INDIGENOUS LAWS IN CANADIAN COURTS

A Statement from the Action Committee

Our Committee supports Canada's courts in their modernization efforts. It provides guidance for addressing challenges, and highlights opportunities and innovative practices to modernize court operations and improve access to justice for court users.

1. CONTEXT

Increasingly, Canadian courts are called upon to interact with Indigenous laws, either by recognizing their existence, appreciating their purpose and impacts, or considering how they may be meaningfully integrated into the Canadian legal system. Situations in which this may occur include considering the unique circumstances of an Indigenous offender when determining sentencing, effectively considering the best interests of an Indigenous child in family or child welfare matters, or interpreting treaties, land claim agreements, and other land transactions with a lens that is inclusive of Indigenous laws.

This development is the result of a number of factors, including:

- → domestic and international reports and recommendations concerning access to justice for Indigenous people
- → the development of Indigenous-focused policy and legislative initiatives
- → an expanding field of Indigenous legal scholarship
- → the revitalization of Indigenous laws
- → greater societal awareness of the importance of reconciliation
- → an increase in Indigenous judges and counsel participating in the Canadian justice system
- → growing judicial familiarity with Indigenous laws and initiatives such as sentencing circles, the involvement of Elders, and Indigenous Courtworker programs

However, this aspect of putting reconciliation into practice can be challenging for judges and court administrators who are unfamiliar with Indigenous laws or do not know how to appropriately engage with them. This guidance therefore aims to provide basic information to begin filling these gaps. As the target audience is judges and court staff who operate in the Canadian legal system, it focuses on the way in which courts may engage with Indigenous laws within the existing Canadian framework, rather than the equally important work of Indigenous Peoples and communities developing and managing their own legal orders. While focusing on the Canadian legal system, it does

not presume its superiority nor recommend Indigenous laws be transformed to fit within it.

2. WHAT ARE INDIGENOUS LAWS?

Across the world, laws share a common purpose of enabling groups of people to live together by helping manage human problems. Despite this overarching commonality of purpose, the details – substance, operational reality, or form – reflect the context in which each law was developed. For example, the Canadian legal system reflects historical developments between French and English control over the early development of the Canadian state, resulting in the presence of both common and civil law within the same legislative framework in an approach known as “bijuralism”.

In Canada, “Indigenous laws” are the laws made by Indigenous Peoples – First Nations, Inuit, and Métis Peoples – throughout history to present day. The origins and existence of Indigenous laws are not dependent on the Canadian state, but they may develop and change as a result of conversation with the Canadian legal system and courts. “Indigenous law” is the field of law that deals with laws developed by and for Indigenous people.

There is no universal Indigenous law because laws are specific to the context in which they develop, and Indigenous Peoples’s contexts comprise a range of experiences, circumstances, and communities. Just as Canada can be distinguished from other countries while also encompassing many smaller, distinct communities, diversity can exist both between Indigenous Peoples and within a single Nation or community. Indigenous laws can also be multilayered, and can include, for example, community-based laws, clan laws, and Nation-based laws. It is important to avoid importing dichotomous thinking prevalent in the Canadian legal system when interpreting Indigenous laws. The fact that a particular practice is done in a community in one way does not necessarily mean that those conducting that practice in another way are wrong. Indigenous legal orders generally embrace the notion of legal pluralism.

Indigenous laws are not:

- → merely limited to tradition or custom, although tradition and custom can provide valuable context for understanding them
- → frozen in the past
- → restricted to a particular form
- → only expressed within the framework of the Canadian legal system or by the extent to which an Indigenous law is integrated by the courts

→ independent from legal practice; like all laws, they are given effect through human interpretation

Indigenous laws are also distinct from Aboriginal law. In the Canadian context, Aboriginal law includes both 1) the body of jurisprudence relating to Aboriginal Peoples as defined under s. 35(1) of the *Constitution Act, 1982*; and 2) laws made pursuant to federal jurisdiction under s. 91(24) of the *Constitution Act, 1867* ("Indians and lands reserved for the Indians"). As discussed later in this guidance, bylaws developed by and for Indigenous communities pursuant to these statutes may draw on and express Indigenous legal principles.

Courts are most likely to encounter Indigenous laws in the context of criminal, child welfare, Aboriginal rights or title, and environmental impact assessment or resource extraction matters. However, because – just like everyone else – Indigenous people have needs, desires, and objectives ranging across all areas of human experiences, Indigenous laws exist to govern behaviour and relationships in any context.

For many years, it was believed that Indigenous communities did not develop their own laws prior to the arrival of Europeans, or that, if they did, these laws were fully eradicated by colonialism. Neither are true, although Indigenous laws were undermined and often damaged by the colonial aim of repressing and dismantling Indigenous Peoples. As such, understanding how Indigenous people are affected by the legacy of colonialism and systemic discrimination is essential to understanding their laws.

"Legal principles", in contrast to "laws", are fundamental ideas informing specific laws. This guidance therefore uses the broader term "Indigenous laws" to refer to both laws and legal principles, and "legal principles" only when referring specifically to these foundational ideas.

"Legal system" and "Indigenous legal order" are broad terms generally including, but not limited to, laws, legal principles, and legal processes. A particular legal system or Indigenous legal order will reflect the specific worldview in which it was developed and in which it continues to exist and evolve. The term "legal system" tends to be used to describe the Canadian approach in which law is a product of the state and developed by trained professionals such as judges and lawyers. It is understood as operating as a distinct institution. In contrast, an "Indigenous legal order" is not created or managed by the state, nor is it a professionalized institution that operates in isolation from other aspects of life.

3. LEGAL PRINCIPLES COMMON AMONG DIFFERENT INDIGENOUS LEGAL ORDERS

While the specific details, such as the corresponding term in a particular Indigenous language, will vary between communities, some general legal principles can be found across many Indigenous Peoples. As such, while it remains essential to always place a specific Indigenous law in its context, these commonalities can serve as an entry point into understanding this body of law.

The Canadian legal system often tends to treat legal relationships as a transaction between two parties with a definite beginning and end, subject to enforcement. Although some fields, such as family law, have embraced more collaborative approaches to problem-solving, proceedings are largely adversarial, with people positioned against either one another or, in the case of criminal law, the state. The Canadian approach to criminal law also emphasizes deterrence and sanction.

In contrast, many Indigenous communities manage social order through a proactive, relational perspective, with specific approaches varying by context. In practice, this can manifest through prioritizing:

→ **Respect:** a foundational principle, respect is deeper and more complex than civility or politeness. The basis for all relationships is respect for both those who have caused harm and those who are impacted by it, including their relations. This can be seen in legal processes that aim to uphold the dignity of all participants by approaching conflict resolution from a place of compassion, healing, learning, and the capacity to improve, rather than punishment. For example, a person who has caused harm may have the opportunity to restore their dignity and that of their family through work that seeks to deepen their understanding of community principles and how to live a good life. Examples of specific Indigenous legal processes centered on respect include smudging, prayer, blanketing ceremonies, and community discussions. The Action Committee's guidance on Indigenous Practices in the Courts, as well as the accompanying Repository of Canadian Examples, provide examples of incorporating these practices into Canadian courts' operations.

→ **Persuasion and prevention:** most Indigenous laws focus on guiding people in living a good life from birth, thereby aiming to minimize potential breaches of responsibility. Community – including learning from family and Elders – is critical for fostering an understanding of what this means and how to act accordingly. Conflicts can therefore be both prevented before they happen and resolved through persuasion when they do, as behaviour aligned with the good life is encouraged and supported rather than coerced.

→ **Relationships:** a central aspect of many Indigenous legal orders is that relationships are the source of reciprocal responsibilities. These legal orders rarely consider just relationships between humans, but rather are concerned with all beings including animals, water, land, skies, ancestors, and the spiritual realm. This approach can lead to a timeline for understanding and managing conflict that extends beyond the scale of human lifetimes and prioritizes enduring, respectful relationships even if disagreements still exist. This relational web means that a breach of responsibility may implicate others, such as the broader community or family members both living and dead, in addition to the people directly involved. Spirits and ancestors may be included in any form of Indigenous law or legal process. For example, they may be welcomed as part of ceremonies on the land or requested to join a sentencing circle.

4. DIFFERENT FORMS OF INDIGENOUS LAWS

In most legal systems, laws may take a variety of forms. For example, the Canadian legal system includes legislation and caselaw. Within caselaw, courts may decide a matter orally and may subsequently record the ruling in writing, or they may issue published decisions. Legislation is always written. The details of each type of law will be shaped by the context in which they are developed, such as the language used as well as whether a jurisdiction draws upon a civil or common law tradition. Regardless of form however, all laws are ultimately interpreted and applied by humans.

Some of the forms Indigenous laws can take include:

→ **Language:** sometimes Indigenous laws are written down, but – unlike Canadian law – they can also be passed down and shared orally. Maintaining an oral, as opposed to written, legal record may be particularly important for communities whose knowledge or information has been non-reciprocally extracted by outside people, organizations, or governments. Oral laws can also offer more flexibility for adapting to changing situations and a law's oral form can be an important part of its substance. For example, certain principles may lose nuance when transcribed, if the written form does not offer an exact analog. These challenges are further compounded when translation occurs in multiple layers, such as from oral to written within a given Indigenous language, then again to English or French. The identity of the person expressing themselves, or the context in which they do so, may also directly impact the substance of a law.

Caution is important in translation and transcription. However, focusing on the principle or idea to be conveyed rather than specific words is an important step towards maintaining thoughtful legal analysis while avoiding the inherent challenges in cross-language communication. Indigenous Peoples have always

communicated successfully across linguistic groups, and there is no insurmountable barrier to translating their legal principles into English or French.

→ **Thinking with stories:** stories can be expressed in literature-based or narrative forms, as well as song and dance. Often – but not always – oral, stories are a way of sharing important principles and laws. However, without access to a different way of thinking or deeper context, the purpose of the story or the law it contains may not be immediately apparent. To shift into the mindset required to understand story as law, consider how Canadian case law could also be understood as a form of stories in which laws are embedded and revealed.

→ **Legislation:** adopting the practices of the Canadian legal system, some Indigenous communities have also recorded laws in legislation. Indigenous laws in this form may be totally new legislation or may be by-laws pursuant to the *Indian Act* or other modern legislation pertaining to Indigenous Peoples. As these bylaws have been created by and for Indigenous people, they may draw on and express Indigenous legal principles.

Some forms of Indigenous laws can be especially challenging to understand for people who are used to law that is predominantly contained in words. In both of the following forms, the physical setting informs the content of the law in a way that is unfamiliar to Canadian courts.

→ **Land-based:** being physically present or engaging in specific practices on a community's land highlights the legal principle of a relational web connecting all beings. Laws can therefore be learned from interaction with and observation of the land from which they originate, just as they can be contained in and learned through stories.

→ **Embodied:** living the community's definition of the good life can be modeled by its members and serve as guidance, in particular from Elders and to youth. In addition to reflecting a preventative approach to social harmony, this form of law may also encompass people beyond those directly involved in a matter, in keeping with the broader relational aspect common to many Indigenous laws. Law can also be embodied, and transferred intergenerationally, through legal processes like ceremonies. People external to a community may have the opportunity to experience embodied law through visiting.

Indigenous laws will likely draw upon multiple forms. For example, a law may be understood by hearing stories from an Elder while being present on and observing the land. Another example might be participating in the construction of a sweat lodge and taking part in a sweat, with laws being expressed throughout, including through storytelling. As with Canadian law, Indigenous laws can also be collected in reference materials, whether primary (such as recordings of conversations with Elders) or

secondary (such as academic scholarship on Indigenous laws). As discussed below, it is important to consider the broader context surrounding these materials to better identify and seek to correct any biases. For example, a colonial framing of original transcripts or audio files collected by the state can influence how the information is perceived.

In addition to other resources listed in Annex 1, concrete examples and more details concerning specific Indigenous communities and their laws can be found in Developing an Indigenous Justice Strategy: A compilation of thought papers by Indigenous legal experts.

5. BEST PRACTICES FOR APPROACHING INDIGENOUS LAWS

Colonialism, systemic discrimination, and the imposition of the Canadian legal system have significantly undermined generations of Indigenous peoples' trust in the courts. Becoming informed and understanding Indigenous laws can be a powerful way to build and maintain respectful relationships in the face of this history. This process can be uncomfortable, challenging, and time-consuming, but could deliver more meaningful justice for Indigenous people and actively put reconciliation into practice. It may be helpful to think about this work as having two elements: 1) expanding one's knowledge base and ways of thinking; and 2) applying Indigenous laws to specific contexts.

This work will look different for judges and court administrators, but the following general tips may be useful for everyone working in the courts to keep in mind:

→ Indigenous laws are valid and legitimate laws, not merely evidence. Just as Canadian court procedures are legal processes, so too are Indigenous practices related to law. Ceremonies, which may include songs, feasts, or sweat lodge events are not only custom or tradition: they are embodiments of Indigenous laws.

→ Like Canadian law, Indigenous laws will also evolve over time in response to social and legal changes. Competence in any domain requires a continuous commitment to remain up to date; Indigenous laws are no different. The Canadian Judicial Council's *Ethical Principles for Judges* speak directly to knowledge of Indigenous laws and Peoples as essential to competent judging, for example at paragraph 8 on page 11; as well as 3.C.4 (page 31), and 4.C.3 (page 36).

→ Respectful and appropriate engagement with Indigenous laws requires critical legal analysis. Application of any law in isolation from the context and without principled reflection is not competent judging. For example:

- Establish the jurisdictional landscape before reviewing details of particular Indigenous laws
- Consider the extent to which power imbalances, including sexism, may inform how an Indigenous law is presented to the court

→ Each Indigenous person who interacts with the court has unique needs. Ensure they are comfortable with both the law being applied and the way it is applied. For example, some Indigenous people may not want their own laws to be applied by a non-Indigenous person in a Canadian court setting.

→ Consider how the court's history with respect to Indigenous Peoples may influence Indigenous court users' attitudes and approaches to interacting with the court.

→ Take into account any timeline modifications and resources required to better understand or give effect to an Indigenous law. Ensure such information informs scheduling and judgment-writing. This could occur when a judge uses their jurisdiction to allow a community to engage with the courts as a group of representatives rather than individually. For example, Elders who are providing evidence to support an Aboriginal title or land claim may request to testify as a panel. In addition, where a court seeks to learn about a community's laws generally, the community may request to offer a number of perspectives rather than identify one person to speak on behalf of everybody.

In addition to these general tips, the following actions provide a starting point for learning about, and engaging with, Indigenous laws. These actions are expanded upon in the Action Committee's Orienting Principles and Operating Practices on the Diverse Needs of Court Users.

5.1 Practice Self-Reflection

Engaging with Indigenous laws requires taking account of one's internalized beliefs. This includes recognizing how everyone's point of view – including one's own – is shaped by the context in which they were raised and educated. Judges and court administrators can practice self-reflection by:

→ acknowledging their own history

→ thinking about how their history shapes perspectives and filters information

→ critically examining initial reactions to different laws, legal systems, and legal orders for potential stereotypes and bias

5.2 Engage in Continuous Learning and Education

As outlined in Meeting the Diverse Needs of Court Users: Orienting Principles, adopting a learning orientation, taking a broad approach to learning, and incorporating self-reflection into the learning journey are all important steps towards gaining an understanding of different lived experiences and social and historical contexts. These principles are important because an Indigenous community will be the authority on its own laws.

Likewise, learning about a legal system or legal order different from one's own requires adopting an orientation of humility, remaining curious, and recognizing the limits of one's expertise. Making errors is part of the process and – when addressed in a way that does not further burden those affected – can provide useful learning opportunities.

When learning about Indigenous laws, it is useful to:

→ **Recognize the limits of comparison as a learning exercise:** do not try to force Indigenous laws into a Canadian legal framework or make pan-Indigenous generalizations. Consider both differences and commonalities with the aim of better understanding Indigenous laws on their own merits.

→ **Consider the source of materials:** secondary sources produced by non-Indigenous people will necessarily be filtered through the author's worldview. This type of content can provide helpful background information, but it is important to consider the extent to which colonialism and systemic discrimination may inform these accounts.

→ **Respect decisions not to share:** teaching others about laws involves considerable substantive and emotional work, and Indigenous people do not owe the courts their assistance. Respect the decision of an Indigenous person or community to refuse a request for teaching. If a community is willing to provide teaching, consider the tips in the Action Committee's publication on Understanding User-Centred Justice on engaging with local communities consistently and respectfully.

→ **Behave respectfully:** appropriate conduct will vary depending on the context. Consider the identity of the person or people being approached including, for example, status as an Elder, Knowledge Keeper, or other community leader, as well as broader principles or individual history with the Canadian legal system. Further details can be found in the Action Committee's guidance on Indigenous Elders in the Courts.

5.3 Practical Tips for avoiding conceptual pitfalls

Courts must provide Indigenous people with services of the same quality as they would to any other court users. Increasingly, fulfilling their obligations to this segment of the population requires meaningfully engaging with Indigenous laws. However, doing so based on biased assumptions or flawed analyses can lead to negative consequences, including: failing to apply relevant laws correctly; mislabelling something that is not actually an Indigenous law as such in official Canadian records; or demonstrating a lack of respect for Indigenous people and communities. The following practical tips can help avoid common conceptual pitfalls:

→ **Center the specific Indigenous People and community in question:** a pan-Indigenous approach treats all Indigenous Peoples and communities as interchangeable by applying laws, practices, or experiences from one context to another. For example, proceeding with smudging where it is not a practice of the Indigenous community, such as in an Inuit context. This can result in a loss of important complexities and nuance and, ultimately, could transform a law or legal process so severely that it no longer has value.

→ **Minimize the consequences of engaging with Indigenous laws outside of their original context:** analyze both the Indigenous law itself and the ways it could be warped through the Canadian legal system. The transformative effects of the Canadian legal system on Indigenous laws are often characterized as "severance" and "distortion":

> **Severance** occurs when an Indigenous law is removed from its original language, format, location, and processes. Some degree of severance may be unavoidable if Canadian courts are going to apply Indigenous laws, such as, for example: translating from the original language to English or French; transcribing an oral law to writing; and holding proceedings in a courtroom. However, it is important to be mindful of the negative effects severance can have on a community and their laws. For example, given the fluid nature of the oral form, translation, transcription, and application of an oral law will capture only a specific moment in time. This, in turn, may impede the natural evolution of language that is an important element of the oral form. Further, judgments offered only in English or French can exclude members of the affected Indigenous community who are fluent in neither. Courts can minimize the negative effects of severance on Indigenous laws and communities by considering the influence of these factors, including how multiple areas of severance can compound one another.
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> **Distortion** happens when Indigenous laws are interpreted entirely within the Canadian legal system, as variations of Canadian law. This can result in loss of nuance or elements that cannot be translated directly into the Canadian

context. Distortion can also be caused when explanations of Indigenous laws by non-Indigenous sources are taken at face-value and not critically examined in their broader context. For example, the Canadian legal system has historically evaluated the authenticity of Indigenous laws depending on how similar they were to an imagined, non-Indigenous idea of the past. This view fails to recognize that, like any legal system or legal order, Indigenous laws continue to change and evolve.

→ **Respect Indigenous legal authorities:** when a judgment applying an Indigenous law becomes part of the Canadian legal system's official record, there is a risk that it will be used as the authority on that matter going forward. Even if correct, neither the judge nor the judgment should replace the relevant Indigenous authorities. Courts can respect Indigenous Peoples' authority over their own laws by not repeating the extractive practices that many Indigenous communities have experienced like taking information, such as stories, legal principles, and laws, without seeking consent or providing anything in return. Recognizing Indigenous Peoples' knowledge about their own community, members and circumstances more broadly can help courts avoid adopting a paternalistic approach.

ANNEX 1: FURTHER RESOURCES

Here is a non-exhaustive list of resources on the topic of Indigenous laws and legal principles. The Action Committee shares this selection as a starting point for those interested in deepening their learning on this topic and does not necessarily endorse all views expressed. While the older publications included provide relevant context, it is important to remain up to date on developments in the scholarship. As the present guidance emphasizes, a contextual approach centered on the specific laws, legal principles, and community in question is essential.

Training Materials

Law Society of BC Professional Legal Training Course 2025, Practice Material: Introduction to Indigenous Law, Jessica Asch and Tara Williamson (2025)

A Duty to Act, The Honourable Chief Justice Robert J. Bauman (2021)

The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice, The Honourable Chief Justice Lance S. G. Finch (2012)

Practical Guidance

Indigenous Laws and Legal Orders Case Reference List, Federal Court (2023)

Developing an Indigenous Justice Strategy: A compilation of thought papers by Indigenous legal experts, contributions from Sarah Morales, Elizabeth Zarpa and Sarah Arngna'naaq, Kerry Sloan, and Aaron Mills; compiled by the Department of Justice (2023)

Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws, Hadley Friedland (2012)

Academic Materials

To Light a Candle: A Solution-Focused Approach toward Transforming the Relationship between Indigenous Legal Traditions and the Criminal Justice System, Hadley Friedland (2023)

Five Linguistic Methods for Revitalizing Indigenous Laws, Naiomi Walqwan Metallic (2023)

Recognizing Indigenous Law: A Conceptual Framework, The Honourable Justice Sébastien Grammond (2022)

Indigenous Law in Canada, The Honourable Justice Leonard S. (Tony) Mandamin (2021)

Did I Break It? Recording Indigenous (Customary) Law, Val Napoleon (2019)

Miyo Nêhiyâwiwin (Beautiful Creeness): Ceremonial Aesthetics and Nêhiyaw Legal Pedagogy, Darcy Lindberg (2018)

What Is Indigenous Law? A Small Discussion, Val Napoleon (2016)

Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape, Lindsay Borrows (2016)

Waniskā: Reimagining the Future with Indigenous Legal Traditions, Hadley Friedland (2016)

More broadly, an array of curated reference materials (including some of the above) are offered in the following resource libraries:

- Wahkohtowin Law and Governance Lodge (University of Alberta, Faculty of Law)
- Indigenous Legal Research Unit (University of Victoria, Faculty of Law)