PRACTICE MADE PERFECT CLE BC

INDIGENOUS LEGAL ORDERS AND THE COMMON LAW
PAPER 2.1

The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice

These materials were prepared by The Honourable Chief Justice Lance S.G. Finch of the Court of Appeal for BC, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, November 2012. This paper was prepared with the considerable assistance of Kate Bond, former Law Clerk to the Court of Appeal for BC to whom the writer is most grateful.

THE DUTY TO LEARN: TAKING ACCOUNT OF INDIGENOUS LEGAL ORDERS IN PRACTICE

I. Introduction

1. A keystone of Aboriginal law jurisprudence is the Crown's recognition that organized societies pre-existed within the territorial limits of what is now Canada. It is artificial to separate the concept of *pre-existing societies* from that of *pre-existing legal orders*. No bright-line distinction exists between a normative principle and an identifiable law, much less in the case of societies which do not frame their own legal orders around the idea of written common law or statutes. Canada was, and remains, a multi-jural nation, in fact if not in law.

2. The need to take this reality into account, to "make space" for Indigenous legal orders, raises big questions for the practice of Canadian law. Like the majority of practitioners attending this conference, I am concerned with the question of *how*, from a practical perspective, to effect this recognition. And of central—indeed paramount—concern on this point is the present and future ability of individual judges, and lawyers, to approach this task in a principled and effective manner.

3. At present, the vast majority of lawyers and judges in Canada are non-Aboriginal[1] and are wholly unfamiliar with Indigenous languages, cultures and world views; for those of us who form part of this majority, our exposure to Indigenous culture is largely gleaned from written texts and other Western cultural media, such as museums, news channels or films, most of which are produced through the lens of a non-Indigenous and often Eurocentric cultural perspective. Moreover, most of us in the legal profession are not formally trained in, for example, anthropology or historiography, or in any comparable discipline which would equip us with the critical and methodological tools required to research and analyze other cultures' normative belief systems.

4. This demographic reality—that is, the fact that most legal practitioners are neither Aboriginal nor academically trained in the investigation of Aboriginal cultures—has significant implications for the development of Aboriginal law, whether in terms of rights and title recognition, or with regard to the project of incorporating Indigenous legal principles into the common law. It goes without saying that what we sorely need is better and more proportionate representation of Indigenous people within

---

1 Exact statistics on the number of Aboriginal lawyers and judges in Canada are elusive, but relevant professional authorities, including the Indigenous Bar Association, are unanimous that Aboriginal people are proportionately underrepresented in the legal profession.

the legal profession, including, of course, within the judiciary. Meanwhile, we are faced with the challenge of the *existing* professional demographic. Professor John Borrows warns us that,

> In practice, there are enormous risks for misunderstanding and misinterpretation when Indigenous laws are judged by those unfamiliar with the cultures from which they arise. The potential for misunderstanding is compounded if each culture has somewhat different perceptions of space, time, historical truth, and causality.[2]

5. The enormity of those risks is directly tied, of course, to the importance of the interests at stake. One might argue that if those individuals presently involved in identifying, presenting and analyzing Indigenous legal issues—that is, counsel and judges—find themselves ill-equipped for the task, better, perhaps, to leave well alone, rather than risk the consequences of misinterpretation and misapplication. But this would be to evade the courts' existing legal responsibilities, or worse still, to pay lip service to the principles involved while perpetrating a legal paradigm which has done little, thus far, to effect meaningful reconciliation between the Crown and Indigenous peoples in Canada. As a result, it is a precondition for the principled application of Indigenous laws that these laws be viewed, as far as may be possible, through the lens of the Indigenous culture in question.

6. In this light, it is as important to address questions of perceptual and ideological readiness *within* the Canadian legal community, as it is to discuss the theoretical and substantive means by which Indigenous legal orders may be incorporated into Canadian law (or vice versa). Ability, in other words, is a precondition to application. Before space can be made in the Canadian legal landscape for Indigenous law, the participants in the process—judges, lawyers, and lawmakers, as well as academics—must be able to conceptualize and recognize what they are making space for, or the exercise will be futile. A profound change in perspective is needed.

7. Given the obvious handicaps I have mentioned, how can we begin to approach this task? How best to equip ourselves—I speak from among the majority—as non-Indigenous, as Anglo- or Francophones, and as lacking in historical, anthropological or sociological training, for the necessary learning process?

8. To this end, I have considered the question which frames this conference: "How can we, as practitioners and as a society, make space within the legal landscape for Indigenous legal orders?" My answer, which I hope to convey more fully in the course of this talk, is that we will begin to create this space within the Canadian legal community through a threefold process of recognition: first, by recognizing the true nature and scope of the challenge; second, by recognizing the preconceptions and limitations which hamper the existing Canadian legal perspective; and third, by recognizing the need for humility, respect and receptivity in our individual and collective approaches to Indigenous legal orders.

II. The Necessity

9. Before I address the question of how, as legal practitioners, to begin to effect this change in perspective, I will touch briefly on the jurisprudence which has made clear the courts' obligation to take into account the Aboriginal legal perspective.

10. In *Sparrow*,[3] the Supreme Court of Canada held of fishing rights that "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[4] In *Van der Peet*,[5] former Chief Justice Lamer further emphasized the point as follows:

---

2 *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 140.

3 *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

4 *Ibid*. at 1112.

5 *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

> ... The notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is ... one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.[6]

11. The present Chief Justice also held in her dissent in the same decision:

> The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread—the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement.[7]

12. In *Delgamuukw*,[8] in its determination of the legal source and nature of Aboriginal title, the Supreme Court held:

> ... [T]he source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy. ...
>
> This approach to the proof of occupancy at common law is also mandated in the context of s. 35(1) by *Van der Peet*. In that decision, as I stated above, I held at para. 50 that the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the "aboriginal perspective while at the same time taking into account the perspective of the common law" and that "[t]rue reconciliation will, equally, place weight on each". I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.[9]

13. These fundamental principles of Aboriginal law jurisprudence have never been explicitly questioned or cut back by subsequent Supreme Court of Canada decisions.

14. The quotes above are taken from modern Section 35 jurisprudence dealing with Aboriginal rights and title. It is important to remember that the Aboriginal perspective, and accordingly Aboriginal legal principles, must be taken into account in many areas of existing Canadian law. These include, for example, Aboriginal perspectives on family law, criminal law and sentencing, natural resource law, and in civil claims against the Crown. This conference is predicated on the theory, at least, that there is no inherent limit to the ways in which Canadian and Indigenous legal orders may be mutually enriched and harmonized.

15. We speak often in the field of Aboriginal law of the honour of the Crown, which mandates, among other requirements, the duty to approach questions of interpretation generously, the duty to consult and the duty to accommodate. Now, I suggest, a more widely applicable concept of honour

---

6 *Ibid*. at para. 50.

7 *Ibid*. at para. 263.

8 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

9 *Ibid*. at paras. 147-48.

imposes on all members of the legal profession the duty to learn: at the very least, to holding ourselves ready to learn. In addition, the legal obligation to take account of the Aboriginal perspective engages the principle of the rule of law. If the rights of all Canadians, including Aboriginal Canadians, are to be articulated and guarded by the courts, the courts must necessarily be capable of understanding the nature of those interests.

III. The Challenge

16. Both the scale and complexity of the task, both in the individual case and in general, are difficult to overstate. Professor John Borrows, in *Canada's Indigenous Constitution*, has stated that:

> The underpinnings of indigenous law are entwined with the social, historical, political, biological, economic, and spiritual circumstances of each group. They are based on many sources, including sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices, and local and national customs.[10]

17. He adds that anyone working with Indigenous legal traditions "must take care not to oversimplify their character," as such traditions "can be just as varied and diverse as Canada's other legal traditions."[11]

18. In a chapter titled "Challenges and Opportunities in Recognizing Indigenous Legal Traditions," Professor Borrows identifies and discusses "some of the more pressing concerns which judges, lawyers, academics, politicians, journalists, theorists, and Indigenous community members might have about the recognition of Indigenous legal traditions."[12] Under the heading of *intelligibility*, he notes that "what may be unintelligible to those inexperienced with Indigenous culture may be quite intelligible to those familiar with it. A Eurocentric approach to legal interpretation must not be allowed to undermine Indigenous legal traditions."[13] Following the warning I have quoted earlier, as to the risks of having Aboriginal legal principles judged by people unfamiliar with their source cultures, Professor Borrows states that

> Those who evaluate the meaning, relevance, and weight of Aboriginal legal traditions must ... appreciate the potential cultural differences in the implicit meanings behind implicit messages if they are going to draw appropriate inferences and conclusions. They should attempt to grasp their unspoken symbolic aspects in order to evaluate their truth and value. Mastering both these facets of interpretation is a tremendously difficult and complex task.[14]

19. He adds, too, that "[t]his evaluation will be especially fraught with danger if the interpreter does not recognize the cultural foundation of knowledge, and fails to acknowledge his or her own bias."[15]

20. The task may be summarized as endeavouring to understand Indigenous legal systems *in context*, both formally and substantively. Professor Borrows has said elsewhere:

> One cannot understand First Nations law without an appreciation of how each story correlates with others. A full understanding of First Nations law, and their

---

10 *Canada's Indigenous Constitution* at 23-24.

11 *Ibid.*

12 *Ibid.* at 137.

13 *Ibid.* at 140.

14 *Ibid.* at 140.

15 *Ibid.* at 141.

> principles for governance, requires familiarity with other stories of the particular culture and the surrounding interpretations given to them by their people.[16]

21. This equation of legal principles with stories, or, more generally, with social narratives, provides a helpful anchor in coming to terms with the critical importance of context. The American legal scholar Robert Cover famously stated, thirty years ago, that

> In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse-—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.[17]

22. Whether speaking of Canadian law or of Indigenous legal orders, law both arises out of, and is continuously shaped by, broader cultural narratives. And such narratives, whether part of a written or oral tradition, will only make intellectual and normative sense viewed in their larger context. The scholar Julie Cruikshank, for example, speaking of the Tlingit ["KLING-git"] storytelling tradition, said this:

> Storytelling may be a universal activity, but understanding what one hears requires close attention to local metaphor and local narrative conventions. When speaking in story-like constructions, Yukon elders tend to make generous assumptions about their listeners' or readers' understandings of such precepts. ... It is, of course, precisely the absence of such knowledge that often makes cross-cultural communication so fraught.[18]

23. Cruikshank herself identifies three concepts in particular which require elucidation: place, kinship, and ideas about personhood. As concepts which all members of an organized society will have absorbed and instilled from birth, these are not contextual details: they are the foundations of our understanding of the meaning of law, and of civilization. The *lack* of knowledge of another culture's precepts, meanwhile, is further fraught and exacerbated by the *presence* of one's own, pre-existing cultural tenets.

IV. The Obstacles

24. Accordingly, I turn now to a discussion of the limitations and obstacles which, to a greater and lesser extent, necessarily hamper the ability of most members of the Canadian legal community to view Indigenous legal orders in context. For clarity's sake, I embark on this discussion under two broad headings: *severance* and *distortion*.

25. On the first point, that of severance, there are a number of specific ways in which Indigenous laws are regularly detached from their cultural context within the Canadian legal perspective.

26. First, of course, there is the matter of language. It is obvious that existing Indigenous legal orders arose out of a myriad of separate languages, many of which bear as little linguistic resemblance to one another as to English or French. And it is axiomatic that language and legal norms are inseparably intertwined: anyone who has ever spent time closely parsing a statute or contract will

---

16 *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 18.

17 "The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative" (1983) Harv. L. Rev. 4 at 4.

18 *Do Glaciers Listen?* (Vancouver: UBC Press, 2005) at 66.

know how acutely nuances of language may affect legal issues and outcomes. Unavoidably, the vast majority of judicial or lawyerly encounters with Indigenous laws will occur in translation; in the process, these spoken or written translations may present an incomplete or even skewed characterization of the original concept. Consider the term *adawx* ["a-DOW-ach"] as it is used in the Coast Tsimshian and Gitksan traditions. While the legitimacy and content of the *adawx* informed much of the evidentiary record in, for example, *Delgamuukw*, the word itself defies straightforward translation. Professor Andrew Martindale gives the meaning of *adawx* as "oral records";[19] Professor Val Napoleon as "the ancient, formal, collective oral histories, which are property owned by the kinship groups";[20] and the Supreme Court of Canada as "a collection of sacred oral tradition about [the group's] ancestors, histories and territories."[21] While a certain commonality of meaning emerges, it is also clear that *adawx*, as a legal term, operates within the Tsimshian and Gitksan languages to signify an enormous, diffuse, and highly complex web of meaning, which an English translation is unlikely to convey faithfully no matter how careful or long-winded.

27. As a second element of severance, there is the matter of text. In both their pre-contact and present-day forms, Indigenous legal orders exist largely in the form of inherited and interrelated oral traditions, themselves subject to complex systems of ownership and protocols. The Canadian legal community's exposure to Indigenous laws thus involves a transmutation of format as well as language. While procedural law has expanded to admit oral evidence in relevant circumstances—for example, in *Delgamuukw*—even evidence adduced orally is, by nature of the court process, rendered into text; appellate courts, for example, will generally only encounter such testimony in written form; likewise the general public. Revision in the form of text has the effect of literally silencing laws and legal principles that are conceived as oral in form and intended to be received and passed on by word of mouth. In the process, the legal principles in question are simultaneously reduced and frozen, and thereby rendered more vulnerable to imposed interpretations. Further, reduction to text may foreclose the legal community's awareness of the protocols and intellectual property issues which may attend the conveyance and dissemination of oral histories.

28. Moreover, severance of Indigenous laws from their spoken medium is just one aspect of an overall severance from individual Indigenous cultures' laws of procedure. At least in rights and title jurisprudence thus far, the courts' consideration of the Indigenous legal perspective amounts to a *substantive* weighing. Because this weighing occurs within the Canadian court system, substantive principles, insofar as they are granted weight, are considered outside of the unique procedural systems in which they are intended to be communicated and applied. In other words, the "what" of the principles is considered independently of the "how." If we recall Lon Fuller's dictum that "If we do things the right way, we are likely to do the right thing,"[22] we must likewise consider that the right *way* of doing things is as open to interpretation and variance across legal orders as the right *thing* itself.

29. Finally, without having exhausted the ways in which Aboriginal legal principles may be stripped of their surrounding context, there is the effect of severance from a legal order's concrete setting: that is, the context in which it arose and which gives shape to understandings of title, property, custodianship, and environmental management. In these areas of law, geography, as much as history, race, class, or political structure, provides a foundation for cultural identity: our relationship

---

19 "Methodological Issues in the Use of Tsimshian Oral Traditions (*Adawx*) in Archaeology" (2006) 30 *Canadian Journal of Archaeology* 158 at 158.

20 "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" (Paper presented at Consent as the Foundation for Political Community, Consortium on Democracy and Constitutionalism, University of Victoria 2004) at 17.

21 *Delgamuukw* at para. 93.

22 "What the Law Schools can Contribute to the Making of Lawyers" (1948) 1 Journal of Legal Education 189 at 204.

to our home landscape—whether conceived of as ownership, as stewardship, as sojourn, or as the uneasy aftermath of colonialism—is central to our sense of individual and collective personhood and social organization. Particularly concerning questions of Indigenous law as they bear on analyses within the Canadian legal frameworks for rights and title, this severance from the *literal* context, as an obstacle to understanding, must be acknowledged.

30. Clearly, these factors, both individually and in aggregate, compromise greatly our ability as practitioners to view Indigenous legal systems in context. In addition, though, there are certain active dangers which attach to this severance from context. One such danger is the potential for conceiving of Indigenous cultures as static across time. The late scholar Marlee Kline, in her analysis of different forms of ideological representation of First Nations in Canadian jurisprudence, has observed that:

> Despite centuries of contact with First Nations and the changing conditions of their lives, 'real Indians' are constructed by the dominant society as those who live as they did before or during the early period of European contact.[23]

31. Another danger, as Kline points out, lies in the perceived homogeneity or unity of Indigenous cultures, the illusion that there is such a thing as a single "Indigenous" outlook or mass society. This warning is echoed and emphasized in Professor Borrows's admonition as to the variance and diversity among Indigenous legal orders.

32 So much for the sources and effects of severance. But the obstacles internal to the Canadian legal perspective go further. There is also the matter of distortion. From the point of view of the non-Indigenous legal practitioner, this distortion occurs both externally and internally.

33. From an external standpoint, there is the effect of colonial mediation, and hence distortion, within evidentiary and scholarly sources. Most serious inquiries into "the Aboriginal perspective" in the course of litigation will rely at least in part on sources derived from non-Aboriginal recorders or experts. Research into a particular Indigenous legal system may likewise make use of historical and modern texts and observations taken from the point of view of non-Indigenous travellers, witnesses, and anthropologists. In assessing such sources for their value as evidence, it is important to examine and scrutinize their reliability in terms of accuracy, completeness, and objective. Colonial onlookers may import both conscious and unconscious agendas to their project of collecting and recording. On this point, the influential oral historiographer Jan Vansina emphasizes the importance of investigating and critiquing the "complex question of authorship," particularly when the authors under question are writing about cultures other than their own. He lists the following factors as central to understanding authorship: first, the question of what information comes from the writer or author him- or herself, as opposed to from an informant; second, the status of the author with regard to the culture he or she is documenting; third, the author's language competence; and finally, his or her gender.[24] I mention these points not to provide a ready-made formula, but to illustrate the importance of retaining, at every stage, a critical awareness—in particular, an awareness of the fact that no colonial source will bring to bear on its subject a truly clear lens.

34. This distortion happens equally internally, however. And here I come to the heart of the matter. From the outset of our education as Canadian lawyers, indeed from the outset of our education, we are immersed in a particular context and point of view. This saturation far transcends our legal training, of course: the experience of a cultural narrative in any form, or on any subject, will be informed—to borrow Julie Cruikshank's framework—by our understandings of place, kinship, and ideas about personhood. This is largely an unconscious process. Whether reading a novel or perusing a judgment, our accrued experience sets off a constant series of connective sparks, or internal signals,

---

23 "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 3 *Social & Legal Studies (SAGE, London, Thousand Oaks and New Delhi)* 451 at 455.

24 *Paths in the Rainforest* (Madison: The University of Wisconsin Press, 1990) at 23-26.

affirmations, and disruptions, all at a level so deeply ingrained as to take place, most of the time, below the radar of awareness. And it is dangerously easy to carry our unconscious matrices of interpretation to our approach to another culture's values and laws.

35. Recognizing and addressing this form of perceptual distortion is perhaps the single most important precondition to the Canadian legal community's meaningful incorporation of Indigenous legal orders. The danger in retaining and imposing our ideas of what constitutes "law," according to our training and established habits of mind, is that we may inadvertently give weight only to those elements of an Aboriginal legal system which are recognizable in Canadian law, rendering the Canadian legal framework determinative. At the same time, we may fail to perceive essential elements of these legal orders. At the very least, we must question our assumptions; at most, we must unlearn them. Not, of course, in every context. But for purposes of approaching Aboriginal legal orders, we must do our utmost to recognize and to relinquish our preconceptions of what *objectively* constitutes a "law" or a "system of laws."

V. The Beginning

36. The need to let go of our established ideas as to what constitutes "law" is one of the only tasks which lies immediately within our control as individual legal practitioners. It is to be hoped that other sources of severance and distortion—difficulties of translation, of transcription, of detachment from setting and from procedural and cultural context—may in time be addressed within the legal institution; at least, better than they are at present. But it is within all of our abilities to recognize and attempt in good faith to divest ourselves of pre-existing certainties as to the nature of law.

37. I come now to the approach itself, once the limitations and obstacles have been identified, and, as far as possible, abandoned.

38. The idea of *legal landscape* which frames this conference is an apt one for purposes of reflecting on the duty to learn. I would argue, though, that the idea of making space within the legal landscape does not fully reflect the nature of the enterprise. A powerful analogy may be drawn from the notion of title, or, expressed more broadly, from the relationship of an organized society to its traditional territory. Present Canadian society must find a way to exist together with a pre-existing cultural landscape. Similarly, in the purely legal context, we must find ways to achieve reconciliation by finding space for the Canadian legal order within the pre-existing legal landscape.

39. In other words, the task for which we are attempting to equip ourselves is not only that of making space within the *known* landscape, as the central question of this conference presupposes; it is a matter of attempting, in good faith, and as respectfully as possible, to enter new landscapes: legal, ethical, and cultural. A deeper understanding of the web of relations between the foundations of a legal system, and law itself, may only be gained by shared experience.

40. In the process of entry, the important qualities of mind to adopt, or to aspire to, are respect and receptivity. To enter a landscape empty-handed is to do so with all senses open, sharpened by a sense of its vastness, its permanence, and its inseparability from the larger world.

41. Respect in this context is simply the acknowledgement that we are all human, we are all different, and that no matter how important they may be, our values cannot be treated as absolute and exclusive. We all have much to learn from one another.

42. Receptivity must take account of context, including the context of the colonial enterprise and the injustice it has so often created. Receptivity does not translate to selective vision or amnesia; on the contrary. The postcolonial scholar Leela Gandhi has argued that nation states carry with them "a

desire to forget the colonial past."[25] Characterizing this "will-to-forget" more precisely as "postcolonial amnesia," Gandhi affirms the critic Homi Bhabha's assertion that "memory is the necessary and sometimes hazardous bridge between colonialism and the question of cultural identity."[26] In other words, receptivity involves acknowledgment of real past and present wrongs: receptivity to the memory of such wrongs, that is, as well as to new knowledge.

43. Moreover, this inversion of the idea of *making space* within Canadian law is crucial to a full and honourable process of reconciliation. In *Van der Peet*, Chief Justice Lamer stated at para. 31 that "the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[27] The idea of "reconciliation" put forward in *Van der Peet* has been criticized for its "undertones of capitulation."[28] Indeed, "reconciliation" is a complex undertaking, implying a variety of possible means to end conflict, not all of which necessarily lead to a just outcome. To guard against imbalance and resulting injustice, we must conceive of reconciliation, in the legal context as well as in social and political terms, as a two-way street: just as the pre-existence of aboriginal societies must be reconciled with the sovereignty of the Crown, so must the Crown, in its assertion of sovereignty, equally be reconciled with the pre-existence of aboriginal societies.

44. As part of this process, I suggest the current Canadian legal system must reconcile itself to co-existence with pre-existing Indigenous legal orders. This conference poses the question: How can we make space within the legal landscape for Indigenous legal orders? The answer depends, at least in part, on an inversion of the question: a crucial part of this process must be to find space for ourselves, as strangers and newcomers, within the Indigenous legal orders themselves.

45. Finally, through all stages of this process, we must retain a sense of humility. For non-Indigenous lawyers, judges, and students, this awareness is not restricted to recognizing simply that there is much we don't know. It is that we don't know just how much we don't know. In principle, we must always admit a measure of uncertainty in our approach, as non-Indigenous practitioners, to another culture's narratives and laws; the more so in our conclusions. Bearing in mind this last cautionary standard, we as Canadian legal practitioners, the strangers in the landscape, may find ourselves ready to begin.

VI. Conclusion

46. I will end by touching briefly on the role of law schools and legal education generally. It is unrealistic to expect the current generation of judges and counsel to achieve the shift in perspective necessary to incorporate Indigenous legal systems into the existing order. However, those at the beginnings of their legal careers and educations have the advantages of time and resources at their disposal. They are best positioned to gain an appreciation of context and to foreclose the calcification of perspective.

47. To this end, I suggest that every Canadian law school should include a course not only on "Aboriginal law" as this label is commonly understood (that is, treaty law and Section 35 jurisprudence), but on Indigenous legal orders, as part of its core curriculum. Forms of teaching matter as well as the contents. Presently, there are a number of exciting developing programs in law schools across Canada.

---

25 *Postcolonial Theory: A Critical Introduction* (Edinburgh: Edinburgh University Press, 1998) at 4.

26 *Ibid.* at 9.

27 *Van der Peet* at para. 31.

28 Darlene Johnston, "Lo, How Sparrow Has Fallen: A Retrospective of the Supreme Court's Section 35 Jurisprudence" in Julia Bass et al., eds., *Access to Justice for a New Century--The Way Forward: Proceedings of a Conference Held in Toronto, Ont., May 28, 2003* (Toronto: Law Society of Upper Canada, 2005) at 223.

The law school at the University of Victoria is showing real leadership in this field. The schools, students, legal community, and Canada as a whole will be the beneficiaries of these programs.

48. The Court's judgment in *Delgamuukw* concluded with the words, "Let us face it, we are all here to stay." True enough: but if in the face of this reality we are to find space for multiple legal orders to co-exist, and if we are ultimately to achieve an equal reconciliation, we must recognize that to stay must also be to learn.