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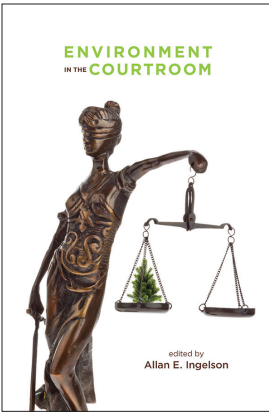
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ENVIRONMENT IN THE COURTROOM

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Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions

HADLEY FRIEDLAND

It is better to know some of the questions than all of the answers.

—JAMES THURBER

Introduction

In this chapter, I argue that serious and sustained practical engagement with Indigenous legal traditions by legal practitioners is important and possible. It is important in the context of environmental issues because it may enable us to move past some “sticking points” in conflicts over resource development and cumulative impacts on traditional lands. It may help us better understand Indigenous perspectives on the impacts of environmental damage and what adequate consultation and reasonable accommodation entails. On a broader level, it also may contribute to a robust reconciliation between peoples within Canada. While practical engagement with Indigenous legal traditions is possible, there are intellectual hurdles to overcome before addressing the legal, political, or institutional questions that are often raised regarding greater formal recognition of these legal traditions within Canada. In this chapter I suggest some methods legal practitioners might use in approaching the intellectual work of engagement.

Practical Engagement with Indigenous Legal Traditions

Even if we agree that both recognition of and engagement with Indigenous legal traditions would be relevant to a better understanding of the Indigenous perspective on environmental issues on traditional lands, we are still left with the very real question of *how*? Indigenous legal traditions may be deeply meaningful

or have great impact in the lives of people within Indigenous communities,¹ but I have come to accept that outside those communities, they are largely invisible or incomprehensible. This perception is illustrated in Professor John Borrows' book, *Canada's Indigenous Constitution*, where he relates a personal conversation with an unnamed chief justice of a provincial appellate court. The chief justice states bluntly to him: "You say Indigenous law exists; I don't believe it for a minute."² However, even people who want to know more about Indigenous legal traditions struggle to understand how to do so. Professor Val Napoleon tells the story of a well-known lawyer for Indigenous groups saying to her: "We all know there is *something* there—but we don't know how to *access* it."³

When we discuss more public, explicit, and integrated use of Indigenous legal traditions in Canada generally, there are many legal, practical, and institutional issues to address. But there are also very real intellectual issues. I believe that how well we are able to address the legal, practical, and institutional issues will depend on whether we actually address the intellectual ones, or whether we skip this step and assume we already know certain answers about the substantive content of Indigenous legal traditions. So, the first step toward practical engagement is finding ways to start engaging with Indigenous legal traditions in a substantive way. Really, it is about us: How can we start asking better questions?

In order to start asking better questions, I suggest we need three main things, which I will elaborate on in this chapter. First, we need a logical starting point. Second, we need to make some reasonable working assumptions, and third, we need a way to get beyond generalities and generalizations. Then we can begin to ask targeted and useful questions about the specific issues we are focused on at any given time.

A LOGICAL STARTING POINT

I will start from a very basic level, for people who may not be Indigenous or even have any prior experience directly interacting with Indigenous communities. I want to suggest a logical starting point for inquiries into Indigenous legal traditions generally, and Indigenous legal principles related to environmental issues specifically, that I do not think requires any prior knowledge whatsoever.

Prior to European contact or "effective control," Indigenous peoples lived here, in this place, in groups, for thousands of years. We know that when groups of human beings live together, they have ways to manage themselves and all their affairs.⁴ This task of coordination is "the most common of common denominators in law."⁵ Indigenous societies harvested resources and used the land in a variety of ways for millennia. Therefore, as a matter of logic alone, our

starting point for any inquiry has to be that, *at some point*, and for a very long time, Indigenous peoples coordinated resource harvesting, management, and land use successfully enough to continue on as societies.

It feels a bit embarrassing to even have to point this out as a logical starting point, but it is important to do so, because the myth of Indigenous people as lawless, and without any regulation of land or methods for resource management, has too often been used as a trope for European theorists and jurists in making claims about property rights, with no basis whatsoever.⁶ There have been devastating political and *legal* consequences for Indigenous societies based on illogical assumptions about an absence of law.⁷

Dispensing with illogical starting points doesn't lead us to subscribe to a utopian vision of Indigenous legal traditions generally, or resource management specifically. However, we have no logical reason to think Indigenous laws didn't work well enough for thousands of years.⁸ Scholars have begun to describe specific resource management regulation in several Indigenous societies in both the past and present, making some of these processes more accessible to outsiders.⁹ We can approach Indigenous legal traditions, not as paragons of perfection but as reasonable legal orders with reasoning people. This logical starting point gives us some clues as to how to frame further inquiries more logically and productively about the *content* of these legal traditions.

REASONABLE WORKING ASSUMPTIONS

There are some reasonable working assumptions that flow from this logical starting point, and these can help us productively frame our inquiries into Indigenous legal traditions. They are just assumptions, but they may serve to keep from us getting stuck in intellectual traps that stem less from facts and more from the ample negative stereotypes about Indigenous people, or from images of Indigenous people that are really just tropes invented by European theorists.

Reasonable working assumptions can help frame relevant questions about aspects of Indigenous legal traditions, including (a) sources of Indigenous law, (b) practitioners and teachers of Indigenous law, and (c) methods for recording and promulgating Indigenous law.

One reasonable working assumption is that there must be sources of Indigenous law that are not courts or parliament.

As there were no courts or parliament before European control, and there was law, there logically must be other sources of law. So, a useful question

is: What are some of these sources of Indigenous law? Borrows has written about five sources of Indigenous law: (1) Sacred, (2) Natural, (3) Deliberative, (4) Positivistic, and (5) Customary.¹⁰ He also makes the important point that the “proximate source” of most Indigenous law, like laws in the common law legal tradition, is deliberation. This means that interpretation and persuasion are vital aspects of legal reasoning within Indigenous legal traditions too.¹¹

A second reasonable assumption is that there have to be practitioners and teachers of Indigenous law who are not lawyers or law professors.

As there were no lawyers or law professors before European control, and there was law, there logically must be other practitioners and teachers of law. So, again, it makes sense to ask: Who are some of the practitioners? Who are some of the teachers?

Borrows suggests that Indigenous laws are more broadly dispersed in a more decentralized way than in the court cases and written legislation we are accustomed to.¹² He argues that part of the strength and resiliency of Indigenous laws is that they have been practised and passed down through “Elders, families, clans, and bodies within Indigenous societies.”¹³

A third reasonable assumption is that there have to be methods to record and promulgate laws that are not court cases, statutes, or texts.

As there were no law texts, statutes, or written records of cases before European control, and there was law, there logically has to be other ways Indigenous laws are recorded and promulgated. Therefore, a useful question is: What are some of the ways Indigenous laws can be recorded and promulgated? Again, Borrows explains that Indigenous laws can be recorded and shared in different forms, and in a more broadly dispersed and decentralized way than the statutes and court cases legal practitioners may be accustomed to, and that Indigenous laws can be recorded and promulgated in various forms, including stories, songs, practices, and customs.¹⁴ Napoleon explains that law “setting out the legal capacities, relationships, and obligations” can be embedded and recorded in narrative, practices, rituals, and conventions.¹⁵ The Canadian Law Commission’s *Justice Within* Report stated that some Indigenous people suggest that law can be found in dreams, dances, art, the land, and nature.¹⁶

It is clear from this brief overview that when legal scholars use these types of reasonable working assumptions to frame their inquiries about Indigenous legal traditions, they are starting to come up with relevant questions and to theorize reasonable answers. This begins to make these intellectual resources

more explicit and accessible. If we start from our logical starting point and our reasonable working assumptions, we can start to generate some relevant questions for practically engaging with Indigenous legal traditions regarding environmental issues. Some of these questions might be:

- What are some of the sources of Indigenous laws related to the environment?
- Who are some of the practitioners or the teachers we can turn to for information about Indigenous laws related to the environment?
- What are some of the ways Indigenous laws related to the environment may be recorded and promulgated?

The first question in this set is a fundamental one about a community's legal foundations.¹⁷ The next two questions are primarily questions about what resources are available for exploring issues within a particular Indigenous legal tradition or even a specific community.¹⁸

Starting our inquiry from this angle allows us greater perspective to understand *why* Indigenous communities might be adopting the positions they are in relation to specific development.¹⁹ As Anishinabek legal scholar Aaron Mills points out, looking seriously at the reasons behind such positions “would be infinitely more productive than not caring about the motivations for the behaviour and focusing solely on its result.”²⁰ One thing that is immediately apparent in asking these questions, and looking at some of the answers being theorized, is that this inquiry can lead us to recognize and reflect on a whole other level of environmental impacts.

If the natural world is one vital source of Indigenous laws,²¹ then environmental damage may be viewed as damaging the very foundations of these laws. If observations of the natural world or inscriptions upon a landscape are used as pedagogical resources for recording, remembering, and promulgating Indigenous laws,²² then changes to the environment may erase some essential resources for passing on these laws. Thus, in addition to other effects, it is possible that the cumulative impacts of environmental damage may also constitute real damage to the basic maintenance of social order within particular Indigenous communities.

GETTING BEYOND GENERALITIES AND GENERALIZATIONS

Once we have framed our inquiry broadly by grounding it in a logical starting point and adopting some reasonable working assumptions so we are asking

relevant questions, we still need a way to get “into” the nitty-gritty details of Indigenous legal traditions. This inquiry can potentially move us beyond increasing our insight into the perspectives behind certain positions to actually increasing our capacity to develop constructive ways forward.

It is crucial to get beyond generalities and generalizations if we are going to practically engage with Indigenous legal traditions. From the outside, looking into a legal tradition, we pay attention to the aspects that directly affect our lives or that bother us. We look for simple answers and we look for “the rules.” Before I started law school, I assumed that law was an immovable object and I would be memorizing a bunch of answers. I didn’t realize how diverse and complex law actually was. Or that I would never be given a book of answers. The difference between before and after law school for me, as for many others, was the difference between an internal and external view of a legal tradition. I started with an external point of view, where I saw the aspects of the law that came to my attention through my work or the media, as well as particular instances of the law’s impact on people I knew. In law school, I moved to an internal point of view, where I understood the language and debates within Canadian law and learned how to argue within its parameters.²³ Most importantly, I went from seeing the law as a static “thing” to memorize to seeing it as a fluid, dynamic conversation, in which I could participate if I knew the terms of the debate and the forms and limits of argumentation.

This personal experience helps me understand why, when practitioners look at Indigenous legal traditions from the outside, they focus on the particular aspects of them that are immediately impacting them, and they expect something simple and they expect rules. But the problem that has arisen is that, over time, this has reduced the way we talk about Indigenous legal traditions to rhetoric or oversimplified, rule-bound accounts. This feeds both negative stereotypes about Indigenous law within broader Canadian society and fundamentalism within Indigenous communities. It doesn’t give us any way to understand Indigenous legal traditions as fluid, dynamic conversations, in their rich complexity, and it doesn’t give us any way to competently question, clarify, or challenge concepts within them.

When we stay at the level of generalities and generalizations, we often end up stuck in discussions that never seem to go anywhere productive. A good example of this is divergent views on whether or not the earth is a living being²⁴ or whether or not animals can bear rights and obligations.²⁵ I have heard people argue, from both sides, that these divergent world views are insurmountable obstacles to bridging the chasm between Indigenous and non-Indigenous

Table 7.1 | Shifts in Questions*

<i>From:</i>	<i>To:</i>
What is Aboriginal justice?	What are the legal concepts and categories within this Indigenous legal tradition?
What are the cultural values?	What are the legal principles?
What are the “culturally appropriate” or “traditional” dispute resolution forms?	What are the legitimate procedures for collective decision making?
<i>Overall Shift:</i>	
What are the rules?	What are the legal principles and legal processes for reasoning through issues?
What are the answers?	

* These shifts were first published in Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2013) 11:2 Indigenous Law Journal 1.

approaches to natural resource management and other environmental issues. I don’t have any definitive answers, but I do think issues look very different when framed in terms of generalizations about cultural world views and incommensurable absolutes than when issues are instead framed in terms of living legal principles, *some* of which may conflict but some of which may provide legitimate ways for resolving the particular issues at hand.

Table 7.1 sets out just a few examples of the shifts in questions that occur when we reframe our inquiries to engage with Indigenous Legal traditions as *legal traditions*, and on a more specific and substantive level.

Following these shifts, our second set of questions could be:

- What are the legal concepts and categories within this particular Indigenous legal tradition relevant to the specific environmental issue at hand?
- What are the legal principles relevant to the environmental issue?
- What are the legitimate procedures for collective decision making regarding the environmental issue?

Overall, we are asking: What are the legal principles and legal processes for reasoning through this environmental issue within this legal tradition?

This shift in questions moves us from a conversation about how legal practitioners should deal with or respond to isolated cultural practices or commitments they may not understand or agree with, and which may not be easily

translatable to a common law right or obligation, to a conversation about reasoning through principles as integral but flexible parts of a comprehensive whole.²⁶ To return to our example, Borrows argues that the earth as living is a “present day principle of central significance,” in an Anishinabek legal tradition.²⁷ This highlights its importance while making it possible to imagine balancing it with other principles, just as we do constantly in Canadian law. Critically, Borrows also gives examples of legitimate community processes and procedures through which legitimate collective decisions have been debated and reached regarding specific environmental issues within his home community.²⁸ This inquiry may help us identify and proceed through productive and legitimate avenues, from Indigenous legal perspectives, for consultative processes and possible accommodation measures.

For a particular issue in specific circumstances, we might ask:

- What are the general principles regarding this environmental issue?
- How do we interpret these principles?
- What are the exceptions?
- What other principles can or should be considered on these specific facts?
- How are legitimate decisions about such issues reached?
- How does this law change in new circumstances?

These types of questions could move us from understanding a position to understanding a *legal reasoning process*. It won't be easy, and it shouldn't be. Serious and sustained engagement requires hard intellectual work, pushing beyond generalizations and generalities to treat Indigenous laws as we do other laws.

Conclusion

Practical engagement with Indigenous legal traditions regarding environmental issues is both important and possible for legal practitioners. I suggest this engagement could start with the intellectual work described in this chapter: asking better questions, grounded in logic, built on reasonable working assumptions, and pushing past generalities and generalizations. Serious and sustained engagement between legal traditions may increase understanding of Indigenous perspectives on environmental damage and expand our understanding of legitimate and effective processes for consultation, accommodation, and, ultimately, reconciliation.

Let me close with one thought on the endeavour of robust reconciliation and why I see it as so important to all of us. Robert Cover once famously described law as “not merely a system of rules to be observed, but a world in which we live”—a “resource in signification.”²⁹ Legal traditions are not only prescriptive. They are descriptive. They ascribe meaning to human events, challenges, and aspirations. They are intellectual resources that we use to frame and interpret information, to reason through and act upon current problems and projects, to work toward our greatest societal aspirations. There are many intractable problems and deep disagreements regarding complex environmental issues that impact us all, as well as the generations after us. We do not have all the answers. One way of looking at the project of greater recognition and engagement with Indigenous legal traditions in Canada is that it is about recovering normative possibilities. It is also about how we will tell the story of our shared future on and with this land.

NOTES

- 1 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23 [Borrows].
- 2 *Ibid* at 46.
- 3 Personal conversation with Val Napoleon (April 2010).
- 4 Lon Fuller describes law as “a direction of purposive human effort” consisting in “the enterprise of subjecting human conduct to the governance of rules”: Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964) at 130.
- 5 Jeremy Webber, “The Grammar of Customary Law” (2009) 54 McGill LJ 579 at 583 [Webber].
- 6 *Ibid* at 591.
- 7 See, for example: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 65; and Michael Asch & Patrick Macklem, “Indigenous Rights and Canadian Sovereignty: An Essay on *R v Sparrow*” (1991) 29:2 Alta L Rev 498 at 507.
- 8 In Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria Faculty of Law, 2009) [Napoleon], this argument is made persuasively throughout.
- 9 See, for example, Webber, *supra* note 5 at 591 (detailed regulation of hunting by the James Bay Cree); and Brenda Parlee, Fikret Berkes & Teet’lit Gwich’in, “Health of the Land, Health of the People: A Case Study on Gwich’in Berry Harvesting in Northern Canada” (2005) 2:2 Ecohealth 127.
- 10 Borrows, *supra* note 1, ch 2 at 23–58.
- 11 *Ibid* at 35–36.
- 12 *Ibid* at 139.
- 13 *Ibid* at 179.
- 14 *Ibid* at 139.
- 15 Napoleon, *supra* note 8 at 71.
- 16 Law Commission of Canada, *Justice Within, Indigenous Legal Traditions*, DVD (Ottawa: Minister of Supply and Services Canada, 2006).
- 17 Borrows, *supra* note 1 at 23.
- 18 Possible resources for judges in accessing Indigenous laws, as well as their limitations, are discussed in the American tribal court context in Mathew LM Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, Working Paper 2006–04 (East Lansing,

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College of Law, 2006) at 36–38, online:

<<http://www.law.msu.edu/indigenous/papers/2006-04.pdf>>.

- 19 See a discussion of the benefits of this for Crown and third-party actors in Aaron Mills, “Aki, Anishinaabek, Kaye Tahsh Crown” (2010) 9 *Indigenous LJ* 107 at 123.
- 20 *Ibid.*
- 21 This is a common, even dominant theme in many Indigenous scholars’ work. See, for example, CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Routledge, 2011), generally; and Tracey Lindberg, *Critical Indigenous Legal Theory* (PhD Dissertation, University of Ottawa, 2007) at 41–51.
- 22 For some examples of this, see Borrows, *supra* note 1 at 29–30 (his mother’s legal reasoning related to observation of butterflies and milkweeds) and at 32–35 (Gitksan legal reasoning “reading” a landmark connected to the *Adaawk* regarding respect of animals).
- 23 Webber contrasts this with legal scholarship from an external viewpoint, which focuses on “historical and sociological accounts of the very same body of law”: Jeremy Webber, “The Past and Foreign Countries” (2006) 10 *Legal History* 1 at 2.
- 24 Borrows, *supra* note 1 at 238.
- 25 Webber, *supra* note 5 at 590.
- 26 Napoleon, *supra* note 8 at 47–48.
- 27 Borrows, *supra* note 1 at 243.
- 28 *Ibid* at 30–32 (fishing stock conservation issue) and 246–248 (alvar prairie development issue).
- 29 Robert Cover, “Nomos and Narrative” (1983) 97 *Harv L Rev* 4 at 5.