

# How can Indigenous law interact productively with and within the Canadian common law tradition? A reconsideration of Canada's Indigenous Constitution



PRESENTED BY

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Aaron Mills has been working for thirteen years to understand the Anishinabe conception of law as taught by elders, knowledge keepers and healers. The approach he applies in his work differs from the case method, still the most commonly used today. John Borrows led the way in applying the case method to Indigenous stories by highlighting the similarities between these stories and the “tales” of case law. He recognized that the method relied to an extent on the translation and “stylization” of Indigenous stories to bring them closer to the common law, and felt the need to justify this. As his focus changed, Borrows decided not to develop the approach in order to make it a true framework for analysis, but Professors Val Napoleon and Hadley Friedland took up the challenge and increased the number of “cases” analyzed, leading to a synthesis that, according to Mills, resembles a reformulation of the Indigenous law concerned. There are at least two completely different conceptions of Indigenous law—it is seen either as propositional law, or as reasoned discernment. The case-study method presupposes the former.

## The first conception: Indigenous law as propositional law

In this conception of Indigenous law, the Indigenous peoples are assumed to make law in the familiar and common meaning of the term, in the form of legal norms. As a result, the distinctiveness of Indigenous law does not lie in its actual form, but in its Indigenous origin. In the familiar meaning, the law is a set of normative propositions that vary depending on the degree of determination they impose (value, norm, principle, rule). If Indigenous law is viewed from a propositional law standpoint, its specificity lies only in the authorities that give it legitimacy. It is therefore possible to imagine that Canadian legislatures, courts and administrative bodies could be adapted to make Indigenous law, since this would not require a fundamental change in their way of thinking about the law. The courts, for example, could retain their conception of the law, procedures, reasoning and outcomes, and simply adapt them. The conception of Indigenous law as propositional law retains the current Canadian conception of the law and its institutional framework.

## The second conception: the law as reasoned discernment (Inaakonigewin)

For many Indigenous people (including elders, knowledge keepers and healers), the propositional conception of the law does not make it possible to articulate their legal systems as they experience them. Substance cannot be separated from form, and Indigenous law is only accessible through stories, dances, songs, teaching by elders, dreams and ceremonies, and from the land itself. Mills share this viewpoint. He believes that the Indigenous conception of the law is entirely distinct, and that Indigenous (in this case Anishinabe) law cannot be reduced to a set of normative propositions. To understand Indigenous law, its own meaning of legality must be addressed. Mills presents four elements of the Anishinabe conception of the law. Instead of modelling their behaviour on abstract, outside proposals, individuals use (1) an assimilated repertoire of sources; (2) in order to make judgments; (3) about a responsible way to behave; (4) in light of the context. The sources concerned may be sacred stories (aadizookaanan), personal or family stories (dibaajimowinan), teaching from the land (akinoomaagewinan) or teaching from elders (izhitwaawinan). The normative content of the sources is not independent of their form; it remains indeterminate until an individual reacts with them, and each person can experience their content differently. This cannot be considered to be a norm, since the judgment made as a result has no meaning outside the context of its immediate application. This deliberative process leads to the formulation of two judgments. First, to act responsibly, an individual must ask the following questions: what are my responsibilities and what is the best way to accomplish them? Secondly, two aspects of the context must be assessed: responsibilities connected to family (a structuring dimension in Anishinabe law), and then all other relevant factual circumstances beyond the family link (time, place, identity, power, etc.). Anishinabe law is therefore not propositional, but instead requires the application of reasoned discernment (inaakonigewin). According to Mills, the viability of the case method depends on how Indigenous law is conceived. If it is seen as a set of legal norms, it may be a valid analytical tool. On the other hand, if Indigenous law is seen as the application of reasoned discernment, the case method loses its relevance.



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