BRITISH COLUMBIA LAW INSTITUTE

INDIGENOUS LAW RESEARCH UNIT
AT THE UNIVERSITY OF VICTORIA

Reconciling Crown Legal Frameworks Program | Primer 2

Indigenous Laws

Three Grandmothers and Fireweed

Kokum Raven Series: Artist Statement

Indigenous law is in the world and there are many ways to learn about it, teach it, and to represent it. The way I have chosen here is with the raven – a trickster for some Indigenous peoples.

She can teach us by being a troublemaker and by upsetting the log jams of unquestioned assumptions. She can also teach us with love, patience, and a wicked sense of humor. She can create spaces for conversations and questions – that is her job as a trickster and a feminist so that nothing is taken for granted and all interpretations are laid bare.

~ Val Napoleon

Overview

The British Columbia Law Institute ("BCLI") is BC's law reform agency. The 2019 Declaration on the Rights of Indigenous Peoples Act requires all laws in British Columbia to be brought into alignment with the UN Declaration on the Rights of Indigenous Peoples. The BCLI has launched its Reconciling Crown Legal Frameworks Program to support the research and innovations required to implement this legislation. This is the second of a series of primers designed to provide information about law reform issues related to this legislation. We are pleased to co-publish this primer with the Indigenous Law Research Unit at the University of Victoria.

The *United Nations Declaration on the Rights of Indigenous Peoples* ("UN Declaration") affirms the rights of Indigenous Peoples to maintain and strengthen their laws and legal orders.[1] The existence and authority of Indigenous legal orders is found in the UN Declaration, recognized in BC's *Declaration on the Rights of Indigenous Peoples Act*,[2] and supported in BC's action plan to implement the UN Declaration.[3]

Bringing BC laws into alignment with the UN Declaration requires an understanding of Indigenous law. Crown governments, courts, lawyers, and members of the public will increasingly be expected to understand the content and meaning of Indigenous law as the *Declaration Act* is implemented.

The work of the BCLI primarily takes place on the unceded territories of the xʷməθkʷəy̓əm (Musqueam Indian Band), Skwxwú7mesh (Squamish Nation), and səlilwətaɬ (Tsleil-Waututh Nation).

[1] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Art. 5, available at: <https://www.refworld.org/docid/471355a82.html> ("UN Declaration).
[2] SBC 2019, c 44 ("*Declaration Act*").
[3] See British Columbia, Ministry of Indigenous Relations and Reconciliation, *Declaration on the Rights of Indigenous Peoples Act Action Plan 2022-2027*, online: https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf.

What are Indigenous Laws?

'Indigenous laws' are the principles and processes that Indigenous Peoples and communities use and have always used to govern themselves. While it is often used interchangeably with 'Aboriginal law' (which is Canadian law about Indigenous issues), it is distinct, and should be understood as deriving from Indigenous Peoples' societies and histories. The Law Society of BC's introductory practice materials describe Indigenous law and related concepts:

> Indigenous law forms within, and forms part of, **Indigenous legal traditions**. "[L]egal traditions" [are] the "set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the ways law is or should be made, applied, studied, perfected, and taught." According to Val Napoleon, the term "Indigenous legal traditions" refers to the protocols, legal processes, and laws of Indigenous societies, as well as their worldviews, aspirations, pedagogies and practices.
> An Indigenous society's structure and organization of its legal traditions, including its laws, legal institutions and legal processes, comprise its **Indigenous legal order**. Val Napoleon uses the term "legal order" instead of the concept of "legal system" to distinguish "law that is embedded in non-state social, political, economic and spiritual institutions" (legal order) from law that is organized around a state in which law is "managed by legal professionals in institutions that are separate from other social and political institutions" (legal system).[4]

It is important to flag the risk of pan-Indigenization[5] that its use carries. Indigenous Peoples and societies have their own terms in their own languages to refer to their own laws, legal traditions, and legal orders and these should be understood and used, wherever possible. For example, for the Gitxsan, ayook means law, custom, legal practices or precedent.

[4] See Jessica Asch & Tara Williamson, *Practice Material: Introduction to Indigenous Law* (Law Society of BC Professional Legal Training Course, 2022) at 3-4, online: https://www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/material/Indigenous.pdf [Asch & Williamson]. Val Napoleon is Interim Dean, Professor, and Law Foundation Chair of Indigenous Justice and Governance at the University of Victoria Faculty of Law, the in-text quotes come from Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds., *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 229 at 230 and Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus Dubber & Tatjana Hörnle, eds., *Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 5.

[5] Pan-Indigenization here refers to an overgeneralization of the cultures, histories, laws, languages, and experiences of different Indigenous Nations and communities in Canada

Sources of Indigenous Law

In societies with common law legal traditions, like BC, law is often characterized as being defined by court decisions and legislation (i.e., statutes and regulations). But, all law, including Indigenous law, has deeper sources as well. These sources are closely linked to a society's collective beliefs, norms and worldviews. These differences lead to different approaches to and organization of responsibility, justice, procedure, and other concepts central to how societies design, interpret, and apply their laws to manage themselves.

Indigenous legal scholar John Borrows identifies five sources of Indigenous law:

- **the sacred**, including origin stories and foundational understandings about creation and the Creator;
- teachings and observations from **the natural world**;
- patterns of behaviour developed over time as **customs**;
- binding proclamations, rules, or teachings from agreed-upon authorities (**positivist law**); and
- **deliberative** processes of collective reasoning, persuasion, and consensus-building. Deliberation is the proxy for all the other sources.[6]

Val Napoleon adds another source of authority for law, that of social interaction whereby we learn conduct through social settings and how we treat one another, so that we can predict general behaviours in large groups. These authorities are not watertight categories, nor are they exclusive to Indigenous Peoples. Many of these same sources are also at the root of common law and other legal traditions. Importantly, they all require human interpretation since law does not interpret itself.

In practice, multiple sources of authorities inform the development

> [T]here may be commonalities between different Indigenous legal principles and precedents, [but] the reasoning and legal structure that support those similarities can be vastly different.
>
> **Law Society of BC**

[6] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23-24. There are other definitions in the legal scholarship about these sources – custom, natural law, etc.

legitimacy, and application of specific laws. Indigenous laws often most visibly emerge from formal deliberative processes or the decisions of legal authorities.[7] These authorities and processes differ from society to society, but there are aspirations of law that are similar since law always has to do the hard work of law (e.g., fairness, dignity, inclusion, safety, etc.).

Proceedings in a Gitxsan Feast Hall,[8] for example, will not be the same as those in a Musqueam[9] or Kwakwaka'wakw Big House.[10] For some Indigenous Peoples, Indigenous legal authority may be held by elected and hereditary leaders, Elders and matriarchs, and/or other governing bodies.[11] The practices and decisions of elected leaders may draw on Indigenous sources of law for their legitimacy and effectiveness. In other cases, the authority of some leaders may be based in non-Indigenous sources (such as the federal *Indian Act*).

Resources for Learning About the Content of Indigenous Law

Legal resources are distinct from law's sources of authority: they are the places where one may go to find, learn, and interpret the law. In non-Indigenous societies, these resources are principally found in written form (e.g., books, articles, legal digests).

Written resources for learning about Indigenous laws are increasing in number. They are not the only or necessarily the best ways in which Indigenous laws are learned, taught, and recorded. Language, stories, names, connections to place, songs, art, dances, recognized witnesses, Elders and other knowledgeable people, and shared memories, among others, are all important ways in which Indigenous law is upheld and passed on. Some Indigenous legal resources require deep historic knowledge and immersion; others are accessible through community connections, consent, or permission; and others (like written works) are publicly available.

[7] *Ibid* at 35.
[8] See Kispiox Band, "Liligit (Feasts)". Online: https://www.kispioxband.ca/liligit.
[9] See the "The Blanket and the Bighouse", *Salish Sea Sentinel* (October 2016), Online: https://salishseasentinel.ca/2016/10/the-blanket-and-the-big-house/.
[10] For a description of a Kwakwaka'wakw Big House ceremony to govern the stewardship of the "Witness Blanket", a work undertaken by Kwakwaka'wakw/Coast Salish artist and master carver Carey Newman (Hayalthkin'geme), see Asch & Williamson, *supra* note 4 at 12.
[11] There are sometimes conflicts where people have not had the time to work the contemporary changes through their own legal processes. This can result in contradictions and sometimes confusion. See Val Napoleon Gitxsan Legal Personhood: Gendered, in George Pavlich, ed., *Interrupting the Legal Person* (2022) Studies in Law, Politics, and Society, Vol.87A, 19-32.

How do Indigenous Laws Operate Today?

Colonialism has undermined and damaged Indigenous legal orders; it did not erase them. Indigenous legal orders continue to exist and in some cases are being revitalized or rebuilt in response to the impacts of colonization. This work, including the growing development of written resources, is being undertaken by Indigenous Peoples themselves and through partnerships with research bodies such as the University of Victoria's Indigenous Law Research Unit and the Wahkotowin Law and Governance Lodge.[12]

Like all law, Indigenous laws are constantly evolving and adapting to reflect modern needs and the legacy of colonialism. Rebuilding processes are "not about trying to recreate conditions of the past or only to recreate past legal practices."[13] Indeed, Indigenous laws generally apply to the same subject matter areas as Crown laws.

Revitalization of Indigenous laws is occurring at different paces and in different sectors (e.g., family, land, water, governance, etc.) for different Indigenous Peoples and communities. The differences in these advances relate to history (e.g., over 400 years of colonialism on the east coast versus less than 150 years on the west coast), priorities, and opportunity and resources.

Aboriginal Law is Not Indigenous Law

Aboriginal law refers to the laws of the Crown (i.e., common and civil law) applied to the 'aboriginal peoples of Canada'.[14] Aboriginal law is expressed through legal mechanisms such as constitutional provisions relating to Aboriginal rights and title, legislation, and court decisions, and is interpreted using legal principles like:

- the **honour of the Crown**, which refers to the expected fair conduct of the Crown towards Indigenous Peoples;
- the **fiduciary duties** of the Crown, which concern the imbalance of power between Crown governments and Indigenous Peoples; and
- the Crown's **duty to consult and accommodate**.

[12] www.ilru.ca; www.wlgl.ca.
[13] Val Napoleon, "Did I break it? Recording Indigenous (Customary) Law" *PER / PELJ* 2019(22) - DOI http://dx.doi.org/10.17159/1727- 3781/2019/v22i0a7588 at p. 26.
[14] This is a term that derives its meaning from s. 35(2) of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11: "[A]boriginal people of Canada' includes the Indian, Inuit and Métis peoples of Canada."

The Relationship between Aboriginal Law and Indigenous Law

The interaction between Indigenous laws and Crown law is not new. Some of the earliest Canadian court decisions necessarily recognized the validity of Indigenous legal processes and institutions.[15] As the Supreme Court of Canada ("SCC") held in 1973 in *Calder v. BC*, Aboriginal title does not originate in the Proclamation of 1763, it originates in the fact that prior to colonization Indigenous communities, organized in societies, occupied the land.[16] Over 40 years later, in the *Tsilhqot'in* decision, the SCC articulated the continuing nature of Aboriginal title as including "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land." [17]

These decisions demonstrate some of the ways in which Indigenous laws have informed and influenced the development of Aboriginal law and the substance of Aboriginal and treaty rights and title. They also demonstrate that courts have treated Indigenous legal orders as evidence and not law, it is this evidence, that has, in turn, informed the development of Aboriginal law.[18] Fortunately, this is now changing, and courts are now drawing on Indigenous laws as a source of reasoning to resolve the problems they are dealing with.[19]

BC's *Declaration Act* sets the course for legislators to give effect to Indigenous laws to operate in a legally plural way alongside Crown laws. This is also an opportunity to develop and practice Aboriginal law in a manner that recognizes Indigenous law as a continuing part of the legal framework in Canada.

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/

[15] See for example *Connolly v Woolrich* (1867), 11 L.C.J. 197 (Que. S.C.), which found that a marriage between a Quebecois man and a Cree woman under Cree law was valid under the common law for the purposes of determining whether their children were entitled to a share of the man's estate.
[16] *Calder et al v. Attorney-General of British Columbia*, [1973] SCR 313 at 328.
[17] See *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 at para 73.
[18] As noted above, legal orders include a society's structure and organization of its legal traditions, including its laws, legal institutions and legal processes. To establish Aboriginal title, courts look for 'evidence' of things such as occupation, ownership, control or exclusive stewardship by a group all of which are the result of Indigenous laws (see *Tsilhqot'in* at para. 38). In other words, the way in which a society has structured its relationship to land and exercised occupation, control or exclusive stewardship come from the laws and legal processes of a society. Yet, these laws and processes are not always received by courts as such.
[19] Several judicial examples include Justice Grammond of the Federal Court Trial Division who has written that "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land..."19. *Pastion v Dene Tha' First Nation* 2018 FC 648. Other cases that are actually engaging with Indigenous law: *R v Ippak* 2018 NUCA 3 (Justice Berger, concurring reasons); *Beaver v Hill* 2018 ONCA 816; *Restoule v. Canada* (Attorney General) 2018 ONSC 7701 (Justice Hennessy); *Pastion v Dene Tha' First Nation* 2018 FC 648 (Justice Grammond); *Ontario Lottery and Gaming Corporation v. Mississaugas of Scugog Island First Nation* 2019 FC 813 (Justice Grammond); *Alderville Indian Band v Canada* 2014 FC 747); and *Clark v Abegweit First Nation Band Council* 2019 FC 721 (Justice Favel).

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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.

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