CAUTION

The **Professional Legal Training Course (PLTC)** provides the *Practice Material* to users as an aid to developing entry-level competence, with the understanding that neither the contributors nor **PLTC** are providing legal or other professional advice.

Practice Material users must exercise their professional judgment about the accuracy, utility and applicability of the material. In addition, the users must refer to the relevant legislation, case law, administrative guidelines, rules, and other primary sources.

Forms and precedents are provided throughout the *Practice Material*. The users also must consider carefully their applicability to the client's circumstances and their consistency with the client's instructions.

The Law Society of British Columbia and **PLTC** can accept no responsibility for any errors or omissions in the *Practice Material* and expressly disclaim such responsibility.

Professional Legal Training Course 2026

Practice Material

Introduction to Indigenous Law

Prepared by **Jessica Asch and Tara Williamson**,
Indigenous Law Research Unit – University of Victoria Faculty of Law

Printed for the May 2026 Session
of the Professional Legal Training Course

Law Society
of British Columbia

A requirement for admission to the bar of British Columbia, the Professional Legal Training Course is supported by grants from the Law Society of British Columbia and the Law Foundation of British Columbia.
© 2026 The Law Society of British Columbia. See lawsociety.bc.ca >Terms of use.

Introduction to Indigenous Law

Table of Contents

Acknowledgments 2

How to Approach and Use These Materials 2

1. Introduction to Indigenous Law 3
2. Sources and Resources of Indigenous Law 5
    a) Sources of Indigenous Law 5
    b) Legal Resources for Indigenous Law 7
3. The Importance of Learning and Revitalizing Indigenous Law 8
4. The Relationship between Aboriginal Law and Indigenous Law 10
5. The Relationship between Indigenous Law and Canadian Law 11
    a) The Witness Blanket 12
    b) Dáduqvḷá qṇtxv Ǧviḷásax̌ˇ — Heiltsuk Tribal Council 12
    c) Nłeʔképmx and Syilx Laws of Water and Watershed Governance 13
    d) Tsleil Waututh — Kinder Morgan/TMX Expansion Project 13
6. The Ethics of Engaging with Indigenous Law 13
    a) Commitment to Learn 14
    b) Issue Identification 15
    c) Recognizing When the Lawyer Lacks Competence to Act 15
7. Resources 16

Acknowledgments

These materials were prepared in March 2022 by Jessica Asch and Tara Williamson of the Indigenous Law Research Unit, which is housed at the University of Victoria's Faculty of Law. For more information about the Indigenous Law Research Unit, see www.ilru.ca. The authors acknowledge and thank David Gill, Alex McArdle and Cheyenne Arnold-Cunningham for their research and editing assistance, and Simon Owen and Annie Rochette for providing helpful feedback on these materials. The authors acknowledge and thank Carey Newman (Hayalthkin'geme) for reviewing the excerpt about the Witness Blanket contract, Eva Tom for reviewing the excerpt about the Nłeʔképmx and Syilx Laws of Water and Watershed Governance project, the Heiltsuk Tribal Council for reviewing the excerpt about Dáduqvḷá qṇtxv Ǧviḷásax̌ and Erin Hanson for clarifying and sharing the excerpt about Tsleil-Waututh Nation's intervention in the TMX Expansion Project.

How to Approach and Use These Materials

While Indigenous Peoples have been practising Indigenous law since before remembered time, defining Indigenous law as a practice area (like family law or real estate law), or even as a conceptual category (in comparison to Canadian common law or civil law) is a live topic amongst practitioners, community members/leaders, professional bodies, and scholars. Discussions about regulation, codes of ethics, governance, and supervisory bodies are just some of the conversations being had as this material is being written.

This material includes references to some of the leading scholars in the field, as well as examples of Indigenous law in practice from some specific Indigenous legal orders. However, these ideas and examples are not, by any means, meant to be an exhaustive inventory of what is happening in the world of Indigenous law. Instead, students should approach these materials as an introduction to a complex field of law that is in its early stages of translation.

For students who want a more in-depth understanding of Indigenous law, the footnotes and references are rich with deeper reading and conversation. For students who are interested in staying apprised of current developments and issues in Indigenous law in Canada, resources will be provided at the end of this material.

1. Introduction to Indigenous Law

When thinking about Indigenous law, it is helpful to think about the nature and definition of law itself. Some definitions of law are narrow, confined to the decisions or legislation originating from authorities such as courts or legislatures. In orienting a conversation around Indigenous law, we start with a broader understanding of law, one that finds law in the way people in a society legitimately and authoritatively solve problems, make decisions, create safety and maintain or repair relationships.[1]

Definitions

In this paper, the term ***Indigenous law*** refers to the reasoned principles and processes that Indigenous societies used and still use to govern themselves. In Canada, Indigenous law pre-dates the common and civil law systems, and continues to evolve, adapt and apply to circumstances today. Although Indigenous law, as a broad concept, has become the common way to refer to the diverse Indigenous legal orders across Canada, it is misleading in that it implies there is one singular or universal Indigenous law that applies across different Indigenous nations and communities. In fact, each society's law is distinct and informed by its unique history, territories, and economic, social and political structures and realities.[2] It is more appropriate to refer to a specific society's law, such as Cree law, or Dene law, rather than Indigenous law. As with Canadian law, there are specific areas of law within each Indigenous legal tradition. For example, the Cree legal tradition will have different legal principles and processes to apply to questions respecting lands, harms and injuries, human rights, or children.

[1] Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015–2016) 1:1: Lakehead LJ 16 at 20, 36. See also 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 227, online: Oxford Handbooks Online <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199673599.001.0001/oxfordhb-9780199673599-e-11?rskey=0ro24F&result=1> [perma.cc/WWE4-KKUZ] [Napoleon & Friedland, "Indigenous Legal Traditions"].

[2] Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019) at 4-5.

Indigenous law forms within, and forms part of, ***Indigenous legal traditions***. John Merryman defines "legal traditions" as 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."[3] 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.[4]

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).[5]

Although there may be commonalities between different Indigenous legal principles and precedents, the reasoning and legal structure that support those similarities can be vastly different. For this reason, it is important to be as specific and accurate as possible when describing and engaging with Indigenous law (by referring to the law by name, for example, Gitxsan law, Secwépemc law, Nuu-Chah-Nulth law) and reject pan-Indigenous characterizations about Indigenous law. It is preferable to use the word that most closely resembles the concept of law in a particular people's language, for example "ayook", meaning law, custom or precedent in Gitxsan, or "snuw'uyulh", which means "our way of life" or "our way of being on Mother Earth" in Hul'qumi'num.[6]

As already stated, Indigenous laws and legal orders pre-date Canada and the Canadian legal system, and have persisted notwithstanding centuries of attempts to undermine and minimize them.[7] Colonial beliefs, policies and laws perpetuate myths about Indigenous Peoples and laws. In Canada, the doctrine of discovery and concept of *terra nullius* (the view that no one owned the land prior to the European assertion of sovereignty) were used to justify the occupation of Indigenous territories in Canada (and around the world) and laid the foundation for a narrative of Indigenous people as being "uncivilized" and therefore lawless.[8] In 2014, the Supreme Court of Canada affirmed that Canada was not *terra nullius,* and that the doctrine of *terra nullius*

[3] John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 2nd ed. (Stanford: Stanford University Press, 1985) at 1.

[4] 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 [Napoleon, "Thinking About Indigenous Legal Orders"]; Napoleon & Friedland, "Indigenous Legal Traditions", *supra* note 1 at 5.

[5] Napoleon, "Thinking About Indigenous Legal Orders", *supra* note 4 at 231.

[6] *Ibid.* at 230; Sarah Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Dissertation, University of Victoria, 2014) [unpublished] at 46-47 [perma.cc/5PZK-Z768] [Morales, *Snuw'uyulh*].

[7] Napoleon & Friedland, "Indigenous Legal Traditions", *supra* note 1 at 3-4.

[8] *Ibid.* at 3-4, 11.

should not have been applied.[9] However, the ongoing practice of "the original, unlawful assertion of sovereignty seamlessly persists in the language woven through colonial law."[10]

As a result of this colonial history and legacy, Indigenous law is not always immediately visible or comprehensively functioning today.[11] Harmful, false and racist myths about Indigenous lawlessness persist. Nevertheless, we are in a period of Indigenous legal revitalization in which Indigenous nations and communities are making concerted efforts to re-state, articulate, practise, and apply their respective laws alongside or instead of imposed Canadian laws.[12]

In this material, we look more closely at Indigenous law as it relates to the competent practice of law in British Columbia. We will look at some of the sources and resources of Indigenous law, consider the importance of revitalization, and distinguish Indigenous law from Aboriginal law. Finally, we will look at the ethical duties of members of the legal profession in relation to engaging with Indigenous laws. However, because of the diversity of Indigenous legal orders and laws, we cannot speak of, let alone teach, a monolithic body of "Indigenous law," as one might for "real estate law" or "wills and estates law." Instead, in the words of former Chief Justice Lance S.G. Finch, we refer to the legal profession's "duty to learn" about Indigenous laws.[13]

2. Sources and Resources of Indigenous Law

a) Sources of Indigenous Law

All laws flow from a place or multiple places of authority, including laws within Indigenous legal traditions. The underpinnings, or sources, of Indigenous law are "…entwined with the social, historical, political, biological, economic, and spiritual circumstances" of different Indigenous peoples and communities.[14] As John Borrows emphasizes, there are many sources of Indigenous law, and "Indigenous peoples hold diverse theories about what gives law its binding force." [15] This is also the case with similar theoretical questions within other legal traditions. Borrows points out that "Canada could be characterized as a juridically pluralistic state because it draws on many sources of law to sustain order."[16]

---

[9] *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at para. 69.

[10] Hadley Friedland, Bonnie Leonard, Jessica Asch & Kelly Mortimer, "Porcupine and Other Stories: Legal Relations in Secwépemcúlecw" (2018) 48:1 RGD 153 at 172.

[11] Val Napoleon, "Legal Pluralism and Reconciliation" (November 2019) Māori L Rev 1 at 5-6 [Napoleon, "Legal Pluralism and Reconciliation"].

[12] Napoleon & Friedland, "Indigenous Legal Traditions", *supra* note 1 at 7, 13-14.

[13] Honourable Chief Justice Lance S.G. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper delivered at the Continuing Legal Education Society of British Columbia's Indigenous Legal Orders and the Common Law Conference, 15 November 2012), at para. 15 [Finch C.J., "Duty to Learn"].

[14] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23-24 [Borrows, *Canada's Indigenous Constitution*].

[15] *Ibid.* at 24.

[16] *Ibid.* at 23.

Borrows identifies five sources of Indigenous law. These sources are not separate, nor do they operate in silos, as "…Indigenous legal traditions usually involve the interaction of two or more…sources…In fact, in practice it would be hard to separate them from one another."[17] The five sources are: "sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices, and local and national customs."[18]

First, sacred law stems from ancient teachings, creation stories and foundational understandings about creation and the Creator "that have withstood the test of time."[19] As Borrows points out, spiritual principles are part of most legal traditions in the world, including Canadian law, which draws upon religion in the preamble to its Constitution.[20] While there is no doubt that the sacred is a source of Indigenous law, not all Indigenous law should be categorized as sacred. This is an important distinction, as laws that are considered sacred are often viewed as being unassailable or unchangeable. An inherent danger of such a perspective is that it reduces human beings to legal actors who are merely following rules, rather than fostering and normalizing legal actors who are responsible for interpreting, debating, reasoning through and applying the law.[21]

The second source of law, natural law, refers to law that is drawn from the observations of the natural world, including analogies and legal reasoning drawn from how animals and other non-human life interact with one another.[22]

The third source of law, deliberative law, is "formed through processes of persuasion, deliberation, council, and discussion."[23] Borrows refers to the debating, interpreting and talking that people do as the "proximate source of law," as opposed to natural or sacred sources that may form the "backdrop" to those discussions.[24]

The fourth source of Indigenous law is positivistic law. Positivistic law includes "the proclamations, rules, regulations, codes, teachings, and axioms" that people understand as governing or binding their behaviour.[25]

A fifth source of law that Borrows identifies is customary law, which refers to the "practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them."[26] Borrows emphasizes that customary law, while often a "label that most people would likely give Indigenous law if they were unfamiliar with the complexity of these societies' social organization" is also a source of binding authority in the common law,

---

[17] *Ibid.* at 24.

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.* at 24-25.

[21] Napoleon, "Thinking About Indigenous Legal Orders", *supra* note 4 at 235.

[22] Borrows, *Canada's Indigenous Constitution*, *supra* note 14 at 28-29.

[23] *Ibid.* at 35.

[24] *Ibid*.

[25] *Ibid.* at 46.

[26] *Ibid.* at 51.

civil law, and international law.[27] For that reason, describing all Indigenous law as customary is inaccurate and incomplete, and often serves to minimize the legitimacy and authority of Indigenous legal traditions, particularly in relation to Canadian or other state law.[28]

Val Napoleon identifies social interaction as another source of law. “Social interaction” means the collective ways in which people formalize law through their long-term social, economic, and political interactions within their own societies and with people in other societies.[29] Alan Hanna identifies relationality as a source of Indigenous law, meaning the ways in which Indigenous legal institutions, such as kinship or family structures, “regulate and maintain interactions with others (human and non-human) and the kinds of behavior that people can expect and rely upon from others.”[30]

b) Legal Resources for Indigenous Law

Distinct from sources of law are legal resources, which are the places where one looks to find, learn, teach, and interpret the law. In Canadian law, these might include legal texts, critical commentary, digests, or academic journal articles. Indigenous legal traditions draw from a diversity of legal resources, including language, land, stories, place names, songs, art, protocol, dreams, deliberative practice, elders, oral histories, conventions, artefacts, trial transcripts, or other secondary materials.[31]

The ability of a person to engage with Indigenous legal resources depends on their pre-existing knowledge, cultural immersion, community connection, and competency with different methods of engagement for those specific resources. As Hadley Friedland explains, some resources require “deep knowledge and full cultural immersion,” such as dances, art, ceremonies, and specific terms in language. Other resources requiring “some community connection” might include stories and information from knowledgeable people in the community. Publicly-available resources, such as academic work, fiction, and trial transcripts, require “the least amount of connection to a particular culture or community to access” and are the most widely accessible to researchers.[32]

---

[27] *Ibid.*

[28] *Ibid.* at 24, 51.

[29] Napoleon, “Thinking About Indigenous Legal Orders”, *supra* note 4 at 233.

[30] Alan Hanna, “Reconciliation Through Relationality in Indigenous Legal Orders” (2019) 56:3 Alta L Rev 817 at 828, online: Alberta Law Review <www.albertalawreview.com/index.php/ALR/article/view/2524>.

[31] Rebecca Johnson & Bonnie Leonard, “Coyote and the Cannibal Boy” in Oonagh E. Fitzgerald, ed., *Corporate Citizen: New Perspectives on the Globalized Rule of Law* (Waterloo: CIGI Press, 2020) 91 at 37.

[32] Hadley Friedland, *Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada* (PhD Thesis, University of Alberta, 2016) [unpublished] at 25-27, online: University of Alberta <era.library.ualberta.ca/items/48bb0f25-2b18-4596-a73a-4b5915211ee1/view/52a9f179-1cf9-4180-88ff-a5197decdd43/Friedland_Hadley_L_201603_PhD.pdf> [perma.cc/3BSQ-PXB5].

Most practitioners engaged in Indigenous law revitalization draw on many Indigenous legal resources, and work collaboratively alongside people with the knowledge to access those important Indigenous legal resources that are learned through cultural immersion and community connection.

3. The Importance of Learning and Revitalizing Indigenous Law

Canada is a multi-juridical country, encompassing and flowing from numerous Indigenous legal traditions as well as common and civil law. As noted by Federal Court Justice Sébastien Grammond in *Pastion v. Dene Tha' First Nation*:

> Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land. Chief Justice McLachlin of the Supreme Court of Canada wrote, more than fifteen years ago, that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty[.]"[33]

As mentioned previously, Indigenous law has been minimized and undermined since contact. As a result, Canadian law has dominated how people teach, learn, understand and apply law in Canada.

While people have been engaging with Indigenous law since before Canada existed, most legal professionals are only starting to recognize their obligations to seriously engage with Indigenous law as law, and to consider how Indigenous and Canadian law might interact. Finch C.J. stressed the importance of considering Indigenous law within a Canadian legal context in order to uphold a robust understanding of the rule of law:

> In addition, the legal obligation to take account of the Aboriginal perspective engages the principle of the rule of law. If the rights of all Canadians, including Aboriginal Canadians, are to be articulated and guarded by the courts, the courts must necessarily be capable of understanding the nature of those interests.[34]

In this context, those perspectives and interests include serious engagement with Indigenous legal traditions.

Part of the impetus for a shift in the legal profession is the release of the Truth and Reconciliation Commission of Canada's (TRC) final report and 94 Calls to Action in 2015.[35] The Report and Calls to Action build on prior recommendations from other reports such as the

[33] *Pastion v. Dene Tha' First Nation*, 2018 FC 648 at para. 8, citing *Mitchell v. Ministry of National Revenue*, 2001 SCC 33 at para. 10.

[34] Finch C.J., "Duty to Learn", *supra* note 13 at para. 15.

[35] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online: Truth and Reconciliation Commission of Canada <www.trc.ca/assets/pdf/Executive_Summary_English_Web.pdf> [perma.cc/W9WM-M38V] [Truth and Reconciliation Commission of Canada, *Summary of the Final Report*].

reports of the Aboriginal Justice Inquiry of Manitoba[36] and the Royal Commission on Aboriginal Peoples,[37] and are further upheld by the subsequent Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.[38]

The Summary of the Final TRC Report stated:

> Aboriginal peoples must be recognized as possessing the responsibility, authority, and capability to address their disagreements by making laws within their communities. This is necessary to facilitating truth and reconciliation within Aboriginal societies.[39]

The TRC defines reconciliation as follows:

> The Commission defines *reconciliation* as an ongoing process of establishing and maintaining respectful relationships. A critical part of this process involves repairing damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change. Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions. It is important that all Canadians understand how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process.[40]

Several Calls to Action from the TRC further emphasize the importance of recognizing, revitalizing and implementing Indigenous legal traditions in law schools and the broader Canadian justice system, and through the creation of Indigenous law institutes. A number of Calls to Action are relevant to members of the legal profession, including Calls to Action 27, 28, 50 and 92.[41] All incoming and existing members of the legal profession should familiarize themselves with all Volumes of the TRC's Final Report and the Calls to Action.

---

[36] Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: The Inquiry, 1991); Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online: Truth and Reconciliation Commission of Canada <trc.ca/assets/pdf/Calls_to_Action_English2.pdf> [perma.cc/ZT7C-XDZ] [Truth and Reconciliation Commission of Canada, *Calls to Action*].

[37] Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back: Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1991), online: <data2.archives.ca/e/e448/e011188230-01.pdf > [perma.cc/N333-3G7Y].

[38] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), online: <www.mmiwg-ffada.ca/final-report/>.

[39] Truth and Reconciliation Commission of Canada, *Summary of the Final Report*, *supra* note 35 at 205.

[40] *Ibid.* at 16-17.

[41] Truth and Reconciliation Commission of Canada, *Calls to Action*, *supra* note 36 at 3, 5-6, 10.

In 2019, the *Declaration on the Rights of Indigenous Peoples Act* came into force in British Columbia. The *Act* binds the government of British Columbia to "take all measures necessary to ensure the laws of British Columbia are consistent with the [*United Nations Declaration on the Rights of Indigenous Peoples*]," and includes a number of provisions about the recognition, consideration and application of Indigenous law.[42] Legal professionals in British Columbia must also consider how the legislation applies to them in the course of representing their clients.

4. The Relationship between Aboriginal Law and Indigenous Law

Indigenous law is not the same thing as Aboriginal law in Canadian legal practice. Aboriginal law is an area of Canadian law that deals with how Canadian law is applied to Aboriginal Peoples, as defined by s. 35 of the *Constitution Act, 1982.*[43] It is the area of law that deals with Aboriginal Title, Aboriginal Rights and Treaty Rights within Canadian law.

Indigenous law is not defined by Canadian law, but is recognized in various international legal instruments including the *United Nations Declaration on the Rights of Indigenous Peoples*.[44] As with Canadian law, there are specific principles and processes within each Indigenous legal tradition for different legal questions. For example, the Cree legal tradition will have different legal principles and processes to apply to questions respecting lands, harms and injuries, human rights, or children and families.

While Aboriginal law has relied predominantly on Canadian law as an interpretative framework, there is a recognition that Indigenous law has shaped the context, scope, and application of Aboriginal law:

> A keystone of Aboriginal law jurisprudence is the Crown's recognition that organized societies pre-existed within the territorial limits of what is now Canada. It is artificial to separate the concept of *pre-existing societies* from that of *pre-existing legal orders*. No bright-line distinction exists between a normative principle and an identifiable law, much less in the case of societies which do not frame their own legal orders around the idea of written common law or statutes. Canada was, and remains, a multi-jural nation, in fact if not in law.[45]

[42] *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44, s. 3.

[43] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 35.

[44] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

[45] Finch C.J., "Duty to Learn", *supra* note 13 at para. 1.

Courts and scholars alike point out that Canadian Aboriginal law itself developed as a result of the bridging of Indigenous legal traditions and the common law over time.[46] As Borrows notes, this blending of legal traditions, for example, in the development of title and rights doctrines relating to Indigenous Peoples, reflects the inter-societal nature of Canadian Aboriginal law.[47]

5. The Relationship between Indigenous Law and Canadian Law

One of the major questions of our times is how Canadian and Indigenous law are related, and how and when they can and should interact. There is a diversity of opinion within Indigenous communities and in the legal profession about this question. Healthy debate is an important aspect of the practice of law.

Borrows notes that "[t]here are compelling arguments that Indigenous traditions could be strengthened by their separation from *and* interaction with the principles and approaches that are found in Canada's other legal traditions."[48] However, he also cautions that "Indigenous legal traditions, like all legal traditions, require a translation process to properly understand them, though one must be careful that such translations do not always flow one way, to the benefit of the dominant systems."[49]

As noted earlier in this material, many jurists and scholars have emphasized that Indigenous law and Canadian law have never operated entirely in silos, even while Canadian law has remained dominant. Further, there is a recognition that legal pluralism, which occurs when two or more legal systems or orders "co-exist in the same social field," has always existed between Indigenous societies.[50] That is, many Indigenous nations and communities have always practised and applied their law in different contexts. Nevertheless, many more Indigenous communities are increasingly taking up intentional efforts to re-state, articulate and apply Indigenous law for their own internal governance purposes, to speak to Canadian law, and interact with Canadian law in different contexts. The following are a few examples of that recent activity.[51]

---

[46] *R. v. Van der Peet,* [1996] 2 S.C.R. 507 at para. 42.

[47] John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 33.

[48] Borrows, *Canada's Indigenous Constitution*, *supra* note 14 at 117.

[49] *Ibid.* at 118.

[50] Napoleon, "Legal Pluralism and Reconciliation", *supra* note 11 at 4-6.

[51] This is, of course, not a comprehensive list. The examples were previously published by the authors of these materials or received feedback from community sources. There are many more examples of individuals, nations and communities who have developed Indigenous legal instruments and processes for the purpose of internal governance work or engagement with Canadian law. See e.g. Stk'emlupsemc Te Secwepemc Nation, "KGHM AJAX Review Process" (last visited 8 July 2021), online: Stk'emlupsemc Te Secwepemc Nation <stkemlups.ca/process/>; Tŝilhqot'in Nation, "ʔELHDAQOX DECHEN TS'EDILHTAN ("ʔEsdilagh Sturgeon River Law")" (2020), online: ?Esdilagh First Nation <www.esdilagh.com/PDF/Esdilagh%20Elhdaqox%20Law%20Final%20Version.pdf> [perma.cc/N5SP-LE4N]; Syilx Nation, "Syilx Nation Siwɬkʷ Declaration" (2014), online: Syilx Koanagan Nation Alliance <www.syilx.org/wp/wp-content/uploads/2016/11/Okanagan-Nation-Water-Declaration_Final_CEC_Adopted_July_31_2014.pdf> [perma.cc/LU7Z-U7FT]; Tsleil-Waututh Nation, "Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal" (2015), online:

a) The Witness Blanket

In 2019, Kwakwaka’wakw/Coast Salish artist and master carver Carey Newman (Hayalthkin'geme) entered into an agreement with the Canadian Museum for Human Rights in a ceremony held at Kumugwe, the K’omoks Bighouse. This ceremony relied on both Canadian contract law and Kwakwaka’wakw Big House legal orders as a means to outline and honour the protocols and laws that would govern housing and stewardship of Newman’s artwork, called “The Witness Blanket,” at the Museum. The Witness Blanket is a 3-metre high, 12-metre wide multi-media installation that took several years to create and brings together objects and representations of stories from Survivors of the residential school era (1870s–1990s) from across the country.

From a Kwakwaka’wakw perspective, The Witness Blanket is an animate work of art that brings together the life and spirit of all of the objects and stories it holds. In this way, protocol requires witnesses, gifting, and feasting in order to activate an agreement to share the responsibility to care for it. An agreement under Kwakwaka’wakw law also required the parties to re-visit and renew their commitments and relationship on a regular schedule. With representatives present from the Museum, this ceremony in the K’omoks Bighouse marked the first time a federal Crown Corporation ratified a legally binding contract using Indigenous laws — 68 years after the *Indian Act* potlatch ban was lifted by the Canadian government. The requirements for a binding Canadian contract were met alongside the requirements of witnessing, gifting, and feasting required by Kwakwaka’wakw law.

b) Dáduqvḷá qṇtxv Ǧviḷásax̌ — Heiltsuk Tribal Council

After the grounding of the tugboat Nathan E. Stewart, which dumped 110,000 litres of diesel fuel in Haíɫzaqv (Heiltsuk) territorial waters in 2016, the Heiltsuk Tribal Council exercised their law — Ǧviḷás — by conducting an independent inquiry into the incident and issuing a report, *Dáduqvḷá qṇtxv Ǧviḷásax̌*, which includes legal analysis of the incident according to Haíɫzaqv (Heiltsuk) law.[52] The report was issued by a council of chosen representatives (legal decision makers) and outlined the legal framework, the misconduct and breaches, the assessment of the harm, and the types of consequences or remedies that could be considered. The legal findings of this report shaped the ongoing relationship between all levels of government and private parties involved in the reparation for this environmental disaster. It is an example of the comprehensiveness of Indigenous law to be applicable to various practice areas of Canadian law (constitutional, environmental, tort, contract, international, and Aboriginal).

Tsleil-Waututh Nation Sacred Trust <twnsacredtrust.ca/wp-content/uploads/TWN_assessment_final_med-res_v2.pdf> [https://perma.cc/2NE8-RAX3].

[52] Heiltsuk Tribal Council, “Dáduqvḷá qṇtxv Ǧviḷásax: To look at our traditional laws” (2018), online: Heiltsuk Nation <www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf> [perma.cc/2J3N-NSEF].

The legal analysis in the report, using Haíɫzaqv law, is informing the Haíɫzaqv Nation's legal action in Canadian courts against the oil shipping company, Canada, and British Columbia.

c) NɫeʔképmX and Syilx Laws of Water and Watershed Governance

In March 2018, five Nicola Chiefs (from the Upper Nicola Band, Lower Nicola Band, Coldwater Indian Band, Nooaitch Indian Band, and Shackan Indian Band) and the Province of British Columbia signed a Memorandum of Understanding to collaboratively govern water throughout the Nicola Watershed according to both Indigenous (Nɫeʔképmx and syilx) and provincial law.[53] This project is grounded in a shared commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples*. As part of this large co-governance initiative, the five communities are working to articulate the legal principles and processes from both legal traditions to inform how their communities use, care for, and address challenges concerning water.

d) Tsleil Waututh — Kinder Morgan/TMX Expansion Project

The Tsleil-Waututh Nation (TWN) has consistently applied Tsleil-Waututh law to consider and assess projects in its territory. In their assessment on the proposed TMX pipeline expansion project, TWN concluded that the risks posed were unacceptable and the project must therefore be rejected. In 2015, TWN released a 90-page Assessment of the proposal that necessarily included consideration of environmental, socio-cultural, and economic factors to extensively detail how the pipeline expansion plans could not be justified under Tsleil-Waututh law. TWN consulted with scientific experts, knowledge holders, and community members to inform their assessment. As part of the National Energy Board (NEB) hearing processes, TWN submitted their assessment as a jurisdiction. Despite all the evidence provided by TWN and despite further opposition by many Indigenous nations whose laws and jurisdictions would be further eroded by the pipeline, the NEB approved the expansion project.

6. The Ethics of Engaging with Indigenous Law

As noted in Chapter 2 of *Practice Material: Professionalism: Ethics*, the Law Society regulates lawyers and law firms in the public interest.[54] The public interest includes consideration of Indigenous Peoples and Indigenous law. In 2021, the Law Society piloted a course to address core aspects of Indigenous intercultural competence and Call to Action 27 of the Truth and

[53] "Nicola Watershed Pilot Memorandum of Understanding" (2018), online: Government of British Columbia <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/nicola_watershed_pilot_mou_-_signed_2018.pdf>.

[54] Law Society of British Columbia, *Practice Material: Professionalism: Ethics* at §2.04.

Reconciliation Commission. The course is mandatory for all practising lawyers in British Columbia.[55] Call to Action 27 states:

> We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.[56]

That said, it is neither realistic nor prudent to expect every new lawyer to be professionally competent to *practise* Indigenous law. As mentioned at the beginning of this material, there are diverse perspectives about theories, best practices, and methodologies of Indigenous law. For this reason, it is difficult if not impossible to comprehensively describe what it means to be competent in every aspect of the field. Furthermore, the extensive scope of Indigenous legal orders and traditions in Canada means that the required knowledge and skills may vary across the field, based on guidance from Indigenous communities, leaders, and legal practitioners.

Every lawyer should nevertheless acquire the following basic knowledge, skills, and attributes in the context of their practice.

a) Commitment to Learn

Finch C.J. articulated the notion of a "duty to learn" as it pertains to Indigenous law:

> We speak often in the field of Aboriginal law of the honour of the Crown, which mandates, among other requirements, the duty to approach questions of interpretation generously, the duty to consult and the duty to accommodate. Now, I suggest, a more widely applicable concept of honour imposes on all members of the legal profession the duty to learn: at the very least, to holding ourselves ready to learn.[57]

This commitment to learn involves both a knowledge of and critical engagement with the history of colonialism in Canada as well as a presumption of the validity of Indigenous law within the Canadian legal landscape. Lawyers should know the history of how colonialism has impacted Indigenous Peoples and Indigenous legal traditions in what is now known as Canada. Lawyers and courts should also accept the existence of Indigenous law as a fact and be willing to consider arguments and considerations rooted in Indigenous law when presented by clients, lawyers, and the courts.

A commitment to learn includes approaching Indigenous law with the same respect, rigour and care as other areas of law or other legal traditions when acting on matters that potentially

---

[55] *Ibid.* at §2.02(3).

[56] Truth and Reconciliation Commission of Canada, *Calls to Action*, *supra* note 36 at 3.

[57] Finch C.J., "Duty to Learn", *supra* note 13 at para. 15.

engage Indigenous law. It is vital that lawyers recognize that "…what may be unintelligible to those inexperienced with Indigenous culture may be quite intelligible to those familiar with it. A Eurocentric approach to legal interpretation must not be allowed to undermine Indigenous legal traditions."[58] Approaching Indigenous law with rigour means that "the law in Indigenous legal traditions must be treated substantively as *law*—to be debated, applied, interpreted, argued, analyzed, criticized, and changed."[59]

b) Issue Identification

Lawyers often identify issues from various areas of practice even if they are not practitioners in those areas of law. Lawyers should also develop an awareness of the existence and possible engagement of Indigenous law in a given situation. For example, while an issue may immediately present as an issue of property law, a closer examination might show that the underlying issue is one that touches on aspects of Indigenous law relating to land or water.

Once a lawyer has identified a possible legal issue, they need to determine if they have the ability to do further legal research to support their clients, or, alternatively, if they should refer their clients to a practitioner with expertise in the field or to other organizations or bodies that have worked with Indigenous law.

The ability to identify legal issues in the area of Indigenous law requires a lawyer to be able to take into consideration "all the surrounding institutional facts, not just the immediate case facts" of issues presented to them.[60] This process might require lawyers to consider not only the facts as presented to them, but also the historical, social, political, cultural or other circumstances that may have given rise to the facts.

c) Recognizing When the Lawyer Lacks Competence to Act

As per *BC Code* rule 3.1-2, "[a] lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer." [61] Lawyers must be aware that they might lack competence for particular matters, including where the matter is beyond their knowledge, skills, and capabilities in Indigenous law. Faced with a task for which the lawyer lacks competence, a lawyer must decline to act unless the client (1) provides instructions to "retain, consult or collaborate with a lawyer who is competent for that task" or (2) consents to the lawyer becoming competent "without undue delay, risk or expense" to them.[62]

---

[58] Borrows, *Canada's Indigenous Constitution*, *supra* note 14 at 140.

[59] Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories" (2016) 61:4 McGill LJ 725 at 739.

[60] Paul Jonathan Saguil, "Ethical Lawyering Across Canada's Legal Traditions" (2010) 9:1 Indigenous LJ 167 at 185.

[61] Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, rule 3.1-2, online: Law Society of British Columbia <www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%e2%80%93-relationship-to-clients/>.

[62] *Ibid.*, rule 3.1-2, commentary [6].

This requirement applies equally to the practice of Indigenous law in British Columbia. While this duty should not preclude lawyers from acting on behalf of clients *any time* Indigenous law might be applicable, it should prompt lawyers to do further research or professional development or seek collaboration when they are engaging with a matter involving Indigenous law.

The relevant knowledge and skills required to act in a matter that engages Indigenous law go beyond the substance of Indigenous legal principles and processes. As noted by Pooja Parmar, "[g]enuine commitments to reconciliation demand that legal professionals commit to unlearning colonial logics, hierarchies of legal cultures, and the disregard of particular knowledges, and approach differences with humility and respect."[63] At a practice-based level, this commitment includes recognizing the limitations that arise when a lawyer does not come from or understand the different worldviews, ways of knowing, or contexts within which distinct Indigenous legal traditions have developed over time.[64] Because a person's worldview is not separate from law, lawyers must remain alive to the potential for mistranslation of legal terms across and between legal orders and systems in their engagement with Indigenous law when they do not have the requisite knowledge to form their interpretations.[65]

It is outside of the scope of this material to provide an enumerated list of steps a lawyer can or should take to assess their own competence in the area of Indigenous law. However, as with every practice area, Practice Advisors at the Law Society of British Columbia are available to help with ethics and practice questions that may arise for lawyers, including discussing concerns about practising in a professionally responsible and competent manner.

7. Resources

Students may consult the websites of the following Indigenous law practice units to gain a more in-depth understanding of Indigenous law and to stay apprised of current developments.

- The Indigenous Law Research Unit at the University of Victoria (www.ilru.ca).
- Wahkohtowin Law and Governance Lodge at the University of Alberta (https://www.ualberta.ca/wahkohtowin/index.html).
- Indigenous Legal Orders Institute at the University of Windsor (https://www.uwindsor.ca/law/Indigenous-Legal-Orders-Institute).

---

[63] Pooja Parmar, "Reconciliation and Ethical Lawyers: Some Thoughts on Cultural Competence" (2019) 97:3 Can Bar Rev 426 at 551.

[64] *Ibid*. at 550.

[65] Morales, *Snuw'uyulh*, *supra* note 6 at 32-33; Robert YEL̸ 9ÁT-TE Clifford, "WSÁNEĆ Legal Theory and the Fuel Spill at SELEK-TEL- (Goldstream River)" (2016) 61:4 McGill LJ 755 at 761–62, online: <www.lawjournal.mcgill.ca/article/wsnea%E2%80%A0-legal-theory-and-the-fuel-spill-at-selektel-goldstream-river/> [perma.cc/5X6J-NLUJ]; Parmar, "Reconciliation", *supra* note 63 at 555.