

# ACCESSING JUSTICE AND RECONCILIATION

## Anishinabek Legal Traditions Report

Community Partner: Chippewas of Nawash Unceded First Nation #27



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# **Anishinabek Traditions Report**

*Community Partner: Chippewas of Nawash Unceded First Nation #27*

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*This research and report are a part of:*

## **The Accessing Justice and Reconciliation Project**

A national collaborative research project by:

UVic Indigenous Law Research Clinic

Indigenous Bar Association

The Truth and Reconciliation Commission of Canada

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## **Introduction**

The Accessing Justice and Reconciliation Project [AJR Project] is a national research project launched by the University of Victoria Faculty of Law's Indigenous Law Research Clinic, in collaboration with the Indigenous Bar Association and the Truth and Reconciliation Commission and funded by the Ontario Law Foundation. The AJR Project explores how Indigenous societies used and applied their own legal principles to deal with harms and conflicts between and within groups. The overall vision for this project is to honour the internal strengths and resiliencies of Indigenous peoples and to identify and articulate principles within Indigenous legal traditions that might be usefully applied today. The AJR Project's approach is to treat Indigenous laws seriously as *laws*. Researchers analyzed publically available materials and oral traditions within partner communities, using adapted methods and the same rigor required to seriously engage with state laws in Canadian law schools.

In this report, you will find a 'Primer', giving a brief, and no doubt incomplete, overview of the broader Indigenous society the represented legal tradition is part of and an 'Introduction to the Community Partner', introducing the specific community within that society who generously partnered with us for this work. The core of the report is the 'Summary of Legal Principles'. This represents the substantive research results from our engagement with Indigenous laws. Finally, the 'Final Report' is included, which provides an overview of the overall project and identifies several major themes that emerged from the project as a whole.

In our eyes, this report is just one tool for the larger work of law occurring within and between communities. We hope it will be useful as a starting point or framework for communities' own ongoing engagement with and application of their legal traditions. We hope it can be discussed, debated, disagreed with, corrected and changed within each community. At the very least, however, we hope each report conveys our recognition of, and respect for, the internal strengths and intellectual resources Indigenous peoples continue to possess and pass down through the generations. So much has been lost and displaced, and yet these strengths and resources are still with us. It is up to each community to decide how best to use them today.

We give this work back to you with gratitude and good intentions,

**Prof. Val Napoleon, LLB, PhD**  
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## Anishinabek Primer

### **Purpose:**

*The Anishinabek legal summary in this package is based on an analysis of Anishinabek stories and oral histories. The analytical work with the stories of a particular Indigenous society must be contextualized by basic information about that society. In other words, the stories themselves are cut from the political structure (e.g., decentralized), legal order (e.g., non-hierarchical or kinship based), and history of a people. This context informs the analysis. The context enables one to see the story's internal logic and to get a sense of the aspirations of law. These aspirations are illustrated by the norms contained in the patterns and incongruities that are created by the stories. The intention of this basic primer is to provide enough context to enable a deeper reflection about the stories and their place in the intellectual life of that society – past, present and future.*

By Lindsay Borrows, Senior Researcher

The Anishinaabe Nation is located around the Great Lakes and spans west into the prairies and east into Quebec.<sup>1</sup> Anishinaabe translates to mean, ‘nishi’ (good) and ‘nabe’ (man).<sup>2</sup> Their very name sets forth an ideal and reminder of how one should live. They balance strong traditions with adaptability to live in good ways in a continually changing world. It is this resiliency that has allowed for their physical, cultural and political presence over such a wide area of land.<sup>3</sup>

Before sustained European contact, the Anishinabek travelled seasonally following the animals and plants that nourished them.<sup>4</sup> They were hunters of deer, rabbit, bear, birds and various other animal species found in the Great Lakes woodlands and out to the prairies. They were also gatherers of berries, leaves, medicines, maple syrup and wild rice. Among them were fishers, crafts people, traders, warriors, parents, storytellers and keepers of assorted sources of knowledge. Like all societies, disputes frequently arose both within the community and with neighbouring tribal Nations that required expertise in peacemaking and law to resolve.<sup>5</sup> Each person was expected to find his or her skills and develop them, and often received a name based on those abilities.<sup>6</sup>

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<sup>1</sup> For a map of Anishinaabe territories see: CJLippert, “Anishinaabewaki” (27 April 2008), online: Wikipedia <<http://en.wikipedia.org/wiki/File:Anishinaabewaki.jpg>>.

<sup>2</sup> It can also mean ‘spontaneous being’ or ‘original people’. See Basil Johnston, *Anishinaubae Thesaurus*, (East Lansing: Michigan State University Press, 2007) at 14.

<sup>3</sup> For a general history of the Anishinaabe Nation see: William Warren, *History of the Ojibwe People*, (Saint Paul: Minnesota Historical Society Press, reprint 2009) and Peter Schmalz, *The Ojibwa of Southern Ontario*, (Toronto: University of Toronto Press, 1991), and Richard White, *The Middle Ground: Indians, Empires and Republics in The Great Lakes Region, 1650-1815 (Studies in North American Indian History)*, (Cambridge: Cambridge University Press, 1991).

<sup>4</sup> There are many anthropological publications about the Anishinaabek. For some sources see: Frances Densmore, *Chippewa Customs*, (Minnesota Historical Society Press, reprint 1979) and Ruth Landes, *Ojibwa Sociology*, (Columbia University Press, 1937) and Henry Rowe Schoolcraft, *Personal Memoirs of a Residence of Thirty Years with the Indian Tribes on the American Frontiers: With Brief Notices of Passing Events, Facts, Opinions, A.D. 1812 to A.D. 1842*, (Nabu Press, reprint 2010).

<sup>5</sup> John Borrows, *Canada's Indigenous Constitution*, (Toronto: University of Toronto Press, 2010), at 77-84.

<sup>6</sup> Basil Johnston, *Ojibway Ceremonies*, (Toronto: McClelland and Stewart, 1991) at 11-31.

The context in which people live today does not require the same modes of seasonal living. As Europeans came and forced different modes of settlement people began to set up more permanent homesteads. For about one hundred years, from 1860 to 1960, farming arose then dwindled on the reserve.<sup>7</sup> The people learned how to bale hay, grow potatoes, milk cows and live like the surrounding farmers. Other changes in the environment and laws have also altered how people live on the land. While these details of life have changed, the broader themes and values of the Anishinaabe have remained and even strengthened. These specific values have often been defined as the ‘Seven Grandfathers,’ which include: nibwaakaawin (wisdom), zaagi’idiwin (love), minaadendamowin (respect), aakode’ewin (bravery), gwayakwaadiziwin (honesty), dabaadendiziwin (humility), debwewin (truth).<sup>8</sup> These values guide political alliances that exist across the U.S.-Canadian border to unify the Anishinaabe Nation. Today Anishinabek speak the Algonquin-based language Anishinaabemowin and have become fluent in English.<sup>9</sup> The Midewin religion has been fortified as people seek Anishinabek-defined ways to heal and commune with the Creator.<sup>10</sup>

While the Anishinabek are tied together by a common language, culture and history, there are also obvious differences between communities. These variations stem from distinct historical interactions with surrounding Nations, both Indigenous and European.

The beauty and fertility of the land did not go unnoticed by European settlers either, leading them to enter into treaties with the Anishinaabe. An element that complicates signing treaties is language. For example, according to the view and memory of the Chippewas of Nawash, the escarpments on their traditional territory on the Saugeen (Bruce) Peninsula includes the shoreline since they were once the water’s edge. Fossils cover the landscape of the ancient shallow tropical sea. For the newcomers, the shoreline is only what you see today because these past stories are not living traditions for the newcomers as they are for the Anishinaabe. The newcomers’ views of the world are based in their own experiences with the land, which often differ from those of the

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<sup>7</sup> For a history of agricultural development amongst Anishinaabe in southern Ontario see Peter S. Schmalz, *The Ojibwa of Southern Ontario*, (Toronto: University of Toronto, 1991) at 144-145, 149, 161-4, 166, 174-9, 185, 217-9, 223-5, 232-3.

<sup>8</sup> Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway*, (Saint Paul: The University of Minnesota Press, 2010).

<sup>9</sup> A 2006 statistics Canada report states that 32,460 people speak Anishinaabemowin: Statistics Canada, “Various Languages Spoken (147), Age Groups (17A) and Sex (3) for the Population of Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2006 Census - 20% Sample Data” online: Statistics Canada <<http://www12.statcan.ca/census-recensement/2006/dp-pd/tbt/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=837928&GK=0&GRP=1&PID=89189&PRID=0&PTYPE=88971,97154&S=0&SHOWALL=0&SUB=0&Temporal=2006&THEME=70&VID=0&VNAMEE=&VNAMEF=>>>. Another 8,355 are reported to speak Anishinaabemowin in the United States: U.S.English Foundation, Inc, “Ojibwa” (2000), online: U.S.English Foundation, Inc <<http://www.usefoundation.org/userdata/file/Research/Languages/ojibwa.pdf>>. This number does not represent the total number of Anishinaabe people because most speak English.

<sup>10</sup> However like any culture the Anishinaabe can and do practice a wide variety of world religions.

Anishinaabe. These cultural differences are just some of the elements that complicate treaty interpretation.<sup>11</sup>

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<sup>11</sup> In international law the right of *Contra Proferentem* is a contractual rule that favours the party who is not in control of the drafting process.



## **Introduction to the Community Partner: Chippewas of Nawash Unceded First Nation**

By Lindsay Borrows, Senior Researcher

The Chippewas of Nawash Unceded First Nation occupy approximately 15,500 acres on the eastern side of the Saugeen (Bruce) Peninsula in southern Ontario.<sup>12</sup> The reserve is called Neyaashiinigiing which means ‘a point of land surrounded by water’.

Neyaashiinigiing used to be one of the main wintering sites for the Anishinaabe on the Saugeen Peninsula. Today there are approximately 700 people living on reserve at Neyaashiinigiing and over 2,000 are enrolled members. It is colloquially called Cape Croker and is located some 30km north of Wiarton and 90km south of Tobermory. There are about 48km of rocky shorelines that stretch along the sparkling blue waters of Georgian Bay. White rock escarpments, dense with pine and hardwood trees, hover over the landscape covering about 1,500 acres. A walk across the land showcases various species of frogs, snakes, birds, bears, deer and beaver to name only a handful of animals that also call this land home.<sup>13</sup> Medicines and rare plants grow all throughout the prairie grasses, forest-floor and waters. It is this environment that has sustained and formed the Anishinaabe of the area.

Colonization put pressure on the traditional ways of life. One such pressure was the Indian residential schools policy developed by the government, and enforced by the Indian Agent.<sup>14</sup> In the 1930s and ‘40s young children would be put on a small boat and shipped off from the point where the last hereditary chief (Charles Kegeдонce Jones) lived.<sup>15</sup> Just a generation before, the people would have fished freely in those waters off the point. They would catch what they wanted and released the fish that were not yet ready to take, according to their laws. The children that went to residential school boarded the boats but not to fish for anything of sustenance. When they came home as young adults, their lives were often far removed from the fish. In the foreign waters of residential school they caught tuberculosis, scarlet fever, and small pox. And this is only what they *caught*. They also fell prey to malnutrition, and physical, emotional and sexual abuse. A lot was also released. Fortunately resistance, family and the land prevented the old ways from being entirely swamped.

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<sup>12</sup> The band’s official website is [Nawash.ca](http://Nawash.ca) which includes these general statistics and a brief historical overview.

<sup>13</sup> See: Peter E. Kelly and Douglas W. Larson, *The Last Stand: A Journey Through the Ancient Cliff-Face Forest of the Niagara Escarpment*, (Toronto: Natural Heritage, 2007) and Wayne Grady, *The Great Lakes: The Natural History of a Changing Region*, (Vancouver: Greystone Books, 2011).

<sup>14</sup> Some comprehensive sources on residential schools include: John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879–1986*, (Winnipeg: University of Manitoba Press, 1999), J.R. Miller, *Shingwauk’s Vision*, (Toronto: University of Toronto Press, 1996), and Royal Commission on Aboriginal Peoples, Final Report of the Royal Commission on Aboriginal Peoples, vol. 1, Looking Forward, Looking Back (Ottawa: Supply and Services, 1996), chap. 10, ‘Residential Schools,’ at 365–76.

<sup>15</sup> Recounted to author by elders John Nadjiwon, Basil and Ernestine Johnston, Jean Jones Borrows among others.

The reserve land of the Chippewas of Nawash helped in this healing. Archaeological evidence and oral history affirms that this has been a healing place for over 1,000 years.<sup>16</sup> From this place the teachings of the Midewin society recount that the people followed the sacred megis shell west and one of their ceremonial stops was here at Nojmowaaning. This sacred presence can still be felt today.

The five main treaties that were signed with the British government in the 1800s essentially opened up some two million acres for sharing with settlers. These treaties include: Treaty 45 ½ (1836), Treaty 67 (1851), Treaty 72 (1854), Treaty 82 (1857) and Treaty 93 (1861). The Anishinaabe were no strangers to tales of tricksters and the history of these treaties represented a new installment in these narratives. The first of these agreements was treaty 45 ½. The two Nations negotiated the opening of 1.5 million acres of Anishinaabe land south of Owen Sound for shared use. It was promised that, in return, the Saugeen Peninsula would be protected forever for Anishinaabe use, including the land of Manitoulin Island (a sacred settlement). Only 15 years later the next treaty had to be signed because the Crown was not upholding their promise.

Treaty 72 was signed in 1854. The Crown told the Anishinaabe that despite their promises, they could not prevent the peninsula's settlement. They said their rights could be better protected if they moved to smaller reserves. When they moved to the reserves the Anishinaabe still viewed the treaties as giving them access to the wider land. The ensuing treaties promised the Anishinaabe that proceeds from all lands sold would be held in trust, and their current reserves would be better protected. Over time, Anishinaabe land diminished including some of their reserves. Furthermore, monies from Nawash trust accounts have not been properly accounted for. Despite this sad history, people continue to advocate for their rights and often say, "at least they pushed us up onto the most beautiful place there is."<sup>17</sup> There are continual land claims in court attempting to secure access to what rightfully belongs to the Chippewas of Nawash. Many of these cases deal with fishing, hunting, environmental and land rights.

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<sup>16</sup> Northern Michigan University has created a website devoted to research about the Anishinaabe migration route. See: <http://www.nmuanthro.net/Welcome.html> . This megis shell route is also discussed in Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway*, (The University of Minnesota Press, 2010).

<sup>17</sup> The author has heard this from Jean Jones Borrows, Norma Jones Robson and Tony Chegahno (residents and members of Chippewas of Nawash) among others.

## Introduction to the Summary of Legal Principles

The following Summary of Anishinabek Legal Principles was prepared based on Hannah Askew's and Lindsay Borrows' research and analysis of the resources within Anishinabek legal traditions to address harms and conflicts between people. The students relied on publically available resources and interviews within the community of Neyaashiinigiing (Chippewas of Nawash Unceded First Nation #27) in the summer of 2012 for their analysis.

Given the short time period and other practical limitations of this research project, we knew anything we could produce would barely scratch the surface of such a rich, complex, living legal tradition. Keeping this reality in mind, this report provides a simple framework that all the students used to organize the outcomes of their analysis, which can continue to be built on as communities see fit. It is *not* a comprehensive or complete statement of legal principles and is not intended to be. Rather, it gives some examples of the legal principles that stood out in each category of the framework. This is best viewed as one starting point for the ongoing work needed within communities.

The framework for this summary is structured around the following five questions, each one forming a section of the summary:

1. Legal Processes: Characteristics of legitimate decision-making/legal processes
  - 1.1 Authoritative Decision-makers: Who had the final say?
  - 1.2 Procedural Steps: What were the steps involved in determining a response or action?
2. Legal Responses and Resolutions: What principles govern appropriate responses to legal/ human issues?
3. Legal Obligations: What principles govern individual and collective responsibilities? What are the “*shoulds*”?
4. Legal Rights: What should people be able to expect from others?
  - 4.1 Substantive Rights
  - 4.2 Procedural Rights
5. General Underlying Principles: What underlying or recurrent themes emerge in the stories that might not be captured above?

Following each question heading we have included a table providing a general re-statement of law and indication of the source material as a “quick reference” guide.

This summary presents answers to the five questions that were interpreted from engagement with published stories and from conversations with elders and other community members. It is *not* intended to be a codification of law, like a penal code or some legislation. Nor does it claim to be an authoritative statement of law, like a court judgment. Rather, this summary is more like a legal memo back to our partner communities. A legal memo synthesizes the legal researcher's best understanding of relevant legal principles after a serious and sustained engagement with those principles. It

organizes information in a way that makes it simpler for others to find, understand and apply those principles to current issues or activities.

We have done our best to identify debates where they arose. We fully expect there will be differing interpretations and opinions within communities and between communities of the same tradition. We believe that rich ongoing debates about legal principles are a sign of health and vitality of these legal traditions. We also note that the length and depth of the various sections will differ in each legal summary and between summaries. The principles identified in each section of a summary are obviously not the only ones in existence, but rather the ones that could be identified most clearly in the particular published stories reviewed and the interviews conducted by the student researchers during one summer. It is critical to conduct further research to explore the many possible factors leading to these differences and fill in gaps where needed. Most importantly, the principles that are identified in the framework need to be discussed within each community further to determine whether they resonate with people's current aspirations and expectations regarding situations of harm or conflict.

In the end, what this summary demonstrates best is what outcomes even a relatively short period of serious and sustained engagement with Anishinabek legal traditions can produce, when we treat it seriously as *law* and work as hard at understanding and expressing it as any other law. It is exciting to imagine the potential outcomes of a longer engagement. We hope this framework, with these examples, provides communities with a way to begin or continue their own ongoing research to identify the rich intellectual and practical resources within their own legal traditions.

## **Anishinabek Summary of Legal Principles: Examples of Some Legal Principles Applied to Harms and Conflicts within a Group**

By Hannah Askew (with input from Lindsay Borrows)

### **Author's Note: *Our Research Process***

The Anishinabek procedural steps and principles for addressing harm and conflict within communities contained in this synthesis were arrived at through an inductive process over a summer of research on Neyaashiinigmiing 27 (“Neyaash”), formerly known as the Cape Croker Indian Reserve No. 27, on the Bruce Peninsula in Ontario. These principles were drawn from approximately 40 Anishinabek stories relating to harm and conflict that University of Toronto law student Lindsay Borrows and I read and case briefed and from interviews we conducted with 13 individuals (primarily Elders) from Neyaashiinigmiing 27. These principles reflect our interpretation of Anishinabek legal principles related to intra-community harm and conflict based on our sample of stories and interviews.

We want to acknowledge that other community members may have different interpretations of the legal steps and principles. An example that illustrates this is that near the end of the summer, we showed the principles to our friend and interview participant Wendall Nadjiwon, who said that while the principles seemed accurate to him, he felt that there were some further considerations to be included. He emailed us later that night to say that he had been inspired by the project to write up his own version of the principles, building on our draft.

The steps and principles recorded below reflect our best effort to sketch out a framework of Anishinabek law related to intra-community harm and conflict but we recognize that there is a diversity of interpretations held by other community members. We hope that our contribution will spark a larger debate and dialogue, as it did with our friend Wendall Nadjiwon, within the Anishinabek community.

# 1. Legal Processes: Characteristics of legitimate decision-making/problem-solving processes

## 1.1 Authoritative Decision-makers: Who had the final say?

General Restatements of Law:
a) <b>A Collective Community Process:</b> Major decisions over how to address serious harms were typically determined through a collective community process: <i>Animosh w'guah izhitchigaet/What the Dog Did, Mayamaking Case, Redfeather, Powwow Case, The Boy Who Defeated a Windigo, Another Windigo Story, Jingle Dress Case.</i>
b) <b>Elders:</b> To address some harms, particularly those involving children, individual elders may act as sole decision-makers: <i>Magic Pots, Jewel Weeds.</i>
c) <b>Chiefs:</b> Chiefs sometimes make decisions on behalf of the community: <i>The Legend of the Birch Trees, Neither Wolf nor Dog, Neyaash Interview: Neepitapinaysiqua, Neyaash Interview: Basil Johnston, Neyaash Interview: Wilmer Nadjiwon.</i>
d) <b>Animal Communities:</b> Animal communities sometimes make decisions concerning harms committed by humans: <i>Zeesigoobimeeshuk/Red Willows, What the Dog Did, Ginaebig, Innih gayae/The Snake and the Man, Redfeather.</i>

## Discussion:

- a) **Collective Community Process:** *Major decisions over how to address serious harms were typically determined through a collective community process.*<sup>1</sup>

A historical example of a collective decision-making process is found in the *Mayamaking Case* where Anishinabek law was used to address a harm that occurred in French River, Ontario in 1838. The incident and the way that it was dealt with by the community was recorded by William Jarvis, Superintendent of Indian Affairs. In this instance, a man named Mayamaking began to act very strangely one winter, first devouring a whole deer at two meals and later tearing open his veins with his teeth drinking his own blood. Eventually the man began to refuse all food and took off his clothes in the snow continuing to drink his own blood. The community was extremely alarmed and feared that Mayamaking had turned into a Windigo (an Anishinabek legal concept describing a very harmful or dangerous person)<sup>2</sup> and might pose a threat to the children. A council was called and a difficult collective decision was made to incapacitate Mayamaking through death in order to protect the safety of the community. A close friend of Mayamaking was chosen to carry out the decision, as the friend would resent anyone else who did it. This friend pledged to provide services to the father of Mayamaking for the rest of his life.<sup>3</sup>

The story of *Redfeather* is another example of a collective decision-making process being used to address a harm. In this story a council of birds meets to decide how to respond to a young boy who is harming their young by needlessly and wastefully killing frogs and crayfish, thus depriving the birds of food. The council eventually decides that the boy must be stopped and so the owl picks up the boy in his talons and places him at the top of a tall tree so that he can do no more harm.<sup>4</sup>

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<sup>1</sup> “Animosh w’guah izhitchigaet/What the Dog Did” in Basil Johnston, *The Star Man and Other Tales* (Toronto: Royal Ontario Museum, 1997), at 44-51 [*Animosh w’guah izhitchigaet/What the Dog Did*]; “Mayamaking Case” in John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Constitution*] at 81-82 [*Mayamaking Case*]; “Powwow Case” in Borrows, *Constitution* at 247-48 [*Powwow Case*]; “The Boy Who Defeated a Windigo” in Victor Barnouw, *Wisconsin Chippewa Myths and Tales and Their Relation to Chippewa Life* (Madison, WI: University of Wisconsin Press, 1977) at 120-21 [*The Boy who Defeated a Windigo*]; Indian Country Project, “The Story of Redfeather” adapted from Beatrice Blackwood, “Tales of the Chippewa Indians” (1929) *Folk-Lore* 40[4]:315-44, online: Milwaukee Public Museum <<http://www.mpm.edu/wirp/icw-141.html#redfeather>> [*Redfeather*]; “Another Windigo Story” in Robert E. Ritzenthaler & Pat Ritzenthaler, *The Woodland Indians of the Western Great Lakes* (Prospect Heights, IL: Waveland Press, 1983) [*Another Windigo Story*]; “Jingle Dress Case”, Interview of Neyaashiinigmiing 27 Community Member Neepitapinaysiqua by Hannah Askew and Lindsay Borrows (5 August 2012) Neyaashinigmiing 27 (Cape Croker) [Neyaash Interview: Neepitapinaysiqua]; Follow-up interview of Neyaashiinigmiing 27 Community Member Neepitapinaysiqua by Hannah Askew and Lindsay Borrows (16 August 2013) Neyaashinigmiing 27 (Cape Croker) [Neyaash Interview: Neepitapinaysiqua Follow-up].

<sup>2</sup> For a more in-depth exploration of the Windigo as a legal concept or category, see Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Sauteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] at 21-53.

<sup>3</sup> *Mayamaking Case*, *supra* note 1.

<sup>4</sup> *Redfeather*, *supra* note 1.



A recent example of Anishinabek collective decision-making occurred in 2000 when a proposal was made to hold the annual Cape Croker Reserve Powwow on a flat and rocky piece of land overlooking Georgian Bay. Some community members were opposed this plan on the basis that it would likely harm the delicate alvar bedrock, which is among the oldest exposed stone in Ontario and which, according to Professor John Borrows, is viewed by many Anishinabek as a storyteller because of what it reveals about an earlier time when the land was submerged under a tropical sea. In order to resolve the issue of the potential harm that would be caused, a band council was held in which scientists, lawyers, elders, medicine people, community workers, and other members of the community discussed the issue and conducted ceremonies, ultimately deciding not to host the powwow on the rock.<sup>5</sup>

**b) Elders:** *To address some harms, particularly those involving children, individual elders may act as sole decision-makers.*<sup>6</sup>

In the story of *The Magic Pots* an elder acts as a decision-maker after three girls play with magic pots that they have been forbidden to touch. A wolf comes by and the girls become scared and drop the pots, breaking them. The break is a serious harm because the loss of the pots means the Anishinabek nation's knowledge of how to make pottery is lost. When an elder sees what the girls have done, she changes them into crows, and that is why crows make such a mournful cawing sound.<sup>7</sup> Likewise, in the story of *Jewel Weed*, Nokomis finds her two grandchildren exploding seed-pods in a jewel weed patch and scolds them because the jewel weed has a liquid that cures rashes and if the plant is harmed it may not return in the same quantity in the following year.<sup>8</sup>

**c) Chiefs:** *Chiefs sometimes make decisions on behalf of the community.*<sup>9</sup>

The researchers found only one example of a Chief making a decision in a traditional story: *The Legend of the Birch Tree*. In this story, the pine tree is Chief of all of the other trees, but the birch tree flouts his authority and proclaims herself to be better than pine because of her beautiful white bark. Pine tree becomes angry and punishes her by calling on the thunder to whip her so that her smooth white bark has dark scratches in it. When we discussed this story with elder Neepitapinaysiqua, she said that the pine tree likely acted as he did because "Well, the pine tree wanted to keep order and sometimes when there is disorder people in that position will do whatever they can to bring back order

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<sup>5</sup> *Powwow Case*, *supra* note 1.

<sup>6</sup> "Jewel Weed" in Verna Patronella Johnston, *Tales of Nokomis* (Toronto: Stoddart, 1975) at 14-17 [*Jewel Weed*]; Indian Country Project, "The Magic Pots" adapted from Albert B. Reagan (1928) 7:1 *Wisconsin Archeologist* 227-28, online: Milwaukee Public Museum <<http://www.mpm.edu/wirp/icw-141.html#pots>> [*The Magic Pots*].

<sup>7</sup> *The Magic Pots*, *ibid.*

<sup>8</sup> *Jewel Weed*, *supra* note 6.

<sup>9</sup> "The Legend of the Birch Tree," in Johnston, *supra* note 6 at 50-53 [*The Legend of the Birch Tree*]. Interview of Neyaashiinigiing 27 Community Member Wendall Nadjiwon by Hannah Askew and Lindsay Borrows (8 August 2012) Neyaashiinigiing 27 (Cape Croker Reserve) [Neyaash Interview: Wendall Nadjiwon].



again.”<sup>10</sup> However, Neeptapinaysiqua expressed discomfort with the method that the pine tree had used, saying, “he attacked her weakness and her weakness was her vanity and I don’t agree with it but that’s what it looked like to me.” She further commented that “for someone who has power then exercises that power over another being there is no equality in that and I personally can’t agree with it.”<sup>11</sup>

The elders interviewed underscored the autonomy that community members typically enjoyed and the relatively limited power that chiefs could exercise over community members historically. For example, Basil Johnston also expressed the following view about leadership and chieftainship within Anishinabek society, and the way that the role of chiefs has been misunderstood by settlers:

Western Europeans when they came over here could not find any merit in native life. ‘They’re primitive so they can’t have any civilized institutions so they went on that premise and couldn’t find any institutions in native life but when you look at native life any tribe they could come and go, they had no bosses, they had no chiefs, but again chief has a different meaning among natives. It comes from the term to count on and to count many followers. So you could have two three four chiefs within a community and there was no quarrel about that. I could say, “I’m going with him.” All right, I’ll go with him. The number of followers that chief has, *Ogimaa*. They didn’t really have any authority except most of them were good hunters. They’d ask when are you next going out to hunt. Well, he knew they were asking him to lead. So that’s, uh, they could come and go. They could select their person to lead them, they could uh they used to say, “I’m my own boss. I’m my own master. There are no other masters.” And so they were all equal and they believed in their perceptions. You have a different perception from me, you have a different perception from me. That’s it. I will not try to prove you wrong. I’ll live with that. Basically you believe in the perception you’ve been given by the great mystery. They never got to that point. They’re uncivilized is what the missionaries said, otherwise they’d have chiefs.”<sup>12</sup>

Elder Wilmer Nadjiwon, who is ninety-one years old and who served as a chief of the Cape Croker Reserve for 14 years, expressed the view that although everyone’s differing viewpoints should be respected, sometimes a chief has to take an unpopular position and potentially even make a decision that others may doubt the wisdom of. For example, he related an instance where he established Cha Mao Zah in 1998, a campground that was also a teaching ground where people could come to learn about native life in spite of the doubts and skepticism of many community members.<sup>13</sup>

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<sup>10</sup> Neyaash Interview: Neeptapinaysiqua, *supra* note 1.

<sup>11</sup> *Ibid.*

<sup>12</sup> Interview of Neyaashiinigiing 27 Community Member Basil Johnston by Hannah Askew and Lindsay Borrows (3 August 2012) Neyaashiinigiing 27 (Cape Croker Reserve) [Neyaash Interview: Basil Johnston].

<sup>13</sup> Wilmer F. Nadjiwon, *Neither Wolf Nor Dog* (Tobermory, ON: Tobermory Press Inc. Publications, 2012) at 150-152.

In an interview elder Wilmer Nadjiwon emphasized that the role of the chief in Anishinabek society has to be understood within its historical context. He explained that prior to the imposition of the *Indian Act*, chiefs were nominated by an informal process of being approached and asked where he intended to hunt the following winter. According to Wilmer, the man would then know that the person who asked intended to follow him. The responsibility of the chief, nominated in this way was great, because if the chief led his followers to a place where there were no animals during the winter, then the group would face possible starvation. Wilmer emphasized to us that the power of the chief depended on the amount of trust put in him by the people and could be withdrawn at any time.<sup>14</sup> Elder Basil Johnston conveyed a similar principle, saying that in the past and even still today “I don’t think that there is anyone that has a final say on things . . . the power of the wolf is in the pack.”<sup>15</sup>

**d) Individuals:** *Individuals to the greatest extent possible are expected to make their own decisions, except when they adversely affect others.*<sup>16</sup>

During the summer of research at Neyaashiinigiing 27, elder Jean Borrows frequently remarked: “If you teach them the principles they will govern themselves.”<sup>17</sup> Other Elders expressed this principle as well. For example, Basil Johnston explained that in order to understand how Anishinabek communities managed to live cohesively without coercive external institutions, police, judges, and jails, it was important to know that the closest Anishinabek words to law are “kinwezhiwein” which translates into “guide” as in “a guiding principle” and “chiinaakonigewin” which means “a big decision” or “a god making a decision.”<sup>18</sup> According to elder Basil Johnston, knowledge of stories and principles played an important role in allowing people to conduct themselves in a harmonious way within the community, in the absence of coercive institutions. In particular, he cited the bear walker stories as acting as a deterrent for negative behaviour when he was younger.<sup>19</sup> However, he also emphasized that it was not only knowledge of the stories and principles that allowed Anishinabek society in the past to function without coercive external institutions that could impose laws by force. Johnston also said that historical context is important because in the past people were very busy surviving and completing all the tasks that they needed to survive the winter so there was not a lot of time left for feuding between community members.<sup>20</sup>

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<sup>14</sup> Neyaash Interview: Wilmer Nadjiwon, *supra* note 9.

<sup>15</sup> Neyaash Interview: Basil Johnston, *supra* note 12.

<sup>16</sup> “Mashos and the Orphans” in Truman Michelson, ed, *Ojibwa Texts Volume VII Part II Collected by William Jones: Miscellaneous Tales* (New York: G.E. Stechert & CO, Agents, 1919) at 151-154 [*Mashos and the Orphans*].

<sup>17</sup> Interview of Neyaashiinigiing 27 Community Member Jean Arlene Jones Borrows by Hannah Askew and Lindsay Borrows (29 June 2012) Neyaashiinigiing 27 (Cape Croker Reserve) [Neyaash Interview: Jean Borrows]; Interview of Neyaashiinigiing 27 Community Member Jean Arlene Jones Borrows by Hannah Askew and Lindsay Borrows (26 August 2012) Neyaashiinigiing 27 (Cape Croker) [Neyaash Interview: Jean Borrows Follow-up].

<sup>18</sup> Neyaash Interview: Basil Johnston, *supra* note 12.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

- e) **Animal Communities:** *Animal communities sometimes make decisions concerning harms committed by humans.*<sup>21</sup>

One example of a story in which an animal community makes a decision that affects humans is *Redfeather*, which is about a small boy who kills a number of frogs and crayfish merely for fun. He is asked to stop by a heron, who explains to the little boy that he is destroying the food supply of the birds. The boy is rude and disregards the warning. He also disregards a second warning from his grandfather. Later the birds call a council to discuss the boy's actions and when the boy will not stop his harmful actions the owl picks up the little boy and places him at the top of a very tall tree. In order to secure his release, the little boy's grandfather has to hold a feast and make assurances to the birds that this harmful behaviour will stop.<sup>22</sup>

## 1.2 Procedural Steps: What were the steps involved in determining a response or action?

### General Restatements of Law:

#### a) **Recognition of Risk Factors and Early Intervention and Support to Prevent Individuals from Escalating Harmful Behaviours:**

- Individuals from the community are sometimes needed to counsel or warn individuals who have begun to commit harmful actions: *Redfeather, Mashos and the Orphans, Papeekawis, The Birth of Nanabushu, Neyaash Interivew: Neepitapinaysiqua.*
- Who should issue the warning? (1) People in close relationships: *The Birth of Nanbushu, Mayamaking Case, Neyaash Interview: Neepitapinaysiqua,* (2) People with special sensitivity or awareness: *Neyaash Interview: Neepitapinaysiqua,* (3) People with similar character or experience: *Mayamaking Case, The Coming of the Europeans,* (4) Elders: *The Birth of Nanabushu, The Magic Pots, Jewel Weed.*

<sup>21</sup> *Redfeather*, *supra* note 1; “Zeesigoobimeeshuk/Red Willows” in Basil Johnston, *The Bear Walker and Other Stories* (Toronto: Royal Ontario Museum, 1995) at 34-37 [*Zeesigoobimeeshuk/Red Willows*]; “What the Dog Did” in Basil Johnston, *The Star-Man and Other Tales* (Toronto: Royal Ontario Museum, 1997) at 44-51 [*What the Dog Did*]; “Ginaebig, Innih gayae/The Snake and the Man” in Basil Johnston, *The Bear-Walker and Other Stories* (Toronto: Royal Ontario Museum, 1995) at 40-47 [*Ginaebig, Innih gayae/The Snake and the Man*]; “The Foolish Maidens and the Diver” in Truman Michelson, ed, *Ojibwa Texts Volume VII Part II Collected by William Jones: Miscellaneous Tales*, (New York: G.E. Stechert & CO, Agents, 1919) at 151-154 [*The Foolish Maidens*]; “The Rabbits and the Roses” in Basil Johnston, *Ojibway Heritage* (Toronto: McLelland & Stewart, 1976), at 44-45, The Story of Redfeather, *supra* note 1.

<sup>22</sup> “The Birth of Nanabushu,” in Truman Michelson, ed, William Jones (collected by) *Ojibwa Texts Volume VII Part I*, (New York: G/E Stechert & Co., Agents 1917) online: Internet Archive < [http://www.archive.org/stream/ojibwatextscoll07jonerich/ojibwatextscoll07jonerich\\_djvu.txt](http://www.archive.org/stream/ojibwatextscoll07jonerich/ojibwatextscoll07jonerich_djvu.txt)> [*The Birth of Nanabushu*] at 3-7; *Redfeather*, *supra* note 1.

- In practical terms, in what circumstances are warnings carried out today?: eg. People drinking so putting their children and family at risk: *Neyaash Interview: Jean Borrows*, eg. Teaching children to not kill animals for fun, proactively guiding children to avoid them causing harm in the future: *Neyaash Interview: Howard Jones*.

**b) Investigation/ Fact-finding/ Evidence – gathering to Establish Whether a Harm Occurred and what Action Needs to be Taken:**

- Harms did occur despite the steps of early intervention, support and counselling. Where a harm occurred, a deliberative process of establishing proof occurs through eye-witnessing, evidence or a confession that a person has actually committed the harm that he or she is accused of doing before any action is taken against that individual: *Mashos and the Orphans, The Story of Toad Woman, Jewel Weed, Nanabojo and his Younger Brother, Peepekawis, The Snake and the Man*.
- An individual who is believed to have committed a harm should be told what it is that he or she has allegedly done before any actions are taken against him or her: *Nanabozho, Peepekawis*.
- It should be proven that an individual has actually committed the harm that he or she is accused of before any action is taken against that individual: *Nanabozho, Peepekawis, Toad Woman*.

**c) A Deliberative Process Occurs to Determine the Appropriate Response to the Harm:** Once it has been established that a harm has been committed and that an individual is responsible, then a deliberative process occurs to determine the appropriate response to the harm: *The Rabbit and the Roses, What the Dog Did, Redfeather, The Boy Who Defeated a Windigo, Mayamaking Case, Neyaash Interview: Neepitapinaysiqua*.

**d) The Response is Implemented:** *Mayamaking Case*.

**e) A Ceremony May Occur:** *Redfeather, Neyaash Interview: Neepitapinaysiqua*.

## **Discussion:**

### **a) Recognition of Risk Factors and Early Intervention and Support to Prevent individuals from Escalating Harmful Behaviours:**

- *Individuals from the community are sometimes needed to counsel or warn individuals who have begun to commit harmful actions.*<sup>23</sup>

In some circumstances, members of the community have an obligation to counsel or warn individuals who have begun to commit harmful actions. For example, in *The Birth of Nanabushu*, a mother warns her daughter not to sit facing West. However, the daughter forgets and becomes impregnated by the West Wind.<sup>24</sup> In another story a mother who is neglecting her two sons and letting them go hungry in order to pursue a sexual affair with some snakes is warned by the elder of her two sons to stop, or he will tell his father. Here also the mother chooses to ignore her son's warning and to continue to engage in the affair and to neglect her two children.<sup>25</sup> Her husband's violent response to her affair and related neglect of the children brings harm to her and the entire family.

In some stories terrible consequences sometimes follow when no warnings are issued. For example, in the story of *Pagauk*, a young man falls in love with his brother's wife and tries to deal with the problem all on his own.<sup>26</sup> In the end, he is unable to overcome his passion and ends up murdering his brother. It is unclear from the story why no one tried to intervene. Perhaps no one noticed Pagauk's feelings for his brother's wife? Perhaps everyone felt uncomfortable and didn't want to get involved? Elder Neepitapinaysiqua stated in relation to the story of *Pagauk* that:

You know it's our job to warn each other when we see each other headed down a wrong way and when we know it just makes sense when these people that leaned to these things, like when you do these things you're going to get hurt. It's an obligation.<sup>27</sup>

- *Who should issue the warning?*

There are four groups that may be obligated to warn or counsel an individual who is engaged in harmful actions: First, people who are close to or who love the individuals who are causing harm;<sup>28</sup> Second, people with a special sensitivity and awareness for

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<sup>23</sup> *Redfeather*, *supra* note 1, *Mashos and the Orphans*, *supra* note 16; "Papeekawis" in Aletha K. Helbig, *Nanabozho Giver of Life* (Michigan: Green Oak Press, 1987) at 190-196 [*Papeekawis*]; Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

<sup>24</sup> *The Birth of Nanabushu*, *supra* note 22.

<sup>25</sup> *Mashos and the Orphans*, *supra* note 16.

<sup>26</sup> "Pagauk" in Basil Johnston, *The Manitous: The Spiritual World of the Ojibway*, (Toronto: Key Porter Books, 2002) [*Pagauk*].

<sup>27</sup> Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

<sup>28</sup> *The Birth of Nanabushu*, *supra* note 22; *Mayamaking Case*, *supra* note 1; Neyaash Interview: Neepitapinaysiqua, *supra* note 1, explaining: "When we spend a lot of time with certain people we can see

noticing things about other people;<sup>29</sup> Third, people who are similar in some way (perhaps through personality or experience) to the individual engaged in the harmful actions;<sup>30</sup> and Fourth, elders.<sup>31</sup>

- *In practical terms, in what circumstances are warnings carried out today?*

Providing a practical example of how the obligation to warn or counsel others had manifested itself in her day-to-day life, Jean Borrows recounted that on several occasions she had spoken to individuals in her community who were abusing alcohol and harming their families and themselves and warned them that they should get help to stop their alcohol abuse.<sup>32</sup> Providing another example, Howard Jones recalled that on one occasion when his teenage sons had shot a robin for fun with a BB gun, that he had asked them to pluck, cook, and eat the robin in order to teach the teenage boys that they should not kill animals just for fun because it was harmful to the environment. Jones further recalled that his own father had taught him not to kill animals for fun using a similar lesson and that the teaching had stuck with him for the rest of his life.<sup>33</sup>

In an interview, Howard Jones emphasized that in terms of providing counsel and warnings, it was particularly important to give them to children, to teach them how to avoid harmful actions and to instil principles in them that would guide their actions in the future. He said that:

A lot of people on this reserve and this world are having children but they're leaving them to fend for themselves and you know make their own way through life without prompting them or telling them and the scenario to this story is that when you have a seed and you go and plant it, you don't just throw it in the ground, you plant that thing in the ground and when you've planted it you water it and when weeds come you pluck it so that plant has a chance to grow. You nurture these things. Then when it is grown it becomes a beautiful, beautiful plant and to me the scenario of people raising children when they just say, 'well, we have children. We'll send them off to school and we'll let this happen and that happen' and they really have no influence in their life, I think that they're its like throwing your seed up in the air and who cares where it falls.<sup>34</sup>

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when these types of things are happening to them, I mean its very obvious, so yes, you know that's fair too that someone would ask for help you know with that person and talk with them".

<sup>29</sup> Neyaash Interview: Neepitapinaysiqua, *supra* note 1, explaining: "You know there are some people who are more astute when it comes to how others are thinking or feeling and there are people in a community who see that faster and sooner than someone else so yes because they have that sensitivity that astuteness it is their responsibility to talk to someone who would have that kind of influence on the young man whether it would be his mother or his father or an aunt or an uncles or a friend and go to that person and say "I have noticed..."

<sup>30</sup> *Mayamaking Case*, *supra* note 1; *The Coming of the Europeans*, as told by Neepitapinaysiqua, in Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

<sup>31</sup> *The Birth of Nanabushu*, *supra* note 22; *The Magic Pots*, *supra* note 6; *Jewel Weed*, *supra* note 6.

<sup>32</sup> Neyaash Interview: Jean Borrows, *supra* note 17.

<sup>33</sup> Interview of Neyaashiinigiing 27 Community Members April and Howard Jones by Hannah Askew, August 11, 2012, Neyaashiinigiing 27 (Cape Croker) [Neyaash Interview: April and Howard Jones].

<sup>34</sup> *Ibid.*



**b) Investigation/ Fact-finding/ Evidence – Gathering to Establish Whether a Harm Occurred and What Action Needs to be Taken:**

- *Harms did occur despite the steps of early intervention, support and counselling. Where a harm occurred, a deliberative process of establishing proof occurs through eye-witnessing, evidence or a confession that a person has actually committed the harm that he or she is accused of doing before any action is taken against that individual.*<sup>35</sup>
- *An individual who is believed to have committed a harm should be told what it is that he or she has allegedly done before any actions are taken against him or her.*<sup>36</sup>

If someone believes that another individual has committed harm, and they intend to respond, they first have a responsibility to explain to the alleged perpetrator what the harm is that they believe them to have committed. For example, in *Nanabozho* a young man who has been raised by his grandmother discovers that his mother died soon after his birth due to neglect from his father. The young man goes to find his father and challenge him to a fight, but before he begins the fight he accuses his father of being the cause of his mother's death. His father admits to having killed the young man's mother, and it is only after this confession that the young man physically attacks his father.<sup>37</sup>

Another story about two brothers illustrates what may happen if there is a failure to explain the allegation before taking action against someone who is believed to have committed a harm. In this story, an unmarried brother is lonely and goes to his married brother's house for company but finds that his brother and his wife has gone out. The unmarried brother mischievously paints some white birds that he finds in the house black, and then hides to see his brother's reaction when he returns. Once the married brother returns he looks for his white birds and doesn't recognize them since they have been painted black. He hears his brother laughing and jumps to the conclusion that his brother must have killed his birds. Rather than saying this to his brother and giving him the opportunity to tell what had actually happened, he sets off in violent pursuit of his brother and ends up killing him before his brother has a chance to explain what actually happened. The story ends with the married brother grief-stricken and mourning the death of his brother over a harmless prank. This story illustrates the principle that not giving

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<sup>35</sup> *Mashos and the Orphans*, supra note 16, "The Story of Toad Woman" in Mentor L. Williams, ed, *SchoolCraft's Indian Legends* (East Lansing: Michigan State University Press, 1991) [*Toad Woman*]; *Jewel Weed*, supra note 6; "Nanabojo and his Younger Brother" in Althea K. Helbig, *Nanabozho Giver of Life*, (Michigan: Green Oak Press, 1987) at 196-200 [*Nanabojo and his Younger Brother*]; *Peepekawis*, supra note 23; and "The Snake and the Man," in Basil Johnston, *The Bear-Walker and Other Stories* (Toronto: Royal Ontario Museum, 1995) at 40-47 [*The Snake and the Man*].

<sup>36</sup> *The Story of Toad Woman*, *ibid*; *Jewel Weed*, *ibid*; *Nanabojo and his Younger Brother*, *ibid*; *Peepekawis*, *ibid*; *The Snake and the Man*, *ibid*.

<sup>37</sup> "Nanabozho" in Mentor L. Williams, ed, *SchoolCraft's Indian Legends* (East Lansing: Michigan State University Press, 1991) at 7-11 [*Nanabozho*].

the party who is accused of committing a harm a chance to answer to the accusation can lead to tragic consequences.<sup>38</sup>

- *It should be proven that an individual has actually committed the harm that he or she is accused of before any action is taken against that individual.*

As the story of *Peepekawis* demonstrates, it is important to know that an individual actually committed the harm they are accused of before any actions are taken against them. This may be done by accusing a person and having the person acknowledge that they have in fact committed the harm, as in the stories mentioned above, or by proving the case through the testimony of eyewitnesses, or presentation of evidence.

One story that involves the observation and eye witnessing to confirm proof of a harm is the story of *Mashos and the Orphans*. In this story, a child reports to his father that his mother is neglecting him in order to participate in an affair. Before taking any action based on the child's story, the father hides in the woods and watches his wife leave the children behind to go and meet her lover. Once he has seen for himself that the child's story is true, the husband then confronts his wife.<sup>39</sup>

In the story of *Toad Woman*, a baby boy is kidnapped and raised by another woman. At the time of the kidnapping the baby boy is sleeping in a cradle made out of wampum and is guarded by a dog. As the baby is being kidnapped, the dog tries to hold onto the cradle and is left with a piece of wampum in his mouth. Many years later, when the baby is grown into a young man, his true mother finds him and tells him the story of the kidnapping. Before taking action against the woman who kidnapped him and who he believes to be his mother, the young man first compares the piece of wampum his real mother has brought him to his cradle and finds that the piece of wampum fits perfectly into the torn part of his cradle. Only after seeing this evidence does the young man retaliate against the woman who kidnapped him and leaves with his birth mother.<sup>40</sup>

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<sup>38</sup> *Peepekawis*, *supra* note 23.

<sup>39</sup> *Mashos and the Orphans*, *supra* note 16.

<sup>40</sup> *Toad Woman*, *supra* note 35.



**c) A Deliberative Process Occurs to Determine the Appropriate Response to the Harm:**

- *Once it has been established that a harm has been committed and that an individual is responsible, then a deliberative process occurs to determine the appropriate response to the harm.*<sup>41</sup>

In the story *What the Dog Did*, the Anishinabek are each assigned an animal to hunt by the Creator. They start to kill too many of the animals, so the animals hold a council to decide how to respond. However, the dog acts a spy for the humans and betrays the strategy of the council to the Anishinabek. The animals discover the dog's betrayal and hold a council in which they decide that the appropriate punishment for the dog is that he must live always with humans.<sup>42</sup>

In addition to a general council discussion, the victim of the harm may also have a say in the response and punishment. For example, in the story of the *Rabbit and the Roses*, the animals decide to punish the rabbit for over-eating the roses almost to the point of extinction. However, as the animals are violently beating Rabbit, the rose herself intervenes to tell them that the punishment is too harsh and to stop beating Rabbit, as the rest of the community is also to blame for not better safeguarding the well-being of the roses. In the end, it is decided that the roses will have thorns so that they will have better protection in the future.<sup>43</sup>

According to elder Neepitapinaysiqua, a council involved in determining the appropriate response to address a harm would likely also involve input from individuals that know the person who committed the harm well. She said:

From anything like what I've ever seen there would be people in that person's life who knew that person and who would know what they had done, people who are with us and know us know how we respond. You had your people to speak against a person but you would have people to speak for them as well. However many people would be in that circle could speak. For those whose responsibility it was to make this decision as to what would happen they would listen to everything they had heard and take it into account.<sup>44</sup>

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<sup>41</sup> "The Rabbits and the Roses" in Basil Johnston, *Ojibway Heritage* (Toronto: McLelland & Stewart, 1976) [*The Rabbit and the Roses*]; *What the Dog Did*, *supra* note 21; *Redfeather*, *supra* note 1; *Mayamaking Case*, *supra* note 1; "The Boy Who Defeated a Windigo" in Victor Barnouw in *Wisconsin Chippewa Myths and Tales and Their Relation to Chippewa Life* (Madison, WI: University of Wisconsin Press, 1977) at 120-121 [*The Boy who Defeated a Windigo*].

<sup>42</sup> *What the Dog Did*, *supra* note 21.

<sup>43</sup> *The Rabbit and the Roses*, *supra* note 41.

<sup>44</sup> Neyaash Interview: Neepitapinaysiqua Follow-up, *supra* note 1.

**d) The Response is Implemented:**

Once a response has been determined, then one or more community members would be selected to implement the response. For example, in the *Mayamaking Case* the decision to incapacitate a Windigo was arrived at and then implemented by the Windigo's closest friend, who was nominated for the responsibility by the community.<sup>45</sup>

**e) A Ceremony May Occur:**

Following a response to stop the harm from reoccurring, the community may decide to hold a ceremony to help everyone who has been affected by the harm to move on in a good way.<sup>46</sup> For example, in *Refeather*, the grandfather of a young boy who harmed the birds by killing their food source (crayfish and frogs) merely for fun held a feast and the boy issued an apology.

Elder Neepitapinaysiqua explained that in some Anishinabek communities annual ceremonies are held to help people to let go of any hurt or bad feelings that they are retaining in relation to harms that have occurred.<sup>47</sup> She noted that:

In ancient times there were annual ceremonies to resolve those feelings that occurred within a community and maybe even within a family. There were remedies for that and that story would be, you know, like possibly told at the beginning of the ceremonial feast that there would you know remind people that's there no use to that . . . it is human nature to take up with each other, you know to take sides and that's why we have ceremonies to take that away.<sup>48</sup>

In terms of the content of the ceremonies, elder Neepitapinaysiqua explained that:

It usually involves gifts you know story telling like by people who were involved they would perhaps have another person who would be involved, you know a speaker would point out that person's good traits you know a positive contribution that speaker would stand up and talk about the good traits as a reminder to that person's foes that you know that this person does have a contribution to make you know if it hasn't involved violence or harm I'm talking about what happens in the community this sense of feud or gossip.<sup>49</sup>

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<sup>45</sup> *Mayamaking Case*, *supra* note 1.

<sup>46</sup> *Redfeather*, *supra* note 1; Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

<sup>47</sup> Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

## 2. Legal Responses and Resolutions: What principles govern appropriate responses to legal/ human issue?

### General Restatement of Law

- a) **Proportionality:** Any action that is taken against an individual who has harmed should be proportionate to the harm they have committed: *Menabojou's Marriage, What the Dog Did, Jewel Weed, Red Willows, Weendigo, The Theft of Fire, Nanabojo and his Younger Brother, Peepekawis, The Woodpecker, The Falcon, Neyaash Interview: April and Howard Jones, Neyaash Interview: Berdina Johnston, Neyaash Interview: Basil Johnston, Neyaash Interview: Neepitapinaysiqua, Neyaash Interview: Jean Borrows.*
- b) **The Importance of Education:** 'Teach them the principles, and they will govern themselves': *Neyaash Interview: Jean Borrows, Neyaash Interview: April and Howard Jones, Neyaash Interview: Neepitapinaysiqua.*
- c) **Respect for Autonomy:** The free will of other people to make their own decisions should be respected as much as possible: *Theft of Fire, What the Dog Did, Neyaash Interview: April and Howard Jones, Neyaash Interview: Neepitapinaysiqua, Neyaash Interview: Berdina Johnston.*
- d) **Recognition that Mistakes sometimes lead to Good Consequences:** This requires humility and recognizing that no individual can know everything: *The Theft of Fire, Pichu/ The Dream Fast, Manabozho and the Maple Trees.*
- e) **Harmful Actions have Natural and Spiritual Consequences:** There are negative natural and spiritual consequences to actions that cause harms to others: *Kaswind/ The Fearfully Strong Man, Animoosh! Amik Abeedimoowaishin!/ Dog, Bring me a Beaver!, Pagauk, Nanabush and the Skunk, Neyaash Interview: Basil Johnston, Neyaash Interview: Justin Johnston, Neyaash Interview: April and Howard Jones, Neyaash Interview: Wilmer Nadjiwon, Neyaash Interview: Neepitapinaysiqua.*

## **Discussion:**

- a) **Proportionality:** *Any action that is taken against an individual who has harmed should be proportionate to the harm they have committed.*<sup>50</sup>

When a retributive action is taken against someone who has committed a harm, that action should be proportionate to the harm they have committed. For example, in one story one brother cheats another brother out of half of his supply of fish for the winter. Later in the winter, the cheating brother runs out of fish and begins to starve along with his family. He goes to his brother to ask for help, but is denied because of the previous harm that he had committed in stealing his brother's fish.<sup>51</sup> Another example is found in the story of *Woodpecker*, where an old woman, because of her stinginess and refusal to share food with a hungry stranger, is turned into a woodpecker and condemned to always obtain her food by pecking it out of rotten wood.<sup>52</sup> Another example is found in *Falcon*, where a man is witnessed murdering his own brother. Because the murder of one's own brother is one of the worst crimes a person can commit,<sup>53</sup> the man is himself killed on the spot by another member of the community.<sup>54</sup>

The consequences of committing a retributive action that is disproportionate to the crime that has been committed can be severe. For example, in one story a man reacts to the discovery of his wife's affair by killing his wife, dismembering her, and burning her body up in the fire despite her pleas to him to take pity on her. As a result of this disproportionate reaction, the husband and two children are forced to run away from their home, and are followed by the rolling head of the murdered wife calling out to them, and asking to be able to breastfeed her youngest child.<sup>55</sup>

As Professor John Borrows points out in his book, *Canada's Indigenous Constitution*, when examining these stories it is important to focus on underlying principles of proportionality that guide the stories and not on the specific outcomes of each story.<sup>56</sup> For example, while in the past incapacitation by death may have been the only option open to a community to protect its members, today the community would have other options open to it such as mental health and psychiatric treatment as well as incarceration. It is

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<sup>50</sup> "Menabojou's Marriage", in Alethea K. Helbig, *Nanabozho Giver of Life*, (Michigan: Green Oak Press, 1987) at 187-190; *What the Dog Did*, *supra* note 21; *Jewel Weed*, *supra* note 6; "Red Willows," in Basil Johnston *The Bear Walker and Other Stories* (Toronto: Royal Ontario Museum, 1995) at 34-37; "Weendigo" in Basil Johnston, *The Manitous: The Spiritual World of the Ojibway*, (Toronto: Key Porter Books, 2002) at 221-239 [*Weendigo*]; "The Theft of Fire" in Truman Michelson, ed, William Jones (collected by), *Ojibwa Texts Volume VII Part I*, (New York: G. E. Stechert & Co., Agents, 1917) at 7-14 [*The Theft of Fire*]; *Nanabojo and his Younger Brother*, *supra* note 35; *Peepekawis*, *supra* note 23; "The Woodpecker" in Basil Johnston, *The Bear Walker and Other Stories* at 38-41 [*The Woodpecker*].

<sup>51</sup> *Nanabojo and his Younger Brother*, *supra* note 35.

<sup>52</sup> *The Woodpecker*, *supra* note 50.

<sup>53</sup> Neyaash Interview: April and Howard Jones, *supra* note 33.

<sup>54</sup> John Tanner (with Introduction by Louise Erdrich), *The Falcon* (New York: Penguin Books, 2003, originally published in 1830), Chapter VIII.

<sup>55</sup> *Mashos and the Orphans*, *supra* note 16. Personal Conversation between John Borrows and Hannah Askew (23 August 2012).

<sup>56</sup> Borrows, *Constitution*, *supra* note 1 at 82-83.

therefore important to consider these stories in their specific historical context and focus on the principles that guide the response to harm. Proportionality is one of the most important principles underlying the Anishinabek legal response to harms.<sup>57</sup>

**b) The Importance of Education:** *‘Teach them the principles, and they will govern themselves.’*

Jean Borrows emphasized that the most important thing is to educate people, particularly when they are young because “If you teach them the principles, they will govern themselves.”<sup>58</sup> The interviewees emphasized that education was the key to people being able to live harmoniously together. Elder Neepitapinaysiqua said in her interview that the kinds of laws that have to be written down and enforced using coercion against people are in a sense “laws for the lawless”, meaning that these kinds of “on the books” laws are necessary when legal education in a community is weak and people have become alienated from the legal traditions and values, so that the laws have to be imposed externally upon people, rather than the laws being part of people’s identity and way of life, as they may become when people are educated in the laws through stories and other means from a very young age.<sup>59</sup>

Former chief Howard Jones also stressed the importance of passing down the teachings to children when they are young. He told us that

A lot of people on this reserve and this world are having children but they’re leaving them to fend for themselves and, you know, make their own way through life without prompting them or telling them and the scenario to this story is that when you have a seed you go and plant it, you don’t just throw it in the ground, you plant that thing in the ground and when you’ve landed it you water it and when weeds come you pluck it so that plant has a chance to grow. You nurture these things.<sup>60</sup>

Although the interviewees particularly emphasized the importance of educating the young, it seemed that education was considered valuable at any age. For example, April Jones said that if another individual was committing a harmful act, she could intervene by speaking up and educating that individual as to the harmful effects of his or her actions.<sup>61</sup>

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<sup>57</sup> Neyaash Interview: April and Howard Jones, *supra* note 33, *Jewel Weed*, *supra* note 6; Neyaash Interview: Neepitanapisqua, *supra* note 1; Interview of Neyaashiinigiing 27 Community Member Berdina Johnston by Hannah Askew and Lindsay Borrows, August 14, 2012, Neyaashiinigiing 27 (Cape Croker) [Neyaash Interview: Berdina Johnston]; Neyaash Interview: Jean Borrows, *supra* note 17, Neyaash Interview: Basil Johnston, *supra* note 12.

<sup>58</sup> Neyaash Interview: Jean Borrows Follow-up, *supra* note 17.

<sup>59</sup> Neyaash Interview: Neepitapinaysiqua Follow-up, *supra* note 1.

<sup>60</sup> Neyaash Interview: April and Howard Jones, *supra* note 33.

<sup>61</sup> *Ibid.*

- c) **Respect for Autonomy:** *The free will of other people to make their own decisions should be respected as much as possible.*<sup>62</sup>

While a number of the interviewees acknowledged the importance of counselling and warning others against harmful actions as discussed above, they also emphasized the importance in most situations of respecting the free will of others to continue to act according to their own understandings. In relation to the story of *The Theft of Fire* Elder Neepitapinaysiqua stated that “you see so that’s always our choice, we can proceed with what we want to do and the people that care about us may warn us against these things that may ultimately harm ourselves but we’re head strong we go on ahead and do these things but we’ve been warned.”<sup>63</sup>

Respect for the autonomy of others to sometimes make choices that seem harmful is also reflected in certain stories. For example, in one story, Nanabush is warned by his grandmother not to steal fire from a neighbouring community, but he chooses to do so anyway. After Nanabush has stolen the fire, his grandmother seems to accept his decision and actually helps him to preserve the fire.<sup>64</sup> In commenting on this story and Nanabush’s decision Elder Neepitapinaysiqua stated that it was probably meant to be because “Whatever we are supposed to have, we eventually get.”<sup>65</sup> In the story of *What the Dog Did*, the dog betrays the other animals to the humans. In response the animals punish the dog by condemning him to always live with the humans, rather than the other animals. Elder Berdina Johnston said in relation to the story that even though the situation started with a harm,

Now when I think of it, I think it is a good thing for man now because the dog now has become his helper. They go hunting, he protects your house, he is your pet and no matter if you scold a dog two minutes later he is wagging his tail and is your long lost friend. They seem to go to bat for you because they can become vicious if an intruder comes in so in that basis it is a good thing and its good that it happened.<sup>66</sup>

- d) **Recognition that Mistakes sometimes lead to Good Consequences:** *This requires humility and recognizing that no individual can know everything.*<sup>67</sup>

A number of the stories emphasize the principle that no individual can know everything. In some of the stories, characters disregard wise and sensible advice from Elders and positive results follow. For example, in *The Theft of Fire*, Nanabush steals fire against the advice of his grandmother. He burns himself in the process, but in the end his

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<sup>62</sup> *Ibid*; Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

<sup>63</sup> Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

<sup>64</sup> *The Theft of Fire*, *supra* note 50.

<sup>65</sup> Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

<sup>66</sup> Neyaash Interview: Berdina Johnston, *supra* note 57.

<sup>67</sup> *The Theft of Fire*, *supra* note 50, “Pichu” or “The Dream Fast”, online: Native Languages of the Americas <<http://www.native-languages.org/ojibwestory2.htm>>; “Manabozho and the Maple Trees”, online: Native Languages of the Americas <<http://www.native-languages.org/ojibwestory.htm>> [*Manabozho and the Maple Trees*].



grandmother helps him to preserve the fires and seems to acknowledge that the acquisition of fire will be a good thing for the people.<sup>68</sup>

In another story about how maple sugar was discovered, a young wife is too lazy to go down to the river to get water so she taps sap from the trees to cook stew in. Rather than watching her stew she leaves it unattended to go and chat with some neighbours. When her husband returns from hunting, he is angry at first because the stew has boiled down to the bottom and looks sludgy. He resolves to punish his wife but before doing so reaches his hand into the pot to taste the stew. It is delicious and sweet. The husband then grows very proud of his wife for having discovered (even if accidentally) how to make maple syrup. This story like the one above illustrates that good results may sometimes flow from the actions of those who disregard seemingly good advice.<sup>69</sup>

e) **Harmful Actions have Natural and Spiritual Consequences:** *There are negative natural and spiritual consequences to actions that cause harms to others.*<sup>70</sup>

In his interview, Anishinabek linguist Basil Johnston noted that there is no word for law in Anishinabemowin but that there is a word called “*chi'inaakonigewin*” which means “a big decision” or “a god making a decision.”<sup>71</sup> Following this observation a number of the stories the researchers noted spiritual consequences to harmful actions. For example, in the story of *Pagauk* a young man murders his brother because he is in love with his brother’s wife. When he drowns shortly after in a canoeing accident, he is denied access to the spirit world because of the harm he has committed. April Jones, a woman who has been trained in the Midewin tradition confirmed that while human beings have free will to make decisions, there will be natural or spiritual consequences that flow from those decisions.<sup>72</sup> Another story that seems to illustrate this is the story of *Dog! Bring Me a Beaver!* in which a woman mistreats a dog and then later chokes to death on a bone while the dog watches and says “I told you so.”<sup>73</sup>

In some of the stories related by interviewees individual human beings sometimes controlled spiritual consequences. For example, in the bear walker stories told by many elders,<sup>74</sup> individuals who were unhappy with someone else in the community would haunt that person through an external shape such as a bear or other animal, or even a

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<sup>68</sup> *The Theft of Fire*, *supra* note 50.

<sup>69</sup> *Manabozho and the Maple Trees*, *supra* note 67.

<sup>70</sup> “Kaswind, or The Fearfully Strong Man” in Truman Michelson (editor), *Ojibwa Texts Volume VII Part II Collected by William Jones: Miscellaneous Tales*, (New York: G.E. Stechert & CO, Agents, 1919) at 196-197; “Animoosh! Amik Abeedimooowashin!/ Dog, Bring me a Beaver!” in Basil Johnston, *The Star Man and Other Tales* (Toronto: Royal Ontario Museum, 1997) at 22-25 [*Dog! Bring me a Beaver!*]; *Pagauk*, *supra* note 26; “Nanabush and the Skunk” in Verna Patronella Johnston, *Tales of Nokomis* (Toronto: Stoddart, 1975) at 5-7; Neyaash Interview: Wilmer Nadjiwon, *supra* note 9.

<sup>71</sup> Neyaash Interview: Basil Johnston, *supra* note 12.

<sup>72</sup> Neyaash Interview: April and Howard Jones, *supra* note 33.

<sup>73</sup> *Dog! Bring Me a Beaver!*, *supra* note 70.

<sup>74</sup> Basil Johnston, *The Bear Walker and Other Tales* (Toronto: Royal Ontario Museum, 1995); Neyaash Interview: Neepitapinaysiqua, *supra* note 1, Neyaash Interview: Neepitapinaysiqua Follow-up, *supra* note 1.

Rolls Royce car in one instance.<sup>75</sup> Elder Neepitapinaysiqua expressed the belief that negative emotions could manifest themselves in a spiritual way, which could have very negative consequences for the affected person, namely depression and listlessness unless treated by a ceremony.<sup>76</sup>

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<sup>75</sup> Neyaash Interview: Basil Johnson, *supra* note 12.

<sup>76</sup> Neyaash Interview: Neepitapinaysiqua, *supra* note 1.



### 3. Legal Obligations: What principles govern individual and collective responsibilities? What are the “*shoulds*”?

General Restatements of Law
a) <b>Responsibility to Help Children:</b> Children are recognized as vulnerable and should be helped by the community when they are in need: <i>Lone Lightening, Mashos and the Orphans, The Story of Redfeather, Toad Woman, Neyaash Interview: April and Howard Jones, Neyaash Interview: Berdina Johnston.</i>
b) <b>Responsibility to Help Those in Need:</b> If a person is in need and asks for help, then others have an obligation to try and help that person: <i>The Snake and the Man, Lone Lightening, Blue Garter, Mashos and the Orphans, Nanabojo and his Younger Brother, Pagauk, Merman, The Youth Who Died and Came Back to Life, Neyaash Interview: April and Howard Jones.</i>
c) <b>Responsibility to Protect the Group from Harm:</b> The safety of the group must be maintained: <i>Redfeather, Weendigo, Mayamaking Case.</i>
d) <b>Responsibility to use Abilities and Power to Support and Protect Others:</b> If someone has a special ability or power they are expected to use it to support and protect others from harm: <i>Another Windigo, The Boy Who Died and Came Back to Life, The Underwater Panther; The Coming of the Europeans, Kaswind/ The Fearfully Strong Man, Windigo Part II, Neyaash Interview: Neepitapinaysiqua.</i>
e) <b>Responsibility to Give Back:</b> Show gratitude and reciprocity to those who help you when you are in need: <i>The Snake and the Man, The Underwater Panther.</i>
f) <b>Responsibility to Respect Other’s Autonomy:</b> Be as respectful of the autonomy of others as possible. This includes allowing people to make their own decisions even if they are mistakes, when not harmful to others: <i>The Two Foolish Maidens, Manabozho and the Maple Trees, Pitchi, Blue Garter, Neyaash Interview: Berdina Johnston.</i>

## **Discussion:**

- a) **The Responsibility to help Children:** *Children are recognized as vulnerable and should be helped by the community when they are in need.*<sup>77</sup>

The special vulnerability of children is recognized and children should receive extra help and consideration from others, including practical assistance and teachings. In the story of “Lone Lightening” a little boy who has been abused by his stepparents runs out into the night and cries out for help. The sky lifts him up away from the harm and provides him with lightening bolts to throw. Lightening bolts seen in the sky are a reminder of the little boy who was abused and the help that he received. In the story of *Toad Woman* a dog tries to protect a little boy who is kidnapped.<sup>78</sup> In the story of *Mashos and the Orphans*, two young orphaned children who are running away from the rolling head of their murdered mother also ask for, and receive, help from a number of sources, including a heron, who ferries them across the river.

- b) **The Responsibility to Help Those in Need:** *If a person is in need and asks for help, then others have an obligation to try and help that person.*<sup>79</sup>

Adults as well as children are entitled to receive help when they are being harmed. In the story of *The Snake and the Man*, a man who has been tricked by a snake and is about to be killed by him asks for help from a fox. The fox saves the man and in return asks only that if he is ever starving that the man should share his food with him. Unfortunately, however, the man forgets and kills the fox when he finds him raiding his food stores during a time of hunger. The story ends with the dying fox reproaching the man for forgetting his promise, which reinforces the message that there is an obligation to help when others are in need.

Even individuals who have committed harms may still expect to receive help when they are in a time of difficulty. For example Pagauk, who has committed the terrible crime of murdering his brother, still asks for and receives help in gathering the bones of his skeleton together so that his spirit may leave the earth. Also, in the story of *Nanabojo and his Younger Brother*, Nanabojo’s younger brother Pokwis steals half of Nanabojo’s supply of winter fish. However, later in the winter when he finds himself and his family starving, Pokwis is still able to ask for and receive help from a stranger in the woods.

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<sup>77</sup> “Lone Lightening,” in William Mentor, ed, *SchoolCraft’s Indian Legends* (East Lansing: Michigan State University Press, 1991) [*Lone Lightening*]; *Mashos and the Orphans*, *supra* note 16; *Redfeather*, *supra* note 1; Neyaash Interview: April and Howard Jones, *supra* note 33; Neyaash Interview: Berdina Johnston, *supra* note 57.

<sup>78</sup> *Toad Woman*, *supra* note 35.

<sup>79</sup> *The Snake and the Man*, *supra* note 35; *Lone Lightening*, *supra* note 77; “Blue Garter” in Truman Michelson, ed, *Ojibwa Texts Volume VII Part II Collected by William Jones: Miscellaneous Tales*, (New York: G.E. Stechert & Co, Agents, 1919) at 23-45 [*Blue Garter*]; *Mashos and the Orphans*, *supra* note 16; *Nanabojo and his Younger Brother*, *supra* note 35; *Pagauk*, *supra* note 26; “Merman” by Basil Johnston in *The Bear Walker and Other Stories*; “The Youth Who Died and Came Back to Life,” in Truman Michelson, ed, William Jones (collected by), *Ojibwa Texts Volume VII Part I*, (New York: G. E. Stechert & Co., Agents 1917) at 1-7 [*The Youth Who Died and Came Back to Life*].

This stranger chastises Pokwis for his harmful action towards his brother, but still helps him to find food so that he and his family can survive the winter. In her interview April Jones explained that even those who had harmed others would often continue to receive help and support from other people because “Regardless of what that person did he is still a human being . . .”

**c) The Responsibility to Protect the Group from Harm:** *The safety of the group must be maintained.*<sup>80</sup>

The safety of the group must be maintained. For example, in the story of *Redfeather* the actions of one small boy jeopardize the well being of the animal community and so the boy is picked up by an owl and placed at the top of a tall tree so that he can no longer harm the group.<sup>81</sup> Likewise in the story of *Weendigo*, a person turns into a grave threat to the community and so as a last resort is killed so that he cannot harm the group.<sup>82</sup>

**d) The Responsibility to use Abilities and Power to Support and Protect Others:** *If someone has a special ability or power they are expected to use it to support and protect others from harm.*<sup>83</sup>

Individuals with a special ability or power are expected to use that ability to benefit the group. For example, in the story of *The Youth Who Died and Came Back To Life* a young boy who has seen the spirit world and returned to the earth shares the knowledge he has gained from his unique experience to benefit the rest of the group. Similarly, in *The Coming of the Europeans* as told by elder Neepitapinaysiqua, the seers who had a special ability to have visions of the future, used that ability to protect the group by alerting the group in advance of potentially threatening occurrences so that the group would have time to plan and develop a strategy. In her interview elder Neepitapinaysiqua, explained that individuals with a special ability to understand others and to see when they were heading into a bad mental/spiritual or emotional place had a corresponding responsibility to intervene and counsel those individuals because of their special perceptiveness.<sup>84</sup>

One interesting consideration however, is that by having a special power you may set yourself apart from the group and cause jealousy. For example, in the story of *Kaswind, or the Fearfully Strong Man* a young man excites jealousy and is eventually drowned by the spirits because he is much, much stronger than an ordinary human being. At first the young man tries to hide his strength but once the community discovers it they want him

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<sup>80</sup> *Redfeather*, supra note 1; *The Magic Pots*, supra note 6; *The Rabbits and the Roses*, supra note 41; *What the Dog Did*, supra note 1; *Weendigo*, supra note 50, *The Coming of the Europeans*, supra note 30.

<sup>81</sup> *Redfeather*, supra note 1.

<sup>82</sup> *Weendigo*, supra note 50. See also *Mayamaking Case*, supra note 1.

<sup>83</sup> *Another Windigo*, supra note 1, *The Boy Who Died and Came Back to Life*, supra note 79; Indian Country Project, “The Underwater Panther”, adapted from Victor Barnouw, *Wisconsin Chippewa Myths and Tales and Their Relation to Chippewa Life*, (Madison: The University of Wisconsin Press, 1977) online: Milwaukee Public Museum < <http://www.mpm.edu/wirp/ICW-141.html#panther>>; *The Coming of the Europeans*, supra note 30.

<sup>84</sup> Neyaash Interview: Neepitapinaysiqua, supra note 1.

to use his strength to benefit the group. The young man does so, but eventually loses his life as a result of the jealousy that ensues.<sup>85</sup>

Finally, in some cases an individual might be required to protect the group from him or herself. For example, in *Windigo Part II* a woman realizes that she is turning into a Windigo and so she commits suicide in order to protect the group.<sup>86</sup>

- e) **Responsibility to Give Back:** *Show gratitude and reciprocity to those who help you when you are in need.*<sup>87</sup>

A corollary to the entitlement to receive help is the responsibility to return the favour. In the story of *The Snake and the Man*, a fox saves a man from a snake and in return asks only that if he is ever starving that the man should share his food with him. When the man forgets and kills the fox for raiding his food stores during a time of hunger the dying fox reproaches the man for forgetting his promise. The story reinforces the reciprocal obligation of providing help.

There is also a responsibility to share your good luck when you have received help. In *The Underwater Panther* a woman used a cedar paddle to cut off the tail of a panther hiding in the water, thereby saving herself and her sister-in-law from harm. When they reached the other side the woman gave the panther's tail, which had turned into a solid piece of copper with magical powers, to her father. Otters gave her father blankets in exchange for a tiny piece of the copper to bring good luck for hunting and fishing, making her family rich.

- f) **Responsibility to Respect Other's Autonomy:** *Be as respectful of the autonomy of others as possible. This includes allowing people to make their own decisions even if they are mistakes, when not harmful to others.*<sup>88</sup>

For example *Blue Garter* is a story about respecting the desire and right of young people to marry: a young man and woman who wish to marry but her father sets a series of impossible tasks for the young man to accomplish first. The young woman, Blue Garter, secretly assists him to complete the tasks and they are married. The parents are angry about the marriage and intend to kill the young man. In order to escape Blue Garter turns herself into a mallard and her husband into a drake to escape them. They live the rest of their lives in the water. The young couple are able to live together but the parents lose their daughter because of their actions.<sup>89</sup>

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<sup>85</sup> *Kaswind*, or *The Fearfully Strong Man*, *supra* note 70.

<sup>86</sup> "Windigo Part II" in Basil Johnston, *The Manitous: The Spiritual World of the Ojibway* (Toronto: Key Porter Books, 2002) at 27-30 [*Windigo Part II*].

<sup>87</sup> *The Snake and the Man*, *supra* note 35, *The Underwater Panther*, *supra* note 83.

<sup>88</sup> *The Two Foolish Maidens*, *supra* note 21; *Manabozho and the Maple Trees*, *supra* note 67; *Pitchi*, *supra* note 79; *Blue Garter*, *supra* note 79; Neyaash Interview: Berdina Johnston, *supra* note 57.

<sup>89</sup> *Blue Garter*, *supra* note 79.

## 4. Legal Rights: What should people be able to expect from others?

### 4.1 Substantive Rights

<b>General Restatements of Law</b>
<b>Individual Rights (What all individuals should be able to expect from others)</b>
<p><b>a) The Right to Be Helped:</b></p> <ul style="list-style-type: none"><li>• This includes being able to expect other people to share resources with you in times of scarcity: <i>Nanabojo and His Younger Brother, The Story of the Woodpecker, Falcon, Neyaash Interview: Jean Borrows.</i></li><li>• This includes being able to expect assistance from others if you are vulnerable or in danger: <i>Lightening Bolt, Mashos and the Orphans, Blue Garter, Redfeather, The Youth Who Died and Came Back to Life, Neyaash Interview: Berdina Johnston, Neyaash Interview: Neepitapinaysiqua.</i></li></ul>
<p><b>b) The Right to Bodily Integrity:</b> People should be able to expect their bodily integrity will not be interfered with by the others in community, unless physical incapacitation is absolutely necessary to protect the bodily integrity of others in the group: <i>Windigo, Another Windigo, Marriage II, Redfeather, Mayamaking Case.</i></p>
<b>Group Rights (groups with unique rights)</b>
<p><b>c) The Rights of the Dead:</b> The Dead have the right to have their memories honoured and their remains protected as sacred: <i>Mandamin, Youth Who Died and Came Back to Life, Pagauk, Neyaash Interview: Wendell Nadjiwon, Neyaash Interview: April Jones and Howard Jones, Neyaash Interview: Patrick LaVallee, Neyaash Interview: Jean Borrows, Neyaash Interview: Dr. Jenny Borrows, Neyaash Interview: Neepitapinaysiqua.</i></p>
<p><b>d) The Rights of Future Generations:</b> Future generations have the right to have their interests in the land and the teachings protected: <i>Ojibway Ceremonies, Neyaash Interview: Jean Borrows, Neyaash Interview: Basil Johnston, Neyaash Interview: Patrick Lavallee.</i></p>

- e) **The Rights of Animals:** Animals may be killed for food but have the right to be treated with respect and not mistreated: *Redfeather, The Boy Who Died and Came Back to Life, Neyaash Interview: April and Howard Jones.*

### **Discussion:**

#### **Individual Rights (what all individuals should be able to expect from others):**

##### **a) The Right To Be Helped:**

- *This includes being able to expect other people to share resources with you in times of scarcity.*<sup>90</sup>

In both stories and interviews the danger in the past of hunger and starvation during the winter months was emphasized. The survival of the group depended on people sharing their resources with one another during the difficult winter months, and therefore to be stingy or refuse to share one's resources with others if they were hungry or close to starvation was considered a serious harm. In his autobiography, John Tanner, who was adopted by an Anishinabek community as a child, recounts an incident where a number of starving men came to his tent during the winter and he shared his own hard won supplies with them and nourished them back to health. He reports that they certainly would have died if he had not been willing to share with them.<sup>91</sup> In the story of *Woodpecker*, an old woman who refuses to share bread with an old man who is hungry and asks for food, is punished for her stinginess by being turned into a woodpecker and forced to peck in the wood for grubs for the rest of her days. One Elder, Jean Borrows, stated that she keeps a year's supply of food stored in her house (as required by her church) and that it is her belief that if a food shortage were to arise that she would be obligated to share the food in her house with other needy members of the community.

- *This includes being able to expect assistance from others if you are vulnerable or in danger.*<sup>92</sup>

Many of the stories show individuals asking for, and receiving help, even from those who are strangers. For example, in the story of *Mashos and the Orphans*, two children flee the rolling skull of their mother who has been murdered. The children receive help from a number of beings along the way, but what is perhaps even more significant is that the rolling head of the mother also asks for and receives help from the same beings as her children do.

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<sup>90</sup> *Nanabojo and His Younger Brother*, *supra* note 35; *Woodpecker*, *supra* note 50; Tanner, *The Falcon*, *supra* note 54.

<sup>91</sup> Tanner, *The Falcon*, *supra* note 54.

<sup>92</sup> *Lone Lightning*, *supra* note 77; *Mashos and the Orphans*, *supra* note 16; *Blue Garter*, *supra* note 79; *Redfeather*, *supra* note 1; Neyaash Interview: Berdina Johnston, *supra* note 57; Neyaash Interview: Neepitapinaysiqua, *supra* note 1; *The Youth Who Died and Came Back to Life*, *supra* note 79.



- b) **The Right to Bodily Integrity:** *People should be able to expect their physical integrity will not be interfered with by the others in the community, unless physical incapacitation is absolutely necessary to protect the bodily integrity of others in the group.*<sup>93</sup>

This principle is apparent through the stories where individuals are incapacitated by being either physically restrained or killed because the needs of the group must be protected. For example, in *Redfeather*, a little boy who is killing the food source of the birds is physically placed in a tall tree against his will in order to prevent him from destroying anymore of the birds' food. Likewise, in the *Mayamaking Case*, a Windigo is killed by his best friend after the entire community deliberates and decides that death is the only way to protect the group. In both the *Mayamaking Case* and *Redfeather*, the decision to interfere with the physical autonomy of another community member is a major one and is not entered into lightly by the community.

Another story that shows the seriousness of interfering with the bodily integrity of another is found in *Marriage 2*, where a father strikes his young son and kills him when he sneaks into a war council. Although the father defends his actions as being part of war time, the mother accuse the father of being a “monster” because of his actions in striking and killing the little boy.<sup>94</sup>

#### **Group Rights (groups with unique rights):**

- c) **The Rights of the Dead:** *The dead have the right to have their memories honoured and their remains protected as sacred.*<sup>95</sup>

The rights of the living and the dead have an important role within Anishinabek law. April Jones stated that the most important rights are actually the rights of the dead since they “supersede the rights of the living on both sides.”<sup>96</sup>

In the story of the *Youth Who Died and Came Back to Life* a young man becomes deathly ill and his spirit leaves his body temporarily. He travels to the spirit world and attends a dance where he sees a number of people who have died. He notices that many of them are missing limbs, or in some cases even their heads. He asks the old woman that he is lodging with why this is, and she tells him that their limbs were separated from their bodies on earth. Also in the same story, the youth sees little babies that have been tied onto boards in distress in the river. The babies tell him that they must be buried with their limbs free so that they can travel across the bridge that leads across the river without

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<sup>93</sup> *Weendigo*, *supra* note 50; *Another Windigo Story*, *supra* note 1; “Marriage 2” in Alethea K. Helbig, *Nanabozho Giver of Life*, (Michigan: Green Oak Press, 1987) [*Marriage 2*]; *Redfeather*, *supra* note 1.

<sup>94</sup> *Marriage 2*, *ibid*.

<sup>95</sup> Interview of Neyaashiinigiing 27 Community Member Patrick Lavallee by Hannah Askew and Lindsay Burrows (13 August 2012), Neyaashiinigiing 27 (Cape Croker) [Neyaash Interview: Patick Lavallee]; Neyaash Interview: Wendell Nadjiwon Follow-up, *supra* note 9; Neyaash Interview: April and Howard Jones, *supra* note 33, “Mandamin” in Borrows, *Constitution*, *supra* note 1 at 276-279 [*Mandamin*]; *Pagauk*, *supra* note 26.

<sup>96</sup> Neyaash Interview: April and Howard Jones, *supra* note 33.

falling in. Once the youth's spirit returns to his body and he recovers from his illness, he is able to tell the other individuals in the community what he has seen.

Another story that emphasizes the importance of respecting the sanctity of human remains is the story of *Pagauk*. In this story a man commits a horrible crime and the bones of his skeleton are scattered along the beach. Because of this he is unable to ascend to the spirit world until he tells his story to a compassionate stranger, who listens to his story and gathers his bones together for him. Both the story of *Pagauk* and the story of *The Youth Who Died and Came Back to Life* emphasize the importance of regarding people's bodies as sacred and suggest that not doing so will have consequences for that individual even in the afterlife.

In follow-up interviews Neyaashiinigiing 27 community members Wendell Nadjiwon, Patrick LaVallee, Jean Borrows, Jenny Borrows, and Neepitapinaysiqua all concurred that the dead had a right to have their memories honoured and their bones and other sacred items respected.<sup>97</sup> Neepitapinaysiqua specified that once a year she feasted to honour the dead, by preparing and eating foods that they particularly enjoyed. She stated that she would feel bad if she did not honour their memories in this way, because it was a way of recognizing that her identity was shaped and constituted by her ancestors. Wendell Nadjiwon emphasized how important it was to honour human remains saying "Even Columbus, if someone came across his bones, they should treat them with respect because he was a human."<sup>98</sup>

- d) The Rights of Future Generations:** *Future generations have the right to have their interests in the land and the teachings protected.*<sup>99</sup>

Basil Johnston writes:

No man can own his mother. This principle extends even into the future. The unborn are entitled to the largesse of the earth, no less than the living. During his life a man is but a trustee of his portion of the land and must pass on to his children what he inherited from his mother. At death, the dying leave behind the mantle that they occupied, taking nothing with them but a memory and a place for others still to come.

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<sup>97</sup> Interview of Neyaashiinigiing 27 Community Member Patrick LaVallee by Hannah Askew and Lindsay Borrows (25 August 2012) Neyaashiinigiing 27 (Cape Croker) [Patrick LaVallee Follow-up Interview]; Interview of Neyaashiinigiing 27 Community Member Wendell Nadjiwon by Hannah Askew and Lindsay Borrows (25 August 2012) Neyaashiinigiing 27 (Cape Croker) [Wendell Nadjiwon Follow-up Interview]; Interview of Neyaashiinigiing 27 Community Member Jean Borrows by Hannah Askew and Lindsay Borrows (25 August 2012) Neyaashiinigiing 27 (Cape Croker) [Jean Borrows Follow-up Interview]; Interview of Neyaashiinigiing 27 Community Member Dr. Jenny Borrows by Hannah Askew and Lindsay Borrows (25 August 2012) Neyaashiinigiing 27 (Cape Croker) [Dr. Jenny Borrows Follow-up Interview]; Interview of Neyaashiinigiing 27 Community Member Neepitapinaysiqua by Hannah Askew and Lindsay Borrows (25 August 2012) Neyaashiinigiing 27 (Cape Croker) [Neepitapinaysiqua Follow-up Interview].

<sup>98</sup> Neyaash Interview: Wendell Nadjiwon Follow-up, *ibid*.

<sup>99</sup> Neyaash Interview: Jean Borrows Follow-up, *supra* note 96; Basil Johnston, *Ojibway Ceremonies* (Toronto: McLelland and Steward 1982) at 24-25; Neyaash Interview: Patrick Lavallee, *supra* note 94.



In addition to rights to the land, the unborn also have rights to teachings as part of their inheritance. Elder Jean Borrows stated that it is important that children be taught the laws because if they don't learn them and then unknowingly violate them there may be negative consequences. She told us that "Thing about law is that even if you don't know it, you still have to obey the rules of the road because someone might be coming along!"<sup>100</sup>

- e) **The Rights of Animals:** *Animals may be killed for food but have the right to be treated with respect and not mistreated.*

Animals may be killed for food but should still be treated with respect.<sup>101</sup> Cruelty towards animals may be punished either in this life or in the afterlife. In the story of *The Boy Who Died and Came Back to Life* a youth whose spirit has to pass through a pack of angry dogs in the spirit world after he dies but they do not harm him because he was never cruel to any dogs during his life. The implication is that the dogs would have attacked him had he mistreated any of them during his lifetime.<sup>102</sup>

#### 4.2 Procedural Rights

General Restatements of Law
<p>a) <b>The Right to be Treated with Dignity and Compassion:</b> All people should be treated with dignity and compassion by others, even if they have committed a harm: <i>Mashos and the Orphans, Pagauk, Redfeather, Marriage 2, The Foolish Maidens and the Diver, Nanabojo and his Younger Brother, Neyaash Interview: Berdina Johnston Interview, Basil Johnston, Think Indian.</i></p>
<p>b) <b>The Right to be Informed of Allegations of Harm:</b> An individual who is believed to have committed a harm should be told what it is that he or she has allegedly done before any actions are taken against him or her: <i>See above, Section 1.2: Procedural Steps.</i></p>
<p>c) <b>The Right to Have Allegations of Harms Proven before a Response:</b> It should be proven that an individual has actually committed the harm, through investigation, eye-witnessing or confession, before any action is taken against that individual (with the exceptions of supervision, warnings and support): <i>See above, Section 1.2: Procedural Steps.</i></p>

<sup>100</sup> Neyaash Interview: Jean Borrows Follow-up, *supra* note 96.

<sup>101</sup> Neyaash Interview: April and Howard Jones, *supra* note 33; *Redfeather*, *supra* note 1.

<sup>102</sup> *The Boy Who Died and Came Back to Life*, *supra* note 79.

**d) The Right to Have Responses Determined through an Open, Deliberative Group Process:** Once it has been established that a harm has been committed and that an individual is responsible, a deliberative process occurs to determine the appropriate response to the harm: *See Above, Section 1.2: Procedural Steps.*

**Discussion:**

a) **The Right to be Treated with Dignity and Compassion:** *All people should be treated with dignity and compassion, even if they have committed a harm.*<sup>103</sup>

Even if people cause harm, they still have the right to be treated with empathy and respect by others. For example, there is one story about two brothers that tells of one brother stealing half of the other brother's supply of fish through lying and trickery. This theft constituted a serious harm because the brother whose fish was stolen was not left with enough food to enable his family to survive the winter. Fortunately, however, this brother eventually received help from a man he encountered in the woods with supernatural powers who was able to help provide him and his family with food. Later in the story, the brother that had committed the theft also ran out of food for himself and his family and faced starvation. This brother also approached the man in the woods for supernatural powers for help. Although aware of the brother's act of theft, the man in the woods (after lecturing the brother for stealing) still helps him to get enough food to enable his family to survive the winter. Likewise, in a number of other stories, individuals who are known to have committed harms are still treated with compassion by other members of the community.<sup>104</sup>

It should be stressed however, that it may not be possible or appropriate for every community member to act with continuing kindness towards an individual that has committed a serious crime. For example, in the story about the stolen fish, the brother who was stolen *from* refuses to later help his brother and his family when they begin to starve, presumably because of the hurtful act his brother had recently committed against him. It may be important that it was a stranger in the woods who eventually helped the transgressing brother, rather than a community member.<sup>105</sup> Likewise in the story of *Pagauk*, which tells about a man who murders his brother in order to gain access to his brother's wife, Pagauk is shunned by his own community but eventually receives empathy and compassion from a stranger who, although knowing his terrible story, agrees to help him anyway.<sup>106</sup>

In interviews, some Elders identified the legal principle of the continuing right of individuals who had committed harm to receive support and empathy from the

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<sup>103</sup> *Mashos and the Orphans*, *supra* note 16; *Pagauk*, *supra* note 26; *Redfeather*, *supra* note 1, *Marriage 2*, *supra* note 92; *The Foolish Maidens and the Diver*, *supra* note 21.

<sup>104</sup> *Mashos and the Orphans*, *supra* note 16; *Pagauk*, *supra* note 26; *Redfeather*, *supra* note 1; *Marriage 2*, *supra* note 92; *The Foolish Maidens and the Diver*, *supra* note 21.

<sup>105</sup> *Nanabojo and his Younger Brother*, *supra* note 35.

<sup>106</sup> *Pagauk*, *supra* note 26.

community, and explained how this principle had manifested itself in their own lives. For example, Berdina Johnston explained that in her career as a nurse she sometimes treated sick or dying prisoners who were brought for treatment from the local jail to the hospital where she worked. She stated her belief that these individuals were entitled to care and compassion in their illness, regardless of the crimes they had committed. She recounted one particular incident to us in which a warden who accompanied a dying First Nations prisoner to the hospital had tightly shackled the prisoner's arms causing him discomfort and making it difficult to treat him. Berdina Johnston repeatedly asked the warden to loosen the patient's shackles so that he could be more comfortable.<sup>107</sup>

According to an explanation given by Basil Johnston, the rationale for this legal principle of the right of continued compassion is believed to benefit not only that individual but the community as a whole. He explained that popular character of Nanabozho in Anishinabek stories stands for the Anishinabek proposition that human beings are fundamentally good and well-intentioned, but that they have difficulty in living up to their own good intentions.<sup>108</sup> He stated that at the time that an individual fails to live up to their own basic goodness and good intentions and commits a harm that it is at that time that the individual most needs to have their fundamental goodness reaffirmed. To treat someone who has committed a harm with a measure of empathy and continued respect, even while simultaneously censuring the harmful act that they have committed, reaffirms that person's basic goodness and capacity for good acts, and will hopefully have the effect of encouraging them to act in a good way in the future. Conversely, writing a person off as fundamentally bad and no longer entitled to respect and compassion may take away their will to strive to be a good person capable of making a positive contribution to the community.<sup>109</sup>

- b) **The Right to be Informed of Allegations of Harm:** *An individual who is believed to have committed a harm should be told what it is that he or she has allegedly done before any actions are taken against him or her.*
- c) **The Right to Have Allegations of Harms Proven before a Response:** *It should be proven that an individual has actually committed the harm, through investigation, eye witnessing or confession, before any action is taken against that individual (with the exceptions of supervision, warnings and support).*
- d) **The Right to Have Responses Determined through an Open, Deliberative Group Process:** *Once it has been established that a harm has been committed and that an individual is responsible, then a deliberative process occurs to determine the appropriate response to the harm.*

For a detailed discussion of these 3 procedural rights, see above: **Section 1.2: Procedural Steps.**

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<sup>107</sup> Neyaash Interview: Berdina Johnson, *supra* note 57.

<sup>108</sup> Basil Johnston, *Think Indian: Languages are Beyond Price* (Ontario: Kegodonce Press, 2011).

<sup>109</sup> *Ibid.*

**5. General Underlying Principles: What underlying or recurrent themes emerge in the stories that might not be captured above?**

<b>General Restatements of Law:</b>
<ul style="list-style-type: none"><li>• <b>The proposition that people almost never follow instructions perfectly:</b> <i>The Birth of Nanabushu, Nanabojo and his Younger Brother, The Foolish Maidens and the Diver.</i></li></ul>
<ul style="list-style-type: none"><li>• <b>The proposition that people are fundamentally good but have trouble following through with their good intentions:</b> <i>Basil Johnston, Think Indian, Neyaash Interview: Neepitapinaysiqua.</i></li></ul>
<ul style="list-style-type: none"><li>• <b>The proposition that human and non-human are part of one community with mutual obligations:</b> <i>The Snake and the Man, The Rabbits and the Roses, What the Dog Did, The Youth Who Died and Came Back to Life, Toad Woman, Neyaash Interview: Jean Borrows, Neyaash Interview: April and Howard Jones.</i></li></ul>
<ul style="list-style-type: none"><li>• <b>The proposition that the earth is animate, including trees and rocks:</b> <i>The Birth of Nanabushu, The Story of Redfeather, The Rabbits and the Roses, The Story of the Birch Tree, The Coming of the Europeans, John Borrows, Canada's Indigenous Constitution, Basil Johnston, Manitous, Weeng, Pagauk, Neyaash Interview: April Jones and Howard Jones.</i></li></ul>
<ul style="list-style-type: none"><li>• <b>The proposition that some laws come from the land, and should be learned by being on the land.</b> <i>Tony Chegahno Conversation, John Borrows Conversation, Neyaash Interview: Basil Johnston.</i></li></ul>
<ul style="list-style-type: none"><li>• <b>The proposition that change is also a part of Indigenous law, even though it may be difficult:</b> <i>Mandamin, John Borrows, Canada's Indigenous Constitution, Neyaash Interview: April and Howard Jones, Neyaash Interview: Jean Borrows.</i></li></ul>

## **Discussion:**

### **a) The proposition that people almost never follow instructions perfectly:<sup>110</sup>**

In a number of the stories, people are given instructions to follow but manage to do so only imperfectly. For example, in the story of *Nanabojo and his Younger Brother*, Nanabojo's brother is given clear instructions on how to obtain food through supernatural means from a powerful stranger in the woods. Part of the instructions involve not looking back during the journey, but Nanabojo's brother cannot resist looking back one time during the trip. Even though he disobeys the instructions, Nanabojo's brother is still able to get food, just not as much as he would have gotten had he not looked back.<sup>111</sup>

Similarly, in *The Birth of Nanabushu*, Winona is told by her mother never to face the west, but she does so anyway one day and then becomes impregnated with Nanabushu through the West Wind. Winona's mother helps to raise her daughter's baby, even though her daughter did not follow her counsel.<sup>112</sup>

The stories seem to reveal that it is human nature to be stubborn and refuse to follow instructions, or forgetful and forget to follow instructions. However, while there are consequences for the failure to follow instructions in the stories, these penalties are rarely harsh. Instead, it seems almost to be expected that people will follow instructions imperfectly.

### **b) The proposition that people are fundamentally good but have trouble following through with their good intentions:**

Basil Johnston explained that popular character of Nanabozho in Anishinabek stories stands for the Anishinabek proposition that human beings are fundamentally good and well-intentioned, but that they have difficulty living up to their own good intentions.<sup>113</sup> An example of this is the man who made a promise with good intentions to share his food with a fox who had saved his life, but who later forgot his promise and killed the same fox when he raided the man's food stores during a lean winter. Elder Basil Johnston explained that human beings' failure to live up to their good intentions does not make them bad, it just makes them fallible. In fact, Johnston stated that according to Anishinabek belief, the time an individual fails to live up to his or her own basic goodness and good intentions and commits a harm, is the time the individual most needs to have their fundamental goodness reaffirmed. To treat someone who has committed a harm as capable of continuing to act in a good way in the future, even while simultaneously censuring the harmful act that they have committed, reaffirms that person's basic goodness and capacity for good acts, and will hopefully have the effect of encouraging them to act better in the future. Conversely, writing a person off as

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<sup>110</sup> *The Birth of Nanabushu*, *supra* note 22; *Nanabojo and his Younger Brother*, *supra* note 35; *The Foolish Maidens and the Diver*, *supra* note 21.

<sup>111</sup> *Nanabojo and his Younger Brother*, *supra* note 35.

<sup>112</sup> *The Birth of Nanabushu*, *supra* note 22.

<sup>113</sup> Johnston, *Think Indian*, *supra* note 107.

fundamentally bad and no longer entitled to respect and support may take away their will to strive to be a good person capable of making a positive contribution to the community.<sup>114</sup> Elder Neepitapinaysiqua also affirmed this belief, explaining to us that during a community meeting to discuss a harm, it is important to also listen to the voices of those who can speak about the good that the individual has done, so that everyone will remember that the individual who has committed the harm is also capable of contributing to the community in a good way, in spite of the harmful act they have committed.<sup>115</sup>

**c) The proposition that human and non-human are part of one community with mutual obligations:**<sup>116</sup>

The interdependence of human and animal communities is emphasized continuously throughout stories and interviews in myriad ways. In relation to *Redfeather*, which tells about a little boy who harms the birds by killing frogs and crayfish for fun with his bow and arrow, April Jones commented that “Everything fits together and everything counts on everything else.”<sup>117</sup>

**d) The proposition that the earth is animate, including trees and rocks:**<sup>118</sup>

This viewpoint is contained in the language so that you cannot even describe the earth without revealing it as alive and an agent.<sup>119</sup> In the stories, many different kinds beings in addition to humans act as agents: the wind,<sup>120</sup> different kinds of animals,<sup>121</sup> birds,<sup>122</sup> flowers,<sup>123</sup> trees,<sup>124</sup> little people,<sup>125</sup> spirits,<sup>126</sup> the Creator, sleep<sup>127</sup> and Death.<sup>128</sup> This underlying view of the world influences how people understand moral responsibility for harm. A good example of this complexity is found in the story of *Weengk* or “sleep”. According to this story, the *Weengk* are small fairies that may attack people and overpower them to make them fall asleep. If you fall asleep, it is due to the will of the fairies but you may bear some responsibility by putting yourself in a vulnerable position to the fairies such as for example lying under a tree in the middle of the day.<sup>129</sup>

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<sup>114</sup> *Ibid.*

<sup>115</sup> Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

<sup>116</sup> *The Snake and the Man*, *supra* note 35; *The Rabbits and the Roses*, *supra* note 41; *What the Dog Did*, *supra* note 1; Jean Borrows Interview, *supra* note 17; *The Youth Who Died and Came Back to Life*, *supra* note 79; *Toad Woman*, *supra* note 35.

<sup>117</sup> Neyaash Interview: April and Howard Jones, *supra* note 33.

<sup>118</sup> Borrows, *Constitution*, *supra* note 1 at 244-245.

<sup>119</sup> *Ibid.*

<sup>120</sup> *The Birth of Nanabushu*, *supra* note 22.

<sup>121</sup> Reprinted in Borrows, *Constitution*, *supra* note 1, at 330.

<sup>122</sup> *Redfeather*, *supra* note 1.

<sup>123</sup> *The Rabbits and the Roses*, *supra* note 41.

<sup>124</sup> *The Story of the Birch Tree*, *supra* note 9.

<sup>125</sup> Johnston, *The Bear Walkers and Other Stories; The Coming of the Europeans*, *supra* note 30.

<sup>126</sup> Johnston, *Manitous*, *supra* note 28.

<sup>127</sup> “Weengk” in Mentor L. Williams, *SchoolCraft’s Indian Legends* (Michigan: Michigan State University Press, 1991) at 228-229 [*Weengk*].

<sup>128</sup> *Pagauk*, *supra* note 26.

<sup>129</sup> *Weengk*, *supra* note 126.

e) **The proposition that some laws come from the land, and should be learned by being on the land:**<sup>130</sup>

The project's Community Coordinator, elder and ecologist Tony Chagonagall believed that it was important for the researchers to learn Anishinabek law by going out on the land to listen to and watch the animals, rocks, wind, water, birds, plants and trees. Many of the stories and teachings that he told depended on being able to observe how different beings on the land behaved and interacted with one another.

This idea is reinforced by the stories in the sense that physical reminders of the stories can be seen all around you on the land, once you know the stories. An example would be the dark stripes on the birch tree, which are a reminder of the consequences of vanity and arrogance. Another would be the sight of the woodpecker, which is a reminder of the consequences of stinginess. The sound of the robin singing is a reminder of the importance of respecting the autonomy of other people, and allowing your children to develop in their own way and according to their own nature.

f) **The proposition that change is also a part of Indigenous law, even though it may be difficult:**<sup>131</sup>

In the story of *Mandamin*, a young man is pressured into a battle with a stranger who challenges him to fight. Although he does not wish to fight, eventually the young man does so for the benefit of his people and ultimately defeats and kills the stranger. The young man is saddened by the struggle and the death, however, after some time has passed corn grows from where the body of the stranger was buried and the young man realizes that a great gift has arisen out of the struggle and the death. In discussing this story in his book, *Canada's Indigenous Constitution*, Professor John Borrows analyzes the ways in which *Mandamin* may be seen as a metaphor for Indigenous law, which also changes and grows in new ways over time, some of which may be difficult.<sup>132</sup>

As elder Jean Borrows explained, when the old laws no longer work or are inadequate to deal with a novel situation that has arisen then an opportunity for change arises because "We can sit down and reason together and find a new way."<sup>133</sup>

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<sup>130</sup> Personal Conversation with Professor John Borrows and Hannah Askew (23 August 2012); Personal Conversation with Neyaashiinigiing 27 Community Member Tony Chegahno and Hannah Askew (20 August 2012); Interview with Neyaashiinigiing 27 Community Member Basil Johnston by Hannah Askew and Lindsay Borrows, August 3, 2012, Neyaashiinigiing 27 (Cape Croker) [Basil Johnston Follow-up Interview].

<sup>131</sup> *Mandamin*, *supra* note 94; Neyaash Interview: April and Howard Jones, *supra* note 33.

<sup>132</sup> Borrows, *Constitution*, *supra* note 1, at 276-279.

<sup>133</sup> Neyaash Interview: Jean Borrows Follow-up, *supra* note 17.



## **Authors' Note: *Inter-Community Harm***

Lindsay and I had much more difficulty gathering information about inter-community harms than we did gathering information about intra-community harms. We found relatively few stories dealing with this issue, and many of the elders that we interviewed only had a small amount of information to share. What follows is some of the information we gathered that was relevant to this issue:

### **a) Structure and Organization of Anishinabek Communities:<sup>134</sup>**

Historically, the Anishinabek lived in communities as clans organized in a loose confederacy, which has more recently been called the Council of the Three Fires. The Anishinabek often manage their resources through kinship allocations agreed upon through discussion and consensus. In some locations, these kin-based allocations have been confirmed, overlain or displaced by band council-sanctioned certificates of possessions under the *Indian Act*.

The Odawa, Potawatomi, and Ojibway have well developed totemic or clan systems that can assist in regulating behaviour and resolving disputes. Each family is classified by a dodem designated by taking a symbol from nature that descends along the male line, or along the female line if the father is not an Ojibway. Persons who are not Anishinabek by birth may be granted citizenship and legal standing to participate in community life through an adopted clan.<sup>135</sup>

A person's dodem creates reciprocal obligations among fellow clan members, thereby establishing a horizontal relationship with different communities and creating allegiances that extend beyond the confines of the home village. For example, persons of one dodem traveling through their Three Fires territory can expect social and material obligations with clan members situated hundreds of miles away. Totemic obligations have helped the Anishinabek allocate resources to their hunting grounds, fishing grounds, village sites, and harvesting/gathering sites.<sup>136</sup> In terms of competition of resources, "Family hunting territories grew out of scarcity as a way to increase efficiency and decrease competition for food."<sup>137</sup>

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<sup>134</sup> Borrows, *Constitution*, *supra* note 1, at 77-78; Neyaash Interview: Patrick LaVallee, *supra* note 94; Neyaash Interview: Wilmer Nadjiwon, *supra* note 9.

<sup>135</sup> Borrows, *Constitution*, *supra* note 1 at 77.

<sup>136</sup> *Ibid* at 78.

<sup>137</sup> Robert Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery* (Lexington: University Press of Kentucky 1990), as cited in Borrows, *Constitution*, *ibid* at 433.

## b) Strategies for Managing Intercommunity Conflict:

- *Teaching the Importance of Practicing Harmony Between Communities Through Stories.*

According to the Anishinabek creation story, the world was made twice. The first time the world was created disharmony emerged and there was a great deal of conflict between people. So the Creator decided to purify the Earth by causing it to be flooded with water. After the flood, Nanabush found himself floating on a log on the water, and all the surviving animals would take turns resting on the log. The animals cooperated together to take turns diving deep down into the water to see if they could find some mud with which to begin a new earth. All the animals tried and failed, until finally Muskrat managed to bring up a little piece of mud in his paw.<sup>138</sup> Thus the Anishinabek creation story models the benefits of cooperation by showing how the earth came into being as a result of the animals learning how to cooperate together.

The story of *The Mink and the Fish* shows the danger of allowing conflict to brew between two groups. In this story, a Mink starts a conflict between the Muskrat and the Pike by spreading false gossip between the two groups so that the two groups begin to grow angry and distrust one another. The Muskrats and the Pike fight and kill one another to the harm of both groups. The only person who benefits is Mink, who then eats all of the Pike that have been killed.<sup>139</sup> This story shows how two communities can be incited to engage in conflict with another to the benefit of a third group.

- *Clan System.*

In interviews, Patrick Lavalley and Wilmer Nadjiwon cited the clan system as providing an effective mechanism for promoting cooperative relations between communities, because Anishinabek traveling between communities would automatically have a family group in each community they traveled to through the clan system (for example, an Otter clan member from one clan group would be part of the Otter family from another clan group when they traveled to another community). This created familial bonds between community members that reduced the likelihood of conflict.

- *Peace Pipe.*

In instances when conflict did occur, one strategy to resolve the conflict was to hold a pipe ceremony with members from both communities in which an attempt would be made to restore harmony.<sup>140</sup>

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<sup>138</sup> Reprinted in Borrows, *Constitution, ibid*, at 330.

<sup>139</sup> Indian Country Project, "The Mink and the Fish," in Victor Barnouw, *Wisconsin Chippewa Myths and Tales and Their Relation to Chippewa Life* (Madison: The University of Wisconsin Press, 1977) online: Milwaukee Public Museum <<http://www.mpm.edu/wirp/icw-141.html>>.

<sup>140</sup> Borrows, *Constitution, supra* note 1 at 80.

- *Wampum Belts/ Treaty-Making.*

Another strategy that was used often in the case of conflict between communities over resources or access to land was treaty making. In the case of treaty-making between communities, an agreement would be reached by council and then recorded through the use of wampum and passed down by way of oral tradition. These agreements would be renewed periodically. The use of the wampum is especially associated by the Haudenshaunee of southern Ontario, southern Quebec, New York and Wisconsin but was also engaged in by Anishinabek peoples.<sup>141</sup>

- *Adoption and Intermarriage.*

Adoption and intermarriage were a common strategy for promoting harmony between groups. For example, John Tanner's autobiography shows that after being kidnapped and then later adopted into an Anishinabek community, he was able to play a role as an intercultural mediator between his adopted Anishinabek culture and the Euro-Canadian culture that he was born into. He was bilingual and eventually wrote a memoir in English that helped settlers to better understand Anishinabek culture. Intermarriage between communities also was a strategy to help promote understanding between communities as well as incentives to reduce conflict between the communities because of the familial ties that were created.

- *Finding Commonalities Between Groups.*

In her interview elder Neepitapinaysiqua, told a story about the coming of the Europeans. In this story, the seers in Anishinabek society predicted the comings of Europeans prior to their arrival. The seers saw that the Europeans would bring with them illness and destruction. A council was called with the little people, the big people, and the Anishinabek. At that time the little people and the big people lived openly with the Anishinabek. At the council meeting, it was decided that the Anishinabek would be best able to deal with the Europeans because they were most similar to them in terms of size and appearance. The big people and the little people went into hiding and are still in hiding today, as the Anishinabek try to deal with the Europeans in Canada.<sup>142</sup> This story shows that there is a principle of looking for commonalities between inter-community groups in order to find common ground and similarities that may make the process of harmony building and negotiation easier.

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<sup>141</sup> *Ibid* at 72-77.

<sup>142</sup> Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

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## Story Case Brief Example

<b>Story</b>	Pagauk
<b>Source</b>	Basil Johnston, <i>The Manitous: The Spiritual World of the Ojibway</i> (Toronto: Key Porter Books, 2002).
<b>ISSUES (What is the main human problem in the story?)</b>	
<ol style="list-style-type: none"> <li>1. What are the consequences for secretly murdering your brother because you fall in love with his wife and want to be with her?</li> <li>2. What is required for someone to ever reach some peace after committing such a terrible crime?</li> </ol>	
<b>FACTS (What facts are relevant?)</b>	
<ul style="list-style-type: none"> <li>• Pagauk falls in love with his brother's wife Beewun.</li> <li>• He tries to overcome the feelings by travelling to another village and living with another woman.</li> <li>• He returns in part out of a feeling of loyalty to his family. He was still worried that his feelings for Beewun might recur. When he comes back his feelings for her are even stronger.</li> <li>• He sees her naked from the waist up one evening and resolves to kill his brother so that he can be with Beewun.</li> <li>• He goes on a fishing trip with his brother and then pushes him over a cliff in a secluded place. He returns home, tells people his brother died in an accident, and paints his face black in mourning.</li> </ul>	
<b>DECISIONS/RESOLUTIONS (What is decided to resolve the problem?)</b>	
<ol style="list-style-type: none"> <li>1. Pagauk is shunned by his community. Even though he paints his face black, and doesn't admit he killed his brother, everyone acts strangely towards him when he returns and they shun him. <ul style="list-style-type: none"> <li>• No benefits flow from his crime. Rather than marrying Pagauk, Beewun kills herself and then haunts Pagauk. He sees her skull following him in the water one day while he is out in a canoe. The canoe tips over and he drowns also.</li> <li>• He is even rejected from the spirit world and his bones are scattered.</li> </ul> </li> <li>2. Long after, he has to tell his full story, and rely on the kindness of the listener in order to be literally put back together again.</li> </ol>	
<b>RATIO/ REASONS (What are the stated and unstated reasons for the decision or resolution?)</b>	
<ol style="list-style-type: none"> <li>1. (unsaid) It seems that in killing his own brother Pagauk committed an unforgivable crime, and is permanently separated and incapacitated because of it. He is shunned from his community, haunted and incapacitated (killed) by the ghost of the woman he loved, and then even rejected from the spirit world.</li> </ol>	

2. (unsaid) When Pagauk tries to hide his terrible crime, he is shunned, haunted, killed and rejected even in the spirit world. However, he eventually appears to reach some peace when he tells the full story honestly to a stranger, who listens, then gathers his bones together. Even though he has done something terrible, he is still seen as worthy of compassion since the listener can identify with him throughout the story and eventually a man collects his bones together for him after having listened to his story.

**BRACKETS (What are aspects of the story you don't understand, but aren't necessary for the case analysis?)**

- Is killing a close relative (especially a brother) or your wife, considered worse and carry heavier consequences than killing someone to whom you are less closely related?
- How did the other people in the village know that he had killed his brother, and there was actually no accident?
- Some details of this story, such as Beewun becoming a ghost and haunting Pagauk, the rejection and scattering of his bones from the spirit world, and Pagauk becoming a wandering spirit, may not be part of some listeners/readers frame of reference or belief systems.

# **IBA Accessing Justice and Reconciliation Project: Final Report**

**February 4, 2014**

Prepared by Hadley Friedland, Research Coordinator

## **I. Introduction:**

The Accessing Justice and Reconciliation Project [AJR Project] is a national research project launched by the University of Victoria Faculty of Law's Indigenous Law Research Clinic, the Indigenous Bar Association and the Truth and Reconciliation Commission, and funded by the Ontario Law Foundation. This report will summarize the major findings from this project and make recommendations for further research.

**Project Vision and Goals:** The overall vision for this project was to honour the internal strengths and resiliencies present in Indigenous societies, including the resources within these societies' own legal traditions. The goal of the AJR Project was to better recognize how Indigenous societies used their own legal traditions to successfully deal with harms and conflicts between and within groups and to identify and articulate legal principles that could be accessed and applied today to work toward healthy and strong futures for communities.

**Project Methodology:** The AJR Project's approach was to engage with Indigenous laws seriously as *laws*. Researchers analyzed publically available materials and oral traditions within partner communities, using adapted methods and the same rigor required to seriously engage with state laws in Canadian law schools. Researchers used an adapted 'case brief' method to analyze a number of published and oral stories, and identify possible legal principles. They presented this work to elders and other knowledgeable people within our partner communities, who graciously shared their knowledge, opinions and stories with them. This helped our researchers to clarify, correct, add to and enrich their initial understandings. The results were synthesized and organized in an analytical framework for accessibility, overall coherence, and ease of reference.

## **II. Recommendations for Future Work:**

In this section, we make recommendations for future work related to the two major overall themes that became evident through our analysis of this research project. These themes, and the recommendations, are discussed in more detail below in the section, “Project Findings: Two Overall Themes”.

### **Theme #1: Diversity:**

*There is no ‘one size fits all’ approach within or among Indigenous legal traditions. There are a wide variety of principled legal responses and resolutions to harm and conflict available within each legal tradition.*

**Recommendation 1.1:** Further research is needed to identify and articulate the full breadth of principled legal response and resolutions within Indigenous legal traditions.

**Recommendation 1.2:** Further research is needed (i) to more clearly identify or develop legal processes necessary for a decision to be accepted as legitimate by those impacted by it, and (ii) identify the guiding or underlying constitutive principles that form interpretative bounds within specific Indigenous legal orders.

### **Theme #2: Consistency, Continuity and Adaptability:**

*Indigenous legal traditions reveal both consistency and continuity over time, and responsiveness and adaptability to changing contexts.*

**Recommendation 2.1:** Support community-based research and engagement processes to enable communities to identify and discuss legal principles so they become more explicit and accessible within communities themselves.

**Recommendation 2.2:** Support community justice and wellness initiatives to identify and articulate guiding or supporting legal principles, as a basis for developing, grounding and evaluating current practices and programming addressing pressing social issues within their communities.

### **III. Summary of Findings: Gathering the Threads:**

I take the thread from the fingers that are weary, and go on with the work.<sup>1</sup>

The existence and ongoing meaningful presence of living Indigenous legal traditions in many Indigenous people's lives and communities is a fundamental premise that underlies this project.<sup>2</sup> Still, even within these communities, it would be misleading to suggest that all Indigenous laws are completely intact or in conscious and explicit use. Given this, at this point in history, when we talk about Indigenous legal traditions, we are necessarily talking about a project that requires not just recognition, but also mindful, intentional acts of recovery and revitalization. No living tradition remains in some static, pristine state over centuries of inevitable internal and external changes. However, when legal traditions have been so comprehensively denied, disregarded and damaged through the concerted efforts and willful blindness of colonialism, there are real challenges to accessing, understanding and applying them today. Indigenous legal scholar, Gordon Christie, cautions us not to underestimate the immense damage and losses to Indigenous laws over years of colonization, and he describes our work as one way of "gathering up the threads".<sup>3</sup> We agree that 'gathering up the threads' is the most honest, hardheaded way to describe the resource outcomes of this research project.

The themes and principles that emerged from this research project are the threads right now. They were pulled out of published stories, oral traditions, lived experiences, opinions and aspirations shared by the generous and thoughtful respondents interviewed in each partner community. What is perhaps most unique or innovative about this research project is that we have synthesized all of these different strands together into one analytical framework for each partner community. We can take the metaphor one step further and invite people to imagine the framework as a loom. Many more threads are needed, and some may not fit, and will need to be removed later, but in each case, we believe there is enough there to allow us to see the faint outline of the complete fabric the threads come from, and envision the rich, textured material that further careful and deliberate work could produce. Of course, the limit to our metaphor is that, with law, unlike fabric, there is never a completely finished product. In all living legal traditions, statements of law are always provisional, not unchanging truths.<sup>4</sup> Indigenous legal principles are no exception to this. They can and should develop, adapt and transform through time.<sup>5</sup>

In this section, we will list the legal traditions this project engaged with, and the partner communities we worked with for each legal tradition. After briefly describing the

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<sup>1</sup> Edward Carpenter, "By the Shore" in Theo Dorgan, ed., *A Book of Uncommon Prayer* (Toronto: Penguin Books, 2008) at 107.

<sup>2</sup> John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23.

<sup>3</sup> Gordon Christie, Guest Lecture, IBA AJR Project Intensive Orientation, May, 2012.

<sup>4</sup> See generally, Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall LJ 167.

<sup>5</sup> For an eloquent argument regarding Indigenous peoples' right to this, see generally: John Borrows, "Chapter 15: Physical Philosophy: Mobility and the Future of Indigenous Rights" in Benjamin J Richardson, Shin Imai and Kent McNeil, eds. *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oregon: Hart Publishing, 2009) at 403.

overarching research question, and the elements and purpose of the common analytical framework, we then identify the two major overall themes that emerged from our analysis, along with examples and recommendations for further work that flow from these findings.

**A. Legal Traditions and Partner Communities:**

This project reflected only a small taste of the broad diversity of Indigenous societies and communities across Canada. There were six distinct legal traditions, and seven partner communities represented. Partner communities had to submit an expression of interest, have a community justice or wellness program in current operation, and have a number of elders or knowledge keepers willing to participate in interviews for the project. From west to east, the representative legal traditions and partner communities were as follows:

<b>Legal Tradition</b>	<b>Partner Communities</b>	<b>Justice/Wellness Program</b>
<b>Coast Salish</b>	Snuneymuxw First Nation	Social Development and Family Preservation Program
	Tsleil-Waututh Nation	North Shore Restorative Justice Society
<b>Tsilhqot'in</b>	Tsilhqot'in National Government	Culture and Customs Program
<b>Northern Secwepemc</b>	T'exelc Williams Lake Indian Band	Holistic Wellness Program
<b>Cree</b>	Aseniwuche Winewak Nation	Mamowichihitowin Wellness Program
<b>Anishinabek</b>	Chippewas of Nawash Unceded First Nation #27	Maadookii Senior's Centre, Residential School Archives
<b>Mi'kmaq</b>	Mi'kmaq Legal Services Network, Eskasoni	Mi'kmaq Legal Support Network

There are several other related and parallel community research projects that the Indigenous Research Clinic was able to connect to this larger project, but which have not yet been shared with partner communities.



**B. The Research Question:**

The broad research objective of this project is found in the name: “Accessing Justice and Reconciliation”. In order to make justice and reconciliation truly accessible through Indigenous laws today, we knew we needed to move the work beyond broad descriptive or philosophical accounts of these laws to more specific results that communities can access, understand and use on the ground if they want to. We broke down the broad research objective of accessing justice and reconciliation into two focused research questions that could assist communities both to respond to the residential school legacy and impacts and to build toward a stronger, healthier future. These research questions were:

<p><b><u>Residential Schools facts, motives and history:</u></b></p> <p>(Harm caused by the State and Residential Schools to Indigenous students, their families and communities)</p>	<p><b><u>Residential School impacts:</u></b></p> <p>“Residential School Legacy” or “Intergenerational Trauma” (Indigenous people harming other people within communities today).</p>
<p><b>= Inter-group harms and conflict</b></p>	<p><b>= Intra-group harms and conflicts</b></p>
<p><b>= <u>Research Question:</u></b></p> <p>How did/does this Indigenous group respond to harms and conflicts <i>between</i> groups?</p>	<p><b>= <u>Research Question:</u></b></p> <p>How did/does this Indigenous group respond to harms and conflicts <i>within</i> the group?</p>

We note that, while these research questions flow from the fact and impact of the residential schools within Indigenous communities, they are also core questions that any functional social or legal order must minimally be able to address.<sup>6</sup> Thus they form a vital part of a future vision of genuine reconciliation wherein Indigenous societies and communities are strong, self-governing, vibrant and healthy places into many future generations. As the research proceeded, it became apparent that there were far more ‘threads’ in both published materials and oral traditions pertaining to the research question about responses to harms and conflicts within groups. The vast majority of community respondents focused on this issue as well. Given these factors, and in response to the strong community interest, the research outcomes of this project focus almost entirely on this latter research question:

***How did/does this Indigenous group respond to harms and conflicts within the group?***

<sup>6</sup> H.L.A. Hart, *The Concept of Law* 2<sup>nd</sup> ed. (New York: Oxford University Press, 1994) at 194.

### C. The Analytical Framework:

The analytical framework used to approach, explore and organize the information gathered in this project consists of five parts. In answering the research question, we asked student researchers to look for:

1. **Legal Processes:** Characteristics of legitimate decision-making/problem-solving processes, including:
  - a. Who are authoritative decision makers?
  - b. What procedural steps are involved in determining a legitimate response or resolution?
2. **Legal Responses and Resolutions:** What principles govern appropriate responses and resolutions to harms and conflicts between people?
3. **Legal Obligations:** What principles govern individual and collective responsibilities? Where are the “*shoulds*”?
4. **Legal Rights:** What should people be able to expect from others (substantive and procedural)
5. **General Underlying Principles:** What underlying or recurrent themes emerge in the stories and interviews that might not be captured above?

There are two important functions we believe this analytical framework serves. First, it focuses our attention to the specifics and working details of Indigenous legal traditions, rather than remaining at the level of broad generalities which can not only flatten the complexity of these traditions into over-simplified or pan-Indigenous stereotypes, but are hard to imagine applying to concrete issues.<sup>7</sup> Second, while focusing on specific details, we are reminded that, just as with other legal traditions, specific principles, practices and aspirations within Indigenous legal traditions do not stand alone, but are all interconnected aspects of a comprehensive whole.<sup>8</sup> The examples provided below will refer to both the Indigenous group, and which part of the analytical framework they come from.

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<sup>7</sup> The Research Coordinator of this project, Hadley Friedland, has discussed the practical need for moving past generalities and generalizations elsewhere. See Hadley Friedland, “Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions”, in: *Environmental Education for Judges and Court Practitioners* (University of Calgary, Canadian Institute of Resources Law, 2012), online: [http://cirf.ca/system/files/Hadley\\_Friedland-EN.pdf](http://cirf.ca/system/files/Hadley_Friedland-EN.pdf) at 5-8.

<sup>8</sup> The Academic Lead of this project, Val Napoleon has argued elsewhere that is reasonable, and crucial, to contextualize individual legal concepts as one aspect of a “comprehensive whole”, a broader, functioning Indigenous legal tradition “(1) that was large enough to avoid conflicts of interest and which ensured accountability, (2) that had collective processes to change law as necessary with changing times and changing norms, (3) that was able to deal with internal oppressions, (4) that was legitimate and the outcomes collectively owned, and (5) that had collective legal reasoning processes”: Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished] at 47-48.

## **D. Project Findings: Two Major Overall Themes:**

It would be impossible to even list all the findings from the syntheses developed from engaging with six legal traditions and seven partner communities. Rather than focusing on the detailed findings within each legal tradition, we will instead focus on the 2 major overall themes that became evident from our analysis of the individual syntheses that made up the project as a whole. The first theme is diversity – there is wide range of principled legal responses and resolutions to harm and conflict in each Indigenous legal tradition. The second theme is consistency, continuity and adaptability. While there is a remarkable consistency and continuity in legal principles over time, how they are implemented demonstrates their adaptability and responsiveness to changing contexts. We include examples to help illustrate these themes, as well as recommendations for future work that flow from each theme:

### **1. Diversity: There is no ‘one size fits all’ approach within or among Indigenous legal traditions. There are a wide variety of principled legal responses and resolutions to harm and conflict available within each legal tradition.**

Often, ‘Aboriginal justice’ is uncritically conflated with ‘restorative justice’ and described idealistically in terms of the values of healing, reconciliation, harmony, and forgiveness. One clear finding of this project is that, while there is often a strong emphasis on some of these concepts, they are not idealized, simple, or stand-alone responses to harms and conflicts. Every Indigenous legal tradition represented had nuanced and robust understandings of what implementation of these principles entail, each legal order has a much broader repertoire of principled legal responses and resolutions to harm and conflict to draw as factual situations warrant.

For example, in our engagement with the Mi’kmaq legal tradition, one elder stated that the Mi’kmaq concept of *abeksikdawaebegik* (reconciliation) was one of the “biggest concepts” in Mi’kmaq society. However, he explained this carefully: “You can tell when reconciliation is done in our community...its not just forgiveness, it’s if that person has taken *abeksikdewapan*, that responsibility”.<sup>9</sup> Indeed, this project’s engagement with the Mi’kmaq legal traditions suggested the predominant legal response to harm is the principle of promoting the taking of responsibility by offenders. The two main ways respondents described promoting responsibility for the offender were, (1) to provide restitution to his or her victims,<sup>10</sup> and (2) to develop empathy for his or her victims.<sup>11</sup> In both published stories and interviews, rehabilitation or personal transformation of offenders emerged as an important principle,<sup>12</sup> as did the principle of healing, support, and rehabilitation of victims.<sup>13</sup> Importantly, both historically and currently, there were also other principled legal responses to harm and conflict. These include either temporary

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<sup>9</sup> *Accessing Justice and Reconciliation Project: The Mi’kmaq Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 23 [Mi’kmaq Legal Traditions Report].

<sup>10</sup> *Ibid* at 23-25.

<sup>11</sup> *Ibid* at 26-27.

<sup>12</sup> *Ibid* at 27-29.

<sup>13</sup> *Ibid* at 29-31.

or permanent separation of an offender,<sup>14</sup> specific deterrence, including, historically, physical punishment, and currently, temporary loss of freedom.<sup>15</sup> In the published stories, there is also included incapacitation in extreme circumstances of cruel and malicious ongoing harm.<sup>16</sup>

In our engagement with the Cree legal tradition, respondents made it very clear they see healing of the offender as the predominant and preferred legal response to even extreme harms. For example, when one researcher asked about published stories in which people who became *wetikos* (windigos) – a Cree legal concept describing a very harmful or dangerous person)<sup>17</sup> were killed, one elder, who practices traditional medicine, exclaimed: “probably someone who didn’t know nothing and had no compassion would just go kill someone”.<sup>18</sup> She went on to state emphatically that instead, the proper response is to try to help and heal the person turning *wetiko*. She stressed that these people should not be seen as faceless dangers, but rather, “these are our family members”.<sup>19</sup>

However, while healing was a preferred response for Cree peoples, it was not implemented in isolation or blind to ongoing risks of harm. When someone was waiting for or not willing to accept healing, the principle of avoidance or separation was often employed in order to keep others safe.<sup>20</sup> Avoidance or temporary separations were also principled ways of de-escalating conflict and expressing disagreement.<sup>21</sup> Other principles guiding responses to harm and conflict included acknowledging responsibility as a remedy,<sup>22</sup> re-integration,<sup>23</sup> learning from natural or spiritual consequences,<sup>24</sup> and, historically, in published stories, incapacitation in cases of extreme and ongoing harm.<sup>25</sup> Re-integration followed healing or taking responsibility.<sup>26</sup> The same elder quoted above pointed out that re-integration might require ongoing observation and monitoring, even for life where warranted, as it was in the case of someone helped from turning *wetiko*, as no one can be completely healed from this.<sup>27</sup>

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<sup>14</sup> *Ibid* at 31-33.

<sup>15</sup> *Ibid* at 33-34.

<sup>16</sup> *Ibid* at 34.

<sup>17</sup> For a more in-depth exploration of the *wetiko* as a legal concept or category, see Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Sauleaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns*. University of Alberta LLM Thesis, 2009 [unpublished] at 21-53

<sup>18</sup> *Accessing Justice and Reconciliation Project: The Cree Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 30 [Cree Legal Traditions Report].

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid* at 31.

<sup>21</sup> *Ibid* at 31-32.

<sup>22</sup> *Ibid* at 33-34.

<sup>23</sup> *Ibid* at 34-35.

<sup>24</sup> *Ibid* at 35-37.

<sup>25</sup> *Ibid* at 37-38. See also: Val Napoleon, Jim Henshaw, Ken Steacy, et al, *Cree Law: Mikomosis and the Wetiko* (Victoria, BC: UVIC, 2013).

<sup>26</sup> Cree Legal Traditions Report, *supra* note 18 at 34-35.

<sup>27</sup> *Ibid* at 34.

One of the paramount considerations underlying responses and resolutions to harm in the Tsilhqot'in legal tradition is maintaining individual and community safety. Elder Marie Dick stressed that ensuring safety is one of the key benefits of law, along with providing for discipline and taking care of people.<sup>28</sup> In older published stories, this principle was applied in diverse ways, according to different circumstances, from pre-emptive action to stop a war,<sup>29</sup> to providing food to a starving community, despite being abandoned by them earlier.<sup>30</sup> Proportionality was another important principle that stood out in many stories and accounts.<sup>31</sup> Deterrence, both general and specific, was also considered an important principle. Elders gave a historical example of this, where a chronic thief was physically punished to deter him from stealing (specific deterrence). Later in life, he became a teacher, and was spoken of respectfully for using his own deformity to discourage young people from stealing (general deterrence).<sup>32</sup> Obviously physical punishment for deterrence no longer occurs today, but the principle behind this case is still seen as a valid and practical response to behaviour causing a lot of harm to others.

In our engagement with the Tsilhqot'in legal tradition, temporary separation, and, in very rare, extreme cases, permanent separation, were also mentioned as available responses to harm and conflict.<sup>33</sup> Finally, like in many other Indigenous legal traditions, healing was seen as a preferable resolution. However, elders were careful to point out that it often requires, or occurs after, a period of separation and reflection. According to some of the elders interviewed, the ability to heal the self is a natural consequence of temporary separation.<sup>34</sup> For example, elder Catherine Haller talked about how community members who committed harms might be “locked in a pit house” in the mountains for a while to allow people who committed harms to let their anger subside.<sup>35</sup> Elder Agness Haller noted that people in “bad situations” would go off on their own to “make them think about what they did” and that was a form of healing.<sup>36</sup> Elder Thomas Billyboy talked about how people would come back to a community after a period of separation if they had “smartened up”.<sup>37</sup> The elders’ discussion of the value of a period of voluntary or even forced separation demonstrates that healing requires creating space for the wrongdoer to reflect and change the thinking and behaviour that led to the harm in the first place.

In our engagement with the Coast Salish legal tradition, a broad spectrum of principles for responding to or resolving harms and conflicts emerged, including teaching responsibilities,<sup>38</sup> conflict avoidance,<sup>39</sup> providing guidance to wrongdoers,<sup>40</sup> restitution,<sup>41</sup>

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<sup>28</sup> *Accessing Justice and Reconciliation Project: The Tsilhqot'in Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 26 [Tsilhqot'in Legal Traditions Report].

<sup>29</sup> *Ibid* at 27.

<sup>30</sup> *Ibid* at 27.

<sup>31</sup> *Ibid* at 28-29.

<sup>32</sup> *Ibid* at 29.

<sup>33</sup> *Ibid* at 29-31.

<sup>34</sup> *Ibid* at 31.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Accessing Justice and Reconciliation Project: The Coast Salish Legal Traditions Report – Community Partner: Snuneymux'w* (2013) [unpublished, on file with authors] (footnotes omitted) at 25 [Coast Salish Legal Traditions Report].

restoration,<sup>42</sup> providing ongoing support and monitoring,<sup>43</sup> retribution,<sup>44</sup> and punishment for deterrence as a last resort when nothing else works to rectify the harmful behaviour.<sup>45</sup> Elders explained that punishment was only used when the harm was severe and nothing else had worked to help the wrongdoer recognize his or her harmful ways. The wrongdoer would first be provided with guidance and taught responsibilities, and with opportunities to rectify the harms. If the harm continued, after multiple opportunities, or was extremely severe to begin with, then punishment could be an appropriate response.<sup>46</sup> What becomes apparent of course, is the corresponding responsibilities of leadership and other decision-makers, and the group as a whole to fulfill arising obligations for dealing with the offender, to ensure that the appropriate legal processes are adhered to and to protect people's respective substantive and procedural rights.

These examples demonstrate that there are nuanced and robust understanding of principles such as healing or reconciliation that may have much to offer other Indigenous communities and the broader Canadian community as well. They also give a sense of the broad variety of legal principles within each Indigenous legal tradition that are available to respond to the unique actual circumstances of specific situations of harm or conflict.<sup>47</sup> The diversity of existing principles reflects the rich complexity of these legal traditions.

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<sup>39</sup> *Ibid* at 27-28.

<sup>40</sup> *Ibid* at 28-29.

<sup>41</sup> *Ibid* at 33-34.

<sup>42</sup> *Ibid* at 35-37.

<sup>43</sup> *Ibid* at 37.

<sup>44</sup> *Ibid* at 30-32.

<sup>45</sup> *Ibid* at 31-32.

<sup>46</sup> *Ibid* at 29, 30 and 32.

<sup>47</sup> It is absolutely critical not to conflate harm with conflict here, as with Canadian law. For an excellent discussion on this point, see Alan Edwards and Jennifer Haslett, "Violence is not Conflict: Why it Matters in Restorative Justice Practice" (2011) 48:4 *Alberta Law Review* 893.

At least two recommendations flow from these findings:

**Recommendation 1.1: Further research is needed to identify and articulate the full breadth of principled legal response and resolutions within Indigenous legal traditions.**

The Canadian justice system and Aboriginal justice are often discussed in starkly dichotomous terms. This oversimplified dichotomy cuts both ways. Flattening the complexity of Indigenous legal traditions can make it appear as if their applicability and utility is limited in cases of repeated or serious harms. Within communities, this dichotomy may undercut people's perception of the legitimacy of certain decisions that could, in fact, be seen as principled responses rooted in one's own legal tradition, albeit implemented through new means, with new partners, such as justice system actors. While there is no question that important differences do exist, at practical, conceptual and aspirational levels, our research results suggests that when Indigenous legal traditions are considered in their full complexity, there are also points of connection and confluence with western legal traditions. We recommend further research to more fully explore the full complexity within Indigenous legal traditions and to identify points of divergence *and* convergence with principles that guide the Canadian justice system.

**Recommendation 1.2: Further research is needed (i) to more clearly identify or develop legal processes necessary for a decision to be accepted as legitimate by those impacted by it, and (ii) identify the guiding or underlying constitutive principles that form interpretative bounds within specific Indigenous legal orders.**

In each synthesis, substantially more threads emerged in the “Legal Responses and Legal Resolutions” section than in any other, including “Legal Processes” and “General Underlying Principles”. Whether this is due to damage from colonialism, the focus or expectations of researchers or respondents, or just the deeply internalized, implicit nature of these principles, further explorations are needed in these areas in order to effectively and legitimately apply the identified response principles in an explicit and transparent way today. The breadth of principled responses available within each Indigenous legal tradition highlights the need to identify the legal processes and procedures that are important to signal the legitimacy of any particular decision to those impacted by it even if they might not agree with the decision itself. In some cases, where the damage from colonialism has been severe, or contexts have changed radically, this may involve partial or full development of new processes. The breadth of principles also guides our attention to the importance of understanding and making more explicit the background and constitutive themes, aspirations and beliefs that frame the interpretative boundaries of these principles, as well as influence the balancing and blending required in any particular case.



**2. Consistency, Continuity and Adaptability: Indigenous legal traditions reveal both consistency and continuity over time, and responsiveness and adaptability to changing contexts.**

One advantage of analyzing and synthesizing information from multiple resources to answer a specific research question within Indigenous legal traditions is that this method enables us to recognize patterns and themes we might not otherwise spot. The consistency and continuity of certain principles in each legal tradition through history, despite different expressions and disparate resources, was noteworthy and significant. Time and time again, we saw that Indigenous legal principles can and do maintain their core integrity while adapting to new and changing contexts. There was often remarkable continuity and consistency in legal principles within Indigenous legal traditions from ancient stories to contemporary times. These deep-rooted principles are illustrated and implemented in new ways over time and in changing circumstances.

For example, in our engagement with the Anishinabek legal traditions, with regard to legal processes, an important legal principle that emerged was that a collective community process was typically required to determine major decisions over how to address serious harms.<sup>48</sup> Collective community processes for determining responses to serious harms were identifiable in a number of stories (*Animosh w'guah izhitchigaet*/What the Dog Did; The Boy Who Defeated a Windigo; The Story of Redfeather; Another Windigo Story) and recorded in historical reports from outsiders to that tradition (the Mayamaking Case).<sup>49</sup> Anishinabek legal responses were also recorded in band council decisions on how to consult and address community concerns regarding contemporary community issues (e.g., Pow-wow),<sup>50</sup> and in respondents' lived experiences of responding to contemporary issues of harm.<sup>51</sup> The described harms differed, ranging from a man who had become extremely dangerous to himself and all those around him in 1838,<sup>52</sup> to a 2000 decision about whether a pow-wow should be held in a location that would disturb a delicate alvar bedrock.<sup>53</sup> Those involved in the collective processes differed, ranging from birds in one story to a smaller hunting group in one historical account, a group of jingle dancers in a contemporary lived experience, to the band council with the entire reserve, and several outside experts as consultants.<sup>54</sup> What did not differ was that the decisions addressing the harms were made through a deliberate collective community process.

Similarly, an important legal right identified in the Anishinabek legal tradition was the right to be treated with dignity and compassion, even after one caused harm. This was evident in several older stories, which included people, animals, and ghosts (i.e., Mashos

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<sup>48</sup> *Accessing Justice and Reconciliation Project: The Anishinabek Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 15 [Anishinabek Legal Traditions Report].

<sup>49</sup> *Ibid* at 15-16 and 25-26. Some of these recorded stories were described as myths or folktales and they are housed in different collections.

<sup>50</sup> *Ibid* at 16.

<sup>51</sup> *Ibid* at 15.

<sup>52</sup> *Ibid* at 15.

<sup>53</sup> *Ibid* at 16.

<sup>54</sup> *Ibid* at 15-16.

and the Orphans; Paguak; The Story of Redfeather; Marriage II; The Foolish Maidens and the Diver).<sup>55</sup> It was also evident through the thoughtful opinions and reasoning, and actions of elders in the interviews. One elder, who worked as nurse for many years, sometimes would treat sick and dying prisoners from the local jail. She stated that it was her belief that the prisoners were each entitled to care and compassion in their illness, regardless of the crimes they had been convicted for. When one prisoner had his shackles on too tight, she acted on her Anishinabek responsibilities by repeatedly asked the warden to loosen them so he could be more comfortable.<sup>56</sup>

Another elder, the renowned author, Basil Johnston, gave an articulate opinion about the underlying rationale of this principle. He explained that to treat someone who has committed harm with continued empathy and respect, even when denouncing the harm they have committed, reaffirms that person's basic goodness and capacity for good acts and thereby encourages them to act in a good way in the future. On the other hand, treating someone as if they were fundamentally bad and no longer entitled to respect and compassion may take away their motivation to strive to be a good person capable of making a positive contribution to the community. Thus this principle benefits the individual and the community as a whole.<sup>57</sup> This example is also a good illustration of how many people do consciously act on and think through these deeply rooted principles today – and in the everyday.

In our engagement with the Coast Salish legal tradition, one example of a legal obligation was to take care of and help those in need.<sup>58</sup> This legal obligation was evident in several ancient stories (The Boys who became a Killer Whale; Flea Lady; Wolf and Wren).<sup>59</sup> In the interviews, elders discussed historic examples, such as the whole village gathering up as much food as they could to help a family get through a long winter and the brothers of a man who died looking after his family for life.<sup>60</sup> They talked about learning this obligation and about contemporary ways they and others acted on this Coast Salish responsibility to others.<sup>61</sup> For example, one elder took a couple aside, so it wasn't in front of a group of people, and offered them help and guidance. He explained he had no relationship with them except for being part of the same longhouse and being a close friend of their grandmother; however he believed "it is the responsibility of the people supposedly in the know to guide the rest that are following".<sup>62</sup>

These responsibilities lead to concrete actions, such as helping people who are injured or hurt, or even opening one's home to a woman whose husband is at home drunk.<sup>63</sup> When discussing the hypothetical example of whether a young couple that didn't know how to take care of their child had an obligation to ask for help, one elder stated that they didn't

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<sup>55</sup> *Ibid* at 41-43.

<sup>56</sup> *Ibid* at 43.

<sup>57</sup> *Ibid*.

<sup>58</sup> Coast Salish Legal Traditions Report, *supra* note 38 at 40.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid* at 40.

<sup>61</sup> *Ibid* at 40-41.

<sup>62</sup> *Ibid* at 29.

<sup>63</sup> *Ibid* at 41.

have that obligation. Rather it was up to the rest of the community “to pull them in”.<sup>64</sup> Again, these threads demonstrate that the legal obligation being illustrated in ancient stories, historically acted on, taught, and learned, continue to form part of Coast Salish peoples’ principled legal actions and thought processes today.

In our engagement with the Secwepemc legal tradition, a vital procedural step that emerged was public confrontation and witnessing. This procedural step, which ensured facts were confirmed prior to any legal response to wrongdoing, is evident in older published stories (Coyote and his Son, The Young Hunter and his Faithless Wife).<sup>65</sup> Publically confronting wrongdoers was also seen as a crucial part of the process for resolving harms in the community in the 1940s. Elder Charlie Gilbert said the Chief and a tribunal used to publically confront wrongdoers in front of a crowd.<sup>66</sup> One elder said that, in the old days, when someone did something wrong, they would be asked to come to a circle, with the Chief and council. She said that she “understood it to be more like a public confession...the way I heard it from the old people”.<sup>67</sup> Another community member, Rick Gilbert, explained his understanding that wrongdoers “would have to come before the Chief and everybody would be there to witness it for the village”.<sup>68</sup>

In contemporary times, this procedural step of public confrontation and witnessing is still considered valuable and used sensitively and creatively, depending on the context. One elder gave an example of a medicine person speaking out in a multi-community gathering about youth using drugs and alcohol, to let them know they were noticed, without directly confronting anyone or specifying who was to blame.<sup>69</sup> On the other hand, in another contemporary situation involving a man over-hunting, the community was consulted, and the wrongdoer was “severely reprimanded” at the public meeting.<sup>70</sup> The community nature of the public confrontation can also serve to reinforce the ties of the wrongdoer to the community. For example, in one contemporary sentencing circle, one of the young men being sentenced was from the community but had grown up in Saskatchewan. Elder Lynn Gilbert understood that the young man was affected by the words of one of the elders who “let him know, you know, that he was a member of the hereditary line and he should be behaving with pride and dignity, not bringing shame upon the name”. The young man “really felt that he didn’t...realize at the time that this was his line, so, I’m hoping, haven’t heard anything bad about him since...”.<sup>71</sup> The diversity of these examples illustrate the enduring nature of this procedural principle, as well as Secwepemc people’s ability to adapt it to multiple contexts and apply it flexibly, depending on each unique factual situation.

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<sup>64</sup> *Ibid* at 41.

<sup>65</sup> *Accessing Justice and Reconciliation Project: The Secwepemc Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 21 [Secwepemc Legal Traditions Report].

<sup>66</sup> *Ibid* at 22.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

In our engagement with the Mi'kmaq legal tradition, when we looked at legal responses and resolutions, one principle that stood out was personal transformation or rehabilitation of offenders.<sup>72</sup> This was colourfully illustrated in ancient stories, where people who caused harm to others were sometimes transformed into somebody or something useful to the community. For example, a man using dark magic who wants to live forever is transformed into a cedar tree (The Man Who Wanted to Live Forever) and a *Jenu*, a dangerous cannibal giant, becomes a beloved, and very helpful, member of a family when they treat him with kindness and hospitality (Jenu). In one story, a girl is cured from causing harm when the underlying cause, a curse from an old man, is discovered and dealt with (The Snow Vampire).<sup>73</sup> This principle is evident and implemented in contemporary times through professional initiatives that employ modern therapeutically transforming practices. Today, the Mi'kmaq Legal Services Network (MLSN) delivers programs to help offenders deal with underlying issues that prompted the offending behaviours, including addiction treatment, therapy, and anger management programs.<sup>74</sup>

When explaining the development of a domestic violence court in nearby Sydney, and the process involved, elder Albert Marshall explained in detail:

You focus on the perpetrator first. If the offence he committed stemmed from dysfunctional family, dysfunctional character, loss of language, residential school, alcohol, addictions, or maybe the person was sexually molested in their lives. All those things have to be dealt with first. So there is going to be very little focus on the offence itself, because when all these things are done and the committee is convinced the person is ready to live up to their responsibility, then you can talk about the healing things we have in our language.<sup>75</sup>

The underlying principle is consistent, although the means through which it occurs has changed drastically. Similarly, it should come as no surprise, given the Cree legal tradition's emphasis on healing as a response to harm, that our AJR Project partner community, AWN, responds to the issue of intimate violence by partnering with the Mamowichitowin Wellness Program to deliver therapeutic services to offenders and families of offenders.<sup>76</sup> These are just two of many examples of Indigenous communities accessing and applying contemporary professional knowledge and resources to implement enduring legal principles in ways that are responsive to the issues they face today.

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<sup>72</sup> Mi'kmaq Legal Traditions Report, *supra* note 9 at 27-29.

<sup>73</sup> *Ibid* at 28-29.

<sup>74</sup> For more information, see: <http://www.eskasoni.ca/Departments/12/>.

<sup>75</sup> Mi'kmaq Legal Traditions Report, *supra* note 9 at 27.

<sup>76</sup> For more information, see online: [http://www.aseniwuche.com/our\\_people/programs\\_services.html](http://www.aseniwuche.com/our_people/programs_services.html).

At least two recommendations flow from these findings:

**Recommendation 2.1: Support community-based research and engagement processes to enable communities to identify and discuss legal principles so they become more explicit and accessible within communities themselves.**

While this project's findings are clear that Indigenous legal principles have great consistency over time, while being implemented in adaptive and responsive ways, much of their current use is occurring on an informal or implicit level within communities. Yet it is clear that at least in some communities, there are people who can discuss these at a practical and philosophical level, and have implemented them within professional justice and wellness programs. Community-based research and engagement processes that work toward making these legal principles more explicit and accessible may strengthen and reinforce their conscious and active use, especially among youth and those who have been dislocated from their community for various reasons.

**Recommendation 2.2: Support community justice and wellness initiatives to identify and articulate guiding or supporting legal principles, as a basis for developing, grounding and evaluating current practices and programming addressing pressing social issues within their communities.**

Given both the continuity and adaptability of Indigenous legal principles, a promising direction for further research is to explore the potential for using these principles as a basis for developing, implementing and evaluating community initiatives and partnerships. In particular, this may provide an alternate or additional method for principled evaluation of these initiatives, rather than simply relying on anecdotal reports or recidivism rates. This work, if carried out in a serious and sustained way, may provide a robust and transparent foundation for strengthening community justice and wellness initiatives, more symmetrical inter-societal partnerships between communities and outside professionals, and practical justice reform rooted in mutual recognition and respect.

#### **IV. Conclusion:**

The only conclusion we can possibly reach at the close of this project is that it is just the beginning. The hard work of gathering the threads from has started. We believe there is much hope that even the process of intentionally and seriously continuing it will contribute to a truly robust reconciliation in Canada. The process and the results of this work contain their own threads for more symmetrical inter-societal relationships based on reciprocity and mutual respect.

This work is vital for the future health and strength of Indigenous societies and has much to offer Canadian society as a whole. Robert Cover once famously described law as “not merely a system of rules to be observed, but a world in which we live”.<sup>77</sup> Law is a “resource in signification”.<sup>78</sup> Legal traditions are not only prescriptive, they are descriptive. They ascribe meaning to human events, challenges and aspirations. They are intellectual resources that we use to frame and interpret information, to reason through and act upon current problems and projects, to work toward our greatest societal aspirations. Finding ways to support Indigenous communities to access, understand and apply their own legal principles today is not just about repairing the immense damages from colonialism. As Chief Doug S. White III (Kwulasultun) puts it, this is the essential work of our time:

Indigenous law is the great project of Canada and it is the essential work of our time. It is not for the faint of heart, it is hard work. We need to create meaningful opportunities for Indigenous and non-Indigenous people to critically engage in this work because all our futures depend on it.

Snuneymuxw First Nation,  
16 November 2012

This work is about recovering normative possibilities for all of Canada. It is about deciding how we will tell the story of our shared future.

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<sup>77</sup> Robert Cover, “Nomos and Narrative” (1983) 97 Harv L Rev 4 at 5.

<sup>78</sup> *Ibid.*