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CITATIONS:

Bluebook 22nd ed.
Willie Ermine, The Ethical Space of Engagement, 6 INDIGENOUS L.J. 193 (2007).

ALWD 7th ed.
Willie Ermine, The Ethical Space of Engagement, 6 Indigenous L.J. 193 (2007).

APA 7th ed.
Ermine, Willie. (2007). The ethical space of engagement. Indigenous Law Journal , 6(1), 193-204.

Chicago 18th ed.
Ermine, Willie. "The Ethical Space of Engagement." Indigenous Law Journal 6, no. 1 (2007): 193-204. HeinOnline.

McGill Guide 10th ed.
Willie Ermine, "The Ethical Space of Engagement" (2007) 6:1 Indigenous LJ 193.

AGLC 4th ed.
Willie Ermine, 'The Ethical Space of Engagement' (2007) 6(1) Indigenous Law Journal 193

MLA 9th ed.
Ermine, Willie. "The Ethical Space of Engagement." Indigenous Law Journal , vol. 6, no. 1, 2007, pp. 193-204. HeinOnline.

OSCOLA 5th ed.
Willie Ermine, 'The Ethical Space of Engagement' (2007) 6 Indigenous LJ 193
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The Ethical Space of Engagement

WILLIE ERMINE*

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The "ethical space" is formed when two societies, with disparate worldviews, are poised to engage each other. It is the thought about diverse societies and the space in between them that contributes to the development of a framework for dialogue between human communities. The ethical space of engagement proposes a framework as a way of examining the diversity and positioning of Indigenous peoples and Western society in the pursuit of a relevant discussion on Indigenous legal issues and particularly to the fragile intersection of Indigenous law and Canadian legal systems. Ethical

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standards and the emergence of new rules of engagement through recent Supreme Court rulings call for a new approach to Indigenous-Western dealings. The new partnership model of the ethical space, in a cooperative spirit between Indigenous peoples and Western institutions, will create new currents of thought that flow in different directions of legal discourse and overrun the archaic ways of interaction.

I INTRODUCTION

I'd like to share with you an idea that I think is relevant to the current discussion on Indigenous legal issues and particularly to the fragile intersection of Indigenous law and Canadian legal systems. The idea is called ethical space and is borne out of the philosophical musings of Roger Poole in his book *Towards Deep Subjectivity.*[1] This idea is further developed here to create the analogy of a space between two entities, as a space between the Indigenous and Western thought worlds. The space is initially conceptualized by the unwavering construction of difference and diversity between human communities. These are the differences that highlight uniqueness because each entity is moulded from a distinct history, knowledge tradition, philosophy, and social and political reality. With the calculated disconnection through the contrasting of their identities, and the subsequent creation of two solitudes with each claiming their own distinct and autonomous view of the world, a theoretical space between them is opened. The positioning of these two entities, the autochthonous and the West, divided by the void and flux of their cultural distance, and in a manner that they are poised to encounter each other, produces a significant and interesting notion that has relevance in the discourse of Indigenous and Canadian law.

According to the writings of Poole, "there are two sorts of space because there are two sorts of intentions. The intentions structure the space in two different ways. When the two sets of intentions … confront each other … then ethical space is set up instantaneously."[2] In Roger Poole's description of ethical space, a photograph dating to the Russian invasion of Czechoslovakia is presented. In the picture, two men are sitting on a park bench looking at each other. One man is dressed in army fatigues and is clearly representative of the dominant and occupying force, while the other man, dressed in civilian, peasant clothing, clearly represents one of the "occupied." The space between them is what intrigued Poole. On the

1. R. Poole, *Towards Deep Subjectivity* (London: Allen Lane The Penguin Press, 1972).
2. *Ibid.* at 5.

surface, the presence of the other is acknowledged, but it is space between people, at the unstated, unseen level of thought and feeling that is overwhelming in the picture. Poole directs our focus to that space and invites us to reflect on the electrifying nature of that area between entities that we thought was empty. It is the contention here that this similar schismatic ambience is created between peoples and cultures, and in particular whenever and wherever the physical and philosophical encounter of Indigenous and Western worlds takes place. At the superficial level of encounter, the two entities may indeed acknowledge each other but there is a clear lack of substance or depth to the encounter. What remains hidden and enfolded are the deeper level thoughts, interests and assumptions that will inevitably influence and animate the kind of relationship the two can have. It is this deeper level force, the underflow-become-influential, the enfolded dimension that needs to be acknowledged and brought to bear in the complex situation produced by confronting knowledge and legal systems.

II ETHICS

The word ethics is defined here as the capacity to know what harms or enhances the well-being of sentient creatures. To speak about the harms or enhancements to humanity inevitably launches our discussion into the arena of morality and the edifice of our civilization. Additionally, ethics entertains our personal capacity and our integrity to stand up for our cherished notions of good, responsibility, duty, obligations, etc. With our ethical standards in mind, we necessarily have to think about the transgression of those standards by others and how our actions may also infringe or violate the spaces of others. Therefore, a discourse on ethics also includes the serious reflection of those crucial lines we draw to delineate our personal autonomous zones and demarcation of boundaries others should not cross. Each of us knows our own boundaries, the contours of our sacred spaces that we claim for ourselves as autonomous actors in the universe. These are our basic personal boundaries, the moral thresholds that we will not cross and we are equally sensitive to others infringing or imposing on those spaces. We also think about boundaries that are imposed by family, perhaps our clan systems or our extended families that have become the spaces of our retreat. We have certain moral architectures built by our families that are taboo to cross lest we create dishonour. There are also boundaries imposed by our cultural imperatives such as the community ethos in each of our communities. In Indigenous societies, the Elders and the oral traditions provide us with the codes of conduct as human beings within our communities. Additionally, there are those ethical boundaries established by collective principles, such

as our knowledge systems, the autonomy of our human communities, or our treaties. This is a heritage from our past that not only informs us of our roots to antiquity and the rights to traditions entrusted to our people, but it also reminds us of what is important in life as we collectively negotiate the future. The spirit of that existence is inviolable, particularly by the actions of other human communities. The sacred space of the ethical helps us balance these moral considerations as we discuss issues that are trans-cultural, or trans-boundary in nature. The discourse surrounding the intersection of Indigenous and Canadian law needs perspectives that create clarity and ethical certainty to the rules of engagement between diverse human communities. With this notion of ethics, and juxtaposed on the broader collective level, we come to the inescapable conclusion about our own agency in the kind of civilization we create to live in.

III THE STATUS QUO

A schism still exists in understanding between Indigenous peoples and Western society. It is a time-lagged issue because the protracted matter of divergence and mal-adaptation had its genesis in first contact and the ensuing time span of relations has not alleviated the condition to any perceptible degree of comfort on either side. A general and broad glance at the historical interaction of Indigenous and Western societies will serve to highlight the precarious nature of this co-existence. Although more complex than presented here, the historical dimension of these relations can be envisioned as a repeating pattern of connect and disconnect, of engagement and disengagement, of union and rupture. How this pattern develops over time is illustrated by the following examples.

Prior to contact, the two societies generally identified as Indigenous and Western peoples, were literally disengaged, continents apart, in the physical sense. In the North American context, Indigenous societies resided in North America and Europe had its own societies of people. With contact and the advent of the fur trade in this country, the two societies were locked in a frenzy of economic interaction and were then considered "engaged" by this wheeling and dealing relationship. The breach of interaction happened in the waning days of the fur trade and the two entities disengaged and resorted to their respective programs of political, economic and social nature. Following this era, land for settlement became a big issue and treaty negotiations and bargaining took on fervor in the face of unfolding political and social realities in the dominion. With the signing of treaties, an agreement to interact now existed that, again, would engage Indigenous peoples and the Canadians in a new frontier of promised national and parallel existence.

Unfortunately, meanings and interpretations to the agreements were divergent and as distanced as the worldviews and philosophies that informed them. The promise of amiable confluence turned to a rift. Thus, the parties became philosophically disengaged. More recently, Indigenous peoples experienced a forced reengagement into mainstream Canadian culture. An imposition represented by the forceful and violent ways of the residential school system, state policy, and other forms of coercion brought home the cruel reality of colonialism for Indigenous peoples. These acts of state produced the sordid and cumulative conditions of sociopolitical entanglement, an irritable bond of communities and trans-cultural confusion at its worst that is now the Canadian experience. We are now so badly entangled in our political and social lives that the principles of our existences as autonomous human communities have become blurred in that intercultural confusion. We no longer know what informs each of our identities and what should guide the association with each other. The ideas from our knowledge bases are so entangled and enmeshed with the other that we now find it compelling to decipher Indigenous thought from European thought. So we continue stumbling about trying to create clarity of the trans-cultural issues that confront us without any thought given to what the rules of engagement might be between these two human communities. The archaic practices of dominance obfuscated boundaries and repeatedly influenced the rupture of relations between peoples. The anguished pattern in the history of Indigenous-West relations tells us that we have continued to do the same thing over and over again even as we pursued co-existence. So we continue the posturing and the status quo remains as it always has because we lack clear rules of engagement between human communities and have not paid attention to the electrifying space that would tell us what the other entity is thinking across the park bench.

IV THE UNDERCURRENT

There are compelling reasons why Indigenous dealings with the Western world have been accompanied by anxiety. From a minority position, the monolithic presence of Western society poses great challenges and these challenges have been discoursed though the critical work of many thinkers and writers, including Indigenous scholars. They have contributed to the socio-cultural analysis of existing power structures and social inequalities, and have sought to end the privileged position of Euro-centrism and create parity in modern thought. Among the challenges is to understand and confront the hidden interests, attitudes, and bedrock assumptions that animate Western dealings with Indigenous peoples. The "undercurrent" is an

analogy used to describe these subsurface interests and attitudes that continually influence communication and behaviors between individuals, organizations and nations. P. McIntosh, a feminist writer, has stated that "to redesign social systems we need first to acknowledge their colossal unseen dimensions."[3] For Indigenous peoples, the thought world of Western society represents this undercurrent, the colossal unseen dimension that influences Indigenous-Western relations.

One of the festering irritants for Indigenous peoples, in their encounter with the West, is the brick wall of a deeply embedded belief and practice of Western universality. Central to the issue of universality is the dissemination of a singular world consciousness, a monoculture with a claim to one model of humanity and one model of society. This is the claim to a God's eye view on humanity and that this perspective is appropriately located in the West. This is an ingrained belief, an enfolded consciousness recreated through systems, institutions and processes in mainstream Canadian society. This mono-cultural existence suggests one public sphere and one conception of justice that triumphs over all others. It is to be supposed that a society built and predicated on these narcissistic beliefs would lack the frameworks by which the experiences and reality of other cultures can be justly named, described and understood because the same terms of reference for understanding Euro-centric life are not applicable to the great majority of people, including Indigenous peoples. This is the realization that diverse human communities do not share a common moral vocabulary, nor do they share a common vision of the nature of human beings as actors within the universe. In the West, this notion of universality remains simmering, unchecked, enfolded as it is, in the subconscious of the masses and recreated from the archives of knowledge and systems, rules and values of colonialism that in turn wills into being the intellectual, political, economic, cultural, and social systems and institutions of this country.

Institutionalized monoculture creates the unfounded belief that there is a consensus about society and that the status quo of Indigenous-Western relations is the "norm" in this country. This norm becomes so embedded that the danger exists of a society believing that the social inequities and dominant/subordinate relationships between human communities are authorized under the laws of nature or that they are the will of God.[4] However, the legacies of dominance and social inequity, borne out of policy

3. P. McIntosh, "White Privilege: Unpacking the Invisible Knapsack" in S. Rothenburg, ed., *Race, Class, and Gender in the United States: An Integrated Study* (New York: St. Martin's Press, 1998) 165 at 168.

4. L. Noël, *Intolerance: A General Survey* (Montreal; Kingston: McGill-Queens University Press, 1994).

and legal apparatus, are human constructions. Humans create the order of society and create the laws that will govern that society. Presently, the norm of Western existence, the norm of its governance, becomes so pervasive in its immediacy, so entrenched in mass consciousness, that the foundations of its being become largely invisible to itself.[5] Within this norm, minority populations such as Indigenous peoples, women, the aged, and the handicapped are imaginatively created for a caged existence and remain invisible and powerless when compared to the mythical norms established in the Western society. The danger for Indigenous peoples is that because their image is created through Western systems and institutions, this same image can also be controlled and manipulated to suit Western interests. As Indigenous peoples, we have lost our most precious of all human rights—the freedom to be ourselves. Our existence is reduced to a meaningless and marginal part of broader Canadian life to be silent and ultimately controllable. Presently, trans-cultural communication, the dialogue of nations, or simply, the conversation between equals continues to be undermined by the persistence of these interests and attitudes borne in the hype and glory of European colonialism. Continuing breaches and ruptures between Indigenous peoples and the state is in large part a result of the continuing influence of this established undercurrent of values, interests and assumptions brought to the encounter between the human communities. The rules of Western dominance we have experienced in this country are archaic and have impeded the fullest development of our humanity.

V INDIGENOUS GAZE

Indigenous humanity along with its experience and awareness of struggle in this country now represents a "gaze" upon the Western world. This gaze projects from the memory of a people and is, in essence, the continuum of a story and a history. It is the social, political and historical consciousness about existence, and a place in the universe that is valid and imbued with purpose and hence our cultural/political claims revolve around identity and issues of knowledge and power. This is a mindful gaze informed by values, a moral structure, and a sincere interest for justice. As Chow states, "this is not the gaze of the [N]ative-as-subject, nor the gaze of the anti-imperialist critic; rather it is a simulation of the gaze that witnessed the [N]ative's oppression prior to her becoming image."[6] Gregory Cajete has suggested that "the

5. M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich, 2000); Noël, *ibid.*
6. R. Chow, *Writing Diaspora: Politics of Intervention in Contemporary Cultural Studies* (Bloomington: Indiana University Press, 1993) 27 at 51.

community is the place where the forming of the heart and face of the individual as one of the people is most fully expressed."[7] The Indigenous community is the primary expression of a natural context and environment where exists the fundamental right of personhood to be what one is meant to be. Movement within this community context allows individuals to discover all there is to discover about one's self. This is a gaze that remembers a time before colonialism and one that reflects a belief in itself as a human community.

Currently, the situation, and very often the plight of Indigenous peoples, should act as a mirror to mainstream Canada. The conditions that Indigenous peoples find themselves in are a reflection of the governance and legal structures imposed by the dominant society. Indeed, what the mirror can teach is that it is not really about the situation of Indigenous peoples in this country, but it is about the character and honor of a nation to have created such conditions of inequity. It is about the mindset of a human community of people refusing to honor the rights of other human communities. The gaze staring out from the mirror is the mindful look of Indigenous humanity standing as it is with substantial heritage. This heritage acts as the standpoint from which Indigenous peoples gauge and view the unfolding of the Canadian state. Philosophically, there is an expectation from our children and grandchildren that we resolve these issues and to leave them a better world than the one we found.

VI EMERGENT RULES OF ENGAGEMENT

We have in this country attempted to follow some measure of international protocol and honour among nations through treaty-making. The treaties between the First Nation and the Crown are historical models of how negotiation can happen between nations as the representations of diverse human communities. These treaties are nation-to-nation dialogues, between one human community and another, with each party supported and informed by their own autonomy and their respective political and cultural systems. The parties negotiated the terms of treaty, and agreements to interact on a nation-to-nation basis were concluded. The treaties still stand as agreements to co-exist and they set forth certain conditions of engagement between Indigenous and European nations.

Constitutional recognition and recent Supreme Court rulings have provided some measure of guidance and vision in the pursuit of Indigenous-

7. G. Cajete, *Look to the Mountains* (Colorado: Kivaki Press, 1994) at 164.

Western co-existence in this country. First, the recognition and affirmation of Aboriginal and treaty rights in the *Constitution Act, 1982,* remind us of unfinished business in our trans-cultural affairs. Aboriginal and treaty rights in Section 35, *Constitution Act, 1982,* create an order of justice, and the treaty order must now be understood as the supreme law in this country.[8] This recognition necessitates the definition of Aboriginal rights. As Battiste and Henderson stated, "the court, in *R. v. Van der Peet* (1996), requires that these rights arise before contact with Europeans and be integral to a distinctive Indigenous order. The Supreme Court acknowledged that these cultural rights arise within the system of beliefs, social practices, and ceremonies of the Aboriginal peoples."[9] In essence, Aboriginal rights must be informed by and asserted through Indigenous knowledge.

The duty to consult and the honour of the Crown are other recent legal principles articulated by the Supreme Court of Canada, and they stipulate that the Crown must act with honour and integrity and in the best interests of Aboriginal groups. With these and other recent developments, we are reminded of the need for expanded legal discourse that includes a resolution and reconciliation of the bigger unresolved issues that impact Indigenous-Western co-existence in this country. There is also the added pressure from human rights legislation and the *United Nations Declaration on the Rights of Indigenous Peoples*. What these legal instruments recognize is that Indigenous peoples are not the enemies of Canadian civilization, but are, and have always been, essential to its very possibility. The compelling legal task is to enable processes so that rights are justly named, described and understood.

VII RECONCILIATION

How do we reconcile worldviews? For example, how do we reconcile the oral tradition with the writing tradition, the two embedded traditions that we confront and must reconcile? That is the fundamental problem of cultural encounters. Shifting our perspectives to recognize that the Indigenous-West encounter is about thought worlds may also remind us that frameworks or paradigms are required to reconcile these solitudes. The theory of the ethical space is one such framework and configuring ethical/moral/legal principles in cross-cultural cooperation, at the common table of the ethical space, will be a challenging and arduous task.

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8. J.Y. Henderson, "Implementing the Treaty Order" in R. Grosse, J.Y. Henderson & R. Carter, eds., *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) at 53.
9. Battiste & Henderson, *supra* note 5 at 212.

In its finest form, the notion of an agreement to interact must always be preceded by the affirmation of human diversity created by philosophical and cultural differences. Since there is no God's eye view to be claimed by any society of people, the idea of the ethical space, produced by contrasting perspectives of the world, entertains the notion of a meeting place, or initial thinking about a neutral zone between entities or cultures. The space offers a venue to step out of our allegiances, to detach from the cages of our mental worlds and assume a position where human-to-human dialogue can occur. The ethical space offers itself as the theatre for cross-cultural conversation in pursuit of ethically engaging diversity and disperses claims to the human order. The dimension of the dialogue might seem overwhelming because it will involve and encompass issues like language, distinct histories, knowledge traditions, values, interests, and social, economic and political realities and how these impact and influence an agreement to interact. Initially, it will require a protracted effort to create a level playing field where notions of universality are replaced by concepts such as the equality of nations. In the Canadian context, the immediate necessity is a protracted effort by the legal community to enable processes at the broader level that start the definition of Aboriginal rights. This must be done in a cooperative spirit between Indigenous peoples and Western institutions. Initially, the emphasis will be to enable, through funding and national commitment, Indigenous institutions and community to do memory work on knowledge that would inform the rights agenda. This also means enabling Indigenous Elders, knowledge keepers, in concert with Indigenous lawyers and allies, many of whom are already committed to the challenge, to articulate, assert and define Aboriginal rights. This concerted effort at nurturing the Aboriginal knowledge base will set the conditions in place for a detailed examination of how the rights must be accommodated. Only then can the full meaning of Aboriginal rights be realized. Only then will there be a level and ethical playing field in Indigenous-West jurisprudence.

The idea of an ethical space, produced by contrasting perspectives of the world, entertains the notion of "engagement." Engagement at the ethical space triggers a dialogue that begins to set the parameters for an agreement to interact modeled on appropriate, ethical and human principles. Dialogue is concerned with providing space for exploring fields of thought and attention is given to understanding how thought functions in governing our behaviours.[10] It is a way of observing, collectively, how hidden values and intentions can control our behaviour, and how unnoticed cultural differences

10. D. Bohm, *On Dialogue* (New York: Routledge, 1996).

can clash without our realizing what is occurring. Attentive work on these issues has not occurred in Indigenous-West relations, nor has there been a framework that enables this discussion to happen. It is argued that the ethical space, at the field of convergence for disparate systems, can become a refuge of possibility in cross-cultural relations and the legal order of society, for the effect of shifting the status quo of an asymmetrical social order to a partnership model between world communities. The new partnership model of the ethical space, in a cooperative spirit between Indigenous peoples and Western institutions, will create new currents of thought that flow in different directions and overrun the old ways of thinking.

It is now my hope that my grandson enters law school and that by then we will have created a solid inclusive path of reconciliation based on humanity, based on respect, based on natural contexts, so that my grandson will feel proud about being a lawyer and about being an Indigenous person and an Aboriginal person in this country.