FOREWORD: INDIGENOUS LAW, LANDS, AND LITERATURE

John Borrows*
Guest Editor

Law is not just an idea; it is a practice. Law helps us find ways of organizing decision making to regulate our actions and resolve our disputes in an authoritative manner. However, what constitutes authority, organization, regulation, and resolution are open questions. The practice of law varies with the context in which decision making is situated. It is coloured by the cultures in which it occurs and is influenced by the beliefs, languages, social structures, political organization, and economic circumstances of the groups within which it takes place. Concepts of time, scale, space, causation, responsibility, opportunity, and success are not the same in all places. The ten articles in this special issue on Indigenous peoples’ law, land, and literature examine the impact of these truths. Each author explores how the contours of Indigenous laws can be explored through stories rooted within specific territorial contexts.

The following articles reflect on the authors’ experiences of working with Indigenous legal traditions through stories. Indigenous legal orders encourage the use of stories to examine regulatory and dispute resolution issues from a grounded perspective. While abstract theories and linear philosophical arguments can be used to discuss Indigenous peoples’ law, the articles in this volume reveal another set of intellectual traditions at work.

Approximately one year ago, Laverne Jacobs, editor-in-chief of the Windsor Yearbook of Access to Justice [WYAJ] asked if I would be willing to act as a guest editor to develop a special issue on Indigenous legal issues. Having served on the WYAJ Advisory Board for some time and having published a couple of articles in the WYAJ during my career, I was very happy to accept the invitation. I immediately identified and invited nine emerging scholars who work at the edge of innovation in their field to write for this volume. They are practitioners and law professors who work with Indigenous peoples’ own legal traditions from a community perspective, and, in the process, they are changing how we think about law in Canada. Remarkably, the changes they identify are not always new. The insights they activate are often rooted in centuries-old understandings of Indigenous peoples’ relationship with the land. Stories related to Indigenous peoples’ land and the laws they implicate are a central theme of this special issue.

The lead article in this volume, which is my contribution, describes work occurring in Canadian law schools related to land-based education. Through my experiences on the Cape Croker Indian reserve and my twenty-five-year career as a law professor, the article considers how Indigenous peoples have their own ways of reasoning from the land that generates resources for legal decision making – through stories and land-based learning. Along the way, this article describes how law schools are taking students outside the classroom to learn about Indigenous peoples’ legal processes and the substantive obligations they generate.

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Hannah Askew, a practitioner who writes the second article in this volume, also describes what it is like to work with Indigenous law through stories within a community context. She describes her experiences with Anishinaabe Elders at Neyaaashinigmiiing in Ontario, who stressed the importance of land in understanding legal principles. In her article, she explains that learning about the nature of stories as legal resources “was by no means a passive process.” She speaks about how community members of the Chippewa of the Nawash were expected to actively grapple with the stories by asking questions, comparing them to other stories, and using them to apply to situations they saw around them. As a result, within her article, Hannah develops the implications of these ideas for her own practice of law and for legal education more generally. In this connection, she observes: “Whenever I travel through Anishinaabe territory and see the birch trees, owls, red willows and other familiar sights on the land I am reminded of the stories and legal principles they attach to, as well as the intimate relational context in which I learned them.” As such, the article helps us consider whether similar insights can be further generalized in Canadian and other legal circles.

The third article in this volume is written by Robert Clifford, a former Juris and Master’s in Law student of mine who is pursuing his doctorate in law degree at Osgoode Hall Law School with Andrée Boisselle. In a storied format, Robert develops his reflections about working with law on Wsáneć territories on the Salish Sea and on Vancouver Island. He discusses the relational nature of law more generally in his work, and he describes how family and the land itself are key elements in the reasoning process. The article carefully develops counterpoints and critiques related to the use of stories when discussing Indigenous law in an academic context. He cautions readers to avoid the temptation of freezing Indigenous law in a past-tense world. Thus, one of Robert’s central messages is that “stories are a vehicle for thinking and relating,” and his work demonstrates how this might occur in very specific ways as a new scholar working in the field.

The fourth article in this volume is written by Jeffery Hewitt, a leading practitioner of Indigenous law who worked with the Mjikining First Nation for close to twenty years. Jeffery recently took up a full-time position in the Faculty of Law at the University of Windsor after teaching at Osgoode Hall Law School and completing his Master’s of Law degree. Jeffery’s work with the Mjikining (the Chippewa of the Rama) took him into the heart of community lawyering, as he developed economic, political, and social structures with the chief, council, and First Nation for close to two decades. In this article, Jeffery discusses the Indian Residential Schools Truth and Reconciliation Commission of Canada’s [TRC] Recommendations 28 and 50 and Calls to Action regarding legal education and the development of Indigenous law institutes. As with the authors before him, Hewitt uses stories to discuss the importance of Indigenous law in relation to standards for judgment in implementing the TRC’s Calls to Action in law school settings. He also uses these same stories to caution readers about the limits of “Indigenization” in Canadian law schools. Jeffery’s article strives to remind us that “the forms and understanding of Indigenous laws require work. They are not easily obtained and will not fully materialize though the application of existing academic research methodologies but, rather, require the

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1 Hannah Askew, “Learning from Bear-Walker: Indigenous Legal Orders and Intercultural Legal Education in Canadian Law Schools” at p 29 in this volume.
2 Ibid.
3 Ibid at 40.
4 Robert Clifford, “Listening to Law” at p 47 in this volume.
acceptance of, and the training in, Indigenous methodologies along with direct relationships with Indigenous communities.” This call to work with communities in a land-based context is described as an important step in decolonizing law schools.

This fifth article in this volume entitled Waniskā is written by Hadley Friedland, who teaches in the Faculty of Law at the University of Alberta. She recently completed her doctorate degree in law from the same institution, and she has done extensive work with the Indigenous Law Research Unit at the University of Victoria. Hadley is also a former student who develops the importance of Indigenous stories as they relate to families, land, and place in a Cree legal context. In this volume, Hadley tells a compelling story that discusses the necessity of Indigenous law in dealing with the painful violence, abuse, and harm that exists within Indigenous communities and in Canada more generally, particularly as it involves Indigenous women. In the process, Hadley shows how Indigenous stories are vital to law in Canada because they “create new insights, communicate experiences and life predicaments within a particular culture, relay emotive content effectively, facilitate moral reasoning, justify ‘principled decisions and opinions’ and change people’s views.” As a result, she demonstrates how stories can be used “to persuade, teach, build community, validate experience, spark imagination and challenge received wisdom about what is natural or just.” Hadley is a scholar with extraordinary insight. Her work in child protection, her experience in government, her deep engagement with the literature, along with her strong community connections illustrates the importance of stories in helping us appreciate the nuances present within Indigenous peoples’ understanding of their own and other’s law.

The sixth article in this work is written by Hul’qumi’um law professor Sarah Morales in the Faculty of Law at the University of Ottawa. Sarah finished her doctorate degree at the University of Victoria in 2015 where she worked with Elders from the Cowichan Tribes on Vancouver Island to understand and apply their laws from a community and land-based perspective. In a law school setting, Sarah usually teaches courses in tort law, international human rights, and Indigenous peoples within Canadian law. In this article, Sarah takes us back to her community and reviews her graduate experience working with Elders in her homelands. In a three-act play, Sarah describes the legal geography of the Cowichan Valley as a place where her ancestors wrote their laws across the land through ancient transformer, trickster, and family stories. She shows how “place names are an important legal tool for maintaining property relations with respect to resource sites and residence areas.” Her work demonstrates how “amongst the Hul’qumi’um Mustimuhw … the land gathers legal significance through these communities’ experiences with and shared memories of these places” to “guide the development of laws for the Hul’qumi’um Mustimuhw with regard to how to conduct oneself in relation to other people and these places.”

The seventh article in this special issue is written by Metis scholar Kerry Sloan. Kerry is currently a post-doctoral student in the Faculty of Law at the University of Saskatchewan, and she recently finished her doctorate in law degree at the University of Victoria on the topic of Metis history and law in British Columbia. Sloan also has extensive experience as a practising lawyer in Alberta, and she has worked for

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5 Jeffrey Hewitt, “Decolonizing and Indigenizing: Some Approaches for Law Schools” at 65 in this volume.
6 Hadley Friedland, “Waniskā: Reimagining the Future with Indigenous Legal Traditions” at 85 in this volume.
7 Ibid.
8 Sarah Morales, “Stl’ul nup: Legal Landscapes of the Hul’qumi’um Mustimuhw” at 103 in this volume.
9 Ibid.
many years in helping other students experience success in the university as a teacher and editor. Her work in this volume considers the flaws in the Supreme Court of Canada’s approach to Metis rights as found in *R. v Powley*. The article also problematizes the profound lack of knowledge and engagement with Metis history as a disciple in the province of British Columbia. Through stories about land and place, Kerry demonstrates, like others in this volume, that stories can bring to life community perspectives that are often missing in the formal academic literature and jurisprudence. As a result, Kerry is able to conclude that the:

Metis concepts of territory and community are not the concepts … that reflect assumptions based in English property law and English social and settlement patterns. … Metis territory is … complex and may be better represented by expansive, overlapping network regions than by sections and townships. Contrary to some detractors’ views … Metis communities and lands have not become so vaguely defined as to be non-existent. There are still many ‘historic’ territories and communities that we and our neighbours recognize [as Metis], even if they are not recognized by the courts of Canada.

The eighth contribution to this volume is written by my daughter, Lindsay Borrows. Lindsay is an articling student at West Coast Environmental Law Association where she works with the Revitalizing Indigenous Law for Land, Air and Water Project. This group of lawyers works with Indigenous communities and identifies traditional narratives and case studies to assist First Nations in revitalizing and applying their own Indigenous laws to contemporary environmental problems and proactive land and resource decision making. Lindsay is a graduate of Dartmouth College in New Hampshire and of the Faculty of Law at the University of Victoria. She also has a lifetime of experience working with Anishinaabe law in her family and in her home territory of Neyaashiinimiing in Ontario on the shores of Georgian Bay. Lindsay’s contribution to this volume describes the importance of *dabaadendiziwin*, which means humility in Ojibwe and Canadian law. Through engaging with storytellers in specific land-based locations on the reserve and beyond, Lindsay discusses how Anishinaabe law attempts to facilitate humility through linguistic and leadership structures, ceremonial practices, and ideas related to *akinoomaage* (learning from the earth). She considers questions such as what is humility and why is it an important legal principle; what processes are in place in both Canadian and Anishinaabe law to actively cultivate humility; how can diverse peoples use these processes when interacting with one another in ways that foster greater harmony in this multi-juridical country? In the process of this inquiry, Lindsay counsels us to confront the sites of discomfort that exist in practising law by actively considering and taking into account the varied perspectives offered by religion, gender, and Aboriginal rights when considering Indigenous peoples’ own laws.


11 Kerry Sloan, “Always Coming Home: A Story of Metis Legal Understandings of Community and Territory” at 125 in this volume.


13 Lindsay Borrows, “*Dabaadendiziwin*: Practices of Humility in a Multi-Juridical Legal Landscape” at 149 in this volume.
The ninth article in this volume is written by Anishinaabe scholar Aaron Mills from the Couchiching First Nation in Ontario. Aaron is a Trudeau Scholar, Vanier Scholar, Social Sciences and Humanities Research Council Impact Scholar, and graduate of a Master’s in Law at Yale University, who completed his juris degree in the Faculty of Law at the University of Toronto before beginning his graduate work. He is currently pursuing a doctorate degree in law at the University of Victoria under the supervision of Jim Tully, Heidi Stark, and myself. Aaron’s article in this volume discusses the process of learning Anishinaabe law from stories, Elders, and teachers throughout his territory. Taking a place-based approach, the article is a welcome addition to our understanding of how Anishinaabe law contends with tricksters, time, and tumult as presented to them in their relationships with surrounding communities and the Canadian states. Aaron is a nuanced storyteller, and his work in this volume helps us see the gulf that often must be crossed in order to apprehend and practise a legal tradition that can be significantly different from those taught and applied in most law schools, courts, legislatures, and law societies across this land.

The final contribution to this special issue is written by Nancy Sandy. Nancy is a lawyer with a great deal of experience working with child welfare and broader family law issues in British Columbia. She is part of the Secwepemc Nation and lives in the T’exelc village in what is also called Williams Lake in British Columbia. Nancy is a former chief of her First Nation, and she is currently the executive director of the Denisiq Services Society, which provides community-based, culturally appropriate child and family programs to the Tl’etinqox, ?Esdlagh, Xení Gwét’in, Tsi Deldel, Yunesit’in, Tl’esqox, and Ulkatchot’en of the Tsilhqot’in Nation. Nancy was a Master’s of Law student at the University of Victoria who completed her thesis in 2011 on the topic of reviving Secwepemc child welfare jurisdiction. In her article for this volume, she describes how St’exelcemc laws are drawn from the land and unearthed in the stories of the Stet’ex7ém. She describes how the Elders with whom she works use stories to govern themselves and to provide processes and principles for authoritatively answering questions about how they should live together in their communities. This is a work of profound beauty. As a part of her article, Nancy describes her own experiences in practising community-based law with her son and family in association with a life-threatening injury he received. In the process, Nancy shows how her community’s stories were used as standard-setting resources to revive and revitalize laws, customs, traditions, and practices that actively build the well-being of their citizens in present-day contexts.

Each of the articles in this volume reveals how stories that arise from the land and are embedded in peoples’ experiences are critical resources for regulating lives, lands, or resources, and assisting them in resolving their disputes in these fields. It is my hope that this volume further opens the door to the use of stories as an important resource for reasoning about law in Indigenous contexts and in Canadian law more generally. While Indigenous peoples have other sources of law and other ways of organizing legal practice and authority, this volume demonstrates that context should not be stripped from the practice of Indigenous law. Land and community are the places where Indigenous legal traditions must live if they are to continue assisting communities in meeting their challenges on terms that persuasively accord with

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14 Aaron Mills, “Driving the Gift Home” at 167 this volume.
15 Nancy Sandy, “Stsqey’ulécw re st’exelcemc (St’exelcem Laws from the Land)” at 187 in this volume.
their own experiences. I hope you enjoy reading them, I hope you find them as profitable as I have in understanding the dynamic, fluid, and living nature of law throughout our country.