DRAWING LAW FROM THE LAND

Blending Indigenous legal traditions with common law benefits all Canadians

by Suzanne Ahearne

When John Borrows comes from in Ontario, the Anishinaabe call this warm, late-spring weather aabawaa. As things begin to melt and flow again, the meeting of hot and cold air masses can make it foggy and difficult to see.

In Ojibway, the word for this weather phenomenon also makes its way into the language of human relationships and legal practice: aabawaa-wendam means forgiveness.

“With forgiveness, as with the land, there are mists between people,” says the Canada Research Chair in Indigenous Law at the University of Victoria. “The word refers to a time when you can’t yet see clearly. But as the ice and snows recede, it’s time to begin to reconstruct your relationship given what happened in the winter of your conflict.”

It’s a fitting analogy for where we are in the process of rebuilding relationships between Indigenous and non-Indigenous Canadians, and of redefining Canadian law so that Indigenous legal traditions are re-established and given equal footing with common law.

To understand the principles of law at work in Indigenous traditions, to be able to read nature for lessons in respect, equality and the security it provides, requires a shift in thinking and a different kind of literacy. Borrows calls this process “drawing the law out of the land.”

When we think about law, we might think of a court process or lawyers and judges and their focus on words. But in visual and oral cultures, the law is often found in the artistic and physical world, explains Borrows, who is Anishinaabe/Ojibway and a member of the Chippewa of the Nawash First Nation.

Primary Indigenous law research, such as the work led by Borrows and colleagues at UVic, involves documenting ceremonial dances, cultural practices such as the potlatch, origin stories, contact stories about settlers, totems, wampum belts and other artistic works, and then teasing out the legal principles and precedents embedded within them.

One of the goals of this primary research, he says, is to change a misunderstanding held by some who think there’s no such thing as Indigenous law: either Indigenous people never had legal systems because they were primitive in some respect; or if they had them, they’re broken and they’re gone or irrelevant in a modern context.

Borrows also points out that, with 150 years of repression of Indigenous people in Canada, it’s been hard to apply Indigenous law in contemporary circumstances. The revitalization of Indigenous legal traditions is creating pathways out of an era of control, into an era of shared autonomy and responsibility.

The UVic research program is establishing a process for Indigenous communities to identify what their laws are in historic terms, and what they could be today. The goal is to help them create legal institutions that are transparent, accountable and potentially “harmonizable” with other laws in the country.

This will benefit areas such as child welfare, education, health, housing, and resource development.

Borrows acknowledges there’s still a lot of conflict and fear when it comes to Indigenous issues in Canada.

“That’s why we need law,” he says. “We can’t just default to blockades and occupations, or dismiss the concerns of the other side. Conflicts fester and boil and we don’t have an avenue or a process that’s orderly to deal with these fears. Indigenous law is building bridges of understanding.”

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