Violating any of these three factors would infringe the s. 35 rights.

In this case the B.C. government relied upon its *Forest Act* as empowering it to control all aspects of "Crown timber" on "Crown land", which it had presumed the land in question to be.[77] The Act limited its scope to land vested in the Crown. Aboriginal title "confers a right to the land itself"[78] such that this land was vested in the Tsilhqot'in Nation and could not be "vested in the Crown" simultaneously so as to be eligible to be managed by the Ministry of Forests under the Act. On the other hand, to say that the *Forest Act* had no application whatsoever to the vast majority of the province that is subject to Aboriginal title claims not yet proven could mean that no one would have the legal authority to protect the forests from abuse, respond to forest fires, or deal with invasive species like the mountain pine beetle. The Court was clearly very concerned about creating any vacuum in effective forest management as this would be to the detriment of First Nations as well as all others. McLachlin C.J. concluded that the B.C. legislature must have meant that the Act would apply to forested lands under claim but only "*up to the time title is confirmed by agreement or court order*."[79] These lands ceased to be "Crown lands" once the court order confirmed Aboriginal title and the trees ceased to be "Crown timber" so as to be available to be regulated under the Act.

The Court chose to "add the obvious" as a comment that the B.C. legislature could amend the Act to cover Aboriginal title lands, so long as it met all "applicable constitutional restraints."[80] What the Court failed to do was consider whether Tsilhqot'in Nation law should apply so that no feared legal vacuum would in fact arise.[81] Although earlier declaring that the

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75. *Ibid* at para 101.

76. *Sparrow*, *supra* note 25 at 1112.

77. *Forest Act*, RSBC 1996, c 157, s 1.

78. *Tsilhqot'in* SCC, *supra* note 1 at para 112.

79. *Ibid* at para 115 (emphasis in original).

80. *Ibid* at para 116.

81. For a discussion about the court's failure to consider Tsilhqot'in law see Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873.

"doctrine of *terra nullius* (that no one owned the land prior to assertion of sovereignty) never applied in Canada,"[82] the Court clearly could only conceive of a legal vacuum if neither federal nor provincial legislation applied.[83] It is troubling that our highest court did not even ask the obvious question: since Tsilhqot'in Nation's Aboriginal title is derived from their pre-existing occupation as the sovereign of this territory with their own legal system, is that pre-existing law not immediately effective or revived to apply on land to which their beneficial title is now recognized once more? This should have been considered particularly because Vickers J. found that the "Tsilhqot'in people were a rule ordered society" and were governed by the laws of their ancestors.[84] For this reason, John Borrows explains that *Tsilhqot'in Nation* "both diminishes and reinforces colonialism in Canada."[85]

Instead, McLachlin C.J. could only see s. 35 as providing a limited brake on either federal or provincial efforts to infringe the "aboriginal and treaty rights" protected therein, while simultaneously enabling such infringement to occur that is justified. Justified in the eyes of whom one might ask? The answer of course is the overwhelmingly non-Aboriginal judiciary. McLachlin C.J. drew the parallel with the *Canadian Charter of Rights and Freedoms*[86] (*Charter*) as similarly imposing a limit on both federal and provincial governments (except it does so to benefit individual rights) but subject to an argument that the breach of the *Charter* is justified. It is critical to note, however, that s. 35 is in Part II of the *Constitution Act, 1982* and so is unaffected by the override clauses found in sections 1 and 33 of the *Charter*.

Here the Court suggests that provincial laws dealing with forest fires and pest invasions "will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders of the right their preferred means of exercising it."[87] This is strikingly worded, as no such cases have ever been heard regarding fires and pests as meeting the requirements of the infringement test to support a conclusion that they "will often pass the *Sparrow* test." Legislation with such goals might well be embraced by First Nations, particularly if they were fully involved in the development of the statute as genuine partners and in its subsequent implementation. One might also hazard a guess that such purposes of fire and pest management would pass the "compelling and substantial objective" justification sniff test, at least in the absence of any First Nations regimes to manage such threats; but that is different than our highest Court suggesting that these laws will pass such scrutiny in the absence of any context. The decision does expressly note, however, that the transfer of timber rights reflects "a direct transfer of Aboriginal property rights to a third party" that would be a "meaningful diminution in the Aboriginal group's ownership right."[88] This once again frames Aboriginal

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82. *Tsilhqot'in* SCC, *supra* note 1 at para 69.

83. For a discussion about *terra nullius* and *Tsilhqot'in Nation* see John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 at 724 (the author argues that the decision implies "there is some kind of emptiness underlying Aboriginal title that must be filled by Crown-derived law to avoid a legal vacuum").

84. *Tsilhqot'in* BCSC, *supra* note 13 at para 431.

85. John Borrows, "Aboriginal Title in Tsilhqot'in v British Columbia [2014] SCC 44" (2014) Maori L Rev, online: Māori Law Review <maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqotin-v-british-columbia-2014-scc-44/>.

86. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

87. *Tsilhqot'in* SCC, *supra* note 1 at para 123.

88. *Ibid* at para 124.

title solely as a proprietary right protected by s. 35, while omitting any consideration of First Nations' governance jurisdiction as part of this section. The Court also chose to state that it agreed with both lower courts when they said "that no compelling and substantial objective existed in this case."[89]

The second constitutional limitation would be the presence of any federal legislation enacted pursuant to s. 91(24) intended to apply to Aboriginal title lands. No such federal statute, outside the *Indian Act* recognized reserves, exists at present regarding forestry, so no paramountcy principle could presently be invoked in favour of the competing federal enactment. Whether the Parliament of Canada will remain so inactive in this space in the future remains to be seen, especially given the clear commitments from the new Trudeau government to respect and implement the *UN Declaration on the Rights of Indigenous Peoples*[90] (UNDRIP) and forge a new nation-to-nation relationship with Aboriginal peoples in Canada. The recent decision of the SCC in *Daniels v. Canada*[91] may also spur on greater and broader legislative federal activity under s. 91(24).

VII HOW SIGNIFICANT IS THIS DECISION ANYWAY?

It is truly hard to overestimate the importance of this judgment from our highest court. At the least, it will enhance the position of First Nations in negotiations for comprehensive claim settlements and bring Canada up to momentum with the progress in other countries, such as New Zealand.[92] In 2015 there were approximately one-hundred comprehensive land claim negotiating tables across Canada.[93] However, to illustrate the speed of these proceedings it should be noted that only six comprehensive land claims have been signed since 2006.[94] In Canadian geographic terms, the *Tsilhqot'in Nation* decision immediately applies in all parts of Canada where Aboriginal title has not clearly been extinguished.[95] Not only does this cover the vast majority of British Columbia, but it also includes areas in the southern Yukon and southern Northwest Territories, the Ottawa Valley, southern Quebec (from the Labrador and New Brunswick borders to Ontario south of the James Bay and Northern Quebec Agreement and Northeastern Agreement boundaries), southern Labrador, and arguably all three Maritime provinces as well as the island of Newfoundland—as none of these have ever been affected

89. *Ibid* at para 126.

90. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 2008, Supp No 53, UN Doc A/61/53 [UNDRIP].

91. *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99.

92. PG McHugh, "The Crown's Relationship with Tribal Peoples and the Legal Dynamics for the Resolution of Historical and Contemporary Claims" (2015) 46:3 VUWLR 875 at 896–98 ("[i]t could be said that common law aboriginal title has been a judicial initiative aiming implicitly to incentivise government negotiation of contemporary claims rather than to become an alternative to it" at 897).

93. Canada, Indigenous and Northern Affairs Canada, *Comprehensive Claims* (13 July 2015), online: Government of Canada <https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578>.

94. *Ibid.*

95. The SCC made clear in its first major decision on s. 35 of the *Constitution Act, 1982* in *Sparrow*, *supra* note 25 at 1097–98, that *regulating* Aboriginal rights—even to a great extent—before 1982 is not enough to *extinguish* those same rights. Rather, they merely become narrower in scope through the regulation but return to greater meaning as if they had been sleeping and were awakened in 1982 by s. 35 coming into force, freed from those prior restrictions.

by treaties with First Nations that expressly included the surrender of title to their traditional lands, even in their English language versions.[96] Thus, millions of Canadians live in areas in which Aboriginal title has never been willingly ceded by its traditional owners or explicitly extinguished by the Crown.[97]

With all likelihood private landowners should be untouched by *Tsilhqot'in Nation*,[98] but the same cannot be said for most natural resource companies who rely upon leases and licences from the Crown to exploit mineral and petroleum wealth and timber on Crown lands.[99] Many cottagers, as well as operators of fish and hunting lodges, also rely on Crown leases. Concerns were immediately voiced that the impact could be negative for the resource sector. Companies seeking to develop projects may face increased risks.[100] A leading columnist for the National Post said that "the implications are staggering: [i]n B.C., for example, First Nations opposing projects such as the Northern Gateway pipelines may no longer need to raise blockades or anticipate lengthy court battles in order to stop shovels from hitting the ground."[101] West Coast Environmental Law celebrated the decision and queried if this meant that the Enbridge pipeline would be cancelled.[102]

While a certain level of panic descended on the resource sector in B.C., the SCC rendered a decision a mere fifteen days later that upheld Ontario's governmental power to "take up" Crown lands so as to significantly infringe treaty harvesting rights in order to issue licences for clear-cut forestry operations in the Keewatin area of Treaty 3 territory.[103] A few law firms opined that *Tsilhqot'in Nation* would ultimately not have a major effect on the legal

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96. These areas of Atlantic Canada are affected by Treaties of Peace and Friendship negotiated by the Crown in 1660-1761 with Mi'kmaq and Maliseet Nations in what is now Canada as well as a number of Indian nations in New England. These treaties did not include any extinguishment of Aboriginal title.

97. It should also be noted that many First Nations dispute explicit land surrender provisions in their treaties by asserting that such provisions were never part of the oral treaty negotiations such that their leaders never consented to any complete ceding of their territory, a concept that did not exist in their culture or their vocabulary.

98. The Australian High Court dealt with this issue very directly in its landmark judgment in *Mabo No* 2, *supra* note 20. In *Tsilhqot'in* SCC, *supra* note 1, the appellants expressly dropped seeking a declaration that included a small area of privately owned land as well as some lands submerged under water, even though the trial judge had included those lands as covered by Aboriginal title.

99. New Brunswick provides a stark exception to this pattern, as many of the logging companies own their forests outright, although they still require provincial permits to log commercially.

100. See Tracy A Pratt & Neal J Smitheman, "Tsilhqot'in Nation case: What it means for resource development in Ontario", *Mining Markets* (11 August 2014), online: Mining Markets <www.miningmarkets.ca/news/tsilhqotin-nation-v-british-columbia-what-does-it-mean-for-resource-development-in-ontario/>.

101. Brian Hutchinson, "Supreme Court B.C. land-claim ruling has staggering implications for Canadian resource projects", *National Post* (26 June 2014), online: The National Post <news.nationalpost.com/news/canada/supreme-court-b-c-land-claim-ruling-has-staggering-implications-for-canadian-energy-projects>.

102. Jessica Clogg, "Tsilhqot'in Nation v. British Columbia: Implications for the Enbridge Tankers and Pipelines Project", *West Coast Environmental Law* (27 June 2014), online: West Coast Environmental Law <wcel.org/resources/environmental-law-alert/tsilhqotin-nation-v-british-columbia-implications-enbridge-tankers>.

103. *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447.

landscape since it didn't significantly alter Aboriginal law.[104] For example, the Federal Court of Appeal in *Hupacasath First Nation v. Canada* explained that *Tsilhqot'in Nation* did not change the law regarding when the Crown's duty to consult is triggered.[105] Further, the BCSC held that the decision imposed no positive obligation on the Crown to negotiate a disputed claim, at least in the context of existing litigation that was not settled after a two week judicial settlement conference.[106] In another recent case, the Saskatchewan Court of Appeal held that the government could issue oil sands exploration permits on treaty lands without consulting with the First Nation community.[107] The Court here decided that the duty to consult was not triggered until an application for surface access rights or approval of an extraction lease was at issue. As such, some skepticism about the overall national impact of the *Tsilhqot'in Nation* decision on the natural resource sector is warranted.

Some other law firms viewed the decision differently, however, and recommended creating a framework for meaningful discussion with First Nations.[108] The emphasis was placed on collaboration to create mutually beneficial relationships between the natural resource sector and Aboriginal peoples. Other lawyers worried about the futility of negotiations and warned that industries may choose to invest in other jurisdictions when faced with a lengthy negotiation or consultation process.[109] Nonetheless, the legal profession is aware that the challenge of proving Aboriginal title remains difficult, time-consuming, and very costly, which places a considerable barrier for Indigenous communities to overcome in order to obtain future declarations of title.[110]

The net result for now is that non-treaty First Nations in some major parts of Canada have gained considerable momentum in protecting their way of life and achieving greater prosperity for the future. At the same time, many Treaty First Nations remain impoverished watching the logging trucks roar past their tiny reserves. Grand Chief Stewart Phillip of the Union of B.C. Indian Chiefs described the implications of the judgments in somewhat provocative terms that reflect the view of many First Nations people in Canada when he said:

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104. See e.g. Osler's Aboriginal Law Group, "Tsilhqot'in Decision: The Sky Is Not Falling", Case Comment on *Tsilhqot'in Nation v British Columbia,* online: Osler <https://www.osler.com/en/resources/regulations/2014/tsilhqot-in-decision-the-sky-is-not-falling>; Robin M Junger, Joan M Young & Brent Ryan, "Supreme Court declares Aboriginal title in *Tsilhqot'in Nation v. British Columbia*", Case Comment, online: McMillan <www.mcmillan.ca/Supreme-Court-declares-Aboriginal-title-in-Tsilhqotin-Nation-v-British-Columbia>.

105. *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at para 80, [2015] FCJ No 4.

106. *Sam (Songhees Nation) v British Columbia*, 2014 BCSC 1783, [2014] BCJ No 2376.

107. *Buffalo River Dene Nation v Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31, 457 Sask R 71.

108. Sarah D Hansen & Kennedy A Bear Robe, "SCC Ruling on Aboriginal Title: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 and Significant Changes to the Legal Landscape", Case Comment, online: Miller Thomson <www.millerthomson.com/en/publications/communiques-and-updates/aboriginal-law-update/july-2014/scc-ruling-on-aboriginal-title-tsilhqotin>. See also Dan Collins, Case Comment on *Tsilhqot'in Nation v British Columbia*, online: Dentons <www.dentons.com/en/insights/alerts/2014/july/3/case-comment-tsilhqotin-nation-v-british-columbia-2014-scc-44>.

109. Harry Swain & James Baillie, "Tsilhqot'in Nation v. British Columbia: Aboriginal Title and Section 35" (2015) 56 Can Bus LJ 265 at 274–75.

110. Roy Millen, Sandy Carpenter & Laura Cundari, "Supreme Court of Canada Releases Landmark Aboriginal Title Case", Case Comment on *Tsilhqot'in Nation v British Columbia,* online: Blakes <www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1968>.

> Canada's top court adopted the international law principle of consent. Indigenous peoples in British Columbia have long been fighting for recognition of our rightful place in the Canadian federation. The Supreme Court of Canada has said that it is time to join the modern era of International Human Rights recognition. This decision puts an end to the legal oppression of Indigenous Peoples and enforces our fundamental human rights and freedoms.[111]

Canada initially voted "no" (as one of only four nations to do so) when the UNDRIP was overwhelmingly adopted by the UN General Assembly on September 13, 2007, only to reverse its position three years later. One of the key reasons it had opposed the UNDRIP under the Harper government was disapproval of the frequent imposition of the "free, prior and informed consent" standard upon states in their dealings with Indigenous peoples. In May 2016, under the Trudeau government, Canada finally announced its full support of the UNDRIP.[112]

The Minister of Indigenous and Northern Affairs, Dr. Carolyn Bennett, explained before the United Nations in New York City that:

> Today's announcement that Canada is now a full supporter of the Declaration, without qualification, is an important step in the vital work of reconciliation. Adopting and implementing the Declaration means that we will be breathing life into Section 35 of Canada's Constitution, which provides a full box of rights for Indigenous peoples.[113]

The path ahead to implement UNDRIP is not an easy one. As the federal Minister of Justice, Jody Wilson-Raybould, formerly the B.C. Regional Chief of the Assembly of First Nations (AFN), stated at the Annual General Assembly of the AFN:

> So as much as I would tomorrow like to cast into the fire of history the *Indian Act* so that the nations can be reborn in its ashes, this is not a practical option—which is why simplistic approaches, such as adopting the UNDRIP as being Canadian law, are unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement it.
>
> What we need is an efficient process of transition that lights a fire under the process of decolonization but does so in a controlled manner that respects where Indigenous communities are in terms of rebuilding…
>
> Accordingly, the way the UNDRIP will get implemented in Canada will be through a mixture of legislation, policy and action initiated and taken by

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111. Grand Chief Stewart Phillip, News Release, "UBCIC, Okanagan Nation Alliance & Shuswap Nation Tribal Council Welcome first declaration of Aboriginal Title" (27 June 2014), online: Union of British Columbia Indian Chiefs <www.ubcic.bc.ca/News_Releases/UBCICNews06271402.html#axzz39fccNNT1>.

112. Indigenous and Northern Affairs Canada, News Release, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: Government of Canada <news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1063339&crtr.tp1D=1&_ga=1.40822306.1066794629.1422563602>.

113. *Ibid.*

> Indigenous nations themselves. Ultimately, the UNDRIP will be articulated through the constitutional framework of section 35.[114]

The Federal Court of Canada recently stated that the "UNDRIP may be used to inform the interpretation of domestic law."[115] Many will suggest that the "free, prior and informed consent" standard has been embraced by the SCC, at least concerning proven Aboriginal title, albeit not explicitly. The SCC has truly provided considerable negotiating leverage to those Aboriginal peoples in Canada who retain Aboriginal title through its decision in *Tsilhqot'in Nation*. As the unanimous judgment stated: "[f]or example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing."[116]

One can readily imagine that such a situation might include public works, such as highways, local streets, mass transit, airports, wharves, etc. In such circumstances, the government concerned will have to persuade future courts that these comply with the "compelling and substantial objective" standard articulated in *Delgamuukw*[117] if it seeks to proceed without consent from the Aboriginal title holders. While these types of projects may readily meet the dominant society's overall perceptions of the public good, it does not necessarily mean that the Crown is home free. As we have witnessed with the prevalence of NIMBY[118] reactions, Indigenous communities will similarly likely argue that the government should build its highway elsewhere. Alternatively, demands may legitimately be presented to receive significant financial and other direct benefits. Many Impact Benefit Agreements between Aboriginal parties and resource companies have demonstrated for over two decades through guaranteeing training, employment, service contracts, royalties, profit shares, etc. that compromise may be acceptable. The Court's very significant requirement that current living members of the collective title holders must ensure that benefits pass to future generations will also trigger the need for longer term arrangements, especially where the land is being altered permanently or a resource (such as petroleum or minerals) is being dissipated through extraction.

The potential necessity to cancel a project, when in midstream or after its completion, will also be of vital concern to the private as well as public sector. Having spent potentially millions if not hundreds of millions of dollars with encouragement from federal and/or provincial governments, any rejection of a major development will logically trigger a lawsuit by the company to recover all monetary losses versus the government that failed to obtain Indigenous consent. The SCC has given clear warning that governments face that real risk if such consent has not been obtained prior to governmental approval of the proposed project. What if the

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114. Notes for an address by Hon Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, (July 12, 2016), online: Government of Canada <news.gc.ca/web/article-en.do?nid=1098629&_ga=1.162708603.671365187.1469487071>.

115. *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 at para 103, [2015] FCJ No 969.

116. *Tsilhqot'in* SCC, *supra* note 1 at para 92.

117. *Delgamuukw*, *supra* note 29 at para 161.

118. An acronym for "not in my backyard" meaning "[o]pposition to the locating of something undesirable (as a prison or incinerator) in one's neighbourhood." *Merriam-Webster Dictionary*, online, sub verbo "NIMBY", online: Merriam-Webster <https://www.merriam-webster.com/dictionary/NIMBY>.

highway or other development has long since been built even though the Aboriginal title is still alive? Restoration of the prior state of the land may be possible in some circumstances, although the cost could be massive. In many other situations it will simply be impossible to mitigate the damage done to the natural habitat. The UNDRIP addressed this very issue by requiring states to provide compensation in "the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."[119]

It is clearly arguable that municipal and regional governments will lose all regulatory authority over lands as soon as they are confirmed to be Aboriginal title lands, just as they do at present with *Indian Act* reserves. These governments will need even more in the future to reach agreements with neighbouring First Nations on how they can work together. The Federation of Canadian Municipalities and the Union of B.C. Municipalities have both been encouraging the development of such practical relationships for over twenty years. Formal compacts between Indian tribes with state and local governments are widespread in the USA regarding cross-deputization of police, integrated water and sewage systems, shared correctional facilities, road clearing, fire services, etc. The *Tsilhqot'in Nation* decision will dramatically increase the necessity for more cooperation at the local level in large parts of the country.

Perhaps one of the bigger surprises in the judgment is the Court's comments about the fragility of existing legislation after a declaration of Aboriginal title has been issued. McLachlin C.J. stated that "if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title."[120]

After a rather ineffective start by the B.C. government following the decision, the Tsilhqot'in Nation and the provincial government have been working together to attempt to build a strong relationship based on economic sustainability and improved social well-being of the Tsilhqot'in communities.[121] They signed a five-year framework agreement, the Nenqay Deni Accord (or the "People's Accord"), in February 2016 "to establish the shared vision, principles and structures…to negotiate one or more agreements to effect a comprehensive and lasting reconciliation between the Tsilhqot'in Nation and British Columbia."[122] It outlines eight pillars of reconciliation[123] that are interrelated and are to be approached holistically.[124] These pillars are further divided into more detailed components throughout the Accord. The agreement

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119. UNDRIP, *supra* note 90, art 28(2).

120. *Tsilhqot'in* SCC, *supra* note 1 at para 92.

121. This is evidenced by memoranda and letters of understanding signed by the government of British Columbia and the Tsilhqot'in Nation: Tsilhqot'in Strategic Engagement Agreement (2014); Tsilhqot'in Nation Letter of Understanding (10 September 2015), and the Tsilhqot'in Nation Letter of Intent (24 September 2015), online: Province of British Columbia <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/tsilhqot-in-national-government>.

122. *Nenqay Deni Accord (The Peoples Accord)*, Tsilhqot'in Nation and the Province of British Columbia, 11 February 2016, online <www.tsilhqotin.ca/PDFs/Nenqay_Deni_Accord.pdf> art 2.1.

123. *Ibid*, art 3.1: ((1) Tsilhqot'in Governance; (2) Strong Tsilhqot'in Culture and Language, (3) Healthy Children and Families; (4) Healthy Communities; (5) Justice; (6) Education and Training; (7) Tsilhqot'in Management Role for Lands and Resources in Tsilhqot'in Territory; and (8) Sustainable Economic Base).

124. *Ibid*, art 4.7.

covers a vast landscape of issues and areas of concern for the Tsilhqot'in Nation and represents a step in the right direction. Chief Roger William explained the importance of the Accord:

> This agreement is about moving forward for our future generations. We have 150 years where no agreements have been signed...To us, this agreement is about building our people up from a history of injustice. The impact of Smallpox, the Tsilhqot'in War, the Indian Act and Residential Schools are all very recent in our history…We name this agreement the Nenqay Deni Accord to honour our ?Esggidam [Ancestors] and to bridge a positive future with our neighbours.[125]

The road towards a brighter future for the Tsilhqot'in Nation has just begun. The SCC's judgment has provided them with considerable leverage that has led to the negotiating of the Nenqay Deni Accord and future agreements. As the pillars of reconciliation indicate, there are a number of outstanding issues and prolonged history of discrimination that First Nations face among the Tsilhqot'in communities and in Canada as a whole. The Tsilhqot'in Nation expressed its commitment to working with other First Nations as it continues to work with the Accord.[126]

One of the major practical implications of the judgment is how difficult it will be for other First Nations, even those with very strong evidence in support of their title assertions, to follow in the footsteps of the Tsilhqot'in Nation. Many subsequent decisions cite this SCC decision, yet no further declarations of Aboriginal title have yet been made in Canada. The Tsilhqot'in Nation benefited from the extremely limited presence of outsiders within their traditional territory coupled with being the first to push through with an Aboriginal title claim. There was little territorial overlap with other First Nation communities. Even if there had been, the trial judge excluded from the trial all lands with Aboriginal title overlap, and which the Tsilhqot'in Nation subsequently excluded from the appeal to the SCC.[127] This will definitely not be the case for many other First Nations communities, whose territories overlap with neighbouring First Nations. The presence of boundary overlaps has retarded comprehensive claim negotiation progress in various parts of Canada over the decades and will create significant challenges in the litigation of Aboriginal title claims.[128] The Tsilhqot'in Nation's counsel,

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125. Tsilhqot'in National Government and Ministry of Aboriginal Relations and Reconciliation, Press Release, "Tsilhqot'in and B.C. sign historic accord" (12 February 2016), online: Tsilhqot'in National Government <www.tsilhqotin.ca/PDFs/Press%20Releases/2016_02_12_Joint%20PR%20NDA.pdf>.

126. Tsilhqot'in National Government, Press Release, "Tsilhqot'in Nation committed to working with other First Nations as it moves forward with Nenqay Deni Accord" (29 February 2016), online: Tsilhqot'in National Government <www.tsilhqotin.ca/PDFs/Press%20Releases/2016_02_29%20Working%20with%20Other%20First%20Nations.pdf>.

127. *Tsilhqot'in* BCSC, *supra* note 13 at para 938.

128. See e.g. Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title" (2015) 48:3 UBC L Rev 821.

therefore, recommends that future litigants exclude territorial overlaps from their claims to facilitate a favourable outcome.[129]

As the Tsilhqot'in Nation were breaking new legal ground, they were able to access test case funding under court order to help cover the likely more than thirty-million dollars' cost of litigation.[130] Such financial support will not be readily available for others as the groundbreaking test case factor is now gone, while provincial governments have deep pockets and a large legal staff to draw upon in asserting jurisdiction to control Crown land. Chief Roger William offers his views as to the importance of the decision:

> While lawyers and academics debate the importance of the *Tsilhqot'in* case, I think that it is too soon to tell. Time and perspective will be needed to measure the true importance of this great case. It is true that many First Nations now have great opportunity of reaping benefits that are not being offered to them under the Treaty Process…Some say that this is a game changer and the tide has turned and our lands that were wrongfully taken from us will now be returned…[A]s of the date I write this, I have nothing concrete to report. But what I have learned is not to be too impatient. I do see some promise on the horizon.[131]

VIII CONCLUSION

At the end of the day, Canada's highest court has delivered a watershed judgment that will be the subject of comment, debate, anger, and celebration for many years to come. It has elevated the status of Aboriginal title significantly in Canada in a manner that is already attracting attention among Indigenous peoples and states in many parts of the world—especially in common law jurisdictions. The decision enhances the bargaining power for those First Nations who retain strong arguments that they still possess Aboriginal title to all or much of their traditional territory.

At the same time, it has further entrenched the status quo that underpins elements of colonialism based on a much-criticized Discovery Doctrine. This doctrine continues to confirm the legitimacy of the historic right of long dead European monarchs to have claimed overarching sovereignty and underlying title to lands they never saw, simply because their representatives asserted the claim in their royal names.[132] While the Court accepted that the *terra nullius* doctrine was inapplicable—as millions of Indigenous peoples occupied

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129. David M Rosenberg & Jack Woodward, "The *Tsilhqot'in* Case: The Recognition and Affirmation of Aboriginal Title in Canada" (2015) 48:3 UBC L Rev 943 at 963–64. See also within this special issue of the UBC Law Review devoted to the *Tsilhqot'in Nation v British Columbia* decision, Gordon Christie, "Who Makes Decisions over Aboriginal Title Lands" (2015) 48:3 UBC L Rev 743; PG McHugh, "Aboriginal Title: Travelling from (or to?) an Antique Land?" (2015) 48:3 UBC L Rev 793; Jacinta Ruru, "Lenses of Comparison across Continents: Understanding Modern Aboriginal Title in *Tsilhqot'in Nation* and *Ngati Apa*" (2015) 48:3 UBC L Rev 903.

130. See Aboriginal Law Group, *supra* note 11 where the trial alone was suggested to have cost thirty-million dollars.

131. Chief Dr. Roger William, "Foreword" (2015) 48:3 UBC L Rev 697 at 698–99.

132. See e.g. Borrows, *supra* note 83 at 726 (where the author states that "[t]he doctrine of discovery is alive and well in Canada").

and governed their own parts of North America—it sustains the legal architecture that has supported the theft of most of the continent and marginalized Indigenous self-determination.

Our highest court has championed a goal of reconciliation for the past two decades. Many Canadians have also embraced this spirit, fueled in large part by the influence of the Truth and Reconciliation Commission.[133] However, for genuine reconciliation to be achieved there must be an honest effort to explain how Indigenous sovereignty was displaced and rightful possession ignored for generations. Alternatively, we have to accept that this longstanding assertion of Crown title and sovereignty was based upon assertions issued from sand castles that need to be replaced by a new foundation grounded on mutual respect that includes accepting shared—as well as separate—areas of jurisdiction for both Indigenous and non-Indigenous governments. Celebrating our sesquicentennial this year will compel us to confront our shared history and to assess how prepared we Canadians really are to embrace decolonization while we build a new image for our country, well before our bicentennial in 2067.

133. Truth and Reconciliation Commission of Canada, Final Report, (Library and Archives Canada Cataloguing in Publication, January 2015), online: Truth and Reconciliation Commission of Canada <www.trc.ca/websites/trcinstitution/index.php?p=890>.

ENGAGING A HUMAN RIGHTS BASED APPROACH TO THE MURDERED AND MISSING INDIGENOUS WOMEN AND GIRLS INQUIRY

*by Brenda L. Gunn**

CONTENTS

I INTRODUCTION

The situation of murdered and missing Indigenous women and girls is one of the gravest human rights atrocities in Canada right now. Many studies have shown that Indigenous women and girls experience violence including assault, abduction, and murder at rates significantly higher than non-Indigenous women and girls.[1] Indigenous women and girls experience systemic discrimination and violence based on the intersections of race, sex, gender, sexuality, ability, class, and impacts of colonization.[2] There have been many reports that have studied murdered and missing Indigenous women and girls, and the consensus of these reports

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1. Pippa Feinstein & Megan Pearce, "Violence against Indigenous women and girls in Canada Review of reports and recommendations - Executive Summary" (2015) 1 at 1, online: Women's Legal Education and Action Fund <www.leaf.ca/wp-content/uploads/2015/02/Executive-Summary.pdf> [Feinstein & Pearce].

2. UN Permanent Forum on Indigenous Issues, *Study on the extent of violence against indigenous women and girls in terms of article 22 (2) of the United Nations Declaration on the Rights of Indigenous Peoples*, 12 February 2013, UN Doc E/C.19/2013/9.

is that "the economic and social marginalization of Indigenous women makes them more susceptible to violence and less able to escape violent circumstances."[3]

Indigenous peoples have long known about the travesty of murdered and missing Indigenous women and girls. In 2005, the Native Women's Association in Canada began the Sisters in Spirit research, education, and policy initiative to raise awareness of the high rates of violence against Aboriginal women and girls in Canada. A primary outcome of the first phase of the initiative was a database that found there were more than 592 missing and murdered Aboriginal women and girls in Canada.[4]

Unfortunately the Canadian police, government, and policy makers failed to take any action for over twenty-five years despite knowing about the problem from their own internal records and the many other public reports. In 2004, Amnesty International released its *Stolen Sisters* report, which details the factors that have contributed to a heightened risk of violence against Indigenous women and girls.[5] The report begins with a discussion of the death of Helen Betty Osborne in 1971, who was sexually assaulted and then murdered by four white men, but which took more than fifteen years to bring one of the men to justice.[6] The murder of Helen Betty Osborne is one of the earliest and widely known examples of the systemic failures of the criminal justice system to protect Indigenous women and to punish those responsible. The Amnesty International report indicates that the police were aware of the problem of violence against Indigenous women and girls perpetuated by white men, but did not take any action to address the situation.[7] This systemic problem was also recognized in the 1991 Aboriginal Justice Inquiry in Manitoba, but no effective actions were taken at the provincial or federal level.[8]

After years of lobbying by Indigenous women and family members of murdered and missing Indigenous women and girls, on December 8, 2015, the federal government officially announced the National Inquiry into Missing and Murdered Indigenous Women and Girls (Inquiry).[9] Before the Inquiry began, the government engaged in consultations with families, national Aboriginal organizations, First Nations, frontline workers, and others to identify the Inquiry's scope and process. The pre-inquiry process led to several recommendations for the Inquiry, including that it should be independent, transparent, and led by Indigenous women, and that it should look at the economic, cultural, political and social causes of violence

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3. Feinstein & Pearce, *supra* note 1 at 1.

4. Native Women's Association in Canada, "Sisters in Spirit", online: <https://www.nwac.ca/policy-areas/violence-prevention-and-safety/sisters-in-spirit/>.

5. Amnesty International, "Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada" (2004), online: <https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf>.

6. *Ibid*.

7. *Ibid*.

8. Manitoba, Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba*, by AC Hamilton & CM Sinclair (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People 1991) online: The Aboriginal Justice Implementation Commission <www.ajic.mb.ca/volume.html> [*Aboriginal Justice Inquiry*].

9. Government of Canada, *National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <www.aadnc-aandc.gc.ca/eng/1448633299414/1448633350146>.

against women.[10] The Terms of Reference released in August 2016 mandate the Inquiry to (1) report on systemic and underlying causes of all forms of violence including sexual violence, (2) identify effective institutional policies and practices to reduce violence, (3) recommend concrete and effective action to remove systemic causes of violence and to increase safety, and (4) recommend ways to commemorate and honor the missing and murdered.[11] The terms of reference also direct the Inquiry to give "due weight"[12] to the findings of other reports that addressed the issue of murdered and missing Indigenous women and girls including the Final Report of the Truth and Reconciliation Commission,[13] the Royal Commission on Aboriginal Peoples,[14] the Sisters in Spirit initiative of the Native Women's Association of Canada,[15] the Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,[16] the report on Missing and Murdered Indigenous Women in British Columbia, Canada[17] by the Inter-American Commission on Human Rights,[18] and the Oppal Commission reports.[19]

Many people were critical of the Inquiry's terms of reference when they were released. Some expressed concern that the terms lacked teeth. Pam Palmater expressed concern that

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10. Canada, *Executive summary of what we heard: Final report of the pre-inquiry engagement process*, (Ottawa: Government of Canada), online: Government of Canada <https://www.aadnc-aandc.gc.ca/eng/1463677212850/1463677388763>.

11. Indigenous and Northern Affairs Canada, "National Inquiry into Missing and Murdered Indigenous Women and Girls' Terms of Reference" (Ottawa: 5 August 2016), online: Government of Canada <https://www.aadnc-aandc.gc.ca/eng/1470422455025/1470422554686>.

12. *Ibid*.

13. Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Honouring the Truth, Reconciling for the Future* (Toronto: James Lorimer and Company, 2015).

14. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal People*, (Ottawa: October 1996), online: Library and Archives Canada <www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>.

15. *Supra* note 4.

16. Convention on the Elimination of All Forms of Discrimination Against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 2015, C/OP8/CAN/1, online: United Nations Human Rights Office of the High Commissioner <tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf>.

17. Missing and Murdered Indigenous Women in British Columbia, Canada (21 December 2014), Inter-Am Comm HR, OEA/SerL/V/II/Doc 30/14, online: Inter-American Commission on Human Rights <www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf>.

18. Organization of American States (OAS), "Inter-American Commission on Human Rights", online: IACHR www.oas.org/en/iachr/>.

19. Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry* (British Columbia: Library and Archives Canada Cataloguing in Publication, 2012) at 82-98, online: <www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Forsaken-ES-web-RGB.pdf> [*Forsaken*].

there was no specific mention of the role of policing.[20] Others still were disappointed that old cases would not be reconsidered.[21] Criticism also included that provinces and territories were not explicitly included within the terms of reference.[22] Despite these concerns, some were cautiously optimistic and hopeful that the Inquiry will succeed in bringing about change.[23]

This article advocates for the Inquiry to engage a human rights based approach when analyzing the systemic causes of violence and making recommendations. Such an approach includes using international human rights norms to evaluate and recommend changes to the laws that failed to protect, and in some cases contributed to, murdered and missing Indigenous women and girls. Such an approach would also include international human rights principles such as Canada's duty of due diligence to prevent, investigate, prosecute, punish, and compensate for murdered and missing Indigenous women and girls, as will be discussed in greater detail below. As Rauna Kuokkanan explains, a "human rights framework is the most appropriate way of addressing violence against indigenous women because it avoids the victimization of women."[24] A human rights based approach keeps Indigenous women's needs at the center of the Inquiry.[25]

Much of the literature on murdered and missing Indigenous women and girls—and violence against women generally—focusses on the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)[26] and the government's obligation of due diligence to prevent violence against women.[27] The Committee on the Elimination of Discrimination against Women conducted an inquiry into murdered and missing Indigenous

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20. "Inquiry into missing and murdered indigenous women won't meet crucial deadline: critic", *CTV News* (7 February 2017), online: <www.ctvnews.ca/canada/inquiry-into-missing-and-murdered-indigenous-women-won-t-meet-crucial-deadline-critic-1.3275332>.

21. "Missing and Murdered Indigenous Women inquiry launches with hope and concern", *CBC Radio—The Current* (4 August 2016), online: <www.cbc.ca/radio/thecurrent/the-current-for-august-4-2016-1.3706942/missing-and-murdered-indigenous-women-inquiry-launches-with-hope-and-concern-1.3706948>.

22. Native Women's Association of Canada, Press Release, "Government of Canada Officially Launches National Inquiry into Missing and Murdered Indigenous Women and Girls" (3 August 2016), online: <https://www.nwac.ca/2016/08/press-release-government-of-canada-officially-launches-national-inquiry-into-missing-and-murdered-indigenous-women-and-girls-mmiwg/>.

23. Brenda Gunn, "The legal system has harmed indigenous women enough–make it the focus of the inquiry", Editorial, *The Globe and Mail* (7 August 2017), online: <www.theglobeandmail.com/opinion/the-legal-system-has-harmed-indigenous-women-enough-make-it-the-focus-of-the-inquiry/article31291679/>.

24. Rauna Kuokkanan, "Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights" (2012) 34:1 Hum Rts Q 225 at 227.

25. Conny Rijken, "A Human Rights Based Approach to Trafficking in Human Beings" (2009) 20:3 Security & Human Rights 212.

26. 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW].

27. See e.g. Kerensa Johnston, "Maori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices" (2005) 4:1 Indigenous LJ 19; Emma Buxton-Namisnyk, "Does an Intersectional Understanding of International Human Rights Law Represent the Way Forward in the Prevention and Redress of Domestic Violence against Indigenous Women in Australia?" (2014/2015) 18:1 Austl Indigenous LJ 119; Heather Monasky, "What's Law Got to Do With It?: An Overview of CEDAW's Treatment of Violence Against Women and Girls Through Case Studies" (2014) Mich State L Rev 327.

women and girls and developed several recommendations.[28] However, there are many other international human rights instruments that set out important obligations relevant to murdered and missing Indigenous women and girls that are not often considered. This article focusses on three instruments that have particular relevance to murdered and missing Indigenous women and girls: the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[29] the *International Convention on the Rights of the Child*,[30] and the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED).[31] The goal is to highlight the broad range of human rights protections that should inform a human rights based approach to the Inquiry. An exhaustive analysis of international law norms and principles relevant to violence against Indigenous women and girls is beyond the scope of this article, and is in fact the analysis this article argues that the Inquiry should undertake. The aim is merely to exemplify the need for the Inquiry to engage a human rights based approach to addressing the systemic and underlying causes, and to provide some preliminary insights on what might be gained through such an approach. It should be noted, as will be discussed in greater detail below, that there are several international human rights instruments that are relevant—all of which should be considered in developing a human rights normative framework to analyze the underlying and systemic causes of murdered and missing Indigenous women and girls.[32] The next section describes a human rights based approach to the work of the Inquiry to set the stage for considering the three specific human rights treaties.

II A HUMAN RIGHTS BASED APPROACH

In order to understand the benefits of a human rights based approach to analyzing the systemic causes of violence, this section provides a general overview of the recommended approach. This section also provides a general introduction to some international human rights instruments that should inform the Inquiry's analysis of systemic causes. This background sets the stage for the following sections, which discuss in greater detail three specific treaties that should inform such an approach to the Inquiry that are not often considered in the literature.

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28. Convention on the Elimination of All Forms of Discrimination Against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UNCEDAW, 30 March 2015, UN Doc CEDAW/C/OP.8/CAN/1.

29. 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, ratification by Canada 24 June 1987) [*Torture Convention*].

30. 2 October 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990) [CRC].

31. 23 December 2006, 66 UNTS 177 (entered into force 23 December 2010) [ICPED].

32. For example, Canada is a party to several treaties such as the *International Convention on the Elimination of All Forms of Racial Discrimination*; the *International Covenant on Civil and Political Rights*; the *Optional Protocol to the International Covenant on Civil and Political Rights*; the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*; the *International Covenant on Economic, Social and Cultural Rights*; the *Convention on the Elimination of All Forms of Discrimination against Women*; the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Convention on the Rights of the Child*; the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict*; the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*; and the *Convention on the Rights of Persons with Disabilities*.

A human rights based approach is a conceptual framework based on international human rights principles and norms with the goal of promoting and protecting human rights.[33] This approach is particularly important to guide the work of the Inquiry as a human rights based approach "seeks to analyze obligations, inequalities and vulnerabilities and to redress discriminatory practices and unjust distributions of power that impede progress and undercut human rights,"[34] such as the situation of murdered and missing Indigenous women and girls. This approach would build upon the rich body of existing reports and recommendations developed by various international human rights bodies, including treaty monitoring bodies on causes and recommendations to address violence against Indigenous women and girls.[35] This would include building on the concluding observations of Canada's periodic review before the Committee on the Rights of the Child, the Committee against Torture, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, and the Committee on the Elimination of Racial Discrimination and the Human Rights Committee, to name just a few.[36]

A human rights based approach should inform the substantive issues considered by the Inquiry and the process of the Inquiry.[37] International human rights principles and norms should guide all policies and programming in all phases of the Inquiry.[38] Specifically, this approach requires direct participation of Indigenous women and girls in the Inquiry's process from beginning to end, as the right to participate in decision making is increasingly recognized as a basic right of Indigenous peoples, including and especially Indigenous women. This right is found throughout the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP).[39]

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33. Office of the High Commissioner for Human Rights, "Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures" (UN), online: <www.ohchr.org/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf> [HRB Approach].

34. *Ibid*.

35. Ineke Boerefijn, "A Human-Rights Based Approach of Violence Against Women" (2007-2008) 4 Intl Studies J 181 at 198.

36. For example, UN Committee Against Torture, *Concluding observations of the Committee against Torture: Canada*, 48th Sess, UN Doc CAT/C/CAN/CO/6, 25 June 2012; UN Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination Against Women: Canada*, 42nd Sess, UN Doc CEDAW/C/CAN/Q/7, 7 November 2008; UN Committee on the Elimination of Discrimination Against Women, *Prior List of Issues: Canada*, UN Doc CEDAW/C/CAN/7, 28 July 2014; UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, 80th Sess, UN Doc CERD/C/CAN/CO/19-20, 4 April 2012; UN Committee on the Rights of the Child, *Concluding Observations on the initial periodic report of Canada*, UN Doc CRC/C/OPSC/CAN/CO/1, 7 December 2012; UN Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, UN Doc CCPR/C/CAN/CO/6, 13 August 2015.

37. Boerefijn, *supra* note 35 at 209.

38. HRB Approach, *supra* note 33.

39. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No. 49, UN Doc A/RES/61/295 (2008) [UNDRIP], arts 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 37, 38, and 40-41.

It has also been recognized in United Nations (UN) human rights treaties as well as in the Inter-American human rights system.[40]

Through engaging in a human rights based approach, the Inquiry would analyze systemic and root causes of murdered and missing Indigenous women from the perspective of Canada's human rights obligations: identifying Canada's international obligations and judging Canada's actions against these standards.[41] Engaging human rights also addresses the concern about provincial involvement in the Inquiry as under international human rights law, the obligations are binding on the state as a whole—all branches at all levels (national, regional, and local)—and internal divisions of powers challenges are not justifiable reasons for failing to implement human rights obligations.[42] This principle is encapsulated in the *Vienna Convention on the Law of Treaties*' article 27 that indicates a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[43] This means if a province violates those obligations, it engages Canada's responsibility.[44]

A human rights based approach to the Inquiry's analysis of systemic causes would develop recommendations that promote the realization of Indigenous women's human rights.[45] In developing its recommendations, the Inquiry should be guided by human rights: "an effective policy on violence against women must be based on the existing human rights framework."[46] This includes recommendations on the development of new laws and policies to conform with Canada's international human rights obligations.[47] The Inquiry should also develop

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40. See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 302 art 25 (entered into force 23 March 1976, accession by Canada 19 May 1976). See also *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratification by Canada 14 October 1970) [ICERD] as interpreted by the Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of indigenous peoples*, UN Doc A/52/18, Annex V. See also the CRC as interpreted by the Committee on the Rights of the Child (CRC), *General comment No 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11 at para 5 [*General Comment No 11*]. See also International Labour Organization (ILO), C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), 27 June 1989, C169 art 6 (entered into force 5 September 1991) [ILO Convention]. See also UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Mexico*, 27 July 1999, CCPR/C/79/Add.109; UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Norway*, 26 October 1999, CCPR/C/79/Add.112. See also *YATAMA v Nicaragua (Nicaragua)* (2005), Judgement (Preliminary Objections, Merits, Reparations and Costs), Inter-Am Ct HR (Ser C) No 127; *Saramaka People v Suriname* (2007), Judgement (Preliminary Objections, Merits, Reparations and Costs), Inter-Am Ct HR (Ser C) No 172.

41. See Rijken, *supra* note 25 at 212 where she proposes "the central question in this [human rights based] approach is which (state) obligations can be derived from the human rights legal framework."

42. Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.1326 (29 March 2004) at para 4.

43. 23 May 1969, 1155 UNTS 331, 8 ILM 679, art 27 (entered into force 27 January 1980).

44. *Ibid*.

45. Siri Damman, "Indigenous Vulnerability and the Process Towards the Millennium Development Goals—Will a Human Rights-Based Approach Help?" (2007) 14:4 Intl J on Minority & Group Rights 489 at 518–19.

46. Boerefijn, *supra* note 35 at 198.

47. HRB Approach, *supra* note 33.

recommendations that strengthen the capacity of Indigenous women to know and assert their human rights, as well as strengthen the capacity of the government to uphold those rights.[48]

Under a human rights based approach, there are some core principles that should further guide the work of the Inquiry: universality and inalienability of human rights, indivisibility, interdependence and interrelatedness of human rights, non-discrimination and substantive equality, participation and inclusion of Indigenous peoples in the process, accountability and the rule of law.[49] The universality of human rights means that all peoples are entitled to the protection of their human rights, and that all people have the same basic human rights; this is sometimes encapsulated by the principles of equality and non-discrimination.[50] However, this does not mean that everyone must be treated the same. In fact, the Expert Mechanism on the Rights of Indigenous Peoples has noted that substantive equality requires states to take special measures to ensure that Indigenous peoples' human rights are realized.[51] Indivisibility, interdependence, and inter-relatedness means that there is no hierarchy of human rights.[52] The denial of any right has an impact on other human rights. Canada still tends to view economic, social, and cultural rights as secondary to civil and political rights.[53] This preference for civil and political rights is particularly problematic for Indigenous women as the denial of economic, social, and cultural rights contributes to murdered and missing Indigenous women and girls. Economic and social marginalization contributes to Indigenous women's susceptibility to violence and lessened ability to escape violent circumstances. Lack of education and employment opportunities result in high levels of poverty, food insecurity, and overcrowding; homelessness also contributes to Indigenous women's vulnerability to violence.[54]

Engaging a human rights based approach to the Inquiry has also been called for by several organizations, including the Feminist Alliance For International Action and the Native Women's Association of Canada.[55] Amnesty International's *Stolen Sisters* report was a human rights response to violence against Indigenous women, which recognizes the need for Canada

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48. *Ibid*.

49. Rijken, *supra* note 25 at 215.

50. UN General Assembly, *Vienna Declaration and Programme of Action*, 25 June 1993, UN Doc A/CONF.157/23 (adopted by the World Conference on Human Rights in Vienna). See also Office of the High Commissioner for Human Rights, "Human Rights: A Basic Handbook for UN Staff" (UN), online: <www.ohchr.org/Documents/Publications/HRhandbooken.pdf> at 3.

51. *Summary of responses to the questionnaire seeking the views of States and indigenous peoples on best practices regarding possible appropriate measures and implementation strategies to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples—Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UNHRC, 30th Sess, UN Doc A/HRC/30/54 (2015) at para 124.

52. Office of the High Commissioner for Human Rights, "Human Rights: A Basic Handbook for UN Staff" at 3, online: <www.ohchr.org/Documents/Publications/HRhandbooken.pdf>.

53. See e.g. *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429, where the Supreme Court of Canada finds that sections 7 and 15 of the *Charter* do not protect socio-economic rights. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 7, 15.

54. *Forsaken*, *supra* note 19.

55. Feminist Alliance For International Action & Native Women's Association of Canada, "The National Inquiry on Murders and Disappearances of Indigenous Women and Girls Recommendations from the Symposium on Planning for Change: Towards a National Inquiry and an Effective National Action Plan" (2016) 28:2 CJWL 408 at 412.

to uphold its human rights obligations.[56] The Legal Strategy Coalition on Violence Against Indigenous Women, a nationwide *ad hoc* coalition of groups and individuals formed to marshal resources that address violence against Indigenous women, has also considered international human rights as an avenue to address murdered and missing Indigenous women and girls.[57]

A human rights based approach to the work of the Inquiry is not a magic solution that will automatically eliminate the phenomenon of murdered and missing Indigenous women and girls. It simply provides a framework to examine state policy, and determine whether the Canadian system complies with all of its obligations under international human rights with a goal of increasing the safety and protection of Indigenous women and girls.[58] As the Senate Committee on Human Rights has recognized, international human rights are an important component for protecting Indigenous women and girls against violence: "human right norms and complaint mechanisms are developed for the benefit of individuals, not the State... [R]atification of international treaties and recognition of the jurisdiction of the bodies created to oversee their implementation give another level of protection not afforded by domestic courts."[59] The next section identifies the broad international human rights norms and principles relevant to develop a basic conceptual framework for murdered and missing Indigenous women and girls.

A. Developing a Human Rights Conceptual Framework

There is much international law that is "aimed at securing the survival and flourishment of indigenous peoples" that requires states to take action that involves Indigenous peoples.[60] A starting place for a human rights based approach to the Inquiry's work on the causes contributing to violence and particular vulnerabilities of Indigenous women and girls is to develop the conceptual framework of human rights that are relevant to murdered and missing Indigenous women and girls. Developing this framework requires synthesizing international human rights to determine the norms and principles, including Indigenous women's and girls' rights and state obligations that should guide the Inquiry's work.

There is no shortage of relevant international human rights instruments that protect Indigenous women's and girls' basic human rights. There are instruments that specifically

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56. *Supra* note 5.

57. Katherine Long & Alessandra Hollands, "Murdered and Missing Indigenous Women Legal Strategies" (14 July 2014) Legal Strategy Coalition on Violence Against Indigenous Women, online: <www.leaf.ca/wp-content/uploads/2015/06/2014-07-14-LSC-Memo-re-MMIW-Legal-Strategies.pdf>.

58. Boerefijn, *supra* note 35 at 210.

59. Parliament of Canada, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, Report of the Standing Senate Committee on Human Rights (Ottawa: May 2003), online: Senate of Canada <www.parl.gc.ca/content/sen/committee/372/huma/rep/rep04may03part1-e.htm> [*Enhancing Canada's Role*].

60. S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (New York: Oxford University Press, 2004) at 185.

consider Indigenous peoples' rights,[61] women's rights,[62] children's rights,[63] rights against racial discrimination,[64] and many others that deal with specific issues.[65] Some instruments are global, others are regional, such as those developed by the Organization of American States' (OAS) Inter-American human rights system.[66] Given the development of this conceptual framework based on human rights norms and principles, Canada's obligations "should be informed by the instruments of human right law that are specific to women and those that are specific to indigenous peoples"[67] as well as general human rights treaties interpreted for the specific Indigenous women context.

Canada is a party to twelve of the eighteen major human rights treaties and optional protocols under the United Nations system: the *International Convention on the Elimination of All Forms of Racial Discrimination*;[68] the *International Covenant on Civil and Political Rights*;[69] the *Optional Protocol to the International Covenant on Civil and Political Rights*;[70] the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*;[71] the *International Covenant on Economic, Social and Cultural Rights*;[72] the *Convention on the Elimination of All Forms of Discrimination against Women*; the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*;[73] the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Convention on the Rights of the Child*; the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*;[74] the *Optional Protocol to the Convention on the Rights of the Child on the*

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61. UNDRIP, *supra* note 39. See ILO Convention, *supra* note 40. See also *American Declaration on the Rights of Indigenous Peoples*, AG/RES 2888 (XLVI-O/16) (adopted 15 June 2016) [*American Declaration*].

62. CEDAW, *supra* note 26. See *Declaration on the Elimination of Violence Against Women*, UNGAOR, 23 February 1994, GA Res 48/104, UN Doc A/RES/48/104. Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, 9 June 1994, 33 ILM 1534 (entered into force 5 March 1995) [*Violence Against Women Convention*].

63. CRC, *supra* note 30.

64. *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratification by Canada 14 October 1970) [ICERD].

65. See ICPED, *supra* note 31. See also *Torture Convention*, *supra* note 29.

66. See Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose, Costa Rica"*, 22 November 1969, B-32 (entered into force 18 July 1978) [*Pact of San Jose*]. See also Organization of American States (OAS), *The American Declaration of the Rights and Duties of Man*, April 1948, OAS Res XXX (adopted 2 May 1948) [*Rights and Duties of Man*], reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

67. Rebecca Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival and Self-determination" (2010) 15 UCLA J Intl L & Foreign Aff 187 at 211.

68. ICERD, *supra* note 40.

69. 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

70. 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976, accession by Canada 19 May 1976).

71. 15 December 1989, A/RES/44/128.

72. 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

73. 15 December 1999, 54 UNTS 49.

74. 14 April 2014, A/RES/66/138.

sale of children, child prostitution and child pornography;[75] and the *Convention on the Rights of Persons with Disabilities* (CRPD).[76] The obligations found in these treaties should guide the Inquiry's analysis of existing Canadian laws, policies, and practices against the standards set out in these provisions.

The range of human rights relevant to Indigenous women and girls include provisions in the ICCPR protecting the right of peoples to self-determination;[77] freedom from discrimination, which includes a right to effective remedy;[78] the right to life;[79] protection from torture and ill-treatment;[80] freedom from slavery and servitude;[81] equality before the courts;[82] freedom from arbitrary or unlawful interference with privacy and unlawful attacks on honour or reputation;[83] freedom of thought, conscience, and religion;[84] legal protection against incitement to discrimination;[85] freedom of association, including a right to join trade unions;[86] protection of the family unit;[87] and the right of minorities to the enjoyment of their religion, culture, and language.[88] Additionally, the CRPD article 16 on freedom from exploitation, violence, and abuse specifically recognizes the gender aspect to these violations and requires states to take action. As Indigenous women and girls with disabilities experience violence in different ways and may have different vulnerabilities, the CRPD is a useful tool to guide this analysis. The ICESCR has been interpreted to recognize that "gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality."[89] Further, the Committee on Economic, Social and Cultural Rights states that "failing to protect women against violence or to prosecute perpetrators is a violation of the right to health" under the ICESCR.[90] Through general

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75. 18 January 2002, A/RES/54/263 [OP CRC 1].

76. 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008, ratification by Canada 11 March 2010).

77. ICCPR, *supra* note 69, art 1.

78. *Ibid*, art 2. Article 24 refers to discrimination specifically in relation to children. Article 26 refers to discrimination in relation to equality before the law.

79. *Ibid*, art 6.

80. *Ibid*, art 7.

81. *Ibid*, art 8.

82. *Ibid*, art 14.

83. *Ibid*, art 17.

84. *Ibid*, art 18.

85. *Ibid*, art 21.

86. *Ibid*, art 22.

87. *Ibid*, art 23.

88. *Ibid*, art 27.

89. Committee on Economic, Social and Cultural Rights, *General Comment No. 16*, UN Doc E/C12/2005/4 (2005) at para 27.

90. *Ibid* at para 51.

comments and individual complaints processes, Canada's obligations to address the situation of murdered and missing Indigenous women under these treaties have been identified.[91]

The UN *Declaration on the Rights of Indigenous Peoples* is critical to understanding the normative content of international human rights of Indigenous peoples.[92] The UNDRIP is the most recent articulation of Indigenous peoples' globally recognized fundamental human rights. The UNDRIP provides a framework (both in substance and process) for engaging in a nation-to-nation relationship with Indigenous peoples, and is thus critical to informing the Inquiry. Canada has stated its commitment to "recognizing and respecting Aboriginal title and rights in accordance with Canada's Constitution, international treaties and other key instruments such as the United Nations Declaration on the Rights of Indigenous Peoples, which Canada plans to implement."[93] Given Canada's commitment to implement the UNDRIP, the standards it sets out should inform the human rights analysis of the Inquiry. However, the UNDRIP is limited in the articulation of Indigenous women's rights with only three specific references: the primary provision being article 22(2), which requires states to take special measures to provide Indigenous women protection against all forms of violence. The UNDRIP has also received criticism for failing to fully account for Indigenous women's rights, only mentioning Indigenous women as vulnerable groups.[94] Despite these limitations, the broader recognition of social, economic, and cultural rights also apply to Indigenous women, and thus should inform the conceptual framework of human rights.[95] However, given the attention the UNDRIP has received lately, it will not be considered here as the goal is to highlight treaties not often considered.

The development of the conceptual framework should not be limited to the human rights treaties that Canada is a party to, but rather the framework should draw on all relevant international human rights instruments to gain a comprehensive understanding of the relevant human rights protections. Increasingly, treaty monitoring bodies interpret their own treaties with reference to other human rights instruments to promote greater coherence

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91. See UN Committee Against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2 [*General Comment No 2*]. See also UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38; UN Human Rights Committee, *General Comment No 28, Article 3 (The equality of rights between men and women)*, 29 March 2000, UN Doc CCPR/C/Rev.1/Add.10.

92. UNDRIP, *supra* note 39.

93. Rachel Wernick, Assistant Deputy Minister at the Department of Canadian Heritage, *Canada's Opening statement to the Committee on Economic, Social and Cultural Rights* (Geneva, Switzerland: 24 February 2016), online: Government of Canada <canada.pch.gc.ca/eng/1457110453479>.

94. Rauna Kuokkanen, "Indigenous Women's Rights and International Law: Challenges of the UN Declaration on the Rights of Indigenous Peoples" in *Handbook on Indigenous Peoples' Rights*, Corrine Lennox & Damien Short, eds, (New York: Routledge, 2016) 129. See also Yakin Ertürk, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Intersections between culture and violence against women*, UNHRC, 4th Sess, UN Doc A/HRC/4/34 (2007) 1.

95. Celeste McKay & Craig Benjamin, "A Vision for Fulfilling the Indivisible Rights of Indigenous Women" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 156.

across the human rights system.[96] Such an approach also conforms with the Supreme Court of Canada's approach that identifies the normative values and principles in international human rights, rather than focus on the bindingness of a particular instrument.[97] The Inter-American Commission and Court of Human Rights have engaged such a normative approach when determining Indigenous peoples' rights.[98]

Unfortunately, Canada is not a party to several key human rights instruments that articulate different substantive rights relevant to murdered and missing Indigenous women, including the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*,[99] and the *International Convention for the Protection of All Persons from Enforced Disappearance*. Canada has also failed to take action on several optional protocols that provide complaint mechanisms that increase accountability, including the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*;[100] the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;[101] the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*;[102] and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.[103] These instruments should be considered as part of the human rights based approach that identifies the relevant human rights principles and norms for murdered and missing Indigenous women and girls and create external avenues for addressing Canada's domestic failings. As part of engaging human rights in the Inquiry, recommendations should include that Canada immediately accede to human rights treaties that would provide further protection of Indigenous women and girls'

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96. For example, see reference to the UNDRIP in UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11. See also Committee on the Elimination of Racial Discrimination, *Concluding Observations on Canada*, April 2012, CERD/C/CAN/CO/19-20, which again references the UNDRIP when discussing Canada's obligations under ICERD, *supra* note 40.

97. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 70–71, 174 DLR (4th) 193. See also Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 NYUJ Intl L & Pol 501.

98. *The Mayagna (Sumo) Awas Tingni Community v Nicaragua (Nicaragua)* (2001), Judgment, Merits, reparations and costs, Inter-Am Ct HR (Ser C) No 79 [*Awas Tingni*]. In determining the property rights of the Awas Tingni Indigenous peoples in Nicaragua, the Inter-American Court of Human Rights took an evolutionary approach to interpret international human rights instruments in order to determine the applicable human rights norms. By engaging in such an approach, the Court looked beyond the particular human rights instrument in question (the *American Convention on Human Rights*) to determine the Awas Tingni's property rights as more broadly defined in international law. This approach has also been followed by the Inter-American Commission of Human Rights in determining rights of Maya Indigenous peoples in Belize and Western Shoshone Indigenous peoples in the United States, and can valuable in developing a conceptual framework for the analysis of Canada's obligations. See *Maya indigenous community of the Toledo District v Belize* (2004), Merits, Inter-Am Ct Hr, Case 12.053, No 40/04, *Annual Report of the Inter-American Commission on Human Rights: 2004*, OEA/Ser.L/V/II.122/doc.5/rev.1 [*Belize*]. See also *Mary and Carrie Dann v United States* (2002), Inter-Am Ct Hr, Case 11.140, No 75/02, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.LN/II.1 17/doc.I/rev. I [*Dann*].

99. 18 December 1990, A/RES/45/158 (entered into force 1 July 2003).

100. 5 March 2009, A/RES/63/117.

101. 18 December 2002, 2375 UNTS 237, 42 ILM 26 (entered into force 22 June 2006).

102. 14 April 2014, A/RES/66/138 (entered into force 14 April 2014).

103. 13 December 2006, A/RES/61/106, Annex II (entered into force 3 May 2008).

fundamental human rights. International human rights instruments are developed to prevent and address human rights violations and provide direction to states to address violations. Thus the Inquiry's recommendations to remove systemic causes of violence and increase the safety of Indigenous women and girls should include extending Canada's human rights obligations.

Providing greater external oversight is an important tool given the current failings of the Canadian legal system to protect Indigenous women. International oversight may be important to promote compliance with the recommendations of the Inquiry and provide a safeguard where changes are not sufficient to address the current situation of murdered and missing Indigenous women and girls. While there may be limited power for the treaty bodies to enforce their concluding observations, the international pressure associated with these international bodies has played a role in changing domestic Canadian policy in the past.[104] This can be critical to ensure that investigations and actions on murdered and missing Indigenous women continue even if there is a change in government. Finally, it is important to many Indigenous peoples, some of whom have turned to international fora to address the failings of Canada domestically, to have an external mediator for disputes.

There are additional human rights instruments under the OAS, including the *American Declaration on the Rights of Indigenous Peoples*,[105] *American Declaration on the Rights and Duties of Man*,[106] the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*,[107] and the *American Convention on Human Rights* that should inform the Inquiry's human rights based approach to analyzing the systemic and underlying causes.[108] As part of the human rights based approach to the Inquiry, the recommendations produced should encourage Canada to accede to relevant treaties that they are not yet a party to, such as the *American Convention on Human Rights*.[109] Acceding to the *American Convention on Human Rights* would extend external oversight through the Inter-American Court of Human Rights, the decisions of which are binding and enforceable through the OAS General Assembly.[110] The Inter-American system has been critical to advancing the understanding and protection of Indigenous peoples' rights throughout the Americas, including

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104. For example, see *Sandra Lovelace v Canada, Communication No. 24/1977: Canada 30/07/81*, UN Doc CCPR/C/13/D/24/1977.

105. *American Declaration*, *supra* note 61.

106. *Rights and Duties of Man*, *supra* note 66. There was also an inquiry into murdered and missing Indigenous women and girls conducted by the Inter-American Commission of Human Rights.

107. *Violence Against Women Convention*, *supra* note 62.

108. *Pact of San Jose*, *supra* note 66.

109. Canada has expressed concern that the right to life might not accord with domestic abortion laws. Recent developments in international law including "the interpretation by the Human Rights Committee of article 6 of the *International Covenant on Civil and Political Rights* guaranteeing the right to life, a woman's right to abortion and access to adequate reproductive health services is an essential component of the right to life, security, and equality under international law" are taken into account when interpreting "article 4(1) of the *American Convention*, given the requirement, under article 29, not to restrict the enjoyment of exercise of any right of freedom recognized by virtue of the laws of any State party or by virtue of another convention to which the State is a party." These developments mean that the right to life under the American Convention can no longer be interpreted as limiting a woman's right to an abortion. *Enhancing Canada's Role*, *supra* note 59.

110. The Senate Committee recommended that Canada take action to accede to the *American Convention on Human Rights* by 2008. See *Enhancing Canada's Role*, *supra* note 59.

the right to property and the right to participate in decision making on the basis of free, prior and informed consent.[111]

When identifying the human rights norms and principles that should guide the work of the Inquiry, the intersection of Indigenous identity and gender must be remembered, even though they are not often discussed together in international human rights.[112] This normative approach to human rights must also recognize that Indigenous women's experiences are not universal, but rather vary depending on sexual orientation and gender identity, residence in urban versus rural communities, socio-economic status, education, and ability.[113] Further, it must recognize that violence against Indigenous women and girls is not just a violation of individual rights, but also the collective rights of Indigenous peoples.[114] These differences must be considered as part of the national Inquiry process.

This article highlights key aspects of three treaties not often considered in the literature, to begin the process of identifying the range of international human rights protections that should guide the work of the Inquiry. It is beyond the scope of this article to develop the conceptual framework of international human rights to guide the work of the Inquiry, and is in fact the work that this article argues the Inquiry should undertake. However, this section surveyed the range of international human rights instruments to demonstrate the breadth and depth of existing standards that are available to inform the work of the Inquiry.

B. Duty of Due Diligence: A Human Rights Norm

A human rights based approach will set out Canada's obligation and international responsibility to address the situation of murdered and missing Indigenous women and girls. According to international law, states are responsible for internationally wrongful acts, which can include acts and omissions.[115] The critical component here is that the state is only responsible for actions (or omissions) of the state or state actors. Even though the doctrine of state responsibility is evolving, the challenge remains for the doctrine to be interpreted to "acknowledge the systematic and structural nature of gender discrimination and the role that states play in maintaining gender discrimination"[116] including Canada's responsibility for

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111. See e.g. *Awas Tingni*, *supra* note 98. See also *Belize*, *supra* note 98; *Dann*, *supra* note 98 for decisions on Indigenous peoples' right to property. See also *Case of the Saramaka People v Suriname, Saramaka People v Suriname*, Interpretation of the judgment on preliminary objections, merits, reparations and costs, Inter-Am Ct HR (Ser C) No 185, IHRL 3058, 12 August 2008.

112. Megan Davis, "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On" (2013) 19 Austl Intl LJ 17 at 30 (noting that even under the UNDRIP Indigenous women do not have a unique status as Indigenous women and as rights-bearers, but only their special needs are emphasized).

113. Penelope Andrews, "Violence Against Aboriginal Women in Australia: Possibilities for Redress Within the International Human Rights Framework" (1997) 60 Alb L Rev 917 at 918.

114. UN Permanent Forum on Indigenous Issues, *Study on the extent of violence against indigenous women and girls in terms of article 22 (2) of the United Nations Declaration on the Rights of Indigenous Peoples*, 12 February 2013, UN Doc E/C.19/2013/9 at para 6.

115. International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Supp No 10, UN Doc A/56/10, art 1.

116. Ivana Radacic, "Feminism and Human Rights: The Inclusive Approach To Interpreting International Human Rights Law" (2008) 14 UCL Jurisprudence Rev 238 at 250.

murdered and missing Indigenous women and girls. This section will discuss Canada's duty of due diligence as an example of a general international norm that should guide the Inquiry's analysis of systemic causes of violence against Indigenous women and the recommendations it is mandated to develop.

One way in which the doctrine of state responsibility is evolving is through the broader duty of due diligence. Under international human rights law, it is now recognized that Canada has an obligation of due diligence to prevent human rights violations, including violence against women and to investigate, prosecute, and punish actors who violate human rights. The development of due diligence is an important tool for Indigenous women to analyze Canada's actions and omissions to determine whether Canada has effectively fulfilled its obligations.[117] This will provide an important lens in the work of the Inquiry because it is relevant when states fail to act.

In 1988, the Inter-American Court of Human Rights articulated the duty of due diligence, holding that the state is obligated to ensure the free and full exercise of human rights.[118] The duty of due diligence requires states to "prevent, investigate and punish any violation of the rights."[119] States must "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[120] The Court explained that under the *American Convention on Human Rights*, states must "take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[121] The Court continued to explain that state responsibility may be found even where a state actor did not directly violate the Convention, if the state failed to exercise due diligence in preventing or responding to the violation.[122]

The duty of due diligence applies beyond the Inter-American system and enforced disappearances, and has been specifically extended to violence against women, including within the UN system. The duty of due diligence was articulated in the UN *Declaration on the Elimination of Violence against Women*: states should "pursue by all appropriate means and without delay a policy of eliminating violence against women and to this end should… exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."[123] The UN Special Rapporteur on Violence against Women Coomaraswamy opined that the states are as guilty as the perpetrators if they fail to act against violence against

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117. Rashida Manjoo, "State Responsibility to Act with Due Diligence in the Elimination of Violence Against Women" (2013) 2:2 Intl Human Rights L Rev 240 at 242.

118. *Velásquez Rodríguez v Honduras* (1988), Inter-Am Ct HR (Ser C) No 4 at para 166.

119. *Ibid*.

120. *Ibid*.

121. *Ibid* at para 174.

122. *Ibid* at para 172.

123. *Violence Against Women Convention*, *supra* note 62, art 4.

women.[124] The duty of due diligence therefore is important to identifying state obligations to address and eliminate violence against women.[125]

This duty of due diligence extends beyond the specific obligations articulated under various international human rights instruments. The Committee on Elimination of Discrimination against Women's general recommendation on violence against women explains that according to international law, state responsibility applies when states fail to act with due diligence to prevent, investigate, punish, and compensate violence against women.[126] It is increasingly recognized as a general principle of international law and has been applied to a range of human rights issues from trafficking in persons to the obligations of transnational corporations.[127] It has even been argued that the duty of due diligence is part of customary international law.[128] Canada's obligations must be broadly understood to include all the human rights violations that are interconnected with murdered and missing Indigenous women and girls. The duty of due diligence applies beyond obligations to directly address and prevent violence against women, to include due diligence to realize broader social, economic, cultural, civil, and political rights.

The next sections provide more detailed information on the human rights obligations found in several human rights treaties including the *Convention Against Torture*, the *Convention on the Rights of the Child*, and the *Convention for the Protection of all Persons from Enforced Disappearances* to demonstrate what can be gained through engaging a human rights based approach to the Inquiry by identifying areas where Canada is currently failing to meet international standards. These sections also highlight the benefits of the individual complaint procedures for ongoing international oversight to encourage Canada to comply with its obligations.

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124. *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, pt II, 26, UNCHR, 52nd Sess, UN Doc E/CN.4/1996/53 (1996).

125. Lee Hasselbacher, "State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection" (2010) 8:2 Northwestern J Intl Human Rights 190.

126. Committee on the Elimination of Discrimination Against Women, *General Recommendation No 19 Violence Against Women*, 1992, UN Doc A/47/38 at para 9.

127. See Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68/Add.1; Sub-Commission on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 as noted in Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk*, UN Doc E/CN.4/2006/61 (20 January 2006) at para 28 [*Ertürk*].

128. *Ertürk*, *supra* note 127 at para 29.

III *CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*

The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) contains relevant sections for Canada's obligations related to the Inquiry. Canada signed this Convention in 1985 and ratified it in 1987. The CAT entered into force on June 26, 1987. As the name suggests, the Convention addresses more than torture; it covers ill-treatment as well. Under CAT, torture is defined as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person…for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[129]

Unfortunately, CAT does not provide a clear definition of ill-treatment other than under article 16.1 which explains that states are obligated to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The scope of this Convention is broad and is relevant to the situation of murdered and missing Indigenous women because many advocates have argued that the police have been directly involved in, or acquiesced to the problems by failing to fully investigate. As noted above, one of the criticisms of the terms of reference was the failure to specifically mention the need to investigate police actions. In particular, the Committee Against Torture has noted that women's experiences of violence, and vulnerability to rights violations, under this Convention varies depending on race, nationality, religion, sexuality, age, and immigration status.[130] When identifying root causes and recommendations, the Inquiry should engage the Convention to examine Canadian laws to identify the special and particular risks Indigenous women face.

Under CAT, Canada is obligated to take effective action to prevent torture and ill-treatment,[131] as well as "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed."[132] The chronic inaction of Canadian police forces to adequately prevent the murder and disappearance of Indigenous women and girls may be a violation of CAT. For example, the Committee Against Torture, which oversees CAT, has stated that "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" is a violation of CAT.[133] While the *Dzemalj* case may be different than murdered and missing Indigenous women and girls, there have long been criticisms that Indigenous women have been over policed and under protected.

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129. *Torture Convention*, *supra* note 29, art 1.

130. *General Comment No 2*, *supra* note 91 at para 22.

131. *Torture Convention*, *supra* note 29, art 2.

132. *Torture Convention*, *supra* note 29, art 12.

133. UNCAT, *Dzemalj et al v Yugoslavia, Communication No 161/2000*, UN Doc CAT/C/29/D/161/2000 (2002) at para 9.2.

The Inquiry should consider police actions in light of these international standards. This article is not meant to pre-determine whether police actions meet or breach these standards, but rather suggests that the Inquiry's work should be guided by these standards when reviewing police action.

Canada's responsibility extends beyond responsibility for state actions. The state can be responsible for violations by non-state actors if the state consented or acquiesced to acts of torture,[134] which is critical for addressing violence against women.[135] Acquiescence may occur when state officials or authorities witness violations and fail to act to prevent the abuse.[136] If the state has knowledge or reason to believe that non-state officials or private actors are engaging in acts of torture or ill-treatment, states must exercise due diligence to prevent, investigate, prosecute, and punish those private actors. CAT has noted that Indigenous women in Canada "experience disproportionately high levels of life-threatening forms of violence, spousal homicides and enforced disappearances," and that Canada has "failed to promptly and effectively investigate, prosecute and punish perpetrators or provide adequate protection for victims."[137]

Canada has been aware of the situation of murdered and missing Indigenous women and girls for decades. Arguably, Canada failed to exercise due diligence and thus failed to uphold its obligations under CAT. Canada was obligated to undertake a criminal investigation to determine the nature and circumstances of the acts and identify the persons responsible.[138] A delay of fifteen months between an incident and the commencement of an investigation was held to be contrary to article 12.[139] As Canada has known of the situation for a significant period and has not acted, the delay itself can be a violation of CAT. While Canadian police forces may have engaged in some investigations of murdered and missing Indigenous women and girls, systemic racism within policing has been noted as contributing to the failings of police to fully and properly investigation cases, such as that of Helen Betty Osborne noted earlier.[140] Again, this article argues that the Inquiry should judge Canada's actions against these international human rights standards.

CAT also applies to the treatment of Indigenous women and girls in prison and the child welfare system. If the victims are within state control, the state must take adequate

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134. UNCAT, *Concluding Observations of the Committee against Torture: Canada*, 25 June 2012, CAT/C/CAN/CO/6 at para 20 [*Concluding Observations*].

135. Lori A Nessel, "'Willful Blindness' to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture" (2004) 89 Minn L Rev 71 at 118.

136. UNCAT, *Osmani v Serbia, Communication No 261/2005*, 25 May 2009, UN Doc CAT/C/42/D/261/2005 at para 10.5.

137. *Concluding Observations*, *supra* note 134 at para 20.

138. UNCAT, *Kirsanov v Russia, Communication No 478/2011*, 19 June 2014, UN Doc CAT/C/52/D/478/2011 at para 11.2 [*Kirsanov*]. See also UNCAT, *Encarnación Blanco Abad v Spain, Communication No 59/1996*, 14 May 1998, UN Doc CAT/C/20/D/59/1996 at para 8.8.

139. UNCAT, *Radivoje Ristic v Yugoslavia, Communication No 113/1998*, 11 May 2001, UN Doc CAT/C/26/D/113/1998 at para 8.6.

140. *Aboriginal Justice Inquiry*, *supra* note 8.

measures to prevent abuses.[141] This includes all circumstances of custody or control,[142] such as "prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm."[143] Through the course of the Inquiry, information should be sought about the general treatment of Indigenous women and girls in these institutions, which contribute to murders and disappearances. The Inquiry should review policies and procedures connected with these institutions to ensure that they uphold Canada's obligations under CAT.

Another area where Canada may be failing to uphold its obligations is under article 14.1 which requires states to ensure that the Canadian legal system provides redress and compensation to victims of torture.[144] State obligations are not met where compensation is only a symbolic amount and no attempt is made to prosecute those responsible in a criminal court.[145] Redress encompasses the obligation to ensure an effective remedy and reparations required under international law.[146] A state cannot evade its obligations by simply providing a civil remedy. Some cases will require criminal prosecution.[147] Under article 14, complaint mechanisms and investigations must take positive steps to take into account gender aspects to ensure victims of "sexual violence and abuse, rape, marital rape, domestic violence, female genital mutilation and trafficking are able to come forward and seek and obtain redress."[148] There has not been any comprehensive or systematic approach to providing compensation for aspects of the situation of murdered and missing Indigenous women that amount to violations of Canada's obligations under CAT.

Canada has not ratified the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).[149] However, on May 2, 2016, Foreign Minister Dion indicated Canada intends to sign on to the OPCAT.[150] The OPCAT provides two primary mechanisms: the Subcommittee on Prevention has the authority to visit states where persons are deprived of liberty to ensure the CAT is upheld and make recommendations to states accordingly, and the National Preventative Mechanisms are independent mechanisms the state is to create to provide domestic oversight that ensures states meet their obligations under CAT, with a particular focus on those deprived of liberty in places of detention.[151] The OPCAT would offer new mechanisms of protection and increased

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141. UNCAT, *Colmenarez and Sánchez v Venezuela, Communication No 456/2011,* 26 June 2015, UN Doc CAT/C/54/D/456/2011 ("States parties must...take the necessary steps to prevent individuals from inflicting acts of torture on persons under their control" at para 6.4).

142. *General Comment No 2*, *supra* note 91 at para 15.

143. *Ibid* at para 15.

144. *Torture Convention*, *supra* note 29, art 24(4).

145. *Kirsanov*, *supra* note 138 at para 11.4.

146. UNCAT, *General Comment No 3*, UN Doc CAT/C/GC/3 (2012) at para 2 [*General Comment No 3*].

147. *Kirsanov*, *supra* note 138 at para 11.4.

148. *General Comment No 3*, *supra* note 146 at para 33.

149. 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) [OPCAT].

150. The Canadian Press, "Dion official: Canada to join UN anti-torture protocol after more than a decade", *CTV News* (2 May 2016), online: <www.ctvnews.ca/politics/dion-official-canada-to-join-un-anti-torture-protocol-after-more-than-a-decade-1.2884291>.

151. OPCAT, *supra* note 149, arts 17-23.

accountability for Canada in relation to murdered and missing Indigenous women and girls and the interrelated issue of overrepresentation of Indigenous women in prisons.

IV *INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD*

One of the critical international human rights instruments applicable to a human rights based approach to the Inquiry is the *International Convention on the Rights of the Child* (CRC), which entered into force on September 2, 1990. Canada ratified the CRC in 1991, under which a child is defined as a human being under eighteen years of age.[152]

Canada has several obligations under the CRC to protect children. Canada is required to take legislative, administrative, and other measures to implement the CRC.[153] In the case of Indigenous children, the Committee on the Rights of the Child recognizes the need to take special measures to ensure the full realization of Indigenous children's rights.[154] The Committee on the Rights of the Child further recognizes that the development of these special measures must be done in consultation with Indigenous peoples, and in a culturally appropriate manner.[155]

The Convention requires states to "ensure to the maximum extent possible the survival and development of the child."[156] States must take measures to protect children against physical and mental violence from their parents, legal guardians or any person who has care of the child.[157] If a child is removed from their family, the state must provide special protection and assistance.[158] When determining the best interest of Indigenous children, states "should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group", and this determination should be done with the participation of Indigenous communities.[159] In Canada, there is a connection between the high number of Indigenous children in the child welfare system and murdered and missing Indigenous women and girls. Employing a human rights based approach to the Inquiry includes examining policies that contravene Canada's obligation under the CRC to protect Indigenous children.

The Committee on the Rights of the Child, which oversees the CRC, is quite critical of Canada and has indicated several ways Canada has failed to uphold its obligations to Indigenous children. The Committee has commented on the situation of Indigenous children in the child welfare system. The Committee has criticized Canada for using removal "as a first resort in cases of neglect or family hardship or disability" because this approach causes

152. CRC, *supra* note 30, art 1.

153. *Ibid*, art 4.

154. *General Comment No 11*, *supra* note 40 at para 5.

155. *Ibid* at para 20.

156. CRC, *supra* note 30, art 6.

157. *Ibid*, art 19.

158. *Ibid*, art 20.

159. *General Comment No 11*, *supra* note 40 at para 31.

poorer outcomes and often leads to further abuse and neglect.[160] The Committee recommended Canada take urgent action to address the overrepresentation of Indigenous children in the criminal justice and child welfare systems.[161] The Inquiry must look at the connection between the child welfare system, the criminal justice system, and murdered and missing Indigenous women and girls using the CRC as a baseline to judge Canada's actions and inactions.

The Committee has further expressed concern over "the lack of a gender perspective in the development and implementation of programmes aimed at improving the situation for marginalized and disadvantaged communities, such as programmes to combat poverty or the incidence of violence, especially in light of the fact that girls in vulnerable situations are disproportionately affected."[162] The Committee then recommended that Canada take steps to "ensure that the factors contributing to the high levels of violence among Aboriginal women and girls are well understood and addressed in national and provincial/territorial plans"[163] and "ensure that all child victims of violence have immediate means of redress and protection."[164] They were also concerned that no national strategy exists to comprehensively address child poverty which has profound impacts on Indigenous children.[165] The CRC should guide the Inquiry as it analyzes systemic causes and develops recommendations.

Under the CRC, states must take "measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."[166] Article 34 requires states to protect children from all forms of sexual exploitation and sexual abuse.[167] The Committee on the Rights of the Child has noted that "indigenous children whose communities are affected by poverty and urban migration are at a high risk of becoming victims of sexual exploitation and trafficking."[168] The Committee has commented that Canada has failed to take action to address child prostitution and sexual abuse.[169] The Committee also connects victims of sexual exploitation and missing and murdered Indigenous women, expressing grave concern about Indigenous girls involved in prostitution and who disappeared or were murdered.[170] The Committee has also recommended that Canada adopt specific culturally sensitive rehabilitation programs for Indigenous child victims of prostitution.[171] The Committee specifically identifies

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160. UN Committee on the Rights of the Child, *Concluding Observations on the Periodic Report of Canada*, 7 December 2012, CRC/C/OPSC/CAN/CO/1 at para 55 [UNCRC *Observations*].

161. *Ibid* at para 33a.

162. *Ibid* at para 32c.

163. *Ibid* at para 47b.

164. *Ibid* at para 47c.

165. *Ibid* at para 67.

166. CRC, *supra* note 30, art 39.

167. CRC, *supra* note 30, art 34.

168. *General Comment No 11*, *supra* note 40 at para 72.

169. UNCRC *Observations*, *supra* note 160 at para 48.

170. *Ibid*.

171. *Ibid* at para 35.c.

the need for Canada to take urgent measures to address the vulnerable position many Indigenous children are in.[172]

Canada is a party to the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. Article 9 of the Protocol requires states to "adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent" the sale of children, child prostitution and child pornography.[173] The Committee has concluded that Canada has failed to fulfill this obligation. Article 9.4 of the Protocol requires states to ensure that children who have been victims of prostitution "have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible."[174] The Committee states that it is "deeply concerned that cases involving Aboriginal girls, including those who may have been involved in the sex trade, have gone missing or have been murdered, have not been fully investigated, with the perpetrators going unpunished."[175] The Committee recommended that Canada "establish a plan of action to coordinate and strengthen law enforcement investigation practices and procedures in cases of child prostitution, especially in Aboriginal communities, and to vigorously ensure that all cases of missing girls are investigated and prosecuted to the full extent of the law."[176] Again here, the value of the CRC in the work of the Inquiry can be seen as there are wide ranging analyses and recommendations that already exist to address the systemic and root causes of missing and murdered Indigenous women and girls.

It is unfortunate that Canada has not ratified the *Optional Protocol on a Communications Procedures* which allows individuals to submit communications to the Committee.[177] Particularly due to the high level of vulnerability of children, it is important to provide external oversight to encourage Canada to take all appropriate measures to realize Indigenous girls' human rights. The Inquiry should consider recommending that Canada accede to this *Optional Protocol*.

V *INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE*

One of the most relevant international human rights treaties to the Inquiry is the ICPED,[178] which entered into force on December 23, 2010. Unfortunately, Canada is not a party to this Convention. Despite the limitation in this Convention's application of Canada, it is still critical to include in the work of the Inquiry if it is to be guided by basic international human rights standards because the Convention builds on existing international human rights law.

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172. UN Committee on the Rights of the Child, *Concluding Observations on the Periodic Report of Canada*, 6 December 2012, CRC/C/CAN/CO/3-4 at para 33a.

173. OP CRC 1, *supra* note 75, art 9.

174. *Ibid*, art 9.4.

175. UNCRC *Observations*, *supra* note 160 at para 26.

176. *Ibid* at para 27.c.

177. *Optional Protocol to the Convention on the Rights of the Child on a communications procedures*, 14 April 2014, A/RES/66/138 art 5.1.a-c.

178. ICPED, *supra* note 31.

As such, Canada may have obligations to protect against enforced disappearances even without acceding to this treaty.[179] After an extensive review of international law, Nikolas Kyriakou argues that the prohibition against enforced disappearance is a rule of customary international law.[180] If the prohibition is a rule of customary international law, it is presumed to be directly incorporated into Canadian common law, regardless of Canada's position on ICPED.[181] In addition, enforced disappearance is recognized to violate numerous other recognized human rights, including many recognized under other international human rights treaties.[182] For example, enforced disappearance violates civil and political rights such as "the right to recognition as a person before the law; the right to liberty and security of the person; the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment; the right to life, when the disappeared person is killed; the right to an identity; and the right to a fair trial and to judicial guarantees."[183] Enforced disappearance also violates rights protected under ICESCR: "the right to protection and assistance to the family; the right to an adequate standard of living; the right to health; the right to education."[184] Enforced disappearances of children as well as the disappearance of parents would be a violation of the *Convention on the Rights of the Child*.[185] Canada's obligations under these international human rights treaties provide some protection against enforced disappearances. Building on general international law on enforced disappearance, the ICPED is important to understanding the scope of state obligations and thus this section considers the scope of protection related to murdered and missing Indigenous women and girls, which should be included in a human rights based approach to the Inquiry.

Under ICPED, enforced disappearance is defined as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the

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179. *Baker*, *supra* note 97.

180. Nikolas Kyriakou, "The International Convention for the Protection of all Persons from Enforced Disappearance and its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition" (2012) 13:1 Melbourne J Intl L 424.

181. *R v Hape*, 2007 SCC 26 at para 39, [2007] 2 SCR 292. Justice LeBel, writing for the majority, held:

> In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.

See also *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] SCR 208, [1943] 2 DLR 481.

182. Office of the High Commissioner for Human Rights, "Enforced or Involuntary Disappearances: Fact Sheet No. 6/Rev.3" at 3, online: <www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf> (UN).

183. *Ibid*.

184. *Ibid* at 3–4.

185. *Ibid* at 4.

disappeared person."[186] Article 3 requires Canada to take measures to investigate enforced disappearances "committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice." Under the Convention, enforced disappearances must be a criminal offence; as well, widespread or systemic practices of enforced disappearances must constitute a crime against humanity.[187] The current state of Canadian law may fulfill this obligation, but specific reference to enforced disappearance would strengthen existing provisions.[188] But it is also worth noting that the widespread and systemic situation of murdered and missing Indigenous women and girls in Canada may meet the threshold for a crime against humanity. While I have not heard any advocate claim that Canada is directly involved in disappearing or murdering Indigenous women, there have been allegations that state actors, including police, may have acquiesced to the disappearances by failing to act when they knew about the situation for decades before taking any major action. Further, if Canada fails to act on the recommendations of the Inquiry, the question remains whether Canada continues to violate this international standard.

The Convention is not limited to enforced disappearances perpetrated directly by the state. States are obligated to take appropriate measures to investigate enforced disappearances "committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice."[189] This obligation is meant to ensure states make genuine efforts to solve missing persons cases. States must also take "measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains."[190] For example, an urgent action request was granted in the disappearance of Jairo Perez, despite no indication that Colombia was involved in his disappearance.[191] The Committee on Enforced Disappearances (CED) and Colombia held regular communications about the investigation until Perez's remains were found.[192] After that point, the Committee continued to monitor the situation and requested that interim or protective measures be adopted for the victim's family.[193] This case demonstrates that Canada may be responsible under ICPED for disappearances even if the disappearance is not directly perpetrated by the state, which may be the case for many murdered and missing Indigenous women and girls.

Under ICPED, states must take measures to hold criminally responsible "any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance."[194] The CED accepted an urgent action request in the disappearance of Daniel Alfaro, who disappeared while travelling between two

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186. ICPED, *supra* note 31, art 2.

187. ICPED, *supra* note 31, art 1.

188. See *Criminal Code*, RSC 1985, c C-46. See also *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

189. ICPED, *supra* note 31, art 3.

190. ICPED, *supra* note 31, art 24(3).

191. Committee on Enforced Disappearances, *Report of the Committee on Enforced Disappearances*, A/69/56 [*Enforced Disappearances Report*] at para 53.

192. *Ibid* at para 54.

193. *Enforced Disappearances Report*, *supra* note 191 at paras 54–55.

194. ICPED, *supra* note 31, art 6(1)(a).

villages in Mexico.[195] When local Mexican authorities failed to take meaningful action, the Committee engaged in a dialogue with Mexico on the case.[196] After repeated letters demanding information, Mexico finally indicated that they had assigned the case to a special unit and that "relatives of the victim were provided with psychological attention and support."[197] The Committee continued corresponding with Mexico and requesting updates about the status of the investigation and the measures implemented to protect the victim and others in danger.[198] This case demonstrates how international pressure and oversight can be important when a state is slow to respond to an incident, as has been the case of murdered and missing Indigenous women and girls in Canada. This obligation to investigate and hold criminally responsible those who have engaged in enforced disappearances should inform the scope of the Inquiry into murdered and missing Indigenous women and girls. Canada has consistently failed to investigate disappearances. Some questions may also exist on previously closed files where insufficient investigation occurred.

The Convention also requires states to ensure that their domestic legal system provides victims with the "right to obtain reparation and prompt, fair and adequate compensation."[199] Reparations should cover both material and moral damages, including restoration of dignity and reputation.[200] Again here, even if remedies exist in theory in Canada, they are not effectively available to many Indigenous women and girls.

The ICPED provides several complaint mechanisms including individual urgent action requests and state inquiries. An urgent action petition can be submitted requesting "that a disappeared person be sought and found."[201] The request can be submitted by a wide range of people, from relatives of the disappeared person to their counsel or any other person who may have a legitimate interest.[202] A state inquiry can be initiated if the Committee "receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party." This information may be brought to the urgent attention of the UN General Assembly. The Convention permits the Committee to engage the state as long as the case of the disappeared person remains unresolved.[203] The Committee can also request to visit the State to investigate the issue.

Beyond corresponding with and putting pressure on states, the ICPED can visit a state if the Committee receives reliable information that a state is violating the ICPED.[204] In 2013, four non-governmental organizations alleged that Mexico was involved in the "perpetration of enforced disappearances, was failing to instigate proper investigations, was not holding

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195. *Enforced Disappearances Report*, *supra* note 191 at para 61.

196. *Ibid* at para 62.

197. *Ibid*.

198. *Ibid*.

199. ICPED, *supra* note 31, art 24(4).

200. *Ibid*, art 24(5).

201. *Ibid*, art 30.

202. *Ibid*, art 30(1).

203. *Ibid*, art 30(4).

204. *Ibid*, art 33.

perpetrators accountable, and was not ensuring the victims received adequate reparations."[205] In this case, the Committee responded by requesting a state visit.[206] The Inquiry should investigate Canada's actions and failures to act against the standards set out in ICPED to determine if Canada is responsible (directly or indirectly) for the disappearances of Indigenous women and girls.

The urgent action and state visit processes are important safeguards for murdered and missing Indigenous women and girls that provide international investigations if Canada fails to act, as they have done in the past. As part of the human rights based approach, the Inquiry should recommend Canada accede to the ICPED and make a declaration under article 31 permitting individual complaints. While it may be difficult to garner the necessary political will for Canada to accede to the ICPED and make a declaration for individual complaints, such a recommendation from the Inquiry may be pertinent as a concrete action Canada can take to increase the safety of Indigenous women and girls by creating additional external checks on Canada's actions going forward.

VI CONCLUSION

The Inquiry should take a human rights based approach. Through such an approach, international human rights standards would be used to examine and evaluate the current state of Canadian law and make recommendations to change law and policies to promote greater realization of Indigenous women and girls' human rights. This approach would also ensure Canada has signed, ratified, and transformed all international human rights instruments into Canadian law. Further, to ensure maximum protection of human rights, Canada should take steps to accede to any human rights treaties to which Canada is not yet a party. This includes the optional protocols and declarations that provide complaint processes.

A human rights based approach to the Inquiry should emphasize Canada's duty of due diligence to prevent, investigate, prosecute, punish, and provide redress for murdered and missing Indigenous women and girls. Through such an approach, the Inquiry should recommend "adopting or modifying legislation; developing strategies, action plans and awareness-raising campaigns and providing services; reinforcing the capacities and power of police, prosecutors and judges; adequately resourcing transformative change initiatives; and holding accountable those who fail to protect and prevent, as well as those who perpetrate violations of human rights of women."[207] Emphasizing the duty of due diligence as articulated through all the human rights instruments, the Inquiry can engage in a process of "societal transformation to address structural and systemic gender inequality and discrimination."[208]

While Canada has often argued that additional human rights protections are not necessary because we have human rights legislation and the *Canadian Charter of Rights of Freedoms*, the vast and systemic nature of murdered and missing Indigenous women and girls demonstrates that the current system in Canada to protect Indigenous women and girls is not working. It is time for a new approach, one that seeks to uphold human rights and ensure Indigenous

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205. *Enforced Disappearances Report*, *supra* note 191 at para 68.

206. *Ibid* at para 69.

207. Manjoo, *supra* note 117 at 262.

208. *Ibid*.

women receive protection under the law, perpetrators of gross human rights violations are prosecuted, and the complicity of the state is addressed. A human rights based approach will help meet these ends because it "emphasizes universality, equality, participation and accountability."[209]

209. The Secretariat of the UN Permanent Forum on Indigenous Issues, "Indigenous Peoples and the MDGs: Inclusive and Culturally Sensitive Solutions", UN Chronicle XLV:1 (March 2008) 40 at 41.

LEARNING INDIGENOUS LAW: REFLECTIONS ON WORKING WITH WESTERN INUIT STORIES

by Rebecca Johnson & Lori Groft†*

CONTENTS

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I INTRODUCTION

As Jutta Brunnée and Stephen Toope remind us, law is constituted and maintained through ongoing engagement.[1] Taking this to be true, we believe that any commitment to law entails a commitment to continue to engage with it. Of course, Canada's history is replete with colonial practices of non-engagement with (or indeed, criminalization of) Indigenous legal orders; there has been a long history of people denying that Indigenous communities have even had legal orders at all, or asserting that any such legal orders have been extinguished.[2] But there has also been a long tradition of people from across the country (Indigenous and settler[3]) continuing to do the hard and rewarding work of engagement—enacting, maintaining, nourishing, revitalizing, and living Indigenous law.

We are at what seems to be a moment of change in our history, a possible shift of official understandings of the place of Indigenous law in Canada's legal order. Certainly, in the Truth and Reconciliation Commission's (TRC) Calls to Action #28 and #27, law schools and law societies across the country have been tasked with new forms of engagement.[4] Indigenous law is to be a mandatory part of legal education, something students are to learn, practitioners are expected to know, and judges will have to work with. Clearly, against the backdrop of our colonial history and the active suppression of Indigenous legal orders, there is much work to be done. This is visible in the ways in which Calls #27 and #28 include "Indigenous law" as a subject distinct from the other included (and related) topics that appear more frequently in law school and Continuing Legal Education (CLE) curricula: *The United Nations Declaration*

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1. See Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, UK: Cambridge University Press, 2011) at 355 for an account of how ongoing engagement with law is what constitutes and maintains it.

2. For an elaboration of these histories, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Canada's Indigenous Constitution*].

3. We have had many interesting discussions about the politics of using the term "settler" with or without capitalization. Our choice on this occasion to proceed without capitalization takes inspiration from the powerful argument made in Rachel Flowers, "Refusal to Forgive: Indigenous Women's Love and Rage" (2015) 4:2 Decolonization: Indigeneity, Education & Society 32.

4. Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015) online: Truth and Reconciliation Commission of Canada <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2. pdf> [TRC, *Calls to Action*].

on the Rights of Indigenous Peoples (UNDRIP),[5] Treaties,[6] Aboriginal Rights,[7] and Aboriginal-Crown relations.[8]

Even as the TRC identifies the importance of teaching and learning Indigenous law, there are persistent barriers that, while not insurmountable, present challenges to people's ability to recognize Indigenous law.[9] One barrier is the tendency to keep the focus solely on the Canadian state. In taking Indigenous law seriously, one needs to make a shift, to begin with Indigenous people. The starting point must be an acknowledgement that Indigenous peoples (be they Salish, Cree, Dene, Anishinabek, Inuit, Malecite, etc.) are and have been lawful people, with forms and practices of law that are robust and complex, capable of precision, include spaces for contestation and disagreement, and can be both learned and applied. One looks to Indigenous peoples themselves, and their descriptions of their forms of legal ordering (including practices of governance, rules regarding belonging and citizenship, authoritative decision making, conflict resolution, obligations and rights, marriage and divorce, harms, legal processes, and mechanisms of enforcement). One accepts that Indigenous legal orders (like all legal orders) have their roots in territory, and move in a stream of time and context. It is important when thinking about Indigenous law not to proceed in a pan-Indigenous

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5. GA Res 61/295, UNGAOR, 2008, Supp No 53, UN Doc A/61/53. The study of the UNDRIP takes one in the direction of international law, and aims to work across national boundaries. For one collection of approaches to the UNDRIP, see Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (Saskatoon: Purich Publishing, 2010).

6. Treaties are formally concluded and ratified agreements between sovereign bodies. As John Borrows points out, the study of treaties can take us not only in the direction of treaties entered into between Canada and different First Nations, but can also take us in the direction of treaties entered into between Indigenous Nations, such as a 1701 treaty between the Haudenosaunee and the Anishinabek. See Borrows, *Canada's Indigenous Constitution*, *supra* note 2 at 130. See also Aimée Craft, *Breathing Life Into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013). See also Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

7. Aboriginal rights draw on the jurisprudence and discourses linked to Canada's acknowledgement of the collective rights of peoples who occupied the land when Europeans began arriving in the territory. Much energy has been devoted to Aboriginal rights, so there are resources to learn from, both for law students and legal practitioners. See generally Olthuis, Kleer, Townshend (OKT), *Aboriginal Law Handbook*, 4th ed (Toronto: Carswell, 2012).

8. A study of Aboriginal-Crown relations involves an understanding of the history of these relations across geographical territories and time. See e.g. Frank James Tester & Peter Kulchyski, *Tammarniit (Mistakes): Inuit Relocation in the Eastern Arctic, 1939-63* (Vancouver: UBC Press, 1994); James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013).

9. For a discussion of common barriers, see Borrows, *Canada's Indigenous Constitution*, *supra* note 2 at 137 (Chapter 6, "Challenges and Opportunities in Recognizing Indigenous Legal Traditions"). Borrows identifies five particular challenges that continue to act as barriers to the recognition of Indigenous law. These are: intelligibility (the problem of settlers not "recognizing law when they see it"), accessibility (difficulties in locating relevant materials and sources), equality (the failure of people to treat Indigenous law with equal respect), applicability (uncertainty as to the reach of the law to both persons and places), and legitimacy (which raises complex questions about emotion and trauma in discussions over the need for internal critique of Indigenous laws, and where they too may need to change). For a related and helpful articulation of institutional and intellectual challenges to practical engagement with Indigenous law, see Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 at 13–17 [Friedland, "Reflective Frameworks"].

way, but, as Kris Statnyk puts it, to "take seriously the multiple and diverse legal systems of indigenous peoples."[10] In approaching Indigenous law it is also important to acknowledge that different legal orders have experienced colonization in different ways, and may be differently situated with respect to the aspects of their legal orders that are operating well, and those aspects that are in need of repair or revitalization.

Certainly, for those focussed on learning and teaching Indigenous law, it seems clear that the work needs to proceed in at least two directions. First, there is the work of people *within* different Indigenous legal traditions, who focus on documenting, living, and revitalizing their own legal orders.[11] Second, there is the work of people *outside* those traditions, who are seeking to develop the kind of knowledge that is crucial in order to rekindle and maintain mutually respectful legal relationships across legal orders. Note that those *outside* a legal tradition include not only settlers, but also people from different Indigenous legal traditions. Questions about how to learn, work with, and apply different bodies of Indigenous law are as important to Indigenous people as to settler people in Canada.[12] In our own work to extend our understanding of Indigenous law, our assumption was therefore *not* that this work could *only* be done by Indigenous people from within their own legal orders. On the contrary, our presumption was that people from outside a given order could engage, and, indeed, needed to engage.[13] In the words of Doug White II (Kwulasultun), of the Snuneymuxw First Nation: "Indigenous law is the great project of Canada and it is the essential work of our time. It is not for the faint of heart, it is hard work. We need to create meaningful opportunities for Indigenous and non-Indigenous people to critically engage in this work because all our futures depend on it."[14]

In this article, we share some of what we learned during one of the meaningful opportunities we have had to critically engage with Indigenous law while working in

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10. Kris Statnyk, "Why does the Canadian justice system treat aboriginal people as if they're all the same?", *CBC News* (1 January 2015), online: CBC News <www.cbc.ca/m/touch/aboriginal/story/1.2886502>.

11. In the context of Coast Salish laws, see e.g. Robert YELḰATŦE Clifford, "W̱SÁNEĆ Legal Theory and the Fuel Spill at SELEḴTEL̓ (Goldstream River)" (2016) 61:4 McGill LJ 775. See also Sarah Noel Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Dissertation, University of Victoria Faculty of Law, 2015) [unpublished], online: University of Victoria <https://dspace.library.uvic.ca//handle/1828/6106>. For an exploration of the seasonal round as a complex practice of applied Tsilhqot'in law, see Alan Hanna, "Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective" (2015) 45:3 Ottawa L Rev 365.

12. For a Dene story explicitly acknowledging a Dene obligation to be attentive to the legal order of other communities, see "Echsone Saves His Family" in George Blondin, *Yamoria the Lawmaker: Stories of the Dene* (Edmonton: NeWest Press, 1997) at 89. For a rich articulation of this point in the contemporary context of the Kawaskimhon Moot, see Lara Ulrich & David Gill, "The Tricksters Speak: Klooscap and Wesakechak, Indigenous Law, and the New Brunswick Land Use Negotiation" (2016) 61:4 McGill LJ 979.

13. It goes without saying that this work can involve a certain amount of "unsettling," as it may involve the letting go of sometimes deeply held beliefs about what one thinks one knows. Humility and openness to being corrected are important assets in projects of decolonization. For two helpful resources on how this work can be approached from the settler side, see Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010) and Emma Battell & Adam J Barker, *Settler: Identity and Colonialism in 21st Century Canada* (Fernwood Publishing, 2015).

14. Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Honouring the Truth, Reconciling for the Future* (Toronto: James Lorimer and Company, 2015) at 207 [TRC, *Final Report*].

collaboration with the Indigenous Law Research Unit (ILRU) at the University of Victoria. In this project, we sought to learn more about Western Inuit law (Inupiaq) using published and publicly available stories about harm. In Part II we will first say more about the background to this project, with its grounding in "story" as a way of learning law. In Part III, we will turn to the specifics of our project, a project that drew on an adapted (common-law) case analysis method. We will first model the case-briefing aspect of the method by using the Inupiaq story *The Wife Killer*. We then discuss the process of scaffolding our understanding of Inupiaq law through creating a synthesis based on the many stories we read. Finally, in Part IV, we reflect on the experience of learning Indigenous law in this way, using accessible public sources, and drawing on a combination of adapted common-law and Indigenous methodologies. We reflect also on how this experience made visible to us that the work of engaging with Indigenous law is not only about documenting a past, but also about working in the present with a view to the future. Indigenous law (in this case, a body of Inupiaq stories including *The Wife Killer*) offers insight into contemporary legal problems confronting Indigenous and settler people alike, including the need to think more broadly about the conditions and contexts that will support safety for those who are vulnerable.

II A METHODOLOGY FOR LEARNING INDIGENOUS LAW FROM AND WITH STORIES—WORKING WITH PARTNER COMMUNITIES

As background, in 2012, ILRU began work on the Accessing Justice and Reconciliation Project (AJR).[15] The context was informed by the work of the TRC, which was beginning to make publicly visible the magnitude of harms experienced by those impacted by residential schools. Many Indigenous communities were exploring ways to address the legacy of these harms by drawing on their own traditions and legal resources. In this context, the AJR project involved ILRU entering into partnership with seven Indigenous communities.[16] The AJR project focussed on developing and articulating a methodology to enable each community to work on researching and rebuilding their own legal tradition.[17]

Such work required that one begin with a specific research question; the AJR project focussed on the harms caused by and flowing from the experiences of residential schools. Each partner community focussed on the community's own legal resources for dealing with such harms. Thus, the question for the project was "how did and does this Indigenous group respond to harms and conflict?" The harms included both those occurring "between"

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15. The Accessing Justice and Reconciliation Project was an extraordinarily rich and exciting collaborative research project, done in conjunction with the Indigenous Bar Association, the Truth and Reconciliation Commission, and the Ontario Law Foundation. Materials produced throughout the project can be located at Accessing Justice and Reconciliation Project, online: <www.indigenousbar.ca/indigenouslaw/>.

16. The project involved seven partner communities representing six different legal traditions. Moving from West to East, those were: Coast Salish (Snuneymuxw First Nation and Tsleil-Waututh First Nation), Tsilhqot'in (Tsilhqot'in National Government), Northern Secwepemc (T'exelc Williams Lake Indian Band), Cree (Aseniwuche Winewak Nation), Anishinabek (Chippewas of Nawash Unceded First Nation #27) and Mi'kmaq (Mi'kmaq Legal Services Network-Eskasoni).

17. For a full description of the project and its methodology, see Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 16–44 [Friedland & Napoleon, "Gathering the Threads"].

groups (harms caused by the state, religious orders, and residential schools to students, their families, and their communities) and those occurring "within" groups (the legacy of harms, and intergenerational trauma involving Indigenous people harming others in their own community).

The project's starting point was the community's stories. That is, it began with published and publicly available stories, stories from the past that could provide a window into ways that the community had once responded to harms and conflicts. In large measure, it was an exercise in using story as a way of learning law. In this regard, ILRU was drawing on well-established traditions amongst both Indigenous and non-Indigenous scholars who understand story as central to law.

As Julie Cruikshank points out, from Walter Benjamin to Mikhail Bakhtin to Harold Innis, scholars from around the world have understood the power of stories to sustain social (and legal) life.[18] Even within the Western legal tradition, with its emphasis on authoritative articulations of law (cases, statutes, regulations, and orders), it is clear that stories play a crucial part in giving meaning to even the most seemingly banal concepts of the reasonable, ordinary, and expected. Indigenous scholars have pointed to the (sometimes magical or alchemical) stories that underpin many Western legal concepts.[19] One has but to recall Robert Cover's well-accepted claim that "No law or institution exists apart from the narratives that locate it and give it meaning."[20] We are, indeed, constituted through story.[21]

In many Indigenous legal orders, often grounded in oral tradition, story has played an important role.[22] Stories are, to return to Cruikshank, social practices, and the stories told are often structured in ways that carry important knowledge.[23] As Val Napoleon and Hadley Friedland note, there are different types of stories, and they can be structured to record different things: some record relationships and obligations, decision making and resolutions, legal norms, authorities, and legal processes; others record violations and abuses of power, and

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18. Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Vancouver: UBC Press, 1998) at xiii.

19. For two articulations of this concern with the legal concept of "sovereignty" see Gordon Christie, "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty" (2011) 110:2 The South Atlantic Q 329. See also John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall LJ 537.

20. Robert Cover, "Nomos and Narrative" (1983) 97 Harv L Rev 4 at 4. See also Anthony G Amsterdam & Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Ways We Understand the Law–and Ourselves* (Cambridge: Harvard University Press, 2000).

21. Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011). See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 (arguing that all law is storied).

22. For an exploration of stories as tools for teaching and for thinking, see Louis Bird, *Telling Our Stories: Omushkego Legends and Histories from the Hudson Bay* (Toronto: University of Toronto Press, 2005) at 33–47.

23. Julie Cruikshank, *Do Glaciers Listen? Local Knowledge, Colonial Encounters, & Social Imagination* (Vancouver: UBC Press, 2005).

responses to these breaches of law.[24] Stories also feature characters that enable us to explore different principles or lessons, and so, as John Borrows argues, there may well be different things to draw from stories structured around heroes, tricksters, monsters, or caretakers.[25] Stories operate in layered fashions, with each telling operating to validate, to extend, and to pass law forward.[26] Even in tales that seem to be little more than entertainment, or ways of passing time, the stories will carry the traces of their animating philosophical and theoretical foundations.[27] In short, stories are important tools for thinking.

And so, in the AJR projects, each team began by gathering published and publicly available stories from their partner communities. The stories were then viewed through the lens of the research question (inter- and intra-community harms). Students worked on briefing each story, using a modified case briefing methodology developed by Napoleon and Friedland, one similar to that used for studying and articulating the Canadian common law.[28] The case briefs were then used to develop a synthesis of the legal question—a synthesis set in a framework, which included a "primer" (the basic background context necessary to enable the stories to be placed in the intellectual life of the community) and a "preliminary legal theory" (including general concepts, working theories, and an intellectual history and tradition of critique).[29]

Once the work of producing the preliminary synthesis and framework was done, the researcher teams travelled to spend time with the partner communities, where the work was considered, revised, honed, and developed in conjunction with elders, leaders, and the wider community. At this stage, the work was extended through additional storied resources, including life histories, interviews, additional stories, or the addition of details that had not been present in the stories gathered. This provided occasions for validation, modification, and extension. It provided space for the emergence of divergent interpretations and spaces of contestation. The preliminary frameworks were revised, and the final reports were delivered

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24. Val Napoleon & Hadley Friedland, "An Inside Job: Engaging With Indigenous Legal Traditions Through Stories" (2016) 61:4 McGill LJ 725. See Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593 at 628–29 [Snyder et al, "Gender and Violence"].

25. John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795.

26. Ellen White Swalasulwut reported: "When the stories were told to us over and over again, we'd say 'We already heard that story.' Granny would say, 'If you are smart, you will be listening for the words that are added from the last time the story was told.'" As she went on to note, "the stories were very easy in the beginning when we were young, and then the stories became more involved as we got older. In this way the lessons were reinforced." Ellen White Kwulasulwut, "Kwulasulwut: Teachings of the Past, Treasures of the Future" in Barbara Brotherton, ed, *S'abadeb, the Gifts: Pacific Coast Salish Art and Artists* (Seattle: University of Washington Press, 2008) 18 at 18.

27. See e.g. Rebecca Johnson, "Notes on Using Film to Engage with Philosophy of Law in the Arctic" in Dawid Bunikowski, ed, *Philosophy of Law in the Arctic* (Rovaniemi: The University of the Arctic, 2016) 123, online: UArctic <www.uarctic.org/media/1596449/tn-arctic-law-_-bunikowski-_-philosophy-of-law-in-the-arctic.pdf>.

28. For a theoretically rich articulation of the challenges of practical engagement with Indigenous legal traditions, and an articulation of the ways the case briefing method can address questions of accessibility, see Friedland, "Reflective Frameworks", *supra* note 9 at 1–40.

29. Friedland & Napoleon, "Gathering the Threads", *supra* note 17 at 31. This is also the method used by Napoleon in her exploration of Gitksan Law. See Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, Faculty of Law, University of Victoria, 2009) [unpublished], online: University of Victoria <hdl.handle.net/1828/1392> [Napoleon, *Ayook*].

to the communities. At this point the materials were in the hands of the community, who could then make decisions about next steps and questions of implementation, application, and critical evaluation. The purpose of this work was to produce materials that would be useful for the partner communities. There was hope that the materials would function in two directions: as resources for the community itself and as the foundation for people from outside the legal tradition to begin to engage with the community's law.

The AJR Project involved a richly textured way of engaging with Indigenous law. The first steps of the projects began with (what some might argue are) less than ideal resources. That is, the stories were ones that required little community connection (such as language fluency or cultural immersion), but were easily accessible.[30] Of course, one needs to be conscious of limitations in such resources: some flexibility is sacrificed when stories are reduced to writing, and important nuance may be lost in the translation into English. However, there are practical advantages in working with materials that are easily accessible. Certainly, in the context of the AJR project, the limitations of working with publicly available resources were, one might say, offset through the grounding of the project in community-partnership. Indeed, the process was driven by community engagement, and in this context, the advantages of beginning with publicly available resources were real. The stories were able to lift themselves from the printed page to again become part of a social practice in communities who had access to language speakers, elders, artists, and other knowledge keepers. One can see this part of the AJR project as sitting firmly in the first dimension mentioned earlier—communities doing the work of documenting, exploring, and revitalizing their own legal order.

30. For a discussion of tradeoffs inherent in working with different sources of Indigenous law, see Friedland, "Reflective Frameworks", *supra* note 9 at 8–13.

III A METHODOLOGY FOR LEARNING INDIGENOUS LAW FROM AND WITH STORIES—WORKING WITH STORIES ALONE

A. An Overview

As the AJR Project was proceeding, we were involved in conversations about the second dimension of engagement—ways that settler scholars could begin learning how to learn from Indigenous resources in contexts where the scholars did not have established partnerships with knowledge keepers from a particular Indigenous legal order. While such partnerships are ideal, challenges of both funding and distance make it inevitable that they are not always possible. One hopes that at some point there will be as many resources for teaching and learning Indigenous law as there are for Canadian law. But until then, could aspects of the adapted case-briefing methodology enable scholars without proximity or relationship to specific Indigenous communities to begin engaging with their law? That is, to begin developing the skills of literacy (familiarity with stories, practices of engagement, contexts, legal theories) that would facilitate meaningful engagement with that legal order?

Our project thus began as an exploration of this question.[31] To build on the work already done by ILRU through the AJR project, we chose to continue with a focus on inter- and intra-community harm. We went to published and publicly available collections of Western Inuit stories, reading through to find ones that dealt with questions of harm. All together, we gathered approximately fifty stories.[32] For each of the stories read, we asked a common set of questions:

1. What is the main human problem the story focusses on?
2. What facts matter?
3. What is decided or how is the issue resolved?

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31. In part, turning to Inuit stories seemed a logical extension. UVic had been involved in the Akitsiraq program, delivering legal education in Nunavut between 2001 and 2004. Several UVic professors had some experience of working in the North. As an extension of that work, Rebecca Johnson had been working on a legal theory course using Inuit film as a primary resource. It seemed to make sense to see if it was possible to further extend our engagement with Inuit Law through exploring Western Inuit stories. See Rebecca Johnson, "Reimagining 'The True North Strong and Free': Reflections on Going to the Movies with James Boyd White" in Julen Etxabe & Gary Watt, eds, *Living in a Law Transformed: Encounters with the Works of James Boyd White* (Ann Arbor: Maize Books, 2014) 173. See also Rebecca Johnson, "Justice and the Colonial Collision: Reflections on Stories of Intercultural Encounter in Law, Literature, Sculpture and Film" (2012) 9 No Foundations: An Interdisciplinary JL & Justice 68.

32. The stories were taken from Wanni Anderson, *The Dall Sheep Dinner Guest: Inupiaq Narratives of Northwest Alaska* (Fairbanks: University of Alaska Press, 2005); Edwin S Hall Jr, *The Eskimo Storyteller: Folktales from Noatak, Alaska* (Knoxville: The University of Tennessee Press, 1975); Leoni Kappi, ed, *Inuit Legends* (Yellowknife: GNWT, Department of Education, 1977); Tom Lowenstein, *The Things That Were Said of Them: Shaman Stories and Oral Histories of the Tikigaq People* (Berkeley: University of California Press, 1992); Agnes Nanogak, *More Tales from the Igloo* (Edmonton: Hurtig Publishers Ltd, 1986); Hother Ostermann, ed, *The Mackenzie Eskimos: After Knud Rasmussen's Posthumous Notes*, (New York: AMS Press Inc, 1976) (This publication is a reprint of the 1942 edition published by Gyldendal, Copenhagen which was issued as v 10 no 2 of Report of the Fifth Thule Expedition 1921–24); Herbert Schwarz, *Elik, and other stories of the MacKenzie Eskimos* (Toronto: McClelland and Stewart, 1970). For a full list of the individual story names, see *infra* note 73.

4. What explanation (said or unsaid) is given for the decision/resolution?

5. Are there unresolved questions that could be bracketed?

As one might expect, particularly at the beginning of the project, the exercise of briefing the stories was sometimes quite challenging for us. While some stories seemed straightforward, this was not always the case: the characters, the actions, and the conventions of storytelling were sometimes very different from what we expected or knew. There were many things we just did not know. We tried not to deal with our uncertainties by turning too quickly to secondary literature for answers. Part of the exercise was to see if some questions could be answered (or if we could at least come up with better questions) by "staying with the trouble," making connections by working through those parts of a story that seemed odd, or confusing, or unexpected.[33] The point was to immerse ourselves for longer in the stories themselves, trusting that there were things that could be learned by reading them closely. We also discovered early on that the process was most robust when we worked together and could talk about differences in what we saw or noticed.

Let us turn then to an example of the case briefing process, using the story *The Wife Killer,* as recounted by Inupiaq elder Nora Paniikaaluk Norton.[34] This is one version of a devastating but widely told story about a man who was a serial killer of women in the community.[35] Then, using *The Wife Killer* as a thread, we will discuss the ways in which individual cases were used to develop a legal synthesis concerning Inuit legal responses to harm. We will close with some observations about the ways this project helped us grapple with contemporary questions about gendered violence and about learning, not merely *about*, but also *from* Inuit law.

Here then, is the story.

B. Beginning with a Story: *The Wife Killer*

> *I'm going to tell a story about a Point Hope person. A Point Hope man was making a living. When the caribou was ready to be harvested during the summer, he would go hunting with his wife. He would be gone all summer with his wife as his companion. He would use the caribou hides for bedding.*
>
> *The man returned to the village during the fall. He was crying and grieving as he was approaching home. The boat he returned in was filled with dried meat and hides that his wife had worked on all summer. The man told others that he had lost his wife. Once back in the village, he stopped at the houses*

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33. Donna J Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Durham: Duke University Press, 2016). For a larger discussion of preliminary worries about the ways outsiders might approach Indigenous stories, see Lori Groft & Rebecca Johnson, "Journeying North: Reflections on Inuit Stories as Law" (2014) Accessing Justice and Reconciliation Project (University of Victoria - Indigenous Legal Research Unit), online: Indigenous Bar Association <indigenousbar.ca/indigenouslaw/wp-content/uploads/2014/05/Groft-and-Johnson-Journeying-North.pdf>.

34. Nora Paniikaaluk Norton, "The Wife Killer" in Anderson, *supra* note 32, 87.

35. For other versions of the story, see Edna Hunnicut, "Lake of Worms" in Hall, *supra* note 32, 90; Angusinaq, "The Man Who Threw His Wives into Worm Lake" in Ostermann, *supra* note 32, 69; Paul Monroe (as told by Makan), "The Man Who Lost His Wives" in Hall, *supra* note 32, 268; Agnes Nanogak, "Kopilgok (Worms)" in Nanogak, *supra* note 32, 53.

of his wife's relatives. They welcomed him because they still considered him their relative.

The man didn't live long without a wife. He remarried. Since he was a good hunter, the women didn't shy away from him. So he married again. And when the caribou were ready to be harvested during the summer, he took off again with his wife. He took off with his new wife in the boat and boated away from Point Hope. He returned home during fall, again with no wife.

He married again, a daughter of a couple. This new wife had two brothers. When time came for the man to leave, as usual he left with his wife. When they arrived at the location where the husband usually did his hunting, he didn't stay around with his wife. Most of the time he would be out hunting the caribou. The husband was acquiring his bedding and his food in preparation for the coming winter. He was a good hunter. He had his wife work all through the summer. She dried the meat and the hides.

The wife worked all summer, wasting nothing. She did whatever her husband told her to do. When it was time to return home, back to Point Hope, the husband told his wife to ready for the trip back. She was told to tie up all the meat and hides into bundles. The wife did as she was told. She got everything ready for their trip back to the village.

They spent their last night at the camp. Early the next morning, the husband told his wife that it was time to leave. He told his wife to load the boat. The young woman did as she was told. All the food and hides were loaded onto the boat. All that was left to do was for the two of them to step into the boat. When the boat was ready, the husband invited his wife to walk up the hill with him."We'll leave right after taking our stroll on the hill."

His wife hesitated, saying, "There's nothing up there. There's nothing to be picked."

The husband however insisted on taking her up the hill. After more persuasion, the wife eventually gave in and walked up the hill with him. "What are we doing on the hill?" she asked. "Nothing really," her husband replied.

While walking up the hill, the woman noticed something on top of the hill. When they reached the top, she saw a big, gaping pit. She could hear humming sounds coming up from the pit. The husband told his wife to take a look. "This is your place!" he told her. "Oh no, no!" The wife had no wish to be in such a place.

The husband had put all kinds of meat into the pit and all through the summer the rotten meat had produced maggots. The husband had been using this place to kill his wives. Year after year, he had been killing them. Point Hope people, however, didn't know that was what he had been doing.

The woman insisted that she didn't want to stay in such a place. She wanted to return home. She started to run but her husband chased after her, trying

to seize her. For a long time, the two of them ran around the pit. The wife, perspiring heavily, began to feel as if she was going to faint. The husband was perspiring too from the chase, but he was a man and had plenty of energy. The poor woman grew weaker and weaker as she tried her best to flee from her husband. Finally he seized her and dragged her to the pit.

The wife tried to stop her husband. "If I had known you'd do this to me, I wouldn't have followed you. Is that why you always returned home without your wife? Is this how you did away with your wives? I want to go home," she tried to tell him. But the wicked man wouldn't listen. He only wanted to drop her into the pit.

The wife got weaker and weaker, trying hard to hold on to her husband. Her hands grew weak. The husband fought, wanting to push her into the pit. There was no ledge for her to try to climb up. Unable to hold on any longer, her hands finally let go, and she dropped into the pit. The husband had been using this pit to kill women.

The husband was definitely demented. He took off and returned to Point Hope. As he was arriving, he could be heard crying. He was grieving. The villagers had no knowledge of what he had done. He told them that he had lost his wife and that she had got sick and passed away. The parents of the young woman took her husband into their home. The family tried to keep the memory of their daughter and sister alive through her husband. They believed that their daughter had really gotten sick and passed away. They didn't know the truth.

Thus the family continued to live together until fall arrived. The sea froze. During fall, the mother began to make new clothing for her sons and also for her son-in-law. She made them from the hides her dead daughter had prepared.

One night while spending the evening together inside the house, the mother was as usual busily making the clothing. After a while the rest of the family, her husband, her sons, and her son-in-law, felt drowsy and retired to bed. The mother, however, continued with her sewing.

All of a sudden her ears picked up a sound. At first she couldn't tell what the sound was. She continued to listen. Soon the sound came closer and she could hear it plainly. She began to recognize it as that of her dead daughter. The sound was that of a woman crying and calling out for her mother.

"Mother, my husband who is living with you dropped me into a pit of maggots! I can't come back to be with you. I'm not allowed to return home. I wasn't sick and died. My husband who is living with you dropped me into a pit of maggots. Other women before me were all dropped into that pit too!"

She was sobbing as she was telling her mother the story. The rest of the family woke up and understood what she was telling. She told them she had to go back and that she came only because she wanted to give them the facts. She wanted her parents to know how she was treated.

> *The husband continued to lie. He insisted that he could never think of doing what she said. "She really got sick and died," he kept repeating to his wife's family. But the family had already heard the words of his victim. The two brothers jumped up and seized their brother-in-law. The brothers killed their sister's murderer on the spot. Afterwards, they felt bad because murder was what the man did to their sister.*

C. Briefing *The Wife Killer*

1. The Problem/Issue (What is the Main Human Problem the Story Focusses On?)

While some stories (like some court cases) seem to address only one problem, others are complex and raise several legal issues. Sometimes an optimal strategy was to write up separate case briefs for each legal issue.[36] This enabled us to shift our focus within the story and to better identify threads that became visible as the questions shifted. At other times, such as here, we explored the issues related to harm in a single brief. In this story, we identify two problems related to harm, one centering on the response of the woman herself to the harm directed at her, and the other on the response of the woman's family to the harm she endured. In short:

- How should a woman respond when someone is trying to kill/harm her?
- How should family members respond towards a person who has killed a relative?

2. The Facts (Which Facts Matter?)

Determining which facts matter in terms of the harm and the legal response to the harm can be difficult. Indeed, it is one of the central challenges of learning law in a common law context. As Qallunaat (non-Inuit) readers of Inuit stories, we were worried that our lack of familiarity with the North might lead us to omit facts that were relevant because we did not understand them.[37] At the beginning of the process we leaned towards including facts when we were uncertain of their relevance.[38] Indeed, sometimes our summaries of the facts were not

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36. For an example of three different ways to brief the same story, see Emily Snyder, Lindsay Borrows & Val Napoleon, *Mikomosis and the Wetiko: A Teaching Guide for Youth, Community, and Post-Secondary Educators* (Indigenous Law Research Unit, University of Victoria, 2014) at 65–67 online: Indigenous Bar Association <www.indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/Mikomosis-and-the-Wetiko-Teaching-Guide-Web.pdf>.

37. We suspect that this is a set of worries that might simply need to be grappled with as Indigenous and non-Indigenous communities begin the harder work of reconciliation. Some of the challenges we experienced are nicely described by Paulette Regan in *Unsettling the Settler Within*, *supra* note 13. It is possible to understand this settler worry as one common to any experience of working across a new boundary, where one needs to develop literacy, particularly in contexts complicated by questions of power.

38. In this story, for instance, we are told that the daughter (wife) returned when her mother was sewing with the skins that had been prepared by her daughter. Is this a fact of significance, or a detail? We were also uncertain as to whether there was significance to the fact that the harm happened during the caribou season. Would familiarity with the caribou season, or caribou hunting tell us more about the distance of the couple from other Inuit? Was the death of a wife from illness during this season unusual or in the course of events? Would a death in this context raise suspicions or not? Is the point simply that the couple had left the community to go hunting, or is there something particular about caribou?

much briefer than the story itself! As we continued, however, the bank of stories consulted provided us with better context, enabling us to make more comfortable choices about facts to draw up in the face of different problems and questions. In this context, here is a summary of the facts in *The Wife Killer*:

- A man marries, takes his wife hunting during caribou season, and returns saying she has died. A second time, the man marries, takes his wife hunting during caribou season, and again returns saying she has died. He marries a third time and again takes his wife hunting.
- During the summer, the wife works hard, wasting nothing, and doing as she is asked. After the wife has prepared everything for the return home, the husband persuades the wife to walk up a hill, where he has prepared a pit of maggots to kill her.
- The wife tries multiple strategies to save herself: she reasons, begs, runs, struggles, and fights, but to no avail. She is thrown into the pit and killed.
- The man returns to the community again grieving that his wife became ill and died, and is taken in by his in-laws, who provide food, shelter and clothing for him.
- The dead wife returns one night to tell her family what had happened to both her and the other missing wives. She said she only came back because she wanted her family to know the facts about what her husband had done to her.
- The husband denies the murdered woman's testimony. The family believed the words of the dead woman. The two brothers of the dead woman killed their brother-in-law. Afterwards, they felt bad because "murder was what that man did to their sister."

3. Decision/Resolution (What is Decided, or How is the Issue Resolved?)

This third aspect of the brief requires a description of how the story answered the questions posed above in the problem section. What was decided, and by whom? In this context, we looked for decisions by i) the woman, and ii) her family.

(i) *The woman's response/decision*: The woman struggled against the man to fight for her life. After her death, she came back and told her family about what her husband had done to her.

(ii) *The response of the dead woman's family*: The family of the woman witnessed the dead woman's testimony about what her husband did to her. In response to their sister's testimony, the brothers killed the husband. That is, the family responds to a killing with a killing.

4. Reasoning (What Explanation (Said or Unsaid) is Given for the Decision/Resolution?)

In this section of the brief, the aim is to consider the reasons for the resolution of the problem presented in the story. This is based on the presumption that all legal orders are based on reasons, not just action. The challenge for all legal orders is that the reasons are sometimes articulated, and they are sometimes part of the taken-for-granted context that

informs an action. Sometimes a particular Inuit story will explicitly describe some of the reasons for a given legal response to harm. But many times, the reasons for a legal response will be unstated in the story. This may be because the storyteller assumes that listeners already know the reasons and do not need to be told. Perhaps reasons are also unstated at times to engage the listener, and to encourage thinking about why a particular action was taken. In any case, the unsaid reasons supporting a legal response must be considered for the legal synthesis. This was another place where conversation with others could help us begin to think about the importance of the unsaid, and of the importance of looking to not only words, but also description and facts in order to find reasons.

In terms of describing the magnitude of the wrongdoing in this story, we are directed not only to the husband's acts of violence, but also to his patterns of deceit. The story emphasizes the fraudulent grieving of the husband and the ways he made use of the hospitality of the wife's family even after her murder. In this, there is an unstated and stated affirmation of the importance of being truthful, and of knowing the facts. We are told that the woman came back in order to make sure that the family "knew what had happened." We are also told that the brothers "had heard the words of his victim."

Unsaid here is that, having witnessed the wife's testimony, the brothers had an obligation and right to respond to the harm that was done to their sister. Given that the woman's husband had murdered their sister and other women, he was a threat to the community women. The story says that the brothers felt bad after killing the man because murder is what the man did to their sister. This might suggest that killing goes against how they would usually conduct themselves, but that this situation required them to do it regardless. Alternatively, it could mean that after they killed him they had the chance to reflect on what the man did to their sister, causing them to feel bad.

5. Bracketing (Are There Unresolved Questions That Could Be Bracketed for Further Study?)

The bracketed aspects of the stories were things that we did not fully understand, or which might not have been fully addressed but which nevertheless seemed important to the story. These were sometimes things that seemed not to be answered in the story, or that complicated it, and thus needed more space for consideration. We tended to put aspects in brackets not because those things were unimportant, but because they seemed to open up other questions and we could see there was more thinking or learning to do. As we moved forward with the stories, we also noted the ways in which aspects might move in and out of the brackets based on our increasing familiarity with a range of stories and sources.

For example, we were uncertain how to grapple with the woman's return from death to tell her family about what had happened. Should we understand this as a mystical or magical event, as a haunting? Was it an unusual event? Or, was her return to be understood as not only possible, but as a real possibility? We began to lean more towards this latter direction as we encountered more stories involving cosmological cycling (the return of spirits or souls into

new bodies and forms).[39] Indeed, we began later to wonder if her return did not say something about legal obligations she may have had? Was it linked to her obligation to share important information with others, and, particularly, in order to stop violence against other women in the community? Was this linked to the family's right to be informed about her death?

In the brackets, we also included questions we had about gender norms and the ways the larger community was implicated. What was the role of the community, for example, in failing to address conditions that made the women vulnerable? Did the community have an obligation to raise questions about the missing wives? Did gender roles play a part in creating conditions for the wife's vulnerability? What kind of conditions made it such that the woman's "obedience" (working hard and doing as she was instructed) reduced her options for escape? We noted that such questions could be explored by going to the story using Indigenous feminist legal analysis.[40] They could also be explored by re-briefing the problem with a new question focussed on community and gender. For example, "How should a community respond when women from the community are going missing or are being murdered or are dying suspicious deaths?" Since we could not see enough material in this story to answer that question (we are told only that the community did not know what was happening), we kept it within the bracket of our brief, making space for it to continue to work in our minds.

D. Synthesizing the Cases

1. Overview of Our Process

As Emily Snyder, Val Napoleon, and John Borrows put it, "One story does not show the complexity and breadth of a given legal tradition any more than one legal case."[41] And, so, we began the work of drawing together fifty western Inuit stories related to harm,[42] cross-referencing them, and putting them into engagement with each other to see if we could develop a deeper understanding of Inuit law and its operation. We were drawing deeply on the methods modelled both in Napoleon's exploration of legal principles in Gitksan law, and Friedland's work with the legal concept of the *Wetiko* in Cree and Anishinaabe legal traditions.[43]

As we engaged in the process, we found ourselves losing some of our fear that the method would function in a "colonizing way" with respect to the stories. Indeed, the process of briefing individual stories was less important for helping us "condense" the cases (identify *ratio* or *obiter*) than it was for helping us "engage" with them; it seemed to open more space for us to think about principles and general statements that might be informing the actions, processes

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39. In working through questions of cosmology, we profited greatly from Bernard Saladin d'Anglure, ed, *Cosmology and Shamanism Interviewing Inuit Elders: Volume 4* (Iqaluit: Nunavut Arctic College, 2001). See generally Edith Turner, "Behind Inupiaq Reincarnation: Cosmological Cycling" in Antonia Mills & Richard Slobodin, eds, *Amerindian Rebirth: Reincarnation Belief among North American Indians and Inuit* (University of Toronto Press, 1994) 67; Bernard Saladin D'Anglure, "From Foetus to Shaman: The Construction of an Inuit Third Sex" in Antonia Mills & Richard Slobodin, eds, *Amerindian Rebirth: Reincarnation Belief among North American Indians and Inuit* (University of Toronto Press, 1994) 82.

40. See Snyder et al, "Gender and Violence", *supra* note 24.

41. *Ibid* at 628–29.

42. The stories were gathered from many sources. For a full list of the individual story names, see *infra* note 73.

43. Napoleon, *Ayook*, *supra* note 29; Hadley Friedland, *The Wetiko (Windigo) Legal Principles* (LLM Thesis, University of Alberta, 2009) [unpublished].

and outcomes that were elaborated in the stories.[44] We found it particularly helpful to put the stories into engagement against six questions formulated by Napoleon and Friedland in the context of the AJR Project:

1. Who made the decisions regarding responding to harm?
2. What were the procedural steps taken to determine the response to the harm?
3. What were the legal responses to harm?
4. What were the principles informing people's responses to harm?
5. What were people's legal obligations relating to harm?
6. What were people's legal rights relating to harm?

The first three of these questions pushed us in the direction of explicit actions taken in the stories, actions that could be described from the perspective of someone not yet deeply familiar with Western Inuit stories or culture (i.e. who made decisions, what steps they took, what actions were followed). The latter three questions pushed us to look more transversally in the direction of concepts, principles, values, and entitlements. As we worked with the latter three questions, we also found that our understanding of the stories was extended by returning to the questions we had initially put in the "bracket" section of the briefs. Together, all six questions formed the backbone for our working synthesis.[45] We began drawing lines between cases in order to organize and elaborate the principles that emerged from a sustained exploration of each of the six questions across a larger group of stories. As we worked, we somewhat re-organized the questions. We began to see the first two questions as simply two aspects of legal process (authoritative decision makers; and legitimate processes of decision making); and we found ourselves exploring the view that legal rights and obligations contain both substantive and procedural dimensions. In the end, we organized our explorations of the stories into a working synthesis using the following five headings:

1.0 Legal Processes
    1.1 Decision making/Decision makers
    1.2 Procedural Steps for Determining a Response to Harm or Conflict
2.0 Legal Responses
3.0 Legal Principles
4.0 Legal Obligations
    4.1 Substantive Obligations
    4.2 Procedural Obligations
5.0 Legal Rights
    5.1 Substantive Rights
    5.2 Procedural Rights

Under each heading, we attempted to identify general statements of law, each of which would be followed by a discussion of each source that supported the general statement including our reasons for seeing the principle operating (or failing to operate) in that story.

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44. Friedland, "Reflective Frameworks", *supra* note 9.

45. Currently, our Western Inuit working synthesis is one hundred and sixty pages long.

In some ways, the synthesis took inspiration from texts like Peter Hogg's on Constitutional Law:[46] the working synthesis functions as a tool, making visible the scaffold used to organize the work in order to help us identify connections between the stories and to see overarching principles more clearly.[47] The purpose of organizing in this way is to enable one to be perfectly transparent with respect to both sources consulted and reasons given. It also enables space for different interpretations, and disagreement about the application or utility of different stories in different places. It also allowed us to begin to see connections that were less visible when we worked only at the level of individual stories.

2. Exploring the Synthesis through the Lens of *The Wife Killer*

To give a sense of how this worked, we will return to *The Wife Killer* to show how it contributed to the production of the synthesis, and to illustrate how some of the general principles were developed as we read the story in conjunction with others. In the work that follows, the principles we reference are taken from our working synthesis using five headings, and the numbering system we employed there.

i. Legal Processes

The "Legal Processes" part of our synthesis addressed two major questions: the first (Section 1.1) focussed on decision makers, and the second (Section 1.2) on processes. Thus, on the first of these two questions, we looked to the stories to identify (authoritative) decision making: Who makes the decision to respond to a harm? In the stories consulted, we identified seven different categories of decision maker: the person harmed; the person *doing* harm; families (of both the person harmed and of the person doing harm); leaders; elders; shamans/medicine people/people with special skills or knowledge; and the community. The process of synthesizing does not stop at the level of identifying general categories of decision makers, however. For each type of decision maker, the goal was to articulate some general statements of law that emerge. The general statement would be accompanied by the sources from which we drew the proposition. Following the general statement would be a short discussion of each of those sources, including the evidence or reasoning in the story to support the proposition. For example, the person harmed is almost always involved in the decision making regarding responses to that harm. Thus, under heading 1.1.1. (The Person Harmed), here are two general statements of law:

> 1.1.1.1 Generally, persons harmed have a right and responsibility to respond to the harm, with or without the assistance of others. (*Malicious Youth*, *Three Brothers, The Wife Killer, Sigvana and the Old Shaman, Fast Runner, Najuko, Northern Lights People, One Who Walked, Pinaqtuq, Smoking Mountains, Sky People, Tuakikpakaktuk, Utuagaaluk, Magic Bear, Atangana 3, Worm Lake, Kopilgok, Atangnak, Good Ears, Duel Between Shamans, Beluga Hunting Fails, Akaluk (Stolen Soul)*)

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46. Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2008).

47. The synthesis is a work in progress. At the completion of the project, it was one hundred and sixty pages long [on file with authors].

> 1.1.1.2. Decisions regarding the response to harm may be made without the person harmed if that person is unable to respond or the response needs to be immediate and there is no time to involve the person. (*Ululina*, *Raid and the Kobuk River Grandmother, Aagruukaaluk, The Man Who Caused Blizzards with an Axe*)

Following those two general statements is a discussion of the stories. In these stories, we see that sometimes those harmed responded to the harm by acting on their own, while other times others assisted them. There were some occasions where persons harmed were not involved in the decision making. In these stories, it was generally because the person was unable to respond (perhaps they were dead, injured or incapacitated, too young, etc.), or because necessity required that another person make the decision without them.

These principles of decision making were visible in the *Wife Killer*. Though the woman ultimately died, she is also shown to be a decision maker who responded to the harm through her active fighting against her husband as she attempted to save herself. The story positions her not simply as a passive recipient of trauma, but as one who continued to exercise her will in attempts to respond to the violence.[48] We find it significant that the story also shows us that she continues to participate as a decision maker by returning after death to her family to give testimony about what had happened to her. Though it is her brothers who do the actual killing of the husband (as she is unable to kill the husband directly), the story tells us that they did so based on the testimony of their sister. In this way, the wife remains as a participant in the decision making and the response.

The second portion of the Legal Processes section of the synthesis (Section 1.2) organized the procedural steps taken to determine the response to harm. What, in the stories, could be seen as elements of procedure? This has required some ongoing thought, as we attempted to put our Western/settler understandings of procedure into respectful engagement with this body of stories. In each story, we asked how the harm became visible to others, about the people that were or were not consulted, about practices of information gathering, about considerations of context by decision makers, and about the deliberative processes that were undertaken. With these questions in mind, it became easier to see six common procedural steps: (i) community gathering and consultation; (ii) considerations of context; (iii) consultations; (iv) investigations/inquiry; (v) waiting/deliberation; and (vi) asking for help.

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48. We have been influenced by Michael White's ideas that "[n]o one is a passive recipient of trauma" and that "the ways in which people respond to trauma are based on what they give value to, on what they hold precious in life." Michael White, "Working with People Who are Suffering the Consequences of Multiple Trauma: A Narrative Perspective" (2004) 1 Int'l J of Narrative Therapy & Community Work 45 at 48. In our readings of the stories, we have tried to ask how responses to harm have made visible that which is held precious. We have been conscious of a desire to ensure we are watchful for the agency of those who suffer trauma. The challenge of operationalizing the insight is nicely articulated by John Borrows in a 2015 lecture on governance under the *Indian Act*: "People are not just passive victims in the stream of history. People find ways to use their agency. They find ways to persevere in the face of great disappointment, and harm and abuse." John Borrows, "Lecture 2: Governance - Canada's Indian Act" (Lecture, 14 September 2015), online: YouTube <https://www.youtube.com/watch?v=3lgrZCBIwwA> at 00h:43m:20s. For an extended exploration of how to look for women's agency and decision making even in the context of gendered (and murderous) violence, see the discussion of the stories "The Wolf Crest" and "The Rolling Head" in Snyder et al, "Gender and Violence", *supra* note 24.

In the context of our synthesis, one general statement of law concerning procedural steps that related to investigation is articulated as such:

> 1.2.4.1 INVESTIGATION/INQUIRY: In determining the proper response to harm, an investigation or inquiry into the harm should be conducted. (*Lake of Worms, Ululina*, *The Man with a Scourge of Bearded Sealskin, Kagsagssuk, Akaluk (Stolen Soul), Eagle-Man, Kopilgok (Worms), Wife Killer, The Lost Little Brother, Tigguasina: A Boy Shaman and a Fraud, Pinaqtuq Who Had No Wish to Marry, Utuagaaluk: Murder Mystery, Sky People, The Northern Lights People, Fast Runner, One Who Walked Against the Wind, The Young Man Who Married a Wife From Across the Sea, Iŋaagiruk, Tuakikpakaktuk*)

In *The Wife Killer* story, one can see this and several other procedural steps. We see the wife gather the community together and ask for help. The testimony of the wife can be understood both as commencing a process, and as part of the evidence in an investigation or inquiry (to provide proof as to what had been done). The story also shows that the investigative processes enabled the husband to respond to the allegations made against him (in his opportunities to deny the wife's accusation). As the story is read alongside other stories, one begins to develop a better sense of different kinds of investigation that arise in different contexts—one begins to think more broadly about the forms that "inquiry" can take.

ii. Legal Responses

Here, we gathered together a range of legal responses available to respond to harm. In the stories consulted, we found the range of responses to harm to be extensive. We finally settled on fourteen categories, including the following: acts of will; sharing; public exposure; acknowledgement of harm; compensation and gifts; isolation/shunning/abandonment/leaving; telling, sharing information; punishment, revenge, equalization; self-defence; deception; removing access to power that allows person to harm; prevention; and education.[49]

We note here that, in many of the stories we read, there seemed to be a principle of equalization in which death was an outcome. Under our heading 2.9, we identified this general statement of law:

> 2.9.1. PUNISHMENT/REVENGE/EQUALIZATION OF HARMS. A response to harm may include equalization of harms or punishment, in order to promote deterrence or retribution or rehabilitation. (*Akaluk (Stolen Soul), Aagruukaaluk, Kagsagssuk, Fast Runner, The Malicious Youth, Avaotok, Wife Killer)*

Though death was not an uncommon outcome, as we became more familiar with the stories we were less inclined to believe that these stories were necessarily saying death *should* be a primary legal response. We were struck by the number of times that the primary legal response seemed to simply be the acknowledgement that a wrong had been done, even where

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49. Note here that there is some fluidity across categories. For example, in some stories, "telling what has happened" is a procedural step, but it may also be a legal response in and of itself. It may also be a substantive legal obligation. At this point, we see this fluidity of concepts and categories as a strength rather than a limit of the project, as it encourages attention to the ways in which procedures, obligations, and responses are interwoven.

no other consequence seemed to flow from that acknowledgement. Certainly, in the context of *The Wife Killer*, one can see a variety of legal responses to the harm identified. The story speaks to the legal response of the equalization of harms (in the killing of the husband), but it also shows us a range of responses being attempted first. In response to the threat of harm, we see the wife attempt to defend herself through talk, physical resistance (self-defence), and an attempt to flee. We also see her return after death to tell her family what had been done. The story centres the importance of acknowledgement—of accurately naming the injury she had suffered, and of having people witness her testimony.

iii. Legal Principles

In reading the stories, we began to get a better sense of some of the deeper principles that were informing the actions. While we did our best to find the right English words to capture the values and principles that were being played out, we were also hyper-conscious that Inuktitut is crucial for articulating an internal understanding of the principles. We attempted to stay within the stories as much as possible, rather than going to secondary literature. This was *not* the case with respect to legal principles. Here, we sought out sources that would give us better English translations of the Inuktitut words for important Inuit values. Such articulations were crucial in helping us better understand the structural values informing the stories we read. We were grateful for opportunities to draw on the insights of those working from the centre of the language out.[50] The experience reminded us of the Truth and Reconciliation Commission's Call to Action related to language and culture, and affirmed for us the necessity of multiple methods of engaging with the law.[51] The Inupiaq legal principles we saw in the stories were also identified (sometimes in the language of "values" rather than "principles") in a number of government documents, including:

- sharing/generosity (*Aatchuqtuutijiq Avatmun*[52] or *Sibñataiññiq*[53]);
- helping, caring for others; serving (*Avanmun Ikayuutiniq*,[54] *Ippigusuttiarniq*,[55] *Piliriqatigiingniq*[56]);

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50. On the importance of thinking these principles through language, we often find ourselves reflecting on Alexina Kublu & Mick Mallon, "Our Language, Our Selves" in *Nunavut '99: Changing the Map of Canada* (Nunavut: Nortext Multimedia Incorporated & Nunavut Tunngavik Incorporated, 1999), online: Nunavut '99 - Changing the Map of Canada <www.nunavut.com/nunavut99/english/our.html>.

51. TRC, *Calls to Action*, *supra* note 4. Calls 13–17 specifically address "Language and Culture". In addition, see Call 10(iv) ("Protecting the right to Aboriginal languages, including the teaching of Aboriginal languages as credit courses") call 61(ii) (Church parties to provide funding for "Community-controlled culture and language-revitalization projects") and Calls 84 and 85 (on Media and Reconciliation).

52. "Iñupiat Ioitqusiat", *University of Alaska Fairbanks*, (19 October 2006) online: Alaska Native Knowledge Network <www.ankn.uaf.edu/curriculum/Inupiaq/Ilitqusiat/Sharing.html> ["Iñupiat Ioitqusiat"].

53. "Iñupiaq Cultural Values", *University of Alaska Fairbanks*, (3 November 2006) online: Alaska Native Knowledge Network <ankn.uaf.edu/ANCR/Values/Inupiaq.html> ["Iñupiaq Values"].

54. *Ibid.*

55. Borrows, *Canada's Indigenous Constitution*, *supra* note 2 at 103.

56. "Educators Guide", *Inuit Qaujimajatuqangit Adventure Website*, online: Inuit Qaujimajatuqangit Adventure Website <inuitq.ca/learningresources/educatorsguide/Educators_Guide.htm> ["Educators Guide"].

- respect for others, animals, land (*Kipakkutaiññiq*,[57] *Avatimik Kamattiarniq*[58])
- fair treatment (*Uppiriqattautiniq*);[59]
- honesty and information sharing (*Pitqiksiġautaiññiq*[60] and *Qaujimautittiarniq*[61]);
- collaboration and cooperation (*Pilirriqatigiikniq*,[62] *Savaqatigiiyujiq*[63] or *Paammaagigniq*[64]);
- non-violence/conflict avoidance (*Paaqtakautainniq*);[65]
- patience/flexibility/humility (*Qimmaksautaiññiq*[66] or *Qinuisaaniq*);[67] and
- resourcefulness and problem-solving (*Qanuqtuurungnarniq*).[68]

One can see that many of the above principles are visible in some form in *The Wife Killer*, either through their enactment or through their violation. The violation of the principles of honesty and trust in relationships contributes to an understanding of why and how the wife returned from the dead to speak of the harm that had been done, and to the ways in which the family responded. The magnitude of this violation is visible in the husband's ongoing deceit in acting the part of the grieving spouse, of living with the wife's family, of sharing in their resources and support, and in his refusal to acknowledge his actions.

iv. Legal Obligations

We saw many obligations articulated in the stories. We identify twenty-two substantive obligations and another seven procedural ones. Undoubtedly, this is a place where fluency in Inuktitut might give us better categories to organize the obligations. But much of what we saw involved obligations including practicing awareness towards others, practicing generosity and hospitality, treating animals respectfully, assisting those in need, telling what you know,

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57. "Iñupiaq Values", *supra* note 53.

58. "Educators Guide", *supra* note 56.

59. Law Commission of Canada, "Indigenous Legal Traditions in Canada", by John Borrows, Report (Canada: LCC, January 2006) at 76, online: Law Commission of Canada <publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf >.

60. "Iñupiaq Values", *supra* note 53.

61. Department of Justice Canada, *Review of Nunavut Community Justice Program: Final Report*, by Research and Statistics Division (Canada: Research and Statistics Division, 2004) at 62, online: Department of Justice Canada <www.justice.gc.ca/eng/rp-pr/aj-ja/rr05_7/rr05_7.pdf>.

62. Nunavut, The Honourable Robert Stanbury, Conflict of Interest Commissioner of Nunavut, *For a Culture of Integrity: Review of Conflict of Interest Legislation Applicable to Members of the Legislative Assembly of Nunavut* (Nunavut: LAN, 15 November 2000) at 5, online: <integritycom.nu.ca/sites/integritycom.nu.ca/files/int_act_con_rep.pdf> ["Integrity"].

63. "Iñupiat Ioitqusiat", *supra* note 52.

64. Ilisagvik College Mission Statement, online: Iḷisaġvik College <www.ilisagvik.edu/about-us/mission-statement/>.

65. *Ibid.*

66. "Iñupiaq Values", *supra* note 53.

67. "Integrity", *supra* note 62 at 5.

68. "Educators Guide", *supra* note 56.

and caring for children. We also identified an obligation to do no harm, and an obligation to maintain trust in trust-based relationships. In *The Wife Killer*, it is easy to focus on the husband's devastating failure of these obligations towards his wife. But we found the story even richer when we began to ask about obligations being performed in the story by other characters. For example, one might ask about the obligations of those whose kin do harm. One might articulate a general statement of law thus:

> 4.1.8.1.1. There is an obligation to prevent kin from harming others. (*Eagle-Man, Paniunayuk and Aqsaqauraq: A Feud Averted, Alaaqanaq, the Man with a Little Drum, Raid and the Kobuk River Grandmother, Akaluk (Stolen Soul), Atangana (Part 3), The Wife Killer*)

In *The Wife Killer*, while one could focus on the killing of the husband by the brothers as retribution for the death of their sister (or as an instance of vengeance), one could also understand the brothers as fulfilling their obligation to ensure that their brother-in-law (kin) was not able to harm others.

In terms of procedural obligations owed to both a person harmed and the one harming, the stories illustrate such obligations as those to:

- tell what you know about the harm (the murdered woman told her family about how her husband had killed her);
- witness (the family witnessed the woman's testimony);
- show respect and affirm equality-constituting practices (the family of the woman listened to her testimony and took seriously what she said by killing her husband in response); and
- assist family members in need (the brothers assisted their sister by listening to her testimony and then killing her husband).

One of the many substantive legal obligations we saw in the stories might be articulated as the following general statement:

> 4.1.1.1 PRACTICING ACKNOWLEDGEMENT/AWARENESS TOWARDS OTHERS. There is an obligation to acknowledge and practice awareness towards others in the community. (*Northern Lights People, Raven and the Whale, Akaluk (Stolen Soul*), *Orphan with No Clothes, Raid and the Kobuk River Grandmother, Alaaqanaq, the Man with the Little Drum, Lake of Worms/Worm Lake, Wife Killer, The Wife with a Jealous Husband, Fast Runner, Utuagaaluk: Murder Mystery*)

In many of the stories we read, including *The Wife Killer*, it is the failure to be aware of others that opens space for the harm to occur. Sometimes the failure of awareness seems obvious, but at other times, stories show us situations where it is difficult to be aware, precisely because of complicated contexts or practices of deceit. *The Wife Killer* story draws this to our attention when it states that the villagers had no knowledge of what the wife killer had done when he returned to the village grieving because of his lost wife. Whether or not the community members had done all they could, the synthesis did help to make visible that there are additional obligations of awareness that may apply beyond the boundaries of an individual family.

v. Legal Rights

For our analysis, legal rights can be understood as the flip side of legal obligations. In the stories as a whole, some of the rights seemed to attach to people who had been harmed, and some to people who were thought to have done harm. Some of the rights identified in the stories included the right to acknowledgement, to share in necessities of life, to hospitality and respectful treatment, to help when in need, to information, to compensation (in certain situations), to equality, and to freedom. One particularly interesting legal right relates to the need to see harms acknowledged:

> 5.1.12 RIGHT TO ACKNOWLEDGEMENT OF HARM (see also 2.5.1. and 4.1.12). There is a right to have harm acknowledged, whether the harm was accidental, negligent, or intentional. (*Pinaqtuq, Who Had No Wish to Marry, The Lake with No End, Utuagaaluk: Murder Mystery, The Duel Between the Point Hope Shaman and the Barrow Shaman, Akaluk (Stolen Soul), Orphan with No Clothes, The Wife Killer, The Brother with Good Ear, Kopilgok (Worms), The Young Man Who Married a Wife From Across the Sea, The Raid and the Kobuk River Grandmother, Lost Little Brother, One Who Walked Against the Wind, Northern Lights People, Sky People, Malicious Youth, Boy Shaman, Utuagaaluk: Murder Mystery, Three Brothers, Raven and the Whale)*

In terms of *The Wife Killer* story, the woman had suffered a great harm. One of the more obvious rights one might see is the right to have her killer brought to justice. But the above principle suggests additional ways of understanding rights. In her return to her family, one can see not just an assertion that a killer should be brought to justice, but also an articulation of her right to have the harm of her death correctly described. It could also be seen as addressing rights to information—in this case her family's right to information. We articulated the general principle thus:

> 5.1.11.iii RIGHT TO INFORMATION. Family members of those harmed have a right to information regarding the harm done to their kin. (*The Brother with Good Ears, The Wife Killer, The Man with a Scourge of Bearded Sealskin, Ululina, Fast Runner*)

Focussing on this informational right gave us yet another angle for thinking about the decision of the wife to return to her family. It also reminded us that the wife had not only told her family about her own murder, but shared information about the deaths of other women in the community, information that her family members may then be obliged to share with the families of the other murdered wives. Placing the principles in 5.1.11 and 5.1.12 side-by-side also helped us think about the differences between the right to have a harm named/acknowledged, and the right to have information available about a harm (even if the information is incomplete, or even if other direct remedies seem unavailable).

IV CONCLUSION: RETURNING TO THE STORIES WITH A QUESTION

To conclude this general discussion of the process of building a synthesis from stories, it should be clear while it is the product of (seemingly objective) texts, the processes of

interpretation are inevitably shaped by the socially constructed narratives and experiences accessible to the interpreter. This synthesis is "our" synthesis, shaped by our own understanding of and work with the stories, and designed to help us learn. While it is "ours" (that is, reflecting our understanding of stories and law), because the processes of building the synthesis are open and transparent, our conclusions are also open for dialogue, contestation, and debate. Just as clearly, any synthesis must be an ongoing project, open to modification as stories are added, and as different interpretations gain ascendancy. This legal synthesis is a work-in-progress and we are still working with the stories to understand them in ways that respect their complexity and nuance. In thinking about the interplay of law and story, we have taken comfort from Julie Cruikshank's observation that she would have been unable to understand the stories Yukon women were telling her about their lives, without also understanding the rich world of stories in which those lives were embedded.[69] We believe this to be true of both Indigenous and non-Indigenous legal orders alike: the knowledge of a legal order is informed by the stories that circulate in that order. There are good reasons to believe that stories provide one powerful vehicle for learning about Indigenous law.

We have, in the process, been struck by the ways that the activity of constructing a synthesis of legal principles from publically available Inuit stories has provided valuable tools for us as non-Inuit women grappling with the reality of gendered harms in current Canadian society. We live on the west coast of British Columbia, where the fabric of our daily living is woven through with the aftermath of the Pickton serial killings, and the devastation of missing and murdered Indigenous women and girls. We too are storied people, and our stories (like those of Western Inuit) raise questions about gender, human vulnerability and safety. Our own questions and concerns were present as we did the work. And those concerns about gendered violence, in its epistemic and structural forms, were matched and mirrored in stories like *The Wife Killer*. We could see that the stories often addressed similar human problems. How might society respond in the face of these deep injuries? Does one need to wait until there is a death? Is it enough to "find and punish the guilty?" How is the larger community implicated in these stories of violence against women? Are there ways to find new lines of response? The process of working with *The Wife Killer* and other stories has helped us to ask other questions about the ways Western Inuit law has developed important and useful "tools for thinking."

Let us then return for a moment to *The Wife Killer*. In the version we shared, little direct attention is paid to the community; we are told only that they did not know that the husband had been preparing a pit of maggots to kill women. In the story, the wife demonstrates "exemplary" behaviour: she is not vulnerable to violence because of her actions (risky behaviours), nor does she succumb due to weakness (failure to learn important skills). She succumbs because the husband has done all he can to hide his intentions (the pit), and to prepare the trap. The story does not enable one to argue that the wife could have escaped if only she had been better, or worked harder. In short, victim-blaming is not a strategy for explaining the outcome, nor for addressing the risk men such as the husband posed to other women.

The story, even in its silence about the community, asks us to think about the obligations of others to disrupt the harmful outcome. The story invites us to consider other stories we know. Consider Edna Hunnicut's recounting of *The Lake of Worms,* another version of *Wife Killer*.[70]

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69. See Cruikshank, *supra* note 18.

70. Hunnicut, *supra* note 35.

In this story, the brothers of the husband's newest wife become suspicious. They wonder why it was that this man was always losing his wives on his hunting trips. Because of their awareness of the suspiciousness of the deaths, the brothers were able to rescue their sister before she could be killed. If one places the two stories together, one begins to see them in dialogue.[71] One can return to *The Wife Killer* asking more about ways that a community might need to practice the kind of awareness demonstrated by the brothers in *Lake of Worms*. Questions about how a community practices its obligations then become visible in many places.

Thinking about how Canada will move forward with the Inquiry into Missing and Murdered Indigenous Women, we found ourselves thinking about "ourselves" as people who might be called upon in thinking about how to respond to the great harms that have been done. We found ourselves reflecting on the stories and the synthesis, particularly those aspects that seem to foreground obligations of caring and sharing, rather than "rights." We found ourselves thinking back to the community as a decision maker, and one of the general statements of law:

> 1.1.5.2. Community or group decisions are required when the community or group is needed to perform obligations such as caring for others and assisting and protecting those in need or at risk of harm. (*The Man Who Was Saved by a Salmon Fin*, *Atangnak*, *The Man with a Scourge of Bearded Sealskin*, *Orphan With No Clothes*, *Selawik and Buckland Wars*, *Utuagaaluk: Murder Mystery*, *Aagruukaaluk and Kippagiak*, *Aagruukaaluk*, *Sky People*, *Northern Lights People*)

Based on these stories, caring for, sharing with, assisting and protecting others are important western Inuit principles informing legal responses to harm. It seems that when someone is in need or at risk, and others are aware of this, there is an obligation to assist if there is an ability to help. All the above stories also make visible the importance of the principle of collaboration in the western Inuit stories (people listen, talk, and take action together).

This principle appears necessary to ensure people are acknowledged, and treated with respect. But it is also necessary in order to ensure the safety of oneself and of others in the community; it makes it possible to recognize danger and harm, so that one can respond wisely and uphold one's obligations to others.

Let us then return to the question of the community's involvement in *The Wife Killer* story. It would seem that since women in the community were being targeted by the wife killer, the problem could be considered one that affected all the villagers and thus a collective response would be appropriate. This fits with the principle regarding community and group decision making articulated in the statement of law (1.1.5.2) above. Also, since the women were in need of protection and assistance from the community, the principle above concerning community

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71. We have slowly come to appreciate the importance of multiple versions of stories. When one stops searching for the most "authentic" version, it becomes possible to better appreciate the ways that small changes in the stories enable stories to make new arguments, and to elaborate new options in the context of new circumstances. This point is powerfully made in considering the multiple variants of the Inuit story of Atanarjuat, and Zacharias Kunuk's decision (working with multiple elder's accounts) to change the ending of the story in his filmic account of the story of Atanarjuat. See Michael Robert Evans, *The Fast Runner: Filming the Legend of Atanarjuat* (Lincoln: University of Nebraska Press, 2010) at 63–85 (Chapter 5, "The Legend and Its Variants").

obligations to assist and care for those vulnerable or in need also supports the importance of a community response to the harm.

When we return then to the question of violence against women, and do so while attentive to the importance of the values of awareness and collaboration, we can see that the stories provide us with an additional resource: they can help us identify situations of particular risk, and places where communities will confront particular challenges in responding to harm.

One could think about *The Wife Killer* through this lens, and come to a number of conclusions. One might simply say, as the story does, that the villagers were not aware that the wife killer was killing his wives. This might then explain why the villagers did not respond to the harm. But one might then pose the question for the future: what ways of practicing awareness might have led the community to be able to identify the harm more quickly? With knowledge of the story, one might consider the ways that people can identify situations in which women may face heightened risk. That is, one can look to the story not to judge the community of the past, but rather as a source of information about contexts in which one might anticipate the value of heightened awareness. This is just a reminder that the point of a synthesis is not simply an elaboration of rights and responsibilities, but a way of organizing the many insights a story has to offer, a way of putting stories in conversation in order to better see the puzzles and patterns they make visible, and then working toward using these insights to better prevent and tackle current situations of harm. So too, one can read the stories together, and ask how those principles and insights might help us today, as we work towards reducing vulnerabilities, and increasing conditions for both safety and thriving.

In short, our experience of working with stories has been that they open more questions than they resolve. While we, as elaborated earlier, feared that this work would participate in the flattening of Inuit legal principles, our experience has rather been one of increased appreciation for the richness of the stories and principles that circulate through them. The experience of using this approach left us seeing the generative capacity of both the stories and the project. This synthesis opens up space for asking questions about the application of these stories and principles to the contemporary landscape. Far from providing simple answers, the stories provide rich context for asking pressing questions about how we structure a world to first avoid, and then respond to harm.

There are of course challenges that come with any project that seeks to build bridges across legal traditions, or indeed, languages. Certainly, there were many occasions where others gave us guidance, or helped us to see places where our own presumptions about the world were making it difficult for us to "see" the possibilities in the stories. The challenge lies in remaining open to the processes of learning. As Cruikshank pointed out, stories are social activities requiring engagement on the part of the listener.[72] The more we engaged with the stories, the more they yielded new insight. We noticed differences between our early attempts to brief and our latter attempts. This reminded us that story-telling and listening are social activities, and that stories link to other stories. For Inuit and non-Inuit alike, stories are embedded in a rich social life; the more stories we encountered, the easier it was for us to see the richness in them.

The adapted case briefing and legal synthesis methodology presented in this paper represents only one approach to learning Indigenous law. We agree with Napoleon that there are many strategies and methods for renewing the relationship of Canadian and Indigenous

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72. See Cruikshank, *supra* note 18.

legal orders. Of course, many substantive engagements with Inuit law are needed. What is offered here is one productive way to open richer conversations between and amongst communities. What this project has helped us see is that there are pathways towards more active engagement with Indigenous legal orders in Canada. There are many ways to make good on the TRC Calls for education about Indigenous laws. While this requires a willingness to move beyond taken-for-granted assumptions about law, it also acknowledges that there are resources within common law legal traditions, in this instance the use of modified case briefing method, which can be mobilized in the service of collaborative engagement.[73]

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73. See generally the following list of stories in the project: Robert Nasruk Cleveland, "Aagruukaaluk" in Anderson, *supra* note 32, 135; Nora Paniikaaluk Norton (as told by Riley Jim Sugunnuuquu), "Aagruukaaluk and Kippagiak" in Anderson, *supra* note 32, 137; "Akaluk and the Stolen Soul of Ugpik" in Schwarz, *supra* note 32, 31; Nora Paniikaaluk Norton, "Alaaqanaq, the Man with a Little Drum" in Anderson, *supra* note 32, 94; Agnes Nanogak, "Atangana and the Giants" in Nanogak, *supra* note 32, 24; "Atangnak" in Nanogak, *supra* note 32, 83; Agnes Nanogak (as told by Mamie Mamayook), "Avaotok" in Nanogak, *supra* note 32, 48; Paul Monroe (as told by Carl Stalker), "The Brother with Good Ears" in Hall, *supra* note 32, 48; Edna Hunnicutt, "The Dead Seal" in Hall, *supra* note 32, 80; Nora Paniikaaluk Norton, "The Duel Between the Point Hope Shaman and the Barrow Shaman" in Anderson, *supra* note 32, 84; Angut Kayuq, "Eagle-Man" in Kappi, *supra* note 32, 90; Leslie Tusragviurag Burnett (as told by J Wells), "Fast Runner" in Anderson, *supra* note 32, 96; Paul Monroe (as told by Charlie Goodwin's wife), "Inaagiruk" in Hall, *supra* note 32, 114; Robert Nasruk Cleveland, "Isiqiak" in Anderson, *supra* note 32, 121; Angusinaq, "Kagsagssuk" in Ostermann, *supra* note 32, 99; Nanogak, *supra* note 35; Hunnicut, *supra* note 70; Agnes Nanogak, "The Lake with No End" in Nanogak, *supra* note 32, 105; Angusinaq, "The Legend of Najuko" in Ostermann, *supra* note 32, 75; Nora Paniikaaluk Norton, "The Lost Little Brother" in Anderson, *supra* note 32, 179; Asatchaq, "The Malicious Youth" in Lowenstein, *supra* note 32, 130; Paul Monroe (as told by Ahsitjuk Kilyikvuk), "The Man who Broke the Polar Bear's Law" in Hall, *supra* note 32, 195; Agnes Nanogak, "The Man Who Caused Blizzards with an Axe" in Nanogak, *supra* note 32, 31; Monroe, *supra* note 35; Angusinaq, *supra* note 35; Paul Monroe (as told by Carl Stalker), "The Man Who Was Saved by a Salmon Fin" in Hall, *supra* note 32, 358; Angusinaq, "The Man with a Scourge of Bearded Sealskin" in Ostermann, *supra* note 32, 130; Nora Paniikaaluk Norton, "Niglaaqtuugmiut and Kuukpigmiut" in Anderson, *supra* note 32, 125; Herbert T Schwarz, "Northern Lights People" in Schwarz, *supra* note 32, 15; Nora Paniikaaluk Norton, "One Who Walked Against the Wind" in Anderson, *supra* note 32, 153; Nora Paniikaaluk Norton, "Orphan Who Married an Umialuk's Daughter" in Anderson, *supra* note 32, 208; Emma Atluk Skin, "The Orphan with No Clothes" in Anderson, *supra* note 32, 204; Paul Monroe (as told by Frank Glover), "Paaluk and the Feast" in Hall, *supra* note 32, 258; Asatchaq, "Paniunayuk and Aqsaqauraq: A Feud Averted" in Lowenstein, *supra* note 32, 116; Andrew Nuqaqsrauraq Skin, "Pinaqtuq, Who Had No Wish to Marry" in Anderson, *supra* note 32, 103; Nora Paniikaaluk Norton, "The Raid and the Kobuk River Grandmother" in Anderson, *supra* note 32, 130; Susie Tiktalik, "Raven and the Whale" in Schwarz, *supra* note 32, 43; Paul Monroe, "Selawik and Buckland Wars" in Hall, *supra* note 32, 303; Asatchaq, "Siġvana and the Old Shaman: Terror in the Entrance Passage" in Lowenstein, *supra* note 32, 85; Aunaraitsaiq, "The Smoking Mountain at Horton River" in Ostermann, *supra* note 32, 60; Nora Paniikaaluk Norton (as told by Edward Norton), "The Sky People" in Anderson, *supra* note 32, 78; Paul Monroe (as told by Leonard Brown), "Three Brothers" in Hall, *supra* note 32, 371; Asatchaq, "Tigguasina: A Boy Shaman and a Fraud" in Lowenstein, *supra* note 32, 78; Paul Monroe (as told by Frank Burns), "Tuakikpakaktuk" in Hall, *supra* note 32, 221; Asatchaq (as told by Niguvana), "Unipkaluktuaq: A Woman's Story Comes to Life" in Lowenstein, *supra* note 32, 95; Angusinaq, "Ululina" in Ostermann, *supra* note 32, 80; Asatchuq, "Utuġaaluk: A Murder Mystery" in Lowenstein, *supra* note 32, 120; Nora Paniikaaluk Norton, "The Widow and the Stingy Sister-in-Law" in Anderson, *supra* note 32, 225; Norton, *supra* note 34, Nora Paniikaaluk Norton, "The Wife with a Jealous Husband" in Anderson, *supra* note 32, 90; Edna Hunnicutt, "The Woman Who Killed Herself" in Hall, *supra* note 32, 88; Flora Kuuqaaq Cleveland (as told by Jack Pungalik), "The Young Man Who Married a Wife From Across the Sea" in Anderson, *supra* note 32, 211.