

Ki'inaakonigewin: Reclaiming Space for Indigenous Laws

"Canada cannot presently, historically, legally, or morally claim to be built upon European-derived law alone"¹

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Prepared for: the Canadian Administration of Justice Conference, *Aboriginal Peoples and Law: "We Are All Here to Stay"*, Oct 14 – 17 2015

Introduction

The Truth and Reconciliation Commission has issued a call to action on the legal education and training front. It has challenged the Federation of Law Societies, Law Schools, and essentially the entire legal profession to ensure appropriate cultural competency training education on legal issues affecting indigenous people. This includes requiring students and lawyers to learn about indigenous laws.

27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal – Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism.²

¹ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitution*] at 15.

² http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

The Supreme Court of Canada has acknowledged that customary laws survived the assertion of sovereignty by the Crown.³ For example, in the *Tsilhqot'in Nation v. British Columbia* case, the SCC found that “the question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507.”⁴

Building on a series of collaborative continuing professional development seminars with the Law Society of Manitoba, the Canadian Institute for the Administration of Justice, the Federal Court of Canada and the National Judicial Institute, this paper aims to assist the profession in understanding the importance of respect for and acknowledgement of indigenous legal systems and principles.⁵

While we continue to strive to make space for and acknowledge the value of indigenous legal traditions, we must be conscious of what fills the space that is made. Indigenous law must remain true to our values and traditions while being dynamic and responsive to the societal evolution of indigenous nations. We must exercise the caution suggested by Prof. Gordon Christie in reflecting on indigenous legal theory through the lense of mainstream legal theories and avoid the distortion of indigenous legal traditions through a non-indigenous perspective.⁶ Ultimately, “it is dangerously easy to carry our unconscious matrices of interpretation to our approach to another culture’s values and laws.”⁷

³ *Mitchell v. Minister of National Revenue*, 2001 SCC 33

⁴ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44

⁵ Borrows argues that, “though negatively affected by past Canadian actions, Indigenous peoples continue to experience the operation of their legal traditions in such diverse fields as, inter alia, family life, land ownership, resource relationships, trade and commerce, and political organization. Indigenous traditions are inextricably intertwined with the present-day Aboriginal customs, practices, and traditions...” supra note 1 at 11.

⁶ Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Benjamin J Richardson, Shin Imai and Kent McNeil (Eds.) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oregon: Hart Publishing, 2009) at 196. See also Borrows, supra note 1 at 140

⁷ The Honourable Chief Justice Lance Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice”, *Indigenous Legal Orders and the Common Law*, 2012

After providing a brief introduction to indigenous legal traditions, this paper will illustrate four case studies highlighting methods for understanding, researching and teaching *ki'inaakonigewin* (our law). It will introduce substantive and theoretical distinctions between western systems of thought and indigenous legal traditions. Through the lense of four different initiatives, the paper will consider how indigenous laws have been considered in legal processes, from education to regulatory proceedings to research, as well as how they continue to operate within existing indigenous law and governance structures.

Indigenous Legal Traditions

Indigenous laws come from many sources, including “sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices, and local and national customs.”⁸ They are influenced by “the social, historical, political, biological, economic, and spiritual circumstances of each group.”⁹ In this way, they are not dissimilar to the common law.

Just as there are many ways of being indigenous, there are many ways of approaching indigenous legal traditions.¹⁰ Each indigenous legal tradition has its own procedural and substantive normative values. These can differ between different indigenous Nations, meaning that there is no one single unified system of Indigenous laws. However, there are many similarities between indigenous legal traditions, including the fact that laws are intimately tied to the worldviews and lived experience of indigenous people. Often those laws will have a spiritual and natural dimension.

⁸ Borrows, *Indigenous Constitution*, supra note 1 at 24

⁹ *Ibid* at 23-24

¹⁰ Aimée Craft, “Living Treaties: Breathing Research”, *Canadian Journal of Women and the Law*, Volume 26, Number 1, 2014, pp. 1-22 at 17 [Craft, *Living Treaties*]

Anishinaabe *inaakonigewin* (law) is culturally and collectively influenced.¹¹ For example, *Anishinaabe* (Ojibway) people have a unique way of viewing the world, understood in part through complex legal systems that draw on sacred and customary forms of law, which are defined by relationship. By understanding our relationships to other living beings, we work towards achieving our *mino-biimaadiiziiwin* (individual and collective well-being). *Anishinaabe inakonigewin* (our law) is an instrumental part of understanding the source of that well-being.

Anishinaabe law is all about relationships¹²; relationships amongst and between ourselves; relationships with other animate beings. These relationships give rise to rights, obligations and responsibilities which are exercised both individually and collectively by the Anishinaabe.¹³ In an Anishinaabe legal context, “rights and responsibilities are intertwined. Wherever a potential right exists, a correlative obligation can usually be found, based on an individual’s relationship with the other orders of the world.”¹⁴

Anishinaabe normative values, or laws, are both procedural and substantive in nature.¹⁵

Elder Allan White affirms that, “The law is the responsibility we have as Anishinaabe. This idea needs to be embedded into what we write about the law, rather than trying to capture the law as an idea.”¹⁶

¹¹ *Ibid* at 18

¹² John Borrows, *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010) at 8 [Borrows, *Drawing Out Law*].

¹³ Rights, obligations and responsibilities are exercised both individually and collectively by the Anishinaabe. See for example Chapter 3, Craft, Aimée, *Breathing Life Into the Stone Fort Treaty*, LLM Thesis, University of Victoria, 2011. See also Craft, *Living Treaties*, supra note 10 at 10

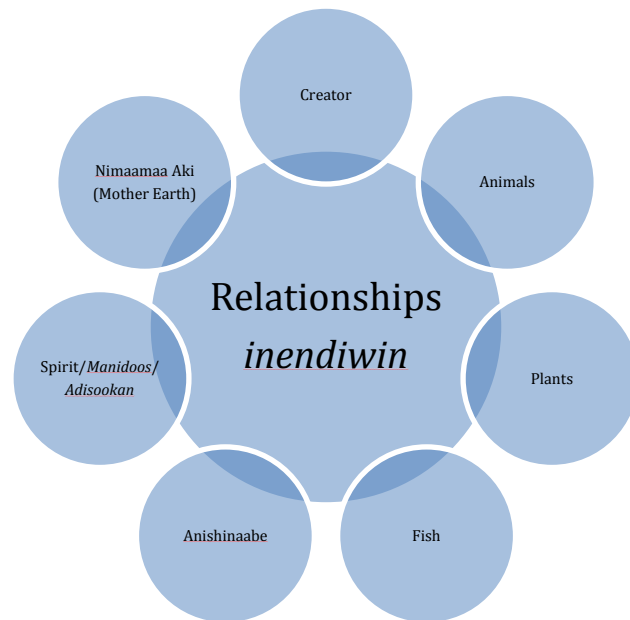
¹⁴ *Borrows at 79*

¹⁵ Aimée Craft, *Breathing Life Into the Stone Fort Treaty* (Saskatoon: Purich Publishing, 2013) [Craft, *Stone Fort Treaty*]. See also Craft, *Living Treaties*, supra note 6 at 9 and 11

¹⁶ Aimee Craft, *Anishinaabe Nibi Inakonigewin Report*, 2014 at 9.

http://chrr.info/images/stories/ANI_Gathering_Report_-_June24.pdf

Relationships are at the heart of Anishinaabe inaakonigewin



While western systems of thought and normative behaviours are focused in large part on protection of private property and individualism (personal liberty), traditional Anishinaabe values are focused on ensuring a good life for our children.¹⁷ We take direction on this value of *mino-bimaadiiwiwin* (good life) from the relationship we have with the Earth mother (*Nimaamaa Aki* or *Ninge Aki*).¹⁸

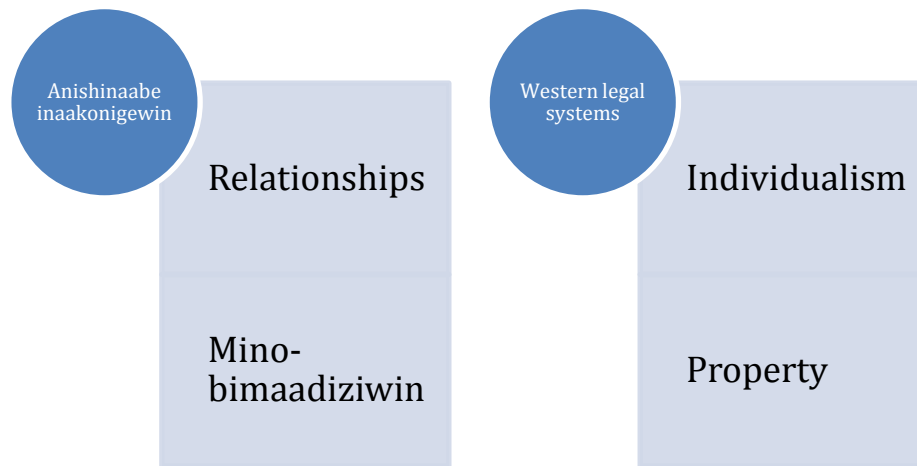
Differences of opinion are not necessarily confrontational or oppositional but rather can be attributed to a different understanding, worldview or values.¹⁹

¹⁷ "I asked Mishomis if our ancestors who made treaty were thinking of us when they negotiated the treaty. He reminded me how Anishinaabe think ahead for the children, grandchildren, great-grandchildren, and beyond that even. Seven generations ahead they would consider. He turned to me and he said: "But you have to remember to think seven generations back when you're making your decisions. Those ancestors are part of your life today, just like you were a part of their life back then." Craft, *Living Treaties*, supra note 6 at 18

¹⁸ See Craft, *Stone Fort Treaty*, supra note 10, particularly Chapter Five *Gizhagiiwin: The Queen's Obligations of Love, Caring and Kindness and Equality amongst her Children*

¹⁹ This difference is explained by Basil Johnston as: "Kitchi-Manitou has given me a different understanding." Basil Johnston, *Honour Earth Mother: Mino-Audjauh Mizzu-Kummik-Quae* (Cape Croker, Ont.: Kegedonce Press, 2003) at 148

Contrast Anishinaabe law with Western law



While we may not achieve our values perfectly, they continue to underlie our systems of thought, views of the world and the responsibilities that we have towards one another.

Based on this understanding, we are then faced with the sometimes daunting task of fulfilling our obligations and responsibilities. These obligations and responsibilities are sometimes descended through our families, other times they result from relationships with knowledge holders, other times they are handed down to us in ceremony, in dreams. Some we can talk openly about. Others are for ourselves. These are our gifts – the gifts we are given and the gifts that we carry. Whether their source is hereditary, democratic or divine, the obligation is sacred. Our gifts inform our methods of understanding and communicating. In essence our gifts are at the root of our methodology.²⁰

“You must come to our house”: the Elders and the Federal Court

In the process of developing an Aboriginal Law Practice Guideline, the Federal Court Aboriginal Law Bar Liaison Committee considered that the issues that engaged Elders and their testimony should be discussed with the Elders. The first gathering with the Elders was held in Ottawa in 2009. Members of the Court, along with representatives of the Indigenous Bar Association, the Canadian Bar Association Aboriginal Law Section and the Department of Justice Canada heard from each the of

²⁰ Craft, *Living Treaties*, supra note 10 at 19

nine Elders representing various indigenous nations from across Canada.²¹ The Elders were clear in their message – they had so much to share with the committee, and a short discussion in the heart of Ottawa would not be enough. Talking about the negative experiences they and other indigenous people had encountered in the Court was not going to be enough. That would still be focusing on the non-indigenous legal system. Elder François Paulette (*Dene*) told the judges: “Now you have to come to our house”. What the Elders were proposing was an education process for the judges about the indigenous perspective, and ultimately, an exposure to indigenous law in practice. What the committee soon realized was that by accepting the invitation to the Elders’ “houses”, a relationship was being fostered that would ultimately lead to a mutual recognition and respect for the value of difference, and in this case, the value of the legal systems that continue to uphold a way of life.

The judges, Elders and legal practitioners made their way to the First Nations Longhouse at the University of British Columbia. They agreed to meet again at the Turtle Lodge in Sakeeng Manitoba, where we were observed by legal scholars, community members and adjudicators. Some were apprehensive about bringing representatives of what they consider to be a colonial system into a lodge. Others were unsure that the judges and Elders could talk to each other and really understand what the other was saying (and the layers of thought, philosophy and worldview that underlies each of their lived experiences). Some worried about language barriers between English and the various indigenous languages spoken by the Elders. And then there were lawyers who worried about what role they should/could play in the dialogue.

At the end of the two day gathering, then Chief Justice of the Federal Court, Allan Lutfy, confirmed that we are living in a tri-judicial country. He had come to our house and understood its inherent value. Following those discussions, a Guideline

²¹ Including Elders from the Dene, Cree, Métis, Anishinaabe, Musqueam, Mi’kmaq and Blackfoot Nations

for Oral History and Elders Evidence was developed and included in the Aboriginal Law Practice Guideline. The Court enhanced its delivery of alternative dispute resolution services to include culturally appropriate and community based dispute resolution, with a group of specially trained judges with indigenous ADR experience and training. And the National Judicial Institute has made space for the Elders to work with judges towards enhancing their knowledge about indigenous people, including indigenous laws.

Anishinaabe Nibi Inaakonigewin

Through a series of five research gatherings, from June 2013 to September 2015, 11 *Anishinaabe* Elders from Manitoba and Northwestern Ontario have shared knowledge aimed at better understanding *Anishinaabe nibi inaakonigewin*.

Based on a methodology of storytelling,²² ceremony, song, and language the research explores water teachings through a legal framework built on the foundations of *inaakonigewin* (law) that is centered around relationships and responsibilities, rather than ownership, individualism and rights. An Anishinaabe Elder Peter Atkinson remarked, “We are responsible to each other and the land”²³, which includes water. The research was conducted in ceremony and mostly in the Anishinaabemowin language.²⁴

²² See Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2013) 11 (2) *Indigenous LJ* 1 at 9.

²³ *Supra* note 14 at 26.

²⁴ “Everything here has been done in ceremony, which is how we’ve been doing things for a long time. We should go down to the water and offer tobacco and our thoughts, so we can ask the water to bless us in helping her in what we’re talking about. I had a dream about doing this. It was showed to me and told to me in my dreams: this is what you do. This is what we do as a people and what we’ve done for a long time. We also talk about looking to the youth to help us.” (Elder Florence Paynter in *Anishinaabe Nibi Inaakonigewin Report*), *supra* note 16.

The results of the research were gathered in a preliminary report.²⁵ The Elders elaborated on the following Anishinaabe legal principles relating to water:

- Water has a spirit
- Water is life
- Water can heal
- Women are responsible for water
- We must respect the water
- We do not own water
- Water had a duality
- Water can suffer

The principles in the report inform the science, psychology and economics aspects of a broader research project relating to Clean Water for First Nations.

Continuing research is considering how this *Anishinaabe nibi inaakonigewin* and knowledge can be transmitted and incorporated into indigenous and non-indigenous forms of decision-making and management of water.

Anishinaabe nibi inaakonigewin helps us re-define and reconsider our relationships to water through our individual and collective processes of decision-making. It encourages the taking up of our responsibilities to water in working towards *mino-biimaadiiziiwin*.

“We’ve had the opportunity to think about the Western concepts of who owns the water, who controls it, and who can make money from it. These are the factors the Anishinaabe need to contest.” (Dennis White Bird, June 2013)

²⁵ *Anishinaabe Nibi Inaakonigewin Report* http://chrr.info/images/stories/ANI_Gathering_Report_-_June24.pdf

Grandmothers and Pike Head teachings

The Grandmothers of Kitigan Zibi and neighbouring communities began meeting to discuss the structure of their legal system. In October 2013 they presented their work, visually and orally at a session with the National Judicial Institute in Kitigaan Zibi. They used an entire pike fish head skeleton to illustrate their understanding of the Anishinaabek Constitution. As grandmothers, they came together and agreed that this had to be taught, not only to benefit Algonquian people, but all people. Their message to the judges was clear: do not assume we are lawless people. We know this fish inside and out. We are related to it. Even when it has died, it has the power to remind us about who we are and how we should behave.

What the Pike Head illustrated is similar to constitutional values that are enshrined in Canada's Constitution such as freedom of choice, expression and association. However, the Pike Head teachings were focused on the reciprocity of relationships in the exercise of those rights and obligations, and the accountability mechanisms that are sustained by those relationships. They shared that the Creator had placed the constitution in the Pike's Head (the pike being a loving relative of the Algonquian people) so that even when the people forgot aspects of the constitution, they could go back to the Pike for their law.

Manitoba Hydro regulatory hearings

In the context of an Environmental assessment process leading up to the building of the Keeyask hydro-electric development, the Minister of Conservation in Manitoba tasked two regulatory bodies with the review of proposed projects. The Clean Environment Commission (CEC) reviewed the environmental assessment of the Keeyask Dam and the Public Utilities Board of Manitoba was to review the need for and alternatives to (NFTA) to the Keeyask dam and other hydro-electric plans in northern Manitoba.

In the context of the CEC proceedings, there was evidence submitted of indigenous laws, including by the First Nations partners in the project.²⁶ For example, participants and presenters, as well as Partner First Nations indicated in their oral presentation and in their First Nations environmental evaluations that some of the people feared *oochinewhin/ohcinewin*.²⁷

Elders from York Factory presented their own views separately from the First Nation, focusing mostly on the negative impacts of hydro (past and projected future impacts) on caribou and fish in their area. In addition, a respected Cree Elder from a related community testified that their Cree law was in practice and reflected in what they were doing.²⁸

*One of our customary laws that we are exercising today is Tawinamakewin. We come here and exercise the art of listening in order to create understanding amongst ourselves. We are exercising our customary law today.*²⁹

In their final report, the CEC Commissioners indicated that the western scientific knowledge is limited by its goals (to seek to find that there are no residual effects to the environment). They suggested that incorporating western science with Aboriginal traditional knowledge (which incorporated indigenous legal principles and privileges the whole of the ecosystem) would benefit the environment. They pointed to what one of the Commissioners, Reg Nepinak (Anishinaabe from Pine

²⁶ A Two Track Approach of Western Science and Indigenous knowledge was built into the partnership negotiations. Each of the First Nation partners conducted their own Environmental Assessment of the proposed Keeyask hydro-electric development.

²⁷ *oochinewhin/ohcinewin* “refers to the belief that negative consequences will result from harmful or disrespectful actions, including harming *Aski/Askiy* (the environment, including the land and water and all the plants and animals) or other people or treating *Aski/Askiy* or other people with disrespect.

²⁸ Others testified on the basis of traditional knowledge and indigenous laws. For a complete detail of the hearings, transcripts are available at:

<http://www.cecmanitoba.ca/hearings/index.cfm?hearingid=39#3>

²⁹ D’Arcy Linklater, CEC, Keeyask Hearing, December 12 at p.6236

Creek First Nation) had shared as a potential decision making process, involving a Circle of Grandmothers.

Final decisions in governing our indigenous societies were made by our grandmothers – Ke nocominank.

The minister should support these long-standing and successful methods of the Cree/indigenous worldview by incorporating a circle of Ke nocominank with a mission to oversee safeguarding the environment.

The Ke nocominank terms of reference would be the teachings of Honesty, Respect, Courage and Truth. These four are engrained with Wisdom, Humility and Love. Elders of today do say these were all we were taught as children.³⁰

In the spring of 2014, a group of concerned resource users spoke to the Public Utilities Board of Manitoba (PUB) about the hydro-electric development plans in Northern Manitoba, from their own perspective. They illustrated their experience and their responsibilities to the PUB. They were from indigenous communities that would be affected by further hydro-electric development on the Nelson River in Northern Manitoba. The group met to discuss their intervention, both in their communities, with adjoining communities and together as a group in Winnipeg prior to the hearing. They compiled images of their lives and the further destruction they were anticipating with additional development. They spoke of their connection to the land and the deep fears that they faced for themselves, their families and communities. They shared what they knew at a great personal cost because of their sense of responsibility. They spoke their Cree language in order to communicate some of the sacredness of the water they spoke of.

It's hard to know how these Cree perspectives, teachings, traditions, knowledge and law affected the process or the ultimate outcomes of the decision-making process. However, I think we should take the CEC's recommendation seriously and acknowledge that indigenous frameworks of understanding can provide for better ways to protect the environment (and other common interests).

³⁰ Clean Environment Commission of Manitoba, Report On Public Hearing Keeyask Generation Project April 2014, p.161 <http://www.cecmanitoba.ca/resource/hearings/39/Keeyask%20WEB.pdf>

Conclusion

These ongoing efforts value and enhance the development and maintenance of indigenous legal traditions. Further, they can help ensure that cultural competency and knowledge about indigenous legal traditions is reflected in our current legal education and training.

Both the Indigenous and non-Indigenous legal communities in Canada will benefit from an enhanced understanding of indigenous laws. For example, each person residing in Manitoba is a participant in an Anishinaabe legal relationship that stems from the agreement to co-exist peacefully and to share in the land, as confirmed in the treaties. These treaties were made on the basis of indigenous law and must be implemented from that perspective as well. Further, we understand that much of Anishinaabe law is learned from the land and by observing nature. A deeper understanding of Anishinaabe law can enhance relationships to land and environment, in the hopes of having a collective good life (*mino-bimaadiziwin*).

Principle based decision making, rather than strict interpretation of legal rights and entitlements based on the protection of privacy interests, or at least considered engagements with indigenous peoples and indigenous principles can shift the focus of decision making. It can enhance knowledge and shift the values and priorities to the collectivity, well-being and relationships. Further, it can provide an enhanced timeline for decision making that takes into account the past, present and future in a way that linear systems often struggle with (particularly with the tension between immediate and future interests). As my *Mishomis* has said, we cannot rest all of the responsibility for the future in the hands of those who are yet to be born. We have to consider those who have come before and the contributions of those who are here now. Collectively, we must be responsible. Our *mino-bimaadiziwin* (good life) depends on it.