

## Applying Dene Law to Genetic Resources Access and Knowledge Issues

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### Abstract

In this chapter, we attempt to interpret Dene stories to extract legal principles and apply them to access and benefit-sharing (ABS) so that Dene peoples and researchers may create ABS agreements consistent with Dene law. This approach to ABS may apply to other Indigenous peoples as they prepare for this new era of nation-to-nation relations and the creation of a domestic ABS regime. The stories outlined in this chapter indicate that three major principles of Dene law that apply to ABS are: (1) equality, (2) sharing and (3) reciprocity, focusing on its application as between humans and non-human life forces (genetic resources). It should be noted that this chapter is an exercise in legal interpretation from the perspective of non-Dene scholars. Our assertions have not been screened by Dene knowledge keepers or Dene elders. Our intention is to provide but one interpretation of Dene law and its possible application to ABS, which may assist Dene peoples and inspire others as they inwardly develop their own legal frameworks and capacity building towards ABS preparedness in theory and practice.

### INTRODUCTION

Indigenous nations and peoples in what is now called Canada have always had their own laws and legal orders.<sup>1</sup> Even though the colonial process and contemporary policies of the Government of Canada have had negative impacts on Indigenous societies, governance and legal orders, Indigenous laws and legal orders never vanished. With the bolstering of Indigenous rights on the international stage and the increased awareness of Indigenous issues throughout Canada, the Government of Canada has committed to reconciliation with Indigenous peoples on a nation-to-nation basis. To engage in a true nation-to-nation relationship, the Government of

Canada must recognize Indigenous law as a legitimate source of law in Canada. This applies to the domestic implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.

This chapter undertakes the exercise of interpreting Dene stories to extract legal principles and apply them to access and benefit-sharing (ABS) so that Dene peoples and researchers may create ABS agreements consistent with Dene law. This approach to ABS may apply to other Indigenous peoples as they prepare for this new era of nation-to-nation relations and the creation of a domestic ABS regime. The stories outlined in this chapter indicate that three major principles of Dene law that apply to ABS are: (1) equality, (2) sharing and (3) reciprocity, focusing on its application as between humans and non-human life forces (genetic resources). It should be noted that this chapter is an exercise in legal interpretation from the perspective of non-Dene scholars. Our assertions have not been screened by Dene knowledge keepers or Dene elders. Our intention is to provide but one interpretation of Dene law and its possible application to ABS, which may assist Dene peoples and inspire others as they develop their own legal frameworks in response to ABS and other issues.

The first section of this chapter provides background information on the Dene and their homeland; Denendeh. The next section explains Indigenous laws and legal orders and how these may be interpreted by legal scholars to apply to ABS issues. This section warns against filtering Indigenous stories through the common law lens and over-intellectualizing the stories. The third section explains the laws that the Dene were given by ‘The Great Lawmaker,’ Yamoria, which they have subsequently published. The fourth section sets out Dene stories, selected from works of George Blondin, a Dene elder. Next, an interpretation of the selected stories outlines the legal principles of equality, sharing and reciprocity in Dene law. Finally, guidance is provided on the integration of these legal principles into ABS agreements so that Dene peoples may engage in ABS agreements in a Dene-lawful way.

## BACKGROUND AND CONCEPTUAL ORIENTATION

### *Dene Peoples*

The Dene are a people who belong to the Athabaskan linguistic family and come from Denendeh, which means ‘the Land of the People.’<sup>2</sup> According to Dene estimates, Denendeh stretches an area of one million square kilometres from the Deh Cho (Mackenzie River) to around the Sahtu (Great Bear Lake) in the western part of what is now referred to as the Northwest Territories.<sup>3</sup> Dene believe that Denendeh is a living person, often calling their land ‘Mother.’<sup>4</sup> In the context of a Statement of the Mackenzie Valley Pipeline Inquiry (circa 1975), Rene Lamothe of

Fort Simpson described the Dene's love of their land and implied that this love demands a certain respectful relationship:

The love of the Dene for the land is in their tone of voice, a touch, the care for plants, the life of the people, and their knowledge that life as a people stems directly from the land. The land is seen as a mother because she gives life, because she is the provider, the protector, the comforter. She is constant in a changing world, yet changing in regular cycles. She is a story-teller, a listener, a traveller, yet she is still, and when she suffers we all suffer with her; and very often in many parts of the world, whether they believe this or not, many people suffer because they have abused their land. She is a teacher, a teacher who punishes swiftly when we err, yet a benefactress who blesses abundantly when we live with integrity, respect her, and love the life she gives. We cannot stand on her with integrity and respect and claim to love the life she gives and allow her to be ravaged.<sup>5</sup>

### *Dene Land Claims Agreements*

Geographic conditions have led to the division of Dene into distinct Nations: Denesoline (Chipewyan), Thcho (Dogrib), Dene Gah Got'ine (Slavey), K'ashot'ine (Hareskin) and Dijii Zhuh (Loucheux).<sup>6</sup> Some Dene Nations have expressed a desire for economic independence by creating alternative community-based economic development under their control.<sup>7</sup> To further this objective, some have negotiated regional land claims agreements with the Federal and Territorial governments, while others in the southern part of the Deh Cho and around Great Slave Lake are in various stages in the land claims agreement process.<sup>8</sup>

The 1993 *Sahtu Dene and Metis Comprehensive Land Claims Agreement* is typical of the four regional Dene land claims agreements. Of relevance to the issue of access benefit and sharing (ABS) agreements, chapter 13 of the *Sahtu Dene and Metis Comprehensive Land Claims Agreement* provides an 'exclusive' right to harvest wildlife to the Dene beneficiaries of the agreement. Additionally, chapter 26 deals with 'Sahtu heritage resources,' defined as 'heritage resources which relate to the history and culture of the participants.'<sup>9</sup> Importantly, there are provisions that deal with the granting of permits and permissions to access renewable resources by non-Dene persons.<sup>10</sup> Thus, it is important to recognize that in terms of access to 'genetic resources'<sup>11</sup> there are detailed provisions in the various land claims agreements that are relevant and may need to be followed in the context of a domestic ABS regime in Canada.

#### INDIGENOUS LEGAL TRADITIONS AS VALID SOURCES OF LAW IN CANADA

Understanding Dene law as it applies to the beneficial use of non-human entities is a necessary and important exercise, which raises broader questions regarding the recognition and application of Indigenous legal traditions within Canada. These

questions involve complex issues related to the scope of Indigenous governance and jurisdiction and the constitutional relationship between the laws of the Canadian state and Indigenous law (Nichols, Chapter 4).<sup>12</sup>

### *Indigenous Legal Traditions*

All legal traditions, including Indigenous legal traditions, are the set of historically conditioned attitudes about the nature of law, the role of law in society, proper organization of a legal system and the way law should be made, applied, studied and taught.<sup>13</sup> Indigenous legal traditions throughout Canada differ depending on the stories, history, ceremony and worldview of each community. They have been shaped by Indigenous worldviews which are largely concerned with maintaining balance with the non-human world. Broad principles emerge from Indigenous worldviews and these principles may be applied to specific incidents or come to define specific legal customs, regulations and rules.<sup>14</sup> Indigenous laws are often unwritten, and tend to be anchored in ceremonies, songs, dances and oral narratives, passed on from generation to generation.<sup>15</sup> As people listen to the stories they are encouraged to come up with their own conclusions based on the principles identified in the stories in ways that help resolve current problems.<sup>16</sup>

Indigenous legal orders are in precarious positions as a result of a long history of colonial contempt for Indigenous peoples' governance authority and the destructive impact of past governments' racist policies aimed at eradication and assimilation. Yet, today, there is a growing movement composed of Indigenous and non-Indigenous peoples, communities and institutions, which has committed to revitalizing Indigenous governance authority and Indigenous legal traditions.<sup>17</sup> For many, the revitalization of Indigenous governance authority and Indigenous laws is an essential part of Indigenous – Canadian reconciliation.<sup>18</sup> It has now become clear that Canada can no longer ignore Indigenous law as valid sources of law in Canada (John Burrows, 2006; Perron-Welch & Oguamanam, Chapter 6). Thus, to further the goals of reconciliation, those interested in working with 'genetic resources' and traditional knowledge associated with those resources must recognize the multi-juridical nature of the Canadian legal landscape and respect Indigenous legal authority over aspects of the natural environment and its non-human entities.

#### ISSUES INVOLVED IN INTERPRETING INDIGENOUS LAWS AND LEGAL ORDERS

The authors remain concerned that unsophisticated attempts to recognize Indigenous legal traditions may result in poorly understood characterizations or descriptions of Dene law due to a lack of grounding in Dene culture. Aaron Mills has argued that it is important for those learning Indigenous law in law schools to have a grounding in the 'lifeworlds' of the people they are studying, so that they may appreciate the constitutional distinctiveness of Indigenous societies rooted in ways of living that

value and recognize interdependence between human and non-human entities.<sup>19</sup> Val Napoleon has described this cultural grounding as the ‘primer’ needed to appreciate the cultural place of Indigenous legal principles.<sup>20</sup> It is uncertain how much exposure to Indigenous lifeworlds, values and beliefs is required to ensure that legal analysis does not unduly appropriate and compromise Indigenous knowledge and ways of knowing, which would damage the very integrity of the learning project as a result.

Indeed, as Hannah Askew has noted, certain scholars such as Gordon Christie are not at all confident that scholars will not filter Indigenous teachings through common law eyes, over-intellectualizing Indigenous legal resources and distorting the message of Indigenous stories.<sup>21</sup> The fear here is that stories interpreted into legal principles by non-Indigenous legal scholars and lawyers trained in the Canadian common law tradition may become so distorted by interpretation that community members no longer recognize them or find them useful.<sup>22</sup>

The authors chose to undertake the exercise of interpreting Dene stories to discern legal principles which may guide ABS frameworks because of the persuasive reasoning and helpful guidance provided by Val Napoleon and Hadley Friedland in *Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions*.<sup>23</sup> There, Friedland and Napoleon argue that legal synthesis is important because ‘taking Indigenous legal research to this level is precisely what will enable us to move beyond external descriptive, historical or sociological accounts of Indigenous legal traditions.’<sup>24</sup>

Following models created by Friedland and Napoleon, the authors identified common themes and patterns which emerged from Dene stories and synthesized relevant stories into categories to discern legal principles applicable to a focused area of law. This method is meant to ensure both reliability and validity.<sup>25</sup> The goal of this methodology is to synthesize concise legal principles capable of being applied to contemporary legal and sociological issues.

The exercise undertaken in this chapter builds on the important and impressive work by George Blondin.<sup>26</sup> The stories interpreted here were recorded and produced by Dene elder George Blondin and published for public knowledge. Blondin published books recording Dene stories because he and other Dene elders had a duty prescribed by Dene law to pass laws and stories onto future generations and they feared the stories would be lost otherwise.<sup>27</sup>

The authors are aware that some Dene teachings/stories are not to be disclosed publicly because of their sacred content. We assumed that relying on published stories by a Dene elder who obtained permission from the storytellers that gifted the stories to him could and indeed should be used and relied on; as to do so would fulfill George Blondin’s wishes as supported by the many Dene communities, Band Chiefs and Council members from the communities he visited. However, we did not test our conclusions regarding the legal principles that were identified from the stories with any of the Dene communities discussed in George Blondin’s books. Thus, any errors of interpretation are ours alone.

We hope that this chapter may assist Indigenous communities in Canada to grapple with ABS preparedness, self-assessment and capacity building and capacity development (Oguamanam & Hunka, Chapter 3). Our methodology may offer a model for Indigenous communities to examine their own legal traditions, to see if engaging with extractive industries generally or genetic resource prospectors specifically is compatible with those laws and traditions.

#### THE DENE LAWS

An important figure in the Dene legal order is Yamoria, 'The Great Lawmaker,' a powerful medicine person who brought the Dene people their laws and taught them how to live a good life.<sup>28</sup> The Dene have published the list of laws handed to them by Yamoria to educate youth and provide a list of principles non-Dene people should understand as a precursor to interaction with Dene peoples, culture or law.

The first law, 'share everything you have' is the 'umbrella law.'<sup>29</sup> Blondin's explanation of this law, outlined in the book *Medicine Power*, directs Dene to share big game and fish, help elders get firewood and with other heavy work, help sick people to do their work, share in the sorrow of relatives when someone dies, help widows and their children with everything they need, look after orphaned kin, and help travellers who are far from their homeland.<sup>30</sup> This umbrella law presumably originated from the scarcity of bush resources and need to share for the good of the community:

It would appear that within local groups bush resources were distributed on the basis of reciprocity or mutual sharing. Generally speaking all participated equally in the good fortune of the hunters and all suffered equally when their luck turned bad. Although the distribution system was basically informal, there was apparently some formality concerning the way in which certain animals were shared in that specific parts were reserved for the hunter and persons closely related to his or her immediate family. In this way, individual ability could be recognized, but not at the expense of the collective good. Thus, it was the whole membership of the local group and not each family or individual that defined the self-sufficient unit.<sup>31</sup>

Some principles prescribed by Dene law are accessible through stories, which have been passed through the generations in an oral tradition. Legal principles discerned from Dene stories and applicable to relationships with the natural world illustrate the interdependence between humans and non-human genetic life forces. Through this exercise, we focus on other related legal principles: (1) equality, (2) sharing and (3) reciprocity. These principles may be applied in contemporary contexts, perhaps with slight modification, to prescribe the characteristics of good relationships between Indigenous nations and peoples, governments, researchers and biotech industries to facilitate access to and use of traditional knowledge and non-human entities, including 'genetic resources.' These two legal principles guide Dene decision-making processes related to non-human genetic forces and may be employed to guide ABS arrangements.

## SELECTED STORIES

*Yamoria*

A girl was wandering in the woods when she came across a sapling swaying rhythmically from side to side amongst motionless trees. The girl, who was taken aback by the small swaying tree, returned home and explained to her parents what she saw. Her parents advised her to ask the tree if it had something to tell her. The next day she revisited the swaying tree but before she could speak to it, the tree fell over and amongst its roots she found two babies, Yamoria and Yagamah.<sup>32</sup>

*Cheely Brings the Caribou to K'ahbamtue*

Cheely was a great caribou leader. He was preparing to leave his caribou body and die. Before he left he called his caribou people together. 'I want to make a deal with you', he told them. 'Even if I become a human being in my next life, I want us to agree that we will always help each other.' All of the caribou agreed to the arrangement.

Soon after he died as a caribou, Cheely entered the body of a pregnant woman to be born again as a human. But he still kept all of his caribou medicine powers. Throughout his human life, when people were starving, all Cheely had to do was talk to the head caribou spirit; even if the herds were hundreds of kilometres away, they would travel to the people. Once there, they allowed themselves to be killed for food.

When Cheely grew old and was dying, he made a promise to his people. 'I want to leave something on this earth for you to remember me by. I feel like I didn't do enough for you during my life. I'm going to talk to my caribou people and make another deal with them. I want to cut out a big portion of the Barren Land herd and establish a new birthing ground for them. This new herd will always come back to have their calves at a certain place close to K'ahbamtue, where I am buried. The caribou will always come pay their respects at my grave and will have their calves around here too. For hundreds of years they will come back here. I'll show you a sign. When the first snow comes, visit my grave and if two small caribou are running around it, you will know that what I have said will come true.'

Sure enough, when the snow fell, the people saw two small caribou moving around Cheely's grave. When the ice froze, a herd of caribou migrated to K'ahbamtue. Cheely died more than sixty years ago and the people are still glad to see the caribou return to his grave each spring for their calving.<sup>33</sup>

*The Challenges of Living with Medicine Power*<sup>34</sup>

It was 1937 and a group of Dene was camped beside an inland fish lake. One day, caribou and moose that had just been shot were brought home for a girl to clean and make ready to cook. As the girl worked on one of the dead animals, she

eventually had to clean the sex parts of the moose. This started her thinking about the moose and caribou in a sexual way, which is not a natural thing when you are a human being. This went over and over in her mind in all kinds of crazy ways. It became like a sickness with her. After some time, the medicine spirit of both the Caribou and the Moose became aware of her obsessive thoughts and were offended by them. They sent the sickness to her as punishment.

When it was announced that that a young girl was very sick, the family was extremely concerned and asked her brother, a medicine man, to perform a ceremony to discover the source of her illness. The source of the girl's illness was revealed through the ceremony. The brother announced that the spirits showed him that the only way to help his sister was to change the part of her body that contains her sexual power so she comes into balance. This method would stop her 'Moon time' each month. Afterwards, she must be taught to control her thoughts and to only entertain respectful thoughts towards animals.

### *The Meeting between Humans and Animals*

When the world was new, a conference took place between humans and animals where they determined how they would relate to each other. During this conference, Yamoria used his medicine powers to control everyone's minds to arrive at a fair resolution. It was agreed that humans may use animals, birds, and fish for food, provided that humans killed only what they need to survive and that they treat the animals with great respect. This respect included using the whole animal, thinking well of the animals, and thanking the Creator for putting them on earth.<sup>35</sup>



ILLUSTRATION 1: The Meeting between Humans and Animals  
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### *Summer in a Bag*

The harsh conditions of a double winter negatively affected both the Dene and the animals. The caribou and moose had difficulty moving around and eating due to the deep snow. Although this made hunting the animals easier, the Dene refused to take advantage of the situation. Instead, they put out food for the animals in order for them to survive. Later, Dene called a meeting to try and 'steal back the spring.' The plan succeeded when a squirrel brought back the warmth to the benefit of everyone.<sup>36</sup>

### *Animals Save a Baby*

A number of animals played a role in rescuing a stranded baby after a family's canoe crash. Two beavers and a few wolves attended to the health needs of the cold and hungry baby. After being rescued, the baby eventually grew up to become a famous medicine man who loved and respected animals and taught children to do so as well.<sup>37</sup>

### *Taming a Beaver*

A family of travellers noticed an injured beaver stranded in an icy lake and immediately went to rescue it without hesitation. After caring for the beaver until it was healed, the family simply carried on with their journey. The beaver was the only one who benefitted from the family's actions upon the conclusion of this story.<sup>38</sup>

### *Caribou Help*

The leader of a herd of caribou spotted a man who was looking to hunt a couple of caribou from his herd. While a non-Dene person might expect the caribou leader



ILLUSTRATION 2: Caribou Medicine

© Kelly Duquette, 2017

to become infuriated, the caribou leader simply confronted the hunter and proceeded to give him medicine power to use when he is in need of serious help. He also told the hunter to proceed with his plan of killing the last two caribou from the herd. Ultimately, the hunter not only got exactly what he wanted (i.e. hunting two caribou) but he also received medicine power that he could use when he was in need.<sup>39</sup>

### *Bear Medicine Heals All*

In the Barren Lands years ago, a Dene shot five caribou and as he hurried to butcher them, he cut his hand on a sharp rib bone. His hand bled and he wrapped it, not thinking too much about the cut since his hand didn't really hurt. The next morning, his hand had swollen with blood poisoning and he was in great pain. He and his group started the three-day canoe trip home to find someone who could heal his hand, but the next night as they camped in the bush, the swelling had spread up his arm.

The next morning, they spied a bear on the hill. In agony, the sick hunter begged his friends to shoot the bear and bring him the bladder. When they did so, he boiled the animal part in his tea kettle to make a bitter, black juice. He rubbed some of the juice on his swollen arm and then wrapped it in a clean cloth.

As he poured some into a cup, he started to pray, 'Grandfather, please help me. I am in trouble. I am sick with pain, Grandfather, you helped people in the past and we believe you still do help the people.' The hunter drank the bear brew and tried to sleep.

The next morning, he told his friends, 'I feel good. There's no pain anymore, none at all.' He took the bandage off his arm and it was back to normal.<sup>40</sup>

## INTERPRETATION

### *Equality and Interdependency*

A review of related Dene stories reveals the legal principle of equality and interdependency between humans and their non-human relatives. In Dene society and law, humans exist alongside animals and the environment as equal parts of the natural world. Blondin's conceptualization of the Dene as people who 'see [themselves] as no different than the trees, the caribou, and the raven [...]' is reflective of this notion of equality.<sup>41</sup> Therefore, humans must always treat animals and the environment with respect and take them into consideration when making decisions.

A dominant theme within the Dene stories outlined above is equality amongst people, animals and other natural elements. Yamoria and Yagamah's origin story shows the circular relationship between nature and people.<sup>42</sup> This story illustrates the notion that there is no hierarchy between people and the environment as they are one and the same. Similarly, the story of Cheely, the caribou leader,

demonstrates the flexibility between the human and animal world, and supports the assertion that there is no hierarchy involved in the distinction between human and non-human entities.

The *Challenges of Medicine Power* story demonstrates the theme of equality between animals and humans because it shows that animals can exert significant power and control over humans, thus placing them on an equal footing with one another. This story shows that animals can have medicine powers just like humans and therefore animals can influence people's lives both positively or negatively. It is critical that humans recognize the power that animals have and treat them with respect and honour just as they would other human beings. Indeed, others have observed that the relationship between animals is fundamentally spiritual. Dene spirituality 'lay, not in defining and controlling interpersonal human behaviour, but rather in attempting to placate and influence the animals and elements.'<sup>43</sup>

The story of *Challenges of Living with Medicine Power* also demonstrates that animals should be respected and treated with the same dignity as other humans because of their capacity to give and receive medicine power. Depending on the medicine person, the Creator will send a messenger – either in the form of an animal, a human apparition, or a natural element – to deliver medicine power to the person. That both humans and the natural environment can act as vessels to deliver medicine power to humans suggests that the Creator views all these things as equal. As a result, all people, with or without medicine power, must have good thoughts, and be respectful towards both animals and humans.<sup>44</sup> People have found themselves in trouble for even thinking wicked thoughts about animals because animals can have medicine power.<sup>45</sup> Here, medicine power again equalizes the relationship between animals and humans.

This fundamentally egalitarian view influences decision-making processes amongst the Dene. Blondin states that the Dene are good stewards of the Earth because they are aware that they 'have a relationship to all creation.'<sup>46</sup> This awareness stems from an appreciation that people and nature are interdependent and therefore must look after the natural world for their own self-preservation. This idea of a duty is reinforced by Blondin's statement that the Creator made the Dene in order to 'live with and look after the animals and plants on Mother Earth.'<sup>47</sup>

### *Sharing, Reciprocity and Mutual Aide*

The Dene often work together with animals and other non-human genetic forces to solve problems and to help each other when needed. In many of Blondin's stories, it is evident that the Dene benefit greatly in a variety of ways from nature, especially animals. Likewise, the animals benefit from the Dene people. Whenever there is an issue or conflict that needs to be resolved, the Dene therefore look to nature to help find a solution.

In addition to equality, a theme of reciprocity echoes throughout the Dene stories included in this chapter. In many of them, we see instances of genuine care being shown by human to animals or other natural elements (and vice versa). For example, in the *Summer in a Bag* story, the Dene and the animals work together to find a mutually beneficial solution to the desolation and scarcity of a harsh double winter; their collective efforts ensure each other's survival. Although the benefit for both parties is not always as immediate or clear like *Summer in a Bag*, the stories show that the giving party is often helped in some way. Understanding the centrality of reciprocity with the natural world and all living things is essential to appreciating how the Dene community approaches decision-making.

From the *Meeting between Humans and Animals* story, we learn that humans and animals have entered into a foundational agreement – a treaty of sorts – which places mutual obligations on them. Animals have agreed to give up their lives while humans have agreed to show great respect, including conservation and gratitude. The obligations that emerged from this conference were fair and equitable for all; Yamoria used his powers to ensure this specific outcome.

The reciprocity demonstrated through the *Animal Saves a Baby* story functions in a more indirect way.<sup>48</sup> The baby, now a famous medicine man, grows older and begins to teach children to show respect for all animals because of his own experiences following the canoe crash. By passing this teachings to new generations, advising appreciation and respect for all animals, the medicine man repays their kindness many years later.

Generally, the transfer of medicine power within many of the stories also illustrates a mutually beneficial exchange. People can receive medicine power in several ways.<sup>49</sup> It is possible for a messenger from the Creator to bring powerful gifts.<sup>50</sup> A messenger can come in the form of an animal, or old man/old woman depending on the medicine person. For example, messengers have come in the form of a moose, caribou, and/or bear.<sup>51</sup> The caribou spirit may communicate to the medicine person by saying something like, 'I am here representing the caribou. I give to you medicine power from my nation so that we can work together to help all the nations on Mother Earth.'

While it is true that there are Dene stories that show only one party benefiting from the other, both animals and humans reap the sole reward from the other's kind acts from story to story. Thus, the reciprocal nature of the relationship between animals and humans remains true. For example, to a non-Dene person, the actions taken in the *Caribou Help* story perhaps would seem an unusual response from the caribou leader, however the caribou leader's actions in this story are consistent with the genuine care and respect animals have for humans in Dene stories. The *Caribou Help* story demonstrates the theme of sharing and reciprocity because when the caribou spirit bestows medicine power to a person, the caribou spirit clearly states that the medicine power should be used to help *all* the nations on Mother Earth,

animal and human alike. Thus, although it is the human in this case that is being given the medicine power, there exists a level of reciprocity between humans and animals that is evidenced by the caribou spirit's statement that the medicine power should be used to help 'all' nations.

Other stories depicting humans as the beneficiary of animal kindness demonstrate a level of reciprocity between humans and animals but also demonstrate positive qualities to guide these reciprocal relationships. The value of selflessness and obligation to all beings is promoted through the *Bear Medicine Heals All* story. This story demonstrates that the bear is generally a good friend and will treat you in accordance with how it is treated. However, the bear has the power to read thoughts and know your actions so if you get into trouble with it, it is your own fault.<sup>52</sup>

Reciprocity in Dene stories is often communal and selfless, reflecting the importance of maintaining a harmonious relationship between people and the environment. This is a far cry from common law conceptions of reciprocity, which are rooted in responsibilities as between individuals and their private property. The emphasis in colonial/Canadian legal traditions on personal rights over things (largely construed in terms of the ability to exclude others from their possession and use) have slowly eroded alternative Indigenous legal discourses of mutual interdependence, harmony, and balance; in the context of respecting the natural world and our place within it. The Dene have much to teach us and we have much to learn. As Canada struggles to reconcile with its Indigenous peoples, and seeks out ways of sustaining its natural wealth amid the growing storm clouds of climate change, ABS has emerged as an important site for assessing the relative value of competing legal traditions in dealing with these related challenges. Below, we set out some of the advantages in using Dene law to develop ABS regimes over living resources and associated traditional knowledge in a manner consistent with equality, sharing and reciprocity.

#### IMPLICATIONS FOR ACCESS TO GENETIC RESOURCES/KNOWLEDGE AND BENEFIT-SHARING AGREEMENTS

Many Indigenous communities are now part of a larger society that values the accumulation of wealth without limit. Many Indigenous peoples are active participants in capitalism and the larger economy of Canada. Many Dene have expressed a desire to foster economic activity in their region that does not undermine their rights to control Denendeh. If the Dene wish to grant access to their genetic resources for profit via ABS agreements, then Dene law impose obligations in terms of how those agreements are to be crafted and understood. Researchers, industry and other stakeholders must equip themselves to meaningfully engage with Indigenous legal traditions that govern how genetic gifts are to be harvested, used, and disposed of in a manner that demonstrates proper respect and ensures sustainability. The legal

principles distilled from Dene stories in this chapter give a useful example of the kinds of principles that must be incorporated into the ABS agreements such that they are consistent with Dene law.

An important preliminary consideration is whether the principles of equality between humans and non-human genetic forces and the obligation to engage in reciprocal relationships is *a priori* inconsistent with the characteristic of ABS. It is the authors' understanding that the right to access the gifts of animals for healing purposes is not at all inconsistent with Dene laws. Indeed, based on the original treaty between animals and humans, described through the story, *The Meeting between Humans and Animals*, (and related stories) animals have an obligation to share their gifts with humans. It is unclear, based on the Dene stories available to the authors, whether this reciprocal relationship extends to plants. However, the importance of respect for the Earth (which includes plants) and the land more generally is consistent with the idea of interdependence and equality being extended beyond animals alone.

ABS agreements provide an opportunity to mandate compliance with Dene law through contractual obligations. Where the Dene nation or individual communities have chosen to grant access to their genetic resources and associated traditional knowledge, they may write into ABS agreement certain provisions which bind researchers to Dene law. For instance, the Dene could negotiate non-monetary benefits on behalf of the non-human genetic resources affected by the ABS agreement. The benefit-sharing provisions in an ABS agreement are intended as a means of equitably sharing the benefits that flow from commercial use of genetic forces from Denendeh. Dene law principles indicate that non-human genetic forces are equal to humans and that as such, relationships between humans and non-human genetic forces must be reciprocal in nature. Therefore, it follows that an ABS agreement would be in violation of Dene law if humans profited from the exploitation of non-human genetic forces without any sort of reciprocal exchange or sharing of benefits. This is consistent with the undergirding rationale for ABS especially as it relates ultimately to the conservation of biological diversity.

To ensure that researchers engage in a (Dene) lawful relationship with the non-human entities of Denendeh, the Dene could write into the ABS agreement non-monetary benefits such as habitat protection or other conservation initiatives. It must be understood that to rely on such plants and animals within a Dene cultural perspective means that individuals or corporations are obligated to respect the original treaty relationship between Dene and animals and to affirm that animals and other aspects of the earth have agency. If a Dene community enters into an agreement with a researcher or biotech firm to share medicinal knowledge about plants or animals, then the researcher or biotech firm will similarly be bound by Dene law. Thus, a firm will be responsible for complying with two agreements: one with the Dene community and one with the Earth (i.e. the animals, plants and natural elements). Moreover, because the life forces of the Earth and humans made

a sacred pact long ago, it arguably would not be possible for the Dene to waive such obligations for a biotech firm without breaching their own constitution.

For the purposes of ABS agreements, it is important to note that the reciprocal relationship between humans and non-human entities, prescribed by Dene law, does not extend to exploitation. Conservation is an integral part of the relationship between the Dene and non-human genetic forces. The stories affirm that there is a duty for humans to only use animals or plants only according to need. It is unlikely that this duty would be respected by corporations looking to commodify 'genetic resources' for the purposes of simply generating profit. As such, ABS agreements adopted by the Dene could put limits on the amount of genetic material flowing from the region – it could be within the scope of the agreement to mandate a certain amount of genetic material remain within Deneneh.

For example, the Dene may agree to provide researchers with no more than a certain percentage of an animal population so that the population is not degraded. Similarly, the ABS agreement may only allow removal of plant samples at certain times of the year, when populations are high, to limit alteration of plant growth cycles. In addition, any agreements with researchers regarding the use of genetic forces must ensure monitoring and authoritative oversight by the Dene communities involved. As the stewards of their lands, this is not an obligation that the Dene can easily contract out of without breaching their own sacred laws. There are also distinct obligations in Dene law for disposing of animals. If parts of animals and plants are not needed, there are obligations as to how to dispose of such parts in a manner consistent with the Dene's sacred obligations to all living things. These obligations may be included in provisions intended to address 'Rights in and Dealings with Samples and Products.'<sup>53</sup>

## CONCLUSION

The Dene are heavily influenced by the natural environment in their decision-making processes. Notions of equality, sharing and reciprocity are key to understanding how Dene communities functioned in some of Blondin's stories. Medicine people and leaders always take into consideration their surrounding environment, which they value and view as interdependent and integral parts of their own communities.

A goal of this chapter is to start a broader conversation about the principles that can be distilled from Indigenous legal traditions, and how those principles might be applied to areas of law that engage Indigenous rights. Although we do not claim that our interpretation of any of these principles is correct or the only interpretation possible, we believe it is still important to include them in this volume and make them accessible to members of the Dene nation and non-Dene individuals. We believe that Blondin published these stories to preserve the importance of Dene understandings of legal principles and to remind people of the prominence of medicine power within the Dene community.

Recognizing Indigenous legal traditions has important implications for the biotechnology industry and Canada's national conversation about ABS over plant and animal genetic resources and associated Indigenous traditional knowledge. The biotechnology industry and research communities must be cognizant of the differing legal and cultural orders their work may engage (Oguamanam & Koziol, Chapter 7). If operating within Dene territory or with regard to Dene knowledge, biotechnology firms and researchers must pay due regard to the principles of Dene law, especially if ABS agreements are negotiated in order to access Dene resources. This also holds true more broadly; if ABS agreements are to be equitable in any meaningful sense, they must engage with, and be shaped by, the laws, traditions, and customs of the people whom they are meant to protect and benefit.

Here, our task was simply to demonstrate that this is not an impossible task, and that distinct, well-defined, and discernable legal principles exist not only in Dene society but in all Indigenous societies. These principles are accessible and can be applied, with occasional modification, in contemporary contexts, including the salient discussion of access to 'life elements,' including 'genetic resources' and associated Indigenous traditional knowledge.

#### NOTES

- 1 The authors employed Dene law for this exercise due to Professor Larry Chartrand's experience with Dene peoples and law, particularly those from the Sahtu region of the Northwest Territories. As an arbitrator appointed under the *Sahtu Dene and Metis Comprehensive Land Claim Agreement*, Professor Chartrand has spent considerable time in Dene communities in the region. The arbitration panel strongly believed that any dispute which arose under land claims should be resolved in a balanced way, relying on relevant Dene law, as well as on Canadian common law. To learn about Dene peoples and culture, Chartrand and other arbitration panel members often stayed on the land in various hunting and fishing camps and met with various groups of elders from the communities they visited. As background for the arbitration panel, he prepared a paper on Dene law, which was largely based on the work of Joan Ryan in her study of Dogrib Dene law. In addition, as part of the panel's obligation to learn and understand Dene law, the panel undertook Dene culture and training workshops to prepare for any disputes which might arise under a land claim. The author is grateful for the assistance of Harman Khosa, Rebecca De Sanctis, Vick Balkaran and Emily Bonnell for the preparation of this chapter.
- 2 Denendeh (The Dene Nation, Yellowknife, 1984) at p. 7.
- 3 *Ibid* at p. 7.
- 4 *Ibid*
- 5 Mel Watkins (ed.). *Dene Nation: The Colony Within* (University of Toronto Press, Toronto, 1977), at p. 11.
- 6 *Ibid* at p. 9.
- 7 *Ibid* at p. 85.
- 8 Four regional land claims agreements have been completed. They include the Inuvialuit (1992), the Gwich'in (1992), the Sahtu Dene and Metis (1993) and the Tilcho (2003) agreements.



- 9 Sahtu Dene and Metis Comprehensive Land Claims Agreement at s. 26.1.1
- 10 *Ibid* at 21.1.
- 11 It should be noted at the outset of this exercise that there are important distinctions between Dene and Western understandings of the nature of ‘genetic resources.’ From an Indigenous epistemology, to describe animals and plants as ‘resources’ tends to imply they are available for human use at the unilateral discretion of human beings to fulfill human needs. Dene societies would not characterize these non-human entities as mere ‘resources’ to be owned and used by humans. Rather, according to Dene society and law, animals and plants are characterized as life forces which possess their own independent agency and are organized into their own ‘nations.’ Dene conceptualization of life forces as possessing agency, including their own spirit medicine powers, has fundamental implications for the biotechnology sector and the obligations that attach to the use of such life forces. For example, Dene law, arguably, does not allow the unfettered commercialization and exploitation of non-human entities.
- 12 John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at chapter 6.
- 13 John Henry Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford, CA: Stanford University Press, 2007).
- 14 Indigenous Canada: Looking Forward/Looking Back, Module 4: New Rules, New Game, Course Notes: New Game, New Rules (Faculty of Native Studies, University of Alberta, 2017) at p. 4.
- 15 *Ibid* at p. 3.
- 16 *Ibid* at p. 9.
- 17 Royal Proclamation 1763; Larry Chartrand, ‘Indigenizing the Legal Academy from a Decolonizing Perspective’ (2015) Ottawa Faculty of Law Working Paper No 2015–22, online: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2631163](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631163).
- 18 John Burrows, 2006, Justice within Indigenous Legal Traditions: Discussion Paper. Ottawa, ON: Law Commission of Canada; The Right Honourable Harry Laforme, ‘Section 25 of the Charter; Section 35 of the Constitution Act, 1982: Aboriginal and Treaty Rights – 30 Years of Recognition and Affirmation’ in Errol Mendes, *Canadian Charter of Rights and Freedoms, 5th Ed.*, (LexisNexis, 2013); Aaron Mills, ‘The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today’ (2016) 61 *McGill Law Journal* 847; Val Napoleon and Hadley Friedland, ‘An Inside Job: Engaging with Indigenous Legal Traditions through Stories’ (2016) 61 *McGill Law Journal* 725; Larry Chartrand, ‘Eagle Soaring on the Emergent Winds of Indigenous Legal Authority’ (2013) 18 *Review of Constitutional Studies* 49. See also the Law Reform Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Her Majesty the Queen in Right of Canada, 2006).
- 19 The Lifeworlds of Law, *supra* note 18 at p. 862; A similar point on the need for mutual capacity building and capacity development has been put forth in Oguamanam & Hunka, this volume.
- 20 Hadley Friedland and Val Napoleon, ‘Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions’ (2015–2016) 1 *Lakehead Law Journal* 16 at 27.

- 21 Hannah Askew, Indigenous Legal Traditions and the Challenge of Intercultural Legal Education in Canadian Law Schools, at p. 24, online: [www.oba.org/CBAMediaLibrary/cba\\_on/pdf/Foundation/StudiesFellowshipHannaAskew.pdf](http://www.oba.org/CBAMediaLibrary/cba_on/pdf/Foundation/StudiesFellowshipHannaAskew.pdf), citing Gordon Christie, presentation on 'Inuit Legal Traditions' delivered at the Indigenous Bar Association conference in Winnipeg in October 2012. Recording available on the 'Accessing Justice and Reconciliation' website at [www.indigenousbar.ca/indigenoulaw/audiovideo/#conference](http://www.indigenousbar.ca/indigenoulaw/audiovideo/#conference) (Accessed October 28, 2014).
- 22 Hannah Askew, *Learning from Bear-Walker: Indigenous Legal Orders and Intercultural Legal Education in Canadian Law Schools* (2016) 33 *Windsor Yearbook of Access to Justice* 29 at 44.
- 23 *Gathering the Threads*, *supra* note 18.
- 24 *Ibid* at p. 27.
- 25 *Ibid* at p. 28.
- 26 George Blondin, *Yamoria the Lawmaker: Stories of the Dene* (Edmonton: NeWest Press, 1997); George Blondin, *Trail of the Spirit: The Mysteries of Medicine Power Revealed* (Edmonton: NeWest Press, 2006).
- 27 The Acknowledgements page from *Yamoria the Lawmaker*, for example, does thank and acknowledge the various storytellers that contributed stories to the collection and the authors would also like to express our thanks as well.
- 28 *Trail of the Spirit*, *supra* note 26 at p. 24; *Yamoria*, *supra* note 26 at p. 71 & 83.
- 29 George Blondin, *Medicine Power* (Dene Cultural Institute, 1996) at p. 8–10.
- 30 *Ibid* at p. 8.
- 31 *Dene Nation: The Colony Within*, *supra* note 5 at p. 48.
- 32 *Trail of the Spirit*, *supra* note 26 at p. 23; *Yamoria*, *supra* note 26 at p. 78; *Medicine Power*, *supra* note 29 at p. 1.
- 33 *Yamoria*, *supra* note 26 at p. 116.
- 34 *Trail of the Spirit*, *supra* note 26 at p. 92.
- 35 *Yamoria*, *supra* note 26 at p. 48.
- 36 *Ibid* at p. 175.
- 37 *Ibid* at p. 176.
- 38 *Yamoria*, *supra* note 26 at p. 182.
- 39 *Ibid* at 186.
- 40 *Yamoria*, *supra* note 26 at p. 170–2.
- 41 *Ibid* at p. 18.
- 42 *Ibid* at p. 81.
- 43 Miggs Wynne Morris, *Return to the Drum: Teaching among the Dene in Canada's North* (Edmonton: NeWest Press, 2000) at 74.
- 44 *Trail of the Spirit*, *supra* note 26 at p. 93.
- 45 *Ibid*.
- 46 *Trail of the Spirit*, *supra* note 26 at p. 41–2.
- 47 *Yamoria*, *supra* note 26 at p. 18.
- 48 This kind of reciprocity as discussed by Mills is distinct from liberal understandings of mutual obligations being more of a mandatory direct exchange. See Mills, *supra* note 21 at 867. Reciprocity is understood as capable of being experienced positively indirectly as well as directly. Moreover, Mills discusses how the cultural context of a society influences

how law functions or is understood within the society. Mills describes Indigenous constitutions as rooted because such societies are so connected quite literally to the earth and interdependent with other life forces. This insight he says has ‘significant implications for the structure of law. Under a rooted vision of freedom, order isn’t secured through rule of law; law isn’t the formal obligation to respect rules (i.e. rights and correlative duties). Rather, law consists in the informal responsibility to coordinate mutual aid (i.e. gifts and needs) within particular forms of relationship: law is a framework for proper judgment.’ at 865–6.

49 Ibid at p. 54.

50 Ibid.

51 Ibid.

52 *Yamoria*, *supra* note 29 at p. 170.

53 Ann Kathrin Buchs & Jorg Jasper, For Whose Benefit? Benefit-Sharing within Contractual ABS-Agreements from an Economic Perspective – the Example of Pharmaceutical Bioprospection, (2007) [unpublished, Diskussionsbeitrag] online: [www.uni-goettingen.de/. . ./Diskussionspapier\\_Buchs\\_%20Jasper\\_200701.pdf](http://www.uni-goettingen.de/. . ./Diskussionspapier_Buchs_%20Jasper_200701.pdf).