

The Law Society
of British Columbia



Approved by the Benchers
September 23, 2022

Indigenous Framework Report

Truth and Reconciliation Advisory Committee

Katrina M.L. Harry (Co-chair)

Christopher A. McPherson, KC (Co-chair)

Brian B. Dybwad

Kelly H. Russ

Barbara Stanley, KC

Michael F. Welsh, KC

Terri-Lynn Williams-Davidson, KC

September 12, 2022

Prepared for: Benchers

Prepared by: Truth and Reconciliation Advisory Committee

Purpose: For Decision

Purpose

This report recommends an Indigenous framework to be endorsed by the Benchers. The framework is prepared to help guide the Law Society in its application of the *Legal Profession Act (Act)*, Law Society Rules (Rules), and the *Code of Professional Conduct for BC (Code)* or any future legislation regulating the legal profession in a manner that will advance the principles of reconciliation with Indigenous Peoples.¹

Proposed resolution

BE IT RESOLVED

that the Benchers endorse the principles set out below in this report as a framework to guide the Law Society's application of the *Act*, Rules, *Code*, policies, procedures, and practices.

Background

A key goal in the Law Society's Strategic Plan is implementing initiatives to take meaningful action toward reconciliation with Indigenous Peoples in the justice system. In furtherance of that goal, the Truth and Reconciliation Advisory Committee's (Committee) mandate letter calls on the Committee to:

1. Make recommendations on how the Law Society can support the advancement of the principles set out in the *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*,² the First Nations Justice Strategy,³ and the Truth and Reconciliation Commission's Calls to Action,⁴ and
2. Review the *Act*, Rules, and *Code* and make recommendations to address systemic biases.

The British Columbia government has recently announced that: 1) all legal professionals will be governed through a single regulatory body under new legislation; and 2) through the *DRIPA* Action Plan, BC will "implement improvements to public...complaints processes...and new models for including Indigenous laws in complaints resolution."⁵

¹ "Indigenous Peoples" is a collective term referring to distinct social groups that share ancestral ties to specific territories. Where appropriate, "Indigenous individuals" is used to refer to individual Indigenous people.

² [DRIPA](#)

³ [BC First Nations Justice Strategy](#)

⁴ [TRC Calls to Action](#)

⁵ [DRIPA_action_plan.pdf, Action Item 3.10.](#)

The initiative of developing a framework of guiding principles arose in light of these announcements. Rather than conducting a detailed analysis of the existing regulatory regime that will soon change, the Committee reached the conclusion, and recommends, that it would be more effective to create a high level framework to guide the application of the Law Society’s *Act*, Rules, *Code*, policies, procedures, and practices, whether in the current or amended format, in a way that will promote the principles identified in the mandate letter and alleviate systemic barriers. In addition, the Committee hopes that the principles will influence the protection of Indigenous interests in the new legislation that is being developed by the Province.

Process

The draft principles were distilled from the Law Society’s Strategic Plan⁶ and Truth and Reconciliation Action Plan,⁷ and have been enhanced with principles from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁸ the TRC Calls to Action, and the BC First Nations Justice Strategy. The draft principles were presented to both the Committee and the Indigenous Engagement in Regulatory Matters Task Force for feedback. Their feedback was incorporated, and refined principles were considered by the Committee. The Committee has developed and unanimously endorsed the resolution that is being proposed to the Benchers.

Principles

The principles listed below underlie the Law Society’s existing commitments (as set out in legislation, the Strategic Plan, and the Action Plan) and should guide the Law Society’s application of the *Act*, Rules, *Code*, policies, procedures, and practices. The commentaries provide additional context to assist in the application of the principles, but are not intended to create additional commitments.

Principle 1: The Law Society complies with the adage: “Nothing about us without us,” and will ensure that Indigenous individuals are engaged in the development of policy proposals or decisions that may affect Indigenous interests.

Commentary 1: The Law Society has committed to increasing Indigenous representation at all levels, including in its governance, tribunals, committees, employment, and membership.

⁶ [Strategic Plan 2021-2025 \(lawsociety.bc.ca\)](https://lawsociety.bc.ca/strategic-plan-2021-2025) (Strategic Plan)

⁷ [TruthandReconciliationActionPlan2018.pdf \(lawsociety.bc.ca\)](https://lawsociety.bc.ca/truthandreconciliationactionplan2018.pdf)

⁸ [UNDRIP](https://www.unhcr.org/refugees-and-asylum-seekers/2018/12/undrip)

Commentary 2: Effective Indigenous engagement requires the active inclusion⁹ of Indigenous individuals in genuine discussions, and responsiveness to Indigenous concerns.

Commentary 3: Any contemplated conduct that may affect Indigenous interests will engage Indigenous individuals at the earliest stage possible (i.e. as soon as any potential impact on Indigenous interests becomes apparent).

Commentary 4: The Law Society has established a practice of including an Indigenous panelist in any regulatory matter that involves an Indigenous person as a complainant, witness, or respondent, and Principle 1 supports and formalizes this practice.

Commentary 5: The enhancement of cooperative relationships with Indigenous Peoples, individuals, and organizations¹⁰ is necessary to facilitate Indigenous engagement regarding the development of Law Society policy proposals or decisions that may affect Indigenous interests.

Principle 2: The Law Society is mandated to protect the public interest in the administration of justice, and acknowledges that Indigenous individuals are members of the public with unique histories and specific constitutional recognition.

Commentary 1: Colonial laws have been harmful to Indigenous Peoples, individuals, and territories; the *Act*, Rules, *Code*, policies, procedures, and practices are meant to protect, not harm, Indigenous Peoples, individuals, and territories.

Commentary 2: The Law Society's longer term objective of improving the intercultural competency of all lawyers in BC is meant to help facilitate the transformation of Canada's legal system into an instrument of empowerment for Indigenous Peoples, individuals, and territories.

Principle 3: The Law Society acknowledges that Indigenous cultures, societies, traditions, governance systems, and laws continue to exist.

Commentary 1: The Law Society values Indigenous efforts to revitalize Indigenous legal systems, and encourages all lawyers in BC to better understand Indigenous laws and their potential applicability within the common law system.

Commentary 2: The Law Society's Indigenous Engagement in Regulatory Matters Task Force is considering possible approaches to making space for Indigenous laws within the Law Society's regulatory processes.

⁹ "Active inclusion" requires the opportunity to fully participate in discussions.

¹⁰ E.g. the BC First Nations Justice Council and Métis Justice Council of BC.

Principle 4: The Law Society regards Indigenous individuals as equal to all other people.

Commentary 1: Colonization has entrenched the racist “twin myths” of colonial superiority and Indigenous inferiority. The application of the *Act*, Rules, *Code*, policies, procedures, and practices must respect Indigenous individuals as equal to non-Indigenous people.

Commentary 2: Indigenous individuals have the right to non-discrimination that goes beyond equality. Non-discrimination requires the elimination of biases, attitudes, and behaviours that negatively impact Indigenous individuals. Anti-bias training for all Law Society Benchers, staff, panel members, and committee members, and all lawyers in British Columbia is encouraged.

Commentary 3: Indigenous individuals are entitled to substantive equality, which may require additional supports for Indigenous individuals to counteract the negative impacts of colonialism.

Principle 5: The Law Society respects the distinctiveness amongst Indigenous Peoples, individuals, and territories.

Commentary: Pan-Indigenous approaches must be avoided with respect to the accommodation of Indigenous interests in the application of the *Act*, Rules, *Code*, policies, procedures, and practices.

Principle 6: The Law Society understands that credibility requires follow through on its commitments, and that its commitments are ongoing.

Commentary 1: Publicizing regular progress reports to demonstrate that meaningful action is taking place is key to the development of credibility.

Commentary 2: Continual review, evaluation, and renewal of commitments is important to maintain credibility.

Analysis

The framework has been drafted so as not to create any new legal obligations or commitments, but rather to set out previously endorsed principles into a single document in order to facilitate their implementation by Law Society representatives (including Benchers, panel members, committee members, staff, and, insofar as possible, contractors). The chart below compares the principles and commentaries with the Law Society’s prior obligations and commitments.

Principles and commentaries	Prior obligations and commitments
<p>Principle 1: The Law Society complies with the adage: “Nothing about us without us,” and will ensure that Indigenous individuals are engaged in the development of policy proposals or decisions that may affect Indigenous interests.</p> <p>Commentary 1: The Law Society has committed to increasing Indigenous representation at all levels, including in its governance, committees, tribunals, employment, and membership.</p> <p>Commentary 2: Effective Indigenous engagement requires the active inclusion of Indigenous individuals in genuine discussions, and responsiveness to Indigenous concerns.</p> <p>Commentary 3: Any contemplated conduct that may affect Indigenous interests will engage Indigenous individuals at the earliest stage possible (i.e. as soon as any potential impact on Indigenous interests becomes apparent).</p> <p>Commentary 4: The Law Society has established a practice of including an Indigenous panelist in any regulatory matter that involves an Indigenous person as a</p>	<p>Action Plan, Action 1.v. states: The Law Society will be more inclusive of Indigenous people¹¹ by:</p> <ul style="list-style-type: none"> • Requesting that the government of British Columbia appoint an Indigenous benchers; • Ensuring Indigenous representation on Law Society committees; • Recruiting Indigenous Benchers, committee members, and staff; and • Connecting with Indigenous communities.¹² <p>The timing of engagement (as soon as any potential impact on Indigenous interests becomes apparent) is consistent with jurisprudence regarding Indigenous consultation and accommodation; Indigenous engagement should occur early so that Indigenous perspectives have influence through the entire decision-making process (rather than later, after key decisions have already been made).</p> <p>Including the phrase “as early as possible” anticipates logistical considerations that may preclude immediate Indigenous involvement.¹³</p>

¹¹ This is a direct quote from the 2018 Truth and Reconciliation Action Plan (Action Plan), which used small caps “people” to refer to Indigenous individuals.

¹² This is also a direct quote from the Action Plan. Since then, consultees for the Indigenous Engagement in Regulatory Matters Task Force have recommended that the Law Society build relationships with Indigenous organizations (such as the BC First Nations Justice Council and Métis Justice Council) as a precursor to connecting with Indigenous Peoples or communities.

¹³ E.g., the Law Society currently has an underrepresentation of Indigenous employees as compared to the Indigenous population of BC. If an Indigenous person makes a complaint, the Law Society may not be able to immediately arrange for an Indigenous investigator to investigate the complaint. The Law Society has already committed to increasing Indigenous representation at all levels, and the Indigenous Engagement in Regulatory Matters Task Force is developing recommendations to improve the Law Society’s complaints, investigations, and discipline processes with regard to Indigenous complainants and witnesses.

<p>complainant, witness, or respondent, and Principle 1 supports and formalizes this practice.</p> <p>Commentary 5: The enhancement of cooperative relationships with Indigenous Peoples, individuals, and organizations is necessary to facilitate Indigenous engagement regarding the development of Law Society policy proposals or decisions that may affect Indigenous interests.</p>	<p>Action Plan, Action 3 states: The Law Society will increase the involvement of Indigenous people in Law Society governance by:</p> <ul style="list-style-type: none"> • Requesting that the government of British Columbia appoint an Indigenous benchers; • Assigning Indigenous individuals to Law Society committees; • Fostering engagement with Indigenous communities; and • Enriching relations with Indigenous lawyers.
<p>Principle 2: The Law Society is mandated to protect the public interest in the administration of justice, and acknowledges that Indigenous individuals are members of the public with unique histories and specific constitutional recognition.</p> <p>Commentary 1: Colonial laws have been harmful to Indigenous Peoples, individuals, and territories, and the <i>Act</i>, <i>Rules</i>, <i>Code</i>, policies, procedures, and practices are meant to protect, not harm, Indigenous Peoples, individuals, and territories.</p> <p>Commentary 2: The Law Society’s longer term objective of improving the intercultural competency of all lawyers in BC is meant to help facilitate the transformation of Canada’s legal system into an instrument of empowerment for Indigenous Peoples, individuals, and territories.</p>	<p>Section 3(a) of the <i>Legal Profession Act</i> states: “It is the object and duty of the society to uphold and protect the public interest in the administration of justice...”</p> <p>Action Plan, Commitment 1 states: the Law Society of British Columbia commits to: “Improving the legal profession’s understanding of the detrimental impacts of the imposition of colonial laws and policies on Indigenous peoples.”</p> <p>Paragraph 11 of the Indigenous Intercultural Report affirms the TRC’s direction that: “In Canada, law must cease to be a tool for the dispossession and dismantling of Aboriginal societies [...and become] an instrument supporting Aboriginal...empowerment.”</p>
<p>Principle 3: The Law Society acknowledges that Indigenous cultures, societies, traditions, governance systems, and laws continue to exist.</p> <p>Commentary 1: The Law Society values Indigenous efforts to revitalize Indigenous legal systems, and encourages all lawyers in</p>	<p>Action Plan Commitments 2 and 3 state the Law Society commits to:</p> <p>2. Fostering the legal profession’s respect for Indigenous individuals, institutions, and laws;</p>

<p>BC to better understand Indigenous laws and their potential applicability within the common law system.</p> <p>Commentary 2: The Law Society’s Indigenous Engagement in Regulatory Matters Task Force is considering possible approaches to making space for Indigenous laws within the Law Society’s regulatory processes.</p>	<p>3. Increasing the legal profession’s appreciation of the applicability of Indigenous laws within the Canadian legal system.</p> <p>The Strategic Plan also identifies the strategic objective to update the Rules and <i>Code</i> to reflect Indigenous law.</p>
<p>Principle 4: The Law Society regards Indigenous individuals as equal to all other people.</p> <p>Commentary 1: The application of the <i>Act</i>, Rules, <i>Code</i>, policies, procedures, and practices must respect Indigenous individuals as equal to non-Indigenous people.</p> <p>Commentary 2: Indigenous individuals have the right to non-discrimination that goes beyond equality. Non-discrimination requires the elimination of biases, attitudes, and behaviours that negatively impact Indigenous individuals. Anti-bias training for all Law Society Benchers, staff, panel members, and committee members, and all lawyers in British Columbia is encouraged.</p> <p>Commentary 3: Indigenous individuals are entitled to substantive equality, which may require additional supports for Indigenous individuals to counteract the negative impacts of colonialism.</p>	<p>Section 15(1) of the <i>Charter</i> states:</p> <p>“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” “Indigenous identity” is a prohibited ground of discrimination in the <i>BC Human Rights Code</i>.</p> <p>Action Plan, Action 4 states: “The Law Society of will improve the intercultural competence of Benchers, staff, and committee members, and all lawyers and Admission Program candidates in BC by mandating Indigenous intercultural competence education.” The Indigenous Intercultural Course contains components on biases, micro-aggressions, and systemic racism.</p> <p>The Supreme Court of Canada characterizes the guarantee of equality as substantive: “the concept of equality does not necessarily mean identical treatment and ‘like treatment’ may in fact produce inequality.” (<i>R. v. Kapp</i>, [2008] 2 S.C.R. 483 at paragraph 15).</p>

<p>Principle 5: The Law Society respects the distinctiveness amongst Indigenous Peoples, individuals, and territories.</p> <p>Commentary: Pan-Indigenous approaches must be avoided with respect to the accommodation of Indigenous interests in the application of the <i>Act</i>, Rules, <i>Code</i>, policies, procedures, and practices.</p>	<p><i>DRIPA</i> refers to a distinctions-based approach with respect to Indigenous Peoples, and the Strategic Plan contains an objective to: “Support the advancement of the principles set out in <i>DRIPA</i>.” To align with <i>DRIPA</i>, the Law Society should apply a distinctions-based approach.</p>
<p>Principle 6: The Law Society understands that credibility requires follow through on its commitments, and that its commitments are ongoing.</p> <p>Commentary 1: Publicizing regular progress reports to demonstrate that meaningful action is taking place is key to the development of credibility.</p> <p>Commentary 2: Continual review, evaluation, and renewal of commitments is important to maintain credibility.</p>	<p>Action Plan, Action 5: The Law Society will regularly review, evaluate, and report on its progress.</p> <p>Action Plan, Action 6: In recognition that truth and reconciliation are ongoing and long term endeavors, the Law Society will ensure the Action Plan maintains relevance by: adapting the Action Plan in response to regular reviews, progress evaluations, and emerging Indigenous legal issues.</p>

Because the Law Society is legally bound by Principles 2 and 4, and has already committed to Principles 1, 3, and 6, the Committee has concluded that the principles do not create any new obligations for the Law Society. Principle 5 regarding the diversity of Indigenous Peoples is the only new principle, and it aligns with the distinctions-based approach set out in *DRIPA*.

Taken together, the principles constitute an assessment tool to ensure that the Law Society is meeting its legal obligations under the *Act*, Rules, *Code*, policies, procedures, and practices, and its prior commitments under the Strategic Plan and Truth and Reconciliation Action Plan with respect to Indigenous Peoples. The principles should help to avoid risks, and are not intended to add responsibilities or costs beyond what is already required. The Principles may also help to inform the Province’s development of legislation for a unified legal regulator.

Recommendation

The Committee recommends that the Benchers endorse the principles as a framework to guide the Law Society’s application of the *Legal Profession Act*, Law Society Rules, *Code of*

Professional Conduct for BC, policies, procedures, and practices as set out in the proposed resolution above.

Subsequent Steps

If endorsed by the Benchers, the Committee recommends that the principles be:

1. Publicized and shared with Law Society representatives (including Benchers, panel members, committee members, staff, and contractors);
2. Included in training materials for Law Society representatives; and
3. Used in the Law Society's application of the *Act*, Rules, *Code*, policies, procedures, and practices.

/AH