

Legal Pluralism in Canada



**'Qa' (To be Together) /
Interwoven Landscape, 2023**

Artist Statement

This artwork is an abstract design that draws upon traditional Coast Salish forms in a contemporary way to tell a story. The story is told through deconstructed weaving patterns and figurative forms. It is about an interwoven landscape. As we follow the work of forming new systems from different traditions, what does that landscape look like? What teachings do we carry? How can we go about existing within this new space in a good way? The details and different aspects of this design remind us that in Indigenous knowledge systems, our teachings come from the land and they come from each other. It is critical to honour that.

~ Eliot White-Hill



Overview

The British Columbia Law Institute (“BCLI”) is BC’s law reform agency. The 2019 *Declaration on the Rights of Indigenous Peoples Act* (“*Declaration Act*”) requires the BC government to “take all measures necessary” to ensure the laws of BC are consistent with the *UN Declaration on the Rights of Indigenous Peoples*, in consultation and cooperation with Indigenous Peoples.¹ The BCLI Reconciling Crown Legal Frameworks Program supports the research and innovations required to implement this legislation. As part of our series of primers on the *Declaration Act*, the BCLI has prepared three primers that explore legal pluralism:

- **Primer 3** – Legal Pluralism in Canada
- **Primer 4** – Legal Pluralism: Indigenous Legal Orders & Other State Jurisdictions
- **Primer 5** – Legal Pluralism: Indigenous Legal Orders & Canadian State Law

BC’s *Declaration Act* establishes the *United Nations Declaration on the Rights of Indigenous Peoples*² (“UN Declaration”) as the framework for reconciliation in BC.³ The provincial government’s 2022-2027 Action Plan for achieving the objectives of the *Declaration Act* is based, in part, on an understanding that BC is “legally plural.”⁴ This primer provides a brief overview of the legal pluralist frameworks that have always been part of Canada’s Crown legal framework.

The work of the BCLI primarily takes place on the unceded territories of the x^wməθk^wəḡəm (Musqueam Indian Band), Skwxwú7mesh (Squamish Nation), and səliłwətał (Tsleil-Waututh Nation).



¹ SBC 2019, c 44, s 3 [*Declaration Act*].

² United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007), online: <https://bit.ly/3pNSX3c> [UN Declaration].

³ See British Columbia, Ministry of Indigenous Relations and Reconciliation, *Declaration on the Rights of Indigenous Peoples Act Action Plan, 2022-2027* at 1, online: <https://bit.ly/3WhnZMQ> [2022-2027 Action Plan].

⁴ 2022-2027 Action Plan, *supra* note 3 at 6.



Legal Pluralism and the Application of a Legal Pluralist Analysis

At its most basic, legal pluralism describes the operation of two or more legal orders within the same geographical jurisdiction or social space. The academic literature on legal pluralism is vast, encompassing varied concepts, theories, and expectations.⁵ Legal orders develop from unique social and cultural histories, accompanied by rules and procedures that are communicated and implemented through legal institutions.⁶

The term legal pluralism refers to a multitude of different arrangements for shared and separate jurisdiction. When pluralism is acknowledged, as it is in the 2022-2027 Action Plan, applying a legal pluralist analysis to coexisting legal orders can help with both understanding existing arrangements and building and maintaining respectful relationships between legal orders. Ultimately, it is the work of legal pluralism to manage the application and prioritization of separate and shared legal authorities.

These three legal pluralism primers apply a legal pluralist analysis to state constitutions, state legislation, interpretive principles, and private contract law to build a better understanding of legal pluralism in practice.

Legal pluralism denotes a situation where two or more legal systems coexist in the same social field.⁷

Dr. Val Napoleon, Indigenous Law Research Unit (ILRU)
Director & Law Foundation
Chair of Indigenous Justice and Governance

Leading Indigenous legal researcher John Borrows has characterized Canada as a juridically pluralistic state with three legal orders, each with its own distinct foundations and methods of application.⁸ These are:

1. the **common law**, as imported by the British tradition;⁹
2. the **civil law**, as imported by the French tradition;¹⁰ and
3. **Indigenous legal traditions**, as practiced by the sovereign and independent Indigenous Peoples within Canada, whose diverse and distinct legal orders existed prior to colonization and continue to operate to this day.¹¹

Legal pluralism also operates within each of these legal traditions.

⁵ See e.g., Sally Engle Merry, "Legal Pluralism" (1998) 22:5 Law & Soc'y Rev 869; Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall LJ 167; and Helen Dancer, "Harmony with Nature: Towards a New Deep Legal Pluralism" (2021) 53:1 J Leg Pluralism & Unofficial L 21.

⁶ See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 8: "Legal traditions are cultural phenomena; they provide categories into which the 'untidy business of life' may be organized and where disputes may be resolved" (citing AWB Simpson, *Leading Cases in the Common Law* (Oxford: Oxford University Press, 1996) at 11).

⁷ Val Napoleon, "Legal Pluralism and Reconciliation" (2019) *Māori L Rev* 1 at 5.

⁸ Borrows, *supra* note 6 at 8.

⁹ *Ibid* at 109-111.

¹⁰ *Ibid* at 111-113.

¹¹ *Ibid* at 11. See generally Chapter 2 ("Sources and Scope of Indigenous Legal Traditions") at 23-58; Chapter 3 ("Indigenous Law Examples") at 59-106; and Chapter 6 ("Challenges and Opportunities in Recognizing Indigenous Legal Traditions") at 137-176.



Canada's Crown Legal Traditions Include Legal Pluralism

Legal pluralism is a familiar concept in Canada's Crown legal system. Its existence is evident in the multiple sources of law and various systems through which law is practiced in Canada. Better understanding the existing arrangements that operationalize legal pluralism can provide context for their application to other legal relationships.

The examples below demonstrate a few of the ways in which multiple legal orders are recognized and accommodated in Canada's Crown legal system. While Canada's different legal orders have separate, independent sources of authority, they operate alongside and in dialogue with one another, interacting through laws, policies, and related procedures.

1. Constitutional Federalist Framework

The legal pluralist framework perhaps most familiar to Canadian audiences is Canada's federalist system. Constitutional federalism is fundamentally "characterized by multiple sources of authority within a single geographic territory."¹² In Canada, these authorities are the federal and provincial governments. Following the constitutional division of powers

set out in sections 91 & 92 of the *Constitution Act, 1867*,¹³ these two authorities have created legal regimes on subject matters within their areas of competence, and that are constantly adjusting to respond to legal issues.

The interaction between federal and provincial governments illustrates the dynamics inherent in legal pluralism when put into practice. A series of constitutional doctrines and interpretive principles exist to guide and manage the relationship between the two authorities. These include:

- **Cooperative federalism**, a principle that encourages intergovernmental cooperation and constitutional flexibility rather than strict adherence to separate, exclusive powers.¹⁴ Relevant mechanisms and arrangements can include **delegation**, where one authority cedes its jurisdiction over a given matter to the other. This form of federalism has been actively encouraged by the Supreme Court of Canada in cases such as *Federation des producteurs de volailles du Québec v Pelland*;¹⁵ *Canadian Western Bank v Alberta*;¹⁶ and the *Securities Act Reference*.¹⁷

¹² Erin Ryan, "Federalism as Legal Pluralism" in Paul Schiff Berman, ed, *The Oxford Handbook of Global Legal Pluralism* (Oxford: Oxford University Press, 2020) 491 at 492-493.

¹³ (UK), 30 & 31 Vict, c 3.

¹⁴ See *Reference re Securities Act*, 2011 SCC at para 57, [2011] 3 SCR 837 [*Securities Act Reference*].

¹⁵ 2005 SCC 20, [2005] 1 SCR 292.

¹⁶ 2007 SCC 22, [2007] 2 SCR 3.

¹⁷ *Securities Act Reference*, *supra* note 14; Warren J Newman, "The Promise and Limits of Cooperative Federalism as a Constitutional Principle" (2016) 76:2 SCLR 67. See further: Scott A Carrière, "The Emergence of a Normative Principle of Co-Operative Federalism and Its Application" (2021) 58:4 Alta L Rev 897.



- The **double aspect doctrine**, which holds that the pith and substance of certain matters may fall within the legislative competence of both levels of government.
- The **ancillary powers doctrine**, which accepts the validity of measures that lie outside an authority's jurisdiction so long as such measures are an integral part of a legal scheme that is within its legislative competence.
- The principle of **federal paramountcy**, which renders provincial legislation inoperative in favor of the federal authority in cases where conflict between the two orders cannot otherwise be resolved cooperatively.
- The doctrine of **interjurisdictional immunity**, whereby an otherwise valid provincial law is made inoperative to the extent that it impairs the core of an exclusive federal competence.

2. Military Law and Religious Law

The Canadian Charter of Rights and Freedoms explicitly recognizes the existence of military law and its justice system, which operates concurrently to the criminal justice system.¹⁸ Religious legal traditions such as Islamic law and Judaic law are also practiced in Canada, although jurisprudence indicates that the legal legitimacy of such orders depends on their consistency with, or an intention to comply with, secular Canadian law.¹⁹

3. Canada's Approach to International Law

Another example of legal pluralism can be seen in the relationship between international law and Canada's domestic law, at least as it relates to treaty law. Canada follows the dualist approach²⁰ towards international conventions, viewing such sources of law as part of a separate legal order that must be received into the domestic system.²¹

¹⁸ See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11: "Any person charged with an offence has the right [...] (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment." The primary source of military law is the *National Defence Act*, RSC 1985, c N-5, and the associated *Code of Service Discipline*. See further, Michel W Drapeau, "Canadian Military Law – Sentencing Under the National Defence Act: Perspectives and Musings of a Former Soldier" (2003) 82:2 Can Bar Rev 391. While the differences between 'civil' and military justice systems has been challenged, the separation between the two legal orders has nevertheless been upheld: see e.g., *R v Stillman*, 2019 SCC 40, [2019] 3 SCR 144.

¹⁹ See e.g., *Alspector v Alspector*, [1957] OR 454, 9 DLR (2d) 679 (confirming the validity of a marriage conducted following Jewish faith despite the absence of a marriage license); *Isse v Said*, 2012 ONSC 1829, 19 RFL (7th) 413 (recognizing the marriage of the parties entered into under Sharia law as valid according to Ontario's *Marriage Act*); *Hesson v Shaker*, 2020 ONSC 1319 (ordering the relevant recitation to affect divorce under Sharia Law and the enforcement of the terms of the Sharia marriage contract). Compare to *Jamil v Akhtar*, 2023 ONSC 474 (finding that the religious wedding was not valid on the basis that the parties did not intend to be in compliance with the *Marriage Act*); *Dwyer v Bussey*, 2017 NLCA 68, 2 CANLR 327 (finding that a marriage echoing the formalities of a Christian wedding was void on the basis that the parties did not enter the form of marriage in good faith); *Hassan v Hassan*, 2006 ABQB 544, 64 Alta LR (4th) 357 (finding a marriage conducted according to Islamic law was not legally valid following the failure of the parties to comply with Alberta law).

²⁰ See Pierre-Marie Dupuy, "International Law and Domestic (Municipal) Law" in *Max Planck Encyclopedias of International Law* (April 2011), online: <https://bit.ly/3Nlkp1p>.

²¹ See *Capital Cities Communications Inc. v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 172-173, 81 DLR (3d) 609; *Francis v Canada*, [1956] SCR 618 at 621, 3 DLR (2d) 618.



This differs from the monist approach to international law, in which international sources are not understood to be part of a separate legal order but are automatically made part of the domestic legal system.²² The rationale for this

approach rests with Canada's federalist division of powers and the understanding that the federal government cannot bind the provinces to legal obligations in matters that lay beyond its jurisdiction.



Legal Pluralism and BC's *Declaration Act*

Implementation of the *Declaration Act* requires the development of a legal pluralist framework to support the building and maintaining of respectful relationships between different systems of law. This is confirmed by the BC government's 2022-2027 Action Plan, which explicitly recognizes that BC is “legally plural”:

The action plan is grounded in the affirmation, consistent with the UN Declaration, that upholding the human rights of Indigenous Peoples includes recognizing that within Canada

there are multiple legal orders, including Indigenous laws and legal orders with distinct roles, responsibilities and authorities.²³

The 2022-2027 Action Plan identifies, as an outcome, the formation of “respectful and productive working relationships” between the province and Indigenous Peoples that “recognize legal pluralism and reflect cooperative federalism.”²⁴ The coordination and prioritization of multiple systems of law can be facilitated through approaches developed collaboratively

²² Canada notably takes the monist approach towards customary international law: see *Jose Pereira E Hijos, SA v Canada (AG)*, [1997] 2 FC 84 at para 20, 126 FTR 167; *Bouzari v Iran*, (2004) 71 OR (ed) 675 at para 65, 243 DLR (4th) 406; *R v Hape*, 2007 SCC 26 at para 36, [2007] 2 SCR 292.

²³ 2022-2027 Action Plan, *supra* note 3 at 6.

²⁴ 2022-2027 Action Plan, *supra* note 3 at 10.



between Indigenous and Crown governments. The principles of cooperative federalism are to support this work.

Indigenous legal scholar and UBC law professor Gordon Christie envisions that legal pluralism flowing from the implementation of the *Declaration Act* will require a “braiding” of laws:

The question, then, is how Canadian authorities might respond to the challenges of implementing provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in light of the existence of Indigenous legal and political authority over Indigenous territories. If one were to employ the metaphor of braiding laws together, the image would then be of separate parties – the Crown and numerous distinct Indigenous communities – each enjoying authority over some

common territory, each coming to the exercise of braiding with their own strands of law, and together having to work out how State law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope.²⁵

Ultimately, the work of legal pluralism is not one of fixed states or definite outcomes, but a matter of ongoing, responsible relationships between multiple legal orders, each of which carries their own laws and sources of law, authorities and systems of governance, including methods of expression and interpretation.

For Crown legal professionals and public servants, legal pluralism brings the invitation and the responsibility to think differently about law. Legal frameworks in BC will need to adapt to reflect multiple legal orders and consider diverse ways of approaching and resolving legal pluralist issues in practice.

Further Resources

For more information on the BCLI’s Reconciling Crown Legal Frameworks Program, please visit: <https://www.bcli.org/project/reconciling-crown-legal-frameworks/>

²⁵ Gordon Christie, “Indigenous Legal Orders, Canadian Law and UNDRIP” in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019) 47 at 47-48.



RECONCILING CROWN LEGAL FRAMEWORKS

BRITISH COLUMBIA LAW INSTITUTE

PRIMER 3

About the BCLI

www.bcli.org

The BCLI is BC's independent law reform agency. We have been bringing collaborators together to clarify and improve the law, develop just and innovative solutions, and increase access to justice for over 25 years.

Our Funders

This publication was made possible with the financial support of the Law Foundation of British Columbia, the Real Estate Foundation of BC, and the McLachlin Fund.



□□ Artist: Eliot White-Hill, Kwulasultun
□□ Coast Salish Artist and Storyteller

□□ Graphic Design:
□□ Perry Sky Jack | Lyackson First Nation