



Roundtable on Indigenous Legal Traditions

Summary of the 6th IOG Aboriginal Governance Roundtable

Ottawa, February 16, 2005

Speaker:

John Borrows, University of Victoria

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We help public organizations of all kinds, including governments, public agencies and corporations, the voluntary sector, and communities to improve their governance.

We bring people together in a variety of settings, events and professional development activities to promote learning and dialogue on governance issues.

The IOG's current interests include work related to Aboriginal governance; technology and governance; board governance; values, ethics and risk; building policy capacity; democratic reform and citizen engagement; voluntary sector governance; health and governance; accountability and performance measurement; and environmental governance.

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2004-05 Institute On Governance Roundtable Series: “Towards a New Aboriginal Governance Agenda - TANAGA”

The IOG Roundtable Series for 2004-05 explored a number of governance issues affecting Aboriginal communities. At each of eight events, 20-25 senior policymakers from Aboriginal organizations and federal departments participated as individuals in the informal discussions. The series was supported by in-depth research and featured expert speakers to stimulate discussion. The eight events in the series were as follows:

<u>Event</u>	<u>Speakers</u>
1. Good Governance in the International and Aboriginal Context – September 21, 2004	Frannie Léautier, Vice President, World Bank, responsible for the World Bank Institute Larry Chartrand, Director, Aboriginal Self-Governance Program, University of Winnipeg
2. First Nations Citizenship and Membership Issues – October 20, 2004	Stewart Clatworthy, Four Directions Project Consultants, Ottawa Andrew Delisle Sr., O.C., Elder Advisor (and former Grand Chief), Mohawk Council of Kahnawake
3. Environmental Management and the on-reserve ‘Regulatory Gap’ – November 17, 2004	John Moffat, Stratos – strategies to sustainability David Nahwegahbow, Senior Partner, Nahwegahbow Nadjiwan Corbiere; Chair of the Board, Forest Stewardship Council
4. Aggregation and First Nations Governance – December 8, 2004	John Graham, Director, Institute On Governance Val Monague, Chief, Beausoleil First Nation
5. Urban Aboriginal Governance – January 20, 2005	Calvin Hanselmann, Senior Policy Analyst, Office of the Federal Interlocutor for Métis and Non-Status Indians Peter Dinsdale, Executive Director, National Association of Friendship Centres Patrick Brazeau, Vice-Chief, Congress of Aboriginal Peoples
6. Indigenous Legal Traditions – February 16, 2005	John Borrows, Professor, Faculty of Law, University of Victoria; Law Foundation Chair of Aboriginal Justice and Governance
7. Métis Governance – March 29, 2005	Jason Madden, JTM Consulting Inc. John Graham, Director, Institute On Governance
8. Government-to-Government Relations in the First Nations context	John Graham, Director, Institute On Governance Alan Latourelle, CEO, Parks Canada Mike DeGagné, Executive Director, Aboriginal Healing Foundation

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The sixth in the series of eight IOG Aboriginal Governance Roundtable events focussed on the topic of Indigenous Legal Traditions. The following note summarizes the event, including introductions, a presentation, and informal discussion.

Participants were welcomed to the traditional territory by Elder Linda Zaluska, from the Anishinabeg community of Kitigan Zibi, who provided opening and closing prayers.

The Moderator, Bruno Bonneville, Executive Director, Law Commission of Canada, welcomed everyone. He then asked Karen Jensen, Senior Research Officer, Law Commission of Canada, to introduce the speaker, John Borrows. Karen Jensen talked about the recognition of relationship themes in some of the work being done by the Law Commission of Canada. One of these themes is governance, and under governance, the Commission has looked at the relationship between First Nations and the Federal Government. In this context, they organized a project to look at indigenous legal traditions. John Borrows has worked on this project as a virtual scholar. Karen Jensen said that he grounds his work in the reality of the people that he knows and loves.

The speaker, John Borrows, is a Professor at the Faculty of Law and Law Foundation Chair of Aboriginal Justice and Governance at the University of Victoria. Professor Borrows is Anishinabe and a member of the Chippewa of the Nawash First Nation. His research interests are in Aboriginal law, constitutional law, and natural resources and environmental law.

John Borrows' Presentation

We are fortunate to have the strength of common law in this country. We have a system of checks and balances. We also have the civil law tradition. This has not just been transplanted, but has resulted from interaction. We are also fortunate to have indigenous traditional law. Canada draws some of its strength from these traditions.

We have two types of indigenous traditional law – law from Aboriginal peoples, and law from developing traditions, which is a work in progress and is something unique. Between 1840 and 1973, there was a waning of traditions, but since 1973, they have been coming back.

The history of this relationship of indigenous legal traditions with the common law and civil law traditions begins at the end of the Seven Years' War in 1763. This was the end of the war



between the British and the French. During the war, First Nations people had allied themselves with the French against the British. In 1763, King George III issued the *Royal Proclamation*. This document said that the Indians would be unmolested and undisturbed. The British did not want further hostilities, so they proclaimed that they would not allow local settlers or local governments to take First Nations' lands. The authority to take land and enter into treaty relationships was to be done from a distance rather than locally.

Since the British had been at war with First Nations, they had to secure their trust in this document. Sir William Johnson, who was the Superintendent of Indian Affairs, the lead colonial official dealing with Indian affairs in North America, gathered First Nations people together to decide on their relationship with the British and with each other. Algonquin runners were sent out with strings of wampum to invite First Nations living around the Great Lakes area to come to a meeting the following summer in Niagara. They agreed to assemble, and over 2000 First Nations people representing 22 different Nations gathered in 1764. Here, the proclamation was read to them. But it was recognized that this document was not sufficient. Wampum belts were circulated through the Council in 1764. The beads of these belts represent the idea that the parties were to live together in peace, friendship and respect. In other words, Sir William Johnson used indigenous legal traditions to constitute the Crown's relations with First Nations people. This way of proceeding continued across the country so that Indigenous people in the territories made their decisions in accordance with Indigenous legal traditions.

So the first act that bound people together in Canada was based on consent, not on discovery, conquest and adverse possession or occupation. But then, not only did Indigenous legal traditions change but so did the Crown's legal traditions change as they have interacted with indigenous legal traditions. This has created an intersocietal law that bridges legal cultures and relies on stepping outside our own ways of justice.

What a benefit the multi-juridical nature of our legal system has been for Canada. We have been able to avoid the conflict that other people in the world have. Other countries are frustrated in trying to achieve agreement between different people. In Canada, we have something special. Canada should recognize that indigenous legal traditions are part of the fabric. We have common law, civil law, and customary law in our midst.

Indigenous legal traditions have been on the rebound since 1973. Supreme Court of Canada interpretations and First Nation actions have demonstrated that we live in a place of law which is intersocietal. This kind of law is *sui generis*, "of its own kind." Common law, civil law and even international law have been brought to Canada's governance concerns. But we are increasingly able to draw upon indigenous legal traditions to solve problems.

This is especially true for something that is environmentally problematic. Often, indigenous legal traditions have the answers. For example, there was a proposal to build settlements around Cape Croker (John Borrows' home town) which led to a number of questions about environmental impacts. CEPA had some answers, the municipal land laws had some answers, but the First Nations had some answers too.



Many Indigenous people have laws embodied in their stories. In these stories, there was a character known as “trickster” who taught good and bad things. Trickster had principles that would direct their answers to questions and guide their thinking about resolving disputes. He had different names, such as Nanabush, Badger, Coyote, Old Man, etc. – these were all tricksters.

One of these stories is about Nanabush. He was hungry and, in his wanderings, he came to a lake. There were many geese and ducks and mudhens on the lake. He wanted these geese and ducks and mudhens and wondered how he could get this feast. He built a great fire. The ducks and geese and mudhens saw the fire but kept their distance. Then Nanabush started to build a lodge and built the fire up. The ducks and geese and mudhens began to get curious. One of the ducks got enough courage to swim close and ask, “What are you doing?” Nanabush replied, “I am building a lodge.” The duck asked him “Why?” And Nanabush said, “Because I am going to build a place where I can sing.” The ducks and geese and mudhens ask if they can come to listen to him sing. He said, “Not now because I have to work. Come back later.” Night fell, and the ducks and geese and mudhens lined up by the shore waiting to be invited in. Nanabush invited them in, but he told them that there was a lot of smoke in the lodge. He told the ducks and geese that they would have to close their eyes when they came into the lodge so they won’t hurt their eyes. They came into the lodge, and Nanabush took his drum and began to sing. The ducks and geese and mudhens sang too. Nanabush was very clever. Without missing a beat, he would take a duck and wring its neck and throw it into a backpack. He continued to do this while he and the ducks, geese and mudhens were singing. The chorus of ducks and geese and mudhens were getting quieter and quieter with each one that Nanabush killed. Finally, one of the ducks opens his eyes and saw Nanabush killing a goose. The duck cried, “Nanabush is killing us. Let’s get out of here.” Then all the ducks, geese and mudhens that were left ran out of the lodge. Nanabush was furious, but he calmed himself and took up his backpack, saying, “There is still a good feast here.” Nanabush went to the great fire that he had built and buried the dead geese, ducks and mudhens to roast in the hot sand close to the fire. He buried them so that their legs would stick out so that he could find them. Then he decided to have a nap. He told his feet to wake him if anyone disturbs the roasting birds. Then he fell asleep. While he was asleep and the birds were roasting, some Winnebago people came by. They saw Nanabush and the birds roasting in the sand. So they went over and pulled the roasted birds out of the sand, being careful not to wake Nanabush. Nanabush’s feet tried to wake him, but Nanabush told them, “Can’t you see that I am trying to sleep?” The Winnebago people ate all the birds except for their feet, which they put back into the sand, sticking up like they were before. Then they left. Much later, Nanabush woke up and decided to have his feast. He pulled a duck leg out of the sand, but there was no bird attached. He thought that the duck must be cooked perfectly and that the meat had come off the bone. So he dug in the sand to find the duck, but there was nothing there. He started to pull out all of the feet and dig for the birds, but he found that there was nothing, just the feet sticking out of the sand. Nanabush got very angry. He told his feet, “I thought I told you to wake me if something came near the ducks. Now I am going to punish you.” So he put his feet into the fire and they began to bubble and pop. He said, “You can cry all you want, but I am going to teach you a lesson.” Then he walked around the fire and he came across the bloodstained tracks in the soil from his feet.



How does this apply to the case of the settlements around Cape Croker? For the Anishinabe, this story could be a law. If you went to the University of Victoria to learn law, you would hear how different people get into trouble. You would have to put different stories next to one another and learn about different cases. Eventually you would get a sense of what is being done. The law uses this comparison of stories. Similarly, the story of Nanabush can be compared to the case of settlements around Cape Croker. What does this story of Nanabush tell us? The difference between Indigenous traditions and civil or common law traditions is that, in the Indigenous traditions, the interpretation is left to the thinker. You can have people that blend the interpretive tradition with the positivistic tradition. The first lesson from the story is that Nanabush was way beyond scale with the ducks, geese and mudhens. He took more birds than he could eat and lost what he wanted to enjoy. This can be applied to putting up the 100 cottages at Cape Croker – there are too many.

Next, what happened to Nanabush when he put his feet in charge of waking him? This was foolish. In environmental management procedures, we put the proponent in charge of the development. But if we really think about it, we might not want to put our own feet in charge. There are a number of other principles in this story, such as designing to scale, etc. The Indigenous legal perspective is actually clearer than what you see in a piece of legislation, for example, CEPA.

Why are indigenous legal traditions so important? First, they exist. They are there, in kinship ceremonies, songs and stories. They have a positivistic use in band council resolutions and tribal dispute resolutions. Also, indigenous laws have been recognized in the Canadian Courts. In the first year of Canada's Confederation, the Quebec Superior Court affirmed the existence of Cree law on the prairies and recognized it as part of Canadian law, in the *Connolly v. Woolrich* case, 1867. The indigenous legal traditions weren't abolished, they were left in full force. Common law and civil law did not extinguish indigenous legal traditions. European arrival didn't extinguish these traditions but rather presumed that they survived.

So, indigenous legal traditions are there and they are acknowledged to be there. They place Canada in a position of consent, not discovery and so on. This is morally more satisfying. Recognizing indigenous legal traditions gives Aboriginal people more of a stake in Canada. It could also improve normative order within Aboriginal communities, especially when dealing with alcoholism, residential schools and colonial impositions. Tort and contract law is not as legitimate as it could be. If indigenous people saw their own values in the law, they would see it as legitimate. This would develop the rule of law within indigenous communities. It could also have an impact on development, including economic development. Aboriginal economics can be called a "bungee economics." Money flows in and bounces out. If it could stay, it would be of great benefit.

We take wisdom where we can find it. No system has all the answers. If we have a blind spot, we go to other systems. Indigenous governance concerns are around accountability. If you wanted to ensure accountability in a Third World Country, you would suggest an independent system of appeal. For accountability in First Nations, there needs to be the ability to go to independent sources. Indigenous legal traditions are living, changing, not the same as before. A tradition is only relevant if it can look beyond itself. Otherwise, tradition can be the dead faith of



living people, or the living faith of dead people. It is important that we think of the here and now, and lessons for Canada and beyond our borders.

Questions and Answers, Open Discussion

Note: Participants spoke as individuals at the event, and because their comments do not necessarily represent the views of their departments or organizations, they are recorded without attribution.

Comment: I want to make this comment as a lawyer. The value of pursuing the revival of indigenous legal traditions is vitally important. What the Department of Justice is doing is also important to recognize indigenous legal traditions. They are involved in a partnership. Justice has reached out to the Indigenous Bar Association and started a dialogue with them. Also, I have worked with McGill revising the curriculum to recognize indigenous legal traditions. This recognition and respect is important. But there are second order questions. How do we link Section 35 of the Constitution with indigenous legal traditions? How do we deal with the interrelationship? Have we got our conception of federalism right? The role of the Charter is important. Can the Charter co-exist with indigenous people's traditions? Can Section 25 be interpreted for this co-existence? There are a complex constellation of questions surrounding Aboriginal representation and engagement. My question is, based on your understanding of the issues, how can we best undertake the task of looking at what is expected of the Canadian legal order?

John Borrows: I am going to use a metaphor here. When you pick up one side of the stick, you also pick up the other end. When you have rights, you also have entitlement. We have to get outside of the rights talk and get to responsibilities. First Nations have a responsibility to the Crown and will ask what is our obligation to the Crown. Don't frustrate the process and don't withhold information. The task is best engaged in when people don't view themselves in terms of rights. Obligations and responsibilities are more useful than rights.

Question: You have talked about the importance of consent. You also talked about how the Supreme Court has been playing an important role. But the decisions of the Supreme Court are not a matter of consent. How can we help encourage understanding and acceptance and move forward?

John Borrows: The best way to encourage people is to give them a sense of where they stand in a historical and international context. You try to encourage them to see it in another light. For example, I attended a meeting of representatives from supreme courts from many countries including the Supreme Court from South Africa, India, New Zealand and so on. In all, 25 courts were gathered there. They discussed interdependence at a global level. The Canadian Court is admired by other courts. They draw on ours. They are learning from us and we are learning from them and taking from the best. We are drawing on the positives and negatives.

Question: I want to ask about the level of awareness there is in Canada of the indigenous legal traditions, and the degree of influence that these traditions have. What can be done to raise that



level of awareness? In the United States, the legal system has a very litigious nature. To avoid going that route, how can we raise awareness of the system of consent in Canada?

John Borrows: It has to happen on different fronts. First, it has to happen through education. For example, in Saskatchewan, the Ministry of Education supplies a Treaty Education Box for every teacher. This gives people an understanding of indigenous traditions. Other tools are books, videos and a speakers bureau of elders. The second way to make it happen is through national media. The Aboriginal Peoples Television Network has enjoyed a growing influence.

Comment: The Law Commission could also improve awareness. It could organize events and develop a communications strategy. We could go to First Nations communities and have them feed us information. This process hopefully would raise the level of awareness.

Comment (another participant): The problem with that is, what audience does the Law Commission have? What is needed is more education as opposed to getting the message to people who already have their values set.

Comment: I think your earlier comment about rights is very important. In talking about indigenous legal traditions, we have to get away from the idea of rights. Some Aboriginal leaders find the Charter too individualistic. This is a problem of the collective versus the individual perspective.

John Borrows: Indigenous legal traditions have a more collective orientation. But we can't generalize. For example, there was a case involving the Nisga'a and the right to religious freedom. Someone challenged the Nisga'a law and it was settled in a Nisga'a court. They drew on the Canadian Charter, then their own court, then it went to the BC court.

Question: We are talking of dichotomies, of natural law and state law. The church and state is not mixed in Canada. That means that natural law, which is spiritual, is not mixed with the state. If we go back to peaceful coexistence, how do we reconcile natural law with the re-birth of "Scroogality" in contemporary society?

John Borrows: We overstate the distinction between church and state in Canada. We have a history of recognizing the spiritual in the State. It is embedded in law. It's already there and there are many points of overweaving of the two. There is a recognition of this in the Charter when it talks about the rule of law and the supremacy of God. Our shared understanding of laws has a moral basis. We can accommodate that.

Question: How would precedents empower indigenous courts? You have been talking about sharing and melding laws. What if decisions of, e.g., the BC Supreme Court would only apply to indigenous people?

John Borrows: You are talking about laws that operate differently. Equality is under Section 15 of the Charter. Sometimes you need to recognize differences. Equality requires that you treat people differently. So, we have one law for all, but equality might require that we recognize differences. This might help the BC Court and the Saskatchewan Court.



Question: You talk about equality and recognizing cultural distinctions. I have two questions. First, Section 25 is an instrument that deals with tension. This provides a structure analysis that at judge must do. What role do you see Section 25 playing? Second, should indigenous law be compulsory in indigenous communities? How does the law interfere? How do we deal with consent within Aboriginal communities?

John Borrows: Voluntariness should be involved. Sometimes people will be compelled to do things within democracy. Democracy required that there be majorities and minorities. Sometimes, as members of minorities, we are forced to do things we don't want to do. For example, some people don't want to pay union dues. But they are compelled to do so in order for Democracy to work. The same thing is true for indigenous groups. Section 25 is part of the process of shielding.

Question (a participant): Homelessness is a serious problem in Canada. A lot of the homeless people in big cities are indigenous people. Aboriginal political organizations haven't shown much influence on this problem. There is a responsibility from all levels of "law" to do something. So my question is, what do we do with this problem?

John Borrows: There needs to be someone or something to play a leadership role for this problem and to get the funding required to do something about it. This is what is required. Our efforts can be strengthened if Aboriginal laws and responsibilities are acknowledged in this area. It is wrong for Aboriginal governments to think of themselves as being reserve-based. Aboriginal citizenship is transnational. Indigenous people are never fully separated from their culture. They can go outside reserves, but they always go back. Canada is a country that does not have a permanent underclass like the United States, but we have a mobile Aboriginal social underclass. When they don't do well in the cities, they go back to their communities. Perhaps we should think about transnational citizenship.

Question: I have a question about the Metis National Council. They are trying to argue that they are Indians. Is that a positive or a negative thing?

John Borrows: This is a situation that could have an analogy with the experience of the Inuit. They became "Indians" in 1939 (91[24]). There is some concern with going down that road. We could ask the Metis, do they really want a "Metis Act"? They could ask themselves, do we really want to be Indian? There are a lot of disadvantages to the system.

Question: Do communities need to have a land base? Do they need to control the land?

John Borrows: There has to be some kind of community. The community is the place where integration of traditions is happening. 50% of Aboriginal people live off reserve. Aboriginal traditions can work on reserves, but can it work off reserves? One of the most successful Aboriginal communities is in Toronto. You create community, you don't just find yourselves in one. In an urban context, there is room to build an ethical community._

Question: What is the biggest risk or threat?



John Borrows: The biggest threat is human rights violations through stereotypes. Also, coercing people to do things is another danger. This is the thin edge of the wedge of the disintegration of Canada.

Question: Canada has been in a state involving an identity crisis. This includes Aboriginal people. Has this been a barrier?

John Borrows: The Charter was proposed in 1971 as a counterbalancing force to Quebec nationalism. But something new has developed as a result. There is a kind of synergy developing in Canada. The Aboriginal component has been given greater play. This is part of our developing identity.

Question: What about the competition that multicultural initiatives might have with Aboriginal claims?

John Borrows: This is the usual argument. If you recognize Indian traditions, then you will have to recognize Sharia law, Jewish law, etc. This gives short shrift to multiculturalism. There is room for give and take. The recognition of Aboriginal differences allows for other distinctions. We are better as a people if we learn from others. We don't have to agree with everything, but learning about other traditions sharpens our understanding. Our culture is always a work in progress and our traditions are not frozen.

Closing Prayer

To conclude the evening, Elder Linda Zaluska offered a closing prayer for the event and wished participants a safe journey home.



Participants Attending¹

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¹ Attendees participated in their individual capacity, not as representatives of their organizations.

