

# Introduction: Moving from the *Why* to the *How* of Indigenous Law

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## INTRODUCTION: MOVING FROM THE *WHY* TO THE *HOW* OF INDIGENOUS LAW

*Fraser Harland\**

Si un numéro spécial portant sur « Le droit autochtone et le pluralisme juridique » avait été publié il y a vingt-cinq ans, il est probable que ses contributeurs autochtones aient eu à expliquer et à justifier l'existence même du droit autochtone et sa relation avec le droit canadien.<sup>1</sup> Certains auteurs non autochtones auraient peut-être développé des arguments concernant la possibilité que le droit autochtone informe le travail de juges canadiens, de négociateurs de revendications territoriales et de législateurs. D'autres auraient peut-être posé que les ordres juridiques qui ont formé et continuent de former les communautés autochtones ne constituent pas le *droit* du tout.<sup>2</sup> En d'autres mots, le débat aurait pu être centré sur *pourquoi* il faut engager avec le droit autochtone.

Today, questions around the need to engage with Indigenous law have given way to an emerging consensus that extends far beyond the legal academy. Law schools<sup>3</sup> and law societies<sup>4</sup> increasingly recognize the im-

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\* Editor-in-Chief, Volume 61. For helpful comments on this Introduction, and indeed for countless hours spent on every article in Volume 61, I am indebted to Emma Loignon-Giroux and Stacey Smydo. Of course, we collectively relied on and benefited from the fine work of the entire editorial board of the *McGill Law Journal*. Working as Editor-in-Chief in general, and on this special issue in particular, has been, quite simply, the greatest professional honour of my life to date.

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<sup>1</sup> En effet, dans un article de John Borrows, un des contributeurs à ce numéro spécial, qui parût au sein de la *Revue de droit de McGill* il y a vingt ans, ceci était précisément le but (voir John Borrows, « With or Without You: First Nations Law (in Canada) » (1996) 41:3 RD McGill 629).

<sup>2</sup> Pour une formulation infâme de cet argument, voir l'analyse du juge McEachern dans *Delgamuukw v British Columbia*, 79 DLR (4th) 185, 1991 CanLII 2372 (BC SC).

<sup>3</sup> Perhaps most ambitiously, the University of Victoria has approved in principle a joint common law/Indigenous law (JD/JID) program (see University of Victoria, Faculty of Law, “Joint Program in Canadian Common Law and Indigenous Legal Orders”, online: <[www.uviclss.ca/blog/wp-content/uploads/2016/02/JID-Scope-and-Components-26-](http://www.uviclss.ca/blog/wp-content/uploads/2016/02/JID-Scope-and-Components-26-)

portance of teaching and making space for Indigenous law. The Supreme Court of Canada has explicitly required that courts account for Indigenous law when adjudicating Aboriginal title claims.<sup>5</sup> And the Truth and Reconciliation Commission issued numerous calls to action pertaining to Indigenous law in its recently published final report.<sup>6</sup> If it is no longer controversial to assert the relevance of Indigenous legal orders, however, there is significant divergence on where we go from here. In other words, the debate has shifted from *why* Indigenous law matters to *how* it should be taught, recognized, interpreted, and understood.

En février 2016, dans le cadre du symposium annuel de la *Revue de droit de McGill*, les contributeurs de ce numéro spécial se sont rassemblés pour présenter leurs textes aux étudiants, professeurs de droit et aux membres des communautés mcgilloise et montréalaise. La version publiée des textes paraît maintenant dans ce numéro spécial pour la toute première fois. À partir de perspectives toutes aussi variées l'une que les autres, les auteurs tentent de trouver une réponse à la très importante question : *comment* approcher le droit autochtone?

Val Napoleon and Hadley Friedland offer a method for using common law techniques to engage with the legal principles in Indigenous stories, narratives, and oral histories. Lara Ulrich and David Gill employ this method, applying the legal principles from Mi'kmaq stories to the question of forestry use and management in New Brunswick. Robert Clifford, on the other hand, draws from the context of a fuel spill to argue that non-Indigenous approaches to issues like jurisdiction and remedy fail to understand the cosmological and ontological framework of WSÁNEĆ law. From a pedagogical angle, John Borrows argues that Indigenous law is best taught using Indigenous frameworks and offers a proposed categorization for teaching Anishinaabe law. Aaron Mills contends that Indigenous law can only be safely and respectfully taught if students are first

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January-2016-1.pdf>). In its curriculum renewal, McGill University's Faculty of Law committed to "an integrated education" that will be "broadened to include other legal traditions, including better understandings of indigenous law" (McGill University, Faculty of Law, "A Global Model of Legal Education: BCL/LLB Curriculum Renewal", online: <[www.mcgill.ca/law/future](http://www.mcgill.ca/law/future)>).

<sup>4</sup> For example, in 2015, the Law Society of Upper Canada offered a full-day continuing professional development course on Indigenous law (see Law Society of Upper Canada, "Indigenous Law Issues", online: <[ecom.lsuc.on.ca/cpd/product.jsp?id=CLE14-0111901](http://ecom.lsuc.on.ca/cpd/product.jsp?id=CLE14-0111901)>).

<sup>5</sup> See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 147, 66 BCLR (3d) 285; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 34–35, [2014] 2 SCR 257.

<sup>6</sup> See Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: TRC, 2015), online: <[www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf)>.

given tools to understand the rooted (as opposed to liberal) constitutions and lifeworlds of Indigenous legal orders, before they begin to study Indigenous laws.

D'autres auteurs considèrent la façon dont les institutions non autochtones pourraient interagir avec les ordres juridiques autochtones. Sébastien Grammond et Christiane Guay exposent les lacunes de mesures législatives récemment proposées au Québec, limitées par leur incapacité de comprendre et d'adresser adéquatement les différences inhérentes dans l'« adoption coutumière » innue. Pour sa part, Kirsten Manley-Casimir milite pour une interprétation bijuridique du principe du respect, qui pourra guider la jurisprudence reliée au titre autochtone. Finalement, Geneviève Motard pose que, malgré le niveau important d'autonomie que pourrait garantir le principe de personnalité aux peuples autochtones dans le contexte d'accords territoriaux, les accords actuels n'ont pas employé le principe à son potentiel complet.

These articles share a number of important unifying premises and themes. All agree on the existence of Indigenous law, on its relational nature, on the importance of Indigenous law being shaped first and foremost by Indigenous communities themselves, on the requirement that Indigenous law be approached with respect by non-Indigenous peoples, and on the fundamental significance of these questions for the development of legal theory and practice in Canada. As is the case in any good special issue, however, they also uncover some key strands of disagreement. For example, Napoleon and Friedland see common law lawyers as equipped to interpret Indigenous law—a task taken up by Ulrich and Gill. Borrows, too, does not dispute the possibility of organizing Indigenous law with common law concepts, though it is clearly not his preference. Yet, Mills issues a strong caution that common law lawyers may actually cause harm unless given tools to understand the rooted nature of Indigenous constitutional orders and Clifford calls for Indigenous law to be understood on its own terms. Meanwhile, Manley-Casimir offers a hopeful theoretical framework for addressing Indigenous law while Motard and Grammond and Guay offer more sobering analyses of how (in)effectively state institutions are engaging with Indigenous law in practice.

This brief reflection only scratches the surface of the rich connections and tensions that are disclosed when these articles are read together. As such, I am optimistic that this special issue will make a lasting impact on the scholarly field of Indigenous law. More than that, I hope that it will contribute to a much wider and ongoing dialogue as citizens, law schools, legal scholars, lawyers, judges, courts, legislatures, and Indigenous communities grapple with the complex and immensely important questions raised in these pages.

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