SECTION 1

Sources and Forms of Indigenous Law

Indigenous law refers to First Nations' own legal systems that govern their relationships, that they use to manage and relate to their lands and waters, and that they use to resolve conflicts. First Nations always had their own legal systems, but many of those systems were displaced by the imposition of foreign laws and systems through colonialism.[1] Despite that displacement, First Nations' legal systems still exist. This section will review some sources and forms of Indigenous law.

It is important to note that First Nations often have different sources, experiences and understandings of their Indigenous laws. Indigenous law informs how First Nations' make political and social decisions, and informs how First Nations manage and relate to lands, waters, animals, and other people.[2] For some, Indigenous legal traditions and principles are fundamental in terms of how they guide behaviours and understandings of how to interact with lands and waters. As such, it can be challenging for a First Nation to identify and communicate very specific legal principles that need to be followed in federal or provincial EAs. This is even more difficult because of the history of colonialism that Indigenous Peoples have been subjected to in Canada. Colonialism functioned to reduce, if not entirely deny, the existence of Indigenous law.

In this context, we draw on the work of Indigenous law scholars, such as Professors John Borrows and Val Napoleon, about identifying and revitalizing Indigenous laws. The work of scholars like Dr. Borrows and Dr. Napoleon has been focused on advancing the understanding

1 Sources and Forms of Indigenous Law

2 Reviewing and Revitalizing Indigenous Law

3 Indigenous Law in EA Action

1 Manitoba, Aboriginal Justice Inquiry of Manitoba. 1999. *The justice system and Aboriginal People,* vol 1 (Winnipeg), at chapter 2, p. 1.

2 Napoleon, V. *Thinking about Indigenous legal orders.* 2007. National Centre for First Nations Governance, at p. 2.

of Indigenous legal traditions within the Canadian legal system.

This section also draws on the work of several other Indigenous law academics including Darcy Lindberg, Naomi Metallic and Hadley Friedland.

Sources of Indigenous Law

Indigenous law lives in many places. These places might be different for different First Nations.

Five Sources of Indigenous Law

Dr. Borrows, a legal scholar and member of the Chippewas of Nawash Unceded First Nation, talks about five sources of Indigenous law:[3] sacred law, natural law, deliberative law, positivistic law and customary law.

The following section reviews these types of law and provides some examples on how they can be applied. Importantly, many expressions of Indigenous law rely on multiple types of law. For example, a land-based learning might rely on sacred knowledge about animals or sacred sites, and so help to inform law, while one might learn about natural law through storytelling and oral history shared by Elders. Given that, the following types of law are described more categorically than it may work in practice.

1. Sacred Law

Dr. Borrows explains that Indigenous "[l]aws can be regarded as sacred if they stem from the Creator, creation stories, or revered ancient teachings that have withstood the test of time."[4] Sacred laws are given the "highest respect" because they are from the Creator, and "contain instructions about how all beings should relate to specific territories."[5]

An example of sacred law is the Anishinaabe principle of ***minopimàdiziwin.*** According to *minopimàdiziwin,* the land is not to be exploited for human gain. *Minopimàdiziwin* requires that Anishinaabe create a reciprocal relationship with land and "achieve balance with nature."[6]

Sources of Law

Sacred law
manidoo-inaakinogewin

Natural law
akinoomagewin

Deliberative law
dazhidaa'idiwin inaakinogewin

Positivistic law
ozhi'bii-inaakinogewin

Customary law
kinwezhawewin

3 Borrows, J. *Canada's Indigenous constitution.* 2010. University of Toronto Press, at 33-66.

4 Borrows, J. *Canada's Indigenous constitution.* 2010. University of Toronto Press, at 34.

5 Borrows, J. *Canada's Indigenous constitution.* 2010. University of Toronto Press.

6 Sioui, M., & Mcleman, R. 2014. Asserting mino pimàdiziwin on unceded Algonquin territory: Experiences of a Canadian 'non-status' First Nation in re-establishing its traditional land ethic. 2014. 10:4 *AlterNative: An International Journal of Indigenous Peoples, at 365.*

This reciprocal relationship demands that people live in balance with all created beings, and posits that the land is not an object to be used for human ends but a "member of the community who demands the highest respect."[7] Eva Petoskey, a former elected official of the Grand Traverse Band of Ottawa and Chippewa Indians (a Nation located in Michigan), described *Minopimàdiziwin* thus:

... [I]f you were to be standing in your own center, then out from that ... are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings within the world, other races of people ... And out from that, the other living beings ... the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the manitous, the various spiritual forces within the world. So when you say that, mino-bimaadziwin, you're saying that a person lives a life that has really dependently arisen within the web of life. If you're saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community.[8]

2. Natural Law

Natural laws are described as being "written on the earth."[9]

A natural law may be based on observing how a plant interacts with an insect, or how animals interact with each other; the First Nation draws legal principles from that experience.[10]

An Elder or Knowledge Holder might practise natural law by "recognizing and protecting the relationship between butterflies and milkweed," or otherwise understanding how different animals or objects in the natural world interact.[11]

An example of this type of law is the Taku River Tlingit First Nation's natural law. This is often associated with Tlingit Traditional Knowledge, and works to preserve woodland caribou herds in northern British Columbia and Yukon.[12]

Tlingit Elders and Knowledge Holders drew from both on the land teachings and oral histories in describing caribou migration and settlement practices.[13] Specifically, Elders used natural law to understand that caribou, in the winter, used low-elevation forests, especially mature lodgepole pine with lichen ground cover. Elders also indicated that caribou herds used low-elevation valleys and lakes as predator escape terrain.[14]

Collectively, interviews with Elders about Traditional Knowledge helped to identify their natural law, and can be used to inform and create a legal framework that supports ecological revitalization efforts.

7 Maclean, Y.Y. 2021. Land ethics in conflict. 1:2 *Aletheia*, the Arts and Science Academic Journal, at p. 7.

8 Petoskey, E. 2012. 40 years of the Indian Civil Rights Act: Indigenous women's reflections. In Carpenter K.A., Fletcher M.L.M., & Riley A.R. *The Indian Civil Rights Act at forty.* Los Angeles: UCLA American Indian Studies Center, 39 at 47.

9 Napoleon, V., & Friedland, H. 2015. *Indigenous legal traditions core workshop materials.* Victoria: University of Victoria, at 4.

10 Borrows, J. 2010. *Canada's Indigenous constitution.* University of Toronto Press, at 28-29.

11 Borrows, J. 2010. *Canada's Indigenous constitution.* University of Toronto Press, at 30

12 Taku River Tlingit First Nation, Polfus J.L., Heinemeyer K., et al. 2014. Comparing traditional ecological knowledge and western science woodland caribou habitat models. *The Journal of Wildlife Management, 78(1):* 112-121.

13 Taku River Tlingit First Nation, Polfus J.L., Heinemeyer K., et al. 2014. Comparing traditional ecological knowledge and western science woodland caribou habitat models. *The Journal of Wildlife Management,* 78(1): 117.

14 Taku River Tlingit First Nation, Polfus J.L., Heinemeyer K., et al. 2014. Comparing traditional ecological knowledge and western science woodland caribou habitat models. *The Journal of Wildlife Management,* 78(1), at page 117.

The Gitxsan's verbal records about past interactions with the local environment, known as *adaawk*, also show how oral history can represent the practice of natural law. This suggests that First Nations might look to oral histories to represent natural law in addition to on the land teachings. The Gitxsan are from the northwest coast of British Columbia, and they form part of the Tsimshian language family.[15] The *adaawk* (collective oral history) tells of the origins and migrations of the Gitxsan to their current territories and establishes ownership over their land and resources. To communicate *adaawk* and ensure that actions are compliant with *adaawk, adaawk* are recounted at Gitxsan feasts.[16]

3. Deliberative Law

Deliberative law is created when individuals speak to each other. The conversation could involve one community member convincing another of their point of view, community members sharing how they arrived at opposing opinions, or community members debating one decision over another.[17]

Dr. Borrows explains that deliberative law can "adapt to changing circumstances in accordance with the needs and priorities of members and in response to external pressures."[18] In other words, as circumstances change, First Nations can revise laws to ensure that laws are responsive to contemporary pressures. As well, deliberative law allows community members to call out outdated and unhelpful practices, ensuring that laws are not oppressive.[19]

The Navajo philosophy of *beehaz* aoanii shows how deliberative law is practised.[20] The Navajo use the Peacemaker Ceremony to draw a connection between spirituality and law when applying Navajo law to modern conflicts.[21] This model is based on the Navajo tradition of "talking things out" and involves building a talking circle between conflicting parties. The Navajo delegate an Elder or Knowledge Holder as the *naat'anni*, who sits in the middle of the talking circle and guides the conversation. The *naat'anni* leads the "justice" process by encouraging dialogue and applying Navajo law to the conflict.[22] This person relies on storytelling to restore "harmony and good relations" and help the parties problem-solve.[23]

Another example of deliberative law is the Haida use of the Potlach. The people of the Haida Nation have occupied Haida Gwaii (located off the western coast of British Columbia) since time immemorial.[24] The Haida have clans with hereditary Chiefs[25] who are appointed by the matriarchs of the clans.[26] The pot-

15 Napoleon, V. 2019. Did I break it? Recording Indigenous (customary) law. 1:22 *PER* 2, at 3.
16 Napoleon, V. 2019. Did I break it? Recording Indigenous (customary) law. 1:22 *PER* 2, at 18.
17 Borrows, J. 2010. *Canada's Indigenous constitution.* University of Toronto Press, at 44.
18 Borrows, J. 2010. *Canada's Indigenous constitution.* University of Toronto Press, at 47.
19 Napoleon, V. & Friedland, H. 2015. *Indigenous legal traditions core workshop materials.* Victoria: University of Victoria, at 4.
20 Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management*, 11(3).
21 Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management,* 11(3), at 165.
22 Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. The International Journal of Conflict Management, 11(3), at 170.
23 Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management,* 11(3), at 172.
24 Council of the Haida Nation. March 2022. *History of the Haida Nation.* Council of the Haida Nation. https://www.haidanation.ca/haida-nation/
25 Quail, S. 2014. Yah'guudang: The principle of respect in the Haida legal tradition. 47:1 UBC L *Rev,* 673 at 649.
26 Quail, S. 2014. Yah'guudang: The principle of respect in the Haida legal tradition. 47:1 UBC L *Rev,* 673.

latch is central to the Haida's traditional system of governance.[27] In 2016, a potlach was hosted to strip two hereditary Chiefs of their titles. They were being stripped of their titles because they had supported Enbridge's Northern Gateway Pipeline, contrary to Haida community consensus to oppose the pipeline.[28] The Haida Elders considered whether the Chiefs' actions had breached the community consensus, and ultimately removed the Chiefs for breaching the law.

4. Positivistic Law

Positivistic law is used to describe rules and teachings that people follow solely because of the authority of the person proclaiming them. Positivistic law could be recorded in agreements, treaties, judgments, statutes, songs, stories, wampum belts, scrolls, totem poles, button blankets and rocks.[29]

The *Tekeni teyohá:te* (Two Row Wampum) is one example of positivistic law. In 1613, the *Tekeni teyohá:te* recorded a diplomatic treaty between the Dutch and Haudenosaunee. Depicted as two parallel white lines on a purple background, the Two Row Wampum represents and codifies the intended relationship between the Dutch and Haudenosaunee. The *Tekeni teyohá:te* depicts two rivers, one for Haudenosaunee canoes and the other for Dutch vessels, travelling side by side but never interfering with one another.[30] The belt is an example of positivistic law because it represents a treaty between two nations and the treaty derives its authority from the inherent jurisdiction of the nations that entered into the treaty.

A modern example of positivistic law are by-laws passed by First Nations governments. Under the *Indian Act,* Chief and Council pass by-laws on reserve with respect to local matters and the community members.[31] Naomi Metallic, a lawyer and law professor from the Listuguj Mi'gmaq First Nation, discusses how recent amendments to the *Indian Act* empower First Nations to legislate in accordance with Indigenous legal principles and self-government.[32] The *Indian Act* is a law that has been imposed on First Nations and part of the legal system that has served to undermine First Nations' own legal traditions. For that reason, many First Nations find the *Indian Act* challenging and constraining to work within. However, the *Indian Act's* by-law powers on reserve do allow First Nations to exercise control over local matters, including the areas of child welfare, social assistance and education. As such, some First Nations have used those powers to exercise their jurisdiction. For example, Spallumcheen First Nation passed the *Spallumcheen Indian By-law #3 – A By-law of the Care of our Indian Children,* in 1980.[33] This by-law relies on both the *Indian Act* and the inherent right of self-determination in giving the First Nation the power "to provide for the health of residents on the reserve,"

27 Quail, S. 2014. Yah'guudang: The principle of respect in the Haida legal tradition. 47:1 UBC L *Rev,* 673.

28 Kung, E. September 2016. *Field notes from the Haida Gwaii potlatch: Why government and industry should take heed of Indigenous governance decisions.* West Coast Environmental Law. https://www.wcel.org/blog/field-notes-haida-gwaii-potlatch-why-government-and-industry-should-take-heed-indigenous

29 Borrows, J. 2016. Heroes, tricksters, monsters, and caretakers: Indigenous law and legal education. 61:4 *McGill LJ*, 795 at 821.

30 Hawkins, C. 2020. *Across the Great Water: Indigenous tobacco and Haudenosaunee diplomacy in early modern England, 1550-1750.* Edmonton: University of Alberta, at 29-30.

31 Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 *UNB*, 211 at 215-16.

32 Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 *UNB* 211 at 212.

33 Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 *UNB*, 211 at 219.

the power over "the observance of law and order," and the power over "the prevention of disorderly conduct and nuisances."[34]

5. Customary Law

Customary laws are created through repetitive social interactions and are accepted as binding by those who participate in the interactions. Customary law relies on unspoken and intuitive agreements about how relationships should be regulated and what conduct is appropriate.[35] Customary law may be found in oral and written traditions, opinions of Elders or community consensus.[36]

An example of customary law is the Anishinaabek custom of treating the environment as a participant in legal decision-making.[37] This Anishinaabek customary law can be seen in the *Nibi Declaration of Treaty #3,* which was ratified in 2019 at the Anishinaabe Treaty #3 Chiefs National Assembly.[38] The Declaration voices the relationship with Nibi (water) that all Anishinaabe have.

The declaration requires that the spirit of Nibi be central to decision-making and governance, and it follows Anishinaabek customary law because it respects the environment's desire to be a decision-maker.[39]

Examples of Indigenous Laws

Cree Law: Five Teachings

Darcy Lindberg, a Cree lawyer and assistant law professor, talks about five foundational ethical teachings which root Cree law and the good way:

- *Tâpwêwin (truthfulness);*
- *Tapateyimisôwin (humility);*
- *Wâhkôtowin (law of relating);*
- *Miyo-wîcêhtowin (good aid/assisting); and*
- *Witaskewin (neighborliness).*[40]

These five Cree law foundational tenets derive from various sources described by Dr. Borrows, including land-based natural law teachings, oral history deliberative law and other sources. Dr. Lindberg further describes how Cree use other vehicles for legal transmission, including dreaming:[41] "[D]reams can be legal, but their legality is dependent upon their relation to these other systems of deliberation, and the interpretation that is offered by these deliberative mechanisms."[42] Dreaming relies on multiple sources and deliberative frameworks for their interpretation into law. Elders engage in deliberative law practices, such as storytelling or ceremonial practices, to interpret dreams and then suggest what legal impact they might have.[43]

34 Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 *UNB*, 211 at 219.

35 Napoleon, V., & Friedland, H. 2015. *Indigenous legal traditions core workshop materials.* Victoria: University of Victoria, at 5.

36 Borrows, J. 2010. *Canada's Indigenous constitution.* University of Toronto Press, at 63.

37 Craft, A., & King, L. 2021. Deliberative constitutional amendments. 13:4 *Water,* 532 at 541.

38 Grand Council Treaty #3. May 2019. *Nibi (water) declaration unanimously supported at the Anishinaabe Treaty #3 Chiefs National Assembly.* Grand Council Treaty #3 http://gct3.ca/nibi-water-declaration-unanimously-supported-at-the-anishinaabe-treaty-3-chiefs-national-assembly/

39 Craft, A., & King, L. 2021. Deliberative constitutional amendments. 13:4 *Water*, 532 at 541.

40 Lindberg, D. Undated. *The richness of Witaskewin-Indigenous law and legal ethics teaching.* Presented by the Indigenous Initiatives Office, Faculty of Law, University of Toronto. https://www.law.utoronto.ca/programs-centres/programs/indigenous-initiatives-office/iio-speaker-series

41 Lindberg, D. 2017. *Kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming gendered protocols in Cree ceremonies through Cree law.* University of Victoria.

42 Lindberg, D. 2017. *Kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming gendered protocols in Cree ceremonies through Cree law.* University of Victoria, at 2.

43 Lindberg, D. 2017. *Kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming gendered protocols in Cree ceremonies through Cree law.* University of Victoria.

Cree Elder Doreen Spence affirms this process of oral stories and oral institutions interacting with other sources of Indigenous law. As Spence explains, Elders use their knowledge to apply Indigenous law in a way which best meets the needs of the community at a specific moment in time.[44] Elders, honoured for their knowledge and understanding of cultural and spiritual protocol within a Nation, use that knowledge to provide guidance and interpretation for their community.[45]

Anishinaabe Law

Anishinaabe law is centred in relationships.[46] Anishinaabe-Métis lawyer and law professor Aimée Craft shares that "the Great Spirit instructed [Anishinaabe] to honour all of life and respect all of Creation."[47] The relationship between Anishinaabe and other life informs a legal system that is structured relationally, with a realm of responsibilities to other creation. In Anishinaabe law, Professor Craft explains: "[W]hen considering the impact of our actions, we do not think in terms of parties with a direct interest, but rather we evaluate the many combinations of relationships within a broader web of relationships that exist within Creation."[48]

This reciprocity extends to include legal relationships to rocks, trees and water. For Anishinaabe, natural objects such as water are treated as actors in a relationship. In Anishinaabe law, water is an independent agent which interacts with other actors.[49]

Anishinaabe law is non-hierarchal, with each level of law being part of a set of concentric circles dependent on each other for a complete legal understanding.[50] These levels include spiritual law, natural law and customary law.

Spiritual law is considered the Creator's Law. This law is given to Anishinaabe through ceremony, creation stories, and laws otherwise passed through the Creator's instructions.[51] These are considered "an underlying set of normative values that reveal themselves to us regularly throughout our lives."[52]

Natural law derives from spiritual law, and is learned from the land and other beings in Creation.[53] This form of law, for Anishinaabe, is learned through obser-

44 Spence, D. *The crucial role of Indigenous elders*. https://www.youtube.com/watch?v=Ipvy8yVTVoQ

45 Stiegelbauer, S.M. 1996. What is an Elder? What do Elders do? First Nation Elders as teachers in culture-based urban organizations. *The Canadian Journal of Native Studies, XVI: 1.*

46 Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws.* Centre for International Governance Innovation, at p. 56.

47 Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws.* Centre for International Governance Innovation, at p. 56.

48 Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws.* Centre for International Governance Innovation, at p. 56.

49 Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws.* Centre for International Governance Innovation, at p. 58.

50 Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws.* Centre for International Governance Innovation, at p. 58.

51 Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws.* Centre for International Governance Innovation, at p. 59.

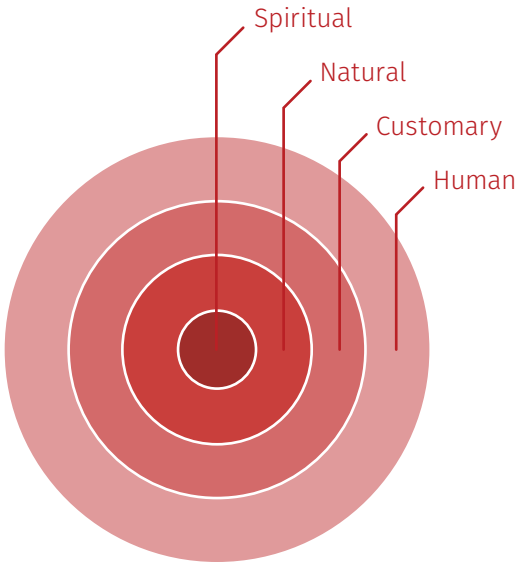
52 Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws.* Centre for International Governance Innovation, at p. 59.

53 Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws.* Centre for International Governance Innovation, at p. 59.

vation of how beings interact with each other. Anishinaabe natural law shows that balance is necessary between human relationships to other beings. Recognizing responsibilities to each other is necessary under natural law, both for the goal of working toward *mino-biimaadiziwin* (collective well-being) and for fulfilling the call to love based on the Creator's spiritual instructions.

Customary law is the application of these spiritual and natural law teachings to human relationships.[54] Some Elders explain Anishinaabe customary law as the Seven Grandfather and Grandmother teachings of love, honesty, respect, courage, humility, wisdom and truth.[55]

Collectively, these forms of law each inform Anishinaabe law and often work in tandem. Consider the *Manito Aki Inakonigaawin,* adopted by the Grand Council of Treaty #3. *Manito Aki Inakonigaawin* was officially written and ratified by Elders of the Nation of Treaty #3 in 1997. In the spring and summer of 1997, a gathering of Elders was held in Kay-Nah-Chi-Wah-Nung at Manito Ochi-waan. The Elders brought the written law through ceremony, where the spirits approved this law and respectfully petitioned the National Assembly to adopt it as a temporal law of the Nation. A traditional validation process was held through a shake-tent ceremony. Elders and Knowledge Holders worked extensively with the traditional shaker to decide the exact question to ask during the ceremony. This would allow for a clear understanding and the greatest certainty when asking the spirits for guidance in regards to writing the law.[56]



54 Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws.* Centre for International Governance Innovation, at p. 60.

55 McGregor, D. 2013. Indigenous women, water justice and zaagidowin (love). 30:2-3 *Can Woman Stud,* 71, at 71-78.

56 Grand Council Treaty #3. Undated. *Manito Aki Inakonigaawi*. http://gct3.ca/land/manito-aki-inakonigaawin/