INDIGENOUS ENVIRONMENTAL LAWS: PURPOSE, SCOPE, RECOGNITION, INTERPRETATION AND ENFORCEMENT

An Opinion Paper prepared for the
Centre for Indigenous Environmental Resources (CIER)

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1.0 INTRODUCTION

The following comments are in answer to the formulation of issues by the Centre for Indigenous Environmental Resources for the Environmental Excellence Vision Project. The answers follow the order of the questions.

2.0 WHAT ARE INDIGENOUS ENVIRONMENTAL LAWS?

Indigenous Environmental laws are those procedures and substantive values, principles, practices and teachings that create, respect, enhance and protect the world in which we live.

3.0 WHAT IS THE PURPOSE OF INDIGENOUS ENVIRONMENTAL LAWS?

The purpose of Indigenous environmental law is to honour the Creator's teachings and facilitate the diversity of life around us in patterns consistent with the balance needed to reproduce Creation in healthy ways.

Indigenous environmental laws create and recreate the world in various spheres. If Indigenous laws are followed they can allow new lands to form or decay (as the case may require). They can generate clean water. The can allow plants to reproduce in proportional and interdependent relationships. Indigenous laws can create healthier populations of insects, fish, birds and animals. They can produce humans that are healthier and more keenly aware of their responsibilities to respect, enhance and protect the earth.

Like most human societies Indigenous peoples have at times struggled to live by their highest laws and values. Indigenous peoples have not always sustained the harmony they desired because of externally imposed forces such as colonialism, or internally generated motivations such as greed. There have been periods of conflict and occasions when they have departed from their laws. Failure to observe law does not necessarily signal the absence of law. Indigenous peoples have environmental laws, not because they have always lived respectfully

with the earth but because they have sometimes withdrawn from this standard. Indigenous peoples should not be romanticized as 'children of the forest', who have always lived in a blissful state of nature before Europeans arrived. Indigenous peoples have caused environmental damage in the past through depletion of various parts of their world. This damage is also apparent in the present. Many Indigenous histories attest that this damage occurred when their laws were ignored. There are significant lessons to learn from these precedents. Indigenous peoples will cause environmental damage in the present or future if their environmental laws are not recognized and affirmed by themselves and others. The purpose of Indigenous environmental law is to ensure that humans respect the world around them.

The principle of respect is central and found within many Indigenous environmental laws. For example, Carrier law which is recorded in their *kungax*, concerns animals and the obligation to treat them with respect.[i] This law teaches that fish, birds or animals will depart from Carrier territories if they are ill-treated; they could even exact retribution. In respect of fish the Carrier enact a ceremony each year to honour the salmon's return. Honour is carried throughout the salmon's cyclical visits with rules concerning its allocation, catch, use, preparation and disposal.[ii] *Kungax* reinforce other Carrier laws surrounding the proper treatment of salmon by providing commentaries about consequences for mistreatment. Anthropologist Diamond Jenness heard stories that taught this principle. He wrote:

> "Many years ago the Natives gathered in *Shin* [summer] to set their weirs in the river. They caught and dried large numbers of fish, while the children played happily around the camp. Then a boy named Mek made a girdle of some fish heads and began to dance with them. An old man scolded him saying, 'Don't do that. Sa [The Sun] will see you and by and by you will be hungry!' A year passed, and the people gathered again at the same spot, but this time they caught no fish at all. The men left the women to attend the net and went away to hunt, but the game too had vanished. Before long they were starving and the first to die was Mek. No sooner was he dead than the river seemed to teem with fish and the people had no difficulty in catching all they needed"[iii]

This *kungax* not only provides precedent to guide future behavior, it also creates strong feelings to motivate and encourage the listener to properly meet their obligations to the salmon.

4.0 WHAT IS THE SCOPE OF INDIGENOUS ENVIRONMENTAL LAWS?

The scope of Indigenous environmental law varies according to their context. Some laws are universal, and are thought to apply to everyone (human and non-human), everywhere (under the earth, on the earth, over the earth). Other laws are universal in some respect, but their application may be limited in another aspect. For example, an Indigenous environmental law might apply everywhere, but only to non-humans. Others laws are regarded as being territorially limited. Other laws may be limited to where they apply, but apply universally to everyone who lives there. These so-called 'territorial' laws may be only obligatory in places Indigenous nations historically resided or are presently located. Territorial laws may have further limitations. Some Indigenous environmental laws may only apply to Indigenous peoples on Indigenous lands, relieving non-Indigenous peoples from obligations and rights relative to those lands. Other laws may not be territorially limited but apply to wherever an Indigenous person resides. These environmental laws may be regarded as 'personal' because they attach to the person rather than the place where the person is found. One must learn the particular laws of an Indigenous nation to understand their scope. Determining the scope of Indigenous environmental law is dependent on a variety of factors: historical, social, political, biological, economic, spiritual, etc.

The scope of Indigenous laws can also be closely related to their source. Examining their source can lead to better understandings of their basis and nature. The source of Indigenous environmental law is the (social/historical/political/biological, economic/spiritual) circumstance from which these laws derive. An understanding of the source of Indigenous environmental laws will also facilitate a better understanding of how they might be recognized, interpreted, enforced and implemented. Sources of Indigenous environmental law are Sacred, Natural, Positivistic, Deliberative and Customary. Indigenous laws related to environmental regimes often combine these different legal sources to create many layers of law within a single society or community. A brief review of some of the sources of Indigenous environmental law further illustrates their purpose and actual or potential scope.

4.1 SACRED LAWS

As noted above, many Indigenous laws stem from the Creator and creation stories. Creation stories often embody sacred laws and must be treated with the greatest deference and regard.

The reach of these laws can be quite expansive because they contain instructions about how all beings should relate to specific territories. They usually are meant to apply over an entire region, and in some cases could be universal in their range. Due to their broad reach and revered nature their interpretation is less flexible than other Indigenous environmental laws. Similarly, their recognition, enforcement and implementation are often regarded as more elemental. They may be fundamental and foundational to the operation of other Indigenous environmental laws.

For example, the Anishinabek creation story is part of what they call "*aadizookaanag*, or the grandfathers. Stories of this genre are set in time immemorial; they explain how the world came to have its present form and furnish embedded observations on how the beings who currently inhabit it should relate to one another."[iv] In this respect the Anishinabek regard Michee-Makinakong on the narrows between Lake Huron and Michigan near Lake Superior as the world's centre;[v] the place where the land above the water was formed.[vi] Michee-Makinakog was where Michabous recreated the upper earth through breathing life into soil which was brought up from the ocean's depths by a muskrat.[vii] The earth grew as the soil was scattered around Michabous' raft and tread upon by this Great Being.[viii] Legal principles concerning water, rock, plant, and animal are implicated in this story. For example, the earth's ability to respond to Michabous' actions provided enough space for plants and animals to find a home.[ix] When these first animals died the first Anishinabe arose from their corpses.[x] The Anishinabek take their identity and dodem or clan names from these ancestors.[xi] For the Anishinabek the earth's creation did not end with Michabous' experience on the raft. The earth grows and develops or dies and decays because it is a living being subject to many of the same forces as all other living creatures. Many Anishinabek people characterize the earth as a living entity that has thoughts and feelings, can exercise agency by making choices, and is related to humans at the deepest generative levels of existence.[xii] Anishinabek environmental laws from sacred stories related to these series of events are often foundational to other Anishinabek laws.

4.2 NATURAL LAWS

Other Indigenous environmental laws are not regarded as flowing directly from creation stories, but are seen to flow from the consequences of creation. These laws are derived from a study of the behavior of the world within Indigenous territories. Natural law understandings of the environment are not necessarily regarded as divinely formed and are often discovered through

observation of the physical and spiritual world. Indigenous law practitioners might watch how a plant interacts with a bug, and draw legal principles from that experience. Others may study how a bug interrelates with a bird, and take legal guidance from that encounter. Some might examine how a certain bird relates to an animal or another bird and see standards for judgment in this relationship. There might also be analogies drawn from the behaviours of watersheds, rivers, mountains, valleys, meadows and shorelines to guide legal actions.

For example, Cree law uses the principles of *pastahowin* to identify demands the natural and spiritual world imposes upon people.[xiii] *Pastahowin* is used to describe something that goes against natural law. If someone offends nature's patterns negative consequences will follow. Examples of *pastahowin* can be found in Cree-animal relationships. Animals are regarded as persons in their own right and the relationship between the Cree and the animal-persons is governed by the same legal considerations that govern human relationships." [xiv] In Cree "animals are spoken of as possessing its own *itatisiwin* 'nature': it is *itatisiwak* that caribou migrate, that beavers build lodges, and so forth. In the shaking lodge and in dreams, animals share human *itatisiwin*: They come to be like human."[xv] If animals are not treated appropriately *pastahowin* can result, something bad will happen. There are many stories which interpret the law relating to animals in the light of these terms.[xvi]

4.3 DELIBERATIVE LAWS

Some Indigenous environmental laws are formed through persuasion, deliberation, council and discussion. While sacred and natural law might form the backdrop against which debate occurs, the proximate source of law developed in this manner is human. Therefore, Indigenous environmental laws drawn from this source may be more flexibly interpreted. The human derivation of these laws means recognition, enforcement and implementation may be more susceptible to change and revision. Since deliberative Indigenous laws draws upon ancient and contemporary legal ideas, they can also more explicitly take account of (and even incorporate where appropriate) legal standards from other legal systems. Deliberation aimed at making Indigenous environmental law can occur in formal and informal meetings and gatherings; in these settings laws can be developed through highly structured or ad hoc means.

Indigenous peoples often use circles to invite participation in developing environmental standards. Circles are considered sacred and represent the bringing together of people in an

atmosphere of equality, as they do not raise one person above another. In a circle discussion everyone is permitted to speak, though only one person speaks at one time. Each must wait their turn to respond to others, in an orderly fashion from right to left. Circles are meant to remind people of Mother Earth and their journey through life: from the earth, to infant, to child, through adulthood to old age and back to the earth. As such, they incorporate environmental patterns in human terms in many ways. Much Indigenous law development that is deliberative can be conducted through circles, such as talking circles, healing circles, and reconciliation circles.

Other Indigenous environmental laws are developed through more formal structures, such as the feast or council house. For example, the Haudenosaunee Great Law of Peace is built on the consensus and agreement. Future generations were considered as a formal part of their deliberations. Unanimity was necessary for the adoption of council decisions.[xvii] Each nation that joined to the League kept their independence and individuality in the midst of a centralized decision-making structure.[xviii] A council of fifty chiefs administered Confederacy business as they repeatedly passed ideas across a fire to explore and analyze ideas before actions were taken. Any Iroquois nation of the Haudenosaunee could request a meeting of the council by sending runners with wampum belts to indicate the time, place and agenda of the meeting.[xix] The Onondoga nation, as the firekeepers of the council, could decide whether the issue would come for full debate before the Confederacy.

Today, perhaps the most visible example of Indigenous environmental law developed through deliberation occurs in band council settings. People persuade, counsel together, discuss and debate. They produce a degree of agreement about how to act; though it must be noted that the Indian Act's restrictive jurisdictional space hinders healthier law making procedures and patterns. If First Nations could get out from under the Indian Act these powers of deliberation would be greatly strengthened. One must also remember public governments like Nunavut, and local governments like Metis Settlements, also exercise deliberative environmental law making power. In these settings laws are developed through persuasion, debate and discussion.

4.4 POSITIVISTIC LAW

Some Indigenous environmental laws are positivistic, which means they are proclaimed. They are like statements of rules. Positivistic laws are human made and not necessarily connected with any larger system of morality. Alternatively, they may once have been connected to a larger normative system but the reasons underlying them have been deliberately abandoned or forgotten as circumstances changed. In such cases Indigenous peoples are left with environmental laws that sound like a chronicle of "dos" and "don'ts". Examples include: 'don't swim in that part of the stream', 'don't walk on that part of the glacier', 'when you take something from that place, you must leave something there from another place', 'make sure you clean that area when you leave', etc. These examples demonstrate how positivistic Indigenous environmental laws often resemble rules or proclamations. Since they are made by humans they can be often changed by humans, without any natural or divine consequences. Their interpretation and enforcement is more contingent on the political power the Indigenous nation possesses. Positivistic Indigenous laws can be formally proclaimed in feast halls, council houses, wampum readings and other such settings. Ancient and contemporary legal ideas can mingle to form bylaws, statutes and regulations aimed at environmental respect. These functions can be carried out through a centralized authority, such as named chiefs, hereditary clan mothers, headmen, sachems and band leaders.

Positivistic Indigenous environmental laws are ancient and contemporary. Metis law demonstrates this. In 1840 the Metis of the prairies developed Buffalo Hunting Laws to ensure wise use of the Buffalo. They used law to organize their economic and social activities. They were also concerned with sustainability of the herds. The Hunt involved hundreds of men, women, children, along with their Red River carts, horses and tools for processing and preserving the meat and hides.[xx] This complex activity was ordered through laws that identified appropriate behavior during a potentially difficult and dangerous pursuit. The Captain of the Hunt could impose penalties if these laws were broken. A codified portion of these laws contained the following provisions:

1. No buffalo to be run on the Sabbath-Day.
2. No party to fork off, lag behind, or go before, without permission.
3. No person or party to run buffalo before the general order.
4. Every captain with his men, in turn, to patrol the camp, and keep guard.
5. For the first trespass against these laws, the offender to have his saddle and bridle cut up.
6. For the second offence, the coat to be taken off the offender's back, and be cut up.
7. For the third offence, the offender to be flogged.
8. Any person convicted of theft, even to the value of a sinew, to be brought to the middle of the camp, and the crier to call out his or her name three times, adding the word "Thief", at each time.[xxi]

The Law of the Hunt as expressed in these principles was important in asserting Metis control over one of their main socio-economic activities in a threatened environmental context.[xxii] In contemporary terms, Metis positivist environmental law may be enacted through the Metis Settlements General Council. This Council may enact laws that are binding on the General Council and every Settlement. These laws are equal in status to other provincial laws. In this example one can see how deliberative law making bodies can produce positivistic legal principles regarding environmental law.

4.5 CUSTOMARY LAWS

Indigenous environmental law might also have a customary source. Customary laws are not necessarily positively proclaimed, deliberated over, analogized from nature, or flow directly from the Creator and creation. Rather, some Indigenous laws are customarily formed through established patterns of behaviour that can be objectively verified through observation within a certain cultural context. Customary laws are inductive and are discerned by examining specific routines and procedures relating to conduct within a community. These patterns of behaviour and conduct are often deeply related to the underlying norms and values of the community. Customary environmental laws achieve legal force when there is little dispute about how rights and obligations are regulated between community members. When there is dispute over these matters customary law operates through incentives and disincentives attaching to patterns of

behaviour. Since customary laws are not as explicit as other forms of law, their recognition, interpretation and enforcement is often initially more difficult to achieve when other laws intervene. However, this does not mean that customary law should give way to other forms of environmental law. Customary law is a creative source of law in its own right, and can be very effective in producing strong and healthy environmental relationships.

An example of Indigenous customary environmental law is found in descriptions of Mik'maq practices. Professor Sakej Henderson writes that Mi'kmaq law is built on ecological relationships that find jurisgenesis in their linguistic expression.[xxiii] Since Mi'kmaq language is verb-centered it emphasizes states of being rather than fixed noun-oriented categorizations of life. This language was formulated by experiencing and empirically identifying living systems within North Atlantic ecosystems.[xxiv] Mi'kmaq legal thought therefore builds upon their language and is shaped by "ecological considerations mediated through their experiences, knowledge, spiritual understanding or interpretation and relationship to a local ecological order."[xxv] For example, the Mi'kmaq confederacy, *Awitkatultik*, divides their territory into districts: *Sakamowati*. These districts acknowledge family rights to certain hunting grounds and fishing waters. Decisions within each district should be based on what each group has learned from the beings within their territory. "The ecosystem in which they lived was their classroom; the life forms who shared the land were their teachers."[xxvi] Building upon the earth's teachings in this manner, the Mi'kmaq people develop environmental law. Leaders of extended families (*saya*) and community spiritual leaders (*kaptins*) attempt to draw attention to these ecological relationships to guide and sustain order and continuity within their districts.[xxvii] At the same time everyone opportunities are available to other's participation in this order (*wikamou*) during certain seasons.[xxviii] The districts can periodically gather to form a Grand Council, *Santé Mawíomi*, to deliberate and facilitate consensus to better order their relationships.[xxix] Mi'kmaq unity in such relationships "resided in their cognitive realm: their language, culture and spirituality"[xxx], which once again is related to their ecological understanding of their territories.[xxxi] Thus, Mi'kmaq legal traditions in relation to their ecologies are embedded in customary norms, "where flux was the universal norm and there was no noun-based system of positive law."[xxxii]

It should be noted that the distinctions between the different sources of law outlined in this section can be made too formalistic. In the real world, Indigenous environmental laws might partake of two or more of the sources described above. Furthermore, the sources of law might

change as Indigenous communities work with them. For example, some aspects of customary law could become positivistic if codification is accomplished. Positivistic law could take on a deliberative source if debate occurs about the appropriateness of rules derived from custom. Similarly, sacred law might influence natural law, if people find the Creator in natural processes. The point of making the distinctions (sacred, natural, deliberative, positivistic and customary) is to illustrate the complex nature of Indigenous law. While this may make working with the law appear more complicated, it should also provide greater opportunities for those interested in recognizing, interpreting, enforcing and implementing these laws. If the source of law is natural, deliberative, positivistic or customary there is potentially a much greater space for action in relation to these laws in the present. We must get away from only viewing Indigenous environmental law as customary. They are customary, but they are much more. If understood in this broader light, Indigenous environmental laws can be regarded as living systems. As living systems, present and future generations can participate in creating and applying them if their sources are better understood as open to human choice and agency, within the context of the communities who will use them.

5.0 INDIGENOUS ENVIRONMENTAL LAW AND GOVERNANCE

5.1 RECOGNITION

There is inadequate recognition of the persisting basis of Indigenous authority to determine environmental laws.

Despite possessing environmental laws, Indigenous peoples do not always act upon them in the most effective ways. There are various reasons for this failure, related to the consequences of colonization. Some of the impacts that diminish Indigenous peoples' recognition of their own environmental laws include: loss of language, disruption of traditional educational teachings, family breakdown, economic dependence, religious persecution, denial or devaluing of Indigenous governance, human conditioning, self-interest, the corrosive effects of some aspects of pop-culture. There are also learned behaviors of dependency that come from welfare and residential school systems. While there is a sufficient basis within Indigenous societies to conclude their laws are authoritative regarding environmental issues affecting themselves and other Canadians, this base needs to be built upon through work on every front where

colonialism has weakened them. Indigenous peoples need to become more firmly aware of what they possess in their rich environmental legal traditions. They need to become more confident that their own laws would be helpful. They need to resist dependency by taking back responsibility for their environments through their law.

Canadian governments also do not recognize Indigenous environmental laws for most practical purposes. Many amongst the general populace probably believe that Indigenous environmental laws are extinguished or, if they do exist, they are inadequate to meet the contemporary challenges. Education is needed to intelligently challenge this position. Amongst officials from the federal and provincial governments there may be halting recognition of isolated pockets for Indigenous authority. This is evidenced through some contemporary treaty provisions signed in the last few years, some limited jurisdiction on Indian reserve lands, and opportunities to participate in environmental decisions through duties of consultation and accommodation. However, much more work is necessary to demonstrate the background context of Indigenous laws in Indigenous communities (sacred, natural, deliberative, positivistic and customary).

Despite limited governmental recognition of Indigenous environmental law, there are strong arguments that this recognition should occur under section 35(1) of the *Constitution Act, 1982*. Indigenous peoples' power to make decisions in relation to their environments was integral to their distinctive cultures prior to the arrival of Europeans. It was essential to their survival and therefore constitutionally recognized. If Indigenous peoples did not take care of their environments they would perish along with them. "Do unto the environment as you would have the environment do unto you". It can also be persuasively argued that Indigenous law-making authority relative to their environments had not been extinguished by governments prior to 1982. The test for extinguishment that most closely accords with a large, liberal and generous conception of Aboriginal rights, which resolves ambiguities in favour of the Indians, is that an explicit statement on the face of a statute is needed to abrogate Aboriginal rights prior to 1982. This standard was articulated by Madame Justice L'Heureux-Dube in *R. v. N.T.C. Smokehouse Ltd*. She wrote: "Clear and plain means that the government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible".[xxxiii] It would be difficult for the government to point to a statute that expressly and with clear and plain intent stated that Indigenous environmental laws no longer exist.

Once courts and governments recognize that Indigenous peoples possess jurisdiction relative to environmental law this constrains government action relative to Indigenous environmental issues. Indigenous environmental jurisdiction could not be infringed unless the government justified such action through a valid legislative objective and the sustenance of the Crown's honour.

Unfortunately section 35 (1) is not a promising basis upon which to assert environmental legal jurisdiction. While there are incredibly strong and persuasive arguments to demonstrate that Indigenous peoples have pre-existing and continuing environmental laws that are not extinguished, the courts continue to read Aboriginal and treaty rights in exceedingly narrow ways. Despite attempts to incorporate Aboriginal perspectives and Aboriginal law section 35(1) remains securely tied to its non-Aboriginal foundations. There is no real Indigenous law cited to arrive at appropriate decisions. In fact, the Supreme Court of Canada has taken to translating Aboriginal perspectives and practices into common law rights,[xxxiv] a sure sign of the problematic nature of this section. Making the common law the ultimate measure of ancient Aboriginal traditions virtually ensures non-Aboriginal cultural aspirations will predominate within section 35. If one were translate Indigenous words into English or French, very many Indigenous nuances, ideas and understandings would be lost in the process. The same thing happens when one translates Indigenous law and legal perspectives into the constitution's common law framework.

In 1990 the Supreme Court of Canada wrote that the recognition and affirmation of Aboriginal and treaty rights represented the "culmination of a long and difficult struggle" which "calls for a just settlement for aboriginal peoples" and "renounces the old rules of the game."[xxxv] It is now fairly clear that section 35 did not end Aboriginal peoples struggle for just settlements, nor did it renounce the most problematic aspects of the old rules of the game which give preferential treatment to non-Aboriginal cultural interpretations of Aboriginal and treaty rights. Aboriginal peoples are still struggling for their rights, and the new rules of the game are increasing looking like the old rules. After some initial promise, the common law as applied within section 35 seems to be collapsing back into itself and interpreting Aboriginal and treaty rights through non-Aboriginal categories and principles. Therefore, while section 35(1) might give the illusion of recognition and affirmation of Indigenous environmental laws, like a mirage, its promise vanishes the closer you get to application.

There is another basis upon which Indigenous environmental law should be recognized: Indigenous action. Capacity is best built by working to strengthen Indigenous individuals communities. The strength of Indigenous law would be facilitated if people and structures were rebuilt within communities to communicate the binding nature of their norms. Section 35(1) must be a part of these rebuilding efforts, but it must remain a small part. The help that section 35(1) can give to overcome the structural problems Indigenous peoples encounter in living their laws must be kept in its proper and limited perspective. People within Indigenous communities need further Indigenous legal information. Elders and faith-keepers could teach sacred laws to children in community language nests and day care centres. Schools could teach natural law as part of science and civics education. Band Councils and other governmental structures could resolve and bind themselves to support Indigenous deliberative law making structures, based on persuasion wherever possible. They could attach legal consequences to failures to abide by this type of proceeding. Researchers, band employees and support workers could identify the positivistic 'rules' that circulate as folk-law wisdom in their communities. People could bind themselves to act by these laws and create dispute resolution mechanisms if there was disagreement concerning them. There could be informal circle resolutions that resemble mediation, or bands could set up tribal courts with clear jurisdiction to formalize dispute resolution. Finally, families could receive greater support from Elders, schools, band councils, researchers, employees and support workers to live by healthy customs within the home. This would have a great benefit for the wider natural world as Indigenous peoples lives were informed by their own laws in making choices about how to live.

Thus, while section 35(1) could continue to receive some attention as a vehicle for recognizing Indigenous environmental laws, its deficiencies mean that greater progress would result if Indigenous peoples received information and resources to assist them in rebuilding their own environmental constitutions (sacred, natural, deliberative, positivistic, and customary).

When Indigenous laws are built on this foundation they are more likely to withstand the inconsistent and weak legal tides emanating from section 35(1). Furthermore, questions relating to jurisdiction (on or off reserve, provincial or federal, paramountcy/co-management, etc) fade in significance when Indigenous legal ideas become the focus. Jurisdiction for Indigenous environmental law becomes more holistic and not limited by the current impoverished nature of current jurisprudential categories in Canada's constitution.

5.2 INTERPRETATION OF INDIGENOUS LAWS

The taxonomy of laws describes in this paper implies that the appropriateness and authority to interpret Indigenous environmental law is dependent on its source. Sacred laws can often only be interpreted appropriately or authoritatively if someone has received permission or training in these laws. One would have to learn the specific protocols of a particular group to determine who had this authority. More Indigenous peoples of the rising generation need to be trained in these laws.

The authority to interpret natural law is more widely vested in those whose life is invested in studying particular eco-systemic features of the natural world. More people need to study the natural world and find the law embedded within their observations. Furthermore, one person might be an expert in interpreting laws derived from the behavior of water, while another person might be an expert in plants. The interpretation of law through observations of nature is a learned skill and could be enhanced through encouragement within First Nations.

More deliberation about Indigenous environmental law is needed within Indigenous communities. The authority to participate in the interpretation of laws that have their source in deliberation is very broad. The widest variety of people within an Indigenous community are likely able to appropriately interpret laws developed through circles, councils, discussions, etc. While most people would be entitled to interpret this form of law, the authoritative and binding interpretation might be vested in a smaller group: chief, band council, council of elders, tribal court, administrative tribunal, etc. Where band structures are inappropriate as the binding source of law, they should be challenged and removed by the community and replaced with a new structure that is more consistent with their legal views. On the other hand, a community may even decide to place some aspects of legal interpretation in a non-Indigenous court or tribunal, if they were persuaded this should be the case by, for instance, these courts having people knowledgeable in Indigenous law to make interpretations. Whatever forum Indigenous peoples use to make binding decisions, it should be consistent with their larger normative values.

When the source of law is positivistic there are also usually broad powers of interpretation, developed through triangulating rules to see what is required when rules may conflict. If the source of positive law is a band bylaw, statute or codification or folk-law “rules” then (just as with

law derived through deliberation) binding interpretation might be vested in a smaller group: chief, band council, council of elders, tribal court, administrative tribunal, etc. This process can turn positivistic law into deliberative law. One can see that laws can flow between the somewhat artificial distinctions made in this paper to illustrate more general points.

Finally, customary law can usually be appropriately interpreted by any member of the community. Whether or not a person's interpretation is authoritative depends on the specific nature of the custom, and its rules for harmonizing conflict.

5.3 ENFORCEMENT OF INDIGENOUS ENVIRONMENTAL LAWS

Depending on the Indigenous legal system at issue, community leadership plays a very large role in enforcing Indigenous environmental law. However, it is important to note that leadership can be broadly defined. Many people within Indigenous communities can be leaders if the term is not defined hierarchically. Leadership for the enforcement of customary law within the home or family might fall on grandparents, aunties or parents in their leadership roles. Leadership power might reside in a clan or kin person. The enforcement of positivistic law could reside in a camp leader, committee chair, chief, tribal court judge, or other person. Deliberative law's enforcement would depend upon the mechanisms those involved in devising the law created for enforcement. If there were no mechanisms, they could deliberate again, and persuade one another about what the best mechanisms for compliance might be. The same could be said for natural or scared laws.

Questions about whom Indigenous environmental laws should be enforced against (members, third parties) are dependent upon whether the laws are territorial or personal. If laws the laws are territorial, then enforcement should strive to have territory wide application.[xxxvi] For example, if the laws are reserved-based they should apply to anyone who comes onto the reserve. If the laws are personal, meaning they apply to an Indigenous personal wherever they reside (such a sacred obligations, or natural law teachings) then enforcement should occur off reserve or territory. The harmonization of personal laws with those of provincial or federal jurisdiction should be accomplished through the Charter, section 35(1), negotiated agreements with federal or provincial authorities, harmonization legislation (similar federal common law/civil law legislation), etc. These are mechanisms that would make Indigenous enforcement more recognizable to federal and provincial authorities, if the political will existed to create them.

Furthermore, the creation of tribal courts for certain Indigenous environmental laws would also make these laws more recognizable and thus facilitate enforcement. Tribal courts would also give notice of Indigenous law to those over whom it applies.

It is important to insert a caveat at this point that, to the widest degree possible Indigenous environmental law should be based on political structures, not racial concepts. For example, laws should not apply to people solely because of their ancestry or heritage. Indigenous laws should be based on the fact that Indigenous societies are First Nations that have a political rationale that is much broader than the specific group of related people that might form its charter membership. Section 35(1) protects the rights of 'peoples' which is a political category. There are many disturbing examples throughout the world of law being applied solely on racial lines. This practice is usually discriminatory and subordinates groups or individuals within society. Aboriginal peoples belong to distinct political bodies that have an existence that is broader than their familial and ancestral ties. As the Royal Commission on Aboriginal Peoples wrote:

> Aboriginal peoples are not racial groups; they are organic political and cultural entities. Although contemporary Aboriginal peoples stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestries. As organic political entities, they have the capacity to evolve over time and change in their internal composition.
>
> … One of the greatest barriers standing in the way of creating new and legitimate institutions of self-government is the notion that Aboriginal people constitute a "disadvantaged racial minority" ... .Only when Aboriginal peoples are viewed, not as "races" within the boundaries of a legitimate state, but as distinct political communities with recognizable claims for collective rights, will there be a first and meaningful step towards responding to Aboriginal peoples' challenge to achieve self-government. [xxxvii]

Indigenous peoples should apply environmental law as political bodies rather than racial groups. Indigenous peoples have rules for adopting others into their communities or granting them citizenship. Indigenous peoples could use these laws to make them

applicable to people from all parts of the world who might use their territories. In other words, other Canadians or people from other countries should have the ability to be fully participating citizens of First Nations. Clauses of the recent Dogrib and Innu treaties recognize the authority of these political bodies to make their own citizenship decisions. Other groups could take this same approach. Indigenous governments should set criteria under their own laws to determine how people from other communities could become Indigenous citizens. They should then be able to participate in the recognition, interpretation, and enforcement of Indigenous environmental laws. This approach could help overcome most problems concerning applicability of Indigenous environmental law on a territorial base within these communities. If this is unacceptable to some Indigenous peoples they may want to consider how their stance is reconciled with their own laws regarding show respect and harmony. If we believe in holistic approaches to life, how do we justify severing people who live in our communities from our love, concern and consideration?

5.4 RISKS AND OPPORTUNITIES

The final question I have been asked to address is whether there is a risk of distorting Indigenous environmental laws by interpreting them in ways that are recognizable to other systems. The short answer is yes. There is a real danger that Indigenous laws will be distorted if the common law or civil is the final measure against which Indigenous laws will be acceptable. The Supreme Court of Canada has fallen into this trap because it measures Aboriginal laws by whether they can be translated into the common law. This process will be very damaging for First Nations if followed further because anything that is not 'translatable' is regarded as unenforceable.

However, there is nothing wrong with Indigenous peoples recognizing, interpreting, enforcing and otherwise implementing their environmental laws in ways that are cognizable to the wider Canadian legal system ***if*** Indigenous peoples retain the ability to develop and affect these laws in significant and substantial ways. Indigenous environmental law can be portrayed in contemporary terms and should avoid idealized historic accounts.[xxxviii] One should always be careful not to over-simplify them as self-contained and unrelated to the human and natural world

around them. Indigenous laws exist in relation to other Canadian laws. Law, like culture, is not frozen but permeable and subject to cross-cutting influences.[xxxix] Indigenous peoples draw upon theirs and other cultures' best legal practices and procedures in their environmental law-making powers. They should compare, contrast, accept and reject legal standards from many sources, including their own. Indigenous law is a living system of social order and control. Some might call this revisionist, and seek to undermine Indigenous environmental law by the use of this label. Such a critique would be invidious. All law and governance is revisionist, as it must be continually re-interpreted and re-applied in each generation to remain relevant to changing conditions. Law would become unjust and irrelevant if it was not continually revised. Indigenous environmental law is no different, and should not be held to higher standards.

Stereotypes must be jettisoned that imply Indigenous peoples ancient legal traditions were uniformly savage or, alternatively romantic, existing in a state of continual harmony and peace. People must also reject ideas that hold Indigenous peoples lose their Aboriginality if they adopt contemporary codes of conduct. Indigenous legal traditions don't cease being Indigenous if they address computer technology, stem-cell research or insider trading in securities law. The authenticity of Indigenous environmental law and governance should not measured by how closely they mirror the perceived past, but by how consistent they are with the current ideas of their communities. It is important to remember that Indigenous environmental laws now exist with a culturally mixed milieu. In practice they will likely draw upon insights and ideas from other Indigenous legal traditions, as well as common law and civil law influences.

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[i] From John Borrows, *Indigenous Legal Traditions in Canada* (Ottawa: Law Commission of Canada, 2006).
[ii] Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Feasts and Land Claims* (Vancouver: U.B.C. Press, 1994) at 157-158.

[iii] Diamond Jenness "Myths of the Carrier Indians of British Columbia." (1934) 47 *American Folklore.*

[iv] Bohaker, Heidi, Nindoodemag: The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region, 1600-1701 (2006) 63 *The William and Mary Quarterly* 1 at para. 6.

[v] Miche-makinock means great turtle, though others felt this was a mistranslation and that Michilimackinac received its name as a memorial to an extinct group of people called the Mi-shi-ne-macki-naw-go who used to occupy the island.

[vi] See Basil Johnston, *Ojibway Heritage* (Toronto: McClelland & Stewart, 1976) at 14. For a description of Anishinabek cosmology see Theresa S. Smith, *The Island of the Anishnaabeg: Thunderers and Water Monsters in the Traditional Ojibwe Life-World* (Moscow: University of Idaho Press, 1995).

vii Nicolas Perrot, Mémoire sur les moeurs, coustumes et relligion des sauvages de l'Amérique septentrionale in Emma Blair, ed., *The Indian Tribes of the Upper Mississippi Valley and Region of the Great Lakes* (Cleveland: Arthur Clark and Co., 1911) at 4-5.

[viii] Ibid.: "The Great hare who had promised to form a broad and spacious land, took this grain of sand, and let it fall upon the rafts when it began to increase. Then he took a part of it and scattered this about, which caused the massive soil to grow larger and larger. When it had reached the size of a mountain, he started to walk around it and steadily increased in size to the extent of his path."

[ix] Such a tradition makes it easy to see why both the Anishnabek and Iroquois peoples referred to America as "the Great Island", see Rev. Frederick Baraga, *Chippewa Indians: As Recorded by Rev. Frederick Baraga in 1847* (New York: Studicia Slovenica, 1976) at 8.

[x] Ibid. at 6: "After the creation of the earth all the other animals withdrew into the places which each kind found most suitable for obtaining therein their pasture or their prey. When the first ones died the Great Hare caused the birth of men from their corpses as also from those of the fishes that were found along the shores of the rivers which he had formed in creating the land. Accordingly, some of the people derive their origins from a bear, others from a moose and others, similarly, from various kinds of animals. And before they had intercourse with the Europeans they firmly believed this, persuaded that they had their being from those kinds of creatures whose origin was as above explained. Even today, the notion passes among them for undoubted truth."

[xi] See Reuban Gold Thwaites, The Jesuit Relations and Allied Documents, Travels and Explorations of the Jesuit Missionaries in New France, Vol. XXXIII, Lower Canada, Algonkins, Hurons: 1648-1649 (Cleveland: Burrows Brothers, M DCCC XCVIII)., pp. 149, 151:

> The great Lake of the Hurons…The Eastern and Northern shores of this Lake are inhabited by various Algonquin Tribes, - Outaouakamigouek, Sakahiganiriouik, Aouasanik, Atchougue, Amikouek, Achirigouans, Nikikouet, Michisaguek, Paoutagoung…The last named are those whom we call the Nation of the Sault….
>
> But let us return to our fresh water sea. On the South shore of this fresh water, or Lake of the Hurons, dwell the following Algonquin tribes: Ouachaskesouek, Nigouaoichirinik, Outaouasinagouek, Kichkagoneiak, and Ontaanak, who are also allies of the Hurons.

[xii] Others groups also regard the earth as living, see John Harding, *Animate Earth* (Oxford: Oxford University Press, 2006).

[xiii] Robert Brighton, Grateful Prey: Rock Cree Human-Animal Relations (Berkeley: University of California Press, 1993) at 104: "*pastahow* (verb) 'someone brings retribution on himself'."

[xiv] Paul Driben, Donald J. Auger, Anthony N. Doob, and Raymond P. Auger "No Killing Ground: Aboriginal Law Governing the Killing of Wildlife Among the Cree and Ojibwa of Northern Ontario" (1997) 1 *Ayaangwaamizin* at 101

[xv] Brighton, supra, at 197.

[xvi] See Rupert Ross has observed:

> Storytelling as a means of law-giving seems to be based on the same understanding – that law can be known to everyone through reciting the consequences of acts alone, not through communicating judgmental labels for either the act or, worse still, the actor

Rupert Ross, *Return to the Teachings: Exploring Aboriginal Justice*, (Toronto: Viking/Penguin, 1996) at 171.

[xvii] John Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: Native Law Center, 1985 at 40.

[xviii] Henry Lewis Morgan, *League of the Ho_De-No-Sau-Nee or Iroquois* (Rochester: Sage, 1851) at 77.

[xix] Ibid. at 109-110.

[xx] See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3* (Ottawa: Supply and Services, 1996).

[xxi] Alexander Ross, *The Red River Settlement: Its Rise, Progress, and Present State* (Minneapolis: Ross and Haines, 1957) at 249–50.

[xxii] See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3* (Ottawa: Supply and Services, 1996): Métis families similarly divided responsibilities between men and women as they ranged on extended hunting expeditions from permanent settlements, such as Red River. A woman from a Montana Métis settlement, who lived a mobile lifestyle with a group that migrated from Manitoba to Montana following the buffalo, recalled camp life in the early part of the twentieth century:

> Our men did all the hunting, and we women did all the tanning of the buffalo hides, jerky meat making, pemmican and moccasins. For other supplies, we generally had some trader with us…who always had a supply of tea, sugar, tobacco and so on.

Obituary of Clemence Gourneau Berger, *Democrat-News*, Lewistown, Montana, 31 December 1943, quoted in Verne Dusenberry, "Waiting for a Day that Never Comes: The Dispossessed Métis of Montana", in *The New Peoples: Being and Becoming Métis in North America*, ed. Jacqueline Peterson and Jennifer S.H. Brown (Winnipeg: University of Manitoba Press, 1985) at 125.

[xxiii] James [saké j] Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model" (1996), 23 *Manitoba Law Journal* 1.

[xxiv] James (Sakej) Henderson, "*Ayukpachi*: Empowering Aboriginal Thought" in Marie Battiste (ed.) *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) at 256.

[xxv] Kiera L. Ladner, "Governing Within an Ecological Context: Creating an AlterNative Understanding of Blackfoot Governance" (2003) 70 *Studies in Political Economy* 125 at 150.

[xxvi] Henderson, *Ayukpachi*, supra, at 264.

[xxvii] Henderson, First Nations Legal Inheritances, supra at 12.

[xxviii] Ibid.

[xxix] Ibid. For further discussion of the *Santé Mawíomi* see *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back, Vol. 1* (Ottawa: Supply and Services, 1996) at chapter 4:

> The Mawíomi, which continues into the present time, recognizes one or more *kep'tinaq* (captains; singular: *kep'tin*) to show the people the good path, to help them with gifts of knowledge and goods, and to sit with the whole Mawíomi as the government of all the Mi'kmaq. From among themselves, the kep'tinaq recognize a *jisaqamow* (grand chief) and *jikeptin* (grand captain), both to guide them and one to speak for them. From others of good spirit they choose advisers and speakers, including the *putu's*, and the leader of the warriors, or *smaknis*.

[xxx] Ibid.

[xxxi] See *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back, Vol. 1* (Ottawa: Supply and Services, 1996) at chapter 4:

> At the annual meeting, the *kep'tinaq* and *Mawíomi* saw that each family had sufficient planting grounds for the summer, fishing stations for spring and autumn and hunting range for winter. Once assigned and managed for seven generations, these properties were inviolable. If disputes arose, they were arbitrated by the *kep'tinaq* individually or in council.

[xxxii] Henderson, 'First Nations Legal Inheritances', at 14.

[xxxiii] [1996] 2 S.C.R. 672 at para. 78.

[xxxiv] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, at para. 48.

[xxxv] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1106.

[xxxvi] To determine whether laws are territorial or personal, once must look to their source and purpose.

[xxxvii] Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services, 1996), Chapter 3.

[xxxviii] The following two paragraphs are from John Borrows, *Indigenous Legal Traditions in Canada* (Ottawa: Law Commission of Canada, 2006).

[xxxix] Clifford Gertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 167.