Podcast 3 – Founding Peoples – Aboriginal Law and Why it Matters

PROFESSOR FORCESE: Welcome back to the virtual Orientation for the first year program of the English JD at the University of Ottawa. In this podcast, I speak to Professsor Larry Chartrand about the importance of Aboriginal law in understanding Canadian law. We’ve chosen to introduce Aboriginal law at the outset of our series of interviews to underscore the importance of this third system of law which animates the Canadian legal framework. You will learn over the course of this podcast series and in your courses about the common law and we will spend some time discussing the civil law tradition of Quebec but before that, it’s important to understand the third pillar in contemporary Canadian law. I began by asking Professor Chartrand to introduce himself.

PROFESSOR CHARTRAND: My name’s Larry Chartrand, I’m a Professor at the Faculty of Law here. I teach tort law, constitutional law and Indigenous law.

PROFESSOR FORCESE: And one of your areas of expertise of course, both research and teaching, is in the area of Aboriginal law. The purpose of this conversation is to draw out those aspects of Aboriginal law that are important for every law student and which every law student really should know as they come in the door of the law school in first year. Why do you think Aboriginal law is important for every law student and lawyer in Canada?

PROFESSOR CHARTRAND: It’s important because much of the relationship between Canada and Aboriginal peoples is based on treaties, for example, and those treaties need to be understood in terms of the legal rights of the parties such as Canadian government or provinces, what they can or cannot do in relation to the interests of Aboriginal peoples, so we need lawyers who can understand the nature of treaties with Canada. There are multiple multiple treaties, there are historical treaties that need interpretation and analysis in terms of the rights of the various parties, there are ongoing modern land claim treaties which are enormous in terms of the work that needs to be done especially the legal work in preparing those modern land claims agreements, which can be very substantial agreements, giving rise to recognition of resource rights, land rights, governance and the jurisdictional decision of powers between federal, provincial and First Nations governments. So lawyers are involved in developing those and it’s an ongoing and necessary part of what we do as lawyers.

PROFESSOR FORCESE: The Federation of Law Societies, which is the amalgam of law societies which govern the legal profession, takes the view that Aboriginal law is foundational in Canadian law. Do you agree and if so, why?

PROFESSOR CHARTRAND: I think it’s foundational primarily because it is a recognition that the status of Canada is dependent on its relationship with the original peoples, the Indigenous peoples, and that much of our understanding of the Constitution is based on understanding that relationship. To date there hasn’t been enough attention paid to the role and status of, for example, treaties within the Canadian Constitution, how they affect the division of powers, how they affect fundamental rights, and it’s important to get an appreciation of Aboriginal law in that sense, to appreciate what the legal obligations of governmetns are vis-à-vis Aboriginal peoples. The other aspect of recognizing Aboriginal law is that there are a lot of areas where Aboriginal peoples have unique legal rights or unique relationships with government or even with private citizens and that we can’t even, for example, a resource company can’t go into northern Ontario without considering the legal implications of, for example, the rights of the Anishnabek that live in the territory or have a claim to the territory. They need to pay attention to what those rights are, develop relationships that accord with those rights…The same with criminal representation in urban communities. When there’s an Aboriginal person involved, they have unique rights that no other Canadian has and lawyers need to understand what those rights are.

PROFESSOR FORCESE: So what are some of the specific topics that you cover in your Aboriginal law class?

PROFESSOR CHARTRAND: In Aboriginal law, we cover a number of major topics. The introductory course for example covers Aboriginal rights generally that are protected in the Constitution. Section 35 of the Constitution recognizes existing Aboriginal and treaty rights so we speak about and learn about what those Aboriginal rights are, we learn about what the treaty rights are, what the legal status of the treaties are, what the ongoing processes are for interpretation and resolving of conflict with respect to treaty implementation. So that’s a significant part of the course. The other part of the course involves deeper relationship, deeper understandings of the legal relationship, the impact of colonization, what legal reparations are needed to address the historical harms of colonization, such as the residential schools, for example, and how to address the cultural harm of the residential schools. And we look a bit at international law, the development of rights specific to Indigenous peoples that states need to understand and address and a range of issues along those lines.

PROFESSOR FORCESE: What about the first year program? To what issues should first year students expect to be exposed in the area of Aboriginal law?

PROFESSOR CHARTRAND: In the first year program, there are areas within Criminal Law, for example, many of the criminal law professors here have significant sections devoted to the issues of the impact of the criminal justice system on Aboriginal peoples and communities and look at alternatives to the adversarial process such as sentencing circles and restorative processes that are more traditionally relevant to Aboriginal communities. So there’s a significant amount of content I think devoted to that area. In terms of Constitutional Law, there is within the issue of human rights, many of the cases involve Aboriginal issues and equality issues with respect to Aboriginal peoples, in trying to protect the equality. So there’s a fair bit of coverage with respect to first year in that sense.

Also I teach Indigenous Legal Mechanisms course for first year students, which is an optional course, and in that course we cover the issue of understanding Canada as a multi-juridical state. There’s a lot of misunderstanding about Canada being bijuridical – common law and civil law – without recognition that there are Indigenous legal traditions within the territory we call Canada that provide a source of legal principles, a source of law, a source of values that can inform Canadian law, can enrich Canadian law. So there’s issues about recognition of the Indigenous legal traditions, how they can be part of an understanding of Canadian law more generally and also in that, involve questions of how do Canadian institutions recognize Indigenous legal traditions or Indigenous legal processes?

What kind of relationship needs to be established? What kind of jurisdictional space needs to be carved out for Indigenous justice systems? Those are some of the issues to explore, as well as what are substantively some of the Indigenous legal principles, say of the Haudenosaune or the Anishnabek or the Mik’maq communities. How do they achieve social order? How do they differ from Western adversarial processes? So these are some of the issues we explore in the Aboriginal Legal Mechanisms class.

PROFESSOR FORCESE: And then in Property Law I believe they deal with Aboriginal title issues. What is Aboriginal title about?

PROFESSOR CHARTRAND: Aboriginal title is a property concept but it’s unique. The courts have characterized it as “*sui generis*” – a legal principle unto itself. It has no parallel in the common law or in Western legal systems. It’s a concept because of the existence of Indigenous peoples’ occupied territory in Canada prior to European settlement and the recognition of that occupation by the courts. And a recognition that is constitutionally protected if an Aboriginal community is able to prove that they possess Aboriginal title to a certain territory. And of course once Aboriginal title is recognized it raises all kinds of questions of, what are the rights of Aboriginal peoples within that territory, what are the rights of non-Aboriginal peoples in terms of the territory. So this an area that involves…It’s a very complicated area, it’s a very complex area.

There are criticisms with the concept of Aboriginal title because it is sourced in colonization and the doctrine of discovery which is no longer credible because of its systemic discriminatory principles of Aboriginal peoples being inferior and therefore not having standing as a nation equal to other nations, but actually falling within the authority of the English, for example. So there’s questions about Aboriginal title that need to be thought about and some of the assumptions about Aboriginal title challenged in terms of the greater equity issues of peoples.

PROFESSOR FORCESE: If a student is interested in pursuing either volunteer work, pro bono work or further involvement in issues surrounding Aboriginal law and more generally Aboriginal rights, how can they get involved?

PROFESSOR CHARTRAND: There’s a lot of ways to get involved. There’s the Aboriginal Law Students’ Association, for example, that welcome non-Aboriginal and Aboriginal members to work on issues such as conferences or guests or cultural events. There is the development of the Aboriginal Law and Indigenous Law Option, where students can get recognition for concentration in the field and within that concentration are a number of courses related to Aboriginal law, some of which involve internships with various organizations. There’s an internship course offered next year with the Specific Claims Commission which looks at conflict arising under treaties. That’s a very busy Commission with lots of files to get through in terms of how to resolve conflict or issues where the government was unable to fulfill its promises and treaty. We also have an internship with the Odawa friendship Centre, where a student can work with the Aboriginal Justice Program, which is an alternative to the Criminal courts where an Aboriginal person can be referred to the Justice Program and dealt with according to Indigenous processes and for example there might be a circle sentence with Elders and representatives from the community that come up with a solution to the problem of why the offender is before the courts in the first place and it opens up the discussion to addressing underlying issues as to why the offender got before the courts in the first place so it can be much more restorative in that sense for Aboriginal offenders. So we have an internship with that program as well that can provide students with experience.

PROFESSOR FORECESE: Is there anything else that you would like to draw to the attention of incoming students relating to Aboriginal law?

PROFESSOR CHARTRAND: My only advice perhaps is to recognize that there’s more to Canadian law than just the common law and civil law systems, that Canadian law schools actually are kind of in the fore of trying to promote a greater recognition of Indigenous legal traditions and to think about their inclusion within institutions like law schools and how to incorporate Indigenous legal principles as well as processes within the mainstream curriculum. Several law schools are doing good work in that area, including the University of Ottawa.

PROFESSOR FORECESE: Thank you very much.