

Philosophy of Law in the Arctic

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The term "Arctic" is not only ecological but also mythical. The term refers to the areas which were thought to be located under the constellation 'Ursa Major' (the Great Bear).

J. Pentikäinen, *Shamanism and Culture*, Helsinki 2006, p.120.

*If we shadows have offended,
Think but this, and all is mended,
That you have but slumber'd here
While these visions did appear.
And this weak and idle theme,
No more yielding but a dream,
Gentles, do not reprehend:
if you pardon, we will mend (...).*

William Shakespeare, *A Midsummer-Night's Dream*,
Epilogue, Cambridge University Press 1924.

"

3.

The Philosophy of Law in Canada's North

*Diana Ginn**

Abstract

The philosophy of law in Canada's North is best understood through the metaphor of a bridge, exemplified through the recognition of customary aboriginal law, the doctrine of aboriginal rights, and the devolution of jurisdiction to territorial governments, all of which reflect a pragmatic, contextual and pluralistic approach to law.

1. Introduction

Canada is a federal state, comprised of 10 provinces and three northern territories (Yukon, Northwest Territories and Nunavut). While some portion of each territory lies south of the Arctic Circle, politically, socially and colloquially, "the North" in Canada is seen as encompassing all of the three territories as well as northern Quebec and Labrador. The North plays a significant role in Canada's geographic reach and its identity: it encompasses more than 40 percent of our land mass and nearly 75 percent of our shoreline;³¹ and in our national anthem, we sing of "*the true north strong and free*".³² The population of Canada's North is small – less than 120,000 people, approximately half of whom are aboriginal (and this percentage rises to 80% above the Arctic Circle³³).

The philosophy of law in Canada's North can best be understood through the metaphor of a bridge. This metaphor is explored here in three contexts: recognition of aboriginal customary law; resolution of land and self-governance claims through the doctrine of aboriginal rights; and devolution of jurisdiction to territorial governments. The pragmatic, contextual and pluralistic approach to law reflected in these three examples has facilitated the building of judicial, legislative and constitutional bridges between systems of law, between aboriginal occupancy and Crown sovereignty, and across a spectrum of governance models.

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³¹ L. Neilson Bonikowsky, "The Arctic, country by country" in *Diplomat and International Canada* (October 4, 2012) available at <http://diplomatonline.com/mag/2012/10/the-arctic-country-by-country> (28.02.2016).

³² "O Canada", Canada's National Anthem, *National Anthem Act* (R.S.C., 1985, c. N-2).

³³ L. Neilson Bonikowsky, *op cit*.

2. Recognition of aboriginal customary law

Britain's acquisition of North America was premised on the continued existence of aboriginal laws and governmental structures, except to the extent these were lawfully extinguished or were incompatible with Crown sovereignty and underlying Crown title.³⁴ This concept of continuity found expression in a number of cases upholding "custom" marriages and adoptions. The earliest known case occurred in 1854, where the court validated a marriage solemnized in accordance with aboriginal law.³⁵ Custom marriages have also been upheld more recently³⁶ as have custom adoptions,³⁷ including where the adopting parent was of European descent but had become part of the aboriginal community.³⁸ Custom adoptions now have statutory recognition in the Northwest Territories and Nunavut.³⁹ This legal pluralism operates as a bridge between two communities and two legal systems, offering a flexible and pragmatic recognition of existing familial relationships.

3. Aboriginal rights: land and self-governance claims

While aboriginal peoples in Canada's North had some early contact with traders, whalers, prospectors and missionaries, they remained largely undisturbed until the early 1970s. In 1968, oil and gas were discovered in Alaska, and by 1975, there were various proposals for pipelines running through the western Arctic. Although the pipelines were put on hold, it became evident that development planned for the North could threaten traditional lifestyles that had remained largely viable until then. One response to the prospect of increased development was the initiation of aboriginal land claims, including an attempt in 1973 to lodge a caveat against title to almost half of the Northwest Territories.⁴⁰ While the application was ultimately unsuccessful, that same year, the Supreme Court of Canada recognized the doctrine of aboriginal title, based on historic use and occupancy, and not dependent on any grant from or treaty with the Crown.⁴¹

³⁴ B. Slattery, *The Hidden Constitution*, Am. J. Comp. Law 1984 vol. 32, p. 366.

³⁵ *Tranchemontaque v. Momtefeand et al*, referred to in B. Morse, *Native people and the Resolution of Family Matters* (LLM Thesis) York University 1981 at p. 45.

³⁶ *Re Noah Estate (1961)*, 32 D.L.R. (2d) 185.

³⁷ *Re Katie's Adoption Petition* (1961) 38 W.W.R. 100; *Re Beaulieu's Petition (1969)*, 3 D.L.R. (3d) 479; *Re Deborah E-789* [1972] 5 W.W.E. 203.

³⁸ *Re Washee* [1967] 57 D.L.R. (d) 743; *Re Tagornak Adoption Petition* (1984) 1 C.N.L.R. 185.

³⁹ *Aboriginal Custom Adoption Recognition Act*, SNWT (Nu) 1994, c 26.

⁴⁰ *History of the Dene Nation*, available at <http://www.denenation.ca/history> (28.02.2016).

⁴¹ *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

The connection between aboriginal title to land and some form of jurisdiction over those lands soon became evident. Two early land claims settled in Canada's North - the James Bay and Northern Quebec Agreement (1975) and the Northeastern Quebec Agreement (1978) - recognized aboriginal control over land and resources, with the latter described as "the first Aboriginal self-government model in Canada".⁴² Similarly, a 1984 agreement between the federal government and the Inuvialuit of the western Arctic contained self-governance elements as did four agreements signed in the Yukon in 1993, which recognized significant aboriginal control over internal administrative matters, and legislative authority over matters of a "local or private nature" within the area covered by the agreements.⁴³ Nunavut (formerly part of the Northwest Territories) was formed through the Nunavut Land Claims Agreement, signed in 1999, with self-government being exercised through a public government representing a majority Aboriginal and minority non-Aboriginal population.

While the resolution of land and self-governance claims has occurred primarily through negotiated settlements, the legal parameters of those negotiations are found in Supreme Court of Canada jurisprudence on aboriginal rights, particularly since 1982 when, as part of the patriation of the Canadian constitution, aboriginal rights were given constitutional protection.⁴⁴ The doctrine of aboriginal rights has been described by the Court as a "*bridging of aboriginal and non-aboriginal cultures*",⁴⁵ which is "*aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory*".⁴⁶ One Supreme Court justice ended his landmark description of aboriginal title with the words, "*Let us face it, we are all here to stay.*"⁴⁷

4. Devolution of jurisdiction to territorial governments

The federal and provincial governments in Canada exercise inherent jurisdiction, enshrined in the constitution. While the territories do not enjoy constitutionally-protected jurisdiction, in all three there has been significant devolution of legislative and administrative

⁴² Y. D. Belanger, ed., *Aboriginal Self-Government in Canada: Current Trends & Issues*, 3d ed. (Saskatoon, Purich Publishing, Ltd.) 2008 at p. 11.

⁴³ M. Whittington, *Aboriginal Self-Government in Canada* in M. Whittington & G. Williams (eds.) *Canadian Politics in the 1990s*, 4th ed. (Toronto: Nelson) 1994 at p. 14.

⁴⁴ Section 35, *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁴⁵ *R. v. Van der Peet*, [1996] 2 S.C.R. 50, para 43.

⁴⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para 81.

⁴⁷ *Ibidem*, para 186.

authority from the federal government.⁴⁸ On a conventional account, this authority could be revoked simply by repealing the relevant federal legislation; however, some political scientists argue that unwritten constitutional conventions would prevent the federal government from dismantling or eviscerating territorial governments.⁴⁹ Thus, devolution too has acted as a bridge, allowing territorial governments to move along the continuum from purely subordinate entities exercising powers at the goodwill of the federal government, to entities that exercise authority and occupy a position far closer to that of provinces. Devolution has happened over several decades and at a different pace in each of the territories, thus allowing a contextualized response to the conditions and realities in each territory.

5. Conclusion

Using the metaphor of a bridge is not intended to portray an unrealistically rosy picture of the Canadian North: there is still a great deal of work to be done in building healthy communities, as is evident from high levels of illness, addictions, poverty and suicide, and in promoting sustainable economic development while respecting traditional ways of life. Recognition of customary aboriginal family, the settlement of land and self-governance claims, and the devolution of legislative and administrative authority to territorial governments are not panaceas; for instance, some would argue that the autonomy of aboriginal child welfare agencies is still limited or that the degree of aboriginal self-government recognized thus far is inadequate.⁵⁰ However, by providing a bridge between different legal systems, between aboriginal use and occupation of the lands and the assertion of Crown sovereignty, and between more and less autonomous models of government, each of these has played some role in offering pragmatic, contextual and pluralistic responses to the challenges and conundrums of the Canadian North.

⁴⁸ *Yukon Devolution*, available at <https://www.aadnc-aandc.gc.ca/eng/1352470994098/1352471080537>; *Northwest Territories Devolution*, available at <https://www.aadnc-aandc.gc.ca/eng/1352398433161/1352400493640>; *Nunavut Devolution*, available at <https://www.aadnc-aandc.gc.ca/eng/1352471770723/1352471861365> (28.02.2106).

⁴⁹ See for example: K. Cameron & G. White, *Northern Governments in Transition: Political and Constitutional Development in the Yukon, Nunavut and the Western Northwest Territories* (Montreal: Institute for Research on Public Policy) 1995 at p. 118.

⁵⁰ J. E. Dalton, *Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claims Agreements?* W.R.L.S (2006) Vol. 22, pp. 29-78.

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Suggested reading

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