Guide for Lawyers Working with Indigenous Peoples

1st Supplement

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Table of Contents

Introduction

Chapter 1: Land Acknowledgments

Chapter 2: Developing a Trauma-Informed Legal Practice

Chapter 3: Missing and Murdered Indigenous Women and Girls Inquiry Report and Calls for Justice

Chapter 4: The *United Nations Declaration on the Rights of Indigenous Peoples Act*

Chapter 5: Developing Indigenous Responses to National Child Welfare Legislation

Chapter 6: Treaty Interpretation and *Restoule v. Canada (Attorney General)*

Chapter 7: The Duty to Consult and Accommodate and Free, Prior and Informed Consent

Chapter 8: Applying and Adapting *R. v. Gladue* Principles

INTRODUCTION

Welcome to the first supplement to the *Guide for Lawyers Working with Indigenous Peoples* ("the *Guide*"). When first published in May 2018, the *Guide* was a joint collaboration of the Indigenous Bar Association, The Advocates' Society and the Law Society of Ontario to produce a starting resource to help lawyers and others in the Canadian civil and criminal justice systems with understanding more of Indigenous peoples, communities and organizations. As we stated then, we repeat now, while educational, this resource will never replace building meaningful one-to-one relationships grounded upon mutual respect and understanding.

When the original *Guide* was produced, it was always understood to be a living resource. In the past four years, there have been many significant developments in Canadian law and its interaction with Indigenous peoples. So much so that the three collaborators have returned to produce this supplement and while it is the first, it is the hope that it will not be the last.

Responding to Call to Action 27 of the Truth and Reconciliation Commission of Canada and its direction specifically to the legal community in Canada, building inter-cultural competency both in form and substance is not a destination, rather a journey that we must continue together. In 2018, we cited the former Chief Justice of British Columbia, the Honourable Lance Finch, and his charge to the legal community that "to achieve an equal reconciliation, we must recognize that to stay must also be to learn." Sadly, the former Chief Justice passed in 2019, but his words resonate and the duty to learn continues to inspire. Perhaps then it is fitting that the current Chief Justice of British Colombia, the Honourable Robert J. Bauman remarked in a 2021 speech, "our duty to learn is an obligation that we will continue to carry throughout our personal and professional lives … it is time for us to embrace our 'duty to act.'"[1]

We begin this supplement with a chapter to introduce the significance of land acknowledgments – what they mean to Indigenous communities, why they remain important and how might we begin to educate ourselves when preparing to deliver one ourselves.

[1] Robert Bauman, "A Duty to Act" (Opening remarks delivered at the 2021 Annual Conference: Indigenous Peoples and the Law, Vancouver, 17 November 2021) [unpublished].

We follow this with a chapter to deepen our inter-cultural competency to understand what it is to develop trauma-informed practice skills and why such skills are necessary to deliver legal services free from racism.

When one in every four female homicides in Canada are Indigenous women and girls, the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) Findings and Final Report cannot afford to be ignored. Organized by 19 themes and 231 Calls to Justice, the Final Report summarizes a number of themes that are directed to the legal community and 25 Calls to Justice directed to the justice sector in particular. The significance of continued advocacy to effect the changes envisioned by this Final Report and the ongoing responses are the focus of a chapter within this supplement and notably directly interact with the trauma-informed practice skills chapter.

While an early objector to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), we noted Canada's 2016 endorsement of the UNDRIP in the original *Guide*. Since that time, Canada introduced and passed federal legislation to confirm the application of UNDRIP in Canadian law and its legal obligation to reconcile Canadian law with the principles of UNDRIP. We have included a chapter to introduce this new legislation and its potential to transform the interaction between Indigenous peoples and Canadian law.

The grossly disproportionate rates of Indigenous child apprehension into the child welfare system prompted the Truth and Reconciliation Commission to lead very directed Calls to Action. We examine these Calls to Action and Canada's response in June 2020 when the *Act respecting First Nations, Inuit and Métis children, youth and families* came into force. Significantly, the Act affirms the rights of First Nations, Inuit and Métis peoples to exercise jurisdiction over child and family services; establishes national principles such as the best interests of the child, cultural continuity and substantive equality; contributes to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* and provides an opportunity for Indigenous peoples to choose their own solutions for their children and families.

In January 2019, the Attorney General of Canada published its *Directive on Civil Litigation Involving Indigenous Peoples*[2], a policy direction establishing guidelines that every federal litigator must follow in the approaches, positions and decisions taken

[2] The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples, 2018, online at: litigation-litiges.pdf (justice.gc.ca). BC has produced its own litigation directive.

on behalf of the Attorney General (Canada). The preamble makes clear that the adversarial nature of litigation is a dispute forum of last resort and – as trust and good faith between Canada and Indigenous Peoples continue to evolve – this allows collaborative processes, including negotiation, to be the primary means of dispute settlement. We draw no conclusions on the implementation of this directive, rather introduce it to broaden awareness. Only time and experience will tell if the necessary interaction and its success between litigation and negotiation with Indigenous people will inspire the next supplement.

We include a chapter specifically dedicated to the *Restoule v. Canada (Attorney General)* decision in Ontario. While the litigation of issues as between the Huron and Superior Anishinaabe and the provincial and federal Crown are not fully resolved, this case provides a timely marker of the law of treaty interpretation in Ontario. The courts in Ontario at least have constructed a key treaty interpretation principle grounded upon the two-step approach first developed by the Supreme Court of Canada in *R. v. Marshall* and focused on reconciliation. To reach this depth of analysis, the court welcomed the Anishinaabe's perspective of treaty into the courtroom through language and ceremony with a keen application of the *Practice Guidelines for Aboriginal Law Proceedings*[3] developed by the Federal Court of Canada in 2016.

We follow our discussion of *Restoule* with a chapter on the Canadian common law principles concerning the duty to consult and accommodate. While this is not new jurisprudence, the passage of the *United Nations Declaration on the Rights of Indigenous Peoples Act* will necessarily prompt a review of Canada's regulatory framework for its compliance with the principles of the UNDRIP. As these are emergent and ongoing issues of advocacy, we introduce these in the spirit of broadening awareness.

In the final chapter, we highlight the continuing need to educate and inform the profession on the application of principles resulting from *R. v. Gladue*. While over two decades old, the rate of Indigenous incarceration throughout Canada continues upwards at a disproportionate rate. In 1999, the Supreme Court of Canada introduced, through its decision in *R. v. Gladue,* a judge's need to take into consideration the individual circumstances of the Indigenous accused and include the challenges of colonization that continue to impact lives. Challenges of racism, poverty, and foster care are real, with real impacts that advocates across Canada

[3] Practice Guidelines for Aboriginal Law Proceedings of the Federal Court (April 2016).

must address. This chapter is intended to advance education and inspire the continued commitment to do what we can to address the systemic inequities throughout the justice system.

In closing, we invite every user of the *Guide* and its supplement to explore the additional resources that are provided to encourage and support your continuing learning. Many of the resources are interactive links which take you directly to the sourced material.

This supplement and all of additional resources provided would not be possible without the excellence and commitment of the people involved in creating it. The Guide was originally developed primarily for lawyers, but was intended to provide some guidance for others working in and around the justice system as well. Most significantly, advocacy and other legal services across the country are increasingly being provided by paralegals. In this supplement, input from paralegals has prompted us to use more inclusive language when describing legal representatives.

The three collaborating organizations would like to extend our sincere gratitude to Levi Marshall, Luc Chabanole, Newsha Zargaran, Subhah Wadhawan and Brendan Schatti for their dedicated research, writing and collaboration. To all of the dedicated Working Group members and committed staff of the Indigenous Bar Association, The Advocates' Society and the Law Society of Ontario, Nia:wen, Miigwetch, Thank you.

CHAPTER 1: LAND ACKNOWLEDGMENTS

1. WHAT IS A LAND ACKNOWLEDGMENT?

1.1 Overview

Land acknowledgments, or "territorial acknowledgments," are a matter of long-standing practice amongst Indigenous peoples, as a sign of respect and recognition for the land rights and jurisdiction of the Indigenous peoples who occupy the territory. Land acknowledgments have become increasingly commonplace for non-Indigenous peoples in many areas of Canadian society over the past decade, both as practice and as pedagogy.

Indigenous peoples have always engaged in practices of recognition, whether in terms of language, nation, territory, clan, or lineage. While pre-colonial territorial "borders" were both fluid and overlapping, there was nonetheless a high degree of awareness regarding demarcations of territory.

All nations held protocols about how to behave in someone else's territory as a guest. To this end, Indigenous cultures maintained systems to manage territorial intrusions by others. While heavily dependent on the particular Nations involved, to enter the territory of other Indigenous people(s) would have entailed thoughtful consideration, permission seeking, gift giving, or ceremonies as elaborate as intermarriage. To host visitors from other nations also implied certain responsibilities, often involving formal speech-acts, feasting, and gifting.

In summary, when Indigenous peoples traditionally acknowledge one another, it is a practice both cultural and political that is fundamentally related to nationhood, sovereignty, and mutual respect.[1]

Within a more contemporary context, we can look at what a land acknowledgment means. In English, "acknowledgment" (regarding a person, declaration, or state of affairs) pertains to:

[1] Joe Wark, "Land Acknowledgements in the Academy: Refusing the Settler Myth" (2021) 51:2 Curriculum Inquiry 191.

- an admission of [X's] truth or existence;
- an acceptance of [X's] validity or legitimacy;
- an expression of gratitude [towards X]; or,
- a gesture, showing notice and recognition [of X].

The Canadian Association of University Teachers' *Guide to Acknowledging First Peoples & Territory* states as follows:

> Acknowledging territory shows recognition of and respect for Aboriginal Peoples. It is recognition of their presence both in the past and the present. Recognition and respect are essential elements of establishing healthy, reciprocal relations. These relationships are key to reconciliation.[2]

Currently, land acknowledgment is widely understood to be the practice of prefacing an event, presentation, or ceremony with a verbal recognition of a particular territory (or place) and of the Indigenous people(s) who have traditionally and historically occupied said territory.[3]

Within legal practice, land acknowledgments are generally provided by both Indigenous and non-Indigenous persons as a gesture of respect and recognition of Indigenous peoples towards the further goal of reconciliation.

While this guide cannot provide a definitive answer to whether someone ought to incorporate a land acknowledgment into their work, here are some instances in which one may wish to consider doing so:

1. When visiting a client
2. Public speaking/continuing legal education events
3. Use in court
4. Firm policy
5. Firm website or public relations

Later in this chapter, we outline some considerations and context that may help inform and guide decision-making.

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[2] Guide to Acknowledging First Peoples & Traditional Territory, 2017, online: <https://www.caut.ca/sites/default/files/caut-guide-to-acknowledging-first-peoples-and-traditional-territory-2017-09.pdf>.

[3] Land acknowledgments may also be written and non-verbal (e.g., scripted on the webpage of an institution or municipality).

1.2 History of Land Acknowledgments

Prior to 2015's release of the Truth and Reconciliation Commission's *Final Report* and *94 Calls to Action*, land acknowledgments performed in Canada were primarily delivered by Indigenous persons. Apart from being a sign of respect and recognition amongst Indigenous peoples, in this initial form, the purpose of territorial acknowledgments performed in Canada was threefold:

1. to expose historical and contemporary colonial violence;
2. to challenge the mythologies of *terra nullius* and the Doctrine of Discovery; and
3. to remind settlers of the Indigenous sovereignties extant on Turtle Island since time immemorial.

As such, these early land acknowledgments were both viewed as **disruptive** to the insidious force of colonization—towards meaningful reconciliation with Indigenous people—while also being **productive** via the formation of relationships with non-Indigenous peoples in the spirit of solidarity, equality, substantive justice, and continued education. Early land acknowledgments were inherently political statements dedicated to changing the status quo for Indigenous peoples.

Upon the release of the Truth and Reconciliation Commission's *Final Report* and *94 Calls to Action*, calls for land acknowledgment in settler or non-Indigenous spaces gradually came to be seen as important gestures within Canada's project of reconciliation with Indigenous peoples. In the intervening years, land acknowledgments have been delivered more frequently by non-Indigenous speakers; both on their own behalf, and on behalf of the institutions they represent.

Notably, the practice of land acknowledgment today is not limited to Crown institutions or representatives. Territorial acknowledgments are now fairly commonplace within educational institutions, sporting events, conferences, and other group activities, and have been accepted at the Supreme Court of Canada, as well as various legislative bodies.

1.3 Do Land Acknowledgments Honour Traditional Indigenous Protocol?

It is sometimes claimed that, in addition to serving the goal of reconciliation with Indigenous peoples, land acknowledgments also function to honour traditional Indigenous protocols. There are, however, important differences and distinctions to

be made between modern land acknowledgments and traditional Indigenous protocol(s).

With this in mind, it is important to recognize that many modern territorial acknowledgments represent one aspect of and bear only a cursory resemblance to traditional protocols and risk becoming little more than lip service.[4] Fundamentally, acknowledgment protocol between Indigenous peoples was not only verbally performative but guided by concrete actions and understandings of relationships and spirituality. To the extent that institutionalized land acknowledgments are passed off as traditional cultural practices, there remains a risk of distorting Indigenous history and culture.

Perhaps even more fundamentally, traditional protocols typically occur between members of sovereign nations within the boundaries of a nation-to-nation relationship. This is not the case with institutionalized land acknowledgments, which often fall short of acknowledging Indigenous territorial rights, nationhood or sovereignty. Further, within the practice of institutionalized land acknowledgments, there is seldom an awareness of the *responsibilities* that both 'guest' and 'host' are called upon to undertake in a particular place and context. To put a finer point on it: Indigenous traditional protocols do not concern themselves with reconciliation after the fact. Rather, these protocols are about creating and maintaining relationships of hospitality, peace, and friendship between equals.

As such, it is often inaccurate to claim that most modern land acknowledgments are commensurate with Indigenous traditional protocols. Rather, contemporary institutionalized territorial acknowledgments most often intend to honour Indigenous knowledge and 'contributions' to Canadian society, while to varying degrees also providing recognition of the many injustices that have been, and continue to be, forced upon Indigenous peoples.

2. LAND ACKNOWLEDGMENT AND RECONCILIATION

The concept of reconciliation is amorphous, partially because it means different things to different peoples. Being that the practice of land acknowledgment purports to advance "reconciliation" within Canada, it is important to provide some clarification in regard to this often muddy and confusing discourse.

[4] Joe Wark, "Land Acknowledgements in the Academy: Refusing the Settler Myth" (2021) 51:2 Curriculum Inquiry 191 at 198.

In the 1990s, around the same time that disruptive land acknowledgments began to gain popularity in Canada amongst Indigenous peoples, the term "reconciliation" first began to appear.[5] The following is a brief attempt to describe varying ideas of reconciliation.

2.1 'Legal' Reconciliation

Perhaps the most popular reconciliation discourse in Canada stems predominantly from the Federal Government, s. 35 of the *Constitution Act, 1982,* and Supreme Court of Canada jurisprudence. First mentioned in the case of *R. v. Sparrow* and advanced over a number of cases including *Van der Peet, Delgamuukw, Haida Nation,* and *Tsilhqot'in*, varying formulations of 'reconciliation' can be found among Supreme Court decisions:

> "…federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights."[6]
>
> *R. v. Sparrow*, per Dickson CJ (1990)

> "… the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[7]
>
> *R. v. Van der Peet*, per Lamer CJ (1996)

> "[The] process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[8]
>
> *Haida Nation v. British Columbia (Minister of Forests)*, per McLachlin CJ (2004)

[5] Kim Stanton, "Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission" (2017) 26 J L & Soc Pol'y 21.
[6] *R v Sparrow* [1990] 1 SCR 1075 at para 62 [*Sparrow*]. [emphasis added]
[7] *R v Van der Peet*, [1996] 2 SCR 507 at para 31 [*Van der Peet*]. [emphasis added]
[8] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 32 [*Haida Nation*].

While various statements of reconciliation exist in Supreme Court cases, they may be summarized as follows:

Legal reconciliation is a process of recognizing that Indigenous societies, as sovereign entities, pre-existed Crown sovereignty. At the same time, legal reconciliation involves subjecting pre-existing Indigenous rights to limits consistent with the goals of the larger Canadian society in which they are now a part.[9]

Following the *Tsilhqot'in* decision, the Supreme Court disavowed the Doctrine of Discovery and stated that *terra nullius* never applied in Canada.[10] It may be helpful to reflect on what, if anything, grounds the Crown's assertion of sovereignty over pre-existing Indigenous societies that "were never conquered,"[11] and how this can be reconciled with the Indigenous interest in nation-to-nation relationships. As stated in the *Report on the Royal Commission on Aboriginal Peoples*, the role of courts may also significantly limit other concepts of reconciliation:

> [Courts] develop the law of Aboriginal and treaty rights on the basis of a particular set of facts before them in a case. They cannot design an entire legislative scheme… Courts must function within the parameters of existing constitutional structures; they cannot innovate or accommodate outside these structures. They are also bound by the doctrine of precedent to apply principles enunciated in earlier cases in which Aboriginal peoples had no representation and their voices were not heard. For these reasons courts can become unwitting instruments of division rather than instruments of reconciliation…[12]

2.2 Reconciliation according to the Truth and Reconciliation Commission

"Truth Commissions" such as the TRC are generally understood to be "transitional justice" mechanisms that enable states to create accurate historical records of

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[9] This reconciliation approach was most recently reflected in *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257.

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

[11] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 25 [*Haida Nation*].

[12] Government of Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996), Vol 1, Looking Forward Looking Back, "Opening the Door", online: <http://data2.archives.ca/e/e448/e011188230-01.pdf>.

periods of extreme social rupture in the interest of preventing their recurrence.[13] In the language of transitional justice, reconciliation refers to social healing.[14]

As described in the mandate of the TRC:

> Reconciliation is an ongoing individual and collective process and will require commitment from all those affected including First Nations, Inuit and Métis former Indian Residential School (residential schools) students, their families, communities, religious entities, former school employees, government and the people of Canada.[15]

As noted by Kim Stanton, the reconciliation envisioned by the TRC "includes truth telling, acknowledgment of past wrongs, reparations for the victims, addressing the structural causes of the wrongs, and a rebalancing between societal groups to prevent the harms from recurring."[16] Further, it is not just about the legacy of residential schools: "[i]t is a multi-faceted process that restores lands, economic self-sufficiency, and political jurisdiction to First Nations, and develops respectful and just relationships between First Nations and Canada."[17]

Lastly, TRC Call to Action #45, listed under the heading "Reconciliation," reads as follows:

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[13] Kim Stanton, "Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission" (2017) 26 J L & Soc Pol'y 22.

[14] Priscilla B Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, (New York: Routledge, 2001) at 133.

[15] The Indian Residential Schools Settlement Agreement (the "Settlement Agreement") was concluded May 8, 2006, following an Agreement in Principle ("AIP") signed November 23, 2005. Schedule N of the Settlement Agreement, "Mandate for the Truth and Reconciliation Commission" (Schedule E of the AIP), sets out the terms of a truth commission, which forms part of the Settlement Agreement.

[16] Kim Stanton, "Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission" (2017) 26 J L & Soc Pol'y 35.

[17] Symposium on Reconciliation in Ontario: Opportunities & Next Steps. (Report on Proceedings delivered at National Centre for First Nations Governance, University of Toronto, 4 March 2011) at 2. Also see: *Canada's Residential Schools: the Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (Montreal: McGill-Queen's University Press, 2015) at 20, online: https://truthcommissions.humanities.mcmaster.ca/wp-content/uploads/2021/03/TRC_The-Final-Report-of-the-Truth-and-Reconciliation-Commission-of-Canada-Volume-6.pdf>.

Royal Proclamation and Covenant of Reconciliation

45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764 and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

    i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.

    ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.[18]

    iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.

    iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.

2.3 Land Acknowledgment Problematics

If territorial acknowledgments performed in Canada were initially intended to disrupt and disturb an unjust status quo, in many arenas this is arguably no longer the case. While land acknowledgments have been used to begin dialogue regarding how non-

[18] The TRC's call to federal, provincial, territorial, and municipal governments to "fully adopt and implement [UNDRIP] as the framework for reconciliation" sheds additional light on this conception of reconciliation. Article 2 states that Indigenous peoples "are free and equal to all other peoples" with the right to be free from any kind of discrimination, while Article 3 acknowledges the right to self-determination, free establishment of political status, and unrestrained pursuit of economic, social, and cultural development.

Indigenous people can support Indigenous sovereignty, many contemporary land acknowledgments unintentionally communicate false ideas about the history of dispossession and the current realities of Indigenous peoples.[19] The following section attempts to detail common problematics with contemporary institutionalized land acknowledgments.

2.3.1 "Box Checking Exercises," Scripts

One of the primary issues with institutionalized land acknowledgments is that they are often meticulously scripted and tend to be read from a sheet of paper. Although not necessarily a bad thing, this practice may arise out of a desire for 'safety' when presenting a territorial acknowledgment, especially if the topic is unfamiliar or uneasy to the speaker. In this sense, written documents may serve as helpful tools to ground land acknowledgments for the uninitiated.

At the same time, scripted land acknowledgments may serve as a vehicle for repetition and apathy that may avoid working towards meaningful reconciliation between non-Indigenous and Indigenous peoples. Where land acknowledgments become a mere "box checking exercise," there is little meaning or purpose to be found behind the message. Ultimately, reading a scripted land acknowledgment requires little effort from the speaker, and can render the speech-act meaningless for both speaker and listener. In line with a question posed by academic Chelsea Vowel, where Indigenous people are routinely subjected to rote and routine land acknowledgments, what do these "mean for people who have heard them ad nauseam? (I mean, how carefully do frequent flyers listen to safety presentations during their flight?)"[20]

2.3.2 Symbolism Without Substance

As stated by Professor Jeffery Hewitt, "[l]and acknowledgments devoid of clear, strongly worded statements challenging colonization and *terra nullius* are about talk, not action."[21] If one is serious about reconciliation *vis-à-vis* societal healing,

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[19] Elisa J Sobo, Michael Lambert & Valerie Lambert, "Land acknowledgements meant to honor Indigenous people too often do the opposite – erasing American Indians and sanitizing history instead", *ASBMB Today* (22 October 2021) online: <https://www.asbmb.org/asbmb-today/policy/102221/land-acknowledgments-meant-to-honor-indigenous-peo>.

[20] Âpihtawikosisân, "Beyond territorial acknowledgments" (23 September 2016), online: *Âpihtawikosisân* < https://apihtawikosisan.com/2016/09/beyond-territorial-acknowledgments/ >.

[21] Jeffery G Hewitt, "Land Acknowledgment, Scripting and Julius Caesar" (2019) 88:2 SCLR at 33.

acknowledgments that simply 'acknowledge' without spurring further action are largely perfunctory. In order to deliver meaningful territorial acknowledgments, the gap between speaking and acting must be addressed.

2.3.3 Land Acknowledgment Should Not Be Easy

Land acknowledgments at their strongest involve deep introspection. They relate to how the individual is implicated in the continuing harms done to Indigenous peoples, and how one must change their relationships with Indigenous peoples for the better. Land acknowledgments are not necessarily 'feel good' exercises. Land acknowledgments can function as the moral tool that spurs political and legal change.

More than simply being 'aware' of Indigenous presence, a strong acknowledgment of territory asks "How can you be in good relationship with Indigenous peoples, with non-human beings, with the land and water?" It is excusable not to immediately know the answers to these questions. Fortunately, engagement with Indigenous peoples regarding these questions remains possible.

2.3.4 Use of Indigenous Labour

While land acknowledgments certainly benefit from engagement with Indigenous peoples, Nations, and communities, they are of little value without personal investment and continued education. While it may be tempting, simply recording the suggestions of Indigenous persons without further reflection about one's own place on a particular territory does not benefit the project of reconciliation. Here, one should look towards doing the hard work of listening and learning from neighbours, the territories they live on, and their relationship to oneself.

2.3.5 Avoiding Responsibility, Deflecting Criticism

As detailed by Professor Jeffery Hewitt, when a land acknowledgment is criticized—particularly by an Indigenous critic—it is unacceptable to use an Indigenous person's involvement as a shield from criticism or to avoid personal responsibility.[22] Indeed, to use Indigenous peoples as a shield against other Indigenous peoples is a tactic of colonial power that does not contribute to reconciliation or decolonization. Land acknowledgment at its strongest pertains to a *relationship* of reconciliation and

[22] Jeffery G Hewitt, "Land Acknowledgment, Scripting and Julius Caesar" (2019) 88:2 SCLR at 32.

humility that is as much about the speaker as it is about Indigenous peoples. As such, to properly engage in reconciliatory land acknowledgment, one must build real relationships with Indigenous people and be prepared to accept criticism and make revisions in the spirit of self-reflection, humility, and understanding.

2.3.6 Languages

"I'd like to acknowledge what happens when you stumble over our nations, our names—when Indigenous language falls carelessly out of the mouth, shatters upon the ground—is heard as a certain kind of acknowledgment too."

> - Dylan Robinson, "Rethinking the Practice and Performance of Indigenous Land Acknowledgment"

Land acknowledgment as reconciliation is both forward and backwards looking. It involves recognizing past wrongs and seeking to create a brighter future. However, given that the suppression and criminalization of Indigenous languages was integral to colonial domination, it is worthwhile to reflect upon why institutional representatives read land acknowledgments in English or French without having or trying to learn the language(s) of the Indigenous peoples concerned.[23] While full delivery in Anishinaabemowin, for example, is not expected, *practice is essential* when adding Indigenous words to a spoken land acknowledgment. Here, a lack of care or effort reflects poorly upon the speaker and may inadvertently further the history of Indigenous language suppression and erasure.

2.3.7 Choice of Language

2.3.7.1 Active vs. Passive, Past vs. Present

Choice of language within a land acknowledgment speaks volumes. Much as an effective acknowledgment involves reflection and introspection about one's relationship with Indigenous people, one must also reflect on appropriate language.

Often, the use of passive or past-tense language will function to distort Indigenous presence or re-write known history. For example, the statement "we would like to acknowledge the Mi'kmaq people, who *were* the traditional stewards of this land" functions to deny present agency to the Indigenous peoples who remain on the same

[23] Jeffery G Hewitt, "Land Acknowledgment, Scripting and Julius Caesar" (2019) 88:2 SCLR at 33.

land. This form of language serves as an abstraction, classifying the Indigenous as belonging to the past.

Similarly, passive phrasing within land acknowledgments may also serve to characterize Indigenous peoples as mere bystanders or subjects of action and not as actors themselves.

2.3.7.2 Possessive Voice

Using a possessive voice to describe Indigenous groups and peoples is reflective of a colonial and paternalistic perspective that harkens back to when Indigenous peoples were considered and treated as wards of the state. For example, saying "**our** First Nations" or "**our** Indigenous peoples" connotes that First Nations or Indigenous peoples belong to or are possessed by the speaker, Canada, or a province, depending on the context in which it is used. This voice also disregards the diversity of Indigenous groups and treats them as all the same which is analogous to pejorative reference to "Indians." Rather than using "our" when describing Indigenous groups or peoples, it is much more respectful and enlightened to name the Nations being referenced and avoiding using a possessive voice when doing so.

2.3.7.3 "Guests"

It is fairly commonplace within the practice of modern land acknowledgment for non-Indigenous speakers to refer to themselves as 'guests' upon Indigenous lands. While it may be true that "we are all here to stay,"[24] guests are typically invited inside for a period of time before they eventually leave. This does not reflect the state of affairs in Canada.

While the use of the term 'guest' may soften the harsh reality of displacement and genocide for some speakers, it is nonetheless inaccurate and incompatible with honourable reconciliation. Recall that land acknowledgments should not be easy. Nor should they be vessels of absolution.

2.3.7.4 Custodians / Stewards

Similarly, the description of Indigenous peoples as the traditional custodians or stewards of land is historically inaccurate. Stewards are not owners, nor are they

[24] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186 [*Delgamuukw*].

sovereigns. This type of language implies that Indigenous peoples were merely taking care of the land until its rightful owners appeared. These descriptions call to mind the racist Doctrine of Discovery and concept of *terra nullius,* which must be disavowed for meaningful reconciliation to be possible.

2.3.7.5 Formal, Distancing Language

Formal distancing language has become increasingly commonplace in institutional land acknowledgments. For example, in institutional settings, the placeholder "we acknowledge Y" fails to directly imply a particular institution and removes ownership from the statement, thereby insulating the institution from the implications of the acknowledgment. By contrast, the statement "We at X-institution acknowledge Y" implicates the speaker and their institution as personally invested, responsible, and present for the contents of the acknowledgment.

Choices in language such as "I would *like to* acknowledge Y" add an additional layer of courtesy when compared with "I acknowledge Y." Where the latter statement is more assertive and takes ownership of the acknowledgment, the former may inadvertently create an imbalanced power dynamic:

> In the first statement, the modal verb "would" seeks to ask permission. Nonetheless, the speaker immediately continues, hence asking for consent without seeking an actual response. This indicates a presumption that the speaker is already licensed to continue as the party of higher status. In other words, this rhetorical device functions to assert power over the abstract Indigenous subject of the statements rather than expressing respectful accountability towards reconciliation.[25]

Effective land acknowledgments require a degree of closeness that is not often found in formal institutional language.

2.3.8 The Problem of Inclusion

A further difficulty in phrasing land acknowledgments relates to the problem of inclusion: which Indigenous groups should be included in the acknowledgment? The following lists 4 potential approaches:

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[25] Stephanie Hammond-Thrasher, *Reconciliation or Obligation? A Discourse Analysis of Written Land Acknowledgements Produced in an Academic Context*, online: <https://www.su.ualberta.ca/media/uploads/1143/Reconciliation%20or%20Obligation.pdf>.

1. Naming a single group (e.g., one of First Nations, Inuit, or Métis)
2. Naming a small number of communities (e.g., First Nations, Inuit, and Métis)
3. Recognizing a larger variety of more specific groups (e.g., the Huron-Wendat, Haudenosaunee, Mississaugas of the Credit, and Anishinaabe peoples)
4. Recognizing a larger variety of specific groups (as immediately above), as well as all "First Peoples of Canada"

The first approach listed is problematic because naming only one broad group tends to promote exclusivity and doubles down on historical inaccuracies.

The second approach that recognizes broad groups of Indigenous peoples is still much less inclusive and accurate than naming specific groups.

However, the third option of naming specific groups may create problems of ordering and inclusion. These issues may impact considerations of sovereignty or claims by other Indigenous groups—for to include others may damage the claims of well-established traditional inhabitants.

While the final option is not immune to problems of ordering and inclusion, some argue that land acknowledgments that include both general and specific groups have the strongest discursive approach.[26] Ultimately however, one must listen, exercise discretion, and consult with others to determine the most appropriate form of inclusion.

2.3.9 Acknowledging Treaties vs. Unceded Territories

Many modern land acknowledgments also make reference to treaties between the Crown and Indigenous nations, or alternatively, to territories that remain 'unceded'. Unfortunately, neither approach is without its difficulties.

Generally, treaties with First Nations demonstrate the sovereignty possessed by the Nation to enter such a compact with the Crown. However, with respect to acknowledging treaties, problems of interpretation have increasingly arisen between written and oral versions of various treaties across Canada. Allegations of bad faith, impropriety, and irreducible meaning in language have cast doubt on the legitimacy

[26] Stephanie Hammond-Thrasher, *Reconciliation or Obligation? A Discourse Analysis of Written Land Acknowledgements Produced in an Academic Context*, online: <https://www.su.ualberta.ca/media/uploads/1143/Reconciliation%20or%20Obligation.pdf>.

of shared understandings in historic treaties. As such, to assume or acknowledge the treaty making process as just and fair may be harmful to the project of meaningful reconciliation.

With regard to 'unceded' territories, one must also proceed with caution, as there appears to be a false dichotomy between treaties and unceded territories in land acknowledgments. 'Unceded' is a legal word used by the Crown that is often conceptually opposed to treaty lands. The implication may be that if non-treaty lands are "unceded," than treaty lands must be *ceded*. One need only look to the Peace and Friendship treaties of the Atlantic provinces to appreciate this is not true. Furthermore, there is increasing doubt that the legal concept of 'cessation' would have been comprehensible to Indigenous worldviews.

Finally, to acknowledge treaties and unceded territories *without more* can serve to elevate the status of settler politics and tools above Indigenous practices, such as covenants and wampums, that preceded European arrival. For meaningful reconciliation to occur, Indigenous law and legal orders can no longer be ignored.

3. CONCLUSION: HOW DO I FIND OUT MORE?

We have compiled a number of educational resources that may assist when preparing to deliver a land acknowledgement in the traditional territories of Indigenous peoples across Canada. These resources are publicly available:

- https://www.whose.land/en/

- https://native-land.ca/

- ***Canadian Association of University Teachers, "Guide to Acknowledging First Peoples & Traditional Territory"*** *link*
  This resource offers the Canadian Association of University Teachers (CAUT) recommended territorial acknowledgement for institutions where our members work, organized by province.

- ***The Elementary Teachers' Federation of Ontario (ETFO) First Nations, Métis & Inuit Education, "Starting from the Heart: Going Beyond a Land Acknowledgement"*** *link*
  This document was developed to provide you with information, ideas and resources that promote further learning while supporting you in your

reconciliation journey. It will invite you to acknowledge your own values, your relationship with family, the community and the land. It will also explore our collective responsibility to protect the natural environment. As you go through the resource, you will be invited to engage in the activities and to examine the importance of nurturing relationships with the Indigenous communities in your region.

In addition, to support the work, we have prepared sample language below to illustrate a place to begin learning. This sample language is merely a suggested starting point to commence the learning and acknowledgment exercise.

If we were gathered in Vancouver, the host speaker could offer:

> *In the spirit of truth and reconciliation, we [I] would like to begin by acknowledging that the land on which we gather is the unceded territory of the Coast Salish Peoples, including the territories of the xʷməθkwəy̓əm (Musqueam), Skwxwú7mesh (Squamish), and Səl̓ílwətaʔ/Selilwitulh (Tsleil-Waututh) Nations.*

If we were gathered in Calgary, the host speaker could offer:

> *In the spirit of truth and reconciliation, we [I] would like to take this opportunity to acknowledge the traditional territories of the Niitsitapi (Blackfoot) and the people of the Treaty 7 region in Southern Alberta, which includes the Siksika, the Piikuni, the Kainai, the Tsuut'ina and the Stoney Nakoda First Nations, including Chiniki, Bearpaw, and Wesley First Nations. The City of Calgary is also home to Métis Nation of Alberta, Region III.*

If we were gathered in Saskatoon, the host speaker could offer:

> *In the spirit of truth and reconciliation, We [I] would like to begin by acknowledging that the land on which we gather is Treaty 6 territory, the traditional territory of Cree Peoples, and on the homeland of the Métis Nation.*

If we were gathered in Winnipeg, the host speaker could offer:

> *In the spirit of truth and reconciliation, We [I] would like to begin by acknowledging that we are in Treaty 1 territory and that the land on which we gather is the traditional territory of Anishinaabe, Cree, Anishininew,*[27] *Dakota, and Dene Peoples, and the homeland of the Métis Nation.*

[27] Oji-Cree has been the English term.

If we were gathered in Ottawa, the host speaker could offer:

> *In the spirit of truth and reconciliation, We [I] would like to begin by acknowledging that the land on which we gather is the traditional unceded territory of the Algonquin Anishinaabe People.*

If we were gathered in Montreal, the host speaker could offer:

> *In the spirit of truth and reconciliation, We [I] would like to begin by acknowledging that the land on which we gather is the traditional and unceded territory of the Kanien'keha:ka (Mohawk), a place which has long served as a site of meeting and exchange amongst nations.*

If we were gathered in Halifax, the host speaker could offer:

> *In the spirit of truth and reconciliation, We [I] would like to begin by acknowledging that we are in Mi'kma'ki, the ancestral and unceded territory of the Mi'kmaq People. This territory is covered by the "Treaties of Peace and Friendship" which Mi'kmaq, Wəlastəkwiyik (Maliseet), and Passamaquoddy Peoples.*

4. RESOURCES

- Jeffery G. Hewitt - Land Acknowledgment, Scripting and Julius Caesar: https://digitalcommons.osgoode.yorku.ca/sclr/vol88/iss1/2/

- Chelsea Vowel – Beyond Territorial Acknowledgments: https://apihtawikosisan.com/2016/09/beyond-territorial-acknowledgments/

- Dylan Robinson, Kanonhsyonne Janice C. Hill, Armand Garnet Ruffo, Selena Couture, and Lisa Cooke Ravensbergen - Rethinking the Practice and Performance of Indigenous Land Acknowledgements: https://uwaterloo.ca/faculty-association/sites/ca.faculty-association/files/uploads/files/rethinking_the_practice_and_performance_of_indigenous_land_acknowledgement_a.pdf

- Native Governance Center – Beyond Land Acknowledgment: A Guide: https://nativegov.org/news/beyond-land-acknowledgment-guide/

- The Conversation - Land acknowledgments meant to honor Indigenous people too often do the opposite – erasing American Indians and sanitizing history instead: https://theconversation.com/land-acknowledgments-meant-to-honor-indigenous-people-too-often-do-the-opposite-erasing-american-indians-and-sanitizing-history-instead-163787

- Melanie Janzen – Breathing Life into Territorial Acknowledgment: https://ojs.library.ubc.ca/index.php/tci/article/view/192298

- Joe Wark – Land acknowledgments in the academy: refusing the settler myth: https://www.tandfonline.com/doi/full/10.1080/03626784.2021.1889924

- Brett Bundale, Global News – On land acknowledgments, some Indigenous advocates are ambivalent: https://globalnews.ca/news/4896904/on-land-acknowledgments/

- Association of Municipalities of Ontario – Guidance on Traditional Land Acknowledgment Statements: https://www.amo.on.ca/advocacy/indigenous-relations/guidance-traditional-land-acknowledgement-statements

- Stephanie Hammond-Thrasher – Reconciliation or Obligation? A Discourse Analysis of Written Land Acknowledgments Produced in an Academic Context: https://www.su.ualberta.ca/media/uploads/1143/Reconciliation%20or%20Obligation.pdf

- Stephen Marche – Canada's Impossible Acknowledgment: https://www.newyorker.com/culture/culture-desk/canadas-impossible-acknowledgment

- CBC News – First Nations title acknowledgments could be used as evidence in N.B. land claim case, say experts: https://www.cbc.ca/news/canada/new-brunswick/first-nation-land-title-acknowledgement-1.6215133

- Clint Burnham – No Poems on Stolen Native Land: https://thetransmetropolitanreview.files.wordpress.com/2017/02/43-78-1-sm.pdf

- Eve Tuck, K. Wayne Yang – Decolonization is not a Metaphor: https://jps.library.utoronto.ca/index.php/des/article/view/18630/15554

- Mark McKenna – Tokenism or belated recognition? Welcome to Country and the emergence of Indigenous protocol in Australia, 1991–2014: https://doi.org/10.1080/14443058.2014.952765

- Maggie Wente - The flags are still flying at half-mast, but has everyone stopped noticing?: https://www.oktlaw.com/the-flags-are-still-flying-at-half-mast-but-has-everyone-stopped-noticing/

- Selena Mills - Land acknowledgements are a good first step, but there's a lot more work to be done: https://www.todaysparent.com/kids/school-age/land-acknowledgements-are-a-good-first-step-but-theres-a-lot-more-work-to-be-done/

- Kairos, "Territorial Acknowledgment as an act of reconciliation": https://www.kairoscanada.org/territorial-acknowledgment

- Canadian Association of University Teachers - Guide to Acknowledging First Peoples & Traditional Territory: https://www.caut.ca/content/guide-acknowledging-first-peoples-traditional-territory

- Ontario Government - Ontario First Nations Maps: https://www.ontario.ca/page/ontario-first-nations-maps

- Government of Canada - Welcome to the First Nation Profiles Interactive Map: https://geo.aadnc-aandc.gc.ca/cippn-fnpim/index-eng.html

- https://www.whose.land/en/

- https://native-land.ca/

- The Elementary Teachers' Federation of Ontario (ETFO) First Nations, Métis & Inuit Education, "Starting from the Heart: Going Beyond a Land Acknowledgement": https://etfofnmi.ca/wp-content/uploads/2019/10/Going-Beyond-A-Land-Acknowledgement-FINAL-VERSION.pdf

CHAPTER 2: DEVELOPING A TRAUMA-INFORMED LEGAL PRACTICE

This chapter is intended to deepen inter-cultural competency to understand what it is to develop trauma-informed practice skills and why such skills are necessary to deliver legal services free from racism. In this chapter, the following key elements are addressed:

- Legal practitioners must take a trauma-informed approach to working with Indigenous peoples.
- Trauma-informed legal practice is part of an advocate's cultural competency, and one must understand the need for trauma-informed practice and develop the skills to take a trauma-informed approach.
- Taking a trauma-informed approach is necessary in all areas of the law involving Indigenous peoples.
- The obligation to take a trauma-informed approach applies to Indigenous clients, witnesses, or other Indigenous people who are participating in or concerned by a legal matter.
- To engage in trauma-informed legal practice, a practitioner must understand what trauma is and how it manifests, so they can adapt their practice to respond to the needs of clients and others.
- Trauma-informed practice encompasses four fundamental principles: trauma awareness; emphasis on safety and trustworthiness; opportunity for choice, collaboration, and connection; and empowerment and strength-building.
- Trauma-informed practice includes building capacity for self-care and resilience for the lawyer.
- Practitioners will face challenges in implementing a trauma-informed approach to their legal practice. However, cultural competency does not require one to know everything there is to know about trauma-informed practice; rather, it is sufficient to know the fundamental principles, use thoughtful practices, engage in ongoing skills development, and maintain a self-awareness to know when to seek additional resources or more qualified assistance.

1. INTRODUCTION TO TRAUMA-INFORMED LEGAL PRACTICE

Trauma and law are interconnected.[1] Developing an understanding of the interconnected nature of trauma and law is the starting point to recognizing the imperative of taking a trauma-informed approach to working with Indigenous peoples and developing the skills necessary to do so. The need to take a trauma-informed approach applies not only to working with Indigenous clients, but also to Indigenous witnesses, members of the Indigenous community concerned by a legal matter, and others involved in a legal proceeding.

In recognition of Calls to Action 27 and 28 of the 2015 Final Report of the Truth and Reconciliation Commission, this chapter will provide an overview of trauma-informed practice as a skill and facet of cultural competency within the legal profession. The Law Society of Ontario's Rules of Professional Conduct also require lawyers to possess and apply "relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client",[2] which includes intercultural competency.

1.1 What Is Trauma-Informed Practice and How Does It Relate to the Law?

A trauma-informed practice supports healing in a way that aims to do no further harm. The trauma-informed framework was developed by mental health and healthcare practitioners as an approach to providing services to vulnerable populations. Similarly, a trauma-informed legal practice equips practitioners within the justice system with the tools to facilitate Indigenous peoples' interactions with the legal system, while being mindful of the historic and ongoing trauma inherent in these interactions. There is increasing recognition that "more effective, fair, intelligent, and just legal responses must work from a perspective which is trauma informed."[3]

In recognition of the significant and negative role that law and policy played in the interactions between settlors and Indigenous communities, advocating for reconciliation involves the provision of legal services in a manner that makes

[1] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 503.
[2] Law Society of Ontario Rules of Professional Conduct, Rule 3.1-1.
[3] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 505.

individuals feel safe and ensures they are not re-traumatized. A trauma-informed practice also extends the objective of doing no further harm to the practitioner themselves. In this way, a trauma-informed practice fosters safety, healing, and connection among all stakeholders and participants throughout the course of the professional relationship.

At first, a trauma-informed practice may appear to only be relevant to criminal law or family law contexts, in which trauma or violence may appear to be most prevalent. However, a trauma-informed practice must be exercised consistently across all areas of law.

For example, class action litigation addressing intergenerational trauma and violence experienced by Indigenous communities is ongoing across Canada (including, for example, between the Assembly of First Nations and the Government of Canada to seek justice for thousands of families impacted by the violence and discrimination within Canada's child welfare system). This class action litigation invites a thoughtful trauma-informed practice by the legal practitioners that work with the parties and the members of the certified class. Any litigation that involves Aboriginal treaty rights, title, or other constitutional rights will also necessitate the involvement of Indigenous peoples – whether as plaintiffs, class members, witnesses, or in other capacities – and the application of cultural competency and trauma-informed practice by the legal representatives involved.

Several characteristics of Canada's adversarial legal regime create the need to take a trauma-informed approach. For example, Canadian common law rules of evidence are in some ways inherently incompatible with the ontological, knowledge-keeping, and dispute resolution practices in Indigenous legal orders. When Indigenous peoples meet with the Canadian legal system, these inconsistencies can invoke harms or trigger traumas relating to the legacies of violence perpetrated and perpetuated by the Canadian legal system, such as colonialism and the displacement of Indigenous peoples from their ancestral lands.

By way of further example, a fundamental facet of Canada's litigation process is the rigorous examination and cross-examination of witnesses; the application of these practices to Indigenous plaintiffs, defendants, Elder witnesses, and traditional knowledge-keepers can be harmful and can trigger, traumatize, and re-traumatize.

Overall, culturally competent lawyers must be mindful of the broad relevance of trauma-informed lawyering across many areas of law, including civil, criminal, constitutional, family, and class action matters, amongst others.

Culturally competent legal professionals should apply a trauma-informed approach throughout their practice, as the baseline approach to working with clients. Indigenous peoples have historically experienced, and continue to experience, significant trauma and harm within the Canadian legal system. Cultivating safety, healing, and connecting in a trauma-informed manner will empower a lawyer to provide good legal advice and competent services. Put simply, "the experience of your client in dealing with you is just as important as providing good legal advice and competent services."[4]

1.2 What Is Trauma and How Does It Manifest?

To engage in trauma-informed practice, a lawyer must first understand what trauma is and distinguish trauma from other distressing experiences:

> While almost everyone experiences distressing events over the course of a lifetime, not everyone experiences events that are traumatic. Unlike a stressful encounter or situation, a traumatic event is one which is so overwhelming that it diminishes a person's capacities to cope, as it elicits intense feelings of fear, terror, helplessness, hopelessness, and despair often subjectively experienced as a threat to the person's survival. Traumatic events are not necessarily violent, though they always entail the violation of a person's sense of self and security.[5]

Second, it is important to recognize how prevalent trauma is:

> The impacts of trauma are widespread, affecting many people's lives, far more than most people recognize. For example, findings from community-based surveys indicate that somewhere between fifty-five per cent and ninety per cent of people have experienced at least one traumatic event in their lifetime.

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[4] Golden Eagle Rising Society, Trauma-Informed Legal Practice Toolkit, online: https://www.goldeneaglerising.org/docuploads/Golden-Eagle-Rising-Society-Trauma-Informed-Toolkit-2021-02-14.pdf.

[5] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 507.

> Approximately one quarter of these people experienced traumatizing events when they were children.[6]

A trauma-informed legal practitioner should be mindful of the different kinds of trauma and the varied responses to traumatic events in order to be responsive to how trauma may impact the lawyer-client relationship.

Trauma is classified depending on the nature, duration, and/or frequency of the traumatic events or conditions experienced. Trauma can be classified as acute, which typically arises from a single traumatic event; chronic, which typically arises from repeated or multiple traumatic experiences; and/or complex, which manifests from exposure to mixed, severe, and often highly invasive traumatic events over prolonged periods of time.[7] Traumatic events vary significantly, including "emotional, physical, and sexual abuse; neglect; physical assaults; witnessing violence in the family, school, or community; war; racism; bullying; acts of terrorism; fires; serious accidents; natural catastrophes; serious injuries; intrusive or painful medical procedures; loss of loved ones; abandonment; and separation."[8]

Practitioners working with Indigenous peoples must be aware of the social context that informs individual experiences of trauma:

> Both the individual and the social levels are important in understanding the origins and alleviation of traumatic responses. Furthermore, individualized experiences of trauma are typically shaped or even partially caused by the impact of social problems on the lives of particular individuals but also communities. An obvious example is found in the generations of state sanctioned decimation of various First Nation communities through colonial policies of assimilation, Aboriginal language destruction, the forced removal of children from their families at residential schools and the so-called 60s sweep, among others.[9]

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[6] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 505.
[7] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 507.
[8] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 508.
[9] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 514.

A legal representative working with Indigenous peoples must be mindful of the different kinds of traumatic events that may have occurred in the immediate lives, communities, and intergenerational history of the Indigenous peoples with whom they work. For instance, Indigenous women, girls, and non-binary people experience disproportionately high rates of violence and abuse, which may have caused acute trauma. Acute trauma may also have been caused by a prior negative experience with a lawyer, police officer, or other actors within the justice system. Displacement, Indigenous homelessness,[10] or poverty may give rise to chronic trauma. The ongoing legacies of colonialism, residential school violence, missing and murdered Indigenous women and girls, and the mass discoveries of unmarked child graves may cause prolonged trauma of a complex nature for an Indigenous person, even if the individual has not personally experienced acute trauma of a similar nature.

Traumatic events trigger varied responses. Lawyers are encouraged to consider the ways in which the Indigenous peoples they work with may have experienced trauma, and the ways in which they can mitigate triggering or re-traumatizing events. Lawyers should also be cautious about making assumptions about the reactions and responses of traumatized peoples.

Post-traumatic responses can be characterized as "simple" or "complex," depending largely on the kind of traumatic experience involved. "It has become clear that simple post-traumatic stress resulting from a one-time incident is markedly different from the complex set of responses that follows chronic, multiple, or ongoing traumatic events."[11]

Trauma responses may include a variety of behavioural, physical, and psychological changes, such as:

1. Re-experience phenomena such as flashbacks and nightmares of the traumatic event, which may make the traumatized person feel out of control;
2. Avoidance and numbing responses, which refer to a person's attempt to avoid reminders of the traumatic event including places, people, actions,

[10] Aboriginal Standing Committee on Housing and Homelessness, 2012, recognized Indigenous homelessness as requiring a more composite description than the lack of a structure of habitation. Rather, it is more fully described as experiencing isolation from relationships to land, water, place, family, kin, each other, animals, cultures, languages and identities. Online: <www.aschh.ca>.

[11] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 511.

thoughts or feelings associated with that event. People who experience these responses may withdraw from their family and friends and lose interest in everyday activities;
3. Physical hyperarousal responses which include a sense of being on guard at all time, irritability or sudden anger, difficulty sleeping, lack of concentration, being overly alert, or easily startled;
4. Affect dysregulation, which refers to difficulties in modulating emotion and impulses;
5. Changes in their consciousness, which means that a traumatized person can at times detach from the immediate reality by "dissociation";
6. Alteration of their self-perception with feelings of shame, guilt, or an exaggerated sense of responsibility;
7. Alteration of their relationships with others, including difficulties in establishing and maintaining intimate emotional connections with others and trusting others;
8. Somatization, which means the manifestation of psychic pain in the body and in physical illness; and
9. Feelings of being overwhelmed or hopeless, or loss of a sense of purpose.

Individuals with simple post-traumatic stress are more likely to experience symptoms (1) to (3), and people with complex post-traumatic stress are more likely to experience symptoms (4) to (9). It is important to remember that these responses are involuntary, as trauma lives in our nervous system.[12]

Trauma-informed legal practitioners may not have the opportunity to recognize trauma responses among Indigenous peoples as "changes", and may rather observe these characteristics as innate qualities. As such, culturally competent trauma-informed work takes caution in drawing inferences about Indigenous peoples based on assumed behaviours or trauma responses. For example, it could be inappropriate to make inferences or engage in propensity reasoning about the credibility of information provided by Indigenous clients based on post-traumatic behaviours.

Indigenous peoples may experience post-traumatic responses to varying degrees of impact on their day-to-day lives and on their relationship with a lawyer. Trauma may therefore impact the lawyer-client relationship in a variety of situations that arise

[12] Golden Eagle Rising Society, Trauma-Informed Legal Practice Toolkit, online: https://www.goldeneaglerising.org/docuploads/Golden-Eagle-Rising-Society-Trauma-Informed-Toolkit-2021-02-14.pdf.

throughout the course of providing legal services; the remainder of this chapter will discuss skills development and practical approaches to such situations.

1.3 The Fundamentals of Trauma-Informed Practice

Trauma-informed practice encompasses four principles:

1. **Trauma awareness:** All services taking a trauma-informed approach begin with building awareness of how common trauma is; how its impact can be central to one's development; the wide range of adaptations people make to cope and survive; and the relationship of trauma with substance use, physical health, and mental health concerns.[13]

As previously discussed, it is imperative that legal professionals understand how trauma and post-traumatic responses can manifest across diverse areas of law and throughout a client's interaction with the legal system.

Legal professionals must be aware of clients who are experiencing post-traumatic injuries generally and be mindful of the need to provide legal services in a trauma-informed manner. For example, this can involve ensuring meeting spaces provide comfortable seating and sufficient personal space, and that the allotted time for a meeting is sufficient to allow the client to take breaks and not feel rushed. The prevalence of trauma in society mitigates in favour of making this a consistent practice in the work environment.

Legal professionals must also be mindful that their interaction with clients may trigger a post-traumatic response. Trauma awareness means practitioners are able to recognize and respond to these situations with clients. For example, consider a legal representative who has created a comfortable meeting space and allocated more time than necessary for a meeting with a client. The practitioner ensures they take regular breaks and checks in with the client throughout the meeting to see how they are feeling. Though the client felt comfortable at the first break, after the second break they are visibly upset and communicate that they feel unwell. Regardless of whether the meeting's objectives have been achieved, a trauma-informed legal representative will recognize the client's changing needs and respond accordingly. The experience of working with a legal representative should not be compromised, just as the quality of the legal services provided would not be compromised.

[13] The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1b, citing the Canadian Centre on Substance Abuse, *The Essentials of Trauma-informed Care*.

Other examples of trauma awareness in practice include:

- Creating a meeting space that is spacious, fitted with comfortable furniture, with accessible restrooms and rest spaces.
- Avoiding assumptions about gender and gender identity, such as by ensuring affirming pronouns are asked for and used.
- Ensuring the correct pronunciation of names.
- Being proactive and adaptive in court proceedings to mitigate harms caused by rigorous cross-examination of Indigenous witnesses, particularly in the case of Elders or traditional knowledge-keepers. The Indigenous Bar Association has worked to establish new Federal Court Practice Guidelines that respond to these specific concerns.

2. **Emphasis on safety and trustworthiness**: Physical and emotional safety for people dealing with trauma is key, because trauma survivors often feel unsafe, are likely to have experienced boundary violations and abuses of power, and may be experiencing, or have experienced, unsafe relationships.[14]

Importantly, the emphasis on safety and trustworthiness invites an awareness of vicarious trauma for the practitioner as well.

Other examples of prioritizing safety and trustworthiness in practice include:

- Avoiding changing or introducing new practitioners part-way through the process; conversely, ensuring continuity in the practitioners with whom the Indigenous client or stakeholder has built a rapport.
- Providing as much information as possible to Indigenous clients or stakeholders about the agenda and planned goals for a meeting. With this information, the individual will be less likely to encounter an unexpected topic or activity that may be triggering, for which they have not had time to prepare.
- Providing clear timelines for what will happen after the meeting, and meeting the timelines and expectations articulated.
- Providing resources or reference to appropriate services.
- Providing regular reports and updates, regardless of whether developments have occurred. This will instill reassurance that the file is being actively managed.

[14] The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1b, citing the Canadian Centre on Substance Abuse, *The Essentials of Trauma-informed Care*.

- Communicating to, and reminding the client, that you as their legal representative represent them and not the justice system.

3. **Opportunity for choice, collaboration, and connection**: Trauma-informed services create safe environments that foster a client's sense of efficacy, self-determination, dignity, and personal control. Service providers aim to communicate openly, equalize power imbalances in relationships, allow the expression of feelings without fear of judgment, provide choices as to preferences, and work collaboratively. In addition, having the opportunity to establish safe connections – with service providers, peers, and the wider community – is reparative for those with early and/or ongoing experiences of trauma.[15]

Other examples of prioritizing opportunities for choice, collaboration, and connection in practice include:

- Avoiding paternalistic approaches that pressure clients to reach a specific decision. Accepting and acknowledging Indigenous clients as the experts in their own lives and as the person best suited to make decisions for themselves is a core example of respecting choice through collaboration.
- All options available to clients must be explained in language that is accessible to the client. The use of interpretation tools or resources may be necessary.

4. **Empowerment and strength building**: Services help participants to identify their strengths and to further develop their resiliency and coping skills. Emphasis is placed on teaching and modelling skills for recognizing triggers, calming, centring, and staying present. Parallel attention to staff competencies and learning these skills and values characterizes trauma-informed services.[16]

"Recognizing and promoting resilience, therefore, is also a fundamental component of effective trauma-informed work."[17]

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[15] The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1b, citing the Canadian Centre on Substance Abuse, *The Essentials of Trauma-informed Care*.
[16] The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1b, citing the Canadian Centre on Substance Abuse, *The Essentials of Trauma-informed Care*.
[17] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 509.

Other examples of client empowerment and strength-building in practice include:

- If a client has developed a strong relationship and consistent routine with an interpreter, take the steps necessary to ensure their interpreter can accompany them to depositions, court proceedings, and other meetings.
- Ensure the client knows that he, she or they may have an Elder or support person to accompany them to hearings or other meetings.

The National Inquiry into Missing and Murdered Indigenous Women, Girls, and 2SLGBTQQIA peoples is one example of a large legal undertaking that applied trauma-informed practices and skills throughout the course of the four-year inquiry. More information about the specific practices undertaken can be found in the final report, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls,* available in the resource section of this chapter.

2. PRACTICAL CONSIDERATIONS FOR TRAUMA-INFORMED PRACTICE

A trauma-informed practice includes building capacity for self-care and resilience for the lawyer. Developing the skills and resources for trauma-informed practice involves a reflective approach that strengthens the practitioner's own safety and ability to care for themselves as they engage in their work, particularly as it relates to vicarious trauma.

Legal practitioners need to be mindful of the challenges inherent in trauma-informed practice, and be responsive to these challenges by drawing on their skills and further resources.

2.1 Challenges to Trauma-Informed Practice

This section will discuss some of the challenges that legal representatives may face in engaging in trauma-informed practice, and caution against approaches that are counterproductive to implementing a trauma-informed practice.

Legal representatives can anticipate challenges with timing and the availability of resources required to provide culturally competent services. For example, a trauma-informed approach may necessitate shortening meetings, which could allow individuals to take the rest they need but increase the amount of time required to complete the practitioner's task. By way of further example, a competent interpreter

could be required to support an individual in a trauma-informed manner, but the availability of the interpreter who speaks the individual's language(s) and the time-consuming nature of working with an interpreter may lengthen the duration of meetings.

Another specific challenge that can be anticipated is the practitioner's own discomfort as they develop their skills in this area. The praxis of trauma-informed work is relatively new and invites practitioners to be reflective and self-aware as they undertake this work. Cultural competency does not require a lawyer to know everything there is to know about trauma-informed care; rather, it is sufficient to know the fundamental principles, use thoughtful practices, engage in ongoing skills development, and maintain a self-awareness to know when to seek additional resources or more qualified assistance.

It is worth emphasizing that cultural competency is not a soft skill; rather, it is an active, ongoing, and substantive praxis and imperative for competent legal representatives. Other misconceptions or barriers to integrating cultural competency in legal practice include:

- the (inappropriate) use of a uniform or homogenous approach, rather one that is Nation-, site-, and region-specific and responds to the specific individual(s) involved;
- conversely, a highly individualized process can also be problematic – although trauma-informed work must be flexible and responsive to the individual needs of the stakeholders involved, an entirely individualized or reactive approach does not align with the four principles of trauma-informed care;
- non-Indigenous lawyers importing personal experience, values, or beliefs that may feel relevant in the practice of working with Indigenous peoples in a way that creates false equivalencies;
- understanding of Indigenous peoples and law in Canada in a way that detaches the histories of violence against Indigenous peoples from the contemporary manifestations of that harm; and,
- failing to incorporate learning about the strength, contributions, and achievements of Indigenous nations and peoples in society.

Overall, it is necessary for legal professionals to engage with the obligations of and commitments to reconciliation in ways that are critical and reflective, rather than superficial.[18]

2.2 Response to Call to Action 28 and Ongoing Skills Development

Call to Action 28 of the Final Report of the Truth and Reconciliation Commission supports the ongoing transformation of the legal profession:

> 28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, 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.

This Call to Action was an important and necessary response to a glaring gap in legal education in Canada:

> Although the law is deeply involved with regulating and responding to human behaviour, legal professionals are virtually never exposed to formal or informed psychological literature, research, or professional knowledge about human behaviour in their legal education or ongoing professional training.[19]

Law schools across Canada, both before and in response to the TRC report, have taken significant steps to advance reconciliation in this way and incorporate learning about Indigenous peoples and law in Canada in their curricula. Varied approaches have been taken, from credit-based degree requirements through to dual JD programs in both common and Indigenous legal orders.

As a result of these initiatives, the level of awareness and cultural competency within the legal profession is changing. Law students and lawyers earlier in their careers have gained substantive knowledge and training about cultural competency and issues related to Indigenous peoples and law in Canada in a way that more senior

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[18] Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97:3 Can Bar Rev 526.

[19] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 510.

lawyers and members of the judiciary did not have access to in their formal legal education. It is important for lawyers at all stages of their careers to be mindful, reflective, and self-aware of the extent of their knowledge and exposure to these issues as they approach advocacy and legal reasoning, particularly when opportunities arise for legal arguments informed by Indigenous world views, peer-based learning, and the advancement of cultural competency.

One example of an established Indigenous cultural competency training program is the Bimickaway Training program, a full-day program for justice sector workers provided by the Indigenous Justice Division of the Ontario Ministry of the Attorney General. Bimickiway is an Anishinabemowin word meaning *to leave footprints*. The comprehensive training curriculum was developed in collaboration with Indigenous constituency groups and has facilitated training to over 6,000 people since 2016.

Lawyers are encouraged to seek opportunities to develop their skills in trauma-informed practice and to continue this iterative learning and unlearning throughout the course of their career, and – importantly – from practitioners and institutions appropriately positioned to facilitate this learning.

3. RESOURCES

3.1 Reports, Literature, and Scholarly Sources

- Cathy Kezelman & Pam Stavropoulos, “Trauma and the Law: Applying Trauma-Informed Practice to Legal and Judicial Contexts,” (Blue Knot Foundation, 2016): https://www.communitylegalqld.org.au/wp-content/uploads/2016/10/blue_knot_paper_trauma_informed_practice.pdf

- Jesse Thistle, “Definitions of Indigenous Homelessness in Canada,” Canadian Observatory on Homelessness: https://homelesshub.ca/sites/default/files/COHIndigenousHomelessnessDefinition.pdf

- Melanie Randall & Lori Haskell, “Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping,” Dalhousie LJ (Fall 2013): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424597

- Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97:3 Can B Rev 526.

- Renee Linklater, *Decolonizing Trauma Work*, (Fernwood Publishing, 2020): https://fernwoodpublishing.ca/book/decolonizing-trauma-work

- Sarah Katz & Deeya Haldar, "The Pedagogy of Trauma-Informed Lawyering" (2016) 22:2 Clinical L Rev 359.

- Lee Norton, Jennifer Johnson & George Woods, "Burnout and Compassion Fatigue: What Lawyers Need to Know" (2016) 84:4 UMKC L Rev 987.

- Lauren Bennett Cattaneo and Lisa A Goodman, (2016) 16 Self-Care Tips for Advocates: https://www.domesticshelters.org/articles/taking-care-of-you/16-self-care-tips-for-advocates#.Wf4f0rpFxPZ

- Mary Seighman et al, “Representing Domestic Violence Survivors Who are Experiencing Trauma and other Mental Health Challenges: A Handbook for Attorneys” (National Center on Domestic Violence, Trauma & Mental Health,

December 2011) : http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2012/01/AttorneyHandbookMay282012.pdf

- The MMIWG Report and Calls for Justice
    - Final Report: mmiwg-ffada.ca/final-report/
    - Calls for Justice: https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf

- Brett Forester, "'You're loved': Plaintiffs in AFN class-action discuss healing journey, fight for child welfare justice": https://www.aptnnews.ca/national-news/youre-loved-plaintiffs-in-afn-class-action-discuss-healing-journey-fight-for-child-welfare-justice/

3.2 Skills Development

- CTRI (Crisis and Trauma Resource Institute): https://ca.ctrinstitute.com/

- The Trauma-Informed Lawyer Podcast: thetraumainformedlawyer.simplecast.com/

- Trauma-Informed Legal Practice: Toolkit, Golden Eagle Rising Society: https://www.goldeneaglerising.org/docuploads/Golden-Eagle-Rising-Society-Trauma-Informed-Toolkit-2021-02-14.pdf

- Communicating Effectively with Indigenous Clients, an Aboriginal Legal Services Toronto publication by Dr. Lorna Fadden: https://1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/Fadden-ALS-2017.pdf

- Decolonizing Family Law Through Trauma-Informed Practices, Rise Women's Legal Centre: https://womenslegalcentre.ca/wp-content/uploads/2022/01/Decolonizing-Family-Law-RiseWomensLegal-Jan-2022-WEB.pdf

- Mental Health Briefs, Ontario Bar Association: https://www.oba.org/openingremarks/Mental-Health-Briefs

- Trauma-Informed Practice Guide (2013) BC Provincial Mental Health and Substance Use Planning Council Healing Families, Helping Systems: A Trauma-Informed Practice Guide for Working with Children, Youth and Families: https://bccewh.bc.ca/wp-content/uploads/2012/05/2013_TIP-Guide.pdf

- Bimickaway Training Program, cultural competency training provided by Indigenous Justice Division of MAG open to stakeholders across Ontario.

CHAPTER 3: MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS INQUIRY REPORT AND CALLS FOR JUSTICE

1. INTRODUCTION

Families, loved ones and survivors of missing and murdered Indigenous women, girls and 2SLGBTQQIA people have been at the forefront of the decades-long advocacy to establish a National Inquiry into Missing and Murdered Indigenous Women and Girls ("MMIWG"). Indigenous women in Canada are three times more likely to experience violence than other women and six times more likely than non-Indigenous women to be murdered.[1] Commissioners of the MMIWG communicated that this violence is the result of colonization and urged advocates everywhere to utilize the Final Report to educate Canadians on this terminology. We include this chapter to educate advocates on the work of the MMIWG and draw attention to the fact that these conditions and practices have not changed – the inequities, marginalization, discrimination, and threats to the lives of Indigenous women, girls and 2SLGBTQQIA people continue and are experienced in nearly every system and institution across Canada.

This chapter relates inextricably to the previous section on developing a skills-based advocacy practice that is trauma informed. Together, this work draws attention to the Calls to Action delivered to the justice sector in particular and raise awareness not only about the issues, but about what further opportunities to effect change can be taken and where.

1.2 The Nature and Scope of the MMIWG

In December 2015, the Government of Canada launched the National Inquiry into Missing and Murdered Indigenous Women and Girls in response to the staggering rates of disappearances, deaths, murders, and violence experienced by Indigenous women, girls, and 2SLGBTQQIA peoples.[2] The National Inquiry was established as a

[1] Jillian Boyce, *Victimization of Aboriginal people in Canada, 2014*, catalogue no. 85-002-X, ISSN 1209-6393 (Statistics Canada, Canadian Centre for Justice Statistics). See also Statistics Canada, Canadian Centre for Justice Statistics Table 7 (2001-2013); Table 35-10-0156-01 (2014-2016).

[2] The term 2SLGBTQQIA peoples represents peoples who identify as two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual plus. For the purposes of this chapter, 2SLGBTQQIA peoples and 'gender-diverse peoples' may be used interchangeably, though it is

truth-gathering process which sought the truths of 2,386 family members, survivors of violence, experts and Knowledge Keepers shared over two years of public hearings and evidence gathering across the country. The National Inquiry sought "to assess the root causes of the violence against Indigenous women and girls:"[3]

> Statistics consistently show that rates of violence against Métis, Inuit, and First Nations women, girls, and 2SLGBTQQIA people are much higher than for non-Indigenous women in Canada, even when all over [*sic*] differentiating factors are accounted for. Perpetrators of violence include Indigenous and non-Indigenous family members and partners, casual acquaintances, and serial killers.
>
> Despite the National Inquiry's best efforts to gather all of the truths relating to the missing and murdered, we conclude that no one knows an exact number of missing and murdered Indigenous women, girls and 2SLGBTQQIA people in Canada. Thousands of women's deaths or disappearances have likely gone unrecorded over the decades, and many families likely did not feel ready or safe to share with the National Inquiry before our timelines required us to close registration. One of the most telling pieces of information, however, is the amount of people who shared about either their own experiences or their loved ones' publicly for the first time. Without a doubt there are many more.[4]

On June 3, 2019, the National Inquiry's Final Report ("Final Report") was released, revealing persistent and deliberate human and Indigenous rights violations and abuses as the root cause behind disproportionate rates of violence. The Final Report, entitled *Reclaiming Power and Place*, calls for transformative legal and social changes to resolve the crisis that has devastated Indigenous communities.

The distressing and comprehensive findings of the Final Report stoke the moral and social conscience of governments, institutions, services providers, and all Canadians, to whom Calls for Justice are directed. For the legal profession, the National Inquiry highlights the distinct and intertwined social, legal, and historical narratives that have

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understood that this does not necessarily capture the full essence and identities of peoples that identify with the 2SLGBTQQIA umbrella.

[3] National Inquiry into Missing and Murdered Indigenous Women and Girls, *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* at 1.

[4] 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, volume 1a* at 3.

shaped the relationship between Canadian legal institutions and Indigenous peoples. The National Inquiry and Final Report implore all legal professionals and justice workers to engage with the findings of the National Inquiry and Calls for Justice in a meaningful way within their professional endeavors.

The Final Report articulates the seven principles of change advanced by the National Inquiry, which are:

1. A Focus on Substantive Equality and Human and Indigenous Rights

   > Indigenous women, girls, and 2SLGBTQQIA people are holders of inherent Indigenous rights, constitutional rights, and international and domestic human rights. In addition, many Indigenous Peoples in Canada are rights holders under various Treaties, land claims, and settlement agreements. These Calls for Justice arise from international and domestic human and Indigenous rights laws, including the Charter, the Constitution, and the Honour of the Crown. As such, governments have legal obligations to fully implement these Calls for Justice and to ensure Indigenous women, girls, and 2SLGBTQQIA people live in dignity.[5]

This principle of change demonstrates a shift away from the rhetoric of Indigenous women and girls as being "victims" to "rights-holders". This rights-based approach transforms the narrative from one of "unfulfilled needs," which animates a patriarchal and colonial posture, to the "denial of rights," which accurately situates Indigenous women and girls as sovereign, right-holding peoples. The focus on "substantive equality" emphasizes the outcome-based objective that is the achievement of true equality for Indigenous right-holders, rather than merely procedural objectives.

2. A Decolonizing Approach

   > It involves recognizing inherent rights through the principle that Indigenous Peoples have the right to govern themselves in relation to matters that are internal to their communities; integral to their unique cultures, identities, traditions, languages, and institutions; and with respect to their special relationship to the land. Our approach honours and respects Indigenous values, philosophies, and knowledge systems. It is a strength-based approach,

[5] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Calls for Justice* at 2.

focusing on the resilience and expertise of individuals and communities themselves.[6]

The disproportionate violence experienced by Indigenous women and girls is one thread in the fabric of Canada's settler-colonial socio-political regime. This principle of change seeks to dismantle the structural forms of colonialism, and instead honour Indigenous values, philosophies, and knowledge systems.

3. Inclusion of Family and Survivors

The National Inquiry's approach to the truth-gathering process was one that centered the perspective and participation of Indigenous women, girls, and 2SLGBTQQIA people with lived experience, as well as the families of the missing, murdered, and survivors. In this context, "family" must not be interpreted in the narrow sense; the notion of family was "understood to include all forms of familial kinship, including but not limited to biological families, chosen families, and families of the heart."[7]

4. Indigenous-led Solutions and Services

> Services and solutions must be led by Indigenous governments, organizations, and people. This is based on the self-determination and self-governance of Indigenous Peoples, as defined by *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") articles 3 and 4, as well as by the recognition of an inherent right that exists independent of any statute or legislation.[8]

Where necessary and appropriate in the nation-to-nation relationships between Indigenous nations and the Canadian government, collaboration in self-determination must be in true partnership.

5. Recognizing Distinctions

This principle of change inspires interpretation and implementation of the Calls for Justice in equitable and non-discriminatory ways, such that the distinct needs, identities, and differences among Indigenous peoples – across geographies and communities – are understood, respected, and upheld.

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[6] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Calls for Justice* at 2.
[7] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Calls for Justice* at 3.
[8] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Calls for Justice* at 3.

6. Cultural Safety

In the context of the health care system, the First Nation Health Authority defines cultural safety and cultural humility as:

> Cultural safety is an outcome based on respectful engagement that recognizes and strives to address power imbalances inherent in the health care system. It results in an environment free of racism and discrimination, where people feel safe when receiving health care.
>
> Cultural humility is a process of self-reflection to understand personal and systemic biases and to develop and maintain respectful processes and relationships based on mutual trust. Cultural humility involves humbly acknowledging oneself as a learner when it comes to understanding another's experience.

In the interpretation and implementation of the Calls for Justice, "the inclusion of Indigenous languages, laws and protocols, governance, spirituality, and religion"[9] are necessary to cultivate cultural safety.

7. Trauma-Informed Approach

As introduced in Chapter 2 of this Supplement to the *Guide*, a trauma-informed practice is one that provides care or services in a manner that aims to do no further harm. Given the violence experienced by Indigenous women and girls, a trauma-informed approach requires an awareness that survivors and families are at risk of being triggered or re-traumatized. The National Inquiry undertook the truth-gathering process using trauma-informed practices and skills throughout the course of the four-year inquiry.

A trauma-informed lens is critical to the interpretation and implementation of the Calls for Justice. In addition, integrating an awareness of trauma in legal practice is a fundamental principle of working with Indigenous peoples, whether as clients or in other ways through the course of your legal practice.

[9] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Calls for Justice* at 3.

1.3 The Final Report's Findings

One of the most significant outcomes of the National Inquiry was the Commission's conclusion that the human and Indigenous rights abuses and violations attributable to the Canadian government and state actors constitutes *genocide*:

> The violence the National Inquiry heard about amounts to a race-based genocide of Indigenous Peoples, including First Nations, Inuit and Métis, which especially targets women, girls, and 2SLGBTQQIA people. This genocide has been empowered by colonial structures, evidenced notably by the Indian Act, the Sixties Scoop, residential schools and breaches of human and Indigenous rights, leading directly to the current increased rates of violence, death, and suicide in Indigenous populations.[10]
>
> The National Inquiry acknowledges that the determination of formal liability for the commission of genocide is to be made before judicial bodies. An assessment of both individual and state responsibility requires a considerable body of evidence and must be carried out by a competent tribunal charged with this task… However, the information and testimonies collected by the National Inquiry provide serious reasons to believe that Canada's past and current policies, omissions, and actions towards First Nations Peoples, Inuit and Métis amount to genocide, in breach of Canada's international obligations, triggering its responsibility under international law.[11]

The Final Report is organized by 19 themes and 231 Calls for Justice that are delineated by the stakeholder groups to whom they are directed.

A number of the themes interact with the legal profession, including:

- Theme 6: The need to fully ratify and implement international human rights instruments
- Theme 11: The need for law reform of discriminatory legislation

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[10] 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, volume 1a* at 50.

[11] National Inquiry into Missing and Murdered Indigenous Women and Girls, *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* at 1.

- Theme 15: The need for measures to improve relationships between police services and Indigenous communities
- Theme 16: The need for more responsive, transparent, and accountable policing: investigations and oversight
- Theme 17: The need for culturally appropriate and equitable judicial processes and supports
- Theme 18: the need for alternatives to Euro-Canadian judicial mechanisms, including community and restorative justice models
- Theme 19: the need to address the overrepresentation of Indigenous women in correctional facilities, and ensure culturally appropriate programming and services for incarcerated Indigenous women

Of the 231 Calls for Justice, Calls 5.1 – 5.25 are directed at the collective governments of Canada in respect of the Justice sector; Calls 9.1 – 9.11 are directed at police services; and Call for Justice 10.1 is directed explicitly at 'Attorneys and Law Societies':

> 10.1 We call upon the federal, provincial, and territorial governments, and Canadian law societies and bar associations, for mandatory intensive and periodic training of Crown attorneys, defence lawyers, court staff, and all who participate in the criminal justice system, in the area of Indigenous cultures and histories, including distinctions-based training. This includes, but is not limited to, the following measures:
>
> i. All courtroom officers, staff, judiciary, and employees in the judicial system must take cultural competency training that is designed and led in partnership with local Indigenous communities.
> ii. Law societies working with Indigenous women, girls, and 2SLGBTQQIA people must establish and enforce cultural competency standards.
> iii. All courts must have a staff position for an Indigenous courtroom liaison worker that is adequately funded and resourced to ensure Indigenous people in the court system know their rights and are connected to appropriate services.[12]

[12] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Calls for Justice* at 22.

2. RESPONSES TO THE NATIONAL INQUIRY FINAL REPORT

In June 2021, the federal government launched the National Action Plan ("NAP") in response to the findings of the National Inquiry's Final Report. The report included the vision, guiding principles, and goals for the NAP, the short-term priorities for the NAP, and proposed immediate next steps: immediate support services for survivors and family members, continued involvement of survivors and family members in the implementation of the NAP, the creation of an oversight body, public awareness and training initiatives, the need for an implementation plan, provincial and territorial roundtables, and accountability mechanisms for the 231 Calls for Justice.

The NAP also articulated 8 specific action groups comprised of members of Indigenous communities to provide guidance to the federal government around the implementation of the NAP. At the core of the action groups is the National Family and Survivors Circle, who guided the process of the National Inquiry at national, regional, and local levels. The National Family and Survivors Circle continues to be at the core of the work to implement the National Inquiry's Calls for Justice and recommendations.



The implementation plan, with more specific information as to the approach, funding, and logistics of the plan, was not included in the NAP launch documents; it was expected to be released in fall of 2021, but has not yet been released.[13] In August 2021, the federal government announced $180 million in funding to support the NAP, including $24.5 million to establish a MMIWG Secretariat and implement the NAP, an Indigenous Data Advisory Group and to create a new program to fund Indigenous data projects. In September 2021, Bruno Steinke was appointed to lead the MMIWG Secretariat. A new Minister of Crown-Indigenous Relations was appointed in December 2021, Marc Miller, who will lead the work of implementing the TRC Calls to Action and MMIWG NAP. In tandem,

[13] Brett Forester, "Ottawa delivers action plan in response to MMIWG inquiry, but implementation plan won't come out until the fall", *APTN News* (03 June 2021), online: <https://www.aptnnews.ca/national-news/ottawa-delivers-action-plan-response-mmiwg-inquiry-implementation-plan-wont-come-out-until-fall/>.

provincial and territorial governments across Canada have also responded to the 2019 Final Report.[14] For example, in December 2021, the Government of the Northwest Territories released its draft action plan to address the Calls for Justice in the report, which sets out 95 actions.[15]

The NAP and the federal government's responses to the Final Report have been widely criticized for lacking substantive response to the Final Report and 231 Calls for Justice. The federal government has also been criticized for the choice of appointment of the MMIWG Secretariat given a lack of representation and connection to the experiences of Indigenous, women, girls, and 2SLGBTQQIA peoples.

2.1 Implications and Lessons for the Legal Professional

Legal professionals who work with Indigenous peoples must be aware of the National Inquiry, the Final Report, and the nature of the Calls for Justice. As stated by the Final Report, culturally competent professionals will engage with the relevant Calls for Justice and integrate the recommendations as appropriate within their respective legal practices:

> There is no statutory duty for the federal or provincial governments to implement recommendations or calls to action made through national commissions or inquiries, and the recommendations themselves do not form part of Canadian law. The calls to action may not be directly legally binding, but they provide a strong moral and political imperative, as well as identifying a path for Indigenous and non-Indigenous Canadians to respond to the wrongs visited on Indigenous people by the Canadian state. As with

[14] Government of Saskatchewan, News Release, "Saskatchewan Response To The National Inquiry Into Missing And Murdered Indigenous Women And Girls" (3 June 2021), online: <https://www.saskatchewan.ca/government/news-and-media/2021/june/03/saskatchewan-response-to-the-national-inquiry-into-missing-and-murdered-indigenous-women-and-girls>; Rhiannon Johnson, "Ontario releases Pathways to Safety plan in response to MMIWG inquiry, *CBC* (27 May 2021), online: <https://www.cbc.ca/news/indigenous/ontario-strategy-response-mmiwg-inquiry-1.6043368>; British Columbia, Ministry of Public Safety and Solicitor General, *A Path Forward: Priorities and Early Strategies for B.C.: June 2021 Status Update*, (PDF), online at: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/mmiw/mmiwg-status-update.pdf>.

[15] Government of Northwest Territories, News Release, "GNWT releases draft action plan to address Calls for Justice on Missing and Murdered Indigenous Women and Girls" (8 December 2021) online: <https://www.gov.nt.ca/en/newsroom/gnwt-releases-draft-action-plan-address-calls-justice-missing-and-murdered-indigenous-women>.

> international instruments, these calls to action may have persuasive value in courts, particularly given the Canadian government's public commitments to follow the recommendations laid out in these important reports.[16]

The Final Report is accessible through the Resource Library section of this chapter and should serve as a central resource for practitioners working with Indigenous peoples, and particularly for building a culturally competent and trauma-informed practice.

As described by the Final Report, a notable facet of the violence experienced by Indigenous women and girls is the involvement of justice sector workers, both in terms of action and omission; there is a history of police misconduct, including sexual violence and abuse as well as flagrant racism and negligence, perpetrated against Indigenous women and girls, as well as a history of apathy and inaction in responding to the violence, deaths, and disappearances.[17] Indigenous peoples are over-policed and under-protected, as accounted for by the Final Report and data on the overincarceration of Indigenous peoples and, particularly, women.[18]

In light of the intergenerational experiences of violence and harm with police and other justice sector workers, the relationship between Indigenous communities and justice sector workers, including lawyers, may be one that harbors distrust or resentment. A trauma-informed practice can support lawyers in navigating relationships and interactions with Indigenous peoples in a way that honours their truth, respects their boundaries, and facilitates competent legal advice and services.

Legal professionals must be mindful of their role in prevention of, response to and intervention in the cycles of trauma and violence that impact Indigenous women and girls, and the ways in which the legal system has reinforced these harms. Through the course of the relationship, opportunities will emerge for legal professionals to support clients with resources, particularly for intervention and response.

As a legal practitioner working with Indigenous clients, a trauma-informed practice and skillset will allow you to be alert to situations where you recognize a problem

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[16] Myrna McCallum & Haley Hrymak, "Decolonizing Family Law Through Trauma-Informed Practices" (January 2022) at 37, online: Rise Women's Legal Centre < https://womenslegalcentre.ca/wp-content/uploads/2022/01/Decolonizing-Family-Law-RiseWomensLegal-Jan-2022-WEB.pdf >.

[17] 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,* at 17, 29.

[18] *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

and be able to determine whether you can provide support *or* promptly seek out the organizations or groups best suited to provide that support. For example:

- Given the extent of harm and violence endured by Indigenous peoples, those with whom you work, whether as clients, witnesses, colleagues, or otherwise, may be at greater risk of being triggered or re-traumatized in their experience with you. An important part of your trauma-informed practice will be to have access to trauma support resources that you can provide your client when they are in crisis.

- Given the often long-term nature of a legal undertaking, through the course of working together, you may become aware of your client exhibiting signs of violence, abuse, or other issues of an intimate or domestic nature that require support. It is most likely that you, the lawyer, will not be the best person to provide this kind of support; instead, seeking out the support and services of an Indigenous institution, such as Native Child and Family Services of Toronto, will be the best course of action.

- Given the disproportionate rates at which Indigenous peoples experience homelessness, food and income insecurity, compiling a list of poverty resources and aids can be helpful to Indigenous clients who need short- or long-term supports. Poverty resources are particularly important as they are a significant contributor to family separation and trauma from abuse or neglect in the child welfare system.

- As evidenced by the National Inquiry and Final Report, Indigenous women, girls, and gender-diverse peoples face a distinct and acute risk of violence, abuse, and discrimination. As such, it will be valuable to compile a broader list of supports and service providers that cater specifically to vulnerable women and girls, such as shelters or institutions that support people fleeing from domestic violence.

- In accordance with the principle of self-determination as well as Indigenous-led services, it will be helpful for you to develop partnerships with qualified Indigenous practitioners with whom you can consult, whether on substantive law issues or inquiries related to working with Indigenous peoples.

- Decolonization requires recognition of and respect for Indigenous social and legal orders. In the criminal context, there may be an opportunity to apply restorative justice as an alternative dispute resolution mechanism. Indigenous institutions, communities, and Elders who are best suited and equipped to facilitate these proceedings should be sought out and integrated into legal practice where appropriate. Friendship Centres, which exist throughout Canada, may be a valuable venue in which to seek out these resources and connect with language-, Nation-, and cite-specific resources.

Proactive and available resources:

Supporting Families of MMIWG through the Family Information Liaison Unit (Department of Justice and Provincial Attorneys General)

- To support families of missing and murdered Indigenous women and girls to access information related to the loss of their loved one, some provinces, like Ontario, have partnered with Justice Canada to create the Family Information Liaison Unit.

Providing Gladue and restorative justice programs for Indigenous women

- Some provinces, including Ontario, have increased funding to Gladue Programs that also design and deliver restorative justice programs to increase opportunities for diversion and supports for community healing within community legal norms and systems

Social Navigators for First Nations police services

- First Nations police services are also on the front lines of investigation, oversight and monitoring. To assist, social navigators are civilian coordinators within police services who work in partnership with social services and justice sectors to provide access to community safety and well-being services to divert at-risk individuals from cycles of incarceration and victimization.

Addressing the overrepresentation of women and youth in the justice system

- During the development of this Supplement, the overrepresentation of Indigenous women in federal prisons continues to make national headlines and is described by the Prime Minister of Canada as “appalling”. Indigenous women now account for half of all federally incarcerated women yet represent only 5% of the Canadian population.

- The disproportionate effect of mandatory minimum sentences under the Criminal Code of Canada has often enmeshed Indigenous women in criminal justice, exacerbating existing trauma and victimization and preventing community healing.

3. CONCLUSION

There are numerous future opportunities for advocates to advance the implementation of the 25 Calls for Justice directed at the justice sector. We must always begin with the simple act of listening to Indigenous women, girls and 2SLGBTQQIA people to understand what is doing them harm, and what would make them safer. The importance of women-led solutions, as experts in their own lives, cannot and should not be diminished. The MMIWG made clear that relationships are key to both understanding the causes of violence and to making changes to end violence in the lives of Indigenous women, girls and 2SLGBTQQIA people. The Commissioners charged that “the daily encounters with individuals, institutions, systems and structures that compromise security must be addressed with a new view toward relationships.” Let that relationship include the legal community and advocates in particular.

4. RESOURCES

4.1 Reports, Literature, and Scholarly Sources

- The MMIWG Report and Calls for Justice
    - Final Report: mmiwg-ffada.ca/final-report/
    - Calls for Justice: mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf

- The TRC Report and Calls to Action
    - Report: https://nctr.ca/records/reports/
    - Calls to Action: https://nctr.ca/records/reports/

- National Action Plan – Urban Path to Reclaiming Power and Place, Regardless of Residency: https://4c3tru4erdnui9g3ggftji1d-wpengine.netdna-ssl.com/wp-content/uploads/2021/06/NAP-Urban-Framework_EN.pdf

- "Backgrounder — National Inquiry into Missing and Murdered Indigenous Women and Girls," Government of Canada (2019): https://www.canada.ca/en/women-gender-equality/news/2019/06/backgrounder--national-inquiry-into-missing-and-murdered-indigenous-women-and-girls.html

- National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Peace: Executive Summary" (2019): mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf

- Maham Abedi, "Why 'Genocide' Was Used in the MMIWG Report," Global News (June 4, 2019): https://globalnews.ca/news/5350772/genocide-canada-mmiwg/

- Rhiannon Johnson, "Ontario releases Pathways to Safety plan in response to MMIWG inquiry", CBC News (May 27, 2021): https://www.cbc.ca/news/indigenous/ontario-strategy-response-mmiwg-inquiry-1.6043368

- Pathways to safety: Ontario's strategy in response to the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls: https://www.ontario.ca/page/pathways-safety-ontarios-strategy-response-final-report-national-inquiry-missing-and-murdered

- Saskatchewan Response to the national Inquiry into Missing and Murdered Indigenous Women and Girls: https://www.saskatchewan.ca/government/news-and-media/2021/june/03/saskatchewan-response-to-the-national-inquiry-into-missing-and-murdered-indigenous-women-and-girls

- A Path Forward: Priorities and Early Strategies for BC | June 2021 Status Update (gov.bc.ca): https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/mmiw/mmiwg-status-update.pdf

4.2 Skills Development and Additional Resources

- Directory of National Association of Friendship Centres, https://nafc.ca/resources/justice

- Booklet Series for Working with Indigenous Peoples, including:
    - Foundational Knowledge
    - Family Health Resources
    - Your Rights as a Victim
    - Police Interactions
    - Navigating the Media
    - Legal Processes for Victims and Families
    - A Guide for Supporters
    - Resources & Relevant Legislation
    - https://drive.google.com/drive/folders/1_4OeD0eFAmeYgzyctqqKoCpNheChylU7

- New Journeys, an online Friendship Centre resource: https://newjourneys.ca/

CHAPTER 4: THE *UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT*

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1. PURPOSE OF THE CHAPTER

The original Guide introduced the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration/UNDRIP) and Canada's endorsement of it at the United Nations General Assembly in 2016. Since the Guide's publication, Canada took the active step of introducing and passing the *United Nations Declaration on the Rights of Indigenous Peoples Act*, to affirm in federal legislation that the principles of UNDRIP apply in Canada. The legislation further requires the Government of Canada to take all measures to ensure that the laws of Canada are consistent with UNDRIP. This has the potential to transform the colonialist past and provide a framework for a new relationship. Because of this potential, this chapter is an invitation to lawyers, in listening, knowing and advocating for Indigenous clients as they proactively interpret and challenge existing federal laws and policies that undermine the implementation of the principles of UNDRIP.

This chapter will assist advocates in understanding the basic framework of the new federal legislation and further support the work of transforming areas of law that are inconsistent with the principles of UNDRIP.

2. INTRODUCTION

On June 21, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (*UNDRIP Act*), also known as Bill C-15, received Royal Assent and came into force in Canadian law.[1] The *UNDRIP Act* is Canada's first substantive step towards ensuring federal laws reflect the standards set out in the *United Nations Declaration on the Rights of Indigenous Peoples* and affirming that the UN Declaration applies in Canada.

[1] Department of Justice Canada, "United Nations Declaration on the Rights of Indigenous Peoples Act" (10 December 2021) online: *Government of Canada* <https://www.justice.gc.ca/eng/declaration/about-apropos.html>.

Consisting of a Preamble and seven sections, the *UNDRIP Act* requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to:

- take all measures necessary to ensure the laws of Canada are consistent with the UN Declaration (section 5);
- prepare and implement a national action plan to achieve the UN Declaration's objectives. The objectives of the Declaration are far-ranging, including ending racism, prejudice, and discrimination throughout society, and upholding the minimum standards for the survival, dignity, and well-being of Indigenous Peoples. The action plan is to be established within three years and is supported by reporting requirements (section 6); and
- table an annual report from Parliament on the work to align the laws of Canada and on the action plan (section 7), with opportunity for examination of progress through the Parliamentary system.[2]

The *UNDRIP Act* was introduced after years of applying pressure on the Canadian Government to legislate the UN Declaration into Canadian law. For instance, the National Inquiry on Missing and Murdered Indigenous Women and Girls called for the implementation of the UN Declaration as part of a rights-based response to the horrific violence faced by First Nations women, girls and two-spirit persons.[3]

Likewise, the Truth and Reconciliation Commission's ("TRC") purpose as articulated through its Calls to Action is inseparably linked to the UN Declaration. Namely, in the TRC's final report, Call to Action 43 stipulates:

[2] University of British Columbia, "Implementing The United Nations Declaration On The Rights Of Indigenous Peoples Through Federal Government Legislation" (2021 February), online: Indian Residential School History and Dialogue Center <https://irshdc.ubc.ca/files/2021/02/UNDRIP-Feb2021_SummaryReport_FINAL.pdf> [*IRSHDC*].

[3] Assembly of First Nations, "UN Declaration on the Rights of Indigenous Peoples" (2021), online: Assembly of First Nations <https://www.afn.ca/implementing-the-united-nations-declaration-on-the-rights-of-indigenous-peoples/> [*AFN*].

> We call upon the federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.[4]

It is important to note that the *UNDRIP Act* does not create new rights, nor does it take away, diminish, or redefine rights. As stated by the Assembly of First Nations, the Act is all about taking long-overdue action to respect and implement rights First Nations already have.[5]

3. PREAMBLE

The *UNDRIP Act*'s preamble is highly significant. The preamble obliges the Government of Canada to "recognize that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government."[6]

Moreover, the preamble protects an ongoing process of implementation that is intended to continue regardless of any changes in government. Lawyers are encouraged to familiarize themselves with the Act's Preamble, the changes it calls for, and the commitments it makes.

As noted by the Assembly of First Nations, the preambles of the *UNDRIP Act* and the UN Declaration make clear that Canada is:

> Ending any and all colonial approaches to Indigenous peoples' rights including those pertaining to Treaty rights. Doctrines of superiority, including

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[4] Canadian Centre for Policy Alternatives, "True, Lasting Reconciliation Implementing the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia law, policy and practices" (2018) at 11 online (pdf) <https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2018/11/CCPA-BC_UBCIC_TrueLastingReconciliation_full_181126.pdf> [CCPA].

[5] Canadian Centre for Policy Alternatives, "True, Lasting Reconciliation: Implementing the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia law, policy and practices" (2018) at 11, online (pdf): <https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2018/11/CCPA-BC_UBCIC_TrueLastingReconciliation_full_181126.pdf> [CCPA].

[6] University of British Columbia, "A Commentary on the Federal Government's Legislation to Implement the United Nations Declaration on the Rights of Indigenous Peoples" (March 2020), online: Indian Residential School History and Dialogue Center <https://irshdc.ubc.ca/files/2021/01/UNDRIPArticle7_CommentaryFedGovt_FINAL.pdf> [*UBC Report*].

> "discovery" and *terra nullius*, are being unequivocally renounced. This, in turn, serves as a clear renunciation of all such previous approaches in the laws and policies of Canada. The status of Bill C-15 as a decolonizing lens for all such discriminatory laws and policies is secured by the preamble, building on the *UN Declaration*.[7]

As called for in the Act's Preamble, advocates working with Indigenous clients to challenge discriminatory laws and policies must do so through a lens of decolonization and with the intention to promote reconciliation.

4. ACTION PLAN

As stated above, the Act requires the Government of Canada to work with Indigenous peoples to develop a National Action Plan, which must be completed within two years from the Act coming into force. The Action Plan must include measures to:

- Address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination.
- Promote mutual respect and understanding as well as good relations, including through human rights education; and
- Monitor, provide oversight, recourse or remedy or other accountability measures with respect to the implementation of the *Declaration*.[8]

Legal professionals ought to begin considering how they interpret existing laws and advance arguments that embody and further the goals of this anticipated Action Plan.

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[7] Assembly of First Nations, "Bill C-15 – Legal Significance of the Preamble" (24 January 2021), online: Assembly of First Nations <https://www.afn.ca/wp-content/uploads/2021/01/C-15_Preamble_ENG-1.pdf>; The Macdonald-Laurier Institute, "Understanding UNDRIP" (26 May 2021) at 12:28, online (video): YouTube <https://www.youtube.com/watch?v=HmEd48lzcGk&t=2479s&ab_channel=TheMacdonald-LaurierInstitute>.

[8] Department of Justice Canada, "Legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples becomes law" (22 June 2021), online: Government of Canada <https://www.canada.ca/en/department-justice/news/2021/06/legislation-to-implement-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-becomes-law.html>.

5. LIMITATIONS OF THE *UNDRIP ACT*

Passage of the *UNDRIP Act* signals a political will to implement the UN Declaration into Canadian law and represents Canada's starting point towards reconciliation.[9]

While the Act presents opportunities to reconcile and advance Indigenous legal rights, it risks undermining Indigenous sovereignty and self-determination if implemented loosely, disingenuously, or without concrete guidance from Indigenous leadership. The Act's main sections for example, maintain the common law interpretation of section 35(1) and section 35(2) of the *Constitution Act, 1982*, which is heavily based on the colonial Doctrine of Discovery and has historically been wielded to strip Indigenous peoples of their land ownership and land rights.[10]

The Act's interpretation section clarifies that 'Indigenous peoples' as it is used throughout the Act is interchangeable with the term "Aboriginal peoples," defined in section 35 of the *Constitution Act, 1982* as referring to First Nations, Inuit and Métis peoples. The interpretation section also states in section 2(2):

> This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the Constitution Act, 1982, and not as abrogating or derogating from them.

Legal representatives must understand that this non-derogation clause affirms that interpreting the *UNDRIP Act* must be carried out to uphold the rights recognized and affirmed in section 35 of the *Constitution Act, 1982* and the risks inherent in this structure.[11] The *UNDRIP Act*, by virtue of not being parallel but rather subject to section 35, will continue to adjudicate using existing case law on section 35. These rulings have historically caused major harm to the daily life of Indigenous peoples and nations, including:

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[9] John Borrows et al, *Braiding Legal Orders Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) at 127 [*Borrows*].
[10] Gordon Christie, *Implementation of UNDRIP with Canadian and Indigenous Law, Assessing Challenges, UNDRIP Implementation More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo: Centre for International Governance Innovation, 2018) at 25.
[11] Grand Council of the Crees, "Passage of national UN Declaration Implementation Act a milestone for Indigenous rights and reconciliation | June 17, 2021" (17 June 2021) online (pdf*): Grand Council of the Crees (Eeyou Istchee) / Cree Nation Government* <https://www.cngov.ca/news-issues/current-issues/undrip-and-bill-c-15/> [*Grand Council*].

- The imposition of Crown sovereignty over Indigenous peoples, including self-government rights;
- Disregarding Indigenous laws and legal traditions;
- Establishing that the Crown has "ultimate title" to land;
- The burden of proof imposed on Indigenous peoples and nations to establish their rights in Canadian courts;
- The ability for the Crown to infringe Aboriginal rights based on the "Sparrow test" that allows infringement of Aboriginal rights under various circumstances;
- The erosion of the duty to consult and accommodate to a procedural right that is reviewable based on administrative law principles; and
- The Sparrow test will continue to apply in all instances related to section 35 rights.[12]

Only time will reveal if the risks inherent in maintaining the status quo or stifling will prevail, instead of advancing, Indigenous legal rights. As such, scholars have noted that the true potential of the *UNDRIP Act* may only be realized if implementation is informed by the expert guidance of Indigenous leaders and communities. The *UNDRIP Act* risks reproducing systemic harms against Indigenous communities if meaningful consultation and collaboration are not part of its implementation.[13]

6. BRITISH COLUMBIA CASE STUDY

On November 28, 2019, the Legislative Assembly of British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act* (*"DRIA Act*"). The Act comprises 10 sections and a schedule (the text of the Declaration).[14] The *DRIA Act* has three main purposes: to affirm the application of the Declaration to the laws of B.C., to contribute to the implementation of the Declaration, and to support the affirmation of and develop relationships with Indigenous governing bodies.[15] The Act requires the province to bring all provincial laws into harmony with UNDRIP, to filter new legislation through the lens of UNDRIP, and to develop an action plan to meet the objectives of UNDRIP, with annual public reporting to monitor progress and ensure accountability.

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[12] *Ibid.*

[13] *Ibid.*

[14] BC Gov News, News Release, "Province Introduces Legislation to Uphold Indigenous Rights", (17 November 2021), online: BC Gov News <https://news.gov.bc.ca/releases/2021AG0073-002191> [*BC Gov News*]; Eugene Kung, "Bill 41: A new law to uphold Indigenous rights in BC", West Coast Environmental Law (13 November 2019), online: West Coast Environmental Law <https://www.wcel.org/blog/bill-41-new-law-uphold-indigenous-rights-in-bc> [*Bill 41*].

[15] *Ibid.*

A draft action plan was developed under the Act after a year of consultation with Indigenous peoples and released in June 2021 for further input. The final action plan is expected to be released in 2022.[16] The Act also establishes the UN Declaration as the Province's framework for reconciliation, as called for by the TRC.[17]

Despite being the first province in Canada to develop legislation to bring provincial laws into alignment with the UN Declaration, many have noted B.C.'s failure to realize the UN Declaration principles and consider the *DRIA Act* to be more symbol than substance.[18]

For instance, it has now been two years since B.C. introduced the Act and, despite a promise to align its laws with the UN Declaration, only one clause of one B.C. statute has been amended and only two recent amendments have been proposed.[19] In November 2021, Bill 18 was introduced, which adds Indigenous identity as a protected ground against discrimination in the B.C. Human Rights Code. Bill 29 was also tabled, which amends the *Interpretation Act* to make it clear that all provincial laws uphold, and do not diminish, the rights of Indigenous people protected under section 35 of the Canadian Constitution.[20]

Moreover, one of the key principles of the UN Declaration is free, prior, and informed consent ("FPIC"),[21] which mandates the effective and meaningful participation of Indigenous peoples in decisions that affect them, their communities, and their territories. This principle has been disregarded in the recent events on Wet'suwet'en

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[16] *Ibid*.

[17] Corrine Tansowny, "An UNDRIP in the Bucket? The Potential Impact of BC's Adoption of the United Nations Declaration on the Rights of Indigenous People" (7 February 2020), online: McGill Journal of Sustainable Development Law (MJSDL) <https://www.mjsdl.com/content/an-undrip-in-the-bucket-the-potential-impact-of-bcs-adoption-of-the-united-nations-declaration-on-the-rights-of-indigenous-people> [*Tansowny*]; Judith Sayers, "A Historic Day for BC First Nations. Now the Work Starts: UNDRIP starts us on a journey, but without work, co-operation and shared vision we will be lost." (2019) 204 *BC Studies* 11 [*Sayers*].

[18] Raymond O Frogner, "The train from Dunvegan: implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in public archives in Canada" (2021) 22:2 Archival Science 9 [*Frogner*].

[19] Matt Simmons, "Two years after B.C. passed its landmark Indigenous Rights act, has anything changed?" *The Narwhal* (13 December 2021) online: <https://thenarwhal.ca/bc-undrip-two-years/> [*Simmons*].

[20] *Ibid*.

[21] Food and Agricultural Organization of the United Nations, "Free Prior And Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities" (14 October 2016) online: *United Nations* <https://www.fao.org/3/i6190e/i6190e.pdf>.

territory. While the elected chiefs and councils on Wet'suwet'en territory signed agreements with the provinces and the proponents in support of the Coastal GasLink pipeline, the hereditary chiefs maintain they have never given consent to the project.[22] Yet, the B.C. Supreme Court granted the company an injunction against pipeline opponents. Despite clearly acknowledging the importance of FPIC, the *DRIA Act* afforded little aid to the Wet'suwet'en hereditary chiefs.

To advance the UN Declaration, lawyers must therefore be mindful of the painful failures of the *DRIA Act* and how to meaningfully engage in consultations with Indigenous persons to avoid reproducing these harms. FPIC describes processes that are free from manipulation or coercion, informed by adequate and timely information, and occur sufficiently in advance of a decision so that Indigenous rights and interests can be incorporated or addressed effectively as part of the decision-making process – all as part of meaningfully aiming to secure the consent of affected Indigenous peoples.[23]

Canada's legacy of colonial laws, policies, and practices have garnered a deep mistrust of Government action amongst Indigenous people. This mistrust requires legal practitioners to undertake meaningful, significant, and collaborative action to build trust and a new way forward. For the *UNDRIP Act* to be successful, it is fundamental for Indigenous peoples to be around the table in the implementation and consultation process – the government cannot unilaterally determine and assess whether alignment exists.[24]

7. WHAT DOES THE *UNDRIP ACT* MEAN FOR LEGAL PRACTITIONERS?

As the *UNDRIP Act*'s Preamble notes, "implementation of the *Declaration* must include concrete measures to address injustices, combat prejudice and eliminate all forms of violence and discrimination, including systemic discrimination, against Indigenous

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[22] Matt Simmons, "Two years after B.C. passed its landmark Indigenous Rights act, has anything changed?" *The Narwhal* (13 December 2021) online: <https://thenarwhal.ca/bc-undrip-two-years/> [*Simmons*].

[23] Roshan Danesh, "Confronting Myths About Indigenous Consent" (October 2019), online: *Indian Residential School History and Dialogue Centre* <https://irshdc.ubc.ca/2019/10/22/editorial-confronting-myths-about-indigenous-consent/?fbclid=IwAR1KwrFVGKNz7QGPoKgcQMFC7kP9TzcgkD5lNYJg1ZWmN2XNux75o6rcKL4>.

[24] University of British Columbia, "Implementing The United Nations Declaration On The Rights Of Indigenous Peoples Through Federal Government Legislation" (2021 February), online: Indian Residential School History and Dialogue Center <https://irshdc.ubc.ca/files/2021/02/UNDRIP-Feb2021_SummaryReport_FINAL.pdf> [*IRSHDC*].

peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender diverse persons and two-spirit persons."[25] This is especially important given that the UN Declaration embeds a host of rights within the larger collective rights of Indigenous communities and touches several practice areas.

For instance, on January 1, 2020, the Government of Canada, in consultation with Indigenous peoples and the provinces and territories, developed The *Act respecting First Nations, Inuit and Métis children, youth and families,* also known as Bill C-92. The Act is the first statute to recognize inherent Indigenous jurisdiction over child and family services as an Aboriginal (section 35) right in Canada.[26] In this way, the Act upholds Canada's commitment to the UN Declaration by acknowledging Indigenous peoples' jurisdiction over child and family services as part of their inherent right to self-government and self-determination.[27] Lawyers ought to seek to understand how the UN Declaration intersects with various practice areas.

Further, the UN Declaration requires States to consult and cooperate in good faith with Indigenous peoples and to obtain their FPIC before adopting and implementing legislative or administrative measures that may affect them (article 19). The FPIC requirement is far-reaching and impacts (as mentioned) the adoption of any legislation or administrative policies that affect Indigenous peoples (article 19), the undertaking of projects that affect Indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources (article 32), the relocation of Indigenous peoples from their lands or territories (article 10), and the storage or disposal of hazardous materials on Indigenous peoples' lands or territories (article 29).[28] Legal representatives are encouraged to critically assess whether a law, policy, or action undermines or respects the aforementioned articles.

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[25] University of British Columbia, "A Commentary on the Federal Government's Legislation to Implement the United Nations Declaration on the Rights of Indigenous Peoples" (January 2021), online*: Indian Residential School History and Dialogue Center* <https://irshdc.ubc.ca/files/2021/01/UNDRIPArticle7_CommentaryFedGovt_FINAL.pdf> [*UBC Report*].

[26] Lac Seul, "Bill C-92 An Act Respecting First Nations, Inuit and Metis Children, Youth and Families" (2021), online: *Lac Seul First Nations* <https://lacseulfn.org/departments/bill-c-92/> [*Seul*].

[27] Koren Lightning-Earle et al, "Bill C-92 Compliance Guide for Social Workers and Service Providers" (2020) at 2, online (pdf): *Wahkohtown Law and Governance Lodge* <https://www.ualberta.ca/wahkohtowin/media-library/data-lists-pdfs/bill-c-92-compliance-guide-for-social-workers-and-service-providers.pdf>.

[28] Office of the High Commissioner for Human Rights, "Free, Prior and Informed Consent of Indigenous Peoples" (September 2013), online (pdf) at <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf>.

Legal professionals should engage Indigenous experts and resources to ensure that they are applying the UN Declaration in the way that it was intended – to contribute to the survival, dignity, and well-being of the Indigenous peoples of the world and to ensure tangible change and sustainable outcomes for Indigenous peoples. To realize the potential of the *UNDRIP Act* and advance the standards affirmed in the UN Declaration, Indigenous sovereignty and self-determination, practitioners must observe and ask questions; and they must consult with Indigenous experts in Indigenous legal orders or other experienced lawyers for advice when working with Indigenous clients.

Working with Indigenous clients requires a unique skill set. Thus, it is not sufficient to superficially consult Indigenous experts or familiarize oneself with the language of the *UNDRIP Act*. It is fundamental for legal representatives to educate themselves on the cultural histories, backgrounds, and nuances of Indigenous identity when working with clients in areas related to lands and resources (forestry, mines, energy, etc.), children and family services, environmental protection, housing, social development, administration of justice, health care, education, agriculture, heritage, labour and skills development, emergency services and more.

As per Ellen Gabriel, the *UNDRIP Act* presents "an opportunity to create an open dialogue with all rights holders, including traditional governments, something that is sorely lacking in the lopsided relationship Canada has with Indigenous peoples today", currently governed through section 35 of the Constitution.[29]

The *UNDRIP Act* commits to undertaking a law and policy review to deconstruct the ways that the law has been applied in harmful and violent ways against Indigenous communities. Inherent in this journey towards decolonization is the need for lawyers to build wise and reflective practices and act with creativity, humility, zeal, and above all a deep sense of responsibility and reciprocity.

In this way, the Act can be understood as an invitation to lawyers to proactively challenge existing policies and laws that constrain the full meaning of the UN Declaration's articles calling for Indigenous self-determination and self-governance. The chart below includes examples of questions that practitioners are encouraged

[29] Grand Council of the Crees, "Passage of national UN Declaration Implementation Act a milestone for Indigenous rights and reconciliation | June 17, 2021" (17 June 2021) online (pdf*): Grand Council of the Crees (Eeyou Istchee) / Cree Nation Government* <https://www.cngov.ca/news-issues/current-issues/undrip-and-bill-c-15/> [*Grand Council*].

to think about or to canvass with their Indigenous clients to ensure they are reconciling law and policy reform with Indigenous liberation.

Article(s)[30]	Question(s)
Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.	• Is this law, policy, or action advancing the Indigenous right to self-determination or self-governance? • Is this law, policy, or action curbing the opportunities for or the abilities of Indigenous persons to realize their rights to self-governance or self-determination? • How, if at all, is the right to self-determination or self-governance implicated by this law, policy, or action? • Is this law, policy, or action upholding Indigenous self-determination or self-governance in a way that is meaningful to Indigenous legal orders? If so, how?
Article 7(2): Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.	• Is this law, policy, or action advancing Indigenous well-being? • Is this law, policy, or action curbing the opportunities for or the abilities of Indigenous persons to realize their well-being? • Does this law, policy, or action involve the removal of Indigenous children and family? What is the broader context under which removal is occurring? • How, if at all, does this law, policy or action enact violence on Indigenous kinship and children?

[30] United Nations Declaration on the Rights of Indigenous Peoples, Indigenous and Northern Affairs Canada (9 May 2016) online: <http://www.aadnc-aandc.gc.ca>.

Article 12(1): Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.	• Is this law, policy, or action advancing the dissemination of Indigenous knowledge, teachings, or heritage? • Is this law, policy, or action impeding or barring the dissemination of Indigenous knowledge, teachings, or heritage? • Am I, as a legal practitioner, familiar with or mindful of my clients' unique cultural customs, traditions, ceremonies, etc.?
Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. **Article 19:** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.	• Was your client(s) meaningfully consulted in good faith? Was free, prior, and informed consent obtained? How was it obtained? From which groups was it obtained? • Does the law, policy or action affirm and respect Indigenous decision-making?

Article 26(1): Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.	• Is this law, policy, or action advancing Indigenous right to lands, territories and resources? • Is this law, policy, or action curbing the opportunities for or the abilities of Indigenous persons to enjoy their right to the lands, territories and resources?

8. UNDRIP: GUIDANCE FROM COURTS

Given the *UNDRIP Act* was only recently passed in Canada, the jurisprudence in this area is still developing. Below are some cases where the Courts have turned their attention to the UN Declaration and its implications.

8.1 *R. v. Francis-Simms*[31]

In *Francis-Simms*, the accused was charged with several drug-related offences. At trial, the accused had a Gladue report prepared and participated in a sentencing circle that provided a wealth of information about his lived experiences, Aboriginal identity, family history, and upbringing. In considering how Gladue principles can be applied in this case, Shamai J held that to apply restorative justice in practical terms, courts must consider what they are restoring – what is it that they are bringing harmony back into. To answer these questions, Shamai J turned to Articles 5 and 11 of the UN Declaration, stating that these Articles provide a framework in which restorative justice may be considered in Mr. Francis-Simms' case.

How Shamai J incorporated the UN Declaration into her analysis is informative for all legal professionals working with Indigenous clients. Shamai J held:

> Restorative justice is engaged on many levels in this case: we are restoring dignity to his family, in giving voice and dignity to their heritage as Indigenous people. It is plain through the evidence of Grandmother Dorothy that the deprivation of a cultural identity is a systemic consequence of previous policies of Canada's government, of colonization. Articles 5 and 11 of the UNDRIP resolve to redress these losses. The Court can identify these losses and the means to redress, in this case. The impact of those policies, played out through the shaming of identity, and the eradication of cultural practice, affects three

[31] *R v Francis-Simms*, 2017 ONCJ 402 at para 47, [*Francis-Simms*].

> generations in the case before me. [...] In endorsing a sentence which recognizes this commitment and assumption of personal responsibility, we are giving voice to a healing process for an individual through Indigenous resources, and a justice process which incorporates the wisdom and, in some measure, the ceremony of the Indigenous community. We are reflecting on, not denying, the devastating impact of colonization, as it has shamed and destroyed members of First Nations, physically, psychologically, and culturally. In this sentencing process, we are recognizing the need to restore the individuals and families and traditions as healthy vibrant actors in our collective Canadian community. This is consistent with the commitments Canada has made in subscribing to the United Nations Declaration of Rights of Indigenous People. This gives substance to the principle of restorative justice.[32]

Shamai J's reasoning illustrates that, as stated in her reasons, "UNDRIP enumerates aspects of Canada's commitment to restoring Indigenous persons to the status any citizen might expect, and in particular Indigenous persons subjected to colonization."[33]

8.2 *Nunatukavut Community Council Inc. v. Canada (Attorney General)*[34]

Nunatukavut Community Council Inc. v. Canada (Attorney General) concerned an application for judicial review, in which the Applicants challenged the decision of the Minister of the Department of Fisheries and Oceans authorizing Nalcor Energy to construct the Muskrat Falls hydro-electric generating station. NCC submitted that the Minister's duty to consult and accommodate should be read in light of UNDRIP and that the values reflected in international law, although not binding, should inform the interpretation of domestic law.

The Court agreed with NCC, holding that when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured.[35]

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[32] *Ibid* at para 48.
[33] *Ibid* at para 52.
[34] *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981, [2015] FCJ No 969 (QL) [*NCC*].
[35] *Ibid* at para 103.

8.3 *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*[36]

This case turned on whether Aboriginal rights could base a lawsuit in the tort of nuisance against private, non-governmental entities. In concluding that First Nations had established an Aboriginal right to fish, the Court considered how the *UNDRIP Act* may supplement, refine, and alter existing jurisprudence addressing Aboriginal rights and reconciliation.

The Court acknowledged that further direction was required from higher courts in respect of understanding the effect of UNDRIP legislation on the common law, in light of the areas of conflict between the two. However, the Court appeared to suggest that, in some instances, UNDRIP may serve as a preferable approach than existing common law.[37] Through its analysis, the Court highlighted how UNDRIP may start to inform and change existing law, stating:

> "[e]ven if [UNDRIP legislation] is simply a statement of future intent, … it is one that supports *a robust interpretation of Aboriginal rights*."[38]

This decision affirmed that Aboriginal rights can form the basis of the common law tort of nuisance against private third parties and that UNDRIP legislation will have future implications for Canadian courts, the Crown, Indigenous peoples, and all Canadians.[39]

9. INTERNATIONAL MECHANISMS FOR COMPLAINTS

Indigenous peoples across the world experience the pains of historical colonization and invasion of their territories. They often seek redress in international forums. The United Nations has two forums intended specifically for Indigenous peoples. The Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council with a mandate to discuss Indigenous issues related to economic and social development, culture, environment, education, health, and human rights. Importantly, the Permanent Forum is not a complaint mechanism. The UN's Expert Mechanism on the Rights of Indigenous Peoples is a subsidiary body of the United

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[36] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 [*Thomas*].
[37] *Ibid* at para 206.
[38] *Ibid* at para 211.
[39] Arend J A Hoekstra, Grace Wu & Thomas Isaac, "BCSC Decision Suggests Implications for UNDRIP Legislation in Canada" (18 January 2022), online: *Cassels LLP* <https://cassels.com/insights/bcsc-decision-suggests-implications-for-undrip-legislation-in-canada/> [*Arend*].

Nations Human Rights Council (HRC) and provides the HRC with expertise and advice on the rights of Indigenous peoples.[40]

There is a special procedure specific to the concerns of Indigenous peoples called the *Special Rapporteur on the Rights of Indigenous Peoples*. It is possible to send communications to the Special Rapporteur about Indigenous peoples in a particular country or to invite them to visit the country. However, where applicable, it is necessary to have the approval of the government in question.

[40] Indigenous Peoples Centre for Documentation, Research and Information, "Indigenous Peoples at the United Nations" (last visited 2022), online: *DOCIP* <https://www.docip.org/en/indigenous-peoples-at-the-un/>.

10. RESOURCES

10.1 Bill C-41

- The Narwhal published a lengthy review of the DRIA Act: https://thenarwhal.ca/bc-undrip-two-years/

10.2 Bill C-15

- The School of Public Policy released a video that discussed the Implications of UNDRIP Bill C-15: https://www.youtube.com/watch?v=O7uMLGZUD90&t=11s&ab_channel=TheSchoolofPublicPolicy

- The Warrior Life Podcast released a YouTube video and podcast titled Understanding UNDRIP & Bill C-15: https://www.youtube.com/watch?v=VuWtRmGIrro&t=2198s&ab_channel=PamPalmater

- The Assembly of First Nations prepared a series of guides on Bill C-15:
  - https://www.afn.ca/wp-content/uploads/2021/02/C-15_Discussion_ENG.pdf
  - https://www.afn.ca/wp-content/uploads/2021/01/C-15_Backgrounder_ENG.pdf
  - https://www.afn.ca/wp-content/uploads/2021/01/C-15_FAQ_ENG.pdf
  - https://www.afn.ca/wp-content/uploads/2021/01/C-15_Preamble_ENG-1.pdf

- Bill C-15:
  - https://www.afn.ca/wp-content/uploads/2020/12/Bill-C-15-English-French.pdf

- The Indian Residential School History and Dialogue Center published a series of reports on Bill C-15:
  - https://irshdc.ubc.ca/files/2020/03/UNDRIP_Article1_Consistency.pdf
  - https://irshdc.ubc.ca/files/2020/03/UNDRIP_Article3_InformedConsent.pdf
  - https://irshdc.ubc.ca/files/2020/03/UNDRIP_Article4_Conflict.pdf

    - https://irshdc.ubc.ca/files/2021/01/UNDRIPArticle7_CommentaryFedGovt_FINAL.pdf
    - https://irshdc.ubc.ca/files/2020/03/UNDRIP_Article2_GoverningBodies.pdf
    - https://irshdc.ubc.ca/files/2021/04/UNDRIP_Article8_AllMeasures_FINAL.pdf
    - https://irshdc.ubc.ca/files/2021/02/UNDRIP-Feb2021_SummaryReport_FINAL.pdf

- The Indian Residential School History and Dialogue Center hosted a Dialogue on February 4, 2021, on the Government of Canada's Bill C-15: https://www.youtube.com/watch?v=6hRitpe1mp4

10.3 UNDRIP

- Video of 46 indigenous representatives presenting a short version of the United Nations Declaration on the Rights of Indigenous Peoples: https://vimeo.com/51598291

- Brenda Gunn published an Introductory Handbook to the UN Declaration: https://www.indigenousbar.ca/pdf/undrip_handbook.pdf

CHAPTER 5: DEVELOPING INDIGENOUS RESPONSES TO NATIONAL CHILD WELFARE LEGISLATION

1. PURPOSE OF THIS CHAPTER

Child welfare leads the 94 Calls to Action released by the TRC in 2015. Calls 1 to 5 call upon all levels of government to commit to reducing the number of Indigenous children in care; to prepare and publish annual reports on the number of children in care; to fully implement Jordan's Principle; to enact Indigenous child welfare legislation that establishes a national standard for child apprehension and custody cases; and to develop culturally appropriate parenting programs for Indigenous families.

The overrepresentation of First Nations children in Canada's child welfare system has a long history. Colonial policies implemented by European settler governments disrupted the traditional ways in which First Nations communities cared for their children, including family life and structure. Academic research divides the history of First Nations child welfare in Canada into three stages: residential schools, the Sixties Scoop, and the contemporary period.[1]

Canada used the residential school system to assimilate First Nations people into western society and culture. Following Confederation in 1867, a small number of schools existed. However, following an 1894 amendment to the *Indian Act*, all First Nations children were required to attend residential schools. The number of schools grew rapidly. Duncan Campbell Scott, then Superintendent of Indian Affairs, stated that the objective of the residential schools was to ensure that "there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian Question, and no Indian Department." This type of racist attitude coupled with chronic underfunding resulted in widespread negative effects on the health and social welfare of First Nations. The effects of the residential schools are ongoing to this day.

[1] Vandna Sinha et al, *Understanding the Overrepresentation of First Nations Children in Canada's Child Welfare System* (2011) in *Child Welfare: Connecting Research, Policy, and Practice*, 2nd ed (Waterloo: Wilfrid Laurier University Press, 2011) 307.

2. JORDAN'S PRINCIPLE

Call to Action 3 calls for the full implementation of Jordan's Principle. Jordan's Principle is a child-first principle to ensure First Nation children get the services they need, when they need them. The principle is named after Jordan River Anderson, a First Nations child from Norway House Cree Nation in Manitoba. Jordan was born with complex medical needs and died at age 5 in hospital. Jordan unnecessarily spent his whole life in the hospital while the provincial government of Manitoba and the Federal government argued over jurisdiction, despite Jordan having been medically cleared for home-based care at the age of 2.

Jordan's Principle is a legal requirement that provides access to services for First Nations children in need and ensures that the *government of first contact* pays for the services promptly.

In 2016, the Canadian Human Rights Tribunal found the Canadian government to be racially discriminating against First Nations children, in part, by the government's failure to implement Jordan's Principle.[2]

3. THE CARING SOCIETY CANADIAN HUMAN RIGHTS TRIBUNAL CASES

These cases used administrative law mechanisms to pursue justice for Indigenous communities, as opposed to the court system. The novel approaches taken by the First Nations Child and Family Caring Society ("Caring Society") as well as the Assembly of First Nations ("AFN"), and the years of work done by a handful of practitioners and their teams, warrants a case study.

The complaint was first brought to the Canadian Human Rights Tribunal ("Tribunal") in 2007[3] and alleged that the Department of Indian and Northern Affairs' provision of First Nations Child and Family Services ("FNCFS") was flawed, inequitable, and thus discriminatory.[4]

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[2] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2, [2016] 2 CNLR 270 [*2016 CHRT 2*]. Since the decision, a number of further orders have been made by the CHRT, which are described on the Caring Society's website.

[3] *Canadian Human Rights Act*, RSC 1985, c H-6 [*Canadian Human Rights Act*]; First Nations Child and Family Caring Society of Canada, "Information Sheet: The Canadian Human Rights Tribunal on First Nations Child Welfare" (July 2014), online (PDF): *First Nations Child and Family Caring Society* <https://fncaringsociety.com/sites/default/files/CHRT%20info%20sheet%2014-07%20v3f.pdf>.

[4] *Ibid*.

3.1 Historical Overview of Proceedings Since 2016 (Previous Publication of this Guide)

In 2016, the Tribunal found that the complaint was substantiated, although questions remained about compensation that were to be dealt with at a later time.[5] In 2019, the Tribunal awarded $40,000 to each individual impacted by these services; $20,000 is notably the maximum amount of damages allowed under statute as a result of the pain and suffering from discriminatory conduct, but an extra $20,000 was ordered due to the wilful and reckless nature of the discriminatory conduct.[6]

In the *2016 CHRT 2* decision, the Tribunal, using the powers bestowed by sections 53(2)(a) and 53(2)(b) of the *Canadian Human Rights Act*,[7] ordered Aboriginal Affairs and Northern Development Canada ("AANDC") to cease the discriminatory practice and to reform the First Nations Child and Family Services ["FNCFS"] Program and the 1965 agreement.[8] AANDC was also ordered to cease applying its narrow definition of Jordan's Principle and to take immediate measures to implement the full meaning and scope of Jordan's Principle.[9] Following this order, the dispute became focused on who was included under the scope of Jordan's Principle.[10]

Between 2016 and 2018, the Tribunal made a number of orders that were not implemented by Canada.[11] In the *2018 CHRT 4* decision, the Tribunal rejected Canada's argument that no remedies should be awarded by the Tribunal in terms of policy or public spending, and made clear that the appropriate way to challenge this order was by way of judicial review, which had not been done here.[12] Further, the Tribunal stated that their orders will inherently have some level of impact on policy or spending, as their role is quasi-constitutional in nature.[13] In addition, the Tribunal

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[5] *2016 CHRT 2*, *supra* note 2 at para 456.
[6] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 at paras 245-257 [*2019 CHRT 39*].
[7] *Canadian Human Rights Act*, RSC 1985, c H-6, ss 53(2)(a), 53(2)(b).
[8] *2016 CHRT 2*, *supra* note 2 at para 481.
[9] *Ibid*.
[10] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, [2021] FCJ No 1041 [*2021 FC 969*].
[11] *2019 CHRT 39*, *supra* note 6 at para 19.
[12] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4, [2018] DCDP no 4 at para 40 [*2018 CHRT 4*].
[13] *Ibid* at para 44.

noted that their order was legally binding and that they expected Canada to implement it.[14]

In the *2020 CHRT 36* decision,[15] the Tribunal specified what the boundaries of Jordan's Principle would be in this case, and broadened it to include not only First Nations children who have status under the *Indian Act*,[16] but also to include non-status First Nations children who reside off of their reserve, who are recognized by their Nations — Canada objected to this broadening of scope.[17] Canada filed for judicial review of the *2019 CHRT 39* and the *2020 CHRT 36* decisions,[18] seeking to quash the compensation order and to overturn the Tribunal's order ensuring that First Nations children residing off the reserve, but who are recognized by their Nations, would be eligible for Jordan's Principle regardless of their status under the *Indian Act*.[19]

At the end of 2021 and moving into 2022, Canada announced that agreements had been reached between the parties, totalling $40 billion;[20] $20 billion for compensation, and $20 billion for long-term reform of the on-reserve child welfare system.[21]

3.2 Novel Approaches — Evidence

In the *2016 CHRT 2* decision, the Tribunal made it clear that AANDC was far from attaining its goals, and that First Nations children and communities have been negatively impacted and, in some cases, denied adequate child welfare services by the application of the FNCFS Program and other funding methods.[22] In addition to proving this, the AFN and the Caring Society also set out to prove that race and/or national or ethnic origin was a contributing factor in these adverse impacts or

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[14] *Ibid* at para 41.

[15] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36, [2020] CHRD No 36 at paras 54-56 [*2020 CHRT 36*].

[16] *Indian Act*, RSC 1985, c I-5.

[17] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20 at paras 71-72, [2020] CHRD No 20 [*2020 CHRT 20*].

[18] *2019 CHRT 39*, *supra* note 6; *2020 CHRT 36*, *supra* note 15.

[19] *Indian Act*, *supra* note 16; *2021 FC 969*, *supra* note 10.

[20] Sarah Turnbull "Largest settlement in Canadian history: Feds release details of $40B deal" (5 January 2022), online: *CTV News* <https://www.ctvnews.ca/politics/largest-settlement-in-canadian-history-feds-release-details-of-40b-deal-1.5726484>.

[21] *Ibid*.

[22] *2016 CHRT 2*, *supra* note 2 at para 383.

denials.[23] Examining the evidence put forward in this case may assist practitioners in assembling evidence in similar situations:

- Dr. John Milloy was brought in as an expert on the history of residential "schools".[24] Dr. Milloy is a historian and the author of the book *A National Crime, The Canadian Government and the Residential School System*.[25] His expertise provided the Tribunal with a clear picture of what transpired at the residential "schools", and the corresponding impact they had on individuals, families, and communities as a whole.[26] He noted that the focus of residential "schools" changed at some point from education to child welfare over the years and that many children were not sent home, as their parents were assessed as not being able to adequately care for them.[27]

- Elder Robert Joseph, from the Kwakwaka'wakw community, was brought in to provide a personal and detailed account of his experience while attending the residential "school" system.[28] He spoke openly about some of his accounts, which included strip searches and being subjected to an instance of public shaming, which involved him being ordered to strip naked in front of his peers and bend over.[29] He spoke about children being locked in closets and cages and recalled a prevalence of racism.[30] He also spoke about how his experiences in residential "schools" led to him turning to excessive alcohol consumption to deal with the trauma that he had.[31]

- Dr. Amy Bombay, Ph.D. in Neuroscience and M.Sc. in Psychology, was brought in as a qualified expert on the psychological effects and transmission of stress and trauma through generations.[32] She spoke about intergenerational trauma that has been passed down to the children of residential "school" survivors, and the Tribunal found her evidence to be helpful to understand the impacts of the individual and collective trauma

[23] *Ibid* at paras 395-427.
[24] *Ibid* at para 406.
[25] John Sheridan Milloy, *"A National Crime": The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999).
[26] *2016 CHRT 2*, *supra* note 2 at 408.
[27] *Ibid* at para 413.
[28] *Ibid* at para 409.
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid* at para 410.
[32] *Ibid* at para 415.

that was experienced by attendees, and their children.[33] The Tribunal stated that "Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves".[34]

3.3 Novel Approaches — Class Action Remedies

The novelty of seeking remedies for discrimination on behalf of a "class" of Indigenous children through the Tribunal is significant, and the availability of a remedy of this nature is discussed in the *2019 CHRT 39* decision.[35] The Attorney General of Canada ("AGC") (representing the Minister of Indigenous and Northern Affairs Canada) argued extensively against the complainants seeking remedies through a class-action type approach within the Tribunal.[36] Many of these arguments were based on the fact that there was already a proposed class proceeding filed in the Federal Court the month before this proceeding, and the nature of that action was very similar to the case at hand.[37] Among some of the arguments made by the AGC were that the complainants were public interest organizations and not victims of the discrimination themselves, and therefore do not satisfy the statutory requirements for compensation under the *Act*.[38] The AGC also submitted that complaints of systemic discrimination are distinct from complaints alleging discrimination against an individual, and require different remedies.[39] Essentially, the AGC submitted that courts are better equipped to deal with class proceedings, and that route would be more appropriate.[40]

The Tribunal stated that they did not need to hear from every First Nation child to determine whether or not being forcibly removed from their homes caused them harm and distress.[41] They noted that the evidence given by the experts had already established this.[42] The model of the *Canadian Human Rights Act* is based on a human rights approach and is aimed at helping victims of discriminatory practices —

[33] *Ibid*.
[34] *Ibid* at para 422.
[35] *2019 CHRT 39*, *supra* note 6.
[36] *Ibid*.
[37] *Ibid* at para 45.
[38] *Ibid* at para 50.
[39] *Ibid* at para 52.
[40] *Ibid* at para 65.
[41] *Ibid* at para 188.
[42] *Ibid*.

systemic or not.[43] Further, the Tribunal noted that the novelty and uncharted territory found in this case should not deter human rights decision-makers from moving forward on reparations for victims and survivors if the claim is supported by the evidence and the statute.[44] The Tribunal also did not take issue with the fact that there was a class proceeding filed in the Federal Court a month earlier, stating that parties might also seek remedies for violations of their *Charter* rights.[45]

Practitioners should note that remedies may also be available to parties through other mechanisms, like administrative tribunals. Further, these systems may offer additional procedural and logistical benefits to practitioners and their clients, as opposed to regular court procedures.

4. BILL C–92, *AN ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES*

The TRC's Call to Action 4 calls upon the federal government to enact Aboriginal child welfare legislation.

The overrepresentation of First Nations children in Canada's child welfare system has a long and complex history. Colonial policies implemented by European settler governments disrupted the traditional ways in which First Nations communities cared for their children, including family life and structure.

On June 21, 2019, the *Act Respecting First Nations, Inuit and Métis children, youth and families* (the "*Act*") received Royal Assent and came into force on January 1, 2020.[46] The *Act* is a response to the current overrepresentation of Indigenous children in the child welfare system caused by of decades of systematic separation of First Nations children from their families and communities, accompanied by the denial of their cultural and spiritual practices.

The *Act* has not been without its critics. Cindy Blackstock described the *Act* as:

> "A colonial Faustian bargain: Accept the flawed bill in its current state or get nothing…Government proclamations of good intention – and statements of reconciliation – must not shield them from a serious review of their actions.

[43] *Ibid*; *Canadian Human Rights Act*, *supra* note 3.
[44] *2019 CHRT 39*, *supra* note 6 at para 188.
[45] *Ibid* at para 205; *The Constitution Act*, *1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[46] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

> Reconciliation is not what you say; it is what you do. On that measure, the Canadian government is choosing to fail."[47]

In its preamble, the *Act* recognizes "the importance of reuniting Indigenous children with their families and communities from whom they were separated in the context of the provision of child and family services".

Broadly speaking, the *Act* is divided into two main sections. The first part establishes national standards, which includes the Purpose and Principles (sections 8 and 9), Best Interests of Indigenous Child (section 10), Provision of Child and Family Services (sections 11 to 15) and Placement of Indigenous Child (sections 16 and 17).

The second part covers jurisdiction. Section 18(1) affirms the "inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982*" to include jurisdiction relating to child and family services. This jurisdiction includes legislative authority to administer and enforce laws. The jurisdiction section also sets out the process for an Indigenous group to exercise its legislative authority in relation to child and family services.

5. QUÉBEC REFERENCE CASE

Reference to the Court of Appeal of Québec in relation with the Act respecting First Nations, Inuit and Metis children, youth and families, 2022 QCCA 185

In February 2022, the Quebec Court of Appeal (QCCA) released its decision in *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Metis children, youth and families.* It should be noted that at the time of writing, the Federal Government has appealed this decision to the Supreme Court of Canada.

The question submitted to the court by the Attorney General of Quebec asked the following: "Is the *Act Respecting First Nations, Inuit and Metis children, youth and families ultra vires* the jurisdiction of the Parliament of Canada under the Constitution of Canada?"

Although the two main parties were the Attorney General of Quebec (Applicant) and the Attorney General of Canada (Respondent), there were also six intervening parties. The Attorney General of Quebec submitted that the question should be

[47] Cindy Blackstock, "Opinion: Will Canada continue to fail Indigenous girls?", *The Globe and Mail* (6 June 2019), online: <https://www.theglobeandmail.com/opinion/article-will-canada-continue-to-fail-indigenous-girls/>.

answered in the affirmative (that the *Act* was indeed *ultra vires* and therefore unconstitutional). The Attorney General of Canada and all of the intervening parties submitted that the question should be answered in the negative. The intervening parties to this case were:

- Assembly of First Nations Quebec-Labrador (AFNQL)
- First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC)
- Makivik Corporation
- Assembly of First Nations (AFN)
- Aseniwuche Winewak Nation of Canada
- First Nations Child and Family Caring Society of Canada (Caring Society)

In a unanimous decision, the QCCA answered — No, except for section 21 and subsection 22(3) of the *Act*.

The court disagreed with the position of the Attorney General of Quebec, who took the stance that the pith and substance of the *Act* was to "dictate how provinces must provide child and family services in an Aboriginal context" (para 332). Rather, the Court concluded that the pith and substance of the *Act* is to "protect and ensure the well-being of Aboriginal children, families and peoples by promoting culturally appropriate child services, with the aim of putting an end to the overrepresentation of Aboriginal children in child services systems" (para 333). The Court points to sections 9 to 17 of the *Act* as evidence of this. However, it also points to "extrinsic evidence", much of which was introduced by the interveners in the case. The AFN and AFNQL both submitted detailed accounts of the historical context that the Court returned to repeatedly through the decision.

Although two provisions of the *Act* were found to be unconstitutional, the appeal court nevertheless affirmed the inherent right of First Nations to self-govern in the area of child and family services. This is the first time a court has made such an affirmation.

6. INDIGENOUS LAWS AND INSTITUTIONAL DEVELOPMENT — OVERVIEW

Since the enactment of this legislation, several communities and nations from across the country have begun taking child welfare matters into their own hands. Section 25 of the *Act* requires that certain information that has been provided under section 20 be published online or made accessible to the public, which has provided a means to monitor developments made as a result of enacting this legislation.

The Government of Canada publishes a growing database of Indigenous governing bodies, acting on behalf of an Indigenous group, community, or people, who have provided

(I) notices of intention to exercise legislative authority; and
(II) requests to enter into a coordination agreement in relation to legislative authority over child welfare matters with the Minister of Indigenous Services and the provincial or territorial government of the jurisdiction in which the group, community or people resides (under section 20(2) of the Act).[48]

Take note, with respect to coordination agreements, a twelve-month period commences on the date on which the request is made to ISC, and after which an Indigenous governing body's Indigenous law may come into force as federal law, even without there being an agreement with all parties. It is only required that the Indigenous governing body makes reasonable efforts to enter into a coordination agreement. If the conditions are met, the Indigenous laws can prevail over provincial, territorial, and even federal legislation.

7. SPECIFIC CASES

The following section looks more closely at two examples of Indigenous communities that have published their laws with regards to child welfare publicly in this Government of Canada database: (I) Cowessess First Nation, and (II) Louis Bull First Nation. A brief description of the legislation and some highlights of the legislation are included below.[49]

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[48] Government of Canada, "Notices and requests related to An Act respecting First Nations, Inuit and Métis children, youth and families" (16 June 2022), online: <https://www.sac-isc.gc.ca/eng/1608565826510/1608565862367#wb-auto-4>.

[49] Wabaseemoong Independent Nations has also begun development of their own laws regarding child welfare. The *Wabaseemoong Independent Nations Customary Care Code* applies to all band members, resident and community members living in One Man Lake, Swan Lake, Wabaseemoong, or any territory subsequently acquired. The *Act* grants authority to the Waabashki Maakinaakoons Family Services to perform functions as performed in the *Child, Youth, and Family Services Act*. The ONAKONIGEWAD is granted authority to hear and distribute petitions seeking an Order for Customary Care or Custom Adoption Orders as well as other orders related to the *Care Code's* purpose. The WIIDOKAZOWAD hears and takes part in case reviews, conference, and consultation about the provision of protection or issues about temporary placements for children and declaring customary care.

7.1 Cowessess First Nation

7.1.1 Brief Description

The legislation in Cowessess First Nation is called the *Cowessess First Nation Miyo Pimatisowin Act*. The name "Miyo Pimatisowin" means striving for a better life. The *Act* refers to a "Child" as a person under the age of 21 years old. The *Act* and the authority given to the Child and Family Services program, applies to all citizens and their children, whether they live on or off the community. This *Act* and the Child and Family Services Program may apply to all other persons residing in the community, in accordance with the Coordination Agreement.

The *Act* provides a range of principles that are to be considered throughout the implementation of their services. For example, these principles and values are exemplified in the order of priority for placement of a child, which reflects the desire for the child to live with another family member or with an adult who is a member of Cowessess First Nation. Notably, the *Act* provides a provision that calls for consideration to be made in the placement of a child, to have the child be around other children, who may be children of their parents or of other family members.

The *Act* also establishes an agency called Chief Red Bear Children's Lodge, which is composed of a Board of Governors to impose limitations on the powers, duties, or functions of the Agency. The Agency has a great range of responsibilities, regarding the development, delivery, and care of a Child and Family Services Program.

7.1.2 Highlights

- "This Act is to be interpreted and administered in accordance with the principle of the best interests of the Child."

- "Primary consideration must be given to the Child's physical, emotional and psychological safety, security and well-being, as well as to the importance, for that Child, of having an ongoing relationship with his or her family and with the Cowessess First Nation or people to which he or she belongs and of preserving the Child's connections to his or her culture."

- "Child and Family Services provided in relation to a Child are to be provided in a manner that does not contribute to the assimilation of the First Nation or to the destruction of the culture of the First Nation;"

- "[...] the extent that it is consistent with the best interests of the Child, the Child must not be apprehended solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her Parent or the Care Provider."

7.2 Louis Bull First Nation

7.2.1 Brief Description

The community of Louis Bull First Nation, in Alberta, has enacted the *Asikiw Mostos O'pikinawasiwin Law* (*AMO Law)*. On Louis Bull First Nation's website, it is noted that "The *AMO Law* seeks to protect their children and families while simultaneously preserving the tribe's Treaty, traditions, language, costumes, culture, and sovereign rights. This law seeks to also bring home children that have been taken away from the Louis Bull Tribe."

The *AMO Law* considers children (or Awasisahk), as being under the age of 18 years old, and recognizes Awasisak as being gifts from their Creator. The legislation focuses on protecting children, families, cultural, and community ties. The AMO Law also gives authority to, and outlines, the structure of the Asikiw Mostos O'pikinawasiwin Society (AMO Society). The AMO Society aims to have full authority over its child and family services. The *AMO Law* also provides rules and regulations with regard to protocol agreements with other Nation(s) for implementation of this Law in their Nation(s); and rules and regulations regarding the licensing of Asikiw Mostos O'pikinawasiwin Kinship Care homes.

The *AMO Law* provides principles governing the law, emphasizes the role and importance of family, provides factors to be considered when determining the best interests of the Awasisahk, provides a guide and rules and regulations in regard to an Awasisahk in need of protection, creates a duty to report an Awasisahk in need of protection, and provides details regarding the Asikiw Mostos O'pikinawasiwin Wellbeing System.

7.2.2 Highlights

- "Decisions about an Awasisahk must be consistent with traditions, culture, values and language relevant to the Awasisahk;"

- "An Awasisahk needs protection where: [...] The Awasisahk has demonstrated severe anxiety, depression, withdrawal, self-destructive behaviour, or aggressive behaviour towards others or any other severe behaviour that is consistent with the Awasisahk having suffered emotional harm or at risk of suffering emotional harm, and the Awasisahk's Parent/Guardian does not provide, or refuses or is unavailable or unable to consent to the provision of services, treatment or healing processes to remedy or alleviate the harm;"

7.3 Note to Practitioners

It will be important for practitioners to keep up to date with the Government of Canada's website. These laws can prevail over federal and provincial laws, and thus it will be important for practitioners to familiarize themselves with them. A legal representative must determine who has jurisdiction at the relevant time for their proceedings, so they know what rules apply and what organizations to engage with on behalf of their client. Transitional provisions may be of importance if the governing authority changes during the course of a care proceeding.

8. INDIGENOUS LAW RESEARCH UNIT ("ILRU", UNIVERSITY OF VICTORIA)[50]

The ILRU has published invaluable resources covering Indigenous Law, with resources focusing specifically on child welfare and family law. This section highlights two such resources; however, the ILRU's website should be visited by all those seeking to better understand Indigenous Law with the goal of "lawyering for reconciliation."

8.1 Coast Salish Laws Relating to Child and Caregiver Nurturance & Safety Toolkit

The Coast Salish Toolkit, which is accompanied by a Casebook and two Activity Books, is meant to inform thinking about how Indigenous legal traditions, particularly Coast Salish traditions, embrace child and caregiver nurturance and safety.

The Toolkit is comprised of Six Units:

[50] Indigenous Law Research Unit, "Resources" (last visited 2022), online: *Indigenous Law Research Unit - Resources* <ilru.ca/resources-2/>. Please visit this link to access resources discussed.

Unit 1 provides an overview of the Northern Straits Salish Peoples and their collective histories.

Unit 2 examines the worldviews and story work of the Coast Salish world and accompanying worldviews.

Unit 3 asks the question – "What is Indigenous Law?" including commonly asked questions and sources, resources and applications of Indigenous Law. This Unit also focuses on the importance of storytelling and oral histories as fundamental building blocks of Indigenous legal traditions within the Coast Salish world. Finally, it introduces the concept of "Legal Narrative Analysis", which involves reading a story and analyzing it through five components: Issues, Facts, Resolutions/Decisions, Reasons, and Brackets.

Unit 4 provides a brief history of colonialism, social work and child welfare. This unit provides a useful timeline of this history.

Unit 5 builds on the previous units and brings them together by looking at the way in which Coast Salish Laws relate to child and caregiver nurturance and safety. This includes the fact that families are the primary legal institution for the caring and teaching of children. Coast Salish Peoples have a long history of sophisticated legal principles relating to child and caregiver nurturance and safety.

Unit 6 is entitled Transforming Systems of Oppression. This unit looks at how social work has been a tool of Canadian colonial policy and challenges and responds to several myths and stereotypes with the goal of transforming these systems of oppression.

Accompanying the Toolkit is a Casebook containing stories meant to be used in conjunction with Coast Salish Laws introduced by the Toolkit. It helps the reader engage with the Legal Narrative Analysis introduced in the Toolkit and asks the reader questions to promote further understanding and consideration.

8.2 Nawendiwin: The Art of Being Related – Anishinaabeg Kinship-Centered Governance and Family Law

This report was completed through a partnership between the ILRU and the Kiijkiwndidaa Anishnaabekwewag Services Circle to illustrate Anishinaabeg kinship-

centred governance and family law. A goal of the report is to help those engaging with Indigenous families and children to work with them and empower them.

Generally, there are five parts to the report.

Part 1 introduces the principles that form Anishinaabeg kinship-centred governance. These include: Nawendiwin, Mino-bimaadiziwin, Self-determination, Onjinewin & Aanjigone, and Gender Fluidity.

Legal Processes are covered in Part 2. This includes who makes decisions and how these decisions are made. Five decision makers are identified: Children and Youth, Primary Caregivers/Parents, Extended Family Network, Elders & Knowledge Keepers, and Community Bodies/Leadership. Decision makers may come to certain decisions either alone or with others.

Procedurally, there are a number of steps that inform decisions being made: Awareness/Early Recognition, Assessment, Naakonige, and Ceremony.

Part 3 covers legal obligations or Kobinasowin (the art of raising your child). Kobinasowin is considered an obligation and follows the Seven Stages of Life model to help in raising children.

Part 4 identifies six legal rights that Anishinaabeg people might expect in kinship-centred decision-making. These rights are subdivided into Substantive Rights (Right to Belong, Right to Integrity, and Right to Meaningful Choice) and Procedural Rights (Right to Information, Right to Voice, and Right to Opportunities to Change).

The Fifth and final part of the Report examines the guiding principles that help in responding to situations of where harm, conflict or vulnerability may arise.

A casebook accompanies the Report to help readers engage further with the materials contained in the Report.

We have provided a link to the complete resource of the IRLU at the conclusion of this chapter.

9. RESOURCES

9.1 Legislation and Jurisprudence

- *An Act respecting First Nations, Inuit and Métis children, youth and families:* https://laws.justice.gc.ca/eng/acts/F-11.73/index.html

- *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969: https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/513674/index.do?q=caring+society

9.2 Secondary Sources

- Alison J Gerlach, Meghan Sangster & Vandna Sinha, "Insights from a Jordan's Principle Child First Initiative in Alberta: Implications for Advancing Health Equity for First Nations Children" (2020) 15:1 International Journal of Indigenous Health 21–33.

- Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*

- Kate Bezanson, "Issue 1: Caring Society v Canada: Neoliberalism, Social Reproduction, and Indigenous Child Welfare" (2018) 28:1 J L & Soc Pol'y 152–173.

- Johanna Caldwell & Vandna Sinha, "(Re) Conceptualizing Neglect: Considering the Overrepresentation of Indigenous Children in Child Welfare Systems in Canada" (2020) 13:2 Child Indicators Research 481–512.

- Kathleen Kufeldt & Brad McKenzie, *Child Welfare: Connecting Research, Policy, and Practice*, (Waterloo: Wilfrid Laurier University Press).

- Peter Choate et al., "Sustaining Cultural Genocide - A Look at Indigenous Children in Non-Indigenous Placement and the Place of Judicial Decision Making - A Canadian Example" (2021) 10:3 Laws 1.

- Cowessess First Nation, "Cowessess First Nation Miyo Pimatisowin Act" (March 2020), online (PDF):
    - https://www.cowessessfn.com

- https://www.cowessessfn.com/wp-content/uploads/2021/01/Cowessess-First-Nation-Miyo-Pimatisowin-Act.pdf

- Criticism/Analysis of Bill C-92, the Act, and Indigenous Child Welfare
  - https://yellowheadinstitute.org/bill-c-92-analysis/
  - https://fncaringsociety.com/educational-resources

- Explanatory note on Bill C-92: https://www.gazette.gc.ca/rp-pr/p2/2019/2019-09-18/html/si-tr96-eng.html

- Government of Canada, "Notices and requests related to An Act respecting First Nations, Inuit and Métis children, youth and families" (7 July 2022), online: *Canada.ca* <https://www.sac-isc.gc.ca/eng/1608565826510/1608565862367#wb-auto-4>.

- Sébastien Grammond, "Issue 1: Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28:1 J L & Soc Pol'y 132.

- Hayley Hahn, Johanna Caldwell & Vandna Sinha, "Applying Lessons from the U.S. Indian Child Welfare Act to Recently Passed Federal Child Protection Legislation in Canada" (2020) 11:3 Intl Indigenous Policy J 1–30.

- *Indigenous Law Research Unit – Resources*: ilru.ca/resources-2/. Please visit this link to access resources discussed.

- Louis Bull First Nation, "Asikiw Mostos O'pikinawasiwin Law" (2021), online: Asikiw Mostos O'pikinawasiwin Society: https://amosociety.ca/amo-law/.

- Naiomi Metallic, "A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case" (2019) 28:2 J L & Soc Pol'y 4.

- Janet Mosher & Jeffery Hewitt, "Issue 1: Reimagining Child Welfare Systems in Canada" (2018) 28:1 J L & Soc Pol'y 1.

- Rachel Garrett, “The Children Parliament Left Behind: Examining The Inequity Of Funding In An Act Respecting First Nations, Inuit And Métis Children, Youth And Families” (2021) 34:1 Can J Fam L 45.

- Vandna Sinha, Ashleigh Delaye & Brittany Orav-Lakaski, “Issue 1: Reimagining Overrepresentation Research: Critical Reflections on Researching the Overrepresentation of First Nations Children in the Child Welfare System” (2018) 28:1 J L & Soc Pol’y 10.

- Vandna Sinha et al, “Substantive Equality and Jordan’s Principle: Challenges and Complexities” (2021) 35:1 J L & Soc Pol’y 21.

- Nancy Stevens, Rachel Charles & Lorena Snyder, “Issue 1: Giidosendiwag (We Walk Together): Creating Culturally Based Supports for Urban Indigenous Youth in Care” (2018) 28:1 J L & Soc Pol’y 101.

- Training on Bill C-92: https://ipsociety.ca/training/community-family-support/c-92-training/

- Wabaseemoong Independent Nations, “Wabaseemoong Independent Nations Customary Care Code” (September 2017), online (pdf): <https://wabaseemoong.ca/wp-content/uploads/WIN-Customary-Care-Code.pdf>.

- Janet Mosher & Jeffery Hewitt, “Issue 2: Reimagining Child Welfare Systems in Canada” (2018) 28:2 J L & Soc Pol’y 1.

CHAPTER 6: TREATY INTERPRETATION AND *RESTOULE V. CANADA (ATTORNEY GENERAL)*

The Anishinaabe peoples of the Robinson Huron Treaty and Robinson Superior Treaty, both signed in 1850, brought an action in the Superior Court of Ontario challenging the interpretation of the annuity payments paid by the Crown by the terms of the treaties. The decision of the Superior Court centred around the perspectives of the independent signatory parties and welcomed the Anishinaabe's interpretation of the treaty through language and ceremony without the need to change the rules of civil procedure or cast doubt through rules of hearsay. Building upon the foundational treaty interpretation principles provided by the Supreme Court of Canada in *R. v. Marshall*, that treaties must be interpreted in a way that achieves the purpose of the treaty, the court advanced a further principle that gives effect to the interpretation of the parties' common intention: that from among the various possible interpretations of the common intention, the one that best reconciles the parties' interests is the one preferred.

This model of treaty interpretation was inclusive of the Anishinaabe knowledge keepers in language and ceremony of the Huron and Superior territories and clearly demonstrated the adaptability of the Practice Guidelines for Aboriginal Law Proceedings original developed in 2016 by the Federal Court of Canada. The inclusion of Anishinaabe protocols in the trial proceedings by the knowledge keepers required a bravery that few of us will ever understand but has shown us a path forward as we make space to listen and learn.

1. OVERVIEW OF PROCEEDINGS

The *Restoule v Canada (Attorney General)* decisions are notable for practitioners as a case study in effectively working with elders, pushing to make proceedings more accessible, and exemplary community lawyering strategies that were implemented by counsel. *Restoule* consists of a series of six decisions (at the time of writing). Though the focus of this Supplement is to provide practical guidance, an overview of the historical and factual context will be provided, along with an overview of the proceedings as essential background information. A helpful overview of the case

narrative and proceedings to date, which was prepared by staff at the Court of Appeal for Ontario for the general public, is also available here.[1]

This overview will focus on the main decisions — the Stage 1 decision,[2] the Stage 2 decision,[3] and the more recent Ontario Court of Appeal decision.[4] The **2018 ONSC 7701** decision dealt with Stage One (of three) matters, concerning the interpretation of the Treaties, precisely the annuity augmentation promise.[5] The **2020 ONSC 3932** decision involved matters of Stage Two, being Crown defences, where limitations and crown immunity issues were dismissed by the court.[6] Finally, **2021 ONCA 779** is the latest decision, at the Court of Appeal level, where matters from both Stage One and Stage Two were appealed by Ontario, but the majority of the determinations were upheld.[7]

2. OVERVIEW OF FACTS

The plaintiffs are Anishinaabe First Nations and the Defendants are the Crown in right of Canada and Ontario, as represented by their respective Attorneys General.[8] The subject of the conflict involves the interpretation of two Robinson Treaties, the *Robinson Huron Treaty* and the *Robinson Superior Treaty*.[9] The primary issue to be resolved here is the interpretation of the Augmentation Clause within the Treaties, and whether there is a cap on the annuities payable to the First Nations.[10]

2.1 The Augmentation Clause

The following clause in the text of both the *Robinson Huron Treaty* and *Robinson Superior Treaty* reads:[11]

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[1] Staff at the Court of Appeal for Ontario, "Overview: Restoule v. Canada (Attorney General) & Ontario (Attorney General)" (last visited 7 July 2022), online: *Ontario Courts - Tribunaux de l'Ontario* <https://web.archive.org/web/20211222204127/https://www.ontariocourts.ca/decisions/2021/2021ONCA0779overview.htm#>. [*Ontario Courts Overview: Restoule*].
[2] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 [*Restoule Stage One*].
[3] *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 [*Restoule Stage Two*].
[4] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779 [*Restoule Court of Appeal*].
[5] *Restoule Stage One*, *supra* note 2.
[6] *Restoule Stage Two*, *supra* note 3.
[7] R*estoule Court of Appeal*, *supra* note 4.
[8] *Restoule Stage One*, *supra* note 2.
[9] *Ibid* at para 1.
[10] *Ibid* at paras 1—2.
[11] *Ibid* at para 243.

> "The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order;..."[12]

The interpretation of this provision, referred to as the Augmentation Clause, is what is in dispute.[13]

2.2 The Parties

The parties to the *Robinson Huron Treaty* and *Robinson Superior Treaty* ("the Robinson Treaties" or "the Treaties") are the Anishinaabe Nations of Lake Huron and Lake Superior and the British Crown.[14]

The *Robinson Huron Treaty* annuity claim was brought by 21 Anishinaabe First Nations. The Anishinaabe beneficiaries are the 21 First Nations and their members.[15]

The annuities claim under the *Robinson Superior Treaty* was brought by two First Nations — Red Rock and Whitesand First Nation. The Anishinaabe beneficiaries are also the First Nations and their members.[16]

The signatories on the Anishinaabe side were the Chiefs in attendance from Lake Huron and Lake Superior. One of the key Chiefs for the Lake Huron Anishinaabe was Chief Shingwaukonse, of Garden River.[17] On Monday, September 9th, 1850, Chief Shingwaukonse and Chief Nebenaigoching signed the *Robinson Huron Treaty*.[18] For the Lake Superior Anishinaabe, it was Chief Peau de Chat, of Fort William, three other

[12] *Ibid*.
[13] *Ibid* at para 244.
[14] *Ibid* at para 15.
[15] *Ibid*.
[16] *Ibid* at para 16.
[17] *Ibid* at para 234.
[18] *Ibid*.

Chiefs, and five other men who signed the *Robinson Superior Treaty* in open council on September 7th, 1850.[19]

It is to be noted that the Robinson Treaties pre-dated the existence of Canada as we know it, and so the Treaties were with the British Crown. The British Crown was represented in the Robinson Treaties by William Benjamin Robinson.[20]

2.3 Historical Context

Significant events occurred between 1763 and 1849, which provide part of the historical and cultural context to the Treaties being negotiated and signed, were critical in the court's interpretation of the Treaties, and reveal that there was not simply passive acceptance of the Treaties on the part of the Anishinaabe.[21] Pre-1763, there existed an alliance called the Covenant Chain, which was a treaty relationship between the British and the Indigenous nations, the alliance centred on the Haudenosaunee Confederacy, known as the League of Five Nations (now called Six Nations).[22]

> "The alliance was represented symbolically as a ship tied to a tree, first with a rope and then with an iron chain. The rope represented an alliance of equals; the iron represented strength. [...] The metaphor associated with the chain was that if one party was in need, they only had to "tug on the rope" to give the signal that something was amiss, and 'all would be restored.'"[23]

Between 1756 and 1763, the British attempted to extend this alliance to other Western First Nations, including the Anishinaabe. These efforts were not entirely successful, and against a backdrop of hostilities, the *Royal Proclamation* of 1763 was issued to bring about peace in the region.[24] The *Royal Proclamation* of 1763 reflected Crown recognition of Anishinaabe sovereignty that survived the declaration of Crown sovereignty.[25] The court stated that the motivation for and the fundamental concepts in the Robinson Treaties flow from the *Royal Proclamation*,[26] and noted that the *Royal Proclamation* is also the source of the special relationship between the Crown and

[19] *Ibid* at para 231.
[20] *Ibid* at para 188.
[21] *Ibid* at para 62.
[22] *Ibid* at para 65.
[23] *Ibid*.
[24] *Ibid* at para 71.
[25] *Ibid* at para 72.
[26] *Ibid* at para 79.

Indigenous peoples, which requires the Crown to act honourably in its dealings with them.[27]

Another important historical event was the Council in Niagara in 1764, following the issuance of the *Royal Proclamation*. The Council at Niagara convened over 1,700 Indigenous people, including many Ojibwe and Odawa Chiefs.[28] The meeting was a diplomatic event where the British sought to renew and strengthen the alliance with the Western Nations, among others.[29] At these meetings, gifts, and strings of wampum were exchanged, including the Great Covenant Chain Wampum and the 24 Nation Wampum.[30] The Anishinaabe plaintiffs took the position that the descriptions of the Great Covenant Chain Wampum and the 24 Nation Wampum represented clear and enduring metaphors of promises of mutual support.[31] According to Anishinaabe tradition, these understandings renewed and strengthened their relationship with the British.[32] Following the *Royal Proclamation* and the Council at Niagara, the Western Nations, including the Anishinaabe of the upper Great Lakes region, were of the understanding that "they held title to their lands, maintained their autonomy, re-established fair trade relationships with the British, secured themselves protection from unscrupulous traders, and secured a process for restitution of fraudulent land purchases".[33]

Through the alliance relationships, the British developed an understanding of Anishinaabe protocols and traditions and incorporated them into their diplomatic exchange, however, British customs were also followed.[34]

The War of 1812 was an important point in the Covenant Chain alliance when the Anishinaabe responded to the British when they invoked the Covenant Chain relationship in 1812 and sought support in the war.[35] A transition occurred in and around the 1820s with the shift in the nation-to-nation relationship, moving from that of a military alliance to that of civil control, where the Crown embarked on a "civilization" effort,[36] and this changed the approaches to treaty annuities, among

[27] *Ibid* at para 80.
[28] *Ibid* at para 81.
[29] *Ibid* at para 83.
[30] *Ibid* at para 84.
[31] *Ibid* at paras 84—85.
[32] *Ibid*.
[33] *Ibid* at para 88.
[34] *Ibid* at para 91.
[35] *Ibid* at para 94.
[36] *Ibid* at para 97.

other things.[37] In 1818, the model of land surrenders changed from one-time payments to annuities,[38] expected to be funded from the proceeds of the ceded lands.[39] "The annuity was expressed as an aggregate amount, based on roughly two and a half pounds (£2.10; equivalent to $10) per person multiplied by the First Nation's population at the time the treaty was made".[40]

The Crown made these dealings on the presumption that the land sales to settlers would generate enough funds to finance the annual payments in perpetuity,[41] and this same formula was used from 1818 to 1850, regardless of the size or value of the land.[42] A change occurred to the annuity system in 1830, where annuity payments for ceded lands were converted to a fixed lump sum held by the Crown and credited to the Indigenous party to the treaty.[43] Accounts were made for each tribe, and the Chiefs made requisitions for goods out of that account, and were approved, "so long as the requisitioned items promoted a sedentary, agricultural, European way of life".[44] This was referred to as the Colborne Policy,[45] and this policy was in place at the time of the Treaties in question being signed.[46]

2.4 Mining Activities and Encroachments on Anishinaabe Lands

During the 1840s, prospectors moved into the upper Great Lakes region in search of valuable minerals, encouraged by "copper fever" on the American side of Lake Superior.[47] The government of the province of Canada was unprepared for entrepreneurial interest in mining development in 1845.[48] The government had no treaty with the Anishinaabe who resided in the very territory that the mining companies took interest in.[49] However, as of August 1845, the government began to issue mining licenses anyway.[50] In the spring of 1846, Chief Shingwaukonse confronted surveyors in the town of Sault Saint Marie about why mining exploration

[37] *Ibid* at para 99.
[38] *Ibid* at para 100.
[39] *Ibid* at para 102.
[40] *Ibid*.
[41] *Ibid* at para 103.
[42] *Ibid* at para 104.
[43] *Ibid* at para 106.
[44] *Ibid*.
[45] *Ibid* at para 107.
[46] *Ibid* at para 108.
[47] *Ibid* at para 112.
[48] *Ibid* at para 113.
[49] *Ibid*.
[50] *Ibid*.

was commencing in the absence of a treaty.[51] In 1848, when mining activity intensified, Chief Shingwaukonse complained personally to the Governor-General in Montreal, stating that his people's ability to make a living, by hunting or woodcutting, had been impaired by the activity.[52]

In the five years leading up to the Treaties being signed, there were numerous complaints from the Anishinaabe,[53] and their leaders demanded recognition for their claim to the land and opposed what they believed was the ongoing, illegal use and occupation of Anishinaabe land.[54] The government's response evolved over this period, from an outright rejection of the claims made by the Anishinaabe to a demand that the Anishinaabe prove their claims, and finally, they initiated a series of investigations.[55] For the Anishinaabe, during these five years, Chief Shingwaukonse and other Anishinaabe leaders firmly demanded compensation in consideration of the perceived wealth from the mining development on their territory.[56] The Anishinaabe reminded the Crown of their ongoing relationship, being the significant military alliance between the nations, the promises made by the Crown officials and representatives, and the history of treaty-making between the two nations.[57]

In June of 1846, a letter was written to the Governor-General, Lord Cathcart, by Chief Shingwaukonse, who asserted ownership over the territory.[58] Chief Shingwaukonse referred to annuity-based treaties in other areas and recognized the value in the territory.[59] Chief Shingwaukonse said that he understood that the newcomers had the technical ability to do this sort of development and proposed to share the benefits extracted from the territory.[60]

2.5 Significance of the Vidal Anderson Commission Report

On August 4, 1849, the Government appointed Provincial Land Surveyor Alexander Vidal and Indian Superintendent Thomas G. Anderson to undertake the final inquiries into the Anishinaabe claims, that they were the proprietors "of the vast mineral beds

[51] *Ibid* at para 114.
[52] *Ibid* at para 116.
[53] *Ibid* at para 119.
[54] *Ibid* at para 123.
[55] *Ibid* at para 120.
[56] *Ibid* at para 124.
[57] *Ibid* at para 125.
[58] *Ibid* at para 126.
[59] *Ibid*.
[60] *Ibid*.

and unceded Forests" of the territory.[61] They were instructed to do the following three things: "(1) Continue to obtain information relating to the claim to title; (2) Obtain other information (e.g., population, land use, and extent of claim); and (3) Measure the expectations of the Anishinaabe relating to treaty terms, including compensation and reserves requested".[62] The Commissioners in their expedition met with 16 of the 22 Anishinaabe Chiefs.[63] The Commissioners had difficulties in their meetings with some of the Chiefs, however, the Commissioners did produce a Joint Report, dated December 5, 1849, which included some recommendations that found their way into the Robinson Treaties.[64] Vidal and Anderson recognized the legitimacy of the Anishinaabe's claims, that they were the ancient occupiers of the territory with a legitimate claim of authority and jurisdiction,[65] they also held that the Crown had also claimed "[t]he Territorial Estate and Eminent Dominion" in and over the soil.[66]

The Commissioners made several observations and recommendations.[67] The court noted that the Commissioners may have had some knowledge that the Crown did not have the means to meet the Chiefs' expectations when they made the recommendation of "[...] an increase of payment upon further discovery and development of any new sources of wealth", but this recommendation introduced to Robinson the idea of increasing the annuity to future revenues.[68] The Commissioners proposed a compensation model that considered the "actual value" of the territory, considering the present information of the resources, and adding a provision for a possible increase to the annuities if there were any further discoveries or developments made of any new sources of wealth.[69] The proposal was unprecedented in treaty-making in Canada and the United States,[70] and it was an idea that was already proposed earlier by Chiefs Shingwaukonse and Peau de Chat in their petitions, speeches, and memorials.[71] This recommendation provided a means of reconciling the parties' divergent expectations.[72]

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[61] *Ibid* at paras 136,139.
[62] *Ibid* at para 140.
[63] *Ibid* at para 141.
[64] *Ibid* at para 155.
[65] *Ibid* at paras 156—157.
[66] *Ibid*.
[67] *Ibid* at para 161.
[68] *Ibid* at paras 161—162.
[69] *Ibid* at para 174.
[70] *Ibid* at para 175.
[71] *Ibid* at para 174.
[72] *Ibid* at para 180.

In and around the year 1850, there were several mining licences issued to companies within the territory of the communities involved.[73] Managers of the mining companies had fears that conflict may arise with the First Nations communities, and they urged the Government to create a treaty with the Anishinaabe of the upper Great Lakes region.[74] In January of 1850, Robinson offered his assistance to help settle tensions with the Anishinaabe of the upper Great Lakes region, and he was appointed as Treaty Commissioner.[75]

In the summer of 1850, Robinson met with various Anishinaabe Chiefs and leaders for discussions and a formal Treaty Council was held to form the Treaties.[76] Two Treaties were signed at the end of three weeks of negotiations and discussions.[77] These Treaties included one with the Lake Superior Chief, and another with the Lake Huron Chief.[78]

From 1851 to 1854, the *Huron Treaty* annuity was paid in the form of goods to each band but did not include individual cash payments.[79] In 1855, the Crown paid the annuity to individuals in the form of cash.[80] Throughout the 1850s, annuities were distributed for the *Robinson Superior Treaty*, in cash, to the head of each family.[81] The Hudson's Bay Company distributed the *Robinson Superior Treaty* annuity to the Lake Superior Anishinaabe for nearly twenty-five years.[82]

The first and only augmentation to the annuities was made in 1875 when the Government of Canada increased the annuities to $4 (equivalent to £1) per capita.[83] This increase was due to persistent demands from the Chiefs.[84] In 1877, the Chiefs petitioned for arrears for the years 1850–1874, arguing that the economic circumstances had existed for years before 1875 for an increase to have been made. In 1903, payment of arrears began.[85] However, a dispute arose between Ontario and

[73] *Ibid* at paras 111—118.
[74] *Ibid* at para 193.
[75] *Ibid* at para 194.
[76] *Ibid* at para 208.
[77] *Ibid*.
[78] *Ibid*.
[79] *Ibid* at para 290.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid* at para 291.
[84] *Ibid*.
[85] *Ibid* at para 292.

Quebec as to who was constitutionally required to pay the arrears, which occasioned the delay in satisfying the arrears of the annuity payments.[86]

The court determined that the post-treaty record is of limited assistance to the exercise of determining the parties' common intention.[87] People at different times and places held different understandings of the Treaties' promise.[88]

3. STAGE 1 DECISION — (2018 ONSC 7701)

This decision concerned matters of Stage One, and several issues needed to be addressed by the court.[89] Significantly, these matters required treaty interpretation to determine whether the Crown was obligated to increase the annuity; how much discretion the Crown has in implementing their obligation; what duties flow from the Honour of the Crown; whether the Crown owes a fiduciary duty to the Treaties' beneficiaries; and how the economic trigger for an increase is calculated.[90] There were questions related to limitations regarding revenues and expenses, and lastly, in the alternative, whether there should be an implied term that the annuity of $4 per person keeps up with inflation.[91]

3.1 Significant Findings

3.1.1 Treaty Interpretation Regarding the Augmentation Clause

- The court's goal was to find the common intention of the parties to determine the best interpretation of the Treaties' promise, using the principles of treaty interpretation from the *R v Marshall* decision.[92]

- The court in *R v Marshall* stated that treaty interpretation is about choosing from among the various possible interpretations of common intention, the one that best reconciles the parties' interests at the time the Treaty was made. This is a two-step process.[93]

[86] *Ibid* at para 292.
[87] *Ibid* at para 318.
[88] *Ibid*.
[89] *Ibid* at para 392.
[90] *Ibid*.
[91] *Ibid*.
[92] *Ibid* at para 395.
[93] *Ibid* at paras 328—329.

- The first step is about examining the words of the Treaty text and noting any patent ambiguities and misunderstandings arising from linguistic and cultural differences (para 82 of *R. v. Marshall*, [1999] 3 SCR 456).[94] The second step involves considering the possible meanings of the text using the Treaty's historical and cultural context (para 83 of *R. v. Marshall*, [1999] 3 SCR 456).[95]

- Justice McLachlin (as she then was) set out a summary of the relevant principles of interpretation for treaties in *R. v. Marshall*, [1999] 3 SCR 456 in paragraph 74 of that decision.[96]

- Using the above framework,[97] the court found that the best interpretation of the augmentation clause is that the parties did not intend to fix a cap on the annuity; and also that the parties intended that the reference to £1 (equivalent to $4) in the augmentation clause is a limit only on the annuity amount that may be distributed to individuals, and that amount is merely a portion of the collective annuity that is payable to the Chiefs and their communities.[98]

3.1.2 Duties that Flow from the Honour of the Crown?

- Duties that flow from the Honour of the Crown vary depending on the circumstances,[99] however, the Honour of the Crown requires treaty promises to be fulfilled with honour, diligence, and integrity.[100] There is a duty to interpret and implement the Treaties purposely and liberally or generously for the Indigenous Plaintiffs.[101] Robinson had a duty to set an annuity that would reflect the value of the territory.[102]

- The Honour of the Crown also requires that the Crown work to implement a process to consider increasing the annuities should the net Crown

[94] *Ibid* at para 328.
[95] *Ibid* at para 329.
[96] *Ibid* at para 324.
[97] *Ibid* at para 395.
[98] *Ibid* at para 397.
[99] *Ibid* at para 496.
[100] *Ibid* at para 538.
[101] *Ibid*.
[102] *Ibid* at para 568.

resource revenues allow for increases to the annuities to be made.[103] The Crown has discretion regarding the implementation process but must follow its duties arising from the Honour of the Crown and their fiduciary obligations.[104]

- The court was clear that sufficient disclosure is necessary for assessing the Crown's implementation proposals.[105] Sufficient information must be included to allow the parties to calculate net Crown resource revenues.[106] The court stated that it would be impossible to define the contents of the duty to consult as of yet.[107]

3.1.3 Does the Crown Owe a Fiduciary Duty?

- The court found there to be an ad hoc fiduciary duty.[108] An ad hoc fiduciary duty arose because the Crown committed to acting in the best interest of the Treaties' beneficiaries in their promise to engage in a process to determine if the economic circumstances warrant an increase to the annuities.[109] The Crown's fiduciary duty varies, but generally includes, to an extent, the duty of loyalty, the duty of good faith, and the duty of disclosure, among other duties.[110]

3.1.4 How Is an Increase Calculated? And Questions Regarding Limitations on Revenues and Expenses

- This issue was not answered, instead, these issues were deferred until Stage Three and the court laid out some principles to provide some guidance.[111]

[103] *Ibid*.
[104] *Ibid* at para 569.
[105] *Ibid* at para 571.
[106] *Ibid*.
[107] *Ibid* at para 572.
[108] *Ibid* at para 519.
[109] *Ibid*.
[110] *Ibid* at para 531.
[111] *Ibid* at para 553.

3.1.5 An Implied Term that the Annuity Keeps Up with Inflation

- The court was not convinced that the concept of persistent inflation and erosion of purchasing power to the parties at the Treaty Council in 1850 would have triggered an agreement to an indexation term.[112] The Treaties already include provisions that take future possibilities into account, including the future value of the annuities.[113]

- The court takes the position that to accept the idea that indexation solves the problem here, is to say the First Nations were content with the purchasing power of the initial annuity, however, this is not historically accurate as the parties were aware that their total annuity would increase.[114]

4. STAGE 2 DECISION — (2020 ONSC 3932)

In this decision, the Plaintiffs sought declarations regarding possible Crown defences, regarding Ontario's limitations legislation and the limitations defence, as well as the doctrine of Crown immunity.[115]

4.1 Significant Findings

4.1.1 Ontario's Limitations Legislation & Ontario's Limitations Defence

- This dispute over the applicability of limitations to these claims is essentially a dispute over whether a treaty can be considered a contract.[116] The court makes it clear that treaties are not equivalent to a contract of any form,[117] and uses excerpts from *Sioui*, *Badger*, *Sundown*, and *Marshall* to support this point.[118]

- The court determined that no limitations legislation applies to bar the plaintiffs' claims and that there is no limitation period applicable to claims

[112] *Ibid* at para 594.
[113] *Ibid*.
[114] *Ibid* at para 593.
[115] *Restoule Stage Two*, *supra* note 3.
[116] *Ibid* at paras 122—125.
[117] *Ibid* at paras 149—151.
[118] *Ibid* at para 127.

for breach of the Treaties.[119] Overall, the claims in this action are not statute-barred by the operation of limitation periods.[120] The court also found that the Treaties do not meet the fundamental definition of a specialty,[121] nor do they constitute a bond nor secure a debt.[122]

4.1.2 Crown Immunity

- The court concluded that equitable claims against the Crown could be pursued via a petition of right before 1963, and therefore that the claims for breach of fiduciary duty in these actions, including claims existing before September 1, 1963, are not subject to Crown immunity.[123]

- The court determined that the purpose of the *Proceedings Against the Crown Act*, S.O. 1962-63, c. 109, was to make the Crown not liable for claims in tort and it was not meant to provide the Crown immunity for all wrongs.[124] In addition, the *Act* also provided that claims previously pursued by petition of right would no longer be available without that procedure.[125]

- The decisions in *Slark*, *Seed*, and *Cloud* were also examined by the court, in addition to a range of works of various legal scholars, to support their position and stated that these determinations remain good law at this time.[126] The court adopted the reasoning in the *Slark* line of cases.[127]

4.1.3 Joint and Several Liability & Paymaster

- In considering the principles set out in *Service Mold* and *Hryniak*, the court determined that there will not be partial summary judgement or a declaration on the question of joint and several liability or paymaster

[119] *Ibid* at paras 181—182.
[120] *Ibid* at para 200.
[121] *Ibid* at para 174.
[122] *Ibid* at para 171.
[123] *Ibid* at para 79.
[124] *Ibid* at para 82.
[125] *Ibid*.
[126] *Ibid* at para 83.
[127] *Ibid*.

questions.[128] The court felt that dealing with matters now will not be the most proportionate, timely, or cost-effective approach.[129]

5. COURT OF APPEAL DECISION — (2021 ONCA 779)

Ontario was the only defendant to appeal, as Canada did not appeal.[130] This is the latest decision in the *Restoule* line of cases, and this decision was heard in the Court of Appeal for Ontario. The appeal concerned some of the determinations made in Stage One and Stage Two of the proceedings. Largely the holdings of the lower court stood.

5.1 Significant Findings

- The court unanimously concluded that the doctrine of the Honour of the Crown is applicable in this case.[131] The majority found that the Honour of the Crown requires the Crown to increase annuities, as per its duty of diligent implementation of the Treaties.[132]

- The majority of the court held that there was no error made by the trial judge in the interpretation of the Treaties and there was no error in considering the evidence that would justify this court's interference with this interpretation.[133]

- The minority disagreed with the trial judge's interpretation of the Treaties but agreed with the majority that the Crown failed to implement the Treaties' promises and that the court could compel it to do so.[134]

- The majority held that Ontario's limitations statute does not apply to treaty claims and that Crown immunity is not applicable here.[135]

[128] *Ibid* at para 269; 279.
[129] *Ibid* at para 271.
[130] *Restoule Court of Appeal*, *supra* note 4.
[131] *Ontario Courts Overview: Restoule*, *supra* note 1.
[132] *Ibid*.
[133] *Ibid*.
[134] *Ibid*.
[135] *Ibid*.

- The court unanimously agreed that the trial judge's approach to potential remedies should be altered to ensure that payments are distributed consistently with the promise of augmentation stated in the Treaties.[136]

5.2 Where Are We Now?

At the time of writing, Ontario has sought and been granted leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

Stage Three will be a comprehensive proceeding. Stage Three, which has yet to take place, will determine the remaining issues, including damages and the allocation of liability between Canada and Ontario.

5.3 Skills Development/Practice Skills

Restoule is a case study in litigation where Anishinaabe laws and legal matters were welcomed into the court. There are several lessons that practitioners may extract from this case, and below are just a few examples of those lessons.

5.3.1 Working with Elders

A request was made by counsel for the Plaintiffs, and an order was granted, for the incorporation of protocols to better facilitate the evidence given by Elders,[137] based upon Part III D. of the Federal Court of Canada's "*Practice Guidelines for Aboriginal Law Proceedings*" (the Third Edition published in April of 2016) ["the Guidelines"].[138] Even though the proceedings occurred at the Ontario Superior Court of Justice, the appropriate adjustments were made to take into consideration the Anishinaabe perspectives, and to make the Guidelines consistent to the provincial court. As is stated in the Guidelines, reconciliation requires the courts to find ways of making their procedures relevant to the Indigenous perspective, while also maintaining the principles of fairness, truth-seeking, and justice.[139]

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[136] *Ibid*.

[137] *Restoule et al v Attorney General of Canada et al,* Court File No: C-3512-14 & C-3512-14A: Order (Procedure for Taking Evidence), Appendix A: Elders' Protocol [*Restoule Evidence Order*].

[138] Federal Court–Aboriginal Law Bar Liaison Committee, *Practice Guidelines for Aboriginal Law Proceedings* (April 2016), online: <https://www.fct-cf.gc.ca/content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf> [*Practice Guidelines 2016*].

[139] *Ibid* at para 30.

Below are some examples of how the court, in using the Guidelines, adjusted procedures to make them relevant to the Indigenous parties involved. Practitioners should consider these accommodations and other ways in which the Guidelines could be applied in other scenarios.

- The Guidelines state that evidence given by Elders may be presented in a demonstrative manner, through songs, dances, culturally significant objects, or conducting activities on the land.[140] In this case, the Elders were permitted to have their sacred pipes and drums, and the Chiefs who were providing oral evidence were permitted to wear their ceremonial headdresses, as they had requested.[141]

- The Guidelines state that ordinary procedures may be altered to hear the Elders' testimonies, and to ensure that the environment is most ideal for them to deliver that testimony.[142] In this case, the Elders involved wished to affirm the truth of their testimony while holding an eagle feather.[143] The Elders also requested to have a sacred fire occurring during the proceedings, particularly those at Manitoulin and Garden River First Nation ["Garden River"].[144] It was also asked that the seating arrangement be adjusted, so that it was in a circular or semicircular positioning, if possible.[145] Lastly, the Elders requested a smudging ceremony before the start of hearings at Thunder Bay, as well as at the hearings dealing with Anishinaabe and Elder evidence at Manitoulin and Garden River.[146]

- The Guidelines stress the importance of accurately interpreting an Aboriginal language, and that the party calling for an Elder to testify should address the need for interpretation and provide for how the interpretation is to be facilitated.[147] In this case, many of the Elders testified in English, however, two Elders stated that they might need to express themselves in Anishinaabemowin, and so an interpreter was acquired for those Elders.[148]

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[140] *Ibid* at para 33.
[141] *Restoule Evidence Order*, *supra* note 137 at para 3.
[142] *Practice Guidelines 2016*, *supra* note 138 at paras 33—34.
[143] *Restoule Evidence Order*, *supra* note 137 at para 4.
[144] *Ibid* at para 4.
[145] *Ibid*.
[146] *Ibid*.
[147] *Practice Guidelines 2016*, *supra* note 138 at para 34.
[148] *Restoule Evidence Order*, *supra* note 137 at 5.

- The Guidelines provide that the court may consider, with a party's application, that all or part of a proceeding should take place in an Indigenous community.[149] In this case, specific venues were selected for hearing the Elder and Anishinaabe evidence, and they were set to be heard at Manitoulin and Garden River.[150]

- The Guidelines also provide for the possibility of adjustments to be made to the direct and cross-examination process of Elders.[151] The Guidelines set out that the process of receiving Elder testimony in court might be better facilitated by approaching it with respect and bearing in mind the Indigenous party's perspective, while also balancing the requirements of the adjudication process.[152] In this case, adjustments were made to the examination-in-chief, and counsel was permitted to sit next to the Elders, who also happened to be hearing impaired.[153] Regarding cross-examination, collaboration occurred between all of the parties to ensure that cross-examinations were conducted appropriately.[154]

- The Guidelines reiterate the importance of ceremony or prayer to particular Indigenous communities.[155] In this case, the Elders requested to have an Eagle Staff present in the courtroom, and a sacred fire lit during the proceedings, especially at the Manitoulin and the Garden River locations.[156] These requests were also fulfilled.

What can be taken away from these examples, is that there are possibilities available for legal representatives to respect and reflect the needs of their clients in litigation. Whether it be ceremonial or cultural practices, protocols, or simply helping to facilitate a more open and comfortable environment for Indigenous participants, these Guidelines have various provisions available that appear flexible enough to satisfy the needs of a particular client.

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[149] *Practice Guidelines 2016*, *supra* note 138 at 34.
[150] *Restoule Evidence Order*, *supra* note 137 at 5.
[151] *Practice Guidelines 2016*, *supra* note 138 at 34—36.
[152] *Ibid* at 35.
[153] *Restoule Evidence Order*, *supra* note 137 at 6.
[154] *Ibid* at 7.
[155] *Practice Guidelines 2016*, *supra* note 138 at 37.
[156] *Restoule Evidence Order*, *supra* note 137 at 8.

5.3.2 Making Proceedings Accessible

The actions that were taken by counsel in *Restoule* also provide an example of how a Superior Court can make its proceedings more accessible, particularly in cases involving Indigenous people and treaties, which can have an impact on all signatories of a treaty. In this case, the Plaintiffs sought to have an order granted permitting the live streaming and archiving of proceedings,[157] under the *Courts of Justice Act*.[158] Whether or not there would be a transmission of the hearing was not an issue for the parties, however, there were disagreements concerning the terms of such an order.[159] The court decided to permit the live streaming and archiving of the proceedings and released written reasons for the decision.[160] There are some aspects of the decision that may prove beneficial for legal representatives working with Indigenous clients to be aware of, especially in cases where accessibility may be a concern.

- The Plaintiffs submitted that the recording and archiving of the proceedings was necessary, due to the difficulties posed related to geography and that the court location would be inaccessible to many who may have an interest in the proceedings.[161] There were also arguments made that this would best serve the broader public interest, and would be in alignment with the pursuit of reconciliation.[162] The court concluded that there were good reasons to authorize the recording and archiving of the proceedings, due to (1) the nature of the interested parties, which includes Indigenous peoples who are geographically dispersed,[163] and (2) the need for transparency to overcome historic distrust of the justice system for Indigenous peoples (the court felt that this act would enhance the integrity of the justice system),[164] and (3) to take necessary and reasonable steps to facilitate an open and transparent proceeding on a historic treaty dispute.[165]

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[157] *Restoule et al v Attorney General of Canada et al,* Court File No: C-3512-14 & C-3512-14A: Order Authorizing Livestreaming and Posting of Proceedings, Annex [*Livestreaming and Posting Order*]. It must be noted that the stage one trial was held prior to the COVID 19 pandemic.
[158] *Courts of Justice Act*, RSO 1990 c C.43, s 136(3)(A).
[159] *Restoule Stage One*, *supra* note 2 at para 2.
[160] *Ibid* at paras 73—78.
[161] *Ibid* at paras 23.
[162] *Ibid*.
[163] *Ibid* at para 72.
[164] *Ibid*.
[165] *Ibid*.

- The court made a note in hindsight, supporting their decision to allow unrestricted broadcasting,[166] stating that on October 25th, 2017, history was made and captured on video in the Community Hall of Garden River, when one of the Elders read aloud a translation of the *Robinson Huron Treaty* in Anishinaabemowin.[167] The judge was of the impression that it was the first time a written translation into Anishinaabemowin of the treaty was made and read aloud in a court setting.[168] This is the language of the Anishinaabek, who were present at the Treaty Council, and who were signatories to the treaty.[169] The room was filled with Elders, Chiefs, and community members, listening to the treaty being read to them in their language for the first time.[170]

- Further, accessibility was also addressed according to the Guidelines,[171] as it was agreed that it would be appropriate for the court to sit in various locations throughout the proceedings: Thunder Bay, Manitoulin Island, Garden River First Nation, and Greater Sudbury.[172] This was because Manitoulin is home to 7 of the First Nations forming part of the *Robinson Huron Treaty*.[173] Garden River First Nation is located at the point where the Huron and Superior Treaty territories meet, and it is also geographically close to where the Treaty Council was held, and where the Treaties were ultimately signed.[174] Sudbury is the Superior Court location where the Robson Huron case was filed, and it is close to the centre of the Robinson Huron territory.[175] This is a point that counsel for an Indigenous client should take note of, as it may be possible to have proceedings held in places that are more convenient or help facilitate a sense of justice for the Indigenous clients if circumstances permit.

For legal representatives working with Indigenous clients, this example of the order to record and archive the proceedings may prove useful as a precedent to put

[166] *Ibid* at paras 79—85.
[167] *Ibid*.
[168] *Ibid*.
[169] *Ibid*.
[170] *Ibid*.
[171] *Practice Guidelines 2016*, *supra* note 138 at 34.
[172] *Restoule Stage One*, *supra* note 2 at para 8.
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid*.

forward, in arguing whether a proceeding in a case should be recorded and archived, in pursuit of accessibility, and meeting the needs of clients.

5.3.3 The Importance of Historical Context

In treaty litigation, the historical context is important information to aid the court in the treaty interpretation and is contemplated in the second part of the *Marshall* test of treaty interpretation.[176] Additionally, for practitioners, it is important to note how the historical context can be brought out. In this case, counsel for the Anishinaabe parties obtained the help of several ethnohistorians and other professionals, to build the evidentiary record. Some examples of professionals that the Anishinaabe parties acquired to help build their case included Mr. Alan Corbiere, an ethnohistorian who was qualified as an expert in the oral history and written record of the wampum and Covenant Chain relationship between the Anishinaabe and the Crown from the Anishinaabe perspective during the 18th and 19th centuries.[177] Counsel also received help from Dr. Paul Driben, another ethnohistorian who was qualified as an expert in Anishinaabe cultural traditions, who brought information regarding the details of the Anishinaabe historical use and occupancy of the land, in cross-cultural understandings of both the Anishinaabe and non-Anishinaabe/Crown actors in the treaty-making process.[178]

Several other expert witnesses helped the parties develop the historical record, such as Ms. Gwynneth Jones (a historian who brought information with respect to the interpretation of historical documents), Mr. James Morrison (an ethnohistorian qualified as an expert on the Robinson Treaties), Dr. Heidi Bohaker (a historian and ethnohistorian qualified as an expert in the principles of Anishinaabe governance, doodemag, alliances, and treaty-making), Dr. Heidi Kiiwetinepinesiik Stark (a political scientist qualified with expertise in Anishinaabe jurisprudence and the application of laws through stories and metaphors), Dr. Carl Beal (an economist and economic historian qualified as an expert on the economic aspects of historical treaties).[179]

[176] *Ibid* at para 324.
[177] *Ibid* at para 9.
[178] *Ibid*.
[179] *Ibid*.

5.3.4 The Importance of Indigenous Law

The role of Anishinaabe law and legal principles presented at trial was part of the fact evidence into the Indigenous perspective.[180] The Plaintiffs did not ask the court to apply Anishinaabe law.[181] Rather, the Plaintiffs and Canada submitted that the court should consider Anishinaabe law as part of the Anishinaabe perspective that informs the common intention analysis.[182] For practitioners, and from a practice perspective, this type of evidence can be brought in through experts on Indigenous law and also via Elders.

Counsel for the parties obtained help from Elders and Chiefs who further described the political, cultural, historical, and linguistic traditions of the Anishinaabe, such as Elder Fred Kelly, Elder Rita Corbiere, Elder Irene Stevens, and Elder Irene Makedebin, as well as Chief Dean Sayers, Chief Duke Peltier, and Chief Angus Toulouse, who all gave testimony in this case.[183]

In this case, counsel for the Anishinaabe parties did not have Elders that had any oral historical recollection of the Treaty Council of 1850, but they had language speakers to discuss how the text might have been interpreted and understood at the time by the Anishinaabe; and had evidence of applicable Anishinaabe laws and how that would have informed the understanding and interpretation of the treaty.

5.4 Additional Takeaways

5.4.1 Collaborating with a Client

Restoule is undoubtedly a good example of community lawyering. In the piece written by Shin Imai, *A Counter-pedagogy for Social Justice: Core Skills for Community Lawyering*,[184] the author describes three skills that he argues are imperative for community lawyering efforts, which were arguably present in *Restoule*: (1) collaborating with a community, (2) recognizing individuality, and (3) taking a community perspective.[185] Imai argues that strategies should be developed in

[180] *Ibid* at para 13.
[181] *Ibid*.
[182] *Ibid*.
[183] *Ibid* at para 10.
[184] Shin Imai, "A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering" (2002) 9:1 Clinical L Rev 195.
[185] *Ibid* at 200.

collaboration with members of the community, and states "In developing these strategies, however, one must be aware that the process of lawyering itself, and the relationship of the lawyer to the community, can determine whether the lawyer is a force of liberation or an agent of domination".[186] This means that representing your client can take its traditional authoritative approach, which may result in parties feeling unempowered, or other collaborative strategies may be pursued, as was the case in *Restoule*, that may result in a better sense of justice for the clients.

In speaking to members of counsel for the Plaintiffs in *Restoule*, much of what has been able to be achieved in this case, as outlined above, was the result of implementing requests from the communities themselves.[187] It was the role of the practitioners to listen to the wants and needs of their clients and to figure out how to navigate the procedural system of the courts, to fulfil those needs.

5.4.2 Being Brave

Don't be afraid to ask about, and push for, the incorporation of Indigenous ceremonies, protocols, etc., even if it has not been done before. In *Restoule*, the legal representatives pushed for Anishinaabe principles and protocols to be incorporated into the court. It was significant to have had a sacred fire burning throughout the process and having an opening *prayer* to open and close court days. Counsel for the Plaintiffs admit that there was hesitation at first, but efforts to build an inclusive court process, if desired by the client and guided by Court practice guidelines, can be a rewarding process, as seen here.[188] In this case, the Ontario Superior Court of Justice did not have to innovate, they took the opportunity to adopt what the Federal Court had already laid out for them in the Federal Court *Practice Guidelines For Aboriginal Law Proceedings*.[189]

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[186] *Ibid* at 197.
[187] Interview of Dianne Corbiere (February 27, 2022) [*Corbiere Interview*].
[188] *Ibid*; "Treaty Interpretation in the Age of Restoule" (May 2022), online: *Yellowhead Institute* <https://yellowheadinstitute.org/treaty-interpretation-in-the-age-of-restoule/>.
[189] *Practice Guidelines 2016*, *supra* note 138.

6. RESOURCES

6.1 Jurisprudence

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- *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 (CanLII), <https://canlii.ca/t/hwqxg>, retrieved on 2022-01-22.

- *Restoule v. Canada (Attorney General)*, 2019 ONSC 5329 (CanLII), <https://canlii.ca/t/j2p16>, retrieved on 2022-01-22.

- *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 (CanLII), <https://canlii.ca/t/j8fpz>, retrieved on 2022-01-22.

- *Restoule v. Canada (Attorney General)*, 2021 ONSC 2221 (CanLII), <https://canlii.ca/t/jdzqg>, retrieved on 2022-01-22.

- *Restoule v. Canada (Attorney General)*, 2021 ONCA 779 (CanLII), <https://canlii.ca/t/jk69c>, retrieved on 2022-01-23.

6.2 Secondary Materials

- Federal Court–Aboriginal Law Bar Liaison Committee, "Practice Guidelines for Aboriginal Law Proceedings" (April 2016), online: <https://www.fct-cf.gc.ca/content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf>.

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- Shin Imai, "A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering" (2002) 9:1 Clinical L Rev 195.

- Interview of Dianne Corbiere (February 27, 2022).

- *Restoule et al v Attorney General of Canada et al,* Court File No: C-3512-14 & C-3512-14A: Order Authorizing Livestreaming And Posting Of Proceedings, Annex.

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- Staff at the Court of Appeal for Ontario, "Overview: Restoule v. Canada (Attorney General) & Ontario (Attorney General)" (date unknown), online: Ontario Courts - Tribunaux de l'Ontario
  - https://www.ontariocourts.ca/decisions/2021/2021ONCA0779overview.htm
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- Treaty Interpretation in the Age of Restoule - Yellowhead Institute

6.3 Interactive Bibliography

- Stage 1 Trial Videos: <https://waawiindamaagewin.com/portfolio-items/robinson-huron-treaty-annuities-case-phase-1/>

- The Robinson Huron Treaty Annuities Case website is here: <https://www.robinsonhurontreaty1850.com/>.

- The Robinson Huron Treaty 1850 – Annuities Case Facebook page: <https://www.facebook.com/RobinsonHuronTreatyAnnuities1850/>

- Case Overview in the Robinson Huron Waawiindamaagewin Tread Times Magazine — Issue 1 at pages 5-11: <https://issuu.com/waawiindamaagewin/docs/rhw_treatytimes_issue1_2021_rough4_low_4_rough>

- Case Overview in the Robinson Huron Waawiindamaagewin Tread Times Magazine — Issue 2 at pages 5-27: <https://issuu.com/waawiindamaagewin/docs/rhw_treatytimes_issue2>

- Nipissing First Nation Website — Robinson Huron Treaty - Annuities Case Updates <https://nfn.ca/news-notices-2021/rht/>

CHAPTER 7: THE DUTY TO CONSULT AND ACCOMMODATE AND FREE, PRIOR AND INFORMED CONSENT

1. PURPOSE OF THE CHAPTER

Canadian statutory law[1] and common law jurisprudence have introduced the duty to consult and accommodate Indigenous rights and interests when infringements may be anticipated or have occurred. While these principles are not new, the passage of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, introduced in chapter 4, will necessarily prompt a review of Canada's regulatory framework when interacting with Indigenous communities, lands and territories. As these are emergent and ongoing matters of advocacy, we include this chapter to review some of the key issues for practitioners and the doctrine of free, prior and informed consent. We conclude with a list of resources to further advance learning.

2. THE DUTY TO CONSULT AND ACCOMMODATE: WHERE DOES THE DUTY COME FROM?

The Duty to Consult and Accommodate (DCA) was first articulated by the Supreme Court of Canada in 1990 in the case of *R. v. Sparrow*,[2] which was the first Supreme Court of Canada decision regarding section 35 rights, involving an infringement of the Musqueam First Nation's aboriginal right to fish. As part of the justification framework, the Court held that the affected rights holders must first be consulted and possibly compensated where the government proposes to infringe their right.[3] Since then, the case law on the DCA has developed quite substantially. In 2004, the Supreme Court of Canada found that the DCA is "grounded in the honour of the Crown," as "part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution" and confirmed that the DCA is a constitutional obligation on the part of the Crown.[4] In 2018, the SCC in *Mikisew* further elaborated on the DCA in the context of treaty rights

[1] Federal or provincial statutes, regulations and policies such as the *Impact Assessment Act (Canada*) or the *Environmental Assessment Act (Ontario).*

[2] *R v Sparrow*, [1990] 1 SCR 1075, [1990] S.C.J. No. 49 [*Sparrow*].

[3] *Ibid* at para 1080.

[4] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 27 [*Haida Nation*]. For more on what exactly "Honour of the Crown" means, see Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29:1 SCLR 433 at 433-434, online: <https://digitalcommons.osgoode.yorku.ca/sclr/vol29/iss1/20>.

and the honour of the Crown where it held:

> The underlying purpose of the honour of the Crown is to facilitate the reconciliation of these interests (*Manitoba Metis*, at paras. 66-67). One way that it does so is by promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). This endeavour of reconciliation is a first principle of Aboriginal law.[5]

The Honour of the Crown is relevant in all of its dealings with Indigenous peoples,[6] including negotiation or litigation of Aboriginal and treaty rights and interests. In *Delgamuukw v British Columbia,* the SCC, referring to whether infringement of aboriginal title is justified, stated that "there is always a duty of consultation."[7] In 2010, the DCA was extended to modern treaties in *Beckman v Little Salmon/Carmacks First Nation*.[8]

3. WHEN DOES THE DUTY ARISE?

As set out in *Haida Nation,* the duty to consult and accommodate arises when "the Crown has knowledge, real or constructive, of potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[9]

Therefore, when the Crown contemplates conduct or a decision that affects a proven or claimed right or interest it will be imbued with a duty to consult and possibly accommodate the affected rights or interest. Contemplated conduct that has potential to adversely affect the (future) exercise of an aboriginal right includes actions that prejudice a pending claim or right-physical; or a high-level management decision or structural changes to resource management. However, previous breaches, speculative impacts, negative impacts on negotiating positions are not considered "adverse effects".

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[5] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 (CanLII) at para 22, [2018] 2 SCR 765 [*Mikisew 2018*].

[6] *R v Badger*, [1996] 1 SCR 771 at para 41, 1996 CanLII 236 (SCC) [*Badger*]*; R v Marshall,* [1999] 3 SCR 456, 1999 CanLII 665 (SCC) [*Marshall*].

[7] *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, 1997 CanLII 302 (SCC)*.*

[8] *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 (CanLII) [*Beckman*].

[9] *Haida Nation*, supra note 4 at para 35.

Some additional examples of when a duty may arise include:

1. Overlapping First Nations land claims: an emerging scenario as seen in *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*[10] where both First Nations with s. 35 rights were owed a duty to consult where contemplated conduct may potentially and adversely affect s. 35 rights. However, resolving the conflict was a question of accommodation.

2. Treaty rights: the Crown will always have notice of its (written/established) contents. The potential for adverse effects must be more than merely speculative. This potential must be appreciable and have current potential to adversely impact the substance of the claimed right.[11]

3. First Nations with s. 35 rights (asserted and treaty) are owed a duty to consult where Crown conduct may adversely affect their rights. Resolving the conflict is a matter of accommodation.

4. WHAT IS THE SCOPE OF THE DUTY?

In deciding on the content of the DCA, the SCC decided that *it lies on a spectrum* and that it "varies with the circumstances."[12] The DCA is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[13]

At one end of the spectrum, the Crown duty may involve actions where no serious impact is planned, in which case providing adequate notice and disclosing relevant information to the affected First Nation may be all that is required. Accommodation in this case may involve discussing and resolving issues raised in response to the original notice. At the other end of the spectrum, where Crown action contemplates serious, adverse impacts, the duty is far more extensive and may involve a comprehensive exchange of information, site visits, research, expert studies,

[10] *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440 [G*amlaxyeltxw*].
[11] *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources*), 2015 SKCA 31 at para 90, [2015] S.J. No. 151 [*Buffalo River*].
[12] *Haida Nation*, supra note 4 at para 39.
[13] *Ibid*.

ongoing dialogue and submissions to decision makers. The Crown will be guided in determining accommodation by the process of consultation undertaken.[14]

Accommodation is similarly a responsibility of the Crown that necessarily is informed by the consultation process. Some examples of accommodation may include development of mitigating measures, attachment of terms and conditions to permits or authorizations, financial compensation, or consideration of changes to the proposed activity.[15]

To date, courts have treated the DCA primarily as a procedural rather than substantive right. Put otherwise, Indigenous groups have the right to a fair process, but not to any particular outcome. For example, in *Taku River Tlinglit*, the SCC stated that the DCA did not impose a "duty to reach agreement … and its failure to do so did not breach the obligations of good faith it owed."[16]

However, many Indigenous peoples have asserted that the DCA must also have a substantive component, such that not all outcomes will discharge the Crown's obligation even if the process was honourable; whether these arguments will be adopted will be for the courts to determine.

5. WHAT HAS BEEN THE IMPACT OF THE DUTY TO CONSULT?

"[W]hile the process that DCA case law has generated has doubtlessly had some positive effects, it has been developed on the assumption that the Crown has sovereignty, legislative power, and underlying title in relation to Aboriginal lands."[17] The DCA framework has been constructed on the assumption of a sovereign-to-subjects relationship between the Crown and Aboriginal peoples, a relationship that Aboriginal peoples have rejected for 150 years.[18]

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[14] The Government of Canada has updated its *Aboriginal Consultation and Accommodation Guidelines for Federal Officials to Fulfill the Duty to Consult,* March 2011, to provide a step-by-step resource in preparing for and carrying out consultation processes (see page 43 for a high-level description of accommodation measures): Government of Canada, "Aboriginal Consultation and Accommodation" (March 2011), online (pdf): <https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-CNSLTENGE/STAGING/texte-text/intgui_1100100014665_eng.pdf>.

[15] *Ibid,* page 43.

[16] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, 2004 SCC 74 [*Taku River Tlingit*].

[17] Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729 at 730 [*Tin Ear*].

[18] *Ibid*, at 730-731.

Perhaps where the impact (or lack thereof) of the DCA has been most felt is in relation to large-scale resource development projects. Over the last decade, the federal government has approved such projects (Trans Mountain Expansion, Northern Gateway, Site C dam) even though there has been widespread objection from Indigenous communities.[19] Within all of this, it is important to consider the role of Indigenous Women and how they are impacted. Sarah Morales has written about the effects that extractive industries have on Indigenous Women and Girls in particular.[20]

Although the DCA has a series of "complicated legal processes and tests that are weighted towards fitting Aboriginal peoples into a constitutional relationship they have consistently rejected,"[21] the recent Royal Assent to Bill C-15, bringing the *United Nations Declaration on the Rights of Indigenous Peoples Act* into the fold, may serve as the first step towards a change.

6. UNDRIP AND FREE, PRIOR AND INFORMED CONSENT

There are many questions about how the DCA will be interpreted when – and if – the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) makes its way into Canadian jurisprudence.

As summarized in the original Guide, in 2016 then-Minister of Indigenous and Northern Affairs Carolyn Bennett stated that Canada would "fully implement UNDRIP without qualification" through a "section 35 framework".

As we introduced in chapter 4, in 2019, the provincial government in British Columbia became the first jurisdiction in Canada to pass legislation based on UNDRIP. In 2021, the Federal government passed the *United Nations Declaration on the Rights of*

[19] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Montreal: McGill-Queen's University Press, Centre for International Governance Innovation, 2019).

[20] Sarah Morales, "Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries?" (2019) 31:1 Can J Women & L 58 at 58–90; Brenda L Gunn, "Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Montreal: McGill-Queen's University Press, Centre for International Governance Innovation, 2019) 14.

[21] *Tin Ear*, *supra* note 17 at 731.

Indigenous Peoples Act.[22] The purpose of the Act, outlined in chapter 4, is to "affirm the Declaration as a universal international human rights instrument with application in Canadian law" and to "provide a framework for the Government of Canada's implementation of the Declaration". However, it is explicitly stated that the Act does not abrogate or derogate any rights of Indigenous peoples as recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

The Act has the potential to have far-reaching effects. A number of publications published before and after the Act came into law have imagined what some of the possibilities are.[23]

As the Indigenous Bar Association recently stated, while the federal government had already established a process for the domestic implementation of the UNDRIP through Bill C-15, the suppression and outright denial of Indigenous laws and the rights of Indigenous people have persisted across Canada due to the failure of the federal and provincial governments to act on the objectives of UNDRIP.[24]

7. WHAT WOULD IMPLEMENTING UNDRIP MEAN FOR THE DCA?

For many Indigenous peoples, UNDRIP promises a whole new relationship with the Crown, built not on Crown sovereignty but on Indigenous self-determination and a Nation-to-Nation relationship. Sarah Morales writes that "one of the major ongoing concerns for Indigenous peoples in Canada is that the government continues to make decisions that affect their lives with little or no input from them."[25] Section 1 of UNDRIP states that:

> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in

[22] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

[23] Robert Hamilton, "Asserted vs Established Rights and the Promise of UNDRIP" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Montreal: McGill-Queen's University Press, Centre for International Governance Innovation, 2019) 8; "The UN Declaration on the Rights of Indigenous Peoples in Canada: Lessons from B.C." (December 2020), online: *Yellowhead Institute* <https://yellowheadinstitute.org/bc-undrip/>; Morales, *supra* note 19.

[24] "In the Wake of the Wet'suwet'en Resistance, the IBA Calls for Substantive Implementation of UNDRIP including Consent, Consultation, and Cooperation with Indigenous Peoples", (17 December 2021), online: *The Indigenous Bar Association in Canada (IBA)* <https://indigenousbar.ca/in-the-wake-of-the-wetsuweten-resistance-the-iba-calls-for-substantive-implementation-of-undrip-including-consent-consultation-and-cooperation-with-indigenous-peoples/>.

[25] Morales, supra note 19 at 6.

> the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Morales further explains that the right outlined in s. 1 of UNDRIP is derived from the right to self-determination, a founding and central guiding principle of UNDRIP.[26]

A number of articles from UNDRIP deal with consultation. UNDRIP requires that consultation shall be undertaken with Indigenous peoples in order to obtain their free, prior, and informed consent prior to the approval of projects related to Indigenous peoples' lands or territories or other resources; the taking of lands, territories and resources traditionally occupied or used by Indigenous peoples; prior to storage or disposal of hazardous material; and prior to taking cultural, intellectual, religious and spiritual property.[27]

8. INTRODUCTION OF ARTICLE 19 OF UNDRIP AND THE PRINCIPLE OF "FREE, PRIOR AND INFORMED CONSENT"

UNDRIP Article 19 states:

> *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*[28]

The principle of free, prior and informed consent (FPIC) has particular potential to impact the DCA. Some fear that it provides Indigenous groups with a veto power – a power expressly not contained in the DCA process. The application of FPIC in Canadian courts, and the interaction between FPIC and the DCA, is a novel area of law yet to be developed; however, practitioners must be aware of the principle and the growing need to interpret and apply its meaning within the context of the *UNDRIP Act* explained in chapter 4 of this supplement.

9. PRACTICE CONSIDERATIONS AND RECENT DEVELOPMENTS

The DCA has greatly expanded in scope since the DCA trilogy of cases of the early

[26] *Ibid* at page 7.
[27] United Nations Declaration on the Rights of Indigenous Peoples, GA, Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/296, $^ ILM 1013 (2007) [UNDRIP].
[28] *Ibid,* Article 19.

2000s. This section will outline how this scope has expanded and identify broad considerations that are important for practitioners to consider when the DCA is engaged.

9.1 What Does the Client Want?

During the pre-consultation and planning stages, once notice of a planned activity has been provided, *it is paramount to understand what the client is seeking*. For example, does an Indigenous client want a proposed project not to proceed, to proceed with modifications, or to proceed if adequate accommodation is provided to the First Nation? Different client goals give rise to different strategic considerations. Identification of a client's goal is the first step.

9.2 Who Are the Rights-Holding Group(s)?

In some cases, there may be questions about who is entitled to consultation as the rights-holding group. Rights are held collectively and consultation must take place with the proper entity.

The scope of who may need to be consulted was recently expanded by the SCC in *R v. Desautel*[29], which confirmed that that a member of the Lakes Tribe of the Colville Confederated Tribes based in the State of Washington, a successor group of the Sinixt can hold s. 35(1) rights. While that case involved a regulatory offence, the Court opined in obiter that "the duty to consult may well operate differently as regards those outside Canada." However, those differences have yet to be established in the case law.

9.3 What Is the Duty of the Rights-Holding Group(s)?

While the rights-holding group does not have an obligation to participate, failure to participate will impact the outcome and may negatively affect possible remedies. Where a rights holder does participate, they must do so in good faith, respond to any notice given and share information.

Many Indigenous communities have developed their own consultation protocols and processes or may be party to a consultation agreement with the Crown(s). It is a fundamental first step to enquire into the existence and requirements of such

[29] *R v. Desautel*, 2021 SCC 17 (CanLII), 456 DLR (4th) 1 [*Desautel*].

protocols so as to give respect to the Indigenous community.[30]

9.4 The Consultation Record and Why It's Necessary

During the consultation process, federal agencies may need to demonstrate the completeness and integrity of the process if challenged in court. Information necessary for the evidentiary record is crucial to proceedings examining whether the Crown (or an agent acting on behalf of the Crown) properly fulfilled its DCA. Ideally, the record has already been built up, which may include ongoing communication between the impacted party, the Crown and potentially a third party. Involvement of a third party may include such things as the commissioning of expert reports or assessments. While it is possible to adduce further evidence at the judicial review stage (the typical route for DCA cases to proceed to Court), to put the Court in the shoes of the initial decision-maker, it is key to build a strong record during the consultation process.

Some recent examples examining the adequacy of consultation include:

***Attawapiskat First Nation v. Ontario*, 2022 ONSC 1196,[31]** where the First Nation brought a judicial review of Ontario's Director of Exploration's decision to issue mineral exploration permits. The court was satisfied that the Crown correctly scoped its duty to consult in this case. However, the Crown "failed to accommodate identified First Nations interests, but that failure has been rectified – based on current information – as a result of a pre-hearing settlement among the parties. However, as we shall also explain, there was a failure to consult properly here, with the result that the consultation process, rather than advancing the process of reconciliation, was corrosive of it."[32]

***Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40,[33]** where the Supreme Court of Canada rendered a decision examining the role of the National Energy Board (NEB) as a regulatory tribunal in fulfilling the Crown's consultation obligations.[34] Significantly, the court noted that the DCA plays a central role in "fostering reconciliation" and the goal of consultation is to "identify, minimize and

[30] The Indigenous community may have published such consultation protocols on their website or may be requested of leadership.
[31] *Attawapiskat First Nation v Ontario*, 2022 ONSC 1196, [2022] O.J. No. 858 [*Attawapiskat*].
[32] *Ibid*, at para 6.
[33] *Clyde River (Hamlet) v Petroleum Geo-Services Inc.,* [2017] 1 SCR 1069, 2017 SCC 40 (CanLII).
[34] *Ibid*, at paras 23, 27-29, 30 [*Clyde River*].

address adverse impact where possible."[35] A project authorization that breaches constitutionally protected rights of Indigenous peoples cannot serve the public interest.[36] "Deep consultation" will be required where important treaty rights are engaged; a level the court found lacking in the NEB's procedures.[37] Finally, "deep consultation" necessitates "deep accommodation" that the NEB's procedures were unable to satisfy.[38] The judgement made no reference to the United Nations Declaration on the Rights of Indigenous Peoples, but this case was decided prior to the passage of the *UNDRIP Act*.

***Prophet River First Nation v. Canada (Attorney General)*, 2017 FCA 15[39] -** An example of an administrative tribunal pointing to the evidentiary record not fully supporting the appellants' arguments: "the evidence on record does not demonstrate that the exercise of the Prophet River First Nation's treaty right extends over 200 km to the Site C Project."[40]

9.5 Is There a Cumulative Effects Argument To Be Made?

***Yahey v British Columbia*, 2021 BCSC 1287[41]**

The Blueberry River First Nations, a party to Treaty No. 8, brought a claim alleging that the Province of British Columbia authorized industrial development without regard for Blueberry River First Nations' treaty rights. Most importantly, Blueberry River First Nations alleged that the cumulative effects of industrial development breached the Treaty and infringed its rights. Infringement of Aboriginal and treaty rights are common under DCA jurisprudence. However, the cumulative impact argument presented by Blueberry River First Nations is novel.

The Supreme Court of British Columbia concluded that the "*cumulative effects of industrial development authorized by the Province have significantly diminished the ability of Blueberry members to exercise their rights to hunt, fish and trap in their territory as part of their way of life and therefore constitute an infringement on their treaty rights.*"[42]

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[35] *Ibid*, at paras 1, 25.
[36] *Ibid*, at para 40.
[37] *Ibid*, at paras 43-445, 52.
[38] *Ibid*, at paras 48-51.
[39] *Prophet River First Nation v Canada (Attorney General)*, 408 DLR (4th) 165, 2017 FCA 15 [*Prophet River*].
[40] *Ibid*, at para 56.
[41] *Yahey v British Columbia*, 2021 BCSC 1287 [*Yahey*].
[42] *Ibid*, at para 3.

9.6 Is There an Impact and Benefit Agreement In Place? Or Have Economic Benefits Been Negotiated with a Potential or Established Project?

Ermineskin Cree Nation v. Canada (Environment and Climate Change), 2021 FC 758[43]

The Ermineskin Cree Nation had negotiated an Impact Benefit Agreement (IBA) with Coalspur, a mining company, to provide "valuable economic, community and social benefits to Ermineskin."[44] This was the second IBA agreed to by the two parties. Compensation was connected to potential impacts caused by the extractive nature of Coalspur's operations. The first IBA was in relation to the original Coalspur mine and signed in 2013. The second IBA, signed in 2019, dealt with a proposed expansion of the original mine. All of Coalspur's mining property was located on Treaty 6, of which Ermineskin is a signatory, and Ermineskin Cree Nation's Traditional Territory. After a Designation Order was made, halting expansion of the mine site, Ermineskin submitted that the Designation Order would "adversely impact Aboriginal and Treaty rights including economic opportunities created by its contractual relationship with Coalspur pursuant to the 2019 IBA."[45] The Federal Court held that the Crown must consider benefits an Indigenous nation may lose as a result of a decision, which in this case was the loss of economic, community and social benefits flowing from impact benefit agreements associated with mining development.

"Well-established jurisprudence requires a generous and purposive approach to the constitutionalized doctrine of the honour of the Crown and its corollary, the duty to consult. This flows from relevant and important objectives including reconciliation between Canada and First Nations. The jurisprudence now extends the duty to consult to include economic rights and benefits closely related to and derivative from Aboriginal rights as discussed below. Thus, rights that are closely related to and derivative from Aboriginal rights are protected by the duty to consult which of course flows from the constitutionalized doctrine of the honour of the Crown."[46]

9.7 Costs Associated with Indigenous Communities Pursuing Challenges to the DCA and Its Impacts: Is An Order for Advanced Costs an Option?

On March 18, 2022, the Supreme Court of Canada released its decision in *Anderson*

[43] *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 [*Ermineskin*].
[44] *Ibid*, at para 5.
[45] *Ibid*, at para 6.
[46] *Ibid*, at para 8.

v. Alberta (Attorney General)[47], which considered the availability of advance costs awards to the Beaver Lake Cree Nation (Beaver Lake), a Treaty 6 First Nation in Alberta. In a rare and unanimous decision, the Court held that Beaver Lake could qualify for advance costs if it did not have sufficient resources to cover its legal fees, taking into account the First Nation's other "pressing needs". The decision certainly improves access to justice for Beaver Lake and may further reflect the application of legal principles in a manner that furthers reconciliation.

***Anderson v. Alberta (Attorney General)*, 2022 SCC 6**

Anderson deals with the pursuit of an order for advance costs to continue litigation concerning the cumulative impacts of breach of Treaty 6.

Beaver Lake Cree Nation, beneficiaries of Treaty 6, sued the Crown for improper take up of its lands. A four-month trial is set for January 2024. Beaver Lake submitted that the estimated cost of litigation ($5 million) is beyond its reach. Although Beaver Lake has access to assets and income that could be applied to fund this costly litigation, it submitted that these resources were better applied to other priorities.[48]

The SCC held that "a First Nation government that has access to resources that could fund litigation may meet the impecuniosity requirement if it demonstrates that it requires such resources to meet its pressing needs."[49] Further, the Court held that "where the applicant is a First Nation government, pressing needs must be understood from the perspective of the First Nation government."[50]

At trial, the case management judge held Beaver Lake to be impecunious given the impoverished state of the community and other needs it was required to meet.[51] The Court of Appeal of Alberta reversed the decision on the grounds that insufficient evidence existed to support the finding of impecuniosity.[52] Although the SCC found that the case management judge erred in their impecuniosity analysis, it sent the determination back to the Court of Queen's Bench of Alberta.

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[47] *Anderson v Alberta*, 2022 SCC 6 [*Anderson*].
[48] *Ibid*, at para 3.
[49] *Ibid*, at para 4.
[50] *Ibid*, at para 8.
[51] *Ibid*, at para 6.
[52] *Ibid*.

9.8 Is This an Administrative Matter? What Is the Standard of Review Following the Decision in *Vavilov*?[53]

Coldwater First Nation v. Canada (Attorney General), 2020 FCA 34[54]

The decision in *Coldwater* follows the decision in *Tsleil-Waututh Nation*, where the approval of the Trans Mountain Pipeline Expansion Project was successfully challenged.[55] Following a reconsideration hearing before the National Energy Board, the Trans Mountain Project was once again approved.

Six applicants were granted leave for judicial review of the decision, with four applicants ultimately submitting applications. The applications for judicial review were restricted to the duty to consult issues, which were outlined by three narrow issues.[56]

The *Coldwater* case is an important development because of its treatment of the standard of review post-*Vavilov*. The case was heard prior to *Vavilov*, with the Court calling for further submissions concerning *Vavilov* after its release.

As *Coldwater* was a statutory judicial review (and not a statutory appeal), the presumptive standard of review was reasonableness.[57] None of the exceptions to reasonableness identified in *Vavilov* were found to apply. Although the SCC held in *Vavilov* that matters dealing with the scope of the DCA must be reviewed for correctness, the scope of the DCA was not under review in *Coldwater* and therefore reasonableness was the standard of review.[58] *Coldwater* is an important decision to consider when pursuing administrative law matters after Vavilov.

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[53] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].
[54] *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater*].
[55] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh Nation*].
[56] *Coldwater*, *supra* note 54 at para 6.
[57] *Ibid*, at para 26.
[58] *Ibid*, at para 27.

10. RESOURCES

10.1 Case Law

- *Anderson v Alberta*, 2022 SCC 6.
- *Attawapiskat First Nation v Ontario*, 2022 ONSC 1196.
- *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53.
- *Behn v Moulton Contracting Ltd*, 2013 SCC 26.
- *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.
- *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41.
- *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40.
- *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34.
- *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.
- *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.
- *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758.
- *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48.
- *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2018 BCSC 440.
- *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
- *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27.
- *Ktunaxa Nation v British Columbia (Forests*, *Lands and Natural Resource Operations)*, 2017 SCC 54.
- *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14.
- *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

- *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.
- *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15.
- *Quebec (Attorney General) v Moses*, 2010 SCC 17.
- *R v Desautel*, 2021 SCC 17.
- *R v Sparrow*, [1990] 1 SCR 1075.
- *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.
- *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74.
- *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153.
- *Yahey v British Columbia*, 2021 BCSC 1287.

10.2 Sample Reports that are Publicly Available

- As Long as the Rivers Flow: Athabasca River Knowledge, Use and Change: https://firelight.ca/wp-content/uploads/2016/05/AsLongastheRiversFlowFullReport-2.pdf

- From Mikisew Cree First Nation to Teck Resources Limited re: Addendum to the Mikisew Cree First Nation Indigenous Knowledge and Use Report, and Assessment for Teck Resources Limited's Proposed Frontier Oil Sands Mine Project: https://iaac-aeic.gc.ca/050/evaluations/document/114502?culture=en-CA

- Application for the Trans Mountain Pipeline Expansion Project, Squamish Traditional Use and Occupancy Study: Final Report: A93274-3_Squamish_Traditional_Use_and_Occupancy_Study_-_A6G4F9.pdf (cer-rec.gc.ca)

- Frontier Oil Sands Mine Project, Integrated Application: https://open.alberta.ca/dataset/5da3a4f0-f982-4f8e-af9b-cb00c39fb165/resource/b3b4e039-681f-4814-bd10-adc456ff0043/download/fpvol8people-and-places.pdf

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CHAPTER 8: APPLYING AND ADAPTING *R. V. GLADUE* PRINCIPLES

1. PURPOSE OF THIS CHAPTER

The legacy of colonialism and the impacts of discrimination, cultural oppressions, dislocation and poverty continue to impact Indigenous peoples and communities. These systemic background factors are not an excuse, but rather a necessary context and must be made available to the court in every case, not just in certain circumstances.

This chapter will examine in greater detail the landmark decision of the Supreme Court of Canada in *R. v. Gladue*. While this case was decided two decades ago, the reality is that the population of Indigenous peoples in the criminal justice system remains disproportionately high. We wanted to re-examine the basic principles of *Gladue* and offer a reminder to advocates that we have a duty to bring individualized information to the court. The needs of the vulnerable and marginalized require this competency and as the courts have made known, the failure to apply *Gladu*e can justify an appeal.

As we will also see, the application of *Gladue* principles is not confined to the criminal justice system and may be adapted to professional discipline, non-criminally responsible hearings, bail hearings, civil contempt and extradition. We will explore these adaptions in the second half of this chapter.

2. INTRODUCTION

For well over two decades, the widespread failure of Canada's justice system in regard to Indigenous peoples has been well known and widely acknowledged. Tragically, and despite an ever-growing body of legislation and remedial jurisprudence, the problem of Indigenous overrepresentation in the criminal justice system has continued to snowball. Much as it was prior to the Supreme Court of Canada's rulings in *Gladue* ([1999] SCR 688), *Wells* (2000 SCC 10), and *Ipeelee* (2012 SCC 13), today's Indigenous peoples remain significantly overrepresented—as both offenders and victims—in Canada's criminal justice system.

Following the findings of both the Aboriginal Justice Inquiry of Manitoba and the Royal Commission on Aboriginal Peoples, the Supreme Court has located the

problem of Indigenous criminal overrepresentation in both the commission of a "disproportionate number of crimes," as well as the harsh treatment of Indigenous people within a "discriminatory justice system."[1] Where either factor is concerned, the Court has further acknowledged that these "current levels of criminality are intimately tied to the legacy of colonialism."[2] As cited in *Ipeelee*, "[c]ultural oppression, social inequality, the loss of self-government and systemic discrimination… are the legacy of the Canadian government's treatment of Aboriginal people…."[3]

In the face of this colonial legacy, recent data suggests that Indigenous adults account for approximately 31% of admissions to provincial/territorial custody and 29% of admissions to federal custody, while representing approximately 4.5% of the Canadian adult population.[4] Where compared to the respective non-Indigenous admissions in both provincial and federal jurisdictions, it is further notable that Indigenous women are overrepresented approximately 10% more than Indigenous men within a gendered population analysis. Figures are similar for Indigenous youth, who account for 43% of youth admissions to correctional services, yet represent 8.8% of the youth population in Canada.[5]

3. DIFFERING CONCEPTIONS OF JUSTICE

At its root, the problem of Indigenous over-incarceration in the criminal justice system can be traced to the legacy of Canadian colonialism and the "cultural genocide" it has engendered.[6] Prior to European contact, Indigenous peoples, communities, and Nations thrived under the guidance of their own multifarious legal systems, cultures, languages, and traditions. Nonetheless, through legally sanctioned means such as the *Indian Act*, the pass system, and other colonial incursions, such integral parts of Indigenous ontologies were invariably discouraged, prohibited, and punished. In their place, Euro-centric understandings of law, culture, language, and religion (among others) were forcibly instituted with the aid of the colonial legal

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[1] *R v Ipeelee*, 2012 SCC 13 at para 65 [*Ipeelee*].
[2] *Ipeelee*, *supra* note 1 at para 77.
[3] *Ipeelee*, *supra* note 1 at para 83, citing *Report of the Aboriginal Justice Inquiry of Manitoba*, vol I at 86.
[4] Jamil Malakieh, "Adult and youth correctional statistics in Canada, 2018/2019" (21 December 2020), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.htm>.
[5] *Ibid*.
[6] See: Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, at p. 1, online: *Government of Canada* <https://publications.gc.ca/site/eng/9.800288/publication.html>.

system. To put it bluntly, the impact upon Indigenous populations has been nothing less than devastating.

The imposition of the Canadian legal system is central to the issue of Indigenous over-incarceration today, for not only is the system alien to many Indigenous understandings of the world, but the very concept of *justice* can vary significantly between legal cultures. Where Western cultures have predominantly equated "justice" with the concept of retribution, Indigenous cultures often understand "justice" in a much more restorative sense.[7] That is, where Western legal systems tend to privilege the goals of denunciation, deterrence, and separation in response to criminal conduct (i.e., in the form of a penal sentence), many Indigenous cultures privilege sanctions that promote rehabilitation, reparation, and responsibility. Here, the primary goal of sanctions is not to pay one's debt to society through the deprivation of liberty (though this option is not foreclosed), but rather to restore harmony between the offender, the victim, and the community.

4. DISPROPORTIONATE NUMBER OF CRIMES

Where the imposition of colonial law is at the expense of Indigenous traditions and conceptions of justice, Indigenous people's relationship to the law often becomes meaningless and estranged. The law, in effect, no longer provides the justice that is needed, effectively leading to alienation, anger, and higher rates of offence. At the same time, imprisonment and isolation tends to ignore the unique needs of imprisoned Indigenous peoples, thus deepening an offender's alienation towards the law and the world, and effectively harming rather than healing. Over time and across generations, these negative consequences accumulate, leading to further deteriorations within communities, offenders, and victims.

5. SYSTEMIC DISCRIMINATION

Equally, widespread discrimination against Indigenous peoples—both within the legal system and broader Canadian polity—exists as a co-determinate factor of Indigenous over-incarceration. Negative stereotypes and discriminatory attitudes have functioned to ignore the unique and unfulfilled needs of Indigenous peoples, instead painting them as generally pre-disposed to crime and blameworthiness within the legal system. Over time, the vicious logics of both systemic discrimination

[7] This is not to say that the concept of retribution is not found within Indigenous systems of law. Rather, that the animating principle of restoration tends to take much greater precedence within the goals of a given system.

and alienation from the law (along with a multitude of other challenges) have manifested in the deepening problem of Indigenous over-incarceration.

6. BILL C-41, *THE SENTENCING REFORM ACT*

Confronted with alarming statistics and the reality that the justice needs of Indigenous peoples were not being met, Federal Bill C-41, more widely known as *The Sentencing Reform Act* ("*SRA*"), was introduced to Canada's 35th Parliament in 1994, coming into force on September 3rd, 1996. As a number of sweeping reforms to the Canadian *Criminal Code,* in particular the sentencing process and its available outcomes, the *SRA* is the starting point for the Supreme Court's *Gladue* jurisprudence.

Important to the issue of Indigenous over-incarceration, s. 718 of the proposed amendments sought to codify the objectives and principles of criminal sentencing. Fundamentally, the ruling principle of sentencing was identified as *proportionality*—that every sentence must be proportionate to 1) the gravity of the offence, and 2) the degree of responsibility of the offender. Here, not only were the well-known sentencing objectives of denunciation, deterrence, and incapacitation listed, but Parliament further signaled its interest in principles of restorative justice: rehabilitation, community reparations, and the promotion of a sense of responsibility in offenders.

Principles codified in s. 718.2 included the guiding principle of *restraint*: that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances." Within the general context of the provision, it is certainly notable that immediately following the principle of restraint (s. 718.2(d)), Parliament specifies that sentencing judges must consider all reasonable and available alternatives to prison, with particular attention to the circumstances of Indigenous people:

> ***Criminal Code*, s. 718.2**
>
> …
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Parliament's rationale behind s. 718.2(e) was made explicit by Attorney General and Minister of Justice Allan Rock, stating:

> [T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada.
>
> …
>
> Obviously, there's a problem here.
>
> What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at…alternatives to jail—and not simply resort to that easy answer in every case.[8]

As the Honourable Morris Bodnar further stated:

> The emphasis is not on retribution but rather on returning to the community its sense of harmony as defined by the aboriginal population.[9]

More generally, throughout readings and debates of Bill C-41, Parliament sought to build upon existing Indigenous justice initiatives that had once again emerged in specific communities. Further, s. 718.2(e) was directly related to the problems of Indigenous over-representation in, and alienation from, the dominant legal system, as well as the unique justice needs of Indigenous people. Three years after the *SRA*'s coming into force, the Supreme Court addressed the remedial implications of s. 718.2(e) for the first time in the case of *R v Gladue*.

7. *GLADUE* AND ITS PROGENY

7.1 What Are the *Gladue* Principles?

Gladue principles exist as part of an interpretive framework developed by the Supreme Court of Canada in response to s. 718.2(e) of the *Criminal Code*. Described

[8] House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No 62 (17 November 1994).
[9] *House of Commons Debates*, 35th Parl, 1st Sess, No 95 (22 Sept 1994) at 6028 (Hon Morris Bodnar) [Emphasis added].

aptly by Andrew Flavelle Martin, "*Gladue* principles may be described as a recognition of the unique circumstances of Indigenous persons, particularly their alienation from the criminal justice system, and the impact of discrimination, cultural oppression, dislocation, and poor social and economic conditions."[10] As such, a starting point for *Gladue* principles is the fact that equal treatment of unequal peoples often results in injustice. The following section will provide an overview of the Supreme Court jurisprudence on *Gladue* principles through a trilogy of related cases.

7.2 *R v Gladue*

The first opportunity for the Supreme Court of Canada to interpret and apply s. 718.2(e) of the *Criminal Code* concerned Jamie Tanis Gladue. Ms. Gladue, a Cree woman from Alberta, killed her common law partner over an alleged infidelity while intoxicated after her 19th birthday celebration. No submissions regarding her circumstances as an Indigenous woman were made at trial, and the trial judge deemed s. 718.2(e) inapplicable because Ms. Gladue and her partner lived off reserve. The sentencing judge confirmed that Gladue was Cree and lived off-reserve, yet emphasized the seriousness of the crime before imposing a three-year prison sentence for manslaughter as well as a ten-year weapons prohibition.

Upon appeal, the British Columbia Court of Appeal unanimously held that the trial judge erred in deeming s. 718.2(e) inapplicable simply because Gladue and her partner lived off reserve. However, a majority of the Court agreed with the trial judge's finding that there was no basis for special consideration of her Indigenous background, further dismissing her application to rely on fresh evidence concerning her efforts to maintain ties to her Indigenous community.

At the Supreme Court, Cory and Iacobucci JJ. wrote for a unanimous bench and began to articulate the general framework for interpretation of s. 718.2(e), an open-ended doctrine known now as the *Gladue* Principles.

7.3 *Gladue* Principles Established In *R v Gladue*

- s. 718.2(e) is not a re-affirmation of existing sentencing principles, rather, it provides for a new body of jurisprudence through the *Gladue* framework.[11]

[10] Andrew Flavelle Martin, "*Gladue* at Twenty: *Gladue* Principles in the Professional Discipline of Indigenous Lawyers" (2020) 4:1 Lakehead LJ 20 at 24 [*Martin*].
[11] *R v Gladue*, [1999] 1 SCR 688 at para 33, 1999 CanLII 679 (SCC) [*Gladue*].

- s. 718.2(e) has a remedial purpose—it intends to remedy the problem of Indigenous over-incarceration and alienation from the justice system, insofar as this is possible through sentencing.[12]

- s. 718.2(e) reflects Parliament's desire to reduce the use of prison as a sanction towards expanding the use of restorative justice principles in sentencing, especially when sentencing Indigenous offenders.[13]

- s. 718.2(e) fundamentally alters the analysis which sentencing judges *must* use to determine the nature of a fit sentence for an Indigenous person.[14]

- For all offenders, "imprisonment should be the penal sanction of last resort," only to be used where no other sanction or combination of sanctions is appropriate given the severity of the offense and the blameworthiness of the offender.[15]

- There is widespread bias and racism against Indigenous people in Canada. This has entailed systemic discrimination within the legal system.[16]

- The criminal justice system has largely failed Indigenous peoples due to their fundamentally different worldviews, cultural values, and experiences.[17]

- The reasons behind Indigenous over-incarceration include poverty, substance abuse, lack of education, lack of employment opportunities, bias against Indigenous people, and an institutional approach that is more inclined to deny Indigenous offenders bail and impose longer prison terms.[18]

- Two categories of unique circumstances *must* be considered when sentencing Indigenous people:[19]

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[12] *Ibid*.
[13] *Ibid at* para 48.
[14] *Ibid at* para 33.
[15] *Ibid at* para 37.
[16] *Ibid at* para 61.
[17] *Ibid at* paras 62-63.
[18] *Ibid at* para 65.
[19] *Ibid at* para 82.

- Unique systemic or background factors which may have played a part in bringing a particular offender before a court; and
- The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their particular Indigenous heritage or connection.

- **Systemic and background factors** that figure prominently in the causation of crime by Indigenous peoples include low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation.[20]

- These *unique* circumstances differ from the majority of non-Indigenous offenders.[21]

- Indigenous offenders are more adversely affected by incarceration, and less likely to be rehabilitated by incarceration because of these circumstances.[22]

Unique systemic and background factors may have relevance to sentencing in several overlapping ways:

1. To determine *why* an offender ended up before the court;
2. To assess whether prison will impact an offender more adversely than others;
3. To assess whether prison is less likely to rehabilitate an offender;
4. To determine whether prison is likely to deter or denounce the offender's conduct in a meaningful way to the offender's community;
5. To ascertain whether restorative sentencing principles ought to be given primacy in order to promote crime prevention and broader community healing.

- Most Indigenous conceptions of sentencing place a primary emphasis upon the ideals of *restorative justice*. **Procedures and sanctions particular to Indigenous heritage or connection** relate specifically to differing conceptions of sentencing procedures and sanctions that are held by an

[20] *Ibid at* para 67.
[21] *Ibid at* para 68.
[22] *Ibid*.

Indigenous community.[23] (E.g., sentencing circles, sweat lodges, community restitution, etc.)

- Restorative justice is "an approach to remedying crime in which it is understood that all things are interrelated, and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist."[24]

- Within a restorative justice framework, the appropriateness of a particular sanction is largely determined by the needs of the victim(s), the community, and the offender.[25]

- Restorative justice does not necessarily entail a more lenient approach than a custodial sentence. For many offenders, the processes of restitution and reintegration into their community is viewed as a greater burden than a custodial sentence.[26]

- Customs, traditions, and concepts of sentencing among Indigenous people vary widely.[27] Nonetheless, the importance of community-based sanctions is a common theme among Indigenous peoples.[28]

- Indigenous ways of life and perspectives are deeply important towards crafting a just sentence. It is always appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with Indigenous perspectives.[29]

The **procedures and sanctions appropriate for an Indigenous person** being sentenced are based on a number of factors:

1. Differing conceptions of sentencing or perspectives on justice held by the Indigenous community to which the accused belongs;

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[23] *Ibid at* para 70.
[24] *Ibid* at para 94.
[25] *Ibid*.
[26] *Ibid* at para 72.
[27] *Ibid* at para 73.
[28] *Ibid* at para 74.
[29] *Ibid*.

2. The availability of relevant community-based sanctions or Indigenous community justice initiatives;
3. Whether alternative sanctions or procedures can achieve restorative justice objectives for the community, the victims, and the offender.

- Much like non-Indigenous communities and jurisdictions across Canada, sentences for a particular offence may vary across Indigenous communities and regions. This is because the just and appropriate mix of sentencing goals will depend on the needs and conditions of the community where the crime occurs.[30]

- The Court's approach to s. 718.2(e) does not entail that Indigenous offenders must *always* be sentenced in a way that favours restorative justice over the goals of deterrence, denunciation, and separation. In all cases, the *Gladue* framework is open-textured and contextually grounded in the particular individual and the particular circumstances of the offence.[31]

- Judicial notice must be given of systemic or background factors affecting Indigenous people in Canada where an Indigenous accused is before the court. Judicial notice must also be given of the relevant approach to sentencing held by the offender's community.[32]

- Indigenous people may waive their entitlement to judicial consideration of either set of unique circumstances (systemic and background factors, or available alternative sanctions).[33]

- In the absence of waiver, both Crown and defence counsel should assist the sentencing judge in adducing evidence relevant to the unique circumstances of an Indigenous offender.[34]

- Sentencing judges *must* make further inquiries as to both the particular circumstances of an Indigenous offender, and the existing alternatives to

[30] *Ibid* at paras 76-77.
[31] *Ibid* at para 78.
[32] *Ibid* at para 83.
[33] *Ibid*.
[34] *Ibid*.

incarceration when the record is insufficient. (E.g., self-represented Indigenous people, unreliable counsel).[35]

- Appellate courts *must* consider relevant and admissible fresh evidence in an appeal against a sentence if the sentencing judge fails to engage with their duties pursuant to s. 718.2(e).[36]

- In order to be treated fairly, the unique circumstances of Indigenous people *must* be taken into account.[37]

- As a minimum, s. 718.2(e) is applicable to *all* Indigenous people described under s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*, regardless of where they live.[38]

- Even if community support is not available, alternatives to incarceration *must* be explored for an Indigenous offender.[39]

7.4 *R v Wells*

One year after the Supreme Court's statement of the broad principles and concepts related to s. 718.2(e) in the case of *Gladue,* it returned in the case of *R v Wells* to explain how the *Gladue* analysis relates to the regime of conditional sentences introduced by Bill C-41.

Mr. Wells is an Indigenous member of the Tsuu T'ina Nation Reserve who sought to have a 20-month prison sentence for sexual assault of an 18-year-old Indigenous woman converted to a conditional sentence on the basis that the sentencing judge failed to properly apply s. 718.2(e). While the sentencing judge acknowledged the need to bear s. 718.2(e) in mind due to Wells' indigeneity, it was ultimately held that the necessary goals of denunciation and deterrence would not be fulfilled if the sentence were to be carried out in the community.[40] Mr. Wells' appeal was dismissed by the Alberta Court of Appeal, where the case was heard before the release of the SCC's *Gladue* ruling.

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[35] *Ibid* at para 84.
[36] *Ibid* at para 85.
[37] *Ibid* at para 87.
[38] *Ibid* at para 88.
[39] *Ibid* at para 92.
[40] *R v Wells*, 2000 SCC 10 at paras 11-12, [2000] 1 SCR 207 [*Wells*].

Writing for a unanimous Supreme Court, Iacobucci J. restated the sentencing guidelines set out in *Gladue* and elaborated on how and when an Indigenous person's unique circumstances ought to be considered in relation to the availability of conditional sentences under the *Criminal Code*.

7.5 *Gladue* Principles Established in *R v Wells*

- The "second stage" of a conditional sentencing analysis requires the sentencing judge to fully consider and apply s. 718.2(e) towards deciding the appropriateness of a conditional sentence (alongside all other principles and objectives contained in ss. 718 to 718.2).[41]

- Whenever a judge narrows their consideration to one involving a sentence of incarceration, they are obliged to consider the unique and systemic background factors which may have played a role in bringing the particular Indigenous offender before the court.[42]

- A conditional sentence may be reasonable "in circumstances where deterrence and denunciation are paramount considerations." Conditional sentences can also serve the objectives of deterrence and denunciation.[43]

- Whether or not a conditional sentence is available in circumstances where the need for denunciation or deterrence is of high importance depends on the sentencing judge's assessment of the case's specific circumstances. These circumstances include aggravating factors, the nature of the offence, the community context, and the availability of conditions which have the capacity to express society's condemnation.[44]

- In the case of "serious" crimes, primacy *may* still be given to the objectives of denunciation and deterrence under the *Gladue* framework. While the *Gladue* analysis requires a different methodology for assessing a fit sentence for an Indigenous offender, it does not necessarily also require a

[41] *Ibid* at para 30.
[42] *Ibid*.
[43] *Ibid* at para 32.
[44] *Ibid* at para 35.

different result.[45] As always, the analysis is highly individualized and context-specific.

- No category of criminal offence exists in which the possibility of a non-custodial sentence is effectively ruled out.[46] To do so would be to offend the principle of proportionality, which requires consideration of both "the gravity of the offence and the degree of responsibility of the offender."[47]

- As such, restorative justice may still be given the greatest weight in instances of "serious" crime.[48]

7.6 *R v Ipeelee*

Following the case of *Wells* in 2000, the Supreme Court did not comprehensively address *Gladue* principles again until the joined cases of *R v Ipeelee* and *R v Ladue* in 2012.

Manasie Ipeelee, an Inuk man from Iqaluit, Nunavut, was designated a long-term offender in 2001 after committing a second sexual assault. He served a six-year prison sentence and was released on a ten-year long term supervisory order ("LTSO") to a community correctional centre. Ipeelee was charged for breaching a condition of his LTSO for becoming intoxicated.

At trial, Ipeelee was sentenced to three years' imprisonment, less pre-sentence custody. Here, the sentencing judge held that the most important considerations when sentencing for a LTSO breach is the protection of the public, while rehabilitation plays a comparatively small role. In such situations, the trial judge held that an Indigenous person's unique circumstances are of "diminished importance." Ipeelee's unique circumstances did not affect his sentence at the Court of Appeal.

In *Ipeelee*, the Supreme Court sought to revisit and reaffirm the *Gladue* framework, as well as to clarify a number of misconceptions that had surfaced in the lower courts. At the same time, *Ipeelee* further clarifies how the *Gladue* framework applies to sentencing where long-term supervision orders ("LTSOs") are broken by an Indigenous offender.

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[45] *Ibid* at para 44.
[46] *Ibid* at para 45.
[47] *Ibid* at para 46.
[48] *Ibid* at para 49.

7.7 *Gladue* Principles established in *R v Ipeelee*

- Rehabilitation and reintegration of a long-term offender is "the ultimate purpose of an LTSO."[49] However, this goal must be balanced against the need to protect the public from risk of further reoffence.

- Restorative justice principles will not always receive the greatest weight when sentencing an Indigenous offender's breach of an LTSO. Like all other sentencing analyses, the process is highly individualized and context-sensitive.[50]

- The tenet of *proportionality*, central to the sentencing process has a "constitutional dimension" as a principle of fundamental justice under ss. 7 and 12 of the *Charter*.[51] Proportionality is the "*sine qua non*" of a just sanction.[52]

- Mandatory judicial notice of the circumstances of Indigenous people in every case provides "the necessary context for understanding and evaluating the case-specific information presented by counsel."[53]

- Counsel have a *duty* to bring individualized information before the court "in every case, unless the offender expressly waives [their] right…"[54]

- *Gladue reports* serve to provide individualized information about the circumstances of an Indigenous person to the Court.[55]

- The misapplication of s. 718.2(e) by lower courts has partially attributed to increasing levels of Indigenous over-incarceration.[56]

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[49] *Ipeelee, supra* note 1 at para 48.
[50] *Ibid* at paras 54-55.
[51] *Ibid* at para 36.
[52] *Ibid* at para 37.
[53] *Ibid* at para 60.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid* at paras 61-63.

- Sentencing judges, as "front-line workers in the criminal justice system" are best placed to evaluate systemic factors and guard against ongoing racial discrimination.

- Both sets of unique circumstances bear on the ultimate question of a fit and proper sentence.[57]

- Systemic and background factors are *mitigating* in nature and may reflect on the diminished moral blameworthiness of an Indigenous offender.[58] Failure to take these circumstances into account offends the principle of proportionality.

- Indigenous perspectives and worldviews can impact the effectiveness of a sentence. "The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community."[59]

- The history of Indigenous peoples is unique and tied to the legacy of colonialism.[60]

- As such, the principle of *parity* should not be a barrier to effective sentences for Indigenous people.[61] Parity "simply requires that any disparity between sanctions for different offenders be justified."[62] Under the *Gladue* framework, different sanctions are to be justified based on the unique circumstances of the offender that are rationally related to the sentencing process.

- It is a legal error to require a causal link between an individual's unique background factors and the unique offence.[63]

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[57] *Ibid* at para 72.
[58] *Ibid* at para 74.
[59] *Ibid*.
[60] *Ibid* at paras 76-77.
[61] *Ibid* at para 66.
[62] *Ibid* at para 79.
[63] *Ibid* at para 80.

- Even if there is no evidence that an Indigenous person's moral blameworthiness is diminished by their unique circumstances, community-level factors may still be relevant to sentencing.[64]

- Systemic and background factors do not provide an excuse or justification for Indigenous criminal conduct. Instead, they provide the necessary context for a sentencing judge to determine appropriate sanctions.[65]

- An Indigenous person's unique circumstances will only influence the ultimate sanction if they "bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized."[66]

- It is a legal error to interpret *Gladue* principles as inapplicable to "serious" offences.[67] To do so would be to deprive s. 718.2(e) of much of its remedial power regarding the problem of Indigenous over-incarceration.

- Failure to apply *Gladue* principles to any case involving an Indigenous offender is an error that can justify appellate intervention.[68]

7.8 Further Established *Gladue* Principles

- The proportionality of a sentence is the responsibility of the sentencing judge, not the prosecutor. There is no evidence to support the proposition that prosecutors *must* consider an Indigenous persons' unique circumstances when making a decision to prosecute and thus limit the sentencing options available to a judge.[69]

- The need to account for Indigenous difference must also be accommodated within the correctional system pursuant s. 4(g) of the *Corrections and Conditional Release Act* ("CCRA").[70] In order to ameliorate systemic discrimination in corrections, Indigenous peoples require different treatment in the interest of substantive equality.

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[64] *Ibid* at para 82.
[65] *Ibid* at para 83.
[66] *Ibid*.
[67] *Ibid* at para 84.
[68] *Ibid* at para 87.
[69] *R v Anderson*, 2014 SCC 41 (CanLII) at para 25, [2014] 2 SCR 167 [*Anderson*].
[70] *Ewert v Canada*, 2018 SCC 30 (CanLII), [2018] 2 SCR 165 [*Ewert*].

- s. 4(g) of the *CCRA*, much like s. 718.2 of the *Criminal Code*, aims to remedy the broken relationship between Indigenous peoples and the Canadian justice system.[71]

- Systemic and background factors impact Indigenous complainants as well as offenders. As such, steps must be taken "to address systemic biases, prejudices, and stereotypes against Indigenous persons—and in particular Indigenous women and sex workers…"[72]

- Trial judges may alert a jury to the systemic and background factors that Indigenous complainants face.[73] The value of these instructions closely relate to the concept of *substantive* equality that animates s. 15 of the *Charter*.[74]

- In the interests of substantive equality, judges may also take judicial notice of statistical evidence regarding the disproportionate level of childhood sexual violence encountered by Indigenous people.[75]

- The relevance of systemic and background factors to an Indigenous victim does not negate the relevance of systemic and background factors in regards to the moral culpability of an Indigenous offender. Nor does it limit the effectiveness of alternative sanctions.[76]

7.9 Power of the *Gladue* Framework

As noted extra-judicially by Mary Ellen Turpel-Lafond, "The reasoning in the *Gladue* decision is not of the sort that is narrowly confined to one specific component of the administration of justice, or criminal procedure. Presumably, it will be introduced in a variety of contexts in the future with interesting results. It would be difficult to confine a notion like 'healing' to only one component of the criminal justice system… and not to extend it beyond this…"[77]

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[71] *Ibid* at para 57.
[72] *R v Barton,* 2019 SCC 33 [*Barton*].
[73] *Ibid* at para 201.
[74] *Ibid* at para 202.
[75] *R v Friesen*, 2020 SCC 9 (CanLII) at para 70 [*Friesen*].
[76] *Ibid* at para 92.
[77] Mary E Turpel-Lafond, "Sentencing within a restorative justice paradigm: procedural implications of R. v. Gladue" (1999) 43:1 Crim LQ 34 at pages 47-48 [*Turpel-Lafond*].

8. ADAPTING THE APPLICATION OF *GLADUE*

8.1 Introduction

Canadian Courts and Tribunals have recognized the expansion of *Gladue* principles beyond the criminal sentencing process. It is important for legal representatives to be aware of the various ways in which the systemic discrimination and alienation of Indigenous persons have impacted their culpability in legally relevant ways across different spaces.[78]

To borrow from the court in *Gladue*, "many Aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions."[79] These lived experiences of systemic discrimination and ongoing colonization require legal representatives working with Indigenous clients to expand the application of *Gladue* to non-criminal state agencies as a means to facilitate its remedial aim.[80]

This section begins from the premise that "the *Gladue* principle entails that special consideration is attributed to Aboriginal status in every decision by a state agency that has the potential effect of undermining an Aboriginal person's life, liberty or security interests."[81] Sharpe JA, in deciding whether the Minister of Justice was required to consider Aboriginal status in extraditions cases, captured this wholly in *United States of America v. Leonard*[82] when he held:

> The *Gladue* factors are not limited to criminal sentencing but … should be considered by all "decision-makers who have the power to influence the treatment of Aboriginal offenders in the justice system" (Gladue, at para. 65) whenever an Aboriginal person's liberty is at stake in criminal and related proceedings.[83]

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[78] Benjamin A Ralston, *The Gladue Principles: A Guide to the Jurisprudence,* (Saskatchewan: Indigenous Law Center, 2021) at 360 [*Ralston*].
[79] *Martin*, *supra* note 10, quoting *R v Gladue* [1999] 1 SCR 688 at para 68, 1999 CanLII 679 (SCC) [*Gladue*].
[80] Marie Manikis, "Towards Accountability and Fairness for Aboriginal People: The Recognition of Gladue as a Principle of Fundamental Justice That Applies to Prosecutors" (2016) 21:1 Can Crim L Rev 173 at 173.
[81] *Ibid* at 184.
[82] *United States v. Leonard*, 2012 ONCA 622, [2012] OJ No 4366 (QL) ["*Leonard*"].
[83] *Ibid* at para 85.

Ergo, the journey towards reconciliation demands the recognition of the application of *Gladue* principles in all instances where an Indigenous person's livelihood is at stake. As LaForme JA observed in *R v Kokopenace*[84]

> In recent years, this court has come to the recognition that the *Gladue* principles properly extend beyond sentencing for criminal offences, and that *Gladue*'s underlying philosophy bears on other aspects of the interaction between Aboriginal peoples and the justice system....This extension was implicit in the recognition in *Gladue*, at para 65, and *Ipeelee*, at para 61, that sentencing innovation alone would not solve the greater alienation of aboriginal people from the criminal justice system.[85]

Although there are no settled legal criteria or tests for when *Gladue* factors should be applied outside the criminal sentencing process, the case law in this area offers important insights as to how courts have historically incorporated *Gladue* principles in their decision-making in non-criminal contexts.

This section takes up some of these formative cases and canvasses how courts have engaged and incorporated *Gladue* considerations in non-criminal or quasi-criminal contexts. Although no cases are identical and the outcome of cases will be fact-specific, the hope is that practitioners will gain a familiarity and deeper understanding of how to engage *Gladue* considerations in civil and administrative contexts where Indigenous peoples' liberty interests are at stake.

8.2 Disciplinary Hearings

In 2016, the *Canadian Centre for Diversity and Inclusion* conducted a study on Canadian Indigenous lawyers. Their study found that Indigenous lawyers comprise approximately 1 percent of the legal profession in Canada.[86] Scholarship in this area has similarly established that Indigenous lawyers occupy a particularly unique position in our legal systems, not just in terms of working within a system that has historically and continues to contribute to their ongoing oppression, but also in terms of the discrimination they experience in these professional spaces.[87]

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[84] *R v Kokopenace*, 2013 ONCA 389 (CanLII), [2013] OJ No 2752 (QL) [*Kokopenace*].
[85] *Ibid* at paras 142–143.
[86] Canadian Centre for Diversity and Inclusion, "Diversity by the Numbers: The Legal Profession" (30 November 2016) online: <https://ccdi.ca/media/2019/dbtn_tlp_2016.pdf> at 27 [*CCDI*].
[87] Sonia Lawrence & Signa Daum Shanks, "Indigenous Lawyers in Canada: Identity, Professionalization, Law " (2015) 38:2 Dalhousie LJ 503 at 513.

It is critical to reflect upon this peculiar relationship when considering the interaction between Indigenous practitioners and Law Societies. Nevertheless, in a review of BC and Ontario's list of aggravating and mitigating factors that impact penalty decisions, there is no explicit reference to the background of the legal representative or, paraphrasing the words of the court in *Gladue*, the "factors which may have played a part in bringing the particular [legal representative] before the [panel]." This absence makes it unclear where the unique systemic and background factors of Indigenous legal representatives would be considered in a disciplinary hearing.[88]

In *Law Society of Upper Canada v. Terence John Robinson*[89], Robinson, a lawyer, enlisted his client to attack a non-client who was harassing and pursuing him. Robinson pleaded guilty to aggravated assault. The hearing panel equated the lawyer's conduct to misappropriation of client funds and imposed a two-year suspension on him. On appeal, Robinson challenged the penalty imposed, arguing that the hearing panel erred in failing to appreciate the relevance of his Aboriginal background. Agreeing with Robinson that the panel erred, the court allowed the appeal and substituted a penalty of 12 months. The panel noted that *Gladue* principles apply to disciplinary proceedings, albeit differently:[90]

> Hearing panels are concerned with the seriousness of misconduct or conduct unbecoming and circumstances that offer aggravation or mitigation. They are concerned with the culpability or moral blameworthiness of the licensee, and any facts that bear on those issues. They are concerned about the character of the licensee who appears before them. And they are concerned about crafting dispositions that meet the required objectives while promoting access to justice for everyone, including of course, the Aboriginal community. The latter is especially true for the Aboriginal community and others whose access to justice has been deeply problematic.
>
> None of the above concerns are incompatible with maintaining public confidence in the legal profession. Indeed, consideration of unique systemic and background factors, as they reflect upon the seriousness of a licensee's conduct, and his or her culpability or moral blameworthiness, is necessary to

[88] *Martin*, *supra* note 10 at 29.
[89] *Law Society of Upper Canada v Terence John Robinson*, 2013 ONLSAP 18 (CanLII), [2013] 4 CNLR 129 [*Terence*].
[90] *Ibid* at para 74.

> enhance respect for, and confidence in our profession and the self-regulation of all of its members.[91]

The panel clearly noted that in deciding on an appropriate penalty, a hearing panel should "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before it."[92] Namely, the panel observed:

> Hearing panels are not bound by the statutory obligations set out in s. 718.2(e) of the *Criminal Code*. They are not addressing the crisis of over-incarceration of Aboriginal people. Finally, we recognize that the objective of maintaining the reputation of, and public confidence in, a self-regulating legal profession differentiates the role of hearing panels from sentencing judges. [...] [Thus], criminal sentencing judges will apply the *Gladue* principles in different ways than hearing panels. After all, they have different tools available to them, as well as a different range of sanctions, including imprisonment. But that simply explains why the *Gladue* principles may be applied differently in discipline proceedings than in criminal proceedings. The principles still apply.[93]

Ultimately, the Society affirmed that the lawyer "need not prove a causal connection between being an Aboriginal person and the subject conduct as long as the background and systemic factors may have played a role in bringing the offender before the hearing panel."[94]

The *Robinson* decision neatly illustrates how, "the systemic and background factors of an Indigenous professional could also shed light on the evidence before the hearing panel in various other ways, such as helping contextualize an individual's attitude towards the police or their work for other Indigenous people as a reflection of their good character."[95]

Engaging *Gladue* considerations in disciplinary hearings ensures that self-regulating bodies are attentive to the unique lived experiences of Indigenous persons and have considered them when determining appropriate penalties for Indigenous professionals who have been found guilty of unprofessional conduct.[96] Further, as

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[91] *Ibid* at paras 72-73.
[92] *Ibid* at para 75.
[93] *Ibid* at paras 72-74.
[94] *Ibid* at para 75.
[95] *Ralston*, *supra* note 78 at 365.
[96] *Ibid* at 364.

Ralston notes, it is imperative to consider Aboriginal identity when sentencing Indigenous practitioners, given their underrepresentation in the profession.

As an articulation and embodiment of substantive equality, *Gladue* principles should be extended into this context where hearing panels can be equipped with case-specific information to make meaningful decisions about the future of an Indigenous legal representative.[97]

See more cases: *Law Society of Upper Canada v Batstone;*[98] *Law Society of Ontario v. Loder*[99]*; Moore v The Law Society of British Columbia*[100]

8.3 Review Board Non-Criminally Responsible ("NCR") Decisions

Legal representatives should also bear in mind that *Gladue* considerations have a role to play in NCR decisions. Counsel must therefore bear in mind the principles above and, whenever appropriate, take steps to ensure they are taken into account.

R v Sim[101] concerned the consideration of *Gladue* principles in reviewing board dispositions of accused found to be NCR. In *Sim*, the accused was found not criminally responsible in respect of an offence of theft under $5,000 and was sent to a medium-security facility. At his last hearing, the Ontario Review Board found that he remained a substantial threat to public safety. Upon appeal, one of the main issues was whether the Board failed to ensure that it had adequate information respecting the accused's Aboriginal background before making its decision. The Ontario Court of Appeal dismissed the appeal.

Sharpe JA writing for the Court concluded:

> I do not think that the principles underlying Gladue should be limited to the sentencing process and I can see no reason to disregard the Gladue principles when assessing the criminal justice system's treatment of NCR accused.[102]

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[97] *Ibid* at 366.

[98] *Law Society of Upper Canada v Batstone*, 2017 ONLSTH 34*,* [2017] LSDD No 39 [*Batstone*].

[99] *Law Society of Ontario v Loder*, 2021 ONLSTH 66, [2021] L.S.D.D. No. 96 [*Loder*].

[100] *Moore v Law Society of British Columbia*, 2018 BCSC 1084, [2018] BCJ No 1282 [*Moore*].

[101] *R v Sim*, [2005] OJ No 4432, 78 OR (3d) 183 [*Sim*].

[102] *Ibid* at para 16. "The National Parole Board has adopted a similar view and now requires that *Gladue* principles be considered when Aboriginal offenders have their parole hearings": Jonathan Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40:22 Osgoode Hall LJ 687 at 700 [*Rudin*].

In considering the statutory criteria for the disposition, Sharpe JA noted that Indigeneity was indispensable to the deliberation of these criteria: "proper consideration of appropriate placement of the accused, reintegration into society and the other needs of the accused will call, where the circumstances warrant, for the [review board] to advert to the unique circumstances and background of aboriginal NCR accused."[103]

The *Sim* decision illustrates how the criminal justice system must alter its procedures to adopt a more inquisitorial approach when sentencing an Aboriginal offender.[104] Likewise, representatives are encouraged to investigate and raise their client's Indigenous history in the context of NCR proceedings.

8.4 Bail Hearings

The SCC in *Gladue* "explicitly identified bail as a reason for over-incarceration of Indigenous persons."[105] The Court held, "the unbalanced ratio of imprisonment for Aboriginal offenders flows from several sources.... it arises also from bias against Aboriginal people and from an unfortunate institutional approach that *is more inclined to refuse bail* and to impose more and longer prison terms for aboriginal offenders."[106] These concerns have been taken up by case law, whereby courts have guided how an Indigenous accused's unique positionality plays a substantial role in bail hearings. For example, Judge Ruddy of the Territorial Court of Yukon in *R v Magill*[107], observed that the risk of systemic discrimination against Indigenous people is inherent in bail decisions, by noting:

> Socioeconomic factors play an equally, if not more important, role at the bail stage of a criminal charge. An accused with a poor employment record, substance abuse issues and an unstable family and community support network is more likely to be detained, even though these are the very results that flow from the Canadian history of colonialism, dislocation and residential schools. A judge has the obligation to evaluate the application of bail criteria to ensure that the result does not serve to perpetuate systemic racial discrimination.[108]

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[103] *Sim*, *supra* note 101 at para 19; *Martin*, *supra* note 10 at 35.
[104] *Rudin*, *supra* note 102 at 700.
[105] *Martin*, *supra* note 10 at 37.
[106] *Gladue*, *supra* note 11 at para 65.
[107] *R v Magill*, 2013 YKTC 8, [2013] YJ No 127 [*Magill*].
[108] *Ibid* at para 26.

Nevertheless, despite a decade of jurisprudence acknowledging the Court's reasoning in *Gladue* and applying *Gladue* principles to bail hearings, confusion over exactly how these principles apply persists. In essence, in several disparate and contradictory ways, there exists a piecemeal approach to the application of *Gladue* to bail hearings across Canada. For instance, the International Centre for Criminal Law Reform and Criminal Justice[109] published a report which provided an informative perspective on the issue and disparate presentation of Gladue Reports in bail hearings – this analysis is reproduced in its entirety below:

> Gladue reports are sometimes requested in the bail context. It is hard to know how frequently this occurs, but it seems to be quite rare. It is in fact not very clear how, practically, a Gladue report can be produced in time in the context of judicial interim release decisions. Rudin believes that it is inappropriate to require a Gladue report prior to considering bail for an Indigenous accused person. First, it takes time to prepare a Gladue report and it is wrong to leave someone in custody for any longer than necessary. Second, at the bail stage, there has not been a determination of guilt yet and the report may inadvertently lead the court to impose conditions that may be relevant to sentencing but inappropriate for someone who has not been found guilty.
>
> Jillian Rogin also argued that Gladue reports should not be used at the time of a bail hearing. Her review of Gladue bail jurisprudence reveals the ways in which Indigenous people in Canada are improperly "being sentenced via bail proceedings". She argues that "Gladue bail hearings closely resemble sentencing proceedings in a manner that erodes Charter protected rights and further exacerbates bias in the application of judicial interim release."[110]

Importantly, where *Gladue* principles and reports are misapplied at bail, courts risk exacerbating the issues of Indigenous overrepresentation in the criminal justice system that *Gladue* and *Ipeelee* seek to ameliorate. To correctly apply the *Gladue* principles, judges and lawyers must assess how the bail system discriminates against Indigenous persons and ensure that such discrimination is not perpetuated when the Crown seeks to detain an Indigenous person before trial or where an Indigenous person faces a reverse onus, as well as in crafting appropriate conditions for release.

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[109] Patricia Barkaskas et al, "Production and Delivery of Gladue Pre-sentence Reports A Review of Selected Canadian Programs (9 October 2019), online (pdf): *International Centre for Criminal Law Reform and Criminal Justice Policy* <https://icclr.org/wp-content/uploads/2020/02/Production-and-Delivery-of-Gladue-Reports-FINAL-1.pdf?x71051> [*Barkaskas et al*].

[110] *Ibid* at 35.

This was first articulated in a paper presented by Justice Brent Knazan of the Ontario Court of Justice to the National Judicial Institute in 2003. Justice Knazan noted that when *Gladue* principles are not considered in the bail context, many Aboriginal offenders will have effectively served their sentences by the time their plea is entered. He further stated that the reason for this

> is that the amount of dead time [aboriginal offenders] will have accrued will be equal to, or in excess of, what they might have received had they pleaded guilty at their first opportunity. The imposition of a "time-served" sentence precludes any meaningful consideration of the Gladue principles on sentencing.[111]

The overrepresentation of Indigenous persons in bail contexts was also recognized by the court in *R v Summers*[112]*.* The court in *Summers* described Canada's bail system as "result[ing] in consistently longer, harsher sentences for vulnerable members of society, not based on the wrongfulness of their conduct but because of their isolation and inability to pay".[113]

In *R v Anthony*[114], Anthony, an Indigenous man and member of the Beaver Clan, was arrested on September 13, 2018, for a series of driving-related offences and administration of justice offences. A reverse-onus contested bail hearing was held on September 18, 2018, before Justice of the Peace Boon. Mr. Anthony's mother acted as a surety. She gave evidence at the bail hearing that she and her mother were residential school survivors. The defence submitted that *Gladue* and *Ipeelee* favoured Mr. Anthony's release to a surety as an alternative to imprisonment. However, the justice did not grant Mr. Anthony's release to a surety and despite the ample submissions on *Gladue* factors, this evidence went unmentioned by the justice. The bail review application at the Ontario Superior Court before Edward J. was dismissed.

In *Anthony*, the appellant noted that *Gladue* considerations must apply to bail because the overrepresentation of Indigenous accused in pre-trial and sentenced custody continues to increase. While Statistics Canada does not keep records of the racial breakdown of annual admissions to pre-trial custody, statistics indicate that between 2006-2007 and 2016-2017, the proportion of male adult Aboriginal persons

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[111] *Rudin*, *supra* note 102 at 699.
[112] *R v Summers*, 2014 SCC 26 (CanLII), [2014] 1 SCR 575 [*Summers*].
[113] *Ibid* at para 67.
[114] See the materials filed in *Her Majesty the Queen v. Timothy Clarke Anthony*, Ontario Superior Court of Justice File Nos. 16-0097, 17-0050 and 17-0003.

in custody (both pre-trial and sentenced) jumped from 20% of all inmates to 28%, while the proportion of female adult Aboriginal persons in custody (both pre-trial and sentenced) increased from 28% to 43%.[115] The Appellant, therefore, submitted that the problem of Aboriginal overrepresentation in pre-trial custody urgently requires a decision akin to this Court's decision in *Gladue*, affirming that the principles in *Gladue* apply to bail.

Most recently, in 2019, Parliament amended the bail provisions in the *Criminal Code*, wherein s. 493.2(a) now statutorily requires judicial officials making bail decisions to give particular attention to the circumstances of accused persons who are indigenous.[116]

Thus, for legal representatives working with Indigenous clients, it is important to consider the application of *Gladue* principles in the context of bail. Applying *Gladue* to bail does not mean that an Indigenous person should never be detained pending trial, just as applying *Gladue* to sentencing does not mean that an Indigenous person should never receive a custodial sentence. All that it means is that a careful analysis must be applied when determining whether an Indigenous person ought to be released pending trial to ensure that Indigenous persons are not disproportionately detained before their trial; it reduces the incentive for Indigenous persons to plead guilty to escape harsh pre-trial detention conditions, and ultimately helps reduce the overrepresentation of Indigenous persons in the Canadian criminal justice system.[117]

Nakatsuru J observed the importance of recognizing and incorporating *Gladue* considerations in the context of bail in *R v Sledz*[118]:

> There is a disproportionate number of Indigenous persons in jail. That means that too many indigenous persons compared to their overall population in this country find themselves behind bars. Too often this starts at the pretrial stage when they cannot get bail. Finding a solution means we must start at the bail stage. We must look at each case. We must carefully look at the unique situation of each indigenous person. And we must try to find an answer. Even when that answer is hard to find. Just as a surety may be hard for you to find.[119]

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[115] *Ibid.*
[116] *R v Kadjulik*, 2021 QCCQ 4344 (CanLII), [2021] OJ No 15389 [*Kadjulik*].
[117] *R. v. Anthony*, *supra*, note 114.
[118] *R v Sledz*, 2017 ONCJ 151, [2017] OJ No 1290 [*Sledz*].
[119] *Ibid* at para 18.

Lawyers working with Indigenous clients in the bail context are encouraged to be mindful of the challenges in raising *Gladue* arguments in these settings. As Ralston notes, to meaningfully apply the *Gladue* principles in bail beyond simply a generalized attention to systemic issues, counsel should try to gather case- and client-specific information. However, ordering comprehensive Gladue reports can be time-consuming and may be inappropriate for a bail hearing, "given the likelihood of this leading to delay, inconvenience, and additional expenses in proceedings that are by their very nature meant to be summary and short notice."[120] In these instances, Ralston suggests that lawyers can look to prior Gladue reports that may already be available for the client, or a prior sentencing decision that summarized the client's unique circumstances.[121]

See more: *R. c. Kadjulik*[122]; *R. v. E.B.*[123]; *R. v. Sledz*; *R v Zora*[124]*; R v Duncan*[125]*; R v Heathen*[126]; *R v Jaypoody*[127]*; R v MLB*[128]; *R c Quannaaluk*[129]*; See also Ralston supra note 78 at Chapter 13, footnote 7 for an in-depth list of jurisprudence that has engaged in a discussion of Indigenous overrepresentation in the bail context.*

8.5 Civil Contempt

Jurisprudence has also established that *Gladue* considerations should apply when sentencing an Indigenous person in contempt of court cases. Borrowing from Ralston, "many of the same rationales for extending the Gladue principles into sentencing proceedings for regulatory offences and professional discipline apply in this context as well, especially their relationship to proportionality."[130]

In *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*[131]*,* the Ontario Court of Appeal held that *Gladue* principles ought to apply in civil contempt cases. In

[120] *Ralston*, *supra* note 78 at 318.
[121] *Ibid*.
[122] *Kadjulik*, supra note 116.
[123] *R v EB*, 2020 ONSC 4383, [2020] O.J. No. 3133 [*EB*].
[124] *R v Zora*, 2020 SCC 14 (CanLII), 388 CCC (3d) 1 [*Zora*].
[125] *R v Duncan*, 2020 BCSC 590 (CanLII), [2020] BCJ No 635 [*Duncan*].
[126] *R v Heathen*, 2018 SKPC 29, [2018] CarswellSask 166 [*Heathen*].
[127] *R v Jaypoody*, 2018 NUCJ 36 (CanLII), [2018] NuJ No 43 [*Jaypoody*].
[128] *R v MLB*, 2019 BCPC 218, [2019] BCJ No 1771 [*MLB*].
[129] *R v Quannaaluk*, 2020 QCCQ 2524, [2020] QJ No 9140 [*Quannaaluk*].
[130] *Ralston*, *supra note* 78 at 366.
[131] *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534, 295 DLR (4th) 108 [*Frontenac*].

Frontenac, a private mining company conducted a campaign of exploratory drilling on certain lands which were subject to an Algonquin land claim. First Nation and aboriginal leaders were found to have committed civil contempt by violating injunctions and engaging in a peaceful blockade to prevent drilling. The individual defendants were sentenced to six months imprisonment and fines ranging from $10,000 to $25,000 were imposed.

In allowing the appeal, Justice MacPherson for the Court of Appeal noted that "the broader themes of Gladue, particularly alienation from the justice system, were especially relevant in the context of this civil contempt for a blockade of lawful drilling"[132]:

> Although Gladue was focused primarily on the serious problem of excessive imprisonment of aboriginal peoples, the case in a broader sense draws attention to the state of the justice system's engagement with Canada's First Nations. I note three factors in particular that were highlighted in Gladue: the estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation and whether imprisonment would be meaningful to the community of which the offender is a member. Those factors were all at stake in this case.[133]

The *Frontenac* decision, therefore, illustrates that the sentencing principles articulated by the Supreme Court of Canada in *Gladue* are applicable when fashioning a sentence for contempt of court on the part of Aboriginal contemnors. In particular, the Court of Appeal, in arriving at its decision, discussed "the estrangement of Indigenous peoples from the justice system, the impacts from years of dislocation, and whether imprisonment would be meaningful to a particular Indigenous community."[134]

Frontenac illustrates how courts and parties to a proceeding must recognize that imprisonment for contempt is at odds with the restorative model of justice and would be far from meaningful to Indigenous communities.

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[132] *Ibid* at para 57.
[133] *Ibid.*
[134] *Ralston*, *supra* note 78 at 369.

See more cases: *Canadian National Railway Company v Plain;*[135] *Bacon St-Onge v Conseil des Innus de Pessamit;*[136] *Trans Mountain Pipeline ULC v Mivasair*[137]

8.6 Extradition

In *Leonard*, the Ontario Court of Appeal held that extradition fits into the "category" of matters to which the *Gladue* principles apply.[138] The main issue in *Leonard* was whether the Minister erred in law by failing to give adequate consideration to the Applicant's Aboriginal status and the principles found in *Gladue* in relation to their ss. 6(1) and 7 *Charter* claims. Sharpe JA was required to consider s. 44(1)(a) of the *Extradition Act*, S.C. 1999, c. 18, which stipulates that the Minister of Justice must refuse to surrender an individual if the surrender would be unjust or oppressive having regard to all the relevant circumstances.[139]

As Sharpe JA noted, determining whether the surrender would be unjust or oppressive requires the Minister of Justice to compare the likely sentence that would be imposed in a foreign state *with the likely sentence that would be imposed in Canada* — a task which is impossible to do without reference to the *Gladue* principles.[140] He explained:

> The jurisprudence that I have already reviewed indicates that the *Gladue* factors are not limited to criminal sentencing but that they should be considered by all "decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system" (*Gladue*, at para 65) *whenever an Aboriginal person's liberty is at stake in criminal and related proceedings*.[141]

Indeed, in *Leonard*, Sharpe JA was required to consider *Gladue* principles given that the accused's liberty interests were engaged in a "related proceeding". Sharpe JA's reasoning demonstrates the need for and importance of lawyers working with Indigenous clients, in any context that implicates their dignity, to cater legal strategies

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[135] *Canadian National Railway Company v. Plain*, 2013 ONSC 4806 (CanLII), [2013] OJ No 3392 (QL) [*Plain*].
[136] *Bacon St-Onge v Conseil des Innus de Pessamit*, 2019 FC 794 (CanLII), [2019] FCJ No 673 [*Bacon St-Onge*].
[137] *Trans Mountain Pipeline ULC v Mivasair,* 2020 BCSC 1512 (CanLII), [2020] BCJ No 1586 *[Trans Mountain Pipeline].*
[138] *Ralston*, *supra* note 78 at 139; *Leonard*, *supra* note 82 at para 85.
[139] *Leonard*, *supra* note 82 at para 2.
[140] *Anderson*, supra note 69 at para 27.
[141] *Leonard,* supra note 82 at para 85.

to account for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views.

9. CONCLUSION

Borrowing from Ralston, "the Gladue framework directs the attention of sentencing judges, counsel for both sides, and the authors of pre-sentence reports towards the unique circumstances of Indigenous people but does so without purporting to exhaustively describe all the circumstances that might arise."[142] The Supreme Court of Canada has noted that it is vital for a sentencing judge to take judicial notice of the various events, policies, and processes that make Canada's treatment of Indigenous peoples distinct, "with a particular focus on the pervasive legacies of settler colonialism and discrimination against Indigenous individuals and collectives."[143] To this end, the *Gladue* framework requires that parties to any proceeding that risks implicating the liberty interests of an Indigenous person, modify their approach to ensure culture, heritage, upbringing, language, experiences, and community connections are carefully explored.

[142] *Ralston*, *supra* note 78 at 155.
[143] *Ibid* at 158.

10. RESOURCES

- List of all of LAO's Gladue report programs in Ontario
  - Gladue Report Programs In Ontario : https://www.legalaid.on.ca/lawyers-legal-professionals/for-aboriginal-legal-issues/gladue-report-programs-in-ontario/

- LAO Annual Reports. (Note: Only the 2014-2015 report engaged in an inquiry of Gladue Reporting in Ontario).
  - Legal Aid Ontario 2014/15 Report: https://www.legalaid.on.ca/wp-content/uploads/LAO-annual-report-2014-15-EN.pdf
  - **Annual Reports:** https://www.legalaid.on.ca/more/corporate/reports/

- Aboriginal Legal Services is an organization contracted by LAO to provide Gladue Reports. They have historically produced research examining their Gladue Caseworker Program. On their website, they have published reports from research undertaken annually for 2004/05, 2005/06 and 2006/07.
  - **Aboriginal Legal Services:** https://www.aboriginallegal.ca/gladue.html
  - **Evaluations of ALS's Gladue Report Program:** https://www.aboriginallegal.ca/gladue-evaluations.html

- Report 1 - *Gladue* Practices in The Provinces And Territories: https://publications.gc.ca/collections/collection_2013/jus/J2-378-2013-eng.pdf

- Report 2 – Production and Delivery of Gladue Pre-sentence Reports A Review of Selected Canadian Programs: https://icclr.org/wp-content/uploads/2020/02/Production-and-Delivery-of-Gladue-Reports-FINAL-1.pdf?x28096

- Benjamin Ralston's Book on Gladue Jurisprudence
  - Benjamin Ralston, *The Gladue Principles: A Guide to the Jurisprudence,* (Saskatchewan: Indigenous Law Center, 2021): https://indigenouslaw.usask.ca/documents/publications/the-gladue-principles_ralston.pdf

- Benjamin Ralston's Book on Gladue Jurisprudence – Executive Summary for Defence Counsel: https://bcfnjc.com/wp-content/uploads/2021/08/Gladue_Principles_Userguides_for_Defence_Counsel.pdf

- Peer-reviewed articles reviewing the application of Gladue outside criminal contexts
  - Andrew Martin, "Gladue at Twenty: Gladue Principles in the Professional Discipline of Indigenous Lawyers" (2020) Schulich Law Scholars at 24.
  - Marie Manikis, "Towards Accountability and Fairness for Aboriginal People: The Recognition of Gladue as a Principle of Fundamental Justice That Applies to Prosecutors" (2016) 21:1 Can Crim L Rev 173.
  - Jonathan Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40:22 Osgoode Hall LJ 687.

10.1 Resources on Writing a *Gladue* Report

Title	Link
R. v. Gladue, [1999] 1 S.C.R. 688	https://www.canlii.org/en/ca/scc/doc/1999/1999canlii679/1999canlii679.html
R. v. Ipeelee, [2012] 1 S.C.R. 433	https://www.canlii.org/en/ca/scc/doc/2012/2012scc13/2012scc13.html
VCC-Vancouver Community College Tami Pierce-Director Aboriginal Education And Community Engagement Gladue Writing Program	https://www.vcc.ca/about/college-information/news/article/media-release-canadas-first-gladue-report-writing-credential-to-be-offered-at-.html Gladue Report Writing Certificate – https://continuingstudies.vcc.ca/public/category/courseCategoryCertificateProfile.do?method=load&certificateId=1023924

Debra Parkes, David Milward, Steven Keesic, and Janine Seymour, "Manitoba Gladue Handbook" University of Manitoba Faculty of Law, September 2012	https://law.robsonhall.com/wp-content/uploads/2019/03/Gladue_Handbook_2012_Final-1.pdf
Legal Services Society BC "Gladue Primer", British Columbia: 2011	http://www.cba.org/CBA/cle/PDF/JUST13_Paper_Shields_GladuePrimer.pdf
Legal Services Society BC, *Gladue Submission Guide* (2022)	https://legalaid.bc.ca/publications/pub/gladue-submission-guide
BearPaw legal Education & Resource Centre, "Writing a Gladue Report", undated.	https://bearpawlegalresources.ca/find-a-resource/adult-justice/writing-a-gladue-report-booklet
Tripartite Working Group of the National Aboriginal Court Worker Program, "Gladue Sentencing Principles", Undated.	http://www.gladueprinciples.ca/welcome

10.2 *Gladue* Factors

Not all factors have to be met in each and every case. The factors must blend into the accused person's life continuum and will help explain how their involvement came to be in the justice system.

- Simply being an Indigenous person
- Criminal record
- Relationships with family/community/extended family (good or bad)
- Emotional/physical/mental/spiritual abuse
- Sexual abuse
- Substance abuse
- Residential school/day school
- Poverty/homelessness/lack of food
- Suicide

- Loss of identity/culture
- Dislocation
- Death of family/friends
- Systemic/intergenerational factors
- Mental health
- Other family members involved in crime
- Broken families by way of separation/divorce
- Marginalization
- Displacement
- Oppression
- Colonization
- Low income
- Lack of education
- Lack of employment
- Racism
- Involvement in Independent Assessment Process and receipt of Common Experience Payments
- Socio-economic issues
- Lack of support networks
- Isolation
- Loss of language
- Witness to violence
- Elder abuse