

ACCESSING JUSTICE AND RECONCILIATION

Anishinabek Legal Summary

A part of:

Anishinabek Legal Traditions Report

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



University
of Victoria | Law



INDIGENOUS BAR ASSOCIATION
ASSOCIATION DU BARREAU AUTOCHTONE



The Law Foundation of Ontario
Building a better foundation for justice in Ontario



Truth and
Reconciliation
Commission of Canada

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 Neyaashiinigmiing (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) A Collective Community Process: 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) Elders: To address some harms, particularly those involving children, individual elders may act as sole decision-makers: <i>Magic Pots, Jewel Weeds.</i>
c) Chiefs: 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) Animal Communities: 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.*¹

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)² 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.³

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.⁴

¹ “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].

² 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.

³ *Mayamaking Case*, *supra* note 1.

⁴ *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.⁵

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

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.⁷ 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.⁸

c) Chiefs: *Chiefs sometimes make decisions on behalf of the community.*⁹

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

⁵ *Powwow Case*, *supra* note 1.

⁶ "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*].

⁷ *The Magic Pots*, *ibid.*

⁸ *Jewel Weed*, *supra* note 6.

⁹ "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.”¹⁰ 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.”¹¹

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.”¹²

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.¹³

¹⁰ Neyaash Interview: Neeptapinaysiqua, *supra* note 1.

¹¹ *Ibid.*

¹² 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].

¹³ 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.¹⁴ 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.”¹⁵

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

During the summer of research at Neyaashiinigiing 27, elder Jean Borrows frequently remarked: “If you teach them the principles they will govern themselves.”¹⁷ 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.”¹⁸ 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.¹⁹ 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.²⁰

¹⁴ Neyaash Interview: Wilmer Nadjiwon, *supra* note 9.

¹⁵ Neyaash Interview: Basil Johnston, *supra* note 12.

¹⁶ “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*].

¹⁷ 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].

¹⁸ Neyaash Interview: Basil Johnston, *supra* note 12.

¹⁹ *Ibid.*

²⁰ *Ibid.*

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

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.²²

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.*

²¹ *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.

²² "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> [*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.*²³

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.²⁴ 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.²⁵ 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.²⁶ 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.²⁷

- *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;²⁸ Second, people with a special sensitivity and awareness for

²³ *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.

²⁴ *The Birth of Nanabushu*, *supra* note 22.

²⁵ *Mashos and the Orphans*, *supra* note 16.

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

²⁷ Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

²⁸ *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;²⁹ Third, people who are similar in some way (perhaps through personality or experience) to the individual engaged in the harmful actions;³⁰ and Fourth, elders.³¹

- *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.³² 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.³³

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.³⁴

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".

²⁹ 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..."

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

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

³² Neyaash Interview: Jean Borrows, *supra* note 17.

³³ 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].

³⁴ *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.*³⁵
- *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.*³⁶

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.³⁷

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

³⁵ *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*].

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

³⁷ "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.³⁸

- *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.³⁹

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.⁴⁰

³⁸ *Peepekawis*, *supra* note 23.

³⁹ *Mashos and the Orphans*, *supra* note 16.

⁴⁰ *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.*⁴¹

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.⁴²

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.⁴³

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.⁴⁴

⁴¹ "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*].

⁴² *What the Dog Did*, *supra* note 21.

⁴³ *The Rabbit and the Roses*, *supra* note 41.

⁴⁴ 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.⁴⁵

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.⁴⁶ 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.⁴⁷ 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.⁴⁸

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.⁴⁹

⁴⁵ *Mayamaking Case*, *supra* note 1.

⁴⁶ *Redfeather*, *supra* note 1; Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

⁴⁷ Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

⁴⁸ *Ibid.*

⁴⁹ *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.*⁵⁰

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.⁵¹ 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.⁵² 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,⁵³ the man is himself killed on the spot by another member of the community.⁵⁴

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.⁵⁵

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.⁵⁶ 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

⁵⁰ "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*].

⁵¹ *Nanabojo and his Younger Brother*, *supra* note 35.

⁵² *The Woodpecker*, *supra* note 50.

⁵³ Neyaash Interview: April and Howard Jones, *supra* note 33.

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

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

⁵⁶ 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.⁵⁷

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.”⁵⁸ 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.⁵⁹

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.⁶⁰

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.⁶¹

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

⁵⁸ Neyaash Interview: Jean Borrows Follow-up, *supra* note 17.

⁵⁹ Neyaash Interview: Neepitapinaysiqua Follow-up, *supra* note 1.

⁶⁰ Neyaash Interview: April and Howard Jones, *supra* note 33.

⁶¹ *Ibid.*

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

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.”⁶³

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.⁶⁴ 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.”⁶⁵ 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.⁶⁶

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

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

⁶² *Ibid*; Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

⁶³ Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

⁶⁴ *The Theft of Fire*, *supra* note 50.

⁶⁵ Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

⁶⁶ Neyaash Interview: Berdina Johnston, *supra* note 57.

⁶⁷ *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.⁶⁸

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.⁶⁹

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

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.”⁷¹ 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.⁷² 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.”⁷³

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,⁷⁴ 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

⁶⁸ *The Theft of Fire*, *supra* note 50.

⁶⁹ *Manabozho and the Maple Trees*, *supra* note 67.

⁷⁰ “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.

⁷¹ Neyaash Interview: Basil Johnston, *supra* note 12.

⁷² Neyaash Interview: April and Howard Jones, *supra* note 33.

⁷³ *Dog! Bring Me a Beaver!*, *supra* note 70.

⁷⁴ 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.⁷⁵ 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.⁷⁶

⁷⁵ Neyaash Interview: Basil Johnson, *supra* note 12.

⁷⁶ 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) Responsibility to Help Children: Children are recognized as vulnerable and should be helped by the community when they are in need: <i>Lone Lightning, Mashos and the Orphans, The Story of Redfeather, Toad Woman, Neyaash Interview: April and Howard Jones, Neyaash Interview: Berdina Johnston.</i>
b) 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: <i>The Snake and the Man, Lone Lightning, 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) Responsibility to Protect the Group from Harm: The safety of the group must be maintained: <i>Redfeather, Weendigo, Mayamaking Case.</i>
d) 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: <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) Responsibility to Give Back: 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) 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: <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.*⁷⁷

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.⁷⁸ 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.*⁷⁹

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.

⁷⁷ “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.

⁷⁸ *Toad Woman*, *supra* note 35.

⁷⁹ *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.*⁸⁰

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.⁸¹ 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.⁸²

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.*⁸³

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.⁸⁴

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

⁸⁰ *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.

⁸¹ *Redfeather*, supra note 1.

⁸² *Weendigo*, supra note 50. See also *Mayamaking Case*, supra note 1.

⁸³ *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.

⁸⁴ 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.⁸⁵

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.⁸⁶

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

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.*⁸⁸

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.⁸⁹

⁸⁵ *Kaswind*, or *The Fearfully Strong Man*, *supra* note 70.

⁸⁶ "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*].

⁸⁷ *The Snake and the Man*, *supra* note 35, *The Underwater Panther*, *supra* note 83.

⁸⁸ *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.

⁸⁹ *Blue Garter*, *supra* note 79.

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

4.1 Substantive Rights

General Restatements of Law
Individual Rights (What all individuals should be able to expect from others)
<p>a) The Right to Be Helped:</p> <ul style="list-style-type: none">• 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>• 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>
<p>b) The Right to Bodily Integrity: 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>
Group Rights (groups with unique rights)
<p>c) The Rights of the Dead: 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>d) The Rights of Future Generations: 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.*⁹⁰

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.⁹¹ 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.*⁹²

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.

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

⁹¹ Tanner, *The Falcon*, *supra* note 54.

⁹² *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.*⁹³

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.⁹⁴

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.*⁹⁵

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.”⁹⁶

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

⁹³ *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.

⁹⁴ *Marriage 2*, *ibid.*

⁹⁵ 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.

⁹⁶ 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.⁹⁷ 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."⁹⁸

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

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.

⁹⁷ 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].

⁹⁸ Neyaash Interview: Wendell Nadjiwon Follow-up, *ibid*.

⁹⁹ 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!"¹⁰⁰

- 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.¹⁰¹ 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.¹⁰²

4.2 Procedural Rights

General Restatements of Law
<p>a) The Right to be Treated with Dignity and Compassion: 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) 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: <i>See above, Section 1.2: Procedural Steps.</i></p>
<p>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): <i>See above, Section 1.2: Procedural Steps.</i></p>

¹⁰⁰ Neyaash Interview: Jean Borrows Follow-up, *supra* note 96.

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

¹⁰² *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.*¹⁰³

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.¹⁰⁴

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.¹⁰⁵ 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.¹⁰⁶

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

¹⁰³ *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.

¹⁰⁴ *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.

¹⁰⁵ *Nanabojo and his Younger Brother*, *supra* note 35.

¹⁰⁶ *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.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹

- 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.**

¹⁰⁷ Neyaash Interview: Berdina Johnson, *supra* note 57.

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

¹⁰⁹ *Ibid.*

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

General Restatements of Law:
<ul style="list-style-type: none">• The proposition that people almost never follow instructions perfectly: <i>The Birth of Nanabushu, Nanabojo and his Younger Brother, The Foolish Maidens and the Diver.</i>
<ul style="list-style-type: none">• The proposition that people are fundamentally good but have trouble following through with their good intentions: <i>Basil Johnston, Think Indian, Neyaash Interview: Neepitapinaysiqua.</i>
<ul style="list-style-type: none">• The proposition that human and non-human are part of one community with mutual obligations: <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>
<ul style="list-style-type: none">• The proposition that the earth is animate, including trees and rocks: <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>
<ul style="list-style-type: none">• The proposition that some laws come from the land, and should be learned by being on the land. <i>Tony Chegahno Conversation, John Borrows Conversation, Neyaash Interview: Basil Johnston.</i>
<ul style="list-style-type: none">• The proposition that change is also a part of Indigenous law, even though it may be difficult: <i>Mandamin, John Borrows, Canada's Indigenous Constitution, Neyaash Interview: April and Howard Jones, Neyaash Interview: Jean Borrows.</i>

Discussion:

a) The proposition that people almost never follow instructions perfectly:¹¹⁰

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.¹¹¹

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.¹¹²

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.¹¹³ 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

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

¹¹¹ *Nanabojo and his Younger Brother*, *supra* note 35.

¹¹² *The Birth of Nanabushu*, *supra* note 22.

¹¹³ 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.¹¹⁴ 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.¹¹⁵

c) The proposition that human and non-human are part of one community with mutual obligations:¹¹⁶

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.”¹¹⁷

d) The proposition that the earth is animate, including trees and rocks:¹¹⁸

This viewpoint is contained in the language so that you cannot even describe the earth without revealing it as alive and an agent.¹¹⁹ In the stories, many different kinds beings in addition to humans act as agents: the wind,¹²⁰ different kinds of animals,¹²¹ birds,¹²² flowers,¹²³ trees,¹²⁴ little people,¹²⁵ spirits,¹²⁶ the Creator, sleep¹²⁷ and Death.¹²⁸ 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.¹²⁹

¹¹⁴ *Ibid.*

¹¹⁵ Neyaash Interview: Neepitapinaysiqua, *supra* note 1.

¹¹⁶ *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.

¹¹⁷ Neyaash Interview: April and Howard Jones, *supra* note 33.

¹¹⁸ Borrows, *Constitution*, *supra* note 1 at 244-245.

¹¹⁹ *Ibid.*

¹²⁰ *The Birth of Nanabushu*, *supra* note 22.

¹²¹ Reprinted in Borrows, *Constitution*, *supra* note 1, at 330.

¹²² *Redfeather*, *supra* note 1.

¹²³ *The Rabbits and the Roses*, *supra* note 41.

¹²⁴ *The Story of the Birch Tree*, *supra* note 9.

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

¹²⁶ Johnston, *Manitous*, *supra* note 28.

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

¹²⁸ *Pagauk*, *supra* note 26.

¹²⁹ *Weengk*, *supra* note 126.

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

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:**¹³¹

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.¹³²

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."¹³³

¹³⁰ 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].

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

¹³² Borrows, *Constitution*, *supra* note 1, at 276-279.

¹³³ 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:¹³⁴

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.¹³⁵

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.¹³⁶ In terms of competition of resources, "Family hunting territories grew out of scarcity as a way to increase efficiency and decrease competition for food."¹³⁷

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

¹³⁵ Borrows, *Constitution*, *supra* note 1 at 77.

¹³⁶ *Ibid* at 78.

¹³⁷ 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.¹³⁸ 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.¹³⁹ 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.¹⁴⁰

¹³⁸ Reprinted in Borrows, *Constitution, ibid*, at 330.

¹³⁹ 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>>.

¹⁴⁰ 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.¹⁴¹

- *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.¹⁴² 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.

¹⁴¹ *Ibid* at 72-77.

¹⁴² Neyaash Interview: Neepitapinaysiqua, *supra* note 1.



INDIGENOUS LAW
RESEARCH UNIT

AT THE

UNIVERSITY OF VICTORIA