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Lawmaking for Nation Rebuilding

Giigoon Naaknigewin: Learning from Nipissing First Nation's Fishery Law

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“Lawmaking for Nation Rebuilding” was a virtual think tank hosted by the Rebuilding First Nations Governance Project and the [Centre for First Nations Governance](#) on May 10, 2022. It was held to inform the work of Upper Nicola First Nation as the people begin drafting laws to implement their inherent right to self-government. It was also attended by other project partner First Nations across Canada. The think tank featured case studies on the lawmaking experiences of Listuguj and Nipissing First Nations as well as presentations from Canadian legal experts.

The following is a written summary of one of those presentations.

Presentations by Chief Scott McLeod and Dwayne Nashkawa, Strategic Advisor, Nipissing First Nation

Introduction

Nipissing First Nation (NFN or Nipissing), a signatory to the 1850 Robinson Huron Treaty, is located in their ancestral territories west of what is now known as North Bay, Ontario. NFN was well known among the Anishinabek nation and their allies as a hub between the communities of the north and south, lending itself naturally as a nexus point for trade routes pre-contact. Since time immemorial, Nipissing has sustained itself through the abundance of fish species that thrived in the lake and its connecting waterways. The fish were supplemented by large game animals that provided sustenance and materials that supported Anishinabek community life.

Lake Nipissing is currently home to over 40 species of fish, include walleye, pike, whitefish and yellow perch, which have significant historical and spiritual importance to the Anishinabek. As the stewards of this land for millennia, the Anishinabek of Nipissing First Nation have an ongoing responsibility to support the health of the lake and its wildlife. Since time immemorial the Anishinabek have lived in a way governed by the connection to the land, water, and living beings based on the values of the Seven Grandfather Teachings: Love, Respect, Humility, Truth, Courage, Honesty, and Wisdom. Through the observance of these values, natural law, and continued employment of Anishinabek knowledge and wisdom, the nation lived within and supported the balance of all life.

By the late 1800s NFN's stewardship responsibilities, governance and jurisdictions were challenged by the steady encroachment of non-Indigenous settlers. The rise of new economic and governance models, rooted in consumption and the doctrine of discovery, forcibly pushed out the original laws of NFN. The impacts of colonialism and active persecution of NFN harvesters in the exercise of their rights, further undermined the Nation's ability to ensure the health and sustainability of the fish population of Lake Nipissing. The assumed sovereignty of Canada and its subsequent delegation of jurisdiction over Lake Nipissing to the province of Ontario eventually led to the ill health of the lake, threatened associated wildlife, and resulted in the infringement on the inherent and Aboriginal Rights of Nipissing First Nation citizens to govern themselves and their ancestral territories. By the late 20th century, the fisheries of the lake were suffering and were on the verge of collapse due to overfishing by commercial and recreational fishers alike. During this time, NFN recognized that something had to be done. From the 1970s the movement towards regaining governance of Lake Nipissing developed momentum and community determination. Through the reassertion of rights, recognition by the courts, and the self-determination of NFN, the nation was able to rebuild their *Giigoon Naaknigewin* (Fisheries Law) in 2004. In line with their own values and governance models, the law supports the ongoing sustainability of Lake Nipissing and its associated wildlife.

Key Issues that led to the *Giigoon Naaknigewin*

The impacts of colonization and the *Indian Act* resulted in non-Indigenous interests benefiting from the rich resources of Lake Nipissing. In the mid-2010s, Lake Nipissing's economic value was estimated to be \$100M per year, a market and source of sustenance that NFN was largely excluded from until the courts began to recognize their inherent rights and jurisdiction.

In the 1950s the lake became a world class fishery that catered to elite sport fisherman and crowds of non-Indigenous tourists who came to angle and enjoy recreational activities. During this period, NFN citizens were fully pushed to the margins, only able to work as guides.

In the 1970s and 1980s, citizens of Nipissing began to exercise and assert their rights, resulting in many charges laid against them by the province for "Fishing commercially without a license." This was a clear infringement on the Aboriginal rights of NFN, further protected by the Robinson Huron Treaty of 1850.

By the 1990s the tide began to shift.

Two court cases played a key role in catalysing NFN's push to reestablish their fishery law. *R. v. Commanda* (1990) recognized Nipissing First Nation's right to commercially fish Lake Nipissing. In addition, the results of *R v. Sparrow* (1990) outlined the delineation of priority sequence for fisheries: sustainability of fishery as paramount, subsistence fishing for Indigenous communities, commercial Indigenous fishing, sport and recreation, followed finally by commercial fishing. At this time Nipissing First Nation realized that they needed to fill in the legal and jurisdictional space by creating their own law. If they did not, jurisdiction would continue to be taken up by the Ontario government, resulting in the Ontario Ministry of Natural Resources and Forestry (OMNRF) continuing to enforce provincial law on the nation, its citizens, and their activities on Lake Nipissing.

Nipissing decided to make their own laws pre-emptively to ensure sustainability and thereby protect subsistence fishing and commercial fishing. Their ongoing goals for *Giigoon Naaknigewin* are to have and maintain a healthy fishery by protecting the declining Walleye and other fish stocks, protect their rights and jurisdiction, and begin to reconcile the economic impacts of previously not having been able to fish.

The Law-Making Process: Engagement, Drafting, and Enacting Laws

In terms of environment and natural resources, NFN has exclusive jurisdiction to make laws with respect to environmental protection of natural resources in accordance with NFN cultural practices. The cultural practices, born of millennia of traditional knowledge and wisdom, were designed to sustain and maintain their lands, fish, forest, wildlife, water and air; protecting their heritage for future generations. They are a continuation of their inherent rights as original caretakers of their homelands and territories. These inherent rights are protected by Treaty and outlined in the NFN *Gichi Naaknigewin* (Big Law or Supreme Law). Through the inherent right to self-government, Nipissing sought to rebuild their fisheries law by engaging the collective rights holders, the citizens of NFN.

Consultations with the nation took place throughout 2004 by engaging with and listening to community members and Elders. Through this process the community identified that the law needed to address sustainable harvesting limits, institute mandatory report, identify fishing seasons, protect spawning fish, and create a process for net identification and ownership. The law was reviewed and amended based on public input before a final vote via referendum to pass the Nipissing First Nation *Giigoon Naaknigewin*.

The law identifies Nipissing First Nation's Natural Resources Department as the permit-issuing authority, and outlines NFN may appoint Fishery Officer(s) for the purposes of maintaining legal compliance. Other key elements of the law empower NFN Chief and Council to set fishing regulations on a yearly basis that identify fishing areas, fishing season, species size and quantities, reporting and assessments, fishing gear (including gill net use), compliance and enforcement.

Through the Fall Walleye Index Netting (FWIN) data collection instrument, NFN has established scientific processes that inform assessments of the health of Lake Nipissing and its fisheries, as well inform the fishing regulations set under the *Giigoon Naaknigewin*.

Lessons on Implementation

There was a distinct period of socialization of the law within NFN and among citizens from 2004 to 2014. Community pressure from Aunties and older members helped to keep members in line with community values. While significant compliance and adoption occurred, there were a small number of community members who refused to follow the law and viewed inherent rights as an individual right, that could not be regulated by anyone, rather than collective rights. It is important to identify here that the impacts of colonialism and decades of infringed rights had led to the conflict between the values of collectivism and individualism. Chief Scott McLeod observed, "They [citizens] were acting as individuals while we were trying to act as a *nation*." NFN actively continues to educate members that these rights are based on the nation's prior

existence, grounded in an interdependent relationship. Language and culture are important elements of this ongoing education, including a ceremony of thanksgiving or *miigwechwin* to begin each fishing season.

In the process of trying to bring balance and adherence to the new law, NFN discovered a new jurisdictional issue.

The laws and jurisdiction of Canada, Ontario and Nipissing First Nation combined to create a legal loophole for NFN fishers. By limiting their authority to reserve lands only, the *Indian Act* prevented Chief and Council from bringing compliance to the nation's laws out on the lake with their own citizens. At the same time, NFN fishers were protected by treaty and inherent rights which prevented the Ontario government from interfering. As a result, over harvesting continued.

In the Anishinaabe language there is no word for enforcement, and by 2014 the data collected by the FWIN indicated that the fishery was on the verge of collapse. At this time, the fishery was subject to heavy recreational and tourism fishing that was contributing to the risk of collapse. Data showed that the only fish being caught were below the age of maturity and that continued fishing would prevent them from reproducing. NFN needed a mechanism to help implement the law immediately to protect the fishery.

In 2014 discussions began between Nipissing First Nation and OMNRF to fill the legal loophole and ensure that everyone on Lake Nipissing was following either NFN laws or Ontario laws. The historical governmental relationship challenges, familiar to all Indigenous nations, required the development of a Memorandum of Understanding (MOU) to codify the relationship between the two governments.

With the mutual goals of supporting population recovery and sustainability of the fisheries in the lake through the effective implementation of the *Giigoon Naaknigewin*, the MOU signed in 2016 supports the ongoing and harmonious relationship between NFN and OMNRF. The scope of the MOU pertains only to commercial fishing activities (subsistence harvest is the exclusive purview of NFN), and the implementation of the NFN Fisheries Law as it pertains to commercial fishing. Unprecedented at the time, the preamble of the MOU states that Ontario recognizes Nipissing First Nation's *Gichi Naaknigewin*, the NFN's constitutional authority to create their own laws. With the MOU established, the two governments worked together to close the legal loophole created by the intersection of laws.

To address the jurisdictional gap, there is an NFN/MOU Compliance model. This model identified the creation of two fishery officers known as *Shkaabewisag* (helpers) who are guides for the laws. Compliance meetings are held to teach about the importance of the law. If further action is needed, a justice circle may be held, and a restorative justice model is employed if "enforcement" is elevated. In the unlikely case of continued non-compliance, or a citizen chooses to be outside the "umbrella" of NFN laws, and all other avenues have been exhausted by NFN, a hand-off process to the OMNRF and provincial courts takes place. Even after the hand-off process, a NFN

citizen can be taken out of the provincial courts and returned to the jurisdiction of NFN. This process ensures that everyone on the lake follows either NFN laws or Ontario laws.

After a period of adjustment, a justice circle has not been required in 5 years, and no cases have been forwarded to provincial jurisdiction.

In 2018 the Institute of Public Administration Canada (IPAC) recognized Nipissing First Nation and the Ministry of Natural Resources and Forestry with an IPAC Gold Award for their leadership and innovation in developing the joint MOU supporting the stewardship of Lake Nipissing.

Evolution of the Law: Reflections and Next Steps

NFN Chief Scott McLeod says that *Giigoon Naaknigewin* is only one of several laws the nation has made towards implementing the inherent right to self-government for the nation. The nation seeks a future in which no outside sources or institutions are required to uphold their laws.

The evolution of the *Giigoon Naaknigewin* makes it adaptable enough that the associated regulations can adjust if needed on a yearly basis to protect the sustainability of the fishery. In addition, future amendments to the law will be informed by the ongoing re-education of citizens as the nation engages in cultural revitalization. NFN is exploring the potential of a fishery co-op, as values of collective well-being are nurtured in response to decolonization and the nation continues on the path to fully exercising its inherent right to self-government.

As part of reclaiming and reasserting their jurisdiction as a nation, NFN signed their *Gichi Naaknigewin* (“Supreme / Big Law” which can be understood as a constitution) into law in June of 2014.

The purpose of the constitution is to define who they were/are as a people, outlining principles, rules and structures. It also identifies the relationship between NFN governing structures and *debendaagziwaad* (*people of or those who belong*), civil and political rights of *debendaagziwaad* and the accountabilities of the leadership to the people.

Gichi Naaknigewin, as the supreme law of NFN, outlines the values and beliefs that guide the nation’s law making. It includes protecting the right to harvest the gifts of the Creator in a sustainable manner as an essential value. It provides for the principles of sustainability, to come into balance with the interests of economic advancement and preservation of natural resources for future generations, as core social values.

Based on *Gichi Naaknigewin*, Nipissing First Nation is creating more of their own laws with the adoption of a Cannabis Law and Election Law, and most recently, the development of a Citizenship Law.

Timeline of Events

- 1970s and 1980s NFN and Fishermen began to reassert their rights against arbitrary laws of Ontario – this led to conflict

- 1990 R. V. Commanda ruled Nipissing had treaty protected rights to fish commercially on Lake Nipissing
- 1990 Sparrow Case set priority on fishing allocation: sustainability of fishery, subsistence fishing for indigenous communities, commercial indigenous fishing, sport and recreation, other commercial
- 2000 Recreational fishing was creating stress among the fish population
- 2004 NFN Fishery Law Created
- 2004 - 2014 On-going compliance challenges and community education in implementing the law
- 2008 NFN implements active fisheries assessment unit on Lake Nipissing
- 2012 *Gichi – Naaknigewin* (Supreme Law or Constitution of NFN) was adopted and signed into law.
- 2014 Fall Walleye Index Netting indicated the fishery was on the verge of collapse
- 2015 Memorandum of Understanding (MOU) signed between NFN and Ministry of Natural Resources and Forestry Ontario
- 2018 Institute of Public Administration of Canada (IPAC) Gold Award
- 2018 and 2021 MOU Renewed