Creating Space for Indigenous Storytelling in Courts*

Kirsten Manley-Casimir

Imagine a world
Of peace—all people as one
Is it possible[1]

I. Introduction

Despite what many Canadians consider a national history characterized by tolerance and respect for human rights, Canada's treatment of Indigenous[2] communities is marked by colonial injustice. The myth of Canada as a neutrally situated peacemaker[3] in the international community sits in sharp contrast to the ongoing oppression of Indigenous communities within Canada.[4] Canadian law, through legislation and court decisions, has played a central role in maintaining the colonial oppression of Indigenous peoples.[5] By relying on new principles based on respecting Indigenous peoples, creating new relationships with Indigenous communities, and engaging the moral

* The author thanks the following people for their editorial assistance, which much improved this article: Elsie Manley-Casimir, Michael Manley-Casimir, Shin Imai, Lauren Bates, two anonymous reviewers, and the editorial staff at the *Canadian Journal of Law and Society*. All errors and omissions are solely the author's responsibility.

1 This haiku was inspired by John Paul Lederach's idea that creativity is central to peacemaking processes; see John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace* (New York: Oxford University Press, 2005), 67.

2 In this article, the term "Indigenous" refers to First Nations, Métis, and Inuit peoples and others who self-identify as such; the term "Aboriginal" refers to claims for rights under Canadian law.

3 Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010), 86, discusses the colonial peacemaker myth as central to the ongoing rationalization of Canada's oppression of Indigenous communities.

4 Rodolfo Stavenhagen, "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. Addendum. Mission to Canada" (UN Doc. No. E/CN.4/2005/88/Add.3; Geneva: United Nations Commission on Human Rights, 2004), http://www2.ohchr.org/english/issues/Indigenous/rapporteur/visits.htm, concluded that in 2004 Canada ranked eighth out of 174 countries on the Human Development Index but that Indigenous communities within Canada ranked forty-eighth.

5 See Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation," *Windsor Yearbook of Access to Justice* 23 (2005), 17; Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, ON: Broadview Press, 2005); Val Napoleon, "Extinction by Number: Colonialism Made Easy," *Canadian Journal of Law and Society* 16, 1 (2001), 113.

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2012, Volume 27, no. 2, pp. 231–247. doi:10.3138/cjls.27.2.231

imagination, however, courts may be able to play a role in the struggle to decolonize Canada.[6]

In Part I below, I set out the terminology, limitations, and structure of this article. In Part II, I outline how colonial violence toward Indigenous peoples has been supported by the state legal system in Canada. I set out the tension between the two competing conceptions of law embodied in Indigenous and non-Indigenous cultures and outline the effects of colonial policies on Indigenous communities. In Part III, I suggest ways in which Canadian courts may contribute to decolonization by applying some central principles of dispute resolution to resolve Aboriginal rights claims. These principles include openly acknowledging the colonial interests served by the state legal system and judges' complicity with it; opening the Court environment up to discomfort, emotion, and unsettling through meaningful listening to Indigenous storytelling; facilitating the creation of processes to enhance relationships between Indigenous communities and non-Indigenous governments and third parties; and engaging the moral imagination.[7]

A. Common Language

In this article, I use the term "colonialism" to refer to the European expansion into Canada, in which Europeans asserted sovereignty over the land and peoples and justified (and continue to justify) this assertion through a belief in their superiority over the Indigenous peoples already inhabiting the land. In my view, colonialism is an ongoing process that continues to affect the lives of all Canadians, to the detriment of Indigenous communities within Canada.

My use of the term "moral imagination" is based on the theories of John Paul Lederach, who defines moral imagination as "the capacity to imagine

---

6 In this article I use the term "decolonization" to include recognition of and respect for Indigenous peoples and the need for solutions to be developed in accordance with and from within Indigenous cultural frameworks, with the end goal of autonomy and the recognition of Indigenous sovereignty. It is important to note that this concept does not necessarily include the expulsion of colonists from Canada, as in some other countries, but instead involves the expulsion of colonial values from Indigenous communities and, ideally, from non-Indigenous institutions within Canada. In arriving at this definition of decolonization, I considered the following sources: Taiaiake Alfred and Glen Coulthard, "A Conversation on Decolonization" (presented at the University of British Columbia, Vancouver, March 15, 2006); Alfred, *Wasáse*; Marie Battiste and James (Sákéj) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000); John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); John Borrows, "Creating an Indigenous Legal Community," *McGill Law Journal* 50 (2005) 153; Gordon Christie, "Justifying Principles of Treaty Interpretation," *Queen's Law Journal* 26 (2000), 143; Christie, "A Colonial Reading of Recent Jurisprudence"; Napolean, "Extinction by Number"; Patricia A Monture-Okanee and Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice," *UBC Law Review* 26 (1992), 239; Mary Ellen Turpel, "Aboriginal People and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges," *Canadian Woman Studies* 10, 2/3 (1989), 149; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," *Canadian Human Rights Yearbook* 6 (1989/1990), 3.

7 These principles are based on those theorized in Lederach, *The Moral Imagination*.

something rooted in the challenges of the real world yet capable of giving birth to that which does not yet exist."[8] Implicit in this definition is the creative act, which gives birth to a new reality. The concept of moral creativity in law is central to the idea that judges have the ability to create positive changes within the Canadian legal system, although such changes are limited by the structural constraints and ideology underlying that system.

B. Caveat

Before I begin, I need to highlight an important caveat with respect to the suggestions I make in this article. The Canadian court system has been heavily criticized for rendering judgments that maintain the *status quo* and serve colonial interests. These critiques, in my view, are valid, and court judgments often leave much to be desired with respect to advancing Aboriginal rights in Canada. My purpose here is to address the ways in which Canadian judges might approach their judging differently, within the structural constraints of the colonial legal system, and to provide constructive suggestions to judges on how they might approach the procedures and rules in Aboriginal-rights cases. Although these suggestions are directed toward judges working within the Canadian legal system, it is important to acknowledge the structural limitations of that system for advancing Aboriginal rights. Further, in addressing how judges might change the way they judge Aboriginal-rights cases, hopefully for the better, I am not suggesting that judges are the key actors in dismantling colonialism. Rather, the thrust must come from Indigenous peoples themselves[9] and from the Canadian government.

In making suggestions to improve how judges make decisions in Aboriginal-rights cases, I remain aware of the very persuasive arguments for establishing separate Aboriginal courts or other institutions to decide such cases. However, I share Judge Mary Ellen Turpel-Lafond's view that reforming the mainstream legal system and creating separate pathways to justice for Aboriginal communities need not be an either/or proposition. Turpel-Lafond writes,

> We spent several years in a distracting debate over whether justice reform involves separate justice systems or reforming the mainstream system. This is a false dichotomy and fruitless distinction because it is not an either/or choice. The impetus for change can be better described as getting away from ... colonialism and domination .... Resisting colonialism means a reclaiming by Aboriginal people of control over the resolution of disputes and jurisdiction over justice, but it is not as simple or as quick as that sounds. Moving in this direction will involve many linkages ...[10]

---

8 Ibid., ix.

9 See, e.g., Glen S. Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada," *Contemporary Political Theory* 6 (2007), 437; see also Alfred, *Wasáse*.

10 Mary Ellen Turpel, "Reflections on Thinking about Criminal Justice Reform," in *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples*

The establishment of separate, culturally appropriate Aboriginal justice systems is an ideal.[11] Indigenous communities need time to design and establish such institutions, however, as well as to build capacity and resources to support their ongoing functioning. I hope the suggestions made in this article on ways to reform the Canadian justice system may enable Canadian judges to make more equitable, fair, and respectful decisions when faced with Aboriginal claims, until such time as more culturally appropriate dispute-resolution mechanisms are set up.

C. *Storytelling in Law*

Included in this article are three narratives, set in italic type, that relate to my experiences as a non-Indigenous person researching in the area of Aboriginal law.[12] By including narratives, I hope to circle into truth through stories.[13] Through my use of narrative, I also attempt to engage in a pedagogy of discomfort[14] that forces the reader to question dominant preconceptions and myths;[15] to convey how a storytelling approach is central to the struggle for decolonization; to emphasize the importance of facilitating rather than silencing Indigenous storytelling; to emphasize the need for Canadian courts to engage the moral imagination in deciding cases involving Indigenous claims; and, most importantly, to create a paradigm shift in the reader.[16] Finally, I include personal stories to highlight the importance of recognizing

---

and Justice, ed. Richard Gosse, James Youngblood Henderson, and Roger Carter, 206–21 (Saskatoon: Purich Publishing, 1994).

11 In Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative," *Windsor Yearbook of Access to Justice*, forthcoming 2012, I argue that the Canadian legal system is ill equipped to deal with Aboriginal-rights cases because of the different world views that form the basis of the Canadian legal system and of Indigenous legal orders. Although this argument may seem to contradict my suggestions here, it is my contention that changes still need to be made to the current system in the interim until separate, more culturally appropriate forums can be established and maintained to deal with Aboriginal claims.

12 The use of personal narratives and reflection to inform legal analysis is becoming more accepted in some legal academic circles; see, e.g., Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, MA: Harvard University Press, 1991).

13 Professor Abdul, a Tajik storyteller and peacemaker who played a central role in ending the war in Tajikistan, has described this as the way communication is done in Tajikistan; qtd. in Lederach, *The Moral Imagination*, 18.

14 Regan, *Unsettling the Settler Within*, 52, quotes Megan Boler and Michalinos Zembylas, "Discomforting Truths: The Emotional Terrain of Understanding Difference," in *Pedagogies of Difference: Rethinking Education for Social Change*, ed. Peter Pericles Trifonas (New York: RoutledgeFalmer, 2003), 111. Boler and Zembylas advocate a pedagogy of discomfort whereby teacher and student "move outside their comfort zones, [which are] ... the inscribed cultural and emotional terrains that we occupy less by choice and more by virtue of hegemony."

15 Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001), 42.

16 Ibid., 44; Paulette Regan, "Unsettling the Settler Within: Canada's Peacemaker Myth, Reconciliation, and Transformative Pathways to Decolonization" (Diss. University of Victoria, 2006), 65, notes that storytelling can create "transformative learning [which] involves a shift in consciousness that dramatically and permanently alters our way of being in the world."

law in social spaces,[17] in personal interactions, and in learning through real-world experiences in relationship with Indigenous peoples.[18]

II. Colonial Legal Violence

Several theorists have pointed to the violence inherent in state legal systems. Law, according to Robert Cover, is infused with violence. "[L]egal interpretation takes place in a field of pain and death,"[19] he argues, since when "a judge articulates her understanding of a text ... somebody loses his freedom, his property, his children, even his life."[20] In his view, the power of the legal system is an organized, social practice of coercion,[21] backed by the power of the state to enforce violence on those who come before it.[22]

Indigenous theorists also implicate the formal legal system in the colonial violence directed toward Indigenous peoples. Frantz Fanon argues that colonial law is directly implicated in the violent suppression of Indigenous revolution and resistance.[23] Similarly, Taiaiake Alfred asserts,

> Recognizing that violence is the foundation of state power and that violence is expressed implicitly in all of its institutions, we must acknowledge that social peace is not a benign situation. Social stability, as it is commonly conceived, is in fact a relation of force, of acts and threats of violence, of a coercion of Onkwehonwe to silent surrender.[24]

Here Alfred asserts that the coercive force of the Canadian state is based on violence, which is inherent in all colonial institutions, including Canadian courts.

Because colonial governments maintain hegemonic power through the use or threat of force, some theorists contend that any struggle for decolonization will also inevitably be violent. Linda Tuhiwai Smith argues that any struggle to break free from colonial powers involves physical, social, economic, cultural, and psychological violence.[25] After studying successful Indigenous decolonization movements, Alfred concludes that violence is central to decolonization, even in pacifist movements:

---

17 Robert M. Cover, "The Supreme Court 1982 Term Foreword: *Nomos* and Narrative," *Harvard Law Review* 97 (1983/1984), 4; see also Williams, *The Alchemy of Race and Rights*, 7.

18 Regan, "Unsettling the Settler Within," 4–5.

19 Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1985/1986), 1601. It is important to note that Cover's views may not be characterized as mainstream within the legal academy.

20 Ibid.

21 Ibid.

22 Ibid., 1607; see also Cover, "The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role," *Georgia Law Review* 20 (1986), 819.

23 Frantz Fanon, *The Wretched of the Earth* (New York: Grove Weidenfeld, 1963), 208.

24 Alfred, *Wasáse* at 267. The Mohawk word *Onkwehonwe* means "Original People": ibid., 19.

25 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books, 1999), 27. For a discussion of the psychological violence of colonialism see also Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1967), cited in Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 2001), 3.

> The logic of contending with state power is inescapable. If contention is necessary to make change, if contention necessarily leads to confrontation, and if confrontation has an inherent element of potential or real violence, as the experiences in Oka or Gustafsen Lake demonstrate, then we must be prepared to accept violence or deal with it.[26]

Since even peaceful demonstrations can incite the violence of the state,[27] extricating Indigenous peoples from the grip of colonial violence will likely create conflict both within and between Indigenous and non-Indigenous communities, which can lead to state violence.

Instances of direct violence in Canada are arguably exceptional; however, more subtle forms of colonial violence also exist within Canada. As Paulette Regan asserts, "[c]reating peace ... lies not simply in the absence of physical violence, but in recognizing and taking action against the more subtle, but equally deadly forms of violence that support and perpetuate colonial relations."[28] Not only must the physical, psychological and emotional violence of colonialism be dismantled; subtle forms of colonialism that manifest in court judgments and legal ideology, such as stereotypes, misunderstandings, and ignorance, must also be eliminated.[29]

A. Competing Conceptions of Law

Legal systems reflect the cultural values from which they evolve. Thus, the common law has developed to reflect and reinforce the values that originated in England, including a strong emphasis on neutrality, objectivity, and impartial adjudication in a formal legal system, as well as a privileging of written over oral sources of evidence.[30]

Similarly, Aboriginal legal systems reflect the specific Aboriginal culture from which each normative system of law originates. Although there are unique aspects to each Aboriginal legal system, reflecting the diversity among Aboriginal cultures within Canada, some aspects are generally shared by these systems. Aboriginal scholars say that the law is performative, dynamic, and evolving;[31] that law is lived in the everyday, rather than

---

26 Alfred, *Wasáse* at 47.

27 Ipperwash is a high-profile Canadian example of a peaceful protest to which the Canadian state responded with militaristic force, resulting in the death of Dudley George. For details see *Report of the Ipperwash Inquiry* (Hon. Sidney B. Linden, Commissioner; 30 May 2007), http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/index.html.

28 Regan, "Unsettling the Settler Within," 11–12.

29 In analysing the Supreme Court of Canada's judgments in Aboriginal-rights cases, some theorists have implicated the Canadian legal system in these more subtle forms of colonialism: see, e.g., Borrows, *Recovering Canada*; Christie, "A Colonial Reading of Recent Jurisprudence"; Alfred, *Wasáse*; and D'Arcy Vermette, "Colonialism and the Suppression of Aboriginal Voice," *Ottawa Law Review* 40 (2008/2009), 225.

30 For a more detailed analysis of the ideology and principles underpinning the Eurocentric legal system see Manley-Casimir, "Incommensurable Legal Cultures."

31 James (Sákéj) Youngblood Henderson, "Aboriginal Jurisprudence and Rights," in *Advancing Aboriginal Claims: Visions/Strategies/Directions*, ed. Kerry Wilkins (Saskatoon: Purich Publishing, 2004), 71.

separated into a formal process outside everyday life;[32] that legal decision makers should be known to and respected by community members;[33] and that histories and evidence exist in the oral domain and are passed down from one generation to the next.[34]

These differences between the Anglo-American legal system and Aboriginal legal systems create an ongoing tension when Aboriginal peoples bring their claims to Canadian courts. Because of the different cultural values and imperatives embedded in the Anglo-American legal system, Aboriginal claimants face a tangible challenge when seeking legal redress within the framework of that system. For example, Aboriginal oral-history evidence is often relied upon to assert legal possession, jurisdiction, and ownership over lands and resources within Indigenous territories. However, the tendering of oral evidence to prove historic claims to land, territory, and spiritually significant sites has met with resistance from Canadian courts,[35] which presents a difficult obstacle for Aboriginal claimants to overcome.

Suggestions abound on how to deal with differences in cultural values and power relations by moving Aboriginal claims into different forums outside the formal court structure.[36] These suggestions include establishing and recognizing the jurisdiction of Aboriginal courts, setting up alternative dispute-resolution processes that integrate Aboriginal legal principles, and moving conflicts into intercultural negotiation processes. In many instances, negotiations that take place outside the Canadian court structure are more likely to resolve conflicts in a way that yields more substantive justice for Indigenous claimants.

Canadian courts can play an important role in pushing the parties toward such negotiations.[37] Some disputes are not appropriately dealt with through negotiation, however, particularly when not all of the interested parties are willing to negotiate. Given the reality that many Indigenous communities bring their claims to Canadian courts, particularly when faced with ongoing encroachments within their territories, it is important to interrogate the assumptions underlying the Canadian legal system and to consider how to change the structure of courtrooms to facilitate Indigenous storytelling. While

---

32 Tracey Lindberg, "Critical Indigenous Legal Theory" Diss. Faculty of Law, University of Ottawa, 2007).

33 Monture-Okanee and Turpel, "Aboriginal Peoples and Canadian Criminal Law," para 18.

34 Ibid., para 16.

35 For a prime example of the devaluation of oral history see *Delgamuukw v British Columbia*, [1991] BCJ No 525 (BCSC) [*Delgamuukw BCSC*]. On appeal by the Gitskan and Wet'suwet'en, however, in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*], the Supreme Court of Canada ordered a new trial because the trial judge had not given any independent weight to oral history. For other examples of cases in which oral history evidence has not been given due weight see *R v Quinney*, [2003] AJ no 313 (Prov Ct) at para 46; *R v Frank*, [1999] AJ no 1074 (Prov Ct); and *R v Brertton*, [1998] AJ no 257 (QB) at para 74.

36 See generally Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004).

37 It is also important to acknowledge that negotiation processes need to take into account and mitigate the power imbalances between Indigenous communities and the Canadian government.

acknowledging the structural constraints embedded within the Canadian legal system, this article is a humble attempt to propose some ways to create respectful space for Indigenous storytellers and oral evidence in Canadian courts.

A Clash of Cultures

In law school, I participated in the Intensive Program in Aboriginal Lands, Resources and Governance at Osgoode Hall. In preparation for the field placement of the Intensive Program, students participated in two weeks of legal review and cultural sensitivity training to provide some context for working with Indigenous communities. My self-perception was that I was socially adept and would have no trouble ensuring that I conveyed my respect for any Indigenous people with whom I interacted during my placement.

During my placement, I worked with a small Vancouver firm to research the impact of proposed offshore oil and gas development in Hecate Strait on the Haida. After five weeks of research, I flew to Haida Gwaii[38] *to give a presentation to the Band Council. Upon my arrival at the Band Council office, each council member introduced himself by first name only, which made me feel welcome and relaxed.*

I had estimated that my presentation would take about two hours, including questions. Three hours into the presentation, I started to feel impatient. There had been many interruptions, including several breaks, and one person kept politely excusing himself as he walked in and out of the room. I felt the presentation was dragging on. I had a long list of potential environmental issues that I wanted to enumerate before taking another short break; while I was going through the list, one member of the Band Council raised his hand. I quickly went through the list, which took perhaps one more minute or so, then asked if he had a comment. From that point on, he refused to participate and instead sat with his arms crossed. Later, I learned that he was the Haida Chief, both through election to the Band Council and through hereditary lines.

In reflecting on my error, I realized that even with the best intentions, I had failed to recognize and respect the cultural differences between the Haida and myself. In failing to listen when the Chief wanted to speak, I had shattered any chances of creating a dialogue and a respectful relationship.[39] *I also fell unwittingly into the role of the outside expert who swoops into an Indigenous community and tells the leaders what the important issues are without listening to their views.*[40] *Rather than rushing through my presentation and ignoring the*

---

[38] *Haida Gwaii*, meaning "Islands of the People," is the Haida name for the Queen Charlotte Islands. See Robert Bringhurst, *A Story as Sharp as a Knife: The Classical Haida Mythtellers and Their World* (Lincoln: University of Nebraska Press, 1999), 28.

[39] Lederach, *The Moral Imagination*, 53–58, argues that people who have lived in situations of protracted violence become cautiously sceptical of the authenticity of social change. He asserts (ibid., 58) that one wrong move after a series of behaviours consistent with peace building can undermine the process.

[40] Smith, *Decolonizing Methodologies*, 1.

Chief's willingness to share his thoughts, I should have focused on being present, opening myself up to meaningful listening and learning from the Indigenous leaders in the room.

B. Restorying History through Narrative

Colonization has systematically disrupted, displaced, and devalued the existence of Indigenous peoples within Canada. The colonial encounter has shaped both colonizer and colonized—colonizer as civilized, enlightened saviour and colonized as the negation of that image. The psychological decolonization of Indigenous peoples therefore includes a reformulation of self, of one's story, and of one's place in the world. It involves mending the split against the self that the colonial encounter produces.[41]

The disruption of a people's story is one of the central effects of colonization. Citing Aküm Longchari, a philosopher, historian, and human-rights advocate from Nagaland, John Paul Lederach writes,

> Aküm articulated the need to understand at a much deeper level the significance of narrative, of story. From the perspective of Indigenous people, he would explain, original violence might best be understood as the disruption—and far too often, outright destruction—of a people's story. These patterns are found on every continent and with every aboriginal group's story. The arrival of Europeans in the Americas, the Great March of Tears of the Cherokee, the impact of British and then Indian nation-building for the Nagas, and the establishment of Australia and the destruction of aboriginal families and life are but a few examples of narratives broken, their stories of peoplehood disrupted.[42]

Longchari proposes a solution to the disruption of Indigenous stories of peoplehood through the concept of "restorying." Lederach explains that

> [o]ne cannot go back and remake history. But that does not mean the history is static and dead. History is alive. It needs recognition and attention. The challenge, Aküm would often express, lies in how, in the present, interdependent peoples "restory," that is, begin the process of providing space for the story to take its place and begin the weaving of a legitimate and community-determined place among others' stories. . . . Narrative has the capacity to create, even heal, but it has had its voice taken. A return to giving narrative a place and voice was needed.[43]

The concept of restorying has profound implications for Canadian law. Not only do non-Indigenous people need to recognize the way in which

---

41 Williams, *The Alchemy of Race and Rights*, 119–20, describes a memory of hearing her white friends whisper about "coloured people" and then later realizing that she was "coloured": "I remember the terrible crash of that devastating moment of union, the union of my joyful body and the terrible power of that devouring symbol of negritude. I have spent the rest of my life recovering from the degradation of being divided against myself; I am still trying to overcome the polarity of my own vulnerability."

42 Lederach, *The Moral Imagination*, 140; see also Fanon, *The Wretched of the Earth*, 210.

43 Lederach, ibid., 140.

https://doi.org/10.3138/cjls.27.2.239 Published online by Cambridge University Press

colonialism has disrupted Indigenous stories, they also need to facilitate the creation of a space in which Indigenous peoples can restory their histories.[44]

Canadian courtrooms may not be the ideal forums for Indigenous peoples to restory their histories. Courtrooms are, however, one of the few places in Canada where Indigenous people speak about their understandings of their rightful place on this earth, their collective histories, and their ongoing relationships with their territories. The Supreme Court of Canada in *Delgamuukw* held that courts must give due weight to oral-history evidence[45] because Indigenous stories often constitute one of the only records of evidence to prove Indigenous claims. Thus, it is important that courts enable Indigenous storytellers to tell their stories, not only to provide a space for such restorying within non-Indigenous institutions but also to acknowledge the importance and validity of oral-history evidence to support Indigenous claims.

C. The Role of Canadian Law in Decolonization

A debate exists about the role of Canadian law in the decolonization of Canada. As mentioned, some view state law as violent in silencing alternative visions of law as well as in enforcing laws based on colonial interests to the detriment of Indigenous peoples. Clearly, state law has the capacity to oppress. However, state law also has the capacity to liberate and create freedom. In many court cases, judges have rendered decisions finding legislation unlawful or unjustifiably oppressive toward a particular community. Judges also make decisions that permit societies to live in peace rather than in a constant state of conflict. Although Cover offers a trenchant critique of the judiciary, he asserts that "judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence."[46] Law therefore plays an important role in society to decide conflicts, regulate people's social interactions, and create peace.

In considering the role of Canadian law in the decolonization of Canada, it is helpful to distinguish between two effects of law's function. Nicholas Blomley distinguishes between *law-preserving violence*, which maintains the *status quo*, and *law-making violence*, which replaces an old legal order with a new one.[47] When deciding Aboriginal-rights cases, courts are faced with a choice between enforcing the state's violence to preserve the colonial *status quo* or doing so to create a new legal order that respects Indigenous people's rights and autonomy and moves Canada toward a decolonized reality. It is safer and easier to make decisions that support colonial policies.

---

[44] These spaces are being created through the use of Truth and/or Reconciliation Commissions around the world, including in Canada in relation to the Indian Residential Schools legacy: for more information see Truth and Reconciliation Commission of Canada, http://www.trc.ca/websites/trcinstitution/index.php.

[45] *Delgamuukw* at para 87.

[46] Cover, "The Supreme Court 1982 Term Foreword," 53.

[47] Nicholas K. Blomley, "Law, Property, and the Spaces of Violence: The Frontier, the Survey, and the Grid," *Annals of the Association of American Geographers* 93 (2003), 126.

In order to advance the principles of justice, freedom, and liberty upon which Canada prides itself, however, Canadian courts may need to take on the difficult task of creating new law that challenges colonial ideology and policies in cases involving Aboriginal rights. One step toward doing so is to actively create space for Indigenous storytelling in courts.

Listening for a Decolonized Space

The day after meeting with the Band Council, I drove up to Masset to visit Michelle, a high school friend. We attended an International Women's Day celebration at a nearby school, which consisted of women from the community sharing their gifts of song, short stories, and poetry.

The master of ceremonies was a Haida woman who was very active in her community. To close the celebration, she talked about learning about Haida culture from the Elders of her community and of her responsibility as the keeper of the songs of her nation. She shared the violence of her experiences in residential school and the identity crisis that she experienced. She then admitted that she had never sung the Haida songs that her Elders had taught her since her residential-school experience. It was an inspiring and touching moment to witness her singing one of her nation's songs for the very first time in public. Her song was a powerful act of strength, courage, and resistance that stirred something deep within the soul of everyone in the room. It conveyed the anguish, history, and pride of the Haida people and brought everyone to tears.

Although I had read about the impact of colonial policies on Indigenous peoples in Canada, this experience drove home the destruction and dispossession of Indigenous peoples on a personal level. It also highlighted the work that needs to be done by Indigenous and non-Indigenous people to address the destruction created by government policies. Finally, it highlighted the importance of being involved with and learning from Indigenous communities in order to contribute in a way that is relevant to their everyday lives.

III. Unsettling Canadian Courts: Storytelling, Meaningful Listening, and the Moral Imagination

To participate in the struggle to decolonize Canada, Canadian courts can change formal processes to create an environment that is receptive to Indigenous voices and respectful of Indigenous peoples. To successfully transcend geographies of violence and begin the journey of creating peace, Lederach argues, intercultural conflict-resolution processes need to be rooted in authenticity, context, and human relationships.[48]

First, judges might acknowledge that they represent the colonial legal system and openly interrogate the way in which the law has evolved to promote colonial interests. This interrogation will necessarily be difficult,

[48] Lederach, *The Moral Imagination*, 76.

https://doi.org/10.3138/cjls.27.2.239 Published online by Cambridge University Press

because judges may need to consider their own complicity with the colonial legal system, but it is central to arriving at just decisions in Aboriginal-rights cases. In some cases, courts have explicitly acknowledged the effects of colonialism on Indigenous communities,[49] and these acknowledgements are important starting points from which to move toward a decolonized Canada.[50]

In examining the colonial interests that state law serves and judges' complicity in that system, judges may realize their personal limitations in understanding the perspectives of the Indigenous claimants. This may lead to a realization that courts need to facilitate mechanisms for Indigenous Elders and leaders to share their expertise on the Indigenous culture and legal principles relevant to the dispute. With Indigenous peoples' input, courts may be able to implement mutually acceptable mechanisms to provide more context, cultural knowledge, and training for judges so that decisions may be culturally appropriate and more balanced in weighing non-Indigenous and Indigenous interests.[51]

Second, Canadian judges might open themselves up to being unsettled and uncomfortable. Drawing on the idea of a pedagogy of discomfort, they might take on the challenge of the need to struggle, to be discomforted and unsettled in engaging in the difficult task of decolonization.[52] Regan asserts that "learning to listen involves engaging our whole being, using silence not to deny, but to welcome and recognize the transformative possibilities of the stories we do not want to hear."[53] This challenge will require judges to open themselves up to the reality that Indigenous peoples' narratives about their stories of peoplehood disrupted are inherently and necessarily emotional, and this may require judges to experience the pain and loss conveyed by Indigenous storytellers as a result of their colonial experiences.

---

49 The most important case in this respect is *R v Gladue*, [1999] SCJ no 19, in which the Supreme Court of Canada recognized the disproportionate incarceration rates among Aboriginal peoples in the Canadian criminal justice system and held that sentencing courts must consider the special circumstances of each Aboriginal offender in determining an appropriate sentence.

50 Although such acknowledgements are central to moving toward the creation of new, more respectful relationships between Indigenous communities and the Canadian state, it is important to keep in mind a central caution regarding the further perpetuation of symbolic and subtle forms of violence by courts. Courts can continue to enact symbolic violence on Aboriginal communities, even while distancing themselves from oppressive policies of the past, if they continue to make decisions that reinforce and legitimate contemporary forms of colonialism. Decisions that continue to dispossess Aboriginal communities from their traditional territories are but one manifestation of court-enforced colonialism in contemporary Canadian society. The mere recognition of colonialism and the Canadian court system's complicity within it, although important, may not be sufficient to address the systemic trampling of Aboriginal rights in Canada in the absence of decisions that actually challenge colonialist agendas and overtly question the dominant legal, political, and economic framework: see Coulthard, "Subjects of Empire," 451, citing E. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, NC: Duke University Press, 2002).

51 Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model," *Manitoba Law Journal* 23 (1996), para 110.

52 Regan, "Unsettling the Settler Within," 18, insists that non-Indigenous people need to join the struggle to decolonize.

53 Ibid., 225.

Being open to Indigenous stories, judges may struggle against the very human urge to withdraw and separate their emotional selves from their professional, judging selves. This emotional withdrawal, what Andrew Woolford terms a "bifurcation of consciousness,"[54] is closely implicated in the preservation of self. By separating their emotional selves from their professional duties, compassionate people can blame the system for causing the pain rather than recognizing their own complicity in that system. The bifurcation of consciousness has the unfortunate effect of silencing Indigenous peoples by failing to recognize the relevance of their pain to the issues in dispute, reinforcing unequal power relations, and preventing non-Indigenous people, including judges, from engaging in creative acts that are deeply transformative.[55]

Third, judges might work to create spaces that respect Indigenous peoples and facilitate genuine listening. One way to create such a space is by working with Indigenous representatives to come up with creative ideas for adapting the rules of evidence to facilitate Indigenous storytelling. Creating space for Indigenous storytelling may be important to ensure that Indigenous Elders are respected and to recognize the holistic worldviews of Indigenous peoples, which may be best reflected in a narrative style of testimony.[56]

By adapting the rules of evidence to enable genuine listening to and engagement with Indigenous witnesses, courts can create respectful spaces in which the knowledge of Indigenous Elders can be shared. Borrows highlights the failure of Canadian courts to treat Elders with the respect that is their due:

> Aboriginal Elders frequently have to endure questioning and procedures that are inconsistent with their status in their communities. The wisdom they have attained and the struggles they have endured in acquiring this knowledge demand that they be shown the highest honour and deepest respect . . . [This treatment] is tantamount to discrediting their reputation and standing in the community.[57]

Borrows also highlights that such questioning breaches Indigenous protocols, demonstrates ignorance and contempt for the knowledge of Elders, and disrespects the Indigenous culture they represent.[58] Adapting the rules of evidence to allow Indigenous Elders to share their knowledge on their own terms might eliminate further disrespectful treatment in Canadian courts.

One example of a creative adaptation of the rules of evidence might involve the judge asking the lawyers to provide Indigenous Elders' credentials

---

54 Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (Vancouver: UBC Press, 2005), 130, cited in Regan, "Unsettling the Settler Within," 191.

55 Regan, ibid.

56 At the Celebrating Indigenous Legal Traditions Law Conference (First Nations House of Learning, University of British Columbia, Vancouver, November 6–7, 2006), Ardith Walkem noted that the rules of evidence fail to acknowledge that groups of Indigenous people, rather than individuals, may collectively hold the knowledge necessary to resolve a dispute.

57 Borrows, *Recovering Canada*, 91.

58 Ibid.

https://doi.org/10.3138/cjls.27.2.239 Published online by Cambridge University Press

on paper prior to their testimony. If necessary, the judge might request affidavits from community members attesting to the status and authority of the Elders, which could be subject to cross-examination by Crown counsel. This evidence could then be taken as proof of status to avoid direct questions as to whether the Elders have the authority to speak on behalf of their nation. The judge might also manage the cross-examination process to ensure that Crown counsel's questions are phrased in a way that is respectful to Elders.

The rules of evidence might also be adapted to recognize the holistic world views of Indigenous peoples. In reading Indigenous writing and listening to Indigenous stories, I have observed that Indigenous people often start from the very beginning of the story and "circle" into the truth. Perhaps this narrative method reflects a more holistic world view that recognizes the interconnections of all beings and things; perhaps, as Longchari and Lederach suggest, the reason Indigenous people sometimes give testimony that starts at the very beginning is that doing so allows them to restory—to reclaim and reassert their cultural identities, values, and localities and restore their place in history.[59]

The judge might facilitate genuine listening by permitting those giving testimony to provide their complete story without time constraints. At the Celebrating Indigenous Legal Traditions Law Conference hosted by the University of British Columbia, Professor Michael Jackson told a story about putting an Elder on the stand in *Delgamuukw*, at the Elder's insistence. This was contrary to his usual practice, since the Elder would not tell Jackson what he was going to say. When the Elder took the stand, he began with "Since the beginning of time . . .," and he told his story for three full days. At the end of the story it was clear why the Elder had started at the beginning, and his testimony was relied on in the final judgment. Because the Court provided a forum for the Elder to tell the full story, the Elder was able to restory the existence of his community.

Lederach makes clear that peace building cannot be rushed.[60] This is particularly so when Indigenous communities are engaged in a struggle to restory their existence as a people. The judge might therefore allot ample hearing time for Aboriginal-rights cases and make clear at the outset that the rules of evidence may be adapted to permit Indigenous witnesses to engage in a narrative style of testimony. By providing adequate time for Indigenous storytelling, Canadian courts might implement in practice the holding in *Delgamuukw* that oral history evidence must be respected.

It is important to highlight that any adaptations to facilitate Indigenous storytelling in courts would ideally be brought forward by the Indigenous community involved in the litigation, in order to provide the most culturally appropriate ways in which Indigenous testimonies might be presented to the

---

59 Lederach, *The Moral Imagination*, 146.

60 Ibid., 160: "People working with reconciliation need to rethink healing as a process paced by its own inner timing, which cannot be programmed or pushed to fit a project. People and communities have their own clocks."

courts. My suggestions merely offer one example of a way in which courts might adapt their processes to this end.

Fourth, judges might take an active role in creating flexible platforms to facilitate the resolution of disputes involving Indigenous communities. Lederach argues that the creation of transformative social change relies on the establishment of a "context-based, permanent, and dynamic platform capable of non-violently generating solutions to ongoing episodes of conflict."[61] Such platforms need to recognize that the relationship between the Canadian state and Indigenous groups is fragile and requires continual renewal, renegotiation, and dialogue.

One key aspect of such flexible platforms is the need to create effective ways to negotiate. The Court might require the government and Indigenous communities to negotiate and provide guidelines for establishing informal, accessible, and mutually designed conflict-resolution processes should the negotiations hit obstacles. Affected Indigenous communities need to play a central role in designing the processes and rules governing negotiations, in order to build and maintain flexible and appropriate conflict-resolution platforms and mitigate power imbalances.[62]

Oil and Water in Haida Gwaii

Upon my arrival, I was taken by school bus to the bed-and-breakfast—a quaint place on the water recommended to me by the compassionate Caucasian lawyer with whom I was working. On the five-minute bus trip, I was awakened to the magic of the island—I saw three bald eagles, two deer, and one bear.

My trip to Haida Gwaii brought to light the disjuncture between the pristine beauty of the island and the threat that offshore oil and gas development poses to the environment and to Haida culture. My visit reinforced the importance of understanding the context in which a dispute arises to grasp fully the implications of any decision. The physical distance between the Canadian courts and the environment in which the offshore dispute is located compounds the difficulties of reconciling competing cultural values and of understanding the real-life implications of legal decisions.[63]

The dispute-resolution processes might also provide for negotiations to alternate between government offices and the Indigenous territory in question. The requirement for government officials to meet in the Indigenous territory might serve to engage their moral imaginations, develop an

---

61 Ibid., 47.

62 In relation to the Indian Residential Schools Settlement, Regan, "Unsettling the Settler Within," 151, highlights the shortcomings of the federal government's attempt to unilaterally impose a tort-based resolution process, which was seen as illegitimate and unacceptable to survivors.

63 Terry Glavin, "The Fall of Dimlahamid: The Gitxsan Wet'su'weten and the Fallout of the Delgamuukw Decision," in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, ed. John Bird, Lorraine Land, and Murray MacAdem (Toronto: Irwin Publishing, 2002), 175, investigates the impact of the Supreme Court of Canada's decision in *Delgamuukw* on the actual community in which Delgamuukw lives.

appreciation of the context of the dispute, and alter the balance of power. This shift in power and appreciation for the geography of the territorial dispute may serve to increase the transformative potential of such interactions.

Finally, Canadian judges might engage their moral imagination in making decisions involving Aboriginal claims. Although many theorists point to the limitations of transformative social change occurring through the Canadian court system,[64] Canadian courts remain one of the few forums where Indigenous peoples can bring their claims to protect their lands, cultures and peoples.[65] As such, courts might play an important role in redefining the relationship between Indigenous peoples and the Canadian state when Indigenous claimants choose to afford them the opportunity to resolve disputes involving Aboriginal rights.

In engaging the moral imagination, judges might adopt a transformational approach that recognizes the possibility that the existing system, structures, and relationships may need revisioning.[66] The moral imagination asks judges to imagine that multiple realities and world views might be able to exist simultaneously[67] without the need to impose colonial views on Indigenous peoples. The moral imagination might, for example, enable a Canadian judge to question the basis and legitimacy of the Canadian state's assertion of sovereignty without requiring the corresponding dismantling of the state. This questioning might instead lead to the creation of mutually agreed dispute-resolution mechanisms that create dialogue and transform Indigenous/non-Indigenous relationships from those based on violence and coercion to those based on mutual respect.[68]

IV. Toward an Alternative Future

Canada has a violent and inherently colonial legacy with respect to its treatment of Indigenous peoples. The journey toward decolonization will be perilous, riddled with discomfort and unsettling emotions; the journey, however, will be worthwhile. When faced with Aboriginal claims, Canadian courts can

---

64 See Turpel, "Aboriginal Peoples and the Canadian Charter"; see also Delgado and Stefancic, *Critical Race Theory*, 26–31.

65 Kerry Wilkins, "Conclusion: Judicial Aesthetics and Aboriginal Claims," in *Advancing Aboriginal Claims: Visions/Strategies/Directions*, ed. Kerry Wilkins (Saskatoon: Purich Publishing, 2004), 288, recognizes that Indigenous peoples and individuals are often compelled to bring claims to Canadian courts as a defence to a criminal prosecution or in response to government and non-Indigenous pressures on their lands and resources.

66 Regan, "Unsettling the Settler Within," 54, citing Christopher Mitchell, "Beyond Resolution: What Does Conflict Transformation Actually Transform?" *Peace and Conflict Studies* 9 (2002), 20.

67 Lederach, *The Moral Imagination*, 62, says that the moral imagination is built upon the capacity to embrace multiplicity.

68 It is important, although not the focus of this article, to note that the moral imagination might also be engaged by legislators and government bureaucrats to recognize Indigenous perspectives within legislation. Borrows, *Recovering Canada*, 137, advocates for the explicit inclusion of Indigenous legal concepts and world views within Canadian law. For example, he advocates for future generations and non-human entities, such as the environment, to be represented in decisions relating to environmental issues and the design of human settlements: ibid., 44–45, 54.

begin to create space for Indigenous storytelling as a step toward restoring the relationship between Indigenous and non-Indigenous peoples in Canada. By creating respectful spaces, embracing discomfort, genuinely listening to Indigenous restorying, and engaging the moral imagination, Canadian courts might take their first anti-colonial step.[69]

Abstract

This article advocates for the inclusion of intercultural dispute-resolution principles in Canadian courts to resolve conflicts between Indigenous communities and the Canadian state. These principles include judges' opening themselves up to discomfort, emotion, and unsettling in listening to Indigenous testimonies; facilitating ongoing processes for negotiation; and engaging the moral imagination to make court procedures more culturally appropriate for Indigenous testimonies. The author argues that by implementing these principles, courts can contribute to the creation of more respectful relationships between Indigenous and non-Indigenous people.

Keywords: Aboriginal, Native, Indigenous, decolonization, rules of evidence, oral history

Résumé

Cet article préconise l'inclusion de principes en matière de résolution des conflits interculturels au sein des tribunaux canadiens afin de résoudre les conflits entre les communautés autochtones et le gouvernement canadien. Ces principes incluent la volonté des juges d'être parfois mal à l'aise ou de vivre des émotions lorsqu'ils écoutent les témoignages des Autochtones, facilitant ainsi les processus continus de négociation et engageant l'imagination morale afin de rendre les procédures judiciaires culturellement mieux adaptées envers les témoignages autochtones. L'auteure soutient qu'en incluant ces principes les tribunaux peuvent contribuer à la création de relations plus respectueuses entre les Autochtones et les non-Autochtones.

Mots clés : Autochtone, indigène, décolonisation, règles de la preuve, histoire orale

Kirsten Manley-Casimir
PhD Candidate
Faculty of Law
University of British Columbia
1822 East Mall
Vancouver, BC V6T 1Z1 Canada
kmanleycasimir@hotmail.com

[69] This idea of courts taking their "first anti-colonial step" comes from Christie, "A Colonial Reading of Recent Jurisprudence," 47.