

The quest for an Indigenous legal order: the Victoria School, between learned law and living law



PRESENTED BY

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In this presentation, Ghislain Otis places the approach of John Borrows and the Victoria School within the broader framework of the theory of sources and the modes of production of the law. He explains various mechanisms by which the law is produced: behaviour, command and teaching. Next, Professor Otis addresses the question of the legal substance resulting from the Victoria method, which involves studying stories from the oral tradition of Indigenous peoples. Last, he examines the potential of this approach as part of the process “for updating Indigenous legal orders and in the self-determination of the Indigenous peoples”.

Review of the fundamental mechanisms by which the law is produced: behaviour, command and teaching

The first mechanism examined by Ghislain Otis is behaviour, which can generate law if it is generally recognized as a model for conduct. According to Sacco, this type of spontaneous law is “*law created without the intervention of a political authority, without a reliance on revelation, with no overriding influence of jurist judges or learned jurists*”. Indigenous law traditionally falls within this category. The second mechanism, command, is law that emanates from an authority with the ability to state norms, whether democratically or not, and impose them on a group of individuals. The Indigenous peoples of eastern Canada have traditionally not used command-based based to any degree. Last, Professor Otis looks at teaching. In teaching, a bearer of knowledge, both actor and observer of spontaneous law, has recognized legitimacy and experience to offer instruction in the law. This teaching may be based on proverbs, parables or stories, or may be in a modern written form.

The Victoria School: using doctrine to revitalize and update Indigenous law

Ghislain Otis also examines the method proposed by the Victoria School, which aims to “restitute, restore and formalize the Indigenous legal orders eroded by colonization through study of a documentary corpus made up of various stories from the oral tradition of Indigenous communities”. The idea that First Nations stories can be a source of legal norms was first put forward by John Borrows and then operationalized by Val Napoleon and Hadley Friedland, who developed a methodology closely based on common law: stories are used as “precedents” from which principles can be extracted, written down and communicated. This approach can be compared, according to Otis, to learned law, “since it relies on analysis and synthesis to construct a coherent doctrinal whole”. The rules and principles extracted using this method can potentially be mobilized by legal operators (communities, Indigenous authorities, etc.) and become materialized in the effective governance of the Indigenous group concerned.

Using legal knowledge to support Indigenous self-determination

For many years, John Borrows and the Victoria School have studied Indigenous law as a form of learned law that can be used to nourish effective law. “The legal knowledge generated by the Victoria method may be mobilized on the ground by communities, and also by Indigenous institutions exercising the right to governmental autonomy or the right to self-determination”. However, according to Ghislain Otis, this is not the only possible method, and the First Nations will perhaps not always choose to use the stories of their elders as a source of normativity in facing current challenges. The principle of self-determination is, above all, the right of an Indigenous people to make its own choices.



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