CASE COMMENT

Our Interconnected Journey

Louise Mandell, QC

All relationships come from stories. Stories are at the very crux of healing, and at the heart of every ceremony. We can't change the past, but we can change the future by the stories we tell. I share this story from that innocent inner space of not knowing, until the unknown opens up.[1]

My personal story is a weave of Jewish ancestry and my journey litigating the land question at our law firm, Mandell Pinder,[2] and with others of my extended family at the Union of British Columbia Indian Chiefs (UBCIC). I am honoured to be the second chancellor at Vancouver Island University (VIU).

Born in 1947, I am of the first post-Holocaust generation. The accident/miracle of my birth prepared me for what was in store. As a young girl, I was drawn to Holocaust stories like a moth to light. How was it possible that six million Jewish people and other victims – how could these people be murdered, in such an orderly way, apparently under cover of law? I went to law school. I wanted to reveal, to stand up, to speak up, to protect, and to correct. I wanted to know justice. I was a legal thinker with a finely tuned mistrust of the law. I knew to look to ancient laws and ways of knowing that are hidden for protection.

The late and great Grand Chief George Manuel hired me to represent UBCIC at the West Coast Oil Ports Inquiry – this was in 1977 – Grand Chief George instructed me: "We want our rights recognized." I was just out of law school. I thought the word "recognized" could be strengthened – I asked: "What about constitutionalized?" He said, "Yes, and recognized." The shape of my story was engaged – at first it was only a resonance, like the ringing of a bell.

[1] The need to tell new stories was presented by Terri-Lynn Williams-Davidson while delivering her paper, "Weaving Together Our Future: The Interaction of Haida Laws to Achieve Respectful Co-Existence," at the Indigenous Legal Orders Continuing Legal Education conference, Vancouver, 15–16 November 2012; and at the Vancouver Coastal Health conference titled "Our Stories: Demonstrating Change through Storytelling," Vancouver, April 2007.

[2] mandellpinder.com.

I am now seventy-one years old – Grand Chief George was right. Aboriginal title has been constitutionalized – "recognized and affirmed" in section 35 of the Constitution. But still Aboriginal title is not recognized.

The rule of law was not followed when it came to Crown dealings with Indigenous Peoples because of greed, ignorance, and prejudice. Colonizers declared the land *terra nullius* – empty land – newcomers strove to empty the land of its real owners and tried to make the land empty of Indigenous laws and culture, oral traditions, ways of learning and teaching.

As far back as the Royal Proclamation of 1763 the Crown was required to respect the original occupants of North America, their laws, legal orders, and occupation of their territories as legal rights, with the incremental perfection of Crown sovereignty through treaty.[3] But that didn't happen for the most part in British Columbia. Crown law prohibited the potlatch, Sun Dance, and Indigenous legal orders. Canadian law silenced both Indigenous law and the voice of legal challenge, all during a period when Indigenous Peoples had no right to vote. The few treaties concluded on Vancouver Island; these too were ignored and then forgotten. The land was stolen "fair and square." The Crown derived its authority from force. The law was used as a weapon. An unjust law is its own form of violence. The effects were cataclysmic, like an earthquake.

The Truth and Reconciliation Commission (TRC) Final Report explains this simply enough: "The Canadian government pursued this policy of cultural genocide because it wished to divest itself of its legal and financial obligations to Aboriginal people and gain control over their land and resources."[4] Grand Chief George Manuel would say: "They will never give it back – we have to take it back."

There was no political will or economic incentive by Crown governments to address the injustice, so Indigenous Peoples turned to legal activism. My work for forty years was litigating the land question. One way to address that question, or perhaps the voice of the very land, is to ask: How did Canada's laws come to cover Indigenous territories when their own laws already lived there? The journey through the courts has been a quest to make space for the reassertion of Indigenous laws on Canadian landscape where these laws were deliberately erased.

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[3] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.); *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 *(Delgamuukw)* at paras. 174, 175; *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, 2004 SCC 73 (*Haida Nation*) at paras. 57, 58.

[4] Truth and Reconciliation Commission, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015), 3.

It is impossible to speak about this recognition journey without taking account of the intense spirituality that underlies the resistance to colonization – and resilience. Resilience is a cultural value, as is activism – staying on message and advancing through prayer and ceremony.

I have spent my life's work in the company of great love, working under the leadership of Dr. Grand Chief Stewart Phillip, beloved president of UBCIC for decades, and Dr. Grand Chief Ed John, First Nations Summit political executive and former expert member of the United Nations Permanent Forum on Indigenous Issues, involved in the development of the Declaration on the Rights of Indigenous Peoples. I have deep gratitude for their kindness, wisdom, and courage, and to the chiefs and leaders, matriarchs, Elders, and youth who have instructed us. All have been unshakable and unwavering in their belief and faith that British Columbia is Indigenous land – their sovereignty is inherent – in the nationhood of their Peoples – with the sheer conviction that the Creator put them here for stewardship – that self-determination will prevail.

Delgamuukw was a leading case testing (and affirming) the existence of Aboriginal title. The Hereditary Chiefs stood up their laws. In the opening statement on behalf of the Hereditary Chiefs, Chiefs Gisday Wa and Delgamuukw put it this way:

> For us, the ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters came power. The land, the plants, the animals and the people all have sspirit – they must be shown respect. This is the basis of our law.
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> The Chief is responsible for ensuring that all the people in his House respect the spirit in the land and in all living things … My power is carried in my House histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances performed and the crests displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the Feast Hall. In this way, the law, the Chief, the territory, and the Feast become one … By following the law, the power flows from the land to the people through the Chief, by using the wealth of its territory.[5]

The land is the culture. The Chiefs, on behalf of the Houses, use the land for strengthening their relationships with their House, their Clan, their

[5] Delgamuukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, May 11, 1987* (Gabriola, BC: Reflections, 1990) 17, 7.

father's Clan, their Nation. The histories, songs, crests, even food gathered from the land, are organized in very specific ways. Totem poles feature crests that record histories rooted in the earth to encode the laws. These crests and poles are authority for the House's present and future actions.

Witness after witness brought love into the courtroom. Their ancestors lovingly named each river and inlet, mountain and meadow. They conveyed their love for their relatives who taught them about their laws and culture, which is transmitted orally across generations embodying laws to live by and giving rise to rights and responsibilities.

Indigenous law derives principles and understandings from the natural world, and it reasons, by way of analogy. The earth is a textbook – a legal archive. Indigenous legal traditions connect to the essential aliveness that courses through the universe, uniting us with that creative power that lives on earth; inside earth; in the fish; in the animals, birds, and insects; in the stones; in the trees; in each of us. In this social arena, ethics are guided by fundamental principles to be deeply respectful of the recognition that everyone has value and something to give to society; that the different gives something to the whole; that the smallest ant can be our teacher. We are reminded of the way we can live in balance with each other and all living things. Every living thing has as much right to live on earth as humans.

"All my relations." I have heard these words spoken countless times: closing meetings, closing speeches, closing prayers, closing testimony. Those words create a relationship with other people, with animals, with the land. To have health, it is necessary to keep all these relations in mind. We are all connected and interconnected.

The witnesses who brought these laws to court in *Delgamuukw* unmasked the disguises the Crown government used to justify taking control of their territories – without treaty, without paying for any of what they took. The Crown governments' defence was extinguishment. Extinguishment is a rash assertion of Crown sovereignty. Canada's founding myths are riddled with racism. Real time, they say, began when the settlers rescued the land from disorder and brought civilization to the savages. The theft equation is turned around. Instead of the appearance of the newcomers benefiting from the lands and resources they had wrested from Indigenous Peoples, we are presented with the idea of a presumed exchange of benefits. Land and water are not seen as territories that were governed and managed by legal orders that respect the sacredness of all life, but as "raw materials" outside any legal structure, in a wilderness of inexhaustible natural resources without ecological limits.

These myths were translated into legal doctrines; the doctrine of discovery and *terra nullius*. The doctrine of *terra nullius* is premised on the false presumption of the inferiority of Indigenous Peoples. The doctrine of discovery is premised on the false presumption of the superiority of the Crown governments and the dominance of Crown laws. Crown lawyers argued these extinguishment doctrines in all of their declining alternatives: the land was unoccupied; or, if occupied, it was by people who were not really civilized; or, if civilized, they did not have concepts of land ownership; they did not have real laws; or, if they did have laws or rights, they were all extinguished; or, if not extinguished, the land they used was just small, spotty, postage-sized parcels. The Crown is honourable, protecting these small spots as Indian reserves.[6]

The assertion of Crown sovereignty cannot be maintained without racial stereotypes. I am sensitive to stereotyping. The Holocaust did not begin in the gas chambers. It began with racial stereotyping – Jewish people unworthy, less than human, could be taken by cattle cars to slaughter. For Indigenous Peoples, the stereotype was of an "Indian race" without laws, a race of people on the low rung of a fictitious social Darwinian ladder that ascended to civilization.

Many academics argue that there is no such thing as race, genetically speaking.[7] The "Indian race" is a social construction forced on Indigenous Peoples by those who want to take their land and then have them disappear.[8] The projected message, which strikes at the heart of Indigenous Peoples, is that you have no laws. You need to be changed. You are not good enough as you are.

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[6] Louise Mandell, QC, "The Ghost Walks the Walk: The Illusive Recognition and Reconciliation Legislation," prepared for the fortieth anniversary of the Union of BC Indian Chiefs (UBCIC), in gratitude for the honour of representing UBCIC for thirty-two of the forty years, October 2009.

[7] For information and discussion, see the Social Science Research Council website What Is Race at http://raceandgenomics.ssrc.org/; Joseph Graves, *The Race Myth: Why We Pretend Race Exists in America* (New York: Penguin, 2005); Leonard Lieberman, Rodney C. Kirk, and Alice Littlefield, "Perishing Paradigm: Race, 1931–99," *American Anthropologist* 105 (2003): 110–13; Ian Whitmarch and David Jones, eds., *What's the Use of Race? Modern Governance and the Biology of Difference* (Cambridge: MIT Press, 2010). For a contrary view, see Vincent Sarich and Frank Miele, *Race: The Reality of Human Differences* (Boulder, CO: Westview Press, 2004).

[8] For a discussion of policies of assimilation within the *Indian Act*, see John Tobias, "Protection, Civilization and Assimilation: An Outline History of Canada's Indian Policy," in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. James Miller (Toronto: University of Toronto Press, 1991), 127; Robert Brownlie, *A Fatherly Eye: Indian Agents, Government Power, and Aboriginal Resistance in Ontario, 1918–1939* (Toronto: University of Toronto Press, 2003); Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: UBC Press, 1995).

The startling reality is that, after over forty years of litigation, the Crown failed to come up with one legal defence for the decades of denial, dispossession, and human rights abuses and misery. Crown extinguishment arguments were all rejected by the Supreme Court of Canada (SCC). The land wasn't *terra nullius*, the law was.

The SCC went back to the law governing Canada's beginnings, recognizing and confirming Indigenous laws and legal orders as the golden thread of the common law.[9] The court held that Indigenous laws and rights to land are inherent collective rights that pre-existed and survived the assertion of Crown sovereignty, that have never been extinguished, and that find expression today in the Constitution.[10]

Inherent rights mean that neither Crown nor court recognition is required for Indigenous Peoples to possess land and resources and exercise governmental law-making authority. Canadian law is only one system of authority – another source is found in Indigenous legal systems. Indigenous sovereignty existed before contact, and this order of government stands on its own. Its powers do not derive from the Constitution, but the Constitution protects Indigenous Peoples from unjustified and dishonourable Crown interference. The *Campbell* case held that jurisdiction is not exhaustively divided between Crown governments.[11] Canada's Constitution is federalism and is comprised of three, not two, legal orders.

What we have learned from Indigenous people who spoke to the highest court, and what has emerged from the SCC, is legal pluralism. This is what occurs when different cultural narratives, worldviews, titles, and jurisdictions co-exist and operate on the same landscape. The plurality of legal orders requires that we turn our minds to mechanisms for the healthy, harmonious interaction between legal orders, making decisions about stewarding the lands and waters, and sharing revenues and benefits. We have yet to do that work.

The purpose of section 35(1) "is to foster the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty."[12]

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[9] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (*Van der Peet*) at para. 263; *Mitchell v. Canada (Minister of National Revenue – M.N.R.)*, [2001] 1 S.C.R. 911, 2001 SCC 33 (*Mitchell*) at para. 8.

[10] *Calder v. Attorney General of British Columbia*, [1970] 13 D.L.R. (3d) 64 (B.C.C.A.) (*R. v. Calder*) at pages 156 and 200; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Delgamuukw, supra,* note 3; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 12 at para. 44.

[11] *Campbell et al. v. Attorney General of British Columbia*, 2000 BCSC 1123 (*Campbell*) at paras. 137 and 180.

[12] McLachlin C.J. in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74, at para. 42.

After more than twenty years of discussion and negotiation, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted and endorsed by Canada. The UNDRIP is a human rights framework operationalizing principles and mechanisms to achieve justice for the specific historical, cultural, and social circumstances of Indigenous Peoples. The principles of free prior and informed consent, and the right to self-determination are fundamental.

We laid our sorrows and burdens next to each other before the Truth and Reconciliation Commission, which resulted in 194 calls to action. We are all called to action. Canada committed to implementing the TRC recommendations, including the UNDRIP, as a step towards remediating the cascade of misery and trauma resulting from an illegal colonial history.

There has been a welcome response by the courts, giving us hope that the rule of law will ultimately prevail.

THE POLITICS OF RECONCILIATION

Beautiful words are spoken by our political leaders. Government decency matters and shapes our lives. On 14 February 2018, Prime Minister Justin Trudeau rose in the House of Commons and said:

> Therefore, over time it too often fell to the courts to pick up the pieces and fill in the gaps. More precisely, instead of outright recognizing and affirming indigenous rights, as we promised we would, indigenous peoples were forced to prove time and time again, through costly and drawn out court challenges that their rights existed and must be recognized and implemented.
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> … going forward, recognition of rights will guide all government interactions with Indigenous Peoples.
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> … The federal government's absence over generations in recognizing and implementing Indigenous Rights has resulted in social and economic exclusion, uncertainty, and litigation, when when our shared focus should have been on creating prosperity and opportunity for everyone.[13]

[13] Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Indigenous Rights Framework, 42nd Parliament, 1st Session, Edited Hansard 264 (14 February 2018), 1540–1605.

Seven out of ten Canadians say that they want to support Indigenous Peoples' aspirations and rectify the past. But here is the problem. While cultural diversity is generally welcome, when it comes to shifting power relationships, the past is not past. When it comes to sharing decision-making, revenues, and benefits, to stewarding Mother Earth together, harm continues to be carried forward. The Prime Minister's words ring hollow. Colonization has not ended. Indigenous Peoples' experience legislation and litigation that reoffends and rewounds.

There is a clear line of legacy with stereotype politics and Crown governments' litigation mandates. One myth is that Crown sovereignty is perfected while Indigenous nations have to prove their title or reach agreements. This false and pervasive Crown position – that Indigenous nations have to prove title for the Crown to recognize it – has been raised repeatedly, and has repeatedly been rejected in the courts.[14] Yet, this remains the litigation position of Crown governments.

Consider the case of the *Haida Nation*. The beautiful and vibrant culture of the Haida peoples is a source of national pride. Schoolchildren know that Haida Gwaii is the homeland of the Haida people. Archaeologists trace human occupation back to at least 12,500 years. The archipelago is made up of more than 150 closely nestled islands, many of which can be crossed over by foot. There are over 2,500 Haida place names spread throughout the archipelago. The Haida language is a linguistic isolate.

The Haida Nation has pioneered shared decision-making and land protection agreements with both the federal and provincial Crowns throughout Haida Gwaii. Also, the Haida Nation has cultivated a longstanding collaborative working relationship with the surrounding non-Aboriginal communities on Haida Gwaii, reaching protocol agreements with the logging communities and the Strategic Land Use Plan Agreement (2007), which emerged from an inclusive and brokered consensus from a community planning forum.

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[14] This argument was first raised in *R. v. Calder* (*supra*, note 10), where Crown governments argued that, while the Royal Proclamation recognized title the Proclamation does not apply to British Columbia – that position was defeated in *Calder*, where the Supreme Court of Canada held Aboriginal title is inherent and does not depend on Crown recognition. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, Crown governments argued that the word "existing" in section 35 meant that section 35 was an empty box – and that constitutional rights need to be recognized by the court or affirmed in agreements. The SCC held that "existing" means "unextinguished" and that section 35 holds the promise of rights recognition. In the *Haida Nation* case (*supra*, note 3), Crown governments argued that the Crown has no constitutional obligations until the Haida prove their title. The court disagreed and found that the honour of the Crown engaged at the assertion of Crown sovereignty because Aboriginal title and laws pre-existed and survived that legal moment and constrained the Crown.

Gwaii Haanas is a significant cultural area; according to Haida oral history both the land and Haida ancestors emerged from the sea, and the first tree took root. In 1985, the Crown governments refused to recognize any Haida interest in these lands. Haida people exercised their responsibility under Haida laws to stop further industrial logging in this area. Their actions, and the spectacle of police escorting loggers to work and arresting Haida Elders for standing to protect their lands, brought international attention to Haida Gwaii.

What emerged from this conflict was a cooperative resolution and path forward based on mutual respect and recognition.[15] Following the Haida designation as a Haida heritage site, British Columbia and Canada agreed to the creation of Gwaii Haanas National Park Reserve in 1993, and the Gwaii Haanas National Marine Conservation Area Reserve in 2010. This area covering five thousand square kilometres is jointly managed and is the first in the world to be managed from mountaintop to sea floor. The area is jointly managed by the Archipelago Management Board, which consists of Haida and Canadian representatives. The Gwaii Haanas agreements were considered with approval by the Federal Court in 2001[16] and 2015.[17] The success of this shared decision-making model was recognized by a panel of experts who participated in a survey conducted by *National Geographic* and ranked Gwaii Haanas as the number-one tourist destination in the world.

Similarly, the Haida Nation and British Columbia have implemented reconciliation through a strategic land use agreement, the Kunst'aa Guu–Kunst'aayah Reconciliation Protocol, by provincial legislation and legislation of the Haida Nation.[18] The parties agreed to resources for implementation, the purchase of forest tenures, shared and joint decision-making, and a significant reduction of the volume of timber through the Land Use Objectives Order.[19]

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[15] Through the South Moresby Agreement, the Gwaii Haanas Agreement (GHA, the *Gwaii Haanas National Park Reserve Order*, SOR/96-93), and the Gwaii Haanas Marine Agreement (*Canada National Marine Conservation Areas Act*, SC 2002, c. 18, Schedule 2, Gwaii Haanas National Marine Conservation Area Reserve and Haida Heritage Site). The history of the negotiation of the GHA and management of tour operator allocations is set out in *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2005 FC 592 (history at paras. 2 to 9; tour operators at paras. 10, 12, and 13).

[16] *Moresby Explorers Ltd. v. Canada (Attorney General)*, [2001] 4 FC 591 at para. 74.

[17] *Haida Nation v. Canada (Fisheries and Oceans),* 2015 FC 290 at paras. 51–56.

[18] *Haida Gwaii Reconciliation Act*, S.B.C. 2010, c. 17.

[19] These facts have been used in various court documents, developed by the Haida legal team comprised of Terri-Lynn Williams-Davidson; David Patterson; Michael Jackson, QC; Stuart Rush, QC; Louise Mandell, QC; and Elizabeth Burdock.

So why has this narrative of success – a tribute to both Crown and Haida governments – not resulted in a Haida Reconciliation Agreement? Crown governments' conduct in litigation reveals their interest in not shifting the basic architecture of the status quo. The Haida have turned to the courts and engaged in litigation, notably in the *Haida Nation* case[20] and in an action seeking a declaration of Aboriginal title to and over Haida Gwaii (which is presently in case management).[21] The old colonial doctrines kick in. Crown pleadings deny Haida Aboriginal title except on reserve lands, and deny that the UNDRIP has legal effect. Crown governments have erected in their statements of defence an iteration of *terra nullius* and bigger small spots.

How different our world would be if Crown governments accepted that distinct Indigenous societies have constitutionally protected rights, including that of self-determination. Section 35 cannot revitalize Indigenous laws until self-determination informs its approach. When Aboriginal title is recognized and not denied in British Columbia, our courts will be freed of the litigation fatigue caused by lengthy, complex, expensive cases dedicated to determining if and where Aboriginal title exists. Our collective attention could turn to how we will live together, building structures that promote peace, so two legal systems could engage in dialogue, could have conflicts that are necessary, but in the right way. And they could agree to principles to govern jurisdictional interplay. Balance could be restored to the relationship. There is no limit to the ways two legal orders could be mutually enriched and live in harmony. Rather than competing, these legal orders could complete one another.

Why is this recalibration so difficult for Crown governments? What can we, individually and collectively, do to compel governments to operationalize what the law requires, what Indigenous Peoples have fought for and achieved through the courts and with the UNDRIP?

I suggest that the politics of reconciliation requires that we must come to terms with fear. Fear shapes the psyche of our society on many unseen levels. It is embedded in our political structures and our thoughts. We can become conscious of how fear feels in our bodies, how fear governs our thoughts and actions – perfectionism has an underlay of fear. Courage is being willing to feel our fear – to face it. I heard a story about Warrior Woman once, told to me by an Elder who said that Warrior Woman makes mistakes, but she has faith in the work unfolding. She has no

[20] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

[21] *Haida Nation v. British Columbia and Canada*, BC Supreme Court, No. L020662, Vancouver Registry, filed March 2, 2002.

secrets – she has nothing to hide – her vulnerability is not a weakness but a strength. Compassion is being willing to suffer – being with the feeling. Changing ourselves, speaking truth to power – this introspection and courage is an essential ingredient in the reconciliation process.

One of the intellectual architects of Nazi Germany, Carl Schmitt, understood the power of fear in acquiring and maintaining state power, establishing tyranny. Fear is used to create the fiction that the moment is unsafe and exceptional. Citizens trade their real freedom and liberties for guaranteed fake safety. The task for the Third Reich was to maintain and manufacture the unsafe moment for years. Then, the forms of violence we take for granted become and remain possible.[22]

Hannah Arendt, a Jewish intellectual who witnessed the Eichmann trial, observed that justice can falter here, as anywhere. But she asks: Can we have confidence that the rule of law ultimately will prevail? She argues that reconciliation cannot be found in a legal solution. A legal solution is appropriate when a person breaks the law. But here we are, talking about governments making unjust laws, which should never have been made in the first place, let alone followed. Reconciliation in this context demands a political reconstitution; a public acknowledgment of the evil done; reparations and amends made; a rejection of the world as it is; a revolutionary break and then a new beginning on different collective terms. This involves all of us who share this history, the land, and the future. Reconciliation is coming to terms with a reality and affirming one's belonging to this reality as one who acts in it.[23]

Indigenous societies conceive of existence in a spiritual ecology in which humans, the natural world, and the universe are one living entity. Most Indigenous languages hold with the ancient teaching: "everything is one … everything is connected and interconnected." In sharp ideological contrast, with the settlers came a fear-based fiction embedded in Western thinking, that we are separate – separate from God, from each other, from nature – luring us to believe in a loveless state, which is the breeding ground for fear and the gateway to suffering. This thought/fiction is an amalgam of illusion about separateness that feeds our ego or false self. We split from our shadow self, pretending to be our idealized self; split our mind from our body and soul and live in the mind; split life from death and try to live avoiding death; split ourselves from others and live in competition; split ourselves from all other living beings, andlive in a

[22] Timothy Snyder, *On Tyranny: Twenty Lessons from the Twentieth Century* (New York: Tim Duggan Books, 2017).

[23] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, 1968 [1951]).

way we believe to be superior.[24] There is a comfortable contract between personal egos and a whole egocentric culture. This creates an ever-present tendency to perceive without love.

Racism stems from fear. Racism illustrates the constant denial of the simple truth of our essential connectedness. We subtract these people from our circle of compassion. We draw lines that perpetuate the illusion that we are separate from one another and that, therefore, "my" good can come at "your" expense. We create the "other." This is a failure of love. I can hurt you if I feel you are not connected to me. Out of that desanctification comes the abuse of groupings of people, of women, substance abuse, gay and lesbian abuse, abuse of the land, colonization.

The tyranny of the status quo of colonization is maintained by fearful thought forms of racial stereotypes. Stereotypes are a stand-in for the real. These stereotypes, which were heard in the courtroom during the extinguishment debate, are also embedded deep within our cultural imagination, continuing colonial violence. We hear these voices today: "We are giving them something … they are taking from us … They want it all back … We know best because … They are only 5 percent of the population and they want the veto … internal fighting – overlapping claims – violence." Then add to this the poverty stereotypes – "an epidemic of individual failure – they are responsible for their own situation … why have kids – you cannot afford them." Shaming discourse. Shame and then silence. The silence of *terra nullius*.

Fear is an imagined reality. An imagined reality is something people believe in, and as long as the communal belief persists, the imagined reality exerts force in the world.

The Truth and Reconciliation Commission gave the power to each of us to stretch out and to mend the part of the world that is broken and within our reach. Changing ourselves changes government, changes the law. Reconciliation means changing Crown laws and colonial policy. Law represents a codification of the public consciousness. But are we complicit with the things we claim to oppose?

Vancouver Island University hosts an Indigenous Speakers Series in partnership with CBC Radio One's *Ideas*, moderated by Paul Kennedy.[25] One of the powerful speakers, Dr. Tracey Lindberg, looked at reconciliation not as a starting point but as a measure of the health

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[24] Richard Rohr, *Immortal Diamond The Search for Our True Self* (San Francisco: Jossey-Bass, 2013).

[25] 1. Chief Shawn A-in-chut Atleo

- VIU story: https://news.viu.ca/chief-shawn-atleo-presents-re-imagining-canada-vius-first-indigenous-speakers-series-event.

of relationships with regard to self, to reconciliation with community, and to reconciliation with Indigenous Peoples. She then addressed reconciliation with Canada. We are all colonized and she raised the question of what it means to Indigenize, challenging us to look at the ways we have benefited from colonization, how we have hurt and helped one another.

When jury verdicts of acquittal were entered in the deaths of Colten Boushie and Tina Fontaine, my world rocked. I felt unsafe, feeling the presence of fear-based stereotypes wobbling the rule of law. I was triggered and so, too, were many of my dear friends and colleagues in the Testify collective.

Testify is a collective of artists and legal thinkers working through conversation about the recognition of Indigenous laws. This project, dreamed into being by Ardith (Wal'petko We'dalx) Walkem (Nlaka'pamux), QC, is about imagining an emerging future rooted in Indigenous laws and legal orders, striving to put reconciliation into practice by creating space for all Canadians to dream a way forward that represents diversity, strength, and hope embodied within Indigenous traditions.[26] Members of the Testify collective did a one-week residency at the Santa Fe Art Institute, where we met together to process these verdicts, to ask what our collective response could be. I felt myself being held – all of us holding one another in this incredible web of loving-kindness, grief, and love in the same place – I felt my heart would burst by holding it all.

Ardith Walkem was paired with artist Corinne Hunt (Kwakwaka'wakw), whose collaboration was on the law of hope. In her brilliant paper "We Are Our Laws Walking the Light Shining Through," Ardith identified

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- CBC Broadcast: https://www.cbc.ca/radio/ideas/rumbling-and-reckoning-shawn-atleo-1.3364058.

2. Tracey Lindberg

- VIU story: https://news.viu.ca/challenging-safe-ideas-dr-tracey-lindberg-examines-reconciliation-vius-second-annual-indigenous.
- CBC Broadcast: https://www.cbc.ca/radio/ideas/reconciliation-before-reconciliation-with-dr-tracey-lindberg-1.3948075.

3. Gabrielle Scrimshaw

- VIU story: https://news.viu.ca/vius-national-indigenous-speaker-shares-reflections-youth-and-reconciliation.
- CBC Broadcast: https://www.cbc.ca/radio/ideas/gabrielle-scrimshaw-on-liberating-the-past-and-embracing-the-future-1.4539471.

4. Doug White

- VIU story: https://news.viu.ca/douglas-white-iii-speaks-re-imagining-reconciliation-vius-indigenous-speakers-series.

CBC Broadcast will not be until January 2019.

[26] Testify link is www.testifyindigenous.ca.

fear and despair as a powerful dangerous spirit walking among us – not a personal shortcoming. She said that fear breaks us apart – "so much of our anger and despair turned inwards, towards our families, ourselves, towards women." She identified the imperative of hope and of –

> our need to act together to cast out despair, to assess the damages that have been done through our colonial history and call upon our laws that would apply to guide us out of this situation … We inherit a colonial landscape, we inherit wounds, we inherit strengths, we inherit … Each of us is damaged, each of us is broken in our own way … How can we gather these broken pieces together to weave ourselves back to wholeness? [27]

We brought together the facts of the *Boushie* and *Fountaine* cases,[28] which we followed like pebbles on the path, looking for our way out of the clear-cut.

Colten was a young twenty-two-year-old member of the Red Pheasant Cree Nation, who, along with his friends, had been hanging out drinking and swimming on the day he died. The day took a turn when they left their swimming spot, got a flat tire, and went looking for help at Gerald Stanley's farm, where he ran an automobile repair business. Gerald and his son Sheldon were working on a fence. The youths were intoxicated: two of them got out of the car and were sitting on (perhaps attempting to steal) an ATV on the property. There was yelling; one vehicle crashed into another. The situation felt dangerous to Gerald Stanley. His extreme fear in these circumstances led him to pick up a gun, not call 911. He shot Colten, who was unarmed and sitting in the truck. He shot him in the head, killing him. Sheldon said his father told him he shot Boushie by accident. Gerald Stanley was acquitted of second-degree murder by a jury who accepted his fear/panic defence. An RCMP investigation cleared the officers who came to tell Colten's family about his death, even though, in her grief, Colten's mother said that the officers shook her, told her to get it together, smelled her breath, and asked her if she had been drinking. Since then, the RCMP Complaints Commission has initiated a complaint and public interest investigation into the RCMP's investigation of the death of Colten and the complaint initially filed by the Colten family.

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[27] Ardith Walkem, "We Are Our Laws Walking the Light Shining Through," on the Testify website at http://n1m.8c4.myftpupload.com/we-are-our-laws-walking-the-light-shining-through./

[28] Extending gratitude to Robyn Gervais, a lawyer with the Testify collective who assembled the facts for our group and also provided them as part of the Testify performance in Victoria.

Tina Fontaine was a fifteen-year-old girl whose small body was pulled from the Red River in Winnipeg. Her mother struggled with addictions, and her father, who had been diagnosed with cancer, was beaten to death. Tina lived with her great-aunt Thelma and Joseph Favel on the Sagkeeng First Nation. She was a good student. She wanted to reunite with her birth mother. Thelma gave her permission to go to Winnipeg for a week, with a long-distance calling card so she could call if things did not work out well or if she wanted to come home before the week was over. When she did not return, Thelma reported her missing to police and child welfare authorities. Thelma was never to see Tina alive again.

After Tina was located, she was placed into care, initially in the Capri Motel. She went AWOL and was reported missing; she was found and placed in other care facilities, left, and was again reported missing. Thelma was not notified. Days before she was killed, Tina came into contact with two police officers, who pulled over a truck in which she was a passenger. But the officers did not notice there was a missing-person alert out for her. A few hours later, she was found passed out in a parking lot, having taken alcohol and drugs. The social worker who picked Tina up at the hospital got her a meal at McDonalds and then dropped her off at the Charterhouse Hotel in Winnipeg, placing her in the custody of a person working with a private company hired by the province. The young woman who said she was with Tina shortly before she disappeared told CBC that Tina had been approached by a man who offered her money to perform a sex act. She had accepted and left with the man. Her body was found wrapped in a duvet cover, wrapped in plastic, weighted down with rocks.

Raymond Cormier was charged with second-degree murder and acquitted. There was evidence from witnesses who saw them together and the fact that Cormier had the same type of duvet cover that was found wrapped around Tina's body.

I honour and respect the jury system – judgment by one's peers is a strong and powerful tradition in our democratic society. Jury members have a difficult job to do, which they do out of service. I mean no disrespect to the juries who heard the *Boushie* and *Fountaine* cases. But there were no Indigenous people on either jury. The Indigenous perspective, in the context of the facts of the cases, was missing from deliberations. Fear, which gives rise to stereotyping, could rear its head. Indigenous men are dangerous; Indigenous women are disposable. Lives are not sacred.

From an Indigenous perspective, blankets reveal laws – blankets are wrapped around people in naming and other ceremonies. When Tina's body was pulled from the river, the blanket was powerful and deeply significant – a karmic connection between Tina and her murderer.

We asked ourselves, how would the *Boushie* case be dealt with under Indigenous law? How are we meant to conduct ourselves in times of fear and conflict? Andrea Hilland (Nuxalkmc), a lawyer, shared an oral history called the Cry Rock Story, which was included in *The Bella Coola Indians*, an ethnography compiled by T.F. McIlwraith.[29] I tell a small fraction of this ancient story.

Above Canoe Crossing there was long ago a village at the point where the two creeks enter the Bella Coola River, one from either side. The people of the place lived in underground houses facing the stream. One night a baby was crying in one of the houses and, as the mother was feeding it, she saw by the light of the fire a face in the window outside, with a white patch on its throat, looking into the house through the doorway – flu. There was always trouble at the place, so the people used to sleep with their weapons beside them. The woman woke her husband, who reached for his bow and shot an obsidian-pointed arrow into the white spot on the beast. The story continues … the family heard a terrible wailing. The father investigated and found a mother *sniniq* (a creature like a sasquatch) sobbing loudly. It was her baby who had been killed out of fear by the father. The father was touched by the mother's grief, and asked her what he could do about her loss. The *sniniq* invited him to cry with her and soon the animal and the man were weeping together.

Through this story, we see Indigenous law and reconciliation/justice, which involves bringing things together, making whole, seeking to maintain and restore balance, striving for well-being. Indigenous spirituality is always about healing. Reconciliation is taking love to the place where pain turns into healing. The question is: What would it take to be or bring things into right relations?

We see what we have not seen for so long: that what we may have called oral history or oral tradition is law embodied. Most importantly we see the humanity. We asked ourselves how do we see that they matter? We can see ourselves, our children, our beloved in their faces, in their circumstances.

Tina died falling through the safety net. Here was a child in a city, without connections, where people in authority knew she was vulnerable and did not protect her. Under Indigenous law, if you know of such a

[29] Thomas McIlwraith, *The Bella Coola Indians*, Vol. 1 (Toronto: University of Toronto Press, 1992 [1948]).

situation, you do not need the state to act – you are compelled to act. Sharing and generosity are revered. Ardith Walkem elaborated on this:

> Our law is, and is found within, our obligations to ourselves to live in alignment with our understanding of what is right, our obligations to each other, our obligations to our living world, in the truth that we are part of the living world and cannot walk away when we see something is wrong, that we cannot refuse to act …
>
> We are all related, what happens to one of us happens to all … [law] speaks to our obligations to each other, to other life we share our world with, in a very real, personal, and abiding way. It is not limited to this world or to linear time. *nkshAytkn* – we are related across realms – the spiritual and other worlds are as real and related to us as this world we see … it means, in a real way, we have to ask how our actions today will impact our Peoples, generations into the future …
>
> When we protect children in ways that break them, we are not acting according to a law of hope; this reflects instead a law or hope of extinguishment.[30]

Indigenous poet Joy Harjo said: "to speak, at whatever the cost, is to become empowered rather than victimized by destruction. In our tribal cultures the power of language to heal, to regenerate, and to create is understood.[31]

Shifting voices break the spell of the status quo.

THE WORLD RESTS ON THE BREATH OF THE SCHOOLCHILDREN[32]

As chancellor at Vancouver Island University, I am witness to an upwelling of the future in the present. I stand in a river of social innovation, creativity, commitment, collaboration, and dedicated purpose among post-secondary institutions meeting the challenge of the TRC Calls to Action to educational institutions to fix a problem through education that was caused by education. Reconciliation includes acknowledging the past and making remedial efforts today.

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[30] Walkem, "We Are Our Laws Walking the Light Shining Through." http://n1m.8c4.myftpupload.com/we-are-our-laws-walking-the-light-shining-through/.

[31] Joy Harjo quoted in *Taking Back our Spirits: Indigenous Literature, Public Policy, and Healing* by Jo-Ann Episkenew (Winnipeg: University of Manitoba Press, 2011), 14.

[32] This quote is a reference to a rabbinical interpretation of Psalm 105:15, recorded in ancient texts.

One of many beautiful examples of work at VIU is bridging an ethical space in the transition from Indigenous high school graduates, many first-generation learners, to post-secondary graduates, to the workplace. This landscape is not predictable. There is the vertigo of transformation. There are unruly areas – uncertain moments and moments of supreme optimism, hope, joy, and miracles. Self-determination is a cornerstone, humility/listening, relationships, collaboration, and mutual respect. Through relationships we share gifts. We share burdens. We learn from each other, learn the need of the other, help one another. We cross over to another's point of view – we grow and change. When we do, walls begin to fall.

There are barriers caused by colonization that prevent Indigenous students from accessing post-secondary education, from succeeding in their education, from getting a job after they graduate. The status quo is inherently inequitable. Colonization has established structures we all live under that have inequality built into them. This is visible at a glance when we look at the statistics on disproportionality – too many Indigenous people in jails, in care, as suicides, as social problems, in poverty; too few Indigenous Peoples as judges, in boardrooms, as decision-makers, in the workforce.

Vancouver Island University has cultivated strong reciprocal relationships with Vancouver Island's three major Indigenous Nations, who provide direction so that the university can create relevance in degree programs that relate to the communities VIU serves. Elders on faculty hold knowledge that we draw upon to move forward. The three totem poles, erected on the Nanaimo campus by each of these language groups, honour VIU's partnership with these Nations and an abiding respect for their ancient laws.

We are a values-based university, and one of those values is access to post-secondary education for those who wish to pursue it, no matter their financial circumstances or backgrounds. Education is the most sophisticated and powerful process human beings have created for conscious social evolution and for creating change in people's lives – better employment options and increased self-sufficiency.

In the Vancouver Island region, there are nearly eight hundred youth in care under a continuation custody order. VIU was the first university in British Columbia to offer a tuition waiver for youths who have been in care. Ruby Barclay, a former tuition waiver student (now an alumna), was a fourth-year student in the child and youth care program. She designed for herself a practicum placement, with VIU's blessing. The job was as a

peer support navigator, advocating to support students in tuition waiver at VIU – ensuring the most vulnerable didn't fall through the cracks. She fostered a space so youth in care could build a new identity. She modelled the impact of being socially connected, successful in school, and doing what she feels passionately about. Teach them well, and let them lead the way.

Vancouver Island University is able to wrap support around the students because of partners who share the same values and commitment to the future. EleV is a collaboration with VIU, the Mastercard Foundation, the Rideau Hall Foundation, Yukon College, and the Indigenous communities we serve. This program is a first-of-its-kind learning partnership providing financial and social "wrap around" supports, offered in a culturally relevant way to Indigenous learners so that they can access higher education, cover their expenses while going to school, and have the assistance of navigators. We can do things better together than we can do them alone. We all want Indigenous graduates to succeed in their chosen path. We want to help students overcome barriers. We want to end disproportionality – to share in leadership and prosperity.

Key to EleV are the navigators. VIU now has four navigators. In their words, their job includes "making connections with potential students and their families to demystify post-secondary education at VIU … being that familiar face when students arrive … walking with them but not doing it for them … igniting resilience and keeping support strength oriented."[33] The navigators provide hand-on-your-back support while Indigenous students and communities define themselves, advocate for themselves, choose their path – leading the necessary change.

The program and the students share a commitment to valuing leadership as service. This act of leadership is symbolically represented by the migratory pattern of geese. Each member takes a turn leading the "V." This is an act of extreme unselfishness – taking their turn at the hardest job, which is to uplift others travelling alongside. Leadership is not about control or dominance but about doing their job, offering their unique gifts, to help others.

From 2015 to 2018, credentials were awarded to 2,326 Indigenous students. But there are roadblocks graduates face in finding jobs. This led to another partnership, which enlarged the ethical space so as to reduce barriers facing graduates entering the workforce. The Indigenous Internship Leadership Program is a partnership of the Province of British Columbia, the BC Assembly of First Nations, the Business Council of

[33] Personal communication with the navigators, 14 November 2018.

BC (which represents major employers throughout the province), and Vancouver Island University. VIU helps Indigenous graduates from post-secondary institutions across British Columbia to find and take advantage of job opportunities. Employers in the public, private, and non-profit sectors hire these graduates for two-year internships. Navigators, called mentors, help the graduates and the employers to succeed.

The ethical space ends with a fierce and beautiful light. Indigenous post-secondary graduates expand their networks and gain work experience. Their communities experience pride in their success, open their arms to their graduates who return home better equipped to find solutions to today's challenges. For the employers, each intern brings new relationships and knowledge about what it means to have Indigenous cultures, values, and ways of knowing in the workplace. These graduates are some of the most resilient people I have ever met. Resilience and persistence are cultural values that help build a more resilient workplace. Soon the family portrait of workplaces will change.

The settlers made a big mistake – driving the wrong metaphor, of conquest, rather than family.

TRANSFORMING PARADIGMS

Assume for a moment that the work of the educational community results in the next generation of Canadians knowing the history that supported the need for truth-telling. Assume that disproportionality – the unacceptable, unethical, and unsustainable social and economic gap between Indigenous and non-Indigenous populations in Canada – has disappeared. Indigenous people enjoy equal participation in all aspects of society. In response to the TRC Calls to Actions, educational institutions still have work to do.

We are not used to seeing Indigenous Peoples as having laws. There has been a historical denial of Indigenous laws and legal orders, which are the oldest roots of the living tree of Confederation. These ancient laws survived colonization and must be heard when decisions are made about how the land and resources are used and managed. We cannot talk about justice and well-being, we cannot talk about reconciliation, without talking about Indigenous laws, about spirituality. The land question is a question of spirituality. Building reconciliation frameworks must be done in the context of Indigenous laws and spirituality, which respects all living things. This requires that educational institutions work within a different paradigm.

We are standing in a confluence of shifting paradigms – a revolution of information and biotechnology and their merger, unconscionable poverty, inequality and social injustice, unprecedented, planetary-wide environmental changes – biodiversity loss, climate change, dying oceans, ecological anxiety disorder – global epidemic of stress. To survive in the world we are transforming, humans need a radical change of consciousness. We need to decolonize and decarbonize or the marriage between the earth and humans will end.

This is about unlearning inconvenient truths about an economic system based on the exhaustion of scarce resources, expansion, and growth. This is about the rediscovery of knowledge of the natural world and humanity's place in it, shifts in how we see the world together, shifting to seeing our interconnectedness and interdependence. This is about re-learning how to sustain the web of relationships of which we are a part.

Science is confirming many of the deep intuitions and sacred teachings embodied in Indigenous laws and cultures. Einstein said that everyone involved in science is convinced that spirit manifests in the laws of the universe, a spirit vastly superior to humanity.

Albert Schweitzer, on receiving the Nobel Peace Prize, said: "It is convinced that compassion, in which ethics takes root, does not assume its true proportions until it embraces not only man but every living being."[34] Compassion manifests wherever beings need help.

Human rights are the ground that will rebuild Canada and lead to reconciliation. We are joined in a human rights framework. The late and great Ellen White – Auntie Ellen – an Elder-in-residence during VIU's beginnings – she was so deeply loved – shared her wisdom and vision. She would say, "We must go forth with both hands full – one filled with traditional knowledge and the other filled with white man's knowledge."

We need to change the ideas that govern us. Knowledge systems are things humans can develop. Ideas are transformation. Consider how fast things can change when we change thought collectively. A person who reached the age of one hundred and lived in Berlin during the twentieth century would have experienced four entirely different forms of government – the Hohenzollern Empire of Wilhelm II, the Weimar Republic, the Third Reich, and communist East Germany.[35] Psychological structures can be safely disarmed.

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[34] Albert Schweitzer, awarded the Nobel Peace Prize 1952, gave the Nobel Lecture, "The Problem of Peace," 4 November 1954. NobelPrize.org.

[35] Snyder, *On Tyranny*, note 22.

Reconciliation is not a journey that ends – it is humanity's journey. We are blessed with the great contribution of Indigenous Peoples to civilization – their laws and legal orders that teach about harmonious co-existence, interdependence, and balance.

I began with the power of stories and I leave you with a story about reconciliation, told by a talented artist, Shain Jackson, who participated in Testify. His stunning contribution is an image of a spiritual figure, a golden eagle. Shain tells the story of the Golden Eagle:

> There are powerful stories told by Elders in my First Nation's community of Shishalh. They derive themselves from up the inlets we historically occupied here in British Columbia. On and above these sacred landscapes, inhabited a supernatural being, the Ch'as-kin, a larger than life Golden Eagle so bright looking at it was like looking into the Sun. It represented all that was good in us ... The Golden Eagle's fiery frock burned the symbol of "justice" into the retinas of all whose image it fell upon. Its effigy screamed POWER, COURAGE, and PRESTIGE; however, the "prestige" was based not on its power and courage alone but on the good deeds this creature would commit using this power and courage. The tales regaled all revolved around the Ch'as-kin's ability to unify our people and … accomplish impossible tasks for the benefit of all.[36]

At first blush, this creature appears to embody an individualist notion of a single saviour-like figure coming to our rescue, but the icon is moreover a metaphor. The truth of the matter is that there is no one saviour, the saviour is in us collectively; that our spiritual path is one that we all travel on together and only together. If the Golden Eagle represents anything, it is the gratitude we have for one another stemming from our individual responsibilities to each other. We look again to this sacred figure to compel us into ascension. When we rise, we rise together.[37]

May reconciliation end the fearful thought structures that hold the status quo in play and may we bring healing to all those affected by colonization, especially to Mother Earth.

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[36] Shain Niniwum Selapem Jackson "Golden Eagle rising – reconciliation, Indigenous resurgence, and a new beginning," *Journal of Global Ethics* 14, 2 (2018): 300–303, DOI: 10.1080/17449626.2018.1517818.

[37] See the *Golden Eagle's* work in action at www.goldeneaglerising.org.

The word "human" comes from the Latin word "humus" meaning earth. There can be no reconciliation of Indigenous laws and legal orders without reconciliation with the earth.

All my relations.