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The Honorable Mr. Justice Jeffrey F. Harris
Manitoba Court of Queen's Bench

Indigenous law – Aboriginal law: What's the Difference?

As the relationship between Indigenous and non-Indigenous Canadians evolves in the process of reconciliation, it is important for us as legal practitioners to understand the concepts which are foundational to reconciliation. In the ***Final Report of the Truth and Reconciliation Commission***, (the "***TRC Final Report***"), the Commissioners make it clear that reconciliation requires an equal place for Indigenous law in our legal systems. This requires us, as common law practitioners, to understand what Indigenous law is and where our place is in the "practice" of Indigenous law. While that understanding will give clarity to the differences to establish a common understanding, we must also ensure that we show respect to those laws that belong to Indigenous people so as to avoid yet another appropriation of something that is not ours.

In this short paper, I will provide an introduction to the common law understanding of Indigenous law, its historical place in our legal system and a sense as to the change that is coming as our institutions move toward reconciliation.

Indigenous law are those customs, systems and practices that governed Indigenous societies long before Europeans arrived in North America and took the first steps in the purported exercise of sovereignty over the Indigenous Nations. Each Indigenous nation across what is now Canada had its own laws and legal traditions. In the ***TRC Final Report***, the Commissioners refer to Professor John Borrows who explains that:

> The recognition of Indigenous legal traditions alongside other legal orders has historic precedent in this land. Prior to the arrival of Europeans

> and explorers from other continents, a vibrant legal pluralism sometimes developed amongst First Nations. Treaties, intermarriages, contracts of trade and commerce, and mutual recognition were legal arrangements that contributed to long periods of peace and helped to restrain recourse to war when conflict broke out. When Europeans came to North America, they found themselves in this complex sociolegal landscape....
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> There were wider systems of diplomacy in use to maintain peace through councils and elaborate protocols. For example, First Nations and powerful individuals would participate in such activities as smoking the peace pipe, feasting, holding a Potlatch, exchanging ceremonial objects, and engaging in long orations, discussions and negotiations. Diplomatic traditions among Indigenous peoples were designed to prevent more direct confrontation....[1]

Quoting Professor Val Napoleon, the authors continue:

> Indigenous law is a crucial resource for Indigenous peoples. It is integrally connected with how we imagine and manage ourselves both collectively and individually. In other words, law and all it entails is a fundamental aspect of being collectively and individually self-determining as peoples. Indigenous law is about building citizenship, responsibility and governance, challenging internal and external oppressions, safety and protection, lands and resources, and external political relations with other Indigenous peoples and the state.[2]

Aboriginal law, on the other hand, is about the resolution of disputes between Indigenous and non-Indigenous societies. Most of these disputes are determined within the scope of s. 35 of the ***Constitution Act, 1982*** ("the ***Constitution Act***") by reliance on the common law, often to the exclusion of Indigenous legal traditions and principles.[3] Even to the extent that Indigenous law is admitted to aid in the resolution of these disputes, the rules for admission are common law rules. Once admitted for that purpose, it is common law judges who, with the assistance of experts, interpret and apply Indigenous law principles.

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[1] Borrows, *Canada's Indigenous Constitution*, 129–130. As cited in the TRC Report, volume 6Ibid, pp. 129 - 130

[2] V. Napoleon, *Thinking about Indigenous Legal Orders*, 230

[3] K. Manley-Casimir, *Toward Bijural Interpretation of the Principle of Respect in Aboriginal Law*, 2016 CanLIIDocs 328

While the relationship between Europeans and Indigenous peoples purported to be nation to nation, the reality was a system of oppression of Indigenous peoples and their cultures. Government enacted laws and policies that criminalized cultural practices which were part of Indigenous legal orders. Canadian law was used to "suppress the truth and deter reconciliation. Parliament's creation of assimilative laws and regulations facilitated the oppression of Aboriginal cultures …".[4]

Despite this suppression, and where not otherwise extinguished, the common law was capable of recognizing, accepting and applying Indigenous law (often referred to as Aboriginal customary law).

A very early case in which Aboriginal customary law was accepted was ***Connolly v Woolrich*** (1867), 17 RJRQ 75 (Qc Sup Ct) ("***Connolly***") wherein the court accepted Aboriginal customary law in deciding that a Cree marriage in the Athabasca region between a trader and his Cree wife married in accordance with Cree custom was valid and that the son of that marriage was entitled to an inheritance from the fur trader's estate. The Court concluded that English common law prevailing in the Hudson's Bay territories did not apply to Indigenous people who were joint occupants of the territories; nor did it supersede or abrogate the laws, usages, and customs of those Indigenous people.

In ***R v Nan-e-quis-a Ka*** (1889), 1 Terr LR 211 (NWT SC) the court held the marriage was valid either on the basis of *Connolly*, and if the marriage had predated the reception of English law, the custom marriage was nevertheless valid.

In ***Re Adoption of Katie E7-1807***, 1961 CanLII 443 (NWT TC), [1961] NWTJ No 2, 32 DLR (2d) 686 (***Re Katie***) at para. 36, Justice Sissons concluded that adoptions "made according to the laws of the Territories" include adoptions in accordance with Indian or

[4] *TRC Report* at page 48

Eskimo custom. ***Re Katie*** was followed in ***Re Beaulieu's Petition*** (1969), 64 WWR 669 (NWT TerrCt).

In ***Re Deborah*** (1972), 1972 CanLII977 (NWT CA), the court expanded the basis for acceptance of custom:

> Custom has always been recognized by the common law and while at an earlier date proof of the existence of a custom from time immemorial was required, Tindal C.J., in *Bastard v. Smith* (1878) , 2 Mood. & R. 129 at 136, 174 E.R. 238, points out that such evidence is no longer possible or necessary and that the evidence extending "as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom" is all that is now required. Such proof was offered and accepted in this case.

Some Indigenous laws have been given recognition by operation of federal statute. For example, Indian custom adoptions of children are included in the definition of "child" and "Band" councils selected in accordance with the custom of the Band are included in the definition of "council of the band" in section 2(1) of the *Indian Act,* RSC, 1985, c I-5.

Despite periodic and limited acceptance of Indigenous customary laws, prior to s. 35 of the ***Constitution Act***, ***1982*** ("the ***Constitution Act***"), the common law status of those laws made them vulnerable to unilateral extinguishment at the instance of the Crown.

Section 35 of the ***Constitution Act*** provided constitutional refuge for Indigenous laws. In ***R v Sparrow***, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, [1990] SCJ No 49, the court confirmed that the effect of s. 35 of the ***Constitution Act*** was to give constitutional protection to existing Aboriginal and treaty rights, including Indigenous laws. As Chief Justice McLachlin observed in ***Mitchell v Canada (MNR)***, 2001 SCC 33, [2001] 1 SCR 911:

> [10] European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary,... aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as

> rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them…. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada. (emphasis added)

McLachlin CJC's conclusion reflects the doctrine of continuity in British Imperial law, which acknowledges the continuation of laws applicable to a territory prior to British colonization.[5] The court relied on this doctrine in ***Connolly***.[6] Thus, barring one of the exceptions noted by the Chief Justice, Indigenous laws continue as part of the law today.

In ***Alderville First Nation v. Canada****, 2014 FC 747 (CanLII)* (***Alderville First Nation***)*,* Mandamin J. concludes that at the very least, Aboriginal customary law which has not been extinguished is given legal effect in Canadian domestic law through Court declarations, including Aboriginal title or rights jurisprudence, or by statutory provisions. It may also be given legal effect by incorporation into Indian treaties.

Regardless of how we get there, it is now clear that Indigenous legal traditions are firmly rooted in Canadian law, establishing a firm constitutional foundation for their full implementation in Canada's legal systems:

> [8] Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land. Chief Justice McLachlin of the Supreme Court of Canada wrote, more than fifteen years ago, that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty" (*Mitchell v MRN*, 2001 SCC 33 at para 10, [2001] 1 SCR 911). In a long line of cases, from *Connolly v Woolrich* (1867), 11 LCJ 197, 17 RJRQ 75 (Que SC) , aff'd (1869), 17 RJRQ 266, 1 CNLC 151 (Que QB), to *Casimel v Insurance Corp of BC* (1993), 1993 CanLII 1258 (BC CA), 106 DLR (4th) 720 (BCCA), Canadian courts have recognized the existence of Indigenous legal traditions and have given effect to situations created by Indigenous law, particularly in matters involving

[5] Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law*, translated by Jodi Lazare (Toronto: Carswell, 2013) at 375-376).

[6] Burrows, *Indigenous Legal Traditions in Canada,* Washington University Journal of Law & Policy, 2005, pp. 183 to 184

> family relationships (for a survey, see Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at 374-385; see also *Alderville Indian Band v Canada*, 2014 FC 747). ***(Pastion v. Dene Tha' First Nation***, 2018 FC 648 (CanLII), [2018] 4 FCR 467)

However, as important that this recognition is, weaving Indigenous legal traditions into the common law comes us short as it remains within the jurisdiction of common law courts to determine whether an Indigenous law has survived. If a law has survived, it remains within the authority of common law judges to interpret those laws. One might appropriately question the expertise of common law judges to interpret Indigenous laws. While s. 35 was significant, it fell short of the aspirations of Indigenous people to full recognition of Indigenous legal traditions.

These aspirations were given life both internationally and domestically through the ***United Nations' Declaration on the Rights of Indigenous Peoples*** (***UNDRIP***), adopted without reservation by the government of Canada in 2016[7], and the ***Truth and Reconciliation Commission: Calls to Action*** (the "***TRC Calls to Action***"). These documents, whether viewed individually or collectively, provide a path to the recognition and protection of Indigenous legal traditions in Canada.

Article 3 of ***UNDRIP*** acknowledges the right of Indigenous people to self-determination, which is considered to include the right to Indigenous legal traditions. Article 5 provides that Indigenous peoples have the right to maintain and strengthen their distinct political, *legal*, social and cultural institutions…." (emphasis added) Article 34 confirms that Indigenous people have the right to exercise their unique legal traditions in line with international human rights standards.

[7] Government of Canada website, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada*

The ***TRC Calls to Action*** 42 and 45 call on government to cooperate in reviving and implementing Indigenous justice systems supportive of Aboriginal and treaty rights and the values in ***UNDRIP***.

In 2016, Canada committed to reconciliation in its ***Principles respecting the Government of Canada's relationship with Indigenous peoples*** in which Canada recognized **"**that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government".

In December 2020, legislation to implement ***UNDRIP***[8] was introduced by the government, requiring Canadian laws to be consistent with ***UNDRIP***:

> 5 The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.

According to Professor Brenda Gunn, ***UNDRIP*** moves us "beyond the interpretations of s. 35 [of the ***Constitution Act***] which are based on a colonial understanding of those rights because UNDRIP grounds Indigenous people rights in Indigenous traditions".[9]

The right to Indigenous legal traditions is integral to reconciliation, as articulated in the ***TRC Final Report***:

> Despite court judgments, not only has Canadian law generally not protected Aboriginal land rights, resources, and governmental authority, but it has also allowed, and continues to allow, the removal of Aboriginal children through a child-welfare system that cuts them off from their culture. As a result, law has been, and continues to be, a significant obstacle to reconciliation. This is the case despite the recognition that courts have begun to show that justice has historically been denied and that such denial should not continue. Given these circumstances, it should come as no surprise that formal Canadian law and Canada's legal

[8] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*
[9] B. Gunn, *Beyond Van der Peet – Bringing Together International, Indigenous and Constitutional Law, UNDRIP Implementation Braiding International, Domestic and Indigenous Laws*, Centre for International Governance Innovation, p. 32.

> institutions are still viewed with suspicion within many Aboriginal communities.
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> Reconciliation will be difficult to achieve until Indigenous peoples' own traditions for uncovering truth and enhancing reconciliation are embraced as an essential part of the ongoing process of truth determination, dispute resolution, and reconciliation. No dialogue about reconciliation can be undertaken without mutual respect as shown Indigenous law through protocols and ceremony.[10]

Some changes are already evident. ***An Act respecting First Nations, Inuit and Métis children, youth and families***, **S.C. 2019, c. 24** recognizes the right of Indigenous peoples to implement Indigenous laws in caring for their children. Section 8 is instructive as to the purpose of the Act, which is to:

> (a) affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;
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> (b) set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and
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> (c) contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

The implementation of the principles of ***UNDRIP*** and the ***TRC Calls to Action*** will bring fundamental changes to our legal system. During our conference today, we will discuss how we as a profession can further our understanding about Indigenous law and our role in implementing these changes.

Thank you.

[10] *TRC Report* at page 49