

Meeting Halfway

Reassessing “Cognizable to the Canadian Legal and Constitutional Structure”

JULIA TOUSAW*

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The Supreme Court of Canada has a tradition of not reasoning with Indigenous laws unless those laws are “cognizable” to the Canadian legal and constitu-

* Julia Tousaw, B.Soc.Sc./J.D., was a member of the Charter Class of the Bora Laskin Faculty of Law at Lakehead University. She thanks her Professors, and in particular Karen Drake and Aaron Mills, for their helpful feedback and inspiration in writing this paper. She also thanks the students and reviewers at the Indigenous Law Journal for their thorough and insightful editorial suggestions. Julia began her career as an Assistant Crown Attorney and is now practicing civil litigation in Toronto, representing Indigenous persons, organizations, and nations.

tional structure. This tradition has created a standard that is too high, as it assumes that judges and lawyers cannot reason with law unless there is agreement on legal propositions or underlying values. But propositions and values shift over time. An important method of reasoning used in the common law is analogical reasoning, which is also used in Indigenous legal orders. Where Indigenous laws incorporate analogical reasoning, those laws are cognizable to the Canadian legal system. When courts realize this, they can engage with the legal propositions and values in Indigenous laws (and Indigenous laws can eventually impact the development of the common law). Until then, the cognizable tradition remains fundamentally unjust, contrary to the promise in Van der Peet, and it makes for poor legal reasoning.

I Introduction

In the 1960s, the Canadian government implemented a settlement policy in Quebec–Labrador whereby nomadic Innu were forced to settle in permanent villages. Prior to forced settlement,¹ the Innu practiced conflict avoidance, a method of dispute resolution in which hunting groups separated when disputes arose. This method worked well. The population was sparse and hunting groups were highly mobile across a vast territory.² Thus, it was feasible and practical to split from another group when conflicts arose. But forced settlement rendered conflict avoidance as a method of dispute resolution ineffective because it was no longer possible for conflicting hunting groups to split up.³ Forced settlement is said to have dichotomized the Innu worldview. On the one hand, there is country life, which came to be seen as “representing the world of the Innu in its entirety.”⁴ On the other hand, there is sedentary community life, which came to be seen as “the antithesis of Innu reality, uninhabited by the sacred forces that infuse life and social relationships in the country with meaning.”⁵ In this new context, conflict avoidance as a method of dispute resolution may actually make existing conflicts worse.⁶

Val Napoleon says “[t]raditions have to have a useful purpose, and to figure whether this is still the case, the practices have to be discussed. If the practice no longer has a useful purpose, then people need to think about changing it.”⁷

The Supreme Court of Canada will not reason with Indigenous law in Aboriginal rights and title cases unless that law is cognizable to the Canadian legal and constitutional structure (the “cognizable practice”). The Supreme Court’s position is predicated on the existence of a major conflict between the Canadian

1 Adrian Tanner, “The Double Bind of Aboriginal Self-Government” in Colin Scott, ed, *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) at 397.

2 Val Napoleon, “Thinking About Indigenous Legal Orders: Research Paper for the National Centre for First Nations Governance” (National Centre for First Nations Governance, 2007) at 11–12.

3 *Supra* note 1 at 399.

4 Hedda Schuurman, “The Concept of Community and the Challenge of Self-Government” in Colin Scott, ed, *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) at 390.

5 *Ibid.*

6 *Supra* note 2 at 12. Schuurman writes that forced settlement has resulted in a sense of anti-community in that the Innu exhibit characteristics of being opposed to their own social formation. See *supra* note 4.

7 *Supra* note 2 at 13–14.

legal order and Indigenous legal orders. In this sense, the cognizable practice can also be viewed as a method of conflict avoidance. But to what extent is there truly a conflict between the Canadian legal order and Indigenous legal orders? Following Napoleon’s advice, it is time to discuss the problems related to the cognizable practice and a possible solution to those problems.

This paper is grounded in a legal pluralist and multi-juridical perspective of Canada. It proceeds as follows. First, I isolate the original purpose of the cognizable practice from the jurisprudence under section 35 of the *Constitution Act, 1982*,⁸ which was to reason with Indigenous laws in Aboriginal rights and title cases. Second, I show how misconceptions about Indigenous laws act to deny the Aboriginal perspective in rights and title cases. This is fundamentally unjust because it ignores the promise of *Van der Peet* to take the Aboriginal perspective into account when defining Aboriginal rights, and it forecloses meaningful integration of Indigenous laws into Aboriginal rights and title jurisprudence. It also makes for poor analogical reasoning, and therefore poor legal reasoning. Third, I propose a wider solution for meaningful integration of Indigenous laws into Aboriginal rights and title jurisprudence. The solution is to engage with Indigenous laws through the reasoning methodology that the common law and some Indigenous legal orders share: namely, analogical reasoning. I argue that, while legal propositions and values change over time, the consistent aspect of the common law is analogical reasoning. Where Indigenous laws incorporate analogical reasoning, those laws are cognizable to the common law. Fourth, I draw on divergent points of view to identify some of the criticisms of my argument. I conclude by encouraging common law practitioners to meet Indigenous legal practitioners halfway by looking to analogy as a possible means for substantive engagement with Indigenous laws. It is only through substantive engagement that Indigenous laws will help to determine the outcomes of cases.

II The Original Purpose: Reasoning with Indigenous Laws

Courts must take into account the “Aboriginal perspective on the rights at stake” when defining Aboriginal rights. A careful review of *Van der Peet* and *Sparrow* reveals that this means analogical reasoners must reason with Indigenous laws when establishing the existence of an Aboriginal right under section 35 of the *Constitution Act, 1982*. Indeed, this was the original purpose behind the cognizable practice.

In *Van der Peet*, Dorothy Van der Peet challenged the constitutionality of charges laid against her under the federal *Fisheries Act*. She argued that the practices, customs and traditions of the Stó:lō include the integral element of exchanging fish for money or other goods, giving rise to an Aboriginal right under section 35. The court found that no such Aboriginal right exists and that Van der Peet failed to show that the exchange of fish for money or others goods was an integral part of distinctive Stó:lō culture prior to contact. In so holding, the court elaborated on the factors to be considered when taking a “purposive” approach to determining the existence of an Aboriginal right. It was at this moment that the cognizable practice made its debut in Aboriginal rights law:

In assessing a claim for the existence of an aboriginal right, *a*

⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. This paper refers generally to s. 35 of this Act as “section 35”.

*court must take into account the perspective of the aboriginal people claiming the right. In Sparrow, supra, Dickson C.J. and La Forest J. held, at p. 1112, that it is “crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake”. It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure*⁹

The *Van der Peet* court was picking up on *Sparrow*, an earlier Aboriginal rights case in which the court stipulated that “[w]hile it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.”¹⁰

In *Sparrow*, Musqueam band member Ronald Sparrow defended a federal *Fisheries Act* charge on the grounds that the drift net length limitation in the *Fisheries Act* violated his Aboriginal right to fish for food or ceremonial purposes.¹¹ In delineating the right, the court relied on anthropological evidence suggesting that salmon fishing has always constituted an integral part of Musqueam distinctive culture, having a “significant role involv[ing] not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions.”¹² The court therefore concluded that “[t]he Musqueam have always fished for reasons connected to their cultural and physical survival.”¹³ The basis upon which the court concluded that the Musqueam have always fished for reasons connected to their cultural and physical survival reveals what the Aboriginal perspective on the rights at stake means for analogical reasoners.

The British Columbia Court of Appeal decision in *Sparrow* sheds light on what is meant by “reasons connected to cultural and physical survival”. The court found that the anthropologist’s evidence was supported by the Crown witness Mr. Grant, “a member of the Musqueam band who ... [i]n cross-examination ... gave extensive evidence of Musqueam *customs* and history, and of the band’s *present reliance* on the salmon fishery”.¹⁴ Later, the Court of Appeal quoted a third witness who indicated that Indigenous peoples in the Pacific Region “regulated their fishing by their own *ceremonies, laws and customs*, in order to ensure the survival of the renewable resource which they identify as the basis for their own continued survival”.¹⁵

Indigenous laws derive from multiple sources. Borrows teaches that there are at least five sources of Indigenous law: sacred law,¹⁶ natural law,¹⁷ deliber-

9 *R v Van der Peet*, [1996] 2 SCR 507 at para 49, 137 DLR (4th) 289 [emphasis added].

10 *R v Sparrow*, [1990] 1 SCR 1075 at para 69, 70 DLR (4th) 385.

11 *Ibid* at paras 3 and 40.

12 *Ibid*.

13 *Ibid*.

14 *R v Sparrow* (1986), 36 DLR (4th) 246 at paras 16–17, 9 BCLR (2d) 300 [emphasis added].

15 *Ibid* at para 68 [emphasis added].

16 John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 24. Of sacred law as a source of Indigenous law, Borrows says at 24, “some Indigenous laws have sacred sources. Laws can be regarded as sacred if they stem from the Creator, creation stories or revered ancient teachings that have withstood the test of time. When laws exist within these categories they are often given the highest respect.”

17 *Ibid* at 28. Of natural law as a source of Indigenous law, Borrows says at 28, “Indigenous peoples also find and develop law from observations of the physical world around them. When considering laws from this source, it is often necessary to understand how the earth maintains functions that benefit us and all other beings. This approach to legal interpretation

ative law,¹⁸ positivistic law¹⁹, and customary law,²⁰ as well as combinations of these sources.²¹ Furthermore, the forms Indigenous laws take are as diverse as Indigenous legal orders themselves. Law is contained in stories,²² in the land,²³ in processes of deliberation,²⁴ in rules and teachings,²⁵ and in customs.²⁶ It is recorded in place names,²⁷ in traditions and practices,²⁸ in oral histories and oral traditions,²⁹ and within relationships and kinship networks³⁰ — and these lists are not exhaustive. With this knowledge, and reflecting on the evidence given at the *Sparrow* trial, it is clear that the witnesses were testifying to Musqueam law. Therefore, it was Musqueam law grounding the “reasons” that the Supreme Court later referred to in *Sparrow* when holding that the Musqueam “have always fished for reasons connected to their cultural and physical survival.”³¹ The Court of Appeal understood this and their understanding was reproduced in the Supreme Court’s decision:

Dr. Suttles described the special position occupied by the salmon fishery in that society. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in “myth times”, established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual. Toward the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species.³²

This passage shows that the anthropological evidence in *Sparrow* described and explained Musqueam protocols (law) meant to ensure conservation of the salmon fishery. Thus, the “Aboriginal perspective” means that analogical reason-

attempts to develop rules for regulation and conflict resolution from a study of the world’s behaviour.”

- 18 *Ibid* at 35. Of deliberative law as a source of Indigenous law, Borrows says at 35, “An especially broad source of Indigenous legal tradition is formed through processes of persuasion, deliberation, council, and discussion. ... The human dimension of these laws means that recognition, enforcement, and implementation make them subject to re-examination and revision through the generations.”
- 19 *Ibid* at 46. Of positivistic law as a source of Indigenous law, Borrows says at 46 that positivistic law: “can be found in the proclamations, rules, regulations, codes, teachings, and axioms that are regarded as binding or regulating people’s behaviour.”
- 20 *Ibid* at 51. Of customary law as a source of Indigenous law, Borrows says at 51, “Customary law can be defined as those practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them.”
- 21 Borrows cautions against rigidly classifying Indigenous laws into categories, given that these sources interact and influence each other in complex and diverse legal systems, particularly with oral legal traditions. See generally *Ibid* at 55–58.
- 22 *Ibid* at 25.
- 23 *Ibid* at 28.
- 24 *Ibid* at 35.
- 25 *Ibid* at 46–47.
- 26 *Ibid* at 51.
- 27 *Supra* note 2 at 13.
- 28 *Ibid*.
- 29 *Ibid* at 14.
- 30 *Ibid* at 15.
- 31 *Supra* note 10 at para 40.
- 32 *Ibid* at para 29.

ers must reason with Indigenous law. *Sparrow* ought to be understood as a commitment to reason with Indigenous laws when taking the Aboriginal perspective into account.

III The Problem: Misconceptions About Indigenous Laws and Poor Analogical Reasoning

The Aboriginal rights and title jurisprudence contains misconceptions about Indigenous laws. Here, I discuss two of those misconceptions. First, common law practitioners and judges misconceive Indigenous laws as fact, but not as the law of another legal order. Second, courts misconceive some Indigenous laws as excessively general, thereby holding Indigenous laws to a higher standard of intelligibility than that used for the common law. These two misconceptions deny the Aboriginal perspective, which in turn forecloses meaningful integration of Indigenous laws into Aboriginal rights and title jurisprudence. Furthermore, these misconceptions make for poor analogical reasoning, and therefore poor legal reasoning. This is because the analogical reasoner who fails to substantively engage with Indigenous laws risks failing to identify and contrast relevant and irrelevant reasons, and risks coming to conclusions based on irrelevant reasons.

Courts Misconceive Indigenous Laws as Facts

The common law misconceives Indigenous laws as cognizable for their truth as evidence of historical facts but *not* cognizable factually as the law of another legal order. An examination of the court's treatment of Indigenous laws expressed through oral histories in *Delgamuukw v British Columbia*³³ sheds light on this misconception's impact on analogical reasoning in the common law.

In *Delgamuukw*, Gitksan and Wet'suwet'en hereditary chiefs, on behalf of their Houses, claimed ownership over their traditional territory in British Columbia. The claimants sought to adduce evidence at trial on the historical use and ownership of their territories through oral histories—the *adaawk* of the Gitksan Houses and the *kungax* of the Wet'suwet'en. The court stated that the oral histories were used for proof of historical facts.³⁴ As out-of-court statements admitted for their truth, oral histories conflict with the rule against hearsay.³⁵ The trial judge admitted the oral histories under the principled exception to hearsay³⁶ but refused to give them independent weight. The Supreme Court later concluded that the trial judge's treatment of the oral histories did not accord with the principle from *Van der Peet* that the rules of evidence must be adapted in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims.³⁷ The Supreme Court held that “[h]ad the trial judge assessed the oral histories correctly, his conclusions on ... issues of fact” relating to occupation and ownership “might have been very different.”³⁸

Though the matter was never retried, Napoleon questions the extent to which the *adaawk* and *kungax* would be differently treated on retrial, arguing that the courts’ “treatment of aboriginal oral histories as cultural artefacts conti-

33 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.

34 *Ibid*, at para 87.

35 *Ibid* at para 86.

36 The principled exception to hearsay comes from *R v Khan*, [1990] 2 SCR 531, 41 OAC 353. It provides that hearsay may be admitted where reliability and necessity are met.

37 *Supra* note 33 at paras 105–107.

38 *Ibid* at para 107.

nues to be appallingly ethnocentric despite constant references to considering the perspectives of aboriginal peoples.”³⁹ Napoleon reproduces excerpts from the *Delgamuukw* trial to show “how difficult it was for the Court to accept the truth of the *adaawk*.”⁴⁰ In one exchange between counsel for the plaintiffs and the court, the trial judge states, “I don’t have any trouble with the proposition that the *adaawk* or the oral history of the various houses is admissible. My problem is to define what is the *adaawk*. ... [I]f the witness says it’s part of the *adaawk*, am I bound by that?”⁴¹ When counsel indicates that the *adaawk* is being led to demonstrate the truth of the oral histories, the court refers to the evidence of the Gitxsan witness. The court states, “she has said that the belief is that the village was destroyed by a supernatural bear. And I think you said a moment ago ... that you were putting forward the history of the *adaawk* as proof of the truth of the facts stated in it.”⁴² Counsel later responds by saying “I think it is clear from the evidence that you’ve heard that the spirit world, the animal world and the human world in many aspects of history are interrelated.”⁴³

It is worth discussing what it would mean to recognise Indigenous laws as laws instead of facts. This could involve the application of standards which exist in private international law. In private international law, the party seeking to rely on the foreign law must plead the foreign law, and they bear the burden of establishing the contents of the foreign law through an expert. Although the foreign law, once proved, remains fact and not law, foreign law is typically still treated by courts “as a matter of law in terms of its application, even if nominally still treated as a matter of fact.”⁴⁴

Studies in the area of international conflict of laws have shown that once the content of the foreign law is ascertained, “there is generally an abandonment of the concept of ‘proof’ and a clear distinction between the ascertainment of adjudicative facts—normally requiring proof—and the ascertainment of facts ‘of a peculiar kind’, such as foreign law.”⁴⁵ Once the contents of the foreign law are established, evidentiary hurdles such as hearsay, which stood in the way of substantive engagement with Indigenous law in *Delgamuukw*, are inapplicable. The role of foreign material in the construction of better judgments should not be downplayed. As Justice La Forest notes,

[T]he use of foreign material affords another source, another tool for the construction of better judgments. Recourse to such materials is, of course, not needed in every case, but from time to time a look outward may reveal refreshing perspectives. The greater use of foreign materials by courts and counsel in all countries can, I think, only enhance their effectiveness and sophistication. In this era of increasing global interdependence ... it seems normal that there should be increased sharing in and

39 Val Napoleon, “Delgamuukw: A Legal Straightjacket for Oral Histories?” (2005) 20:2 CJLS 123 at 123–124.

40 *Ibid* at 149.

41 *Ibid*.

42 *Ibid* at 150.

43 *Ibid*.

44 Shaheezal Lalani, “Establishing the Content of Foreign Law: A Comparative Study” (2013) 20:1 MJECL 75 at 85.

45 *Ibid* at 86.

among our law and lawyers as well.⁴⁶

Courts and counsel should make greater use of Indigenous laws when arguing and reasoning within the Aboriginal rights and title context. Courts should reason with Indigenous laws as law and not as fact, even if the Indigenous laws are proven as fact according to the principles of private international law.

Courts Misconceive Some Indigenous Laws as Excessively General

A second misconception in the common law is that some Indigenous laws, in so far as they are “excessively general”, are not cognizable. This notion originated in *R v Pamajewon*,⁴⁷ where the court held that a right to self-government advanced in very broad terms is not cognizable. The court in *Delgamuukw* later reiterated this proposition, noting that, “[u]nsurprisingly, as counsel for the Wet'suwet'en specifically concedes, the appellants advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1).”⁴⁸

In *Pamajewon*, two members of Shawanaga First Nation and three members of Eagle Lake First Nation defended *Criminal Code* gaming charges on the grounds that the *Code* provisions violated their Aboriginal right to self-government, which includes a right to regulate gambling on reserve. Characterizing the right as a right to high-stakes gambling, the court held that the evidence did not show that gambling, or the regulation of gambling, was an integral part of the distinctive cultures of Shawanaga or Eagle Lake First Nations at the time of contact. It was therefore not protected by section 35.

Prior to characterizing the right, the court said that the legal standard set out in *Van der Peet* applies to self-government claims.⁴⁹ Such claims must, therefore, be considered “in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes.”⁵⁰ The court’s characterization of the right, however, is not consistent with *Van der Peet*, as the court failed to consider the Aboriginal perspective in equal measure to the common law perspective. The court found that a right to manage use of reserve lands is inconsistent with the necessary specificity requirement from *Van der Peet*, stating that “[t]o so characterize the appellants’ claim would be to cast the Court’s inquiry at a level of excessive generality.”⁵¹ In applying the integral to the distinctive culture test, the court goes on to say that, while the evidence

demonstrate[d] that the Ojibwa gambled ... [it] in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community. [The witness’s] ... account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to

46 Gerald V La Forest, *The Use of American Precedents in Canadian Courts*, (1994) 46 Me L Rev 211 at 220.

47 *R v Pamajewon* [*R v Jones*; *R v Gardner*], [1996] 2 SCR 821, 138 DLR (4th) 204.

48 *Supra* note 33 at para 170.

49 *Supra* note 47 at para 24.

50 *Ibid.*

51 *Ibid* at para 27.

community regulation, of the sort at issue in this appeal.⁵²

By refusing to engage with the Indigenous laws due to their excessive generality, the court in *Pamajewon* fails to apply the same intelligibility standard as required by the common law. At common law, courts rely on *Nova Scotia Pharmaceutical*. That case states that a law is impermissibly vague only if it “does not provide an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria.”⁵³ The case further states that “a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able ... to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”⁵⁴

In *Pamajewon*, the principle that the Aboriginal perspective must be taken into account was undermined by the specificity requirement from *Van der Peet*. This principle was undermined without any analysis into whether the appellant’s practices relating to the regulation of gaming on reserves met the low threshold for vagueness from *Nova Scotia Pharmaceutical*. In these circumstances, the effect of the cognizable standard is that the Indigenous perspective is held to a higher standard of intelligibility compared to the common law. This is fundamentally unjust. As Borrows notes,

[i]f broader Canadian law can describe “debatable” legal standards as intelligible, Indigenous legal traditions should surely be given the same courtesy. Care must be taken to ensure that Indigenous legal traditions are not held to a higher standard of intelligibility than non-Indigenous law.⁵⁵

Borrows goes on to note that “Indigenous people may well be able to argue that their laws meet the standards of intelligibility as outlined by the courts, even if they are not immediately ‘cognizable’ to a judge trained in the common law or civil law systems.”⁵⁶

The Problem Summarised

Courts harbour two misconceptions about Indigenous laws which in turn cause courts to reject the use of Indigenous laws on the basis that they are not cognizable. First, courts mistake Indigenous laws for facts instead of laws. Second, courts misconceive some Indigenous laws as excessively general, thus requiring them to be more intelligible and specific than the common law. The result is poor analogical reasoning, and therefore poor legal reasoning.

In this section, I provide two examples of poor analogical reasoning where the Aboriginal perspective was shut out. The first involves the court failing to identify and contrast relevant with irrelevant factors. The second involves the court resting its decision on irrelevant reasons.

Proper analogical reasoning requires the identification and discussion of both relevant and irrelevant factors. As Levi states, legal rules arise “out of a process in which if different things are to be treated as similar, at least the dif-

52 *Ibid* at para 28.

53 *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at para 64, 93 DLR (4th) 36.

54 *Ibid* at para 57. See also *supra* note 16 at 142.

55 *Supra* note 16 at 142.

56 *Ibid*.

ferences have been urged.”⁵⁷ Further, patterns of similarity and difference do not jump out from the facts on their own. The analogical reasoner makes the patterns herself. As Sunstein says, “[p]atterns are made, not simply found. Whether one case is analogous to another depends on substantive ideas that must be justified.”⁵⁸

We can refer back to *Pamajewon* as an example of differences not being urged because the Aboriginal perspective was ignored. In *Pamajewon*, one rule that emerged was that claiming self-government is excessively general and not cognizable to the Canadian legal system. Comparing the facts in *Pamajewon* to the principles expressed in *Van der Peet*, the court considered whether regulating gambling on reserve lands was integral to the distinctive cultures of the Shawanaga and/or Eagle Lake First Nations. The court opined,

the only evidence presented at either trial dealing with the question of the importance of gambling was that of James Morrison, who testified at the Pamajewon trial with regards to the importance and prevalence of gaming in Ojibwa culture. While Mr. Morrison’s evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, his evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community. His account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal.⁵⁹

The reasoning is unpersuasive insofar as it does not urge difference. Indeed, the passage implies that self-government *requires* evidence of large-scale activities subject to community regulation. Yet it does so *without justifying why this is so* and without justifying why more informal activities taking place on a small scale can never be relevant evidence for proving self-government. A practitioner of Ojibwa or Anishinaabe law could, in this situation, explain why the existence of small-scale, informal activities *actually is* or *perhaps is not* relevant to determining whether self-government existed *in Ojibwa culture*. Without the Aboriginal perspective, however, the court fails to urge the relevance or irrelevance of the difference.⁶⁰

Shutting out the Aboriginal perspective also results in situations where analogical reasoning offers reasons that do not support the truth of the ultimate con-

57 Edward Hirsch Levi, “An Introduction to Legal Reasoning” (1948) 15:3 U Chicago L Rev 501 at 504.

58 Cass R Sunstein, “On Analogical Reasoning” (1993) 106:3 Harv L Rev 741 at 756.

59 *Supra* note 47 at para 28.

60 This comment is subject to the following caveat. The court in *Pamajewon* re-characterized the right from a right to self-government to a right to high-stakes gambling. The parties had made submissions and called evidence based on a claimed right to self-government. The parties did not know that the Supreme Court would re-characterize the claimed right to a right to high-stakes gambling. In addition, the *Van der Peet* test did not exist at the time of the *Pamajewon* trial. For these reasons, the Supreme Court’s dismissal of the claim based on a lack of evidence is questionable from a legal process perspective. See Senwung Luk, “Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada” 41:1 Ottawa L Rev 101 at 121.

clusion and are irrelevant to determining whether the conclusion is true.⁶¹ Macklem identifies an instance of this in *Van der Peet*, when the court was determining the purpose of section 35. Macklem notes that the court “defines the purpose of the provision as the reconciliation of Aboriginal prior occupancy with the fact of Canadian sovereignty.”⁶² But Canadian sovereignty, Macklem argues, “is irrelevant to determining what purpose is served by constitutionally recognizing and affirming such rights”⁶³. Sound legal reasoning demands substantive argument about the relevance or irrelevance of Canadian sovereignty to the purpose served by constitutionally recognizing section 35 rights. Untested by Indigenous laws, Canadian sovereignty is now so fixed in the jurisprudence that it is constitutive of how many lawyers arrange their worlds.⁶⁴ It is constitutive of thought itself.

IV A Proposed Solution: Reason Analogically with Indigenous Laws in Aboriginal Rights and Title Cases

The failure of Canadian courts to substantively engage with Indigenous laws might be remedied in part by emphasizing that the common law and many Indigenous legal orders share the methodology of reasoning by analogy. The use of analogical reasoning makes it possible to engage with Indigenous laws as laws while holding them to the same intelligibility standard as the common law.

This section proceeds in four parts. First, I explain what an analogy is, and how analogy permeates the common law. Second, I show that reasoning by analogy is also prevalent in Indigenous legal orders. Third, I describe how analogical reasoning allows the common law to reason with Indigenous legal orders, without requiring those orders to agree on fundamental principles or underlying values. Finally I demonstrate, with examples, how this solution might work.

Analogical Reasoning in the Common Law

An analogy is a tool for thinking. It is a comparison of two or more things based on similarity.⁶⁵ Analogy is used in the common law through a reasoning process known as analogical reasoning. Analogical reasoning is so important to the common law that the mechanics of this reasoning process is often the first lesson delivered to law students in their first year.⁶⁶ It is alien at first, but students quickly learn to compare cases based on likeness. Students identify similarities

61 This can be understood as a fallacy of relevance. For a discussion on fallacies and on the classification of certain fallacies as fallacies of relevance, see Douglas N Walton, “Which of the Fallacies are Fallacies of Relevance?” (1992) 6:2 *Argumentation* 237.

62 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press Incorporated, 2001) at 166.

63 *Ibid.*

64 From an analogical reasoning perspective, Sunstein explains how “similarity between ... two cases can almost be taken as constitutive of how lawyers arrange their world, rather than as a controversial proposition that requires a substantive argument.” He goes on to note that “[m]uch creativity in law consists of the effort to show that a judgment about likeness that seems constitutive of thought actually depends on contestable substantive arguments – or vice-versa”. See *supra* note 58 at 749.

65 See generally, *The Oxford English Dictionary*, 3rd ed, *sub verbo* “analogy”.

66 Sunstein describes the importance of this reasoning process. Sunstein writes that “[r]easoning by analogy is the most familiar form of legal reasoning. It dominates the first year of law school; it is a characteristic part of brief-writing and opinion-writing as well.” See Cass Sunstein, *supra* note 58 at 741.

and differences amongst cases, then reason from those similarities and differences to mould legal argument. Outside of law school it is no different: lawyers argue and judges decide cases based on similarity and difference.

Analogical reasoning can be found in all common law cases. For example, in *R v Halley*,⁶⁷ a police officer obtained a search warrant after receiving information from two confidential informants (“CIs”) that guns and drugs were stashed in the accused’s apartment. After finding that the search of the apartment breached the accused’s section 8 *Charter* rights, the court had to determine whether the loaded firearm located during the search ought to be excluded under section 24(2) of the *Charter*. The court was presented with the Ontario Court of Appeal decision *R v Dhillon*.⁶⁸ In *Dhillon*, the search warrant obtained based on information from a CI was set aside, a section 8 *Charter* breach was found and the evidence was excluded under section 24(2). In applying *Dhillon*, the court in *Halley* reasons by analogy, saying,

In my view, this case, like *R. v. Dhillon*, falls on the more serious side of the spectrum of police conduct. I appreciate that the facts of this case are not on all fours with the facts in the case of *R. v. Dhillon, supra*. In particular, in the case at bar, the affiant did not misstate emails and the results of surveillance because he was rushing. However, after listening to the examination of Det. Cst. Williams, and hearing him testify in court, I do find that he had no real appreciation for what his obligations were in relying on untested informants ... Moreover, Det. Cst. Williams demonstrated a complete disregard for the need to be accurate, fair and frank to the issuing justice about the strengths and weaknesses of his application. So while this case is not on all fours with *R. v. Dhillon*, I do find that there are relevant similarities in the overall conduct of the affiant in this case with the affiant in the *Dhillon* case. In my view, when I consider all the evidence, I am satisfied that Det. Cst. Williams’ conduct falls on the more serious side of the spectrum of police conduct.⁶⁹

Viewed simply as a comparison of similarity and difference, and based on the excerpt from *Halley*, analogical reasoning seems simple. Nonetheless, law students struggle to employ it. This is because the key to sound analogical reasoning is relevance.

Cass Sunstein has said that “[t]he major challenge facing analogical reasoners is to decide when differences are relevant.”⁷⁰ This is because similarity must first be *seen* between cases before the legal principle inherent in the first case can be applied to the second case.⁷¹ Analogical reasoners must therefore (a) identify similarity and difference and (b) decide which similarities and differences are *relevant*. From these select similarities and differences, the analogical reasoner moulds her argument in an attempt to convince the judge that her case merits or does not merit the application of the legal rule from the prior case. The legal rule does not come out of nowhere. Rather, the relevant legal

67 *R v Halley*, 2012 ONCJ 117, 255 CRR (2d) 91.

68 *R v Dhillon*, 2010 ONCA 582, 218 CRR (2d) 243.

69 *Supra* note 67, at para 63.

70 *Supra* note 58 at 745.

71 *Supra* note 57 at 501–502.

rule is itself “discovered in the process” of analogical reasoning.⁷² On this view, law is a process of reasoning. Thus, when thinking about law, “the emphasis should be on the process.”⁷³

Analogical Reasoning in Indigenous Law

The common law is not the only legal order to reason analogically. Indigenous legal orders, when articulating law through stories, reason analogically as well. Through their work applying adapted common law methodologies to Indigenous legal traditions, Napoleon and Friedland observe that “stories provide an architecture that enables reasoning by analogy and metaphor as a form of collaborative problem solving.”⁷⁴ Thus, while the nature, content and structure of Indigenous stories will vary in accordance with the diversity of Indigenous societies and legal orders, stories can generally be understood as tools for thinking within Indigenous societies.⁷⁵ Accordingly, practitioners of Indigenous law learn by analogy just like practitioners in the common law.⁷⁶ And just like in the common law, analogical reasoning in Indigenous law is far from simple.

Analogical reasoning in Indigenous stories occurs at the application stage, just as it does in the common law. However, the reasons in Indigenous stories are often implicit or unsaid, unlike in the common law, where reasons are (supposed to be) explicit. Therefore, students of Indigenous laws expressed through stories “make inferences about what the unsaid reason was.”⁷⁷ And just like in the common law, analogical reasoning with Indigenous stories requires the reasoner to identify similarity and difference. Napoleon and Friedland write that “recognizing the variations and divergences [*differences*] is just as important as identifying the patterns [*similarities*] within a specific area in order to answer practical questions and facilitate debate, principled disagreement, and productive agreement.”⁷⁸

Borrows provides examples of analogical reasoning in Anishinaabe law. He explains that heroes, tricksters, monsters and caretakers are characters that frequently appear in Anishinaabe narratives. Likening these characters to ideal “types” as Friedland implicitly did in her legal analysis of Windigos⁷⁹, Borrows explains that these characters’ actions “can be compared and contrasted to contemporary behaviors and analogized or distinguished to guide present actions.”⁸⁰ Thus, through the telling and listening of these Anishinaabe narratives, reasoners analogize from the behaviours of the characters to their own beha-

72 *Ibid* at 502.

73 *Ibid*, at 573.

74 Val Napoleon and Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” (2016) 61:4 McGill LJ 725 at 739.

75 Val Napoleon and Hadley Friedland, “Gathering the threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015–2016) 1:1 Lakehead LJ 16 at 22.

76 John Borrows, “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law & Legal Education” (2016) 61:4 McGill LJ 795 at 812.

77 *Supra* note 75 at 25.

78 *Ibid* at 28.

79 See Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM thesis, University of Alberta, 2009) [unpublished].

80 *Supra* note 76 at 825.

viour.⁸¹ In doing so, standards of judgment are gleaned from the experiences and lessons of the characters and applied to present-day problems.⁸² In this process, analogy is the method by which the legal principles, embodied in the experiences and lessons of the characters, are accessed and applied. And the lessons to be learned are as diverse as the subject matter of the stories themselves.

Take *The Mink and The Marten*, for example. In this Anishinaabe story, a Mink and Marten come to live together, but their relationship is not right. The story continues,

As for the Marten, he killed the hares, ruffed grouse, squirrels, rats. And as for the Mink, fishes only he killed. Even though they gave each other food, yet but a little did Marten (give), never did he give Mink a rabbit's head to eat. And so Mink became discontented. And now Mink did not even feed Marten a fish-tail. And as for himself, Marten grew sulky.

...

Now, when summer came on, they separated from each other. This is as far as (the story) goes.⁸³

Unlike the passage from *Halley*, analogical reasoning does not structure the story itself. Instead, analogical reasoning occurs in the discussion and application of the story. In his law course Anishinaabe Constitutionalism, Aaron Mills invites students to draw on the Anishinaabe gift logic embedded in the story, and to reason analogically to compare the teachings and the facts in *The Mink and The Marten* with the real-life relationship between the Canadian and Anishinaabe constitutionalisms. My sense of the analogical reasoning process in this example follows.

First, consider what is similar and dissimilar between *The Mink and The Marten* and the relationship between Anishinaabe constitutionalism and Canadian constitutionalism. The similarities include discontented relationships and a lack of sharing in a generous way. The differences are that, although Mink and Marten separate after trying to live in relationship, a clear separation has not similarly occurred in the Anishinaabe–Canadian constitutionalism relationship.

Second, examine why these similarities and differences are relevant. The discontented relationship is relevant because it shows the tension and possibilities for conflict that arise when individual needs encounter communal needs. The ungenerous sharing is relevant because it shows a lack of acknowledgment of mutual and interdependent need.

Third, envision what principle from *The Mink and The Marten* can be applied in light of these similarities. The principle is that living together does not work where relationships are not honoured and sharing is not done in the right way. This is why Mink and Marten separate come summer.⁸⁴

81 *Ibid.*

82 *Ibid.*

83 Kagige (John) Pinesi, "The Mink and the Marten" in William Jones (ethnographer) and Truman Michelson, ed, *Ojibwa Texts, Volume VII, Part II*, Publications of the American Ethnological Society, edited by Franz Boas (New York: The Arbor Press Incorporated, 1919) at 129.

84 This interpretation is based on content from the law course *Anishinaabe Constitutionalism*, taught by Professor Aaron Mills at the Bora Laskin Faculty of Law at Lakehead University

A second example drawn from Mills's law course is *The Man, The Snake and The Fox*. In this Anishinaabe story, a man goes out hunting but catches nothing for most of the day. The man comes across an immense serpent tangled in a thicket. The hunter frees the serpent. The serpent springs on the hunter. A fox arrives and realizes the hunter is about to be killed. The fox asks the hunter and the snake why they were locked in a struggle, and the hunter and the snake stop. Each gives their own version of the story. Pretending not to understand the snake's explanation, the fox asks the snake to act out his version. The snake entangles himself once again in the thicket, and the man is saved. The hunter asks the fox how he might show his gratitude in some tangible way. The fox explains that,

Not only was there no need ... there was nothing that the man could do for the fox; there was not a thing that the fox needed or desired of human beings. However, if it would make the man happier ... the man might feed him should he ever have need.⁸⁵

Some years later, the hunter shoots a fox. The man draws his knife to finish him off and the fox gasps, “[d]on’t you remember”.⁸⁶

One can reason analogically to compare the principles behind relationships of sharing in *The Man, The Snake and the Fox* with principles of sharing in the common law. The similarities are that needing of others is common to both systems, and gives rise to relationship. One of the differences, however, is that the relationship of sharing in Anishinaabe law is not a contract. The lack of a contract in Anishinaabe law is relevant to showing the Anishinaabe principle that we are already connected in relationship through legal principles such as gift and responsibility. This is why the fox refuses the one-time gift from the hunter. The fox prefers to be linked to the man in a constant way. The principle from *The Man, The Snake and The Fox* is that when we are linked to others in a constant rather than contractual way, our relations will provide to us what is needed, when it is needed.⁸⁷

Fundamental Principles and Underlying Values in Analogical Reasoning

Legal reasoning comprises three components: legal propositions, the values underlying those propositions, and an overall methodology, analogical reasoning. To the extent that the cognizable practice shuts out substantive engagement with Indigenous laws, the practice assumes that the common law cannot engage with Indigenous laws unless the legal propositions (rules or statements of law) or underlying values (normative principles) are the same as those found in the common law. But this standard is too high, because the common law does not require such a high standard of itself.

The common law is able and designed to incorporate changing values. Indeed, it is through the adoption of shifting values that the common law develops new legal propositions over time. For these reasons, analogical reasoning does

in winter 2014. Mills discusses this course in “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847.

85 Basil Johnston, “Is That All There Is? *Tribal Literature*” (Spring 1991) 128 *Canadian Literature* 54 at 59.

86 *Ibid* at 60.

87 *Supra* note 84.

not require agreement before it gets underway. Broad agreement across parties, whether at the level of propositions or the level of values, is not how analogical reasoning works. Instead, analogical reasoning enables parties to agree on a result without necessarily agreeing on the supporting rationale.⁸⁸ This is so whether or not conflict exists at the level of propositions or values.

Sunstein explains that “people can often agree on constitutional *practices*, and even on constitutional rights, when they cannot agree on constitutional *theories*. In other words, well-functioning constitutional orders try to solve problems through *incompletely theorized agreements*.”⁸⁹ People can therefore know that something is true or relevant without being able to agree on why.⁹⁰ By “theory” Sunstein means fundamental principle. He explains that people can agree on the result and on a narrow explanation for that result, but do not need to agree on the fundamental principle underlying the result.⁹¹ Thus, disagreement on abstract explanations does not preclude agreement on lower-level particulars.⁹²

On this view, it is unnecessary for the court to stipulate that the Aboriginal perspective must be cognizable to the Canadian legal and constitutional structure, since “people can agree on individual judgments even if they disagree on general theory.”⁹³ The cognizable practice, on the other hand, implies that agreement is necessary where it may be impossible. That has never been the role of analogical reasoning in law. Rather, the role of reasoning in law is to reason through difference anyway, even when agreement is impossible. Analogies are the means through which the law makes it “possible to obtain agreement where agreement is necessary ... [and] unnecessary to obtain agreement where agreement is impossible.”⁹⁴

Analogical reasoning is also not hampered by differences in values. As Levi explains, “[l]egal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities.”⁹⁵ Analogical reasoners should be open to seeing the new differences and similarities that the values underlying Indigenous laws inject into the common law system.

The existence of the cognizable practice implies that a permanent conflict exists between the Canadian legal order and Indigenous legal orders. As Borrows explains,

[m]uch of the history of Canadian law concerning Aboriginal peoples can be seen as a contest between ideas rooted in First Nations, English, U.S. and international legal regimes. The intersection of these various legal genealogies is sometimes portrayed as a conflict, in which one source of law is incompatible with, or should gain pre-eminence over, the others. In such instances, the Aboriginal source of law is generally not applied

88 Cass R Sunstein, “Incompletely Theorized Agreements in Constitutional Law” (Spring 2007) 74:1 Social Research: An International Quarterly 1 at 3.

89 *Ibid* at 1 [emphasis in original].

90 *Ibid* at 4.

91 Cass R Sunstein, “Commentary: Incompletely Theorized Agreements” (1995) 108:7 Harv L Rev 1733 at 1735–1736.

92 *Supra* note 88 at 3.

93 *Ibid* at 4.

94 *Ibid* at 5 [emphasis removed].

95 *Supra* note 57 at 573–574.

because of its perceived incompatibility with, or supposed inferiority within, the legal hierarchy.⁹⁶

Based on the foregoing, it is inaccurate to classify the common law and Indigenous legal orders as being in a state of permanent conflict or always incompatible, since analogical reasoning works in the absence of complete agreement on fundamental principles and underlying values. But analogical reasoners do make interpretive choices when determining whether similarities and differences are relevant, and these choices are based only on what is before the court. Thus, in so far as the cognizable practice precludes reasoning with Indigenous laws, judges cannot draw on Indigenous laws when making choices while reasoning. So long as this is the case, Indigenous laws will not make their way into judges' legal reasoning.

How this Solution Might Work

Borrows says that “[t]he principles found within Aboriginal societies contain important standards and criteria against which legal questions can be measured.”⁹⁷ Indigenous laws, treated properly as law, can be the criteria that analogical reasoners draw on when determining the existence and relevance of similarity and difference. For example, Professor Karen Drake, discussing *Van der Peet*, wonders what the cognizable principle might mean for Indigenous law as it plays a role in the articulation of Aboriginal rights under the common law. She asks if the Anishinabek⁹⁸ legal principle that the Earth has legal agency is, on its face, cognizable to the Canadian legal system.⁹⁹ It probably is not. But analogical reasoning works in the absence of complete agreement on principles or underlying values. Therefore, complete agreement on the principle that the Earth has legal agency is not required in order for analogical reasoners to reason with that legal principle.

The same may hold true for the supernatural grizzly bear in the *adaawk* at the *Delgamuukw* trial. Preoccupied with the factual existence of a supernatural grizzly bear, the court may have missed an opportunity to reason with the witness's testimony analogically. The judge did not have to believe in the interrelation of the spirit world, animal world and human world. That was clearly not cognizable to that judge. The judge simply had to believe that the testimony reflected the *adaawk*, and then they could understand the analogy within the witness's testimony. Furthermore, had the judge proceeded on the basis of acceptance of legal pluralism, they may have accepted the witness's statement as true as law, whether or not it was cognizable and true to the judge as historical fact.

96 John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41:3 McGill LJ 629 at 633 [footnotes omitted].

97 John Borrows, “Indian Agency: Forming First Nations Law in Canada” (2001) 24:2 Political Legal and Anthropology Review 9 at 17.

98 The difference between Anishnaabe, Anishnabek, and Anishnabeg is discussed briefly in Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One*, (Saskatoon: Purich Publishing Limited, 2013) at 8. Craft writes that “[t]he Anishinabe (Ojibway, Chipewa, Ojibwe or Anishinaabe) language, *anishinabemowin*, has many dialects. In some areas, Anishinabe people will refer to the plural form as Anishinabek or Anishinabeg. Some will also use a double vowel, e.g. Anishnaabeg, to refer to the long sound of that vowel.”

99 This question was posed to students during the fall 2014 portion of the *Aboriginal Law* course at the Bora Laskin Faculty of Law at Lakehead University.

Trial counsel for the plaintiffs in *Delgamuukw* did invite the judge to reason analogically with the witness's testimony about the supernatural grizzly bear. Counsel argued that the *adaawk* of the bear's destruction of the village was, in part, an analogy for a landslide that had occurred at Seeley Lake near the Gitksan ancestral village of Texplaxam some 3,500 years ago.¹⁰⁰ The judge could have accepted that the story was part of the *adaawk*, and further that the bear was an analogy for the landslide. Had the judge done so, the judge could then have also accepted counsel's submission that the Gitksan peoples had been in that area since at least the time of the landslide.

In an earlier ruling, the trial judge had expressed his concerns about the hearsay evidence being presented in the case, stating,

I have no doubt the relevant oral history of a people can be given in evidence under an exception to the hearsay rule for it could not otherwise be proven. But for the purpose of this case, what is history? Does it include just the dramatic events such as the victories of Suuwiigos who repelled the invaders and the destruction of the village and the dispersal of the people, or does it also include, for example, the "grizzly" details?¹⁰¹

Side-stepping the analogy of the landslide in his final ruling, the trial judge avoided answering his own question. He chose not to make a finding as to whether or not the *adaawk* of the grizzly bear actually described a landslide that happened, preferring instead to find Gitksan and Wet'suwet'en present in the area at the relevant time based on the archaeological, linguistic and genealogical evidence.¹⁰² In this case, the court only needed to accept and understand the analogy within the relevant Indigenous law. In other cases, the court may need to make new analogies with Indigenous laws.

Had the *Pamajewon* court proceeded on the basis that the appellants sought a right to self-government and not a right to high-stakes gambling, the court could have reasoned analogically with the Indigenous law adduced as evidence at trial. Chief Roger Jones testified that, after a summer of community consultations, the community approved the Lottery Law in a unanimous referendum. He testified that governance in his community was democratic in that Council "are there to take direction from the people who put us there."¹⁰³ The expert historian witness James Morrison testified to examples of Anishinabek governance practices. One piece of evidence was the Anishinaabe story of the windigo, which was read into the record:

He came among us at the very beginning of last winter, having in most severe weather walked six days, without either kindling a fire, or eating any food.

During the most part of this winter he was quiet enough, but as the sugar season approached got noisy and restless. He went off to a lodge, and there remained ten days, frequently eating a whole deer at two meals. After that he went to another [lodge] when a great change was visible in his person. His form seemed

100 *Delgamuukw v British Columbia*, 79 DLR (4th) 185 at para 443, [1991] 3 WWR 97.

101 *Delgamuukw v The Queen*, 40 DLR (4th) 685 at para 18, [1987] 6 WWR 155.

102 *Supra* note 99 at para 474.

103 Testimony of Chief Jones, reproduced in *supra* note 60 at 116.

to have dilated and his face was the color of death. At this lodge he first exhibited the most decided professions of madness; and we all considered that he had become a Windigo (giant). He did not sleep but kept on walking round the lodge saying “I shall have a fine feast.” Soon this (caused) plenty of fears in this lodge, among both the old and growing. He then tore open the veins at his wrist with his teeth, and drank his blood. The next night was the same, he went out from the lodge and without an axe broke off many saplings about 9 inches in circumference. [He] never slept but worked all that night, and in the morning brought in the poles he had broken off, and at two trips filled a large sugar camp. He continued to drink his blood. The Indians then all became alarmed and we all started off to join our friends. The snow was deep and soft and we sank deeply into it with our snow shoes, but he without shoes or stockings barely left the indent of his toes on the surface. He was stark naked, tearing all his clothes given to him off as fast as they were put on. He still continued drinking blood and refused all food eating nothing but ice and snow. We then formed a council to determine how to act as we feared he would eat our children.

It was unanimously agreed that he must die. His most intimate friend undertook to shoot him not wishing any other hand to do it. ...

The lad, who carried into effect the determination of the council, has given himself to the father of him who is no more: to hunt for him, plant and fill all the duties of a son.

We also have all made the old man presents and he is now perfectly satisfied.

This deed was not done under the influence of whiskey. There was none there, it was the deliberate act of this tribe in council.¹⁰⁴

The court could have reasoned analogically with the witness’s testimony. This would first require evaluating what was similar and dissimilar between the Windigo story and the facts before the court. The similarities included a need to make a decision for the community, the coming together in council, a process of collective decision-making and acting on the decision. The differences were the subject matter of the issues at hand. The issue in the Windigo story concerned the proper community response to a community member who had become a danger to others, whereas the issue in *Pamajewon* concerned the proper community response to the need to create revenue for new schools, community and medical centres, housing and services.¹⁰⁵ The court would then have to determine the relevance of these similarities and differences. For example, the pro-

104 Testimony of James Morrison, reproduced in *ibid* at 117–118. Borrows provides a thorough analysis of the legal principles underlying this piece of Anishinabek law. See generally John Borrows, *Indigenous Legal Traditions in Canada*, Report for the Law Commission of Canada, 2006 at 45–48.

105 Testimony of Chief Roger Jones and Testimony of James Morrison, reproduced in Luk *supra* note 60 at 115–118.

cess of collective decision-making was relevant to showing the consensus-based nature of the governance process. Finally, the court would have to determine what legal principle from the Windigo story should be applied to the facts at hand. As Borrows explains, the principle is that community decisions are made by coming together in council, not by making decisions alone. In other words, “[t]heir method of making judgments was collective, not individualized.”¹⁰⁶

It is this type of reasoning that enables Luk to argue that, prior to European contact, the Anishinabek did have a power-conferring rule which, if exercised, could have made gambling subject to regulation. Luk concludes,

These cases, along with the evidence of a general rule about the use of the consensus procedure, were adduced as evidence in the expert testimony of historian James Morrison. Consensus in these cases was a condition of validity for the conferral of power to act in the name of the community and to reach a decision to form a norm that was authoritative for the community. The evidence adduced seemed to add up to establish the existence of a customary power-conferring rule by which certain procedures were regarded as recognized ways of creating authoritative norms for the community and binding upon members of the community. As seen in the testimony of Chief Roger Jones, when the Shawanaga First Nation decided to enact the Lottery Law, they understood it to be an application of the rule that consensus enabled the community to act as a group. The Shawanaga Band Council was explicitly applying its ancient rule regarding the authority granted by the consensus procedure. The Council held the referendum expressly to try to achieve the kind of consensus that would have arisen from the pre-contact plenary meeting. Although the evidence of consensus decision-making in ancient times does not show that the community could have used it to make the very decision it made in enacting the Lottery Law, there is no reason to believe that it would have been an invalid use of the procedure.¹⁰⁷

Had the court in *Pamajewon* not re-characterized the claimed right as the narrow right to regulate high-stakes gambling, the court may have reasoned analogically with the law introduced by the witnesses. The court then may have found that, as Luk advocates, an ancient power-conferring rule has existed and continues to exist in Anishinaabe law, which grants the Shawanaga and Eagle Lake communities the authority to enact laws of various kinds.

V Critique

I have advocated for the rejection of the notion that there is a major conflict between the common law and Indigenous legal orders, and suggest that practitioners should look to analogy as a way to substantively engage with Indigenous laws in Aboriginal rights and title cases. There are a number of important shortcomings and criticisms to these and other arguments so far expressed in this paper. These criticisms come from both the Indigenous scholarship perspective and the common law perspective. I address some of them now.

106 See Borrows *supra* note 104 at 47.

107 *Supra* note 60 at 125–126.

A first important criticism questions whether the liberal notion of Aboriginal rights can be meaningful within the constitutionalisms of specific Indigenous legal orders. I have proceeded on the assumption that the liberal concept of Aboriginal rights is, for lack of a better word, a “good” thing. But there are voices in Indigenous scholarship that warn against such blind acceptance. For example, Mills argues that legal pluralism risks legal imperialism when academics and practitioners attempt to translate Indigenous law across constitutional contexts *without first* engaging with and understanding the lifeworlds beneath the Indigenous legal order. Mills’s work does not suggest that analogies are inappropriate when it comes to translating law across legal orders. His work instead suggests that one must first study and understand Indigenous law within its own lifeworld before drawing analogies between legal orders.¹⁰⁸

A related concern is that Indigenous law, once “received” by Canadian law, ceases to be Indigenous law. To this end, one can reflect on Justice Mandamin’s words in *Mississaugas of Alderville*:

Aboriginal customary laws ... are not ... part of Canadian common law or Canadian domestic law until there is some means or process by which the independent Aboriginal customary law is recognized as being part of Canadian domestic law. Such an acceptance or recognition may at time have the effect of altering or transforming the Aboriginal customary law so that it and Canadian law are aligned.¹⁰⁹

On this view, Indigenous laws might be altered or transformed through the analogical reasoning process.

It is true that Canadian courts risk altering Indigenous laws when they reason analogically with these laws. This is particularly apparent when one recognises the prevalence of rights-based decision-making in the common law. However, this should not prevent courts from attempting to reason with Indigenous laws. If the claims of Indigenous people should not be recognised in the form of rights, it seems reasonable that more appropriate ideas could be found by reasoning with Indigenous laws. Moreover, the risk of altering Indigenous laws can be addressed by various means.

For example, Canadian courts must be receptive to the view that “[i]n making Indigenous tradition more accessible, close attention must be paid to the specific cultural contexts in which it operates, and solutions must be crafted which skillfully address those contexts.”¹¹⁰ Practitioners of Indigenous laws may also wish to advocate to the court an interpretation which alters the Indigenous law as little as possible, or they might choose to not present the Indigenous law to the court. Practitioners might be required by law to follow, as Borrows explains, elaborate protocols before sharing knowledge which should be considered intellectual property.¹¹¹ These choices will always be in the hands of the Indigenous litigant, who alone has the knowledge as to whether or not there is something inherently wrong with the relevant Indigenous laws being altered or transformed. Alteration and transformation is, however, inevitable in

108 *Supra* note 84 at 854–855.

109 *Alderville Indian Band Now Known as Mississaugas of Alderville First Nation v The Queen*, 2014 FC 747 at para 40.

110 *Supra* note 16 at 149.

111 *Ibid* at 149.

analogical reasoning. Alteration and transformation is what allows for the constant, slow change of the common law.¹¹²

Second, others criticize rights as too vague to be an appropriate vehicle for reconciliation. The view is that Aboriginal rights are so vague that they miss an important goal of reconciliation: namely, restoring Indigenous peoples' relationship with and obligations towards their land. Taiaiake Alfred writes, "when you are the person whose land is being used by mining interests, uranium explorers, settlers and so forth, you don't see as a victory ten more years of lawyers doing battle in court for this vague concept of aboriginal rights and title."¹¹³ He further states that,

In Canada since 1982 we have been in a paradigm of recognition, where indigenous people have fought for their vision of section 35 – the Two Row Wampum, the recognition of nationhood and respect of equal partners – and the Canadian government and, to a large extent, Canadian society have defended their own vision, which is still rooted in colonisation. And [speaking to Aboriginal title] the Supreme Court has sided with the state in every single decision that has come forward, up until last year [in *Tsilhqot'in*].¹¹⁴

The fact that Aboriginal rights are always subject to "justified" infringement if a Canadian national interest is at stake¹¹⁵ means that Canadian governments can infringe Aboriginal rights irrespective of whether or not Indigenous laws are reasoned with. This, in turn, means it is not worth questioning the cognizable practice.¹¹⁶

However, the extent to which the vague concept of rights can properly be used as a vehicle for restoring Indigenous peoples' relationship with and obligations towards land is separate from the question of the extent to which Indigenous laws can and should be reasoned with in the common law. As well, the more practitioners and judges reason with the relevant Indigenous laws, instead of shutting them out or diminishing them, the more the common law is likely to help restore Indigenous relationships and obligations towards land. Such a potential to help exists, even if it should not be treated as a panacea.

Third, Canadian judges might not have the legal training required to substantively engage and reason with Indigenous laws. Napoleon and Friedland write that, while Indigenous oral histories and stories have been accepted and told in Canadian courts, "we have yet to see them actually make their way into

112 *Supra* note 57 at 502. Levi states that legal rules change from case to case and are remade with each case. He calls this the indispensable dynamic quality of law.

113 Taiaiake Alfred, "Cultural strength: Restoring the Place of Indigenous Knowledge in Practice and Policy" (2015) 2015:1 *Australian Aboriginal Studies Journal* 3 at 5.

114 *Ibid* at 4–5. See also *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

115 *Ibid* at 5.

116 Christie also writes about the implications on Aboriginal rights and title of the power of the Canadian government to 'justifiably' infringe on the right. Christie writes that, "[w]hen the Aboriginal right at issue is Aboriginal title, the power of Canadian governments to justifiably infringe is at its maximum, as title is exclusive in nature, potentially interfering with other deemed-legitimate interests in the lands in question. Legislatures may, then, act to limit this title in the furtherance of such objectives as economic development and regional fairness, acting to promote, for example, hydroelectric projects." See Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2:1 *Indigenous LJ* 67 at 88.

judicial reasoning or into the written ratios in Canadian jurisprudence.”¹¹⁷ One potential reason for this is that the judge does not know how to think *through* the story in a way that the specific Indigenous legal order requires. Napoleon and Friedland write that “[l]istening alone is clearly not enough ... [T]hese stories are not enigmas to those who tell them; rather, they have a logic, purpose, structure, and methodology.”¹¹⁸ Therefore, even if the cognizable practice were rejected by Canadian courts, judges still might not substantively reason with Indigenous laws expressed through oral history or story. Indigenous laws would still not help to determine the outcomes of cases, since the judge would not know how to reason with a legal order in which she has no training. On this view, the judge is the impediment to meaningful integration of Indigenous laws into Aboriginal rights and title jurisprudence.

This point raises the pressing need for increased Indigenous legal education in Canada.¹¹⁹ Judges’ lack of training in Indigenous laws may impact their effectiveness in reasoning with Indigenous laws through analogy. However, Indigenous laws in these contexts may still be cognizable to the Canadian legal system, and they should not be ignored.

Fourth, there may be other reasons why courts fail to engage with Indigenous laws, beyond requiring that Indigenous laws be cognizable. For example, there are jurisprudential limits to the recognition of Aboriginal rights under the constitution. David Milward discusses these limits and states that there is minimal space to recognize Indigenous laws relating to criminal justice under section 35. This is due to the notion of competing jurisdictions.¹²⁰

Although Milward’s recognition of constitutional constraints placed on the recognition of Indigenous laws as rights under section 35 is accurate, his work does not suggest these are the only limits on engagement with Indigenous laws. Rather, his work properly suggests that there is more at play than the requirement that Indigenous laws be cognizable when it comes to the stunted role that Indigenous laws have played in the interpretation of section 35 rights.

Fifth, difficulties with the intelligibility of some Indigenous laws may pose challenges for reasoning analogically with Indigenous laws. For example, years of past and ongoing colonization have damaged some Indigenous laws, rendering access to them difficult.¹²¹ The result is that many Indigenous laws are not “completely intact, employed formally, or even in conscious or explicit use.”¹²² Borrows notes that socioeconomic dislocation resulting from colonialism renders access to Indigenous laws difficult in some circumstances.¹²³ This can have cascading effects within and across Indigenous and non-Indigenous communities. Borrows predicts that ultimately, if the Canadian public cannot easily learn about Indigenous law, then the different legal traditions will have difficulty co-existing.¹²⁴

117 *Supra* note 74 at 735.

118 *Ibid* at 736.

119 Although Indigenous legal education is happening in Canada. For a survey of some of the Indigenous legal education taking place in Canadian law schools, see generally John Borrows, “Outsider Education: Indigenous Law and Land-Based Learning” (2016) 33:1 Windsor YB Access Just 1.

120 David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) at 72.

121 *Supra* note 75 at 18 and 21.

122 *Ibid* at 17.

123 *Supra* note 16 at 143.

124 *Ibid*.

This issue warrants consideration of the minimum level of intelligibility required when arguing that Indigenous law applies to a legal issue. Fletcher suggests that the best way to bring Indigenous laws before the court is for the parties themselves to do so. Yet Fletcher is critical of Borrows and argues that there must be some bounds to interpretation. Fletcher explains,

It is more difficult to see the relevance of tribal legends and stories to modern dispute resolution in the manner Borrows suggests. For example, Borrows draws the rule in administrative law cases that all administrative remedies must be exhausted, with notice given to all affected parties, from the story of the Duck Dinner, in which the Anishinaabe trickster Nanaboozhoo (or any of numerous spellings) decapitates a number of ducks for his dinner, falls asleep while they are cooking, and is angered upon awakening to find them gone.¹²⁵

Fletcher argues that without limitation on meaning, there is no meaning at all.¹²⁶ In the common law, precedent acts to draw limits on the interpretation of facts, or to “constrain ... the areas of reasonable disagreement.”¹²⁷ This raises the question as to how a court can limit the interpretation of Indigenous law without the use of precedent.

Though a complete response to this criticism would require an article in and of itself, two responses can be made here in brief. The first response to Fletcher is that forms of precedent already exist within Indigenous legal orders. For example, with respect to the Gitksan legal order and the *adaawk*, Richard Overstall explains that

The Gitksan legal order has evolved as the result of people observing the consequences of their behaviour over time. When the behaviour is disrespectful of spirits, animals, and others, then consequences are dire and are often recorded in the *adaawk*, especially if the behaviour alters a lineage’s relationship with its territory. The *adaawk* thus have a role as legal precedents that inform later conduct.¹²⁸

If it were true that nothing like precedent exists in Indigenous legal orders, then Indigenous laws would never inform later conduct. Second, even if Fletcher is correct that without limitation on meaning, there is no meaning at all, parties should still be able to plead that Indigenous law applies. A survey of the jurisprudence on Aboriginal rights suggests judges have little difficulty in limiting the meaning of Aboriginal rights (even when those rights are cognizable). To the extent that the cognizable practice forecloses any such argument and analysis before the argument even reaches the courtroom, it should be rejected. Although some Indigenous laws may be unintelligible to Canadian courts, this should not prevent courts from allowing practitioners of Indigenous law to show

125 Matthew LM Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (2007) 13:57 *Mich J Race & L* 57 at 96.

126 *Ibid.*

127 *Supra* note 58 at 783.

128 Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, ed., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) at 40. See also Val Napoleon, “Thinking about Indigenous Legal Orders”, *supra* note 2 at 14–15.

that Indigenous laws meet the standards of intelligibility outlined by the common law. Courts must understand what this process involves, and should not ignore Indigenous laws where analogy is possible.

VI Conclusion

Reasoning analogically in law is a process that demands substantive engagement. Every once in a while, a principle in the law can appear and subsequently stifle the process. The cognizable practice has done just that. A close look at the practice reveals serious misconceptions about Indigenous laws. The practice is fundamentally unjust because it ignores the promise of *Van der Peet* and forecloses meaningful integration of Indigenous laws into Aboriginal rights and title jurisprudence. This makes for poor analogical reasoning, and thus poor legal reasoning.

Though legal propositions and values change over time, a consistent aspect of the common law is analogical reasoning. Practitioners should reject the notion that a major conflict exists between the legal orders and should instead substantively engage with Indigenous laws through analogical reasoning, whether or not disagreement exists at the level of legal propositions or underlying values. Reasoning analogically across legal orders can result in more diverse criteria from which to argue similarity and difference. Reasoning analogically across legal orders could mean that Indigenous laws help determine the outcomes of common law cases.

Justice La Forest says that drawing on the law of multiple jurisdictions can create better judgments.¹²⁹ This is especially important for Aboriginal rights and title cases, where multiple legal orders are, or should be, brought to bear on the problem at hand. Reasoning analogically across legal orders is possible but it requires sustained commitment. Many Indigenous scholars are working hard to make Indigenous laws more accessible. Analogical reasoners in the common law should meet them halfway. We can start by remembering that reasoning in the common law is and always has been designed to reason with similarity *and* difference. Analogical reasoners could be like Mink and Marten. Or they could be different.

129 *Supra* note 46.