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Making Space for Indigenous Law

By Estella White (Charleson) – Hee Naih Cha Chist in Commentary | January 12th, 2016

There is a simple, yet woefully neglected truth that the Canadian legal system must confront: Indigenous legal orders and Indigenous laws exist. Indigenous legal systems are diverse and resilient, and they exist despite overt and racist attempts by Canada's governments and its legal system to ignore, subvert and even prohibit them.

Indigenous Laws Exist: What Are They?

Acknowledging that they exist is the first step in creating space for Indigenous laws. Too often Indigenous peoples have been portrayed as having no laws, or when their laws are acknowledged, they are oversimplified and flattened as cultural beliefs or values, rather than as complex intellectual processes for reasoning, decision making and social ordering.

Indigenous law exists as a source of law apart from the common and civil legal traditions in Canada. Importantly, *Indigenous laws* also exist apart from *Aboriginal law*, though these sources of law are interconnected. Aboriginal law is a body of law, made by the courts and legislatures, that largely deals with the unique constitutional rights of Aboriginal peoples and the relationship between Aboriginal peoples and the Crown. Aboriginal law is largely found in colonial instruments (such as the *Royal Proclamation* of 1763, the *Constitution Acts* of 1867 and 1982 and the *Indian Act*) and court decisions, but also includes sources of Indigenous law.

Indigenous law consists of legal orders which are rooted in Indigenous societies themselves. It arises from communities and First Nation groups across the country, such as Nuu Chah Nulth, Haida, Coast Salish, Tsimshian, Heiltsuk, and may include relationships to the land, the spirit world, creation stories, customs, processes of deliberation and persuasion, codes of conduct, rules, teachings and axioms for living and governing.

The Importance of Recognizing Indigenous Law

First Nations have made important gains in the recognition of Aboriginal rights

and title in the courts. While these victories are important, and are essential steps in the advancement of *Aboriginal law*, they nonetheless indicate a lack of serious engagement with *Indigenous law* by the courts.

Strict legal rules and tests continue to dictate how First Nations 'prove' their rights to the land and resources. It took the Tsilhqot'in more than a decade to prove Aboriginal title while the Nuu Chah Nulth have spent nearly 100 days in a justification trial despite having already proven their Aboriginal rights to fish and sell fish. These processes do not adequately engage Indigenous legal orders. They also do not fairly advance reconciliation.

Space for Indigenous Law

Though recognition of Indigenous laws has been inadequate thus far, there is space for recognizing and engaging with these laws in the Aboriginal law context and in the common law generally. Doing so will be consistent with principles that Canada prides itself on: namely the principles of tolerance, respect for minorities, the rule of law and pluralism. If the rights of all Canadians, including Indigenous Canadians, are to be articulated and guarded by the Courts, the Courts must necessarily be capable of understanding and engaging with those rights.

The primary goal of Section 35 of the *Constitution* is reconciliation. True reconciliation must give equal weight to the Aboriginal perspective and the perspective at common law. In the interest of reconciliation, it is incumbent on legal practitioners and members of the judiciary to learn what the Aboriginal perspective is.

Taking the "Aboriginal Perspective" a Step Further – Recognizing Indigenous Legal Orders as part of Reconciliation

Law of any kind is hard work. As an Indigenous person, I have just as much difficulty identifying, articulating and applying Indigenous laws as I do common law or statutory law. But I am committed to learning the mainstream law of Canada as an Indigenous person and it is tough.

As challenging as the converse effort may seem – a non-indigenous legal actor learning Indigenous law – Indigenous legal orders are legitimate and must be respected and treated seriously. Given that such a small percentage of the judiciary and legal profession are Indigenous there are concerns with how to seriously engage with Indigenous laws in this sector, given how underequipped many are to engage with it. I don't expect that non-Indigenous peoples will find it easy to engage with Indigenous laws, but it is worth it. This is a necessary part of reconciliation.

This work of recognizing Indigenous legal orders has been given momentum by the Truth and Reconciliation Commission's Calls to Action, which call for the recognition of Indigenous legal orders and the adherence to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). With government support to implement the Calls to Action, this moment in time represents a

tremendous opportunity to create and occupy space for Indigenous legal orders in Canada, for the benefit of Indigenous peoples and the benefit of all Canadians. Indigenous legal orders can offer valuable tools for effectively solving problems, in some cases more effectively than the Canadian legal system (particularly in responding to harm in the criminal law context).

Occupying the Space for Indigenous Law

We can look to ongoing efforts to guide our way forward, but we must not rely on others to do the hard work. Serious engagement with Indigenous law presents challenges and opportunities for us all. The following are some ways we as lawyers can engage with Indigenous laws.

As a first principle, we must take Indigenous laws seriously as laws. Flowing from that, we must consider all the effective uses that we may make of those laws and to raise them in all appropriate contexts.

Indigenous Law in Regulatory Processes

A ground-breaking example of an effort to utilize Indigenous legal systems has been seen in a recent regulatory process. Leading the way in this effort are the Tsleil-Waututh, who used their laws to conduct an assessment of a major resource project in their territory. Following their own legal processes, supported by numerous expert reports and Coast Salish legal principles, the Nation determined that the project posed unacceptable risks and therefore could not proceed. Stories were drawn upon to identify and articulate important legal principles in the review process. Environmental assessment processes led by the Provinces, the Federal Government or First Nations, ought to accord weight to these legal sources. To non-Indigenous people it may not be apparent how a story contains laws, but further engagement can reveal complex interrelationships, precedents for problem solving, and examples of principled decision making.

Indigenous Law in Giving Meaning and Content to Aboriginal Rights and Title

Indigenous legal orders can and should provide meaning and content to Aboriginal rights and title, before and after 'proving' them. Prior to proof of Aboriginal rights and/or title, consultation and accommodation should be consonant with First Nations' rights, which includes governance rights (Aboriginal rights and title goes beyond resource rights). In some cases this will necessarily involve consent of the First Nation if any project is to proceed in their territory. This is consistent with the current state of Aboriginal law jurisprudence. First Nations should be expected to provide principled reasons and be able to point to sources of law to illustrate why consent is given or withheld.

In proving Aboriginal rights and title, the legal processes and rules need to be expanded to properly recognize and engage with Indigenous sources of law. This should include expanding the rules of proof for Aboriginal rights and title to more appropriately recognize Indigenous legal concepts of property, resource use and management. For example, in some legal traditions creation stories carry

significant weight in determining the degree of attachment of certain peoples to particular places. These stories not only attach peoples to place, they can inform the groups' rights and responsibilities in relation to those places. This form of evidence should be given as much, if not more, weight than non-Indigenous forms of evidence such as anthropological and ethnographic evidence.

Another option is to develop out of court processes for the recognition of Aboriginal rights and title. What would an Indigenous legal process look like? This could involve, or work alongside, a re-engagement in self-government negotiations, or other such processes that recognize the right for First Nations to govern themselves beyond the confines of the *Indian Act*, in accordance with their laws. The paternalism engrained in the *Indian Act* has proven to be costly for everyone.

Indigenous Law in Educational Institutions

An important and crucial place to engage with Indigenous legal orders will be our educational institutions. Support for Indigenous legal education, Indigenous law degree programs, and Indigenous legal institutions is important to advance the hard work of teaching, learning and working with Indigenous laws.

A great example and resource for those who want to learn more about how to seriously engage with Indigenous laws is the Indigenous Law Research Unit at the University of Victoria, led by Val Napoleon.

Free, Prior and Informed Consent (FPIC)

FPIC is fundamental to the recognition of Indigenous laws, as recognized by the TRC Calls to Action and UNDRIP. Consent is premised on First Nations' legal processes of reasoning, deliberating and decision making. Giving or withholding consent is Indigenous law in action. Implementing FPIC will be a key step in taking Indigenous legal orders seriously.

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