DECOLONIZING AND INDIGENIZING: SOME CONSIDERATIONS FOR LAW SCHOOLS

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The Truth and Reconciliation Commission of Canada [TRC] identified law schools as a site of ongoing colonization and specifically called upon law schools to change in a variety of ways – from instituting mandatory courses relating to Indigenous Peoples to reconceptualizing the institution of law schools themselves. This article considers whether “Indigenizing” curriculum is coming at the expense of addressing the need to decolonize law schools as institutions. The author argues that both Indigenizing and decolonizing are a vital coupling if full meaning is to be given to the TRC’s Calls to Action. Though the process is complicated and ripe with challenge, listening to and working with Indigenous peoples is essential if law schools really seek fundamental change.

La Commission de vérité et réconciliation du Canada [CVR] a reconnu que les facultés de droit étaient des milieux où la colonisation se perpétuait et leur a demandé expressément de changer de diverses manières – en commençant par instaurer des cours obligatoires sur les peuples autochtones et en allant jusqu’à repenser l’institution des facultés de droit elle-même. Cet article est une réflexion sur la question de savoir si l’« autochtonisation » du programme d’enseignement se fait aux dépens de la nécessité de décoloniser les facultés de droit en tant qu’institutions. L’auteur soutient que l’autochtonisation et la décolonisation doivent aller de pair pour que les appels à l’action de la CVR prennent tout leur sens. Bien que cette démarche soit complexe et semée d’embûches, il est essentiel pour les facultés de droit d’être à l’écoute des peuples autochtones et de collaborer avec eux si elles cherchent vraiment à changer de manière fondamentale.

I. THE WARNING OF THE NIGHTBIRDS¹

The nightbirds were the first to know. They could see it with their big eyes. Sense it in the cool night air. Feel it ripple along the tips of their feathers. Something was different. The Animiiki were restless. Though there are many manitous – some of whom were once people – the Animiiki are different.² They have only ever been manitous. Thus, though the Animiiki are powerful forces of good, they have always

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¹ It is a traditional practice to introduce a story by talking about how I learned it and relate to it. This was one of the Thunderbird stories told to me by John Snake of Rama First Nation. I hope I have retold it well. It is part of the Anishinaabe story of the flood and one of the stories that reminds me of what it means to observe great power and the potential consequences for failing to remember how to be good. It is also why I marvel whenever I hear the call from any of the nightbirds. I am grateful for their watchfulness, observations, and caring for us.

² B Johnston, *Manitous, The Spiritual World of the Ojibway* (Toronto: Key Porter Books, 1995).

been feared. So, when something was happening in the great nests of the Animiiki, the nightbirds began to whisper and chirp to each other. Change was coming.

For as long as any of the nightbirds – even the oldest among their number – could remember, the Animiiki descended from the sky every spring, bringing with them thunder and rain and carrying fire in their eyes that the people called lightning. Each year, the Animiiki settled into their nests, tended to Mother Earth by quenching her thirst and stitched together her great blanket of grasses. They coaxed the trees, flora, and fauna of the forests, fields, and valleys into full bloom. In this way, the Animiiki painted, blended, and sketched breathtaking landscapes until every autumn when the Animiiki cloaked themselves in pale clouds and returned to the sky for their well-earned winter's sleep. But this autumn was different. The Animiiki did not ascend to the sky. They stayed and stirred the great fires in their nests. Vast, dark clouds billowed and rose in great columns. Thunder boomed. Streaks of liquid fire flew across the inky sky. The nightbirds woke the forest, fields, and valleys with an urgent warning for all of their friends and relations. The animals all ran for shelter. The people – who had long-forgotten how to be good – followed.

And the deluge began.

II. SOMETHING IS DIFFERENT

A. Overview

What might the *Warning of the Nightbirds* illustrate for us about the powerful forces that shape the world of law schools? Although for decades there have been calls for change, it was the Truth and Reconciliation Commission of Canada's [TRC] 2015 Calls to Action that has gained attention. Similar to other reports, it is likely the TRC included law schools because they educate and graduate students solely in common and civil law to the exclusion of Indigenous legal orders and thereby contribute to ongoing colonization.³ Too often, course curriculum perpetuates the Canadian courts' assumptions of sovereignty over Indigenous peoples. There can be an overriding view of faculty that any curriculum relating to Indigenous peoples is the exclusive purview of public law and thereby irrelevant to all other courses, such as contracts, corporate/commercial, family, dispute resolution and estate law. Even the foundational institutional framework of law schools themselves, which was established without Indigenous participation, supports a set of assertions relating to the legitimacy of common and civil law as paramount English and French contributions to Confederation – as though Indigenous laws, which were practised long before Confederation,⁴ never existed. But Indigenous peoples are also partners in Confederation – the partner who contributed all of the lands and natural resources.⁵ Those same lands

³ R Ryser "Nation-States, Indigenous Nations and the Great Lie" in L Little Bear, M Boldt & JA Long, eds, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) 28.

⁴ J Borrows sets out examples of various Indigenous legal orders practiced long before Confederation. J Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 59–106 [Borrows, *Canada's Indigenous Constitution*].

⁵ J Hopkins & A Peeling, "Aboriginal Judicial Appointments to the Supreme Court of Canada" (2004) at 6, online: Indigenous Bar Association
<<http://www.indigenousbar.ca/pdf/Aboriginal%20Appointment%20to%20the%20Supreme%20Court%20Final.pdf>.

and resources serve as sources of law for many Indigenous peoples, such as the Anishinaabe.⁶ Yet, so long as law schools fail to both weave Indigenous legal orders throughout the curriculum and deeply embed such principles within the institutional structure itself, both the curriculum and the institution continue to support legal myth building that positions the laws of Indigenous peoples as being outside the normative legal framework in Canada.⁷ So what is to be done?

This article specifically considers the TRC's Recommendations 28 and 50, regarding legal education and the institution of law schools, respectively. The first part of the article is a brief examination of the legacy of legal education in Canada. The second part considers whether current efforts are centred on focusing perhaps too singularly on Recommendation 28 – namely Indigenizing law school curriculum – while leaving aside the complicated work set out in Recommendation 50 of decolonizing the institutional framework of law schools. The third part of the article concludes with some considerations for beginning the process of reconceptualizing the institution of law schools, including possible lessons from a master lodge builder – the beaver – and the inclusion of Elders within the structure of law schools, before returning to final reflections on the *Warning of the Nightbirds*. Overall, this article is intended to be reflective. How might the story of the nightbirds assist us in seeing the benefits of quiet observation and the potential dangers of failing to be good?

B. Calls to Action

Like the nightbirds' observations of the Animiiki, something is different in Canadian law schools. Arguably, the platform for change was set in motion by the work of the TRC – a national inquiry body established to examine Canada's Indian Residential School legacy – which produced a number of substantive reports, including the Calls to Action.⁸ While these ninety-four recommendations chart a path forward for Canada, there were a few groups specifically called out, including law schools. In particular, the following recommendation quickly gained the most attention in Canadian law schools:

28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism.⁹

Law schools should also be closely considering Recommendation 50, which calls for the establishment of Indigenous legal institutes while not limiting the possibility of such institutes forming either within

⁶ For more, see V Napoleon, "Thinking about Indigenous Legal Orders," in R Provost & C Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 229 [Napoleon, "Thinking about Indigenous Legal Orders"].

⁷ Borrows, *Canada's Indigenous Constitution*, *supra* note 4.

⁸ Truth and Reconciliation Commission of Canada (TRC), Calls to Action (2015), online: TRC <http://www.trc.ca/web-sites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf>.

⁹ TRC, *ibid*. I would argue that all of the Calls to Action are important for law schools to consider and respond to. One might consider the Calls to Action to be like family – though they may not all be our personal favourites or even well known to us, they are still family and warrant invitation to family gatherings.

existing law schools or independently. The former requires a decolonizing strategy for such Indigenous institutes to be fully formed within Canada's law schools. The recommendation specifically states:

50. In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.¹⁰

Why was the TRC specifically concerned with law schools? In Canada, legal education has been “in large part ... an imperial project of the legal profession.”¹¹ Law schools produce legal actors and, through this production line, serve as a site of colonization because in Canada law has been, and continues to be, a vehicle to oppress Indigenous peoples.¹² This has not prevented Indigenous peoples from entering law schools in Canada, learning about and practicing Canadian law, completing graduate degrees, and joining law faculties. Meanwhile, law schools have learned little about Indigenous legal orders. In sum, the presence of Indigenous peoples in law schools and on faculty does not equate to an end of the law school's role in colonization, which the TRC has ultimately stated in its work.

Responses to Recommendation 28, such as the development of new course material and broader discussions on curriculum reform, is often being referred to as the “Indigenization” of law schools and leads to such questions as: should there be a course offered; should it include Indigenous peoples' laws; if so, which Indigenous peoples and what are their laws; who on the faculty can teach it; who on the faculty should teach it; might those who teach the course be marginalized; what about the potential effects on Indigenous law students; does focusing mainly on Recommendation 28's call for a new course leave deeper reflections on institutional contributions to colonization found in Recommendation 50 for a later time; and does creating a mandatory course allow for a check in the box labelled “TRC response” without an examination of the institutional architecture of law school?

Many of the questions being considered in response to Recommendation 28 relating to legal education should rightly lead to an examination of Recommendation 50 on institutional reform because a single mandatory course will not erase ongoing colonization.¹³ By considering who on faculty can and should teach such a course requires an inquiry into legal education as a whole.¹⁴ For example, if

¹⁰ *Ibid.*

¹¹ RA Macdonald & TB McMorrow, “Decolonizing Law School” (2014) 51:4 *Alta L Rev* 717 at 721.

¹² For more, see, for example, J Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Napoleon, “Thinking about Indigenous Legal Orders,” *supra* note 6; G Christie, “A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation” (2005) 23 *Windsor YB Access Just* 17; D Johnston, “Respecting and Protecting the Sacred,” *Ipperwash Inquiry* (2006); ME Turpel, “Home/land” (1991) 10 *Can J Fam L* 17; P Monture-Angus, “Thunder in My Soul: A Mohawk Woman Speaks” (1996) 25:1/2 *Resources for Feminist Research* 52.

¹³ M McDonald, “Unsafe Space: The Danger of Mandatory Indigenous Studies Courses,” *Northern Public Affairs* (18 February 2016), online: <<http://www.northernpublicaffairs.ca/index/unsafe-space-the-danger-of-mandatory-indigenous-studies-courses/>>; M.J. McCallum, “When History Needs an Intervention,” *Active History* (15 January 2016), online: <<http://activehistory.ca/2016/01/when-history-needs-an-intervention/>>.

¹⁴ R Kuokkanen, “Reconciliation and Mandatory Indigenous Content Courses: What are the University's Responsibilities?” *Decolonization, Indigeneity, Education & Society* (17 March 2016), online: <<https://decolonization.word->

common and civil law are taught broadly across the curriculum, why have law schools not been teaching Indigenous laws broadly? In what ways have law schools failed to make room for Indigenous legal orders, Indigenous scholars, and Indigenous legal research methodologies? How does the choice of language that law schools use in response to the TRC shape the response? Might these questions be considered in light of the TRC's inclusion of a call for the establishment of Indigenous law institutes?

C. Words, Words, and More Words

In law, words matter. It follows that words used by law schools (which teach students to master words and demonstrate care in word choices in response to the TRC), also matter. For example, "Indigenizing" is a word seemingly on the rise in many law school environments as a response to the TRC but how is "Indigenizing" different from "decolonizing"? Why does it matter? While the "Indigenization" of some law schools may have already begun, the work of decolonizing is also a necessary response to the Calls to Action. Otherwise, law schools run the risk of continuing to contribute to ongoing colonization. In *The Warning of the Nightbirds*, the Animiiki were revered for their great powers that brought balance with the rains of spring and tending to life throughout the summer. Colonization is also a notorious power that has conversely brought about disharmony, destruction, and imbalance. In essence, colonialism is a master narrative that supports the racist view that Indigenous peoples are inferior to the settler population.¹⁵ While every site of colonialism may be somewhat different in its implementation, across the world, colonialism "locked the original inhabitants and the newcomers into the most complex and traumatic relationships in human history."¹⁶

As Howard Adams states,

[t]he experience of colonialism is far more than simply the expansion of the capitalist market for the production of economic surpluses. The impact of the colonial domination on the Indigenous society is total. It exploits the oppressed people, destroying their national society and replacing Indigenous cultures. In this capacity, racism plays a crucial role.¹⁷

press.com/2016/03/17/reconciliation-and-mandatory-indigenous-content-courses-what-are-the-university-responsibilities/.

¹⁵ *Johnson v M'Intosh*, 21 US 543 (1823) (8 Wheat), the United States' landmark decision in which the doctrine of discovery was firmly entrenched into US law was adopted by Canadian courts in *R v Sparrow*, [1990] 1 SCR 1075. *Sparrow* was the first time the Supreme Court of Canada interpreted section 35 of the *Constitution Act, 1982*, in which the Court firmly entrenched the legal narrative of the relationship between the Crown and Indigenous Peoples (at 1103): "It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, ... there was from the outset never any doubt that sovereignty and legislative power and indeed underlying title, to such lands vested in the Crown." See also E Kades, "The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands" (2000) 148:4 Penn L Rev 1065, for an analysis of the courts as the most economically efficient means of taking land from Indigenous peoples versus warfare; G Coulthard, *Red Skin, White Masks* (Minneapolis: University of Minnesota Press, 2014) for an excellent examination of the law as a land grab and the rights of Indigenous peoples to self-government and to directly benefit from lands and resources development.

¹⁶ A Loomba, *Colonialism/Postcolonialism* (New York: Routledge 1998) at 106.

¹⁷ H Adams, *Tortured People: The Politics of Colonization* (Penticton, BC: Theytus Books, 1999) at 6.

Though more complicated, the essential process of colonization might simply be described in two main waves. In the first, Indigenous peoples are reduced to non-human status.¹⁸ This clears the way for the second wave, wherein lands and resources are simply taken from the ‘non-humans’ without guilt or recourse by the settler population who control not only the lands and resources but also the education and legal systems, thereby establishing a master narrative.¹⁹ The benefactors of the second wave then, having been educated to believe in an erasure of Indigenous peoples’ cultures and legal systems, are readily able to support Crown superiority and the assumption of sovereignty over the Indigenous peoples.²⁰ The settler population is afforded the deniability of ongoing wrongdoing and responsibility. Therefore, decolonizing is the complicated work of acknowledging historic and ongoing wrongdoings along with claiming responsibility through naming, dismantling, countering and neutralizing both the collective and individual assertions and assumptions made in relation to Indigenous peoples. Thus, if law schools’ varying responses to the TRC focus mainly on Indigenization, are they then able to deny any wrongdoing or take responsibility for contributing to colonization?

Recommendation 28’s call for a mandatory course and skills-based training, for the purposes of this article, might be considered an act of “Indigenization” legal education. Recommendation 50, meanwhile, sets out a “decolonization” strategy for law schools by requiring deeper institutional structural change and meaningful partnerships with Indigenous organizations. But where did the current use of “Indigenization” come from? Does the use of the word within law faculties in response to the TRC hold real currency or is it a reflection of something else, such as colonial second-wave denial? It seems that in the context of Canadian law schools, the use of the word “Indigenization” arises from *Indigenizing the Academy: Transforming Scholarship and Empowering Communities*, in which, among other things, Taiaiake Alfred examines the effects of Indigenous peoples arriving into academic institutions. Alfred critically discusses research, connection to communities of Indigenous scholars, activism, and long-established hiring practices by the academy that keep many community-based Indigenous researchers and knowledge keepers out.²¹ Alfred examines elements of academe that are much broader than Recommendation 28’s call for the creation of a mandatory course. If the current use of the word “Indigenizing” is indeed drawn from *Indigenizing the Academy*, it has been overly simplified because if anything, upon closer inspection, *Indigenizing the Academy* leans towards the appeal for institutional changes and calls to decolonize as set out in Recommendation 50.

Without exercising caution, “Indigenizing” may all too quickly lose any of its power for reinvention of the academy as Alfred sets out in *Indigenizing the Academy* and, instead, become a too-friendly, feel-good, co-opted word as a gentle way to side-step other responsibility-filled, harsher-sounding words like “decolonizing.”²² Yet, the decolonizing of law schools is necessary to fully implement the TRC’s Calls

¹⁸ H Todacheene, “She Saves Us from Monsters: The Navajo Creation Story and Modern Tribal Justice” (2015) 15 Tribal LJ 30.

¹⁹ DN Paul, *We Were Not the Savages: A Micmac Perspective on the Collision of European and Aboriginal Civilization* (Halifax: Nimbus, 1993).

²⁰ For an example of ongoing settler deniability, see T Flanagan, *First Nations? Second Thoughts* (Montreal and Kingston: McGill-Queen’s Press University Press, 2008).

²¹ T Alfred, D Mihesuah & A Cavender Wilson, *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln, NB: University of Nebraska Press, 2004).

²² E Tuck & KW Yang, “Decolonization Is Not a Metaphor” (2012) 1 Decolonization: Indigeneity, Education and Society 1.

to Action. Indigenizing and decolonizing must work together – like the many different nightbirds who warned as many as they could. Recommendation 50 calls for the establishment of Indigenous law institutes, as a means of both countering and dismantling the ongoing harm that law and law schools inflict upon Indigenous peoples. Law schools may either reinvent to become locations where Indigenous laws are fully valued and taught alongside common and civil law traditions or risk being left behind. Recall that while Indigenous peoples have been studying Canadian law; practising it; completing graduate degrees in it; and are teaching it, most practitioners, legal academics and law schools have learned very little about Indigenous legal orders. A growing number of Indigenous law students and academics – though not all – are also steeped in Indigenous legal orders. What prevents a newly formed Indigenous law institute, shaped by Indigenous peoples and staffed with those versed in Indigenous legal orders, from also teaching common and civil law? The Indigenous law institutes of Recommendation 50 may be stand-alone institutions built from the ground up by Indigenous peoples or located within existing law schools. The text of Recommendation 50 does not exclude Canadian law schools from the opportunity to redesign the current institutional structure and curriculum, but it requires much deeper action than the currently favoured Indigenizing responses to Recommendation 28. The impetus for decolonizing has been cast in Recommendation 50. Are law schools ready for change?

III. SOME LESSONS FROM THE ANIMIIKI

A. Changing Approaches?

Education is a profound power, like the powers of the Animiiki. How law schools might choose to wield it will produce varying results. This section begins with a general discussion on the power of education toward more specific considerations for legal education. As an efficient means to further expand colonization, no “branch of learning was left untouched.”²³ The content and structure of the education system – law schools included – was an imperial project. As a counter measure, Marie Battiste has argued about the importance of displacing cognitive imperialism in education through the inclusion of Indigenous knowledge.²⁴ Among other things, “displacement of cognitive imperialism” within law schools includes the acceptance of Indigenous legal research methodologies and Indigenous laws in all of their forms. Val Napoleon and Hadley Friedland propose asking “more specific research questions of Indigenous laws” and “approaching Indigenous laws as laws.”²⁵ They set out a framework by which legal scholars – all legal scholars – may choose to engage in legal research methodologies as applied to Indigenous legal orders. Leanne Simpson, along with others such as Murray Sinclair, posit that while legal scholarship comes in written form – more familiar to academe – Indigenous laws are also found in songs, ceremony, art, stories, and drums.²⁶

²³ Loomba, *supra* note 16 at 57.

²⁴ M Battiste, *Decolonizing Education: Nourishing the Learning Spirit* (Saskatoon: Purich Publishing, 2013).

²⁵ H Friedland & V Napoleon “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015) 1:1 Lakehead LJ 16 at 20.

²⁶ L Simpson, “Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships” (2008) 23:2 Wicazo Sa Review 29; Justice Murray Sinclair, untitled lecture, (Annual Conference, Canadian Institute for the Administration of Justice, Saskatoon, Saskatchewan, October 2015).

None of these scholars provide a caveat that such methodologies and forms of law are exclusive to Indigenous scholars. But, as Simpson reminds us, the forms and understanding of Indigenous laws requires work of a different kind than is currently taught in law schools. Indigenous legal knowledge is not easily obtained and will not fully materialize through the application of existing academic research methodologies but, rather, requires the acceptance of, and the training in, Indigenous methodologies along with direct relationships with Indigenous communities. Such relationships are often – although not always – among the many contributions Indigenous scholars add to law faculties, which may then be built upon, but only if there is institutional openness and support to such relationships. It is vital that law schools make room for comprehensive approaches of incorporating Indigenous legal research methodologies and supporting the further inclusion of Indigenous peoples steeped in Indigenous laws within academia. Creating safe spaces must be a priority for law faculties and university administrations since colonization has largely silenced Indigenous voices, particularly those of Indigenous women.²⁷

Indeed, Indigenous women in law schools and the academy often have concerns both different from, and similar to, Indigenous men.²⁸ For example, problems with the curriculum being based on a colonial power structure do not disappear when an Indigenous scholar of any gender lectures in a classroom, though this may be particularly so for an Indigenous woman.²⁹ This raises concerns in relation to implementing a mandatory course and assuming an Indigenous scholar should teach it. Indigenous scholars, regardless of gender, should be able to teach any course, including a mandatory one, but supports for a mandatory course should not solely be placed on the shoulders of Indigenous scholars. Rather, it must be owned by the whole of the academy – men and women. Further, engagement in a mandatory course requires law schools to commit to the variety of ways individual Indigenous scholars may require supports and be mindful such requirements will be different based on a variety of factors, including experience and gender.

We might observe from the opening story that the Animiiki had long followed a pattern of bringing rains each year before returning to the sky but when the people forgot how to be good the great birds unleashed fire and forced all living beings to run. Law schools have also developed long established patterns to the exclusion of Indigenous laws and Indigenous peoples. Moreover, little space has been made within the academy for Indigenous legal research methodologies and scholars – particularly Indigenous women. In sum, changes to curriculum called for in Recommendation 28 are essential but Recommendation 50 holds the potential power for fundamental change where law schools either find ways to respond effectively or see the rise of new Indigenous legal institutions that may effectively integrate Indigenous, common and civil legal traditions. The Animiiki are not only stewards of the earth but also teachers who remind us that if we do not continuously pay close attention and reflect on our own behaviour, there may be a stirring of fire with distressing results. In the context of Indigenous peoples and legal education, fires have been stirred for decades but what has been learned?

²⁷ B Lawrence & K Anderson, “Introduction to Indigenous Women: The State of Our Nations” (2005) 29:2 *Atlantis: Critical Studies in Gender, Culture and Social Justice* 1 at 3.

²⁸ T Lindberg, “What Do You Call an Indian Woman with a Law Degree-Nine Aboriginal Women at the University of Saskatchewan College of Law Speak Out” (1997) 9 *CJWL* 301.

²⁹ Monture-Angus, *supra* note 12 at 61.

B. Preparing for Truth

The Red Paper on Native Development,³⁰ which was authored primarily by Harold Cardinal as a response to Canada's 1969 White Paper,³¹ which proposed a full-scale assimilation of Indigenous peoples. The Red Paper called for fundamental change, including Aboriginal jurisdiction and control of education.³² Similarly, in 1996, the Royal Commission on Aboriginal Peoples (RCAP) recommended vital changes to education, particularly in relation to Aboriginal peoples. The RCAP's recommendations set out a blueprint for the development of institutional capacity and control for Aboriginal peoples over education.³³ Commissioners of the RCAP wrote:

The destiny of a people is intricately bound to the way its children are educated. Education is the transmission of cultural DNA from one generation to the next. It shapes the language and pathways of thinking, the contours of character and values, the social skills and creative potential of the individual. It determines the productive skills of a people.³⁴

...

For nearly 30 years, Aboriginal leaders have made policy recommendations to governments, and governments have conducted internal studies ... What we find most disturbing is that the issues raised at our hearing and in interveners' briefs are the same concerns that Aboriginal people have been bringing forward since the first studies were done.³⁵

Moreover, in 1998 the Assembly of First Nations released *Tradition and Education: Towards a Vision for the Future*,³⁶ identifying more direct Indigenous control over the education of Indigenous peoples as the pathway forward. Such control matters because the education system of the settler population is stacked³⁷ not only against Indigenous peoples from content to pedagogy,³⁸ but against settlers themselves from understanding Canada's oppressive historical and ongoing actions against Indigenous peoples. Canada's education system, including law schools, is premised on the assumption of sovereignty over Indigenous peoples. One way in which this is evidenced is through the granting of degrees in either common or civil legal traditions.

³⁰ H Cardinal, "Red Paper on Native Development," Indian Chiefs of Alberta (1969).

³¹ J Chrétien, "Statement of the Government of Canada on Indian Policy, 1969" (1969), online: <<http://files.eric.ed.gov/fulltext/ED043431.pdf>>.

³² F Abele, C Dittburne & KA Graham, "Towards a Shared Understanding in the Policy Discussion about Aboriginal Education" in MB Castellano, L Davies & L LaHache, eds, *Aboriginal Education: Fulfilling the Promise* (Vancouver: UBC Press, 2000) 3; see also Cardinal, *supra* note 30.

³³ Royal Commission on Aboriginal Peoples, R Dussault & G Erasmus, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Indian and Northern Affairs Canada, 1996) at 433–444 [RCAP].

³⁴ *Ibid* at 433.

³⁵ *Ibid* at 440.

³⁶ *Tradition and Education: Towards a Vision for the Future, A Declaration of First Nations Jurisdiction Over Education*, National Indian Brotherhood/Assembly of First Nations (Ottawa: Assembly of First Nations, 1998) [AFN].

³⁷ For more on the control of content within the education system see: P. Freire, *Pedagogy of the Oppressed* (Bloomsbury Publishing, 2000).

³⁸ Friedland & Napoleon, *supra* note 25.

No law school is yet granting law degrees in civil, common, and Indigenous legal traditions, though some positive movement is transpiring.³⁹ Yet, prior to confederation, the Crown accepted and engaged with Indigenous legal practice and procedure.⁴⁰ But merely recalling the Crown's and Indigenous peoples' engagements in both common law and Indigenous laws is not enough. As RCAP set out, "[e]ducation is the transmission of cultural DNA from one generation to the next."⁴¹ When it comes to Indigenous Peoples, will law schools transmit truth or continue to perpetuate legal myth?

To decolonize, the story of the dominant culture that either denies the existence of or places Indigenous legal orders in the past, and thereby on the outside, must be rewritten and replaced with truth.⁴² To recognize Indigenous peoples' contributions to Canada and the continued existence of Indigenous legal orders, all law schools should offer a degree in the Indigenous legal traditions as a necessary reshaping of the master narrative – in this instance, the overarching story founded on the paternalistic premise that Indigenous peoples are uncivilized and do not have laws.⁴³ Canada's master story is continuously upheld by a legal education system that reinforces colonization through, among other things, teaching court decisions⁴⁴ that entangle Indigenous peoples,⁴⁵ while excluding Indigenous legal orders.

The 1969 Red Paper, the Final Report of the RCAP, and the work of the TRC all establish that, so long as an inaccurate historical record is taught; legal fiction relating to the assertion of sovereignty over Indigenous peoples forms part of the curriculum; and Indigenous peoples themselves are excluded from forming education curriculum and creating corresponding institutions, the master story will not change – hence, the call for more education in the TRC's Recommendation 28 and the creation of Indigenous legal institutions in Recommendation 50.

³⁹ By way of example, the Faculty of Law at the University of Victoria is proposing a degree in Indigenous laws as discussed in Borrows, *Canada's Indigenous Constitution*, *supra* note 4, and there is the University of Ottawa's Faculty of Law's commencement of a new Indigenous law program, which is currently linked to the common and civil programs. For more information, see L Chartrand, "Indigenizing the Legal Academy from a Decolonizing Perspective," Ottawa Faculty of Law Working Paper 2015-22 (2015).

⁴⁰ J Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in M Asche, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 155.

⁴¹ RCAP, *supra* note 33.

⁴² P Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010).

⁴³ S Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007) at 4. Moreover, Thobani notes: "In the case of Canada, the marking of Native peoples as 'doomed to extinction' is an example of the necropolitics indispensable to the incipient sovereignty. The creation of reserves and, subsequently, the residential school system as the sites for the physical and cultural extinction of these peoples points to a long history of the deployment of necropower in the services of the colonial order and (re) production of the national subject" (at 12). In short, Canada's building of a master narrative supports the taking of lands and resources held by Aboriginal peoples, who are either extinct, or it is simply a question of timing before Aboriginal peoples, their laws, languages, cultures, customs, practices and traditions have vanished.

⁴⁴ J. Borrows, "With or Without You: First Nations Law (in Canada)" (1995) 41 McGill LJ 629; GS Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition in Canada'" (2007) 6:4 Contemporary Political Theory 437 at 451.

⁴⁵ JY Henderson, "Aboriginal and Treaty Rights and Tribunals" (2006) 19 Can J Admin L & Prac 1; GB Yngvesson, *Virtuous Citizens, Disruptive Subjects* (New York: Routledge, 1993).

There is a lesson here about ignoring the calls for change, which the *Warning of the Nightbirds* reminds us can bring about devastating results. Though there have been official warnings since at least 1969 the response from law schools has been remarkable: continue along virtually uninterrupted, unmoved, and unchanged, while perpetuating legal myths related to the ongoing colonization of Indigenous peoples. This deniability afforded by the benefactors of the second wave of colonization is a powerful tool because, as Patricia Monture-Angus points out, it means that for Indigenous peoples “[o]ur time is spent on talk not action. Action is required to change the desperate life circumstances of Aboriginal Peoples in this country. I would assert that jurisdictional disputes are a very effective way of oppressing a people.”⁴⁶

In relation to law faculties, ‘jurisdictional disputes’ might be individual faculty members who deny the development and implementation of a mandatory course in response to the TRC is necessary, which in turn leads to a pedagogical debate while the machinery of colonization hums along.⁴⁷ It might also mean steadfast refusal on the part of faculty, students and administrators to address the institutional construction of law schools to make room for meaningful Indigenous contributions.⁴⁸ Among the considerations for law faculties to bear in mind when building responses to the TRC is that Indigenous peoples, including Indigenous scholars, expect action from the entire faculty, not just Indigenous scholars and allies. Such action must be more than a veneer of Indigenizing the school with a mandatory course. It must also include realigning the structure of the institution. This requires collective ownership over the contributions that legal education has made to the ongoing colonization of Indigenous peoples. It requires making room, as Battiste argues. It means embracing Indigenous legal research methodologies, such as those set out by Napoleon and Friedland, to imbue more research, scholarship, and content of what is subsequently taught in classrooms with Indigenous laws. It means, as Simpson sets out, the inclusion of Indigenous sources of law as valid law. It means developing a plan of action for change to both the curriculum and the institution. It means Recommendations 28 and 50.

Through a variety of reports, including the TRC, legal educators have been warned. The nightbirds could sense that something was wrong. Knowing, but doing nothing differently, led to growing trouble

⁴⁶ Monture-Angus, *supra* note 12 at 93.

⁴⁷ Without doubt there are – and will likely be more – resisters who have adopted the position that academic freedom is impugned by the very existence of a mandatory course in law school that addresses the law’s role in colonization and serves to reeducate law students in relation to Indigenous Peoples. See: Brent Venton, “Clipping freedom, ideas at U of W”, *Winnipeg Free Press* (12 January 2015), online: <<http://www.winnipegfreepress.com/opinion/analysis/clipping-freedom-ideas-at-u-of-w-359340581.html>>. But such positioning is rhetoric generated to create disruption while deftly avoiding the claimant’s contribution to colonization. Such claims are merely an attempt to cloak base assumptions against Indigenous Peoples that resulted in the work of various scholars, inquiries and commissions, including the Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission of Canada. In other words, it is a demonstration of the kind of jurisdictional dispute Monture refers to as a distraction, which is in no way about academic freedom, but is aimed at continuing the oppression. Moreover, since not all faculty members are required to teach constitutional, property or contracts or criminal law – which are also required courses – not all faculty will be (nor should be) required to teach a required course on Indigenous Peoples, though perhaps all faculty would benefit from taking it.

⁴⁸ Venton, *ibid*, argues a mandatory course indoctrinates students to a particular viewpoint in relation to Indigenous Peoples – presumably the non-paternalistic and non-racist one? Such resistance requires a diversion by demands for more talking – and any listening is solely of the critical type wherein the listener seeks to only hear enough to formulate more resistance as a means to breakdown any efforts to decolonize.

and ultimately prompted the Animiiki into action. They unleashed fire, and no one was immune. Changes to legal education are necessary if we are to reframe the imperial order reaffirmed throughout the current system. Our failure to do so may be at our collective peril, whether Indigenous or not. Sometimes the truth can be difficult to face, which might explain why there is a seemingly preferential focus on “Indigenizing,” but, ultimately, as is taught in law schools, truth is a necessary and essential component of the common, civil, and Indigenous legal orders, as is explored further below.

C. Truth and Reconciliation in Law Schools

The TRC and Aimée Craft have stated that truth must come in advance of reconciliation.⁴⁹ But what is meant by “truth”? In responding to Recommendation 50 by constructing a decolonization process, truth is essential in a critical examination of all curriculum and the underpinning values.⁵⁰ In relation to law schools, by excluding Indigenous peoples in the design of the institution and as an all-to-common means of resistance to change, the “normative culture of objectivity in legal education enables students and professors alike to perpetuate the myth of ... ‘perspectivelessness.’”⁵¹ Similarly to that second wave of colonization, perpetuating the tenant of an “objective truth” without critique allows for the denial of responsibility. Fortunately, there is already a resistance to “perspectivelessness,” found in various courses within law schools,⁵² such as feminist legal theory and critical race theory.⁵³ Such courses and related materials are designed to challenge objectivity within legal education,⁵⁴ but they tend to be both taught by professors and populated by students who have already developed critical approaches to law.⁵⁵ An institution-wide application of a critical model against perspectivelessness in the curriculum and institutions is essential if room is to be made for Indigenous peoples, who, such as the Anishinaabe, also value truth.

Basil Johnston states that objective truth is a concept that is not necessarily found in Anishinaabe law but, rather, *debwewin* (truth) is “a philosophical proposition that, in saying, a speaker casts his words and his voice only as far as his vocabulary and his perception will enable him.”⁵⁶ Johnston explains that Anishinaabe legal tradition holds that there is an accuracy of *debwewin* as defined by individual

⁴⁹ According to the preamble for the TRC’s mandate, “[t]here is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. ... The truth of our common experiences will help set our spirits free and pave the way to reconciliation.” TRC <<http://www.trc.ca/websites/trc-institution/index.php?p=7>>; see also A Craft, “Ki’inaakonigewin: Reclaiming Space for Indigenous Laws” (Canadian Institute for the Administration of Justice Annual Conference, Saskatoon, SK, 2015).

⁵⁰ Regan, *supra* note 42; RF Devlin, “Legal Education as Political Consciousness-Raising or Paving the Road to Hell” (1989) 39:2 J Leg Ed 213.

⁵¹ R Ruparelia, “Guilty Displeasures: White Resistance in the Social Justice Classroom” (2014) 37 Dalhousie LJ 815.

⁵² JE Mosher, “Legal Education: Nemesis or Ally of Social Movements?” (1997) 35 Osgoode Hall LJ 613.

⁵³ See, as examples, B Lawrence & E Dua “Decolonizing Antiracism” (2005) 32:4 Social Justice 102 at 120–43; S Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007); S Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998).

⁵⁴ S Imai, “Counter-Pedagogy for Social Justice: Core Skills for Community Lawyering” (2002) 9 Clinical L Rev 195.

⁵⁵ N Bakht et al, “Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education” (2007) 45:4 Osgoode Hall LJ 667.

⁵⁶ B Johnston, “One Generation from Extinction” in DD Moses & T Goldie, eds, *An Anthology of Canadian Native Literature in English* (Oxford: Oxford University Press, 1998) 101.

knowledge and experiences, against which one “does not separate the world from the self.”⁵⁷ In other words, *debwewin* is intimately connected to each individual. The individual perspective offered by *debwewin* stands in stark contrast to teaching law students that objectivity in truth is a foundational tenant of the Canadian legal system. Johnston’s teachings on *debwewin* illustrate that truth in law, legal education, or adversarial systems may be strategic and instrumental, but it is bias in its very perspective through the exclusion of Indigenous (in this instance Anishinaabe), legal orders. *Debwewin* will also be required by law schools when examining both curriculum and the institution because perspective matters and the premise of perspectivelessness in law schools – both in the curriculum and in institutional architecture – is as long sustaining a myth as the supposition that the Crown’s assertion of sovereignty is *de facto* sovereignty⁵⁸ and, thereby, justification for taking all of the lands and resources without hesitation.

Craft reminds us that prior to reconciliation comes truth. Therefore, in advance of reconciliation there must be a reckoning of the role that law schools have played in colonizing Indigenous people along with a process for decolonizing the institutions.⁵⁹ This goes beyond the inclusion of scholarship or individual approaches taken in the classrooms – though these too are necessary. Law schools must reach into their core and openly confront the truth of their own past in relation to Indigenous peoples, which should be done in tandem with individual members of the faculty assuming responsibility for decolonizing their classrooms. It should be done with perspective; with *debwewin*.

By way of example, not long after the TRC’s Calls to Action was released, an online proposal from a group of legal academics was established to collaborate in building a reconciliation syllabus by drawing on the experiences of voluntary participants within their respective law schools and classrooms as a means to openly share materials, projects and discuss community engagements.⁶⁰ This online collaboration allows opportunity for *debwewin* to be shared through individual contributions and perspectives on teaching law, which sometimes poses hard questions without the certainty of answers. If Recommendation 28 is to be fully implemented, best practices, lessons learned, and changes made should be shared across law schools. It is important to learn from each other – in the way the nightbirds could have only protected themselves but instead chose to call to everyone and share what they knew. The reconciliation syllabus seeks to collectively respond to Recommendation 28 in building shared resources regardless of academy affiliation. It is an act toward positively changing the classroom experience for students and faculty alike. Yet, while creating a collaborative reconciliation syllabus matters, we must simultaneously confront the colonial underpinnings of law schools themselves. What might that look like?

⁵⁷ E Laroque, “Preface – or Here Are Our Voices – Who Will Hear?” in J Perrault & S Vance, eds, *Writing the Circle* (Edmonton: NeWest Press, 1990) xxi.

⁵⁸ B Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 20 SCLR 433 at 437.

⁵⁹ There is growing debate within scholarship as to whether “reconciliation” is an objective that will fully address the past and ongoing harms caused by colonization because “reconciliation” is not an Indigenous concept and in any event may not be attainable without compensation for the wrongful taking of lands and resources. For more information, see A Taiaiake & J Cornthassel, “Being Indigenous: Resurgences against Contemporary Colonialism” (2005) 40:4 Government and Opposition 597; T Alfred Taiaiake, “Colonialism and State Dependency” (2009) 5 Journal de la santé autochtone 42; Glen S Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada” (2007) 6:4 Contemporary Political Theory 437.

⁶⁰ See Reconciliation Syllabus <<https://reconciliationsyllabus.wordpress.com/>>.

Such an initiative will, like the reconciliation syllabus, call upon faculty to participate. In addition, it will require more than voluntary collaboration. Like the call for a required course, decolonizing necessitates wide-spread participation to achieve meaningful change. Indigenizing without an accompanying decolonization plan of action renders a fulsome response to the TRC, including Recommendations 28 and 50, unsustainable. Like Indigenizing curriculum, the work of developing a plan for decolonizing in a law school is considerable, complicated and will take time – none of which are grounds for inaction. By way of reflection, the TRC's process took time, which allowed for a process to be considered and those harmed had the opportunity to decide whether, and on what terms, to come forward and be heard.⁶¹ In theory, it also allowed for non-Indigenous Canadians to listen and learn about part of Canada's violence against Indigenous peoples. The experiences of former students and the effects of residential school were already known to Indigenous peoples, whose families, communities, and nations continue to experience intergenerational effects.⁶²

The responsibility of teaching and listening in law schools belongs to the faculty. Yet, there can be profound assumptions made on the part of law schools that proceed to take more from Indigenous scholars and Indigenous law students than from their non-Indigenous colleagues and students. Drawing upon the process of the TRC, might law schools also make open inquiry of Indigenous faculty, alumni and students in relation to their experiences and be prepared to listen, even if the statements are disquieting? Beyond current faculty and students, invitations should be extended to Indigenous peoples who have been entangled with the Canadian legal system and who have something to contribute to decolonizing legal education. Non-Indigenous alumni, who too often graduated without learning anything about Indigenous peoples and colonization, should be included as observers, witnesses and listeners. All of this is necessary because if law schools have yet to fully discover or acknowledge the truth about their contributions to colonization, what precisely is being reconciled in responding to any of the TRC's recommendations?

In sum, as Craft reminds us, excavating the truth is a necessary component to meaningfully respond to TRC. Such a process might be accomplished by acknowledging, as Johnston does in his explanation of *debwewin*, that truth is inextricably entwined with perspective and grounded in the experience of the speaker. The process of seeking truth and establishing a decolonization plan for law schools will inform the quality of the outcomes. The TRC sets out a process which led to its subsequent reports that are now so widely being cited. In implementing the Calls to Action, including Recommendations 28 and 50, law schools must also create a process to come to terms with truth and subsequently reconcile the role of law and legal education in ongoing colonization. Like the TRC process, Anishinaabe principles of restorative justice might also be instructive in offering guiding principles for law schools to consider when constructing a decolonization plan.

D. Lessons from Anishinaabe Models of Justice

When the people forgot how to be good, it led to problems with the Animiiki. Similarly, failing to decolonize law schools will continue to compound the disharmony between Indigenous and non-

⁶¹ TRC <<http://www.trc.ca/websites/trcinstitution/index.php?p=39>>.

⁶² For more on intergenerational effects of Indian Residential Schools, see A Bombay, K Matheson & H Anisman, "The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma" (2014) 51:3 Transcultural Psychiatry 320.

Indigenous Canadians that the reports from the Assembly of First Nation, the RCAP, and the TRC have all called upon us to proactively address. The main elements of Anishinaabe models of justice⁶³ – also referred to as “restorative justice” – are to support the creation of “social arrangements that foster human dignity, mutual respect and equal well-being,” presumably the goals of any law school’s decolonization project.⁶⁴ Though not utopian, Anishinaabe restorative justice models are centred on healing⁶⁵ and are process oriented,⁶⁶ with an overall goal of transformation,⁶⁷ thereby fundamentally different from the typically punitive Canadian justice system.⁶⁸ The elements of Anishinaabe restorative justice are worth being examined by law schools seeking to create a decolonization plan. The substantial body of literature citing positive impacts of Anishinaabe-based restorative justice initiatives offers both substantive value and is presented in a form more familiar to the legal academy.⁶⁹ Overall, Anishinaabe restorative justice models take aim at underpinning colonial violence by healing all those involved in a process that is intended to be culturally relevant⁷⁰ and inclusive of non-Indigenous participants.⁷¹ Do the values of Anishinaabe restorative justice provide law faculties with a potential response to who can and should teach a mandatory course as set out in Recommendation 28? Does the claiming of responsibility and inclusivity of participation by all found in Anishinaabe restorative justice offer principles by which a plan for decolonizing law schools might be developed? How might a diverse faculty with varying experiences come together to decolonize a law school space and thereby respond to Recommendation 50?

These questions may best be addressed by applying Anishinaabe principles of restorative justice to the decolonization project of law schools, which is inclusive of all faculty, students, alumni, staff, and Indigenous communities themselves. It is a challenging process in which there is a confrontation of sometimes very difficult truths and ownership of the actions that caused the harm. This claiming of responsibility opens up the pathway to healing, which is the foundational element of Anishinaabe

⁶³ In this article, I use the terms Indigenous models of justice and “restorative justice” interchangeably; however, there is some criticism that “restorative justice” is a westernized modelling of Indigenous justice, the discussion of which is outside the parameters of this article.

⁶⁴ D Miller, *Social Justice* (Oxford: Oxford University Press, 1976), as cited by D Sullivan & Larry Tift, “What Are the Implications of Restorative Justice for Society and Our Lives?” in H Zehr & B Towes, eds, *Critical Issues in Restorative Justice* (Colorado: Lynne Rienner Publishers, 2010) 387.

⁶⁵ JW Zion, “Monster Slayer and Born for Water: The Intersection of Restorative and Indigenous Justice” (1999) 2(4) *Contemporary Justice Review* 359; R Yazzie, “Navajo Peacemaking: Implications for Adjudication-Based Systems of Justice” (1998) 1:1 *Contemporary Justice Review* 123.

⁶⁶ JP Beven et al, “Restoration or Renovation? Evaluating Restorative Justice Outcomes” (2005) 12:1 *Psychiatry, Psychology and Law* 194.

⁶⁷ J Braithwaite, “Principles of Restorative Justice” in A von Hirsh et al, eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Oxford: Hart, 2003) 1.

⁶⁸ RA Duff, “Restorative Punishment and Punitive Restoration” in L Walgrave, ed, *Restorative Justice and the Law* (Devon: Willan Publishing, 2002) 82.

⁶⁹ For more information, see DW Van Ness & K Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice* (Boston: Newnes, 2013); EGM Weitekamp & H-J Kerner, eds, *Restorative Justice, Theoretical Foundations* (New York: Routledge, 2012); C Andersen, “Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities through ‘Tradition,’” (1999) 31:4 *Crime, Law and Social Change* 303; R Ross, “Restorative Justice: Exploring the Aboriginal Paradigm” (1995) 59 *Sask L Rev* 431.

⁷⁰ Friedland & Napoleon, *supra* note 25.

⁷¹ J Braithwaite, “Restorative Justice and Social Justice” (2000) 63 *Sask L Rev* 185.

restorative justice. Responsibility for harm and healing of pain allow for the creation of a sustainable action plan for well-being and the prevention of future harm. In the *Warning of the Nightbirds*, it is possible that if the people and animals had come together earlier and addressed the concerns of the Animiiki there would have been no deluge.

IV. SOME CONSIDERATIONS

A. Lodge-Building Lessons from Brother Beaver

The Anishinaabe often refer to the beaver as “brother.” The beaver is more closely related because it is one of the only other beings that reshapes the landscape for its own purposes.⁷² Beavers remodel their surroundings to build their lodge, which is created for the purpose of raising and educating the young so that the kits will know how to grow up and become good. I have been asked why I would choose to spend time in a law school when there is so much to be done in Indigenous communities. For now, part of my response is that I have taken a lesson from our brother and reimagined the institution of law schools as a great lodge in which my role is to both learn and teach others how to be good. To be good, we are reminded that Recommendations 28 and 50 demonstrate the importance of legal education and the role of law schools in decolonizing. Reimagining the very institution of law schools is the purview of Recommendation 50. It is this repositioning of the institution of law schools to a lodge that helps reduce my internal worries about my own contributions. Having been legally educated in Canadian law, I am not exempt from a decolonizing process. Decolonizing and Indigenizing law schools is something we all must address because “education is what got us here and education is what will get us out.”⁷³

But lodges take time to build, and along the way there is a constant practice of reassessment, reflection, and, if necessary, renovation. Thus, Recommendations 28 and 50 will take time, and any subsequent action, such as a mandatory course, must not be assumed to be completed but, rather, subject to ongoing consideration and open to change. There must be a continuous reshaping of the landscape of legal education in the way the beaver shapes the forest and waterways and of the law schools themselves. A new law school lodge is required to redress what in legal education Battiste describes as “displacing cognitive imperialism.” But how might law schools go about the business of building a lodge?

B. Building a New Lodge

In the immediate future, as the TRC’s commissioner, now Senator Murray Sinclair has stated, all Canadians, including law schools, should take the time to learn how to listen.⁷⁴ For real change, faculty must also confront how listening transpires. It may be argued that academics are expert listeners, though,

⁷² There are many stories about the giant beavers and the Anishinaabe that further explain the proximity of the relationship, but those are for another time and place.

⁷³ Justice Sinclair, Commissioner, Truth and Reconciliation Commissioner interview with H Watters, online: Canadian Broadcasting Corporation <<http://www.cbc.ca/news/politics/truth-and-reconciliation-chair-urges-canada-to-adopt-un-declaration-on-indigenous-peoples-1.3096225>>.

⁷⁴ In June 2015, Osgoode’s Convocation Hall, at a convocation dinner honouring him with an honorary doctorate of laws from Osgoode Hall Law School, Justice Murray Sinclair noted the work of the TRC is to create a country of listeners and slow the rush of quick-fix responses that may make the country feel better in the short term but do little to nothing to resolve the underlying systemic problems that are avoided by a snap diagnosis that might miss the real issues.

upon further examination, they might more accurately be described as expert critical listeners – listening only long enough to form a counter-argument versus listening actively for the purposes of understanding.⁷⁵ This is not an easy task for a professional school that excels at teaching students how to talk and offers entire courses dedicated to learning how to argue. Taking time means that law schools should not rush into immediately rebuilding the curriculum by way of response to the TRC, particularly if such a curriculum only means a consolidation of legal scholarship without a critical examination of how law is taught. Listening is very different from doing nothing – the latter playing a powerful role in law schools understanding themselves from the perspective of colonization. This is a moment to be uncomfortable and mindful. Creating a process for decolonizing law schools will not be gained through a means by which the academy may be most comfortable. Mindfulness means resisting falling into existing patterns of comfort when attempting to address systemic problems that place law schools as part of the apparatus of colonization. It is critical that meaningful approaches are adopted as law schools consider their varied responses – because there should be many – to Recommendation 28.

For example, when beaver builds a lodge, it is from learned experience – having been taught by those with greater knowledge. Similarly, each law school might create an advisory circle of Elders to guide the school not only through a healing process – such as the Anishinaabe restorative justice model discussed earlier – but also through a subsequent action plan of decolonizing law schools. Indeed, Elders must play a vital role in establishing what a decolonizing process may look like, which will be different for each school, depending on the parameters of the legal orders of the Indigenous nation upon whose land the law school sits. The full participation of Elders within the structure of law schools may lead to the AFN's *Tradition and Education: Towards a Vision for the Future's* pathway forward⁷⁶ and redress what RCAP referred to as “the transmission of cultural DNA from one generation to the next.”⁷⁷

There should not be a pan-Indigenous approach for law schools, but, rather, the details of the process may best be guided by an advisory circle of Elders who are knowledge in the laws of the lands where each law school is located. The advisory circle should include an equal balance of both grandmothers and grandfathers as a means to resist a recreation of male-centred leadership,⁷⁸ or for schools located in territories of Indigenous peoples who are matrilineal, perhaps the advisory council may be comprised with higher numbers of (or only) grandmothers than grandfathers. The advisory circle's structure itself is vital and should be created as a means to resist colonization and not be another iteration of it. As Heidi Todacheene reminds us, Indigenous peoples have been subjected to the ravages of colonization, and as a means to encourage healthy governance, a re-engagement with creation stories of Indigenous nations is necessary.⁷⁹ Among their many contributions, some Elders carry these stories along with songs, dances and instruction on ceremonies. Drawing upon the principles of governance and law found in sources of Indigenous legal orders, law schools may find a pathway to reimagine the institutional structure and form a basis for a decolonization plan of action. Moreover, law schools' structure should be reshaped to create space for an advisory circle to have permanent representation on all faculty and student

⁷⁵ M Weisberg & JK Peters, “Experiments in Listening” (2007) 57:3 Journal of Legal Education 427.

⁷⁶ AFN, *supra* note 36.

⁷⁷ RCAP, *supra* note 33.

⁷⁸ V Napoleon, “Aboriginal Self-determination: Individual Self and Collective Selves” (2005) 29:2 Atlantis: Critical Studies in Gender, Culture & Social Justice 31.

⁷⁹ Todacheene, *supra* note 18.

committees and vote at the Faculty Council, so their knowledge is both institutionally valued and entrenched in policy and governance decisions.⁸⁰ In this way the advisory circle should be valued and compensated as faculty.

Moreover, as guests in Indigenous territories, agreements should be made with the Indigenous communities upon whose lands the law school operate. Such agreements might include permanent law school legal clinics serving the needs of Indigenous communities and include the application of Indigenous laws. Other such agreements with Indigenous communities might directly link research initiatives driven by Indigenous peoples with the legal academy and developed using Indigenous legal research methodologies.⁸¹ The allocation of more research funding for law schools should be established as a priority to entrench the elements of both Recommendations 28 and 50 because “the research produced by professors shapes the way in which problems of, in, for and through law are perceived by students.”⁸² These connections create opportunity for powerful contributions not only to Indigenizing law schools with rich research but also to decolonizing law schools through a deeper knowledge base. Part of the research work with any Indigenous community should not commence with academic curiosity but, rather, with the “acceptance of Indigenous laws as law,”⁸³ which includes ceremony within the law schools by academics, students, staff, and Indigenous communities as participants as a means to ensure ongoing responsibility to, and learning from, Indigenous peoples.

Decolonizing law schools also means thinking about where and how we teach law.⁸⁴ Experiential-base learning is also an essential component because the laws of some Indigenous peoples, such as the Anishinaabe, are best taught where the laws originated outside.⁸⁵ Leanne Simpson explains that land itself is pedagogy.⁸⁶ Stories, such as the *Warning of the Nightbirds*, ceremonies, and songs remind us how to be good and are found both in and on the land.⁸⁷ This does not only mean on First Nation reserves but also in Canadian towns and cities as well. On this point, every law school in Canada is situated on Indigenous lands, making the instruction of Indigenous laws unique to each school. Teaching outside and on the land also necessitates seasonal learning. For example, as John Borrows points out in his article “Outside Education: Indigenous Law and Land-Based Learning,” law schools in Anishinaabe territory might require lessons that are seasonally and geographically specific,⁸⁸ thereby challenging how law classes and timetables are structured. Moreover, encouraging Faculty Council meetings and school committees to on occasion transpire outside while consistently including appropriate Indigenous

⁸⁰ Elders carry expertise that is necessary to the decolonization process for law schools. As with all experts, Elders should be appropriately compensated.

⁸¹ To some extent, this has begun in various Canadian law schools and should be further entrenched. One example is Osgoode Hall Law School, which in 2015 launched a new Environmental Law Clinic, which in its first year includes working with an Indigenous community in Ontario.

⁸² Macdonald & McMorro, *supra* note 11.

⁸³ Friedland & Napoleon, *supra* note 25.

⁸⁴ L. Chartrand “Indigenizing the Legal Academy from a Decolonizing Perspective,” Ottawa Faculty of Law Working Paper 2015-22 (2015).

⁸⁵ M Wildcat et al, “Learning from the Land: Indigenous Land Based Pedagogy and Decolonization” 3.3 (2014).

⁸⁶ L. B. Simpson, “Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation” (2014) 3:3 Decolonization: Indigeneity, Education and Society, 1.

⁸⁷ *Ibid.*

⁸⁸ J Borrows, “Outside Education: Indigenous Law and Land-Based Learning” (Windsor Yearbook of Access to Justice, Forthcoming in this special issue) at 1.

ceremonial openings guided by the Elders advisory council, decision-making processes, and Indigenous closing protocols are other means by which faculty and student council representatives might engage in land-based learning and the simultaneous reshaping of the institution of law school.

As the reconciliation syllabus initiative demonstrates for us, blurring institutional lines and encouraging a collective response from law schools working together is possible in responding to Recommendation 28. Similarly, sharing best decolonization strategies; collaborating more on learning in partnership with Indigenous peoples; as well as convening annual gatherings of each law school's Elder's advisory circles to come together are all ways in which law schools might also consider addressing Recommendation 50.

C. The Warning of the Nightbirds: Reprise

Though Indigenization may currently be the more popular of the two siblings in law schools' responses to Recommendations 28 and 50, decolonization is also underway to varying degrees in some law schools, but it requires more direct attention. If reinventing law schools is the objective of Recommendation 50, it will be complicated, difficult, and will require both time and resources. Though there is much more contained in the opening story, I have attempted to set out some early considerations that require schools to listen and engage directly with Indigenous peoples because colonization is not the only narrative Indigenous peoples have to share,⁸⁹ but it is too often the only one told because it fits within the existing structure. Though I do not possess all of the answers, I do know that law schools must engage with Indigenous peoples as part of the solution and not the problem. I have also sought to begin an examination of at least three elements from the *Warning of the Nightbirds* in relation to strategies to decolonize law schools: (1) Recommendation 28, like the call of the nightbirds, is a warning; (2) the Animiiki possess tremendous power and, observing us from their great nests, demonstrate what it means to both restrain and exercise their power; and (3) forgetting how to be good eventually leads to an exhaustion of patience by those who are watching and contributing in quiet but profound ways, such as the Animiiki, who may harshly correct us if we fail to do it ourselves. I have also proposed some ways in which law schools might begin to structure a decolonization plan, such as engaging with, and listening to Indigenous peoples; erasing lines among individual law schools to share best practices and account to each other on decolonizing strategies; developing relationships and agreements directly with Indigenous communities; examining curriculum and fundamental tenants taught in law school that have assisted in upholding colonization; and creating a permanent institutional space for an Indigenous Elders' advisory circle.

Once something was different in the great nests of the Animiiki. Among the most intriguing elements of the *Warning of the Nightbirds* story for me is the great duality of the Animiiki's important work. The thunderbirds bring water and life as well as destruction. Law schools teach future lawyers, judges, and scholars who might use their knowledge to continue the oppression of Indigenous people and bring about destruction or work towards decolonizing and bring about new life. Like our brother the beaver, we will have to reshape the landscape and build a new lodge (as is the call of Recommendation 50) because the one we have was not created with Indigenous peoples in mind – indeed, just the opposite. The nightbirds were unsettled by the happenings around them. Often I too am unsettled by the

⁸⁹ T Alfred & J Cornthassel, "Being Indigenous: Resurgences against Contemporary Colonialism" (2005) 40:4 Government and Opposition 597.

happenings around me. When it comes to decolonizing law schools, we should all be anxious because, like the Animiiki, law holds great power. There is much to be done. As law schools begin in earnest to Indigenize, developing and implementing a decolonizing agenda is also vital and necessary because without such efforts, Indigenizing may be reduced to a glossy veneer covering over a deeper and troublesome master narrative.

Something is different. The nightbirds knew. Do we?