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Indigenous Law

Relating to Information and Knowledge

National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and
Community Control over Knowledge and Information

Koren Lightning-Earle and Hero Laird

January 18, 2023

Introducing us

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Indigenous law relating to information and knowledge

- **Wahkohtowin**
- **Grounding principles and Indigenous law**
- **Applying Indigenous law to information and knowledge**
 - (e.g. OCAP)
- **Methods to access Indigenous law on your Nation's journey**
- **Research Partnership Agreements**

Wahkohtowin Lodge Purpose

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Upholding Indigenous laws and governance

- Support Indigenous communities' goals to identify, articulate, and implement their own laws.
- Develop, gather, amplify, and transfer wise practices, promising methods and research tools.
- Produce useful and accessible practical legal resources and public legal education.

The Wahkohtowin Lodge responds to the expressed needs of Indigenous communities and organizations and specifically answers the TRC Call to Action #50, which calls for the creation of Indigenous Law Institutes for the “development, use and understanding of Indigenous laws.”



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Wahkohtowin

and

Mîyo Wichetowin

as legal principles governing relationships, and good relationships, are the guiding principles with the work we support or do with Indigenous communities.



What are Indigenous Laws?

Indigenous Laws:

- NOT Aboriginal law (state laws applied to Indigenous peoples)
- NOT Restorative Justice, Indigenous Courts, or Healing Programs

Indigenous Laws:

- May be ancient, deeply rooted, sourced in the sacred or the earth
- May be recent, drafted as treaty, agreements, bylaws, or legislation
- May have elements of both Indigenous legal traditions and other sources of law

Indigenous Law & Aboriginal Law

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Aboriginal Law:

- Constitutional, Statute & Judge made law
- Aboriginal peoples and the Crown

Indigenous Law:

- Rooted in Indigenous societies
- Indigenous legal orders

Indigenous Laws

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Roots to Renaissance*: Four Eras of Indigenous Laws

1. Roots (1000+ Years):

- A Logical Starting Point – Where there are groups of people, there is law.

2. Repression and Resilience (100-400 years):

3. Recovery and Revitalization (10-40 years):

4. Resurgence and Renaissance (1-10 years):

- Engaging with Indigenous Laws as LAWS

*Napoleon and Friedland, *Oxford Handbook of Criminal Law* (2014)



What are Indigenous Laws?

Indigenous Laws:

- Deliberation and Debate, not Declarations
- Principles and Processes, not Positions

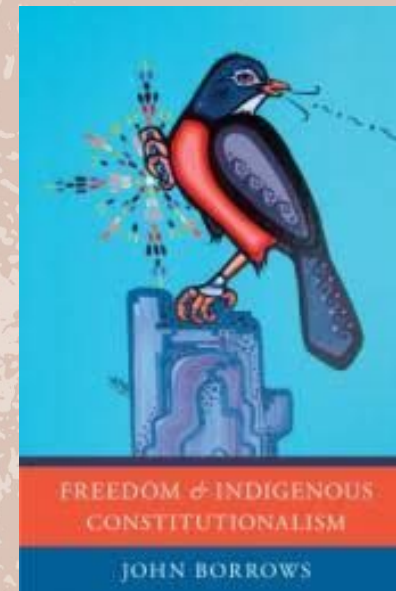
Indigenous Laws:

- May be being used in an implicit or informal way
- May be damaged, unevenly understood, mistrusted
- May be shared in ways that are not familiar to legal professionals
- Are rarely recognized, resourced and enforced adequately



Indigenous Laws

“The hard work of law is never done” – Jutta Brunée & Stephen Toope
Indigenous laws are living, adapting, changing, developing, like ALL laws.



Indigenous legal traditions are “uplifting, positive and liberating forces when they are connected to living systems of thought and practice” – John Borrows



Indigenous Laws &

...The Constitution

- "Traditional laws" recognized and affirmed
 - *The Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, C11
 - *R v Vanderpeet (Van der Peet)*, [1996] 2 SCR 507
 - *Delgamuukw v. British Columbia* [1997] 3 SCR 1010

...The Courts

- Affirming and applying Indigenous law
 - "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land..." writes Justice Grammond, *Pastion v Dene Tha' First Nation* 2018 FC 648

...The Legislature

- Many examples of engaging with Indigenous laws, e.g. Bill C-92



Indigenous Laws & Canada

Summary: Indigenous Laws & Canada Today

- Indigenous Nations exercising jurisdiction, visiblizing, formalizing and developing laws *as Nations*

AND

- Engaging Indigenous laws *as law* is also part of Canadian law



Applying Indigenous Laws

OCAP says:

- “First Nations have control over data collection processes, and that they own and control how this information can be used.”
- “Given the diversity within and across Nations, the principles will be expressed and asserted in line with a Nation’s respective world view, traditional knowledge, and protocols.”



Indigenous Laws and the OCAP

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(A few) questions that specific Indigenous law can help answer....

- who defines control? data? collection processes?
- who is involved in decision making?
- who makes final decisions?
- how are they held accountable?
- what processes are used to address disagreement?
- how are changes made?

Common Challenges: Indigenous Law Revitalization and Development Work

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- **Challenges of accessibility, intelligibility, applicability and legitimacy** (Borrows).
- **Prolonged state repression** leads to unevenness and issues of intelligibility and accessibility.
- **Unenforceability** and lack of funding to formally develop, administer and implement laws leads to issues of legitimacy and effectivity.
- **Educational gaps** within communities and between communities.

Common Challenges: Indigenous Law Revitalization and Development Work

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- **Relentless pressures** from external sources, intergenerational trauma, social suffering and perpetual crisis- “wicked problems”
- **External pressures** to develop laws quickly and in a format acceptable and understandable to outside governments, to alleviate ‘wicked problems’
- **Internal disconnect** between new formal laws drafted under pressure and familiar/informal legal principles, understanding or practices can lead to conflict or challenge of legitimacy.

WLGL Approaches to the “How”

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- **Indigenous and legal communities, broad public reach:**
 - Resources on website, social media
 - Presentations to First Nations communities and various groups
 - Education with Canadian government, courts and others
 - Curating and amplifying wise practices, methods, other useful Indigenous law resources, etc. to make connections, provide options
 - One-on-one coaching and advising to support communities doing the work
- **Major Community-led research projects: specific to work by a particular Nation, time and labour intensive.**

A few of many Methods in use...

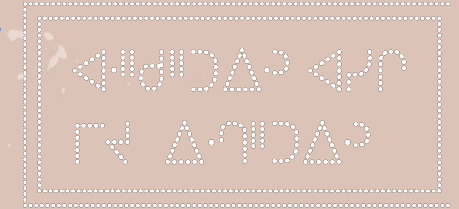
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- **Community Embedded Method** - Identifying implicit legal principles embodied in local practices, activities and experiences (Napoleon et al, Sandy)
- **Land-based Learning** (Borrows, Morales, Littlechild, Sandy)
- **Ceremonial Practice** (Borrows, Bird, Lindberg, Boiselle, Kennedy)
- **Linguistic Method** (Fletcher, Young)
- **Story-based Methods** (Bird, Borrows, Napoleon)
- **ILRU (Story Analysis) Method** (Napoleon & Friedland)
- **Relational Governance Method** (Wildcat)
- Interviews and focus groups in community and w/elders (all)
- **Visiting** (Campbell, Flamingo, AWN)

Methods to Engage Indigenous Law



What Methods:

- Best align with your current capacities?
- Are more or less appropriate based on your role?
- Are practicable in the short term or take long term or life long work?
- Will achieve what your community or client needs and wants most effectively?

How does each Method address:

- Your objectives given the reality of the resources available to you?
- Challenges of intelligibility, accessibility, equality, applicability and legitimacy?
- Issues of relevance, utility?
- Issue of negative and positive stereotypes?

Community Embedded Method: Making the Implicit, Explicit

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Identifying “local law” (Napoleon et al):

“Indigenous laws and legal orders may continue to function and flourish just beneath the visible surface...at an implicit and informal level.”

- Unpacking “a way of life” or “the way things are. ”
- “Moving from focus on the practice itself to the philosophical basis of the practice allows us to see more clearly the norms that are at work, the ways that those norms are contested, and the dispute management mechanisms, or local laws, that mediate this contestation.
- Local law “locates law in the on-the-ground, day-to-day self-governance performed by Aboriginal people according to Aboriginal laws.”



Community-led Research Projects

Pre-Research Process Preparation:

1. Research Partnership Agreements and Ethics Process

- Negotiated and drafted based on Communities' goals and needs
- University research ethics process, community ethics process
- * Dual hiring:

Law student researchers & Community researchers (key)

2. Indigenous Research Methods for Revitalizing Indigenous Laws and Governance Training Course

- Law student researchers & Community researchers take together, some leadership, other interested community members
- Concepts of Indigenous laws, methods for engagement, practice methods, discuss together



2021/2022 Community-led Research Projects

Research Process (Community Researcher + Law Student RA):

1. Community Inventory of Strengths and Resources
2. Identifying and selecting primary methods
3. Co-creating the Research Plan:
 - Matching Goals, Strengths with Methods
- 4. Implementation of Research Plan:**
 - Of course this is a process in itself! Most time intensive.
5. Analysis and Final Report
6. Identifying Next Steps (i.e. legislative drafting, next phase of larger project, targeted community engagement etc.)



Ethics Process

- Not strictly necessary if no publications anticipated (strictly legal research service) but benefit of university partnership.
- Communities see benefit: potential for public education, co-publications, amplify + individuals within community feeling safer participating, individual protection/choice vis-a-vis Nation.
- Indigenous Research Ethics attracts additional requirements and scrutiny in universities (overall this is a good thing).
- WLGL standard Research Partnership Agreements, process, consent, scripts, exceed standards in place, held up as exemplar.
- BUT takes time, uncertainty (e.g. for identical applications, very different approval process and timing)

Examples of community-led Indigenous Law research

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7 Cree Principles

Seven Cree principles were identified by the Aseniwuche Elders Council and leadership as fundamental to the Aseniwuche Winewak Nation. [Wahkohtowin Law and Governance Lodge](#) Research Assistant and long-time colleague of AWN, Johanne Johnson, explored each of these principles and how they apply to the Nation historically and today as part of her Master's in Native Studies.

With the help of Cree-fluent community member, Carol Wanyandie, Johanne conducted interviews with seven AWN Elders and Traditional Knowledge Holders. They asked questions to elicit their personal understandings of the meaning behind each principle, how they have seen these principles being applied in past and present actions in their lives, and how they believed the principles should apply in the future.



Traditional Activities

(the larger the word, the more frequent it was listed in the survey)



Examples of community-led Indigenous Law research



ᑕᖅᓂᓄᓐ tapwewin

"If I make a promise to someone, I have to do it. That is ᑕᖅᓂᓄᓐ tapwewin."

Elder Mary Delorme, August 24, 2018 ¹

In Cree legal tradition, the principle and related laws of ᑕᖅᓂᓄᓐ tapwewin "require that the obligation to speak the truth be meticulously followed when a subject matter has been considered and dealt with through the spiritual traditions and ceremonies of the nation" (Cardinal, 2000).²

ᑕᖅᓂᓄᓐ tapwewin may also be simply defined as "the act of telling the truth" (LeClaire & Cardinal, 2011)³ or "speaking with precision and accuracy" (Cardinal, 2000).⁴ According to one knowledge keeper, this principle implies self-knowledge originating from being aware of "where you come from" and it may be practiced authentically by living according to the principle of ᓂᓄᓐ ᓂᓄᓐ ᓂᓄᓐ nehiyaw pimatisiwin (Cree way of life).⁵ Other interviewees emphasize that ᑕᖅᓂᓄᓐ tapwewin is demonstrated by showing integrity of character as well as by building accountability and trust.⁶ Being true to your word is, by extension, connected to this foundational principle.⁷

Many interviewees describe their responsibilities regarding ᑕᖅᓂᓄᓐ tapwewin as being closely connected to being honest and transparent in their general behaviour and in the quality of their communications.⁸

Related obligations are adapted to the circumstances and to the specific context. For example, in the event of an unexpected occurrence such as an accident, individuals witnessing the event may be expected to gather and relay the information to others in an accurate and reliable way.⁹ Other interviewees describe how they hold

Research Partnership Agreements

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Purpose

- A. _____ Nation is a First Nations Band located near what is currently known as _____, in Treaty _____ territory.
- B. _____ Nation protects and manages the lands, waters and resources within _____ First Nation Territory;
- C. _____ First Nation requires a protocol for every research project conducted within _____ First Nation Territory or with _____ First Nation members;
- D. _____ Nation has approached the WLGL and requested the WLGL carry out research according to the terms of the project description set out in Schedule "A."
- E. Dr. Hadley Friedland, WLGL Academic Director, and Koren Lightning-Earle WLGL Legal Director and supervised WLGL researchers [the WLGL research team] will, in collaboration with _____ First Nation, carry out the research project in Schedule A.
- F. This is a _____ First Nation initiated and driven research project, based on _____ First Nation's goals. The parties wish to enter into this Protocol in order to ensure the research project recognizes, respects, and protects _____ First Nation's Intellectual Property and Confidential Information while still achieving _____ Nation's and the WLGL's goals for this research project.



Research Partnership Agreements

Definitions

- (a) “**Intellectual Property**” means an expression of knowledge held or created by a _____ Nation member or an WLGL research team member participating in research activities performed pursuant to this Protocol; and
- (b) “**Confidential Information**” means all information that is not currently publicly available, regardless of its form, disclosed by _____ First Nation members and/or staff to the WLGL Research Team.
- (c) “**Final Report**” means the finalized report containing the WLGL team’s analysis and summary of _____ First Nation legal principles. It is a _____ First Nation co-written and/or approved publicly accessible document.



Research Partnership Agreements

Consent

The WLGL Research Team will **not** work with or invite third parties to engage in activities in _____ Nation Territory unless _____ Nation has approved those third parties in writing. Any third party will confirm in writing that they have seen and will adhere to all the terms of this Protocol.

The WLGL Research Team **must** obtain a signed Consent Form from each _____ Nation member participating in the Research Project, in the form approved in the WLGL ethics certificate from the University of Alberta research ethics board.

Nation is aware that any modifications to this consent form must be submitted and approved by the University of Alberta Ethics board. _____

Nation may have their own Consent Form, which they may wish to combine or use in addition to the WLGL's Consent Form.

Research Partnership Agreements

Information Storage & Sharing

The WLGL will keep all recordings and transcripts of interviews confidential in accordance with University of Alberta Ethics guidelines. All parties understand this includes an ethical obligation to keep individual respondents' interview recordings and transcripts confidential from anyone other than the WLGL, including employees, contractors and leadership of _____ Nation, unless the respondent has also signed the _____ Nation consent form, consenting to _____ Nation having access to the information.

Nation will provide the WLGL Research team access to or copies of the information and resources _____ First Nation deems appropriate and important for the WLGL research team to analyze in order to meet _____ Nation's research goals. In deciding what material to share, _____ Nation will be responsible for balancing their research goals for this project with their need to protect their other interests. The WLGL Research Team will not share any of this information with third parties without the written consent of _____ Nation. The WLGL Research team will provide Nation with copies of any and all research results from their analysis of these resources and information.





Research Partnership Agreements

Information Storage & Sharing cont'd

Nation may use the project outcomes from this research project to inform and support programming, education, resource management and governance within the territory. This may include disclosing research related information to third parties without notifying the WLGL Research team prior to the disclosure.

The WLGL research team will not, without prior written consent of _____ Nation, disclose any Confidential Information to any person or entity.

If the WLGL research team is required by judicial or administrative process to disclose any Confidential Information, they will promptly notify _____ Nation and allow reasonable time for _____ Nation to oppose the process before disclosing the Confidential Information.



Research Partnership Agreements

Intellectual Property & Co-Authorship

All information or knowledge owned by _____ Nation that is disclosed under this Protocol **remains the intellectual property of _____ Nation.** This research project and Protocol does not transfer any intellectual property in information, work products or knowledge currently held or yet to be developed by _____ Nation, _____ Nation programs and departments, or _____ Nation individuals to the WLGL research team. **The WLGL research team will properly attribute all sources of information and knowledge in their analysis, reports and any future publications or presentations.**



Research Partnership Agreements

Intellectual Property & Co-Authorship

All parties understand that all materials, published or otherwise, written by the WLGL Research Team will reflect their work product, interpretations, analysis, and opinions. All materials created solely by the WLGL research team under this Protocol will remain the property of the WLGL Research team. Materials co-authored by individuals from _____ Nation and the WLGL research team will be co-owned by _____ Nation, the WLGL and the individual authors. In consideration of _____ Nation's depth of knowledge and contribution to the development of all these materials, the WLGL research team grants _____ Nation the right to use, reproduce, modify and distribute these materials for any public purpose.

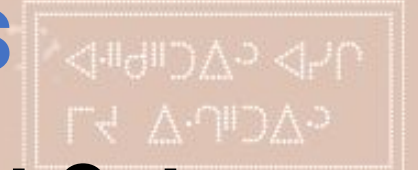
Research Partnership Agreements

Intellectual Property & Co-Authorship

The Parties agree that co-authorship is mutually beneficial and will strive to achieve co-authorship on project outcomes and future publications where practicable. The specific authors and their order on all works will be mutually agreed upon by the Parties and will be based on potential authors' oral, written, knowledge and research contributions towards a particular report or publication.



Research Partnership Agreements



Public Availability & Publications based on Project Outcomes

Prior to finalization, _____ First Nation will further review the Final Report for any concerns or objections to a proposed disclosure on grounds including, but not limited to, including such information may: (a) harm the interests of the Nation; (b) contain too sensitive or Confidential Information to be publicly available; (c) disclose the Intellectual Property of the Nation or a _____ Nation member which needs protection; or (d) not accurately reflect the cultural context in which the information was shared for the research project.

Representations

At no time will the WLGL act as an agent of _____ Nation or _____ Nation for the WLGL. The WLGL will not use _____ Nation on any proposals or agreements without their consent. _____ Nation will not use WLGL involvement with the research project for any proposals or agreements without their consent.

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Future Use

- The WLGL research team may further analyze and synthesize the Final Report to use in publications and presentations for academic and professional purposes as set out in “Project Outcomes” in Schedule B. The WLGL Research Team will advise ____ Nation of co-authorship opportunities and strive to achieve co-authorship with ____ Nation whenever practicable. **The raw data and materials of the project will not be used for any future publications without specific written consent from ____ Nation and a new research agreement.**
- If there are WLGL research team future publications or presentations based on the Final Report that are not co-authored or co-developed with ____ Nation, the WLGL research team will provide an opportunity for ____ Nation to review and comment on the use of the Final Report, including their interpretation and context, prior to their publication or public availability

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This Agreement shall be construed, and the rights of the Parties shall be governed and enforced, in accordance with the laws of _____ **Province** (without regard to any conflict of laws principles) and in accordance with any laws of **Canada** and the _____ **Nation** applicable therein.

Kokum's Kitchen

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Virtual Spaces

- Website
- Facebook
- Twitter
- Tiktok

Community building



WELCOME LAW STUDENTS PANCAKE DAY
 AT THE WAHKOHTOWIN LODGE
 WEDNESDAY SEPTEMBER 7, 2022
 8:30 AM - 11:00 AM
 1ST FLOOR OF LAW CENTER
 PAST WOMEN'S BATHROOM AND DONOR RECOGNITION WALL



SISTERS IN SPIRIT
 Memorial Vigil
 Tuesday Oct 4th 12:00-2:00pm
 Faculty of Law Foyer - Main Entrance

We honour the lives of missing and murdered Indigenous women, girls & 2SLGBTQIA+ individuals

#MMIW
 OPENING PRAYER
 GUEST SPEAKER
 DRUMMING
 MOMENT OF SILENCE

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JOIN WLGL & ILSA FOR...

BANNOCK & Beading

FRIDAY OCT 7TH
 12:00-2:00PM IN THE
LODGE

VISITING, BANNOCK & BEADING. BRING BEADS OR ANY PROJECTS YOU ARE WORKING ON. A FEW EXTRA BEAD KITS AVAILABLE



Legal Education, Anti-racism & Cultural Competency Training

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Les traditions juridiques autochtones aujourd'hui

Colloque de formation des Cours d'appel de l'Institut national de la magistrature
24 septembre 2019



Koren Lightning-Earle, WLGL Lawyer & Sessional Instructor at the [University of Alberta Faculty of Law](#), will be the distinguished speaker at the RODA's 7th Annual Diversity Conference: "Systemic Change : What Role Will You Play?"

RODA's Diversity Conference takes place November 23 & 24. Information & Registration here: https://cbapd.org/details_en.aspx?id=on_on21oba58i



SYSTEMIC CHANGE — WHAT ROLE WILL YOU PLAY?
RODA's 7th Annual Diversity Conference
in Partnership with the OBA

November 23 & 24, 2021

aire de la Fondation du droit
directrice, Unité de recherche
té de droit de l'Université de
djainte, cochef, Wahkohtowin
bit

SAVE THE DATE

The Assembly of First Nations (AFN) presents:
2022 National Forum on Policing and Restorative Justice
April 6 & 7, 2022
(Online via Zoom)

The national forum will host plenary and dialogue sessions to discuss the evolution of First Nations policing and restorative justice.

Please check the AFN website for updates at www.afn.ca

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Thank you

Please contact for further information:

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Check out our wahkohtowin [website](#) for more resources.

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