Guide for Lawyers Working with Indigenous Peoples

A joint project of:

The Advocates' Society

The Indigenous Bar Association

The Law Society of Ontario

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1 OVERVIEW

1.1 Introduction

There is a growing recognition in Canada, across all sectors and regions, of the need for a deeper understanding and more meaningful inclusion of the Indigenous Peoples[1] of Canada. One of the centrepieces of this recognition was the Final Report of the Truth and Reconciliation Commission of Canada, released in 2015, which included 94 calls to action to effect reconciliation with Indigenous Peoples. Call to Action 27 was directed at the legal community of Canada, calling on us (through the Federation of Law Societies of Canada) to:

> Ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

This admonition is consistent with the findings of a long line of court decisions, governmental studies and special commissions across the country. As the Supreme Court of Canada concluded in *R. v. Delgamuukw*, "Let us face it, we are all here to stay." Reflecting on that statement, the former Chief Justice of British Columbia, Lance Finch, surmised:

> True enough: but if in the face of this reality we are to find space for multiple legal orders to co-exist, and if we are ultimately to achieve an equal reconciliation, we must recognize that to stay must also be to learn.[2]

[1] The term "Indigenous" is the main reference relied upon today, but we note that caselaw and earlier jurisprudence and academic writing use the term "Aboriginal".
[2] Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice", *Continuing Legal Education Society of British Columbia*, November 2012 at 2.1.2. [emphasis added]

The *Guide for Lawyers Working with Indigenous Peoples* was written in the spirit of these ideas. This Guide is intended to be a starting resource to help lawyers and others in the justice system to learn about Indigenous cultures and understand the interplay between Indigenous legal orders and the Canadian legal system. However, reading this Guide cannot replace building meaningful relationships with Indigenous peoples, communities, and organizations, nor should it be the only action a legal practitioner takes to better understand legal matters relating to Indigenous peoples.

In 2016, The Advocates' Society formed a Task Force of individuals with experience and interest in working with Indigenous Peoples in the legal context. The Task Force members, listed at the end of this Guide, are members of the bar of varying levels of seniority, from public and private practice, and former members of the bench. Our outreach led to a three-way partnership for the project, adding the expertise and resources of the Indigenous Bar Association and the Law Society of Ontario (formerly Law Society of Upper Canada).

For more than a year, the Task Force worked together to identify key areas of focus for learning and practical guidance. Task Force members conducted extensive research and shared their own varied personal experiences. Upon completion of a draft version of this Guide, the Task Force engaged in a series of consultations with a broader cross-section of members of the bar, bench, academia, community workers and Elders. Feedback was gratefully collected from individuals and associations across the country, through meetings, conferences, telephone interviews and electronically.

The result is a Guide which incorporates the views of a number of leading authorities who work with Indigenous Peoples on a regular basis. We thank everyone who provided input.

The Guide is not intended to be exhaustive or an all-encompassing resource. It is only a starting point for advocates and others working with Indigenous peoples in legal proceedings. The Guide was prepared respectfully and with our best efforts. We recognize that there will be generalizations and omissions, particularly given the diversity of Indigenous cultures, traditions and histories across a vast geography.

The learning through this project and other initiatives must continue. This Guide is intended to be an iterative and living document. It will be supplemented and amended from time to time with a continued view towards reconciliation. Comments on the Guide are welcome and may be sent to policy@advocates.ca.

1.2 Key Themes

- This Guide is intended to assist lawyers – litigation counsel in particular – as they work with Indigenous Peoples (First Nations, Inuit and Métis Peoples) and related issues in Canada.[3]

- A better understanding of Indigenous Peoples, including histories, cultures, laws, including spiritual laws, and legal orders, is an essential part of representing and working with all members of our communities.

- Indigenous law is important to everyone, not just Indigenous peoples. Treaties and the Constitution are the highest law of the land.

- This Guide aims to provide some of the important elements of this learning, as well as resources for lawyers to continue their education and improve their service to clients and others.

1.3 Purpose and Scope

This Guide aims to be nationally relevant, but we acknowledge that not all regions, cultures and jurisdictional requirements are reflected or equally represented. Readers must adapt and extend the contents of this Guide for local circumstances.

A deeper understanding of this area is essential to practising in it. This Guide is intended to provide a starting point for counsel not experienced in working with Indigenous peoples. It is not intended to replace the importance of cultural competence training, mentorships or relationships that will contribute to a better understanding of working with Indigenous peoples.

Lawyers also need to know when not to act, and instead to know the referral resources, programs, and services that can assist. Lawyers and the law are not a complete answer to every situation or client, and we need to understand the concept of intersectionality (and the concerns of over-extending). Together, we are working toward a more informed, respectful and holistic approach.

Following this introduction, the second section of the Guide provides a brief historical overview of Indigenous Peoples and cultural competency. The third section aims to provide advocates with practical tools and guidance. The fourth section lists resources

[3] It is important to note that the term “Indigenous” may not be immediately recognizable to some members of these communities and/or may not be viewed as the most appropriate term. Lawyers are encouraged to learn about their clients’ specific community and heritage, as discussed further below in Section 3 below.

for more specific assistance. The Guide concludes with a list for further reading – and learning.

1.4 Currency

The state of the law is current as of the date of publication. While best efforts have been made to state the law as accurately as possible, readers are encouraged to conduct their own research to ensure they are meeting the needs of the particular client and their legal issue(s).

2 LEARNING FOR LAWYERS[4]

This section of the Guide provides an overview of the essential elements that lawyers need to understand to work effectively with Indigenous communities and individuals. The lessons and information contained in this section are vital to a lawyer's understanding and appreciation of the historical challenges experienced by Indigenous peoples since contact with Europeans.

2.1 Understanding the practical implications of the Truth and Reconciliation Commission's Report

The impetus for this guide stems in large part from the findings and the 94 Calls to Action contained in the Final Report of the Truth and Reconciliation Commission of Canada ("TRC Report") which was released in 2015.[5]

The TRC Report was the result of a 6-year-long inquiry undertaken by the TRC into the legacy of the Residential School System. The Commission was established in 2006 as part of a class action settlement agreement between the Government of Canada, the Churches responsible for running the Residential School System, and survivors of the system. The settlement agreement was the result of a process led by survivors of the Residential School System, working over decades. The Commission's mandate included promoting awareness of the Residential School System and its impacts, creating a historical record of the system and its legacy, and recommending changes across Canadian society to further the process of Reconciliation.

The TRC Report has broad implications for the legal profession in Canada, including for litigators dealing with Indigenous Peoples and issues.[6]

[4] This Guide was developed primarily for lawyers, but it is 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, and we hope this Guide is useful for that important group of legal practitioners as well. We welcome input from paralegals and others for future editions.

[5] The Commission was Chaired by the Honourable Justice Murray Sinclair, alongside Commissioners Dr. Marie Wilson and Chief Wilton Littlechild. The Final Report of the Truth and Reconciliation Commission comprises six volumes. Both the complete Final Report and an Executive Summary are available here: http://www.trc.ca/websites/trcinstitution/index.php?p=890

[6] Since the TRC Report, other cases and investigations have contributed to a broader national recognition of the need for awareness and reform on Indigenous issues in Canada. Among other things, see the "Sixties Scoop" litigation (*Brown v. Canada (AG),* 2017 ONSC 251) and the National Inquiry into Murdered and Missing Indigenous Women and Girls (http://www.mmiwg-ffada.ca/).

2.1.1 The Residential School System

The Residential School System was a system of boarding schools for Aboriginal children established by the government and administered by a number of Christian churches. The schools began as a government policy in the early 1800's and were authorized by statute by Canada upon confederation. The TRC found that, for much of its operational history, the policy underlying the Residential School System was an attempt at cultural genocide,[7] to systematically assimilate Indigenous Peoples by forcibly separating children from their families and suppressing Indigenous languages, traditions, and other cultural elements. As noted in the TRC's Final Report:

> *Physical genocide* is the mass killing of the members of a targeted group, and *biological genocide* is the destruction of the group's reproductive capacity. *Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.[8]

The last federally-supported Residential Schools remained in operation until the 1996.[9] On June 11, 2008, as a condition of the settlement agreement, the Prime Minister of Canada apologized on behalf of Canadians for the Residential Schools System.[10]

Despite such obvious injustices, the TRC found that the Canadian legal system failed to respond:

> Canada's laws and associated legal principles fostered an atmosphere of secrecy and concealment. When children were abused in residential schools, the law, and the ways in which it was enforced (or not), became a shield behind which churches, governments, and individuals could hide to avoid the consequence of horrific

[7] Final Report of the Truth and Reconciliation Commission, Executive Summary (online: (http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf) at preface; and p. 1.
[8] Final Report of the Truth and Reconciliation Commission, Executive Summary (online: http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf) at p. 1.
[9] Final Report of the Truth and Reconciliation Commission, Executive Summary online: (http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf) at preface; and p. 3.
[10] "Statement of apology to former students of Indian Residential Schools", The Right Honourable Stephen Harper, online: http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649.

> truths. Decisions not to charge or prosecute abusers allowed people to escape the harmful consequences of their actions. In addition, the right of Aboriginal communities and leaders to function in accordance with their own customs, traditions, laws and cultures was taken away by law. Those who continued to act in accordance with those cultures could be, and were, prosecuted. Aboriginal people came to see law as a tool of government oppression.

2.1.2 Calls to Action and the Advocate's Responsibility

The TRC Report issued 94 Calls to Action aimed across Canadian civil society to redress the wrongs of the Residential School System, and, more generally, to promote reconciliation in Canada.

Call to Action 27 identifies a necessary path of learning for advocates in the reconciliation process. It calls upon to the Federation of Law Societies of Canada to:

> Ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

These goals have been acknowledged by the provincial law societies,[11] the Federation of Law Societies of Canada,[12] and the Canadian Bar Association.[13] As stated by former Chief Justice of British Columbia Lance Finch, lawyers have a "duty to learn".[14]

That duty should not be limited to learning about Indigenous history and culture (and how Europeans affected "them"), but also includes learning about Indigenous laws and how Indigenous legal orders have affected the development of non-Indigenous laws in

[11] See, e.g. Law Society of British Columbia: https://www.lawsociety.bc.ca/our-initiatives/truth-and-reconciliation/; Law Society of Manitoba: http://www.lawsociety.mb.ca/news/truth-and-reconciliation-commission; Law Society of Ontario: https://www.lsuc.on.ca/uploadedFiles/For_the_Public/News/News_Archive/2015/release-public-statement-TRC.pdf;; Nova Scotia Barristers' Society: http://nsbs.libguides.com/content.php?pid=679663&sid=5805502; Law Society of PEI: http://lawsocietypei.ca/media/upcoming_events/upcoming_events15.pdf;Law Society of the Northwest Territories: http://lawsociety.nt.ca/data/public/trc-working-group-report-final.pdf.

[12] Federation of Law Societies of Canada: http://flsc.ca/federation-of-law-societies-commits-to-effective-response-to-trc-report/

[13] Canadian Bar Association: https://www.cba.org/Our-Work/Resolutions/Resolutions/2016/Responding-to-the-Truth-and-Reconciliation-Calls-t

[14] Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice", *Continuing Legal Education Society of British Columbia*, November 2012 at 2.1.2.

Canada. Effective lawyering in this area will require openness and humility. Anishinaabeg scholar Lindsay Borrows provides this perspective:

> Humility is a state of positioning oneself in a way that does not favour one's own importance over another's. Humility is a condition of being teachable. Humility allows us to recognize our dependence upon others and to consider their perspectives along with our own. A humble opinion may be given in a spirit of deference or submission. The antonym is expressed in terms such as arrogant, elevated, or prideful. In English, the etymological origin of humility is derived from the Latin word *humilis*, which literally means "on the ground" from Latin *humus* meaning "earth." This is where the colloquial expression describing a person as being "down to earth" stems. Even in English, humility is linked to the earth. In Anishinaabemowin, the word for humility is *dabaadendiziwin*. It means "to measure out your thoughts." This refers to being careful with our thoughts or views and appropriately apportioning our judgements. *Dabaadendiziwin* is one of the Anishinaabe Seven Grandfather Teachings. This suggests it is a highly important principle to learn and live.[15]

This Guide aims to help lawyers fulfill the duty to learn by encouraging a fuller understanding of Indigenous cultures. Indigenous Peoples are complex and thriving in Canada. Indigenous peoples' interaction with the legal system should be viewed as an opportunity for continued advancements towards reconciliation, rather than as a problem in need of a solution.

2.2 Understanding the importance of cultural competence

There is no such thing as a culturally neutral practice of law. Everything that lawyers and judges interact with on a daily basis in the course of their work comes from some culture, somewhere. Often, as here, the root culture of law will not be the same as the culture of those individuals that use legal services or engage with legal processes. As legal scholar Tracey Lindberg states:

> Without an informed understanding of in/justice written, interpreted, understood and transmitted by Indigenous peoples, understanding of the same is limited to the vision and interpretation of individuals who do not have a history of responding to and living through the attempted/colonization of Indigenous peoples.[16]

This section is intended to provide an overview of cultural competency, the sources of cultural competence, the consequences of a lack of cultural competence, and the

[15] Borrows, Lindsay, *Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape* 33 Windsor Y.B. Access to Just. 149, (footnotes removed)
[16] Lindberg, Tracey. Critical Indigenous Legal Theory. Library and Archives Canada, 2008. P 137. Online: < https://ruor.uottawa.ca/handle/10393/29478>.

relevance and need for cultural competence within legal professions. The section concludes with suggestions on how cultural competence may be developed and some practical examples.

2.2.1 The *meaning* of cultural competence

Cultural competence (or competency), just like all competencies that lawyers are required to develop and maintain, is not a single activity, but knowledge and a set of attitudes and behaviours that are developed over a continuum of understanding. [17]

For example, although many people may refer to "Aboriginal culture" collectively, there is no single Aboriginal culture. There are numerous Aboriginal cultures and it is not possible for an individual to become fully competent in every Aboriginal culture in every region in Canada.

Cultural competency is an evolving, ongoing and never-ending process. It requires lawyers and judges to acquire, develop and maintain practical skills to achieve its goals and serve clients across different cultures effectively.

2.2.2 The *sources* of cultural competence appreciation

2.2.2.1 Indigenous culture is not a monolith, but a wide variety of different Indigenous Peoples, cultures, languages, histories, traditions and laws

It is important for lawyers to recognize that there is no single "Indigenous culture" or "Indigenous perspective." Professor Karen Drake of the Faculty of Law at Osgoode Hall Law School calls this common misconception "pan-aboriginalism," or "the tendency to assume that Indigenous cultures are sufficiently alike that knowledge of one culture can readily be applied to another culture."[18]

Speaking generally, Indigenous peoples in the territory now called Canada belong to three broad subgroups: First Nations, Métis and Inuit:

> First Nations people are the descendants of the original inhabitants of the territory south of the Arctic. "First Nations" is a term used to describe Indigenous people whose territories are primarily south of the treeline. The term "First Nations" came

[17] "Cultural competence is a set of behaviors, attitudes and policies that come together in a system, agency or professional and enable that system, agency or professional to work effectively in cross-cultural situations." (Terry L. Cross, MSW, *Focal Point*, The Research and Training Center on Family Support and Children's Mental Health, Portland State University, Fall 1988.

[18] Nora Rock, "Providing high-quality service to Indigenous clients." LawPRO Magazine Volume 15, Issue 1 at p. 6 [online at: http://www.practicepro.ca/LawPROmag/High_Quality_Service_Indigenous_Clients.pdf].

into use in the 1980's to replace the term "Indian", which was a colonial term defined in the *Indian Act*.

Métis people are the descendants who were born of relations between First Nations women and European men, at least initially. Over time, the Métis have developed distinct communities and cultures. The Métis National Council defines Metis as follows:

> The Métis emerged as a distinct people or nation in the historic Northwest during the course of the 18th and 19th centuries. This area is known as the "historic Métis Nation Homeland," which includes the 3 Prairie Provinces and extends into Ontario, British Columbia, the Northwest Territories and the northern United States. This historic Métis Nation had recognized Aboriginal title, which the Government of Canada attempted to extinguish through the issuance of "scrip" and land grants in the late 19th and 20th centuries.[19]

The Métis National Council consequently also adopted the following definition of "Métis" in 2002:

> "Métis" means a person who self-identifies as Métis, is distinct from other Aboriginal peoples, is of historic Métis Nation Ancestry and who is accepted by the Métis Nation.[20]

Inuit are the descendants of the original inhabitants of the Arctic territory. They are culturally similar to the Indigenous peoples of Greenland and Alaska. International Journal of Indigenous Health provides the following definition:

> Inuit are a circumpolar people, inhabiting regions in Russia, Alaska, Canada and Greenland, united by a common culture and language. There are approximately 55,000 Inuit living in Canada. Inuit live primarily in the Northwest Territories, Nunavut and northern parts of Quebec and coastal Labrador. They have traditionally lived for the most part north of the treeline in the area bordered by the Mackenzie Delta in the west, the Labrador coast in the east, the southern point of Hudson Bay in the south and the High Arctic islands in the north."[21]

[19] The Métis Nation of Ontario: http://www.metisnation.ca/index.php/who-are-the-metis/citizenship
[20] http://www.metisnation.ca/index.php/who-are-the-metis/citizenship
[21] https://journals.uvic.ca/journalinfo/ijih/IJIHDefiningIndigenousPeoplesWithinCanada.pdf

The unique territories that Indigenous people occupied are an important part of how distinct Indigenous cultures and Nations developed.

All three Indigenous subgroups have constitutional protection as "the Aboriginal peoples of Canada" under section 35 of the *Constitution Act, 1982.*[22] All three subgroups fall within the definition of "Indians" for the purposes of federal jurisdiction under section 91(24) of the *Constitution Act, 1867.*[23]

Within each of these broad groups are a wide variety of distinct Nations, cultures, communities, languages and histories. For example, with respect to First Nations alone, there are over 630 First Nation communities across Canada, representing over 50 distinct Nations and 50 Indigenous languages.[24] The Royal Commission on Aboriginal Peoples (RCAP) described Aboriginal Nations, as distinct from Aboriginal peoples, as "a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories."[25]

According to the 2011 National Household Survey, there were 1,400,685 people in Canada having an Aboriginal identity.[26] Indigenous people comprise diverse groups living across the country, ranging from rural and on-reserve locations to large urban centres. Indigenous populations are young and growing, with the largest numbers in Ontario and the four western provinces.

Each Nation has a different creation story, spirituality, and worldview. An understanding of these elements is important to an understanding of Indigenous cultures. Each community also holds distinct values, customs, traditions and laws. For example, in the Final Report[27] of the Indigenous Bar Association's (IBA) *Accessing Justice and Reconciliation Project,*[28] Professor Hadley Friedland notes the significant diversity of legal traditions amongst Indigenous communities:

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[22] Section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[23] Section 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3; *Reference re Eskimos*, [1939] SCR 104 (regarding Inuit); *Daniels v Canada (Indian Affairs and Northern Developments)*, 2016 SCC 12 (regarding Metis). The *Indian Act*, RSC 1985, c. I-5 defines eligibility for Indian registration, resulting in the statutory categories of "status Indians" and "non-status Indians", as well as the creation of Indian bands comprised of status Indians. As of 2013, there were 614 Indian bands in Canada.
[24] Indigenous and Northern Affairs Canada, Indigenous Peoples and Communities: First Nations. (online: http://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795).
[25] RCAP Final Report, Vol 1, "Looking Forward, Looking Back." Online: https://qspace.library.queensu.ca/bitstream/handle/1974/6874/RRCAP1_combined.pdf?sequence=5&isAllowed=y at p. iii.
[26] Statistics Canada National Household Survey (2011): http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm.
[27] Hadley Friedland, "Accessing Justice and Reconciliation Project: Final Report" (2014) [online at: http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf].
[28] The Accessing Justice and Reconciliation Project was a national research project launched by the University of Victoria Faculty of Law's Indigenous Law Research Clinic, the Indigenous Bar Association

> There is no 'one size fits all' approach within or among Indigenous legal traditions. There are a wide variety of principled legal responses and resolutions to harm and conflict available within each legal tradition.[29]

Lawyers, therefore, should be mindful of the unique cultures, histories, values, traditions, worldviews and diversity of Indigenous clients and counterparties.

2.2.2.2 The history and impact of attempts at colonialization, the dispossession of land and forced relocation

It is impossible to make sense of the issues that trouble the relationship today without a clear understanding of the history and (ongoing) impact of attempts at colonization on Indigenous peoples in communities.

Indigenous peoples had been living on the lands for thousands of years, living in complex legal orders, when settlers arrived.[30] The Doctrine of Discovery, by which European settlers historically claimed ownership of North American lands as *terra nullius* and authority over Indigenous Peoples, has been soundly rejected. As the Supreme Court of Canada unanimously held in 2004: "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered."[31]

The early period of co-operation between Indigenous peoples and settlers offers some insight into how to restore balance to the relationship between Indigenous peoples and settler society. However, relations between Indigenous peoples and settlers evolved as the balance of power between Indigenous peoples and settlers shifted. [32]

(IBA) and the Truth and Reconciliation Commission of Canada (TRC), and funded by the Ontario Law Foundation.

[29] Hadley Friedland, "Accessing Justice and Reconciliation Project: Final Report" (2014) online at: http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf at p. 3

[30] http://data2.archives.ca/e/e448/e011188230-01.pdf

[31] *Haida Nation v. British Columbia*, [2004] 3 SCR 511 at para 25.

[32] RCAP, p. 95:""Relations were established in a context in which Aboriginal peoples initially had the upper hand in population and in terms of their knowledge of the land and how to survive in it. These factors contributed to early patterns of co-operation and helped to overcome the colonial attitudes and pretensions the first European arrivals may originally have possessed. The newcomers, far from their home ports and scattered in a vast land of which they had little practical knowledge, of necessity had to develop friendly relations with at least some original inhabitants. Political and economic accommodations soon followed." http://data2.archives.ca/e/e448/e011188230-01.pdf

The Royal Commission on Aboriginal Peoples (RCAP) noted in 1996 the profound impact of colonization – particularly the impacts of displacement.[33] Aboriginal peoples were displaced physically — they were denied access to their traditional territories and in many cases forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. They were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.[34]

RCAP further noted the devastating impact that colonization has had on Indigenous Peoples and communities:

> Repeated assaults on the culture and collective identity of Aboriginal people […] have weakened the foundations of Aboriginal society and contributed to the alienation that drives some to self-destruction and anti-social behaviour. Social problems among Aboriginal people are, in large measure, a legacy of history.[35]

For example, a 2013 study by the Canadian Centre for Policy Alternatives indicates that 40 percent of Indigenous children in Canada fall below the poverty line, compared to 15 percent of children in the wider population.[36] The number rises to a full 50 percent when looking at "status" First Nations children only. This is as a result of (ongoing) colonization, the theft of land, failures in treaty promises, and the failure of the Canadian state to live up to its legal obligations to respect the human rights of Indigenous children.[37] While Indigenous Peoples and communities undoubtedly face these and other gaps in social, health and well-being indicators as compared to the general population, as the Truth and Reconciliation Commission has observed, "[u]nlike in other countries, the Canadian government has not provided a comprehensive list of well-being indicators comparing Aboriginal and non-Aboriginal populations. The lack of accessible data on comparable

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[33] RCAP Final Report, Vol 1, "Looking Forward, Looking Back." Online: https://qspace.library.queensu.ca/bitstream/handle/1974/6874/RRCAP1_combined.pdf?sequence=5&isAllowed=y at p. 36.
[34] RCAP Final Report, Vol 1, "Looking Forward, Looking Back." Online: https://qspace.library.queensu.ca/bitstream/handle/1974/6874/RRCAP1_combined.pdf?sequence=5&isAllowed=y at p. 132.
[35] RCAP, "Highlights from the Report of the Royal Commission on Aboriginal Peoples: Gathering Strength" <online: http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637#chp5> at para 4.
[36] David MacDonald & Daniel Wilson, "Poverty or Prosperity: Indigenous Children in Canada" Canadian Centre for Policy Alternatives (June 2013) at p. 12.
[37] 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 (CanLII)

health indicators means that these issues receive less public, media, and political attention."[38]

Another insidious impact of colonization that is difficult to measure is the loss of family and community ties and cohesion, and a sense of cultural identity among many Indigenous Peoples as a result of physical, cultural, social and political displacement described above.

2.2.2.3 The legacy of Indian residential schools and other colonization attempts and their multi-generational impact

As briefly introduced above, lawyers should recognize the history and legacy of the Indian Residential School System and its impacts. The Residential School System was a central aspect of Canada's deliberate and longstanding policy to suppress, and ultimately eradicate, Indigenous cultures and assimilate Indigenous peoples into the dominant settler society. Children in Residential Schools often suffered severe abuse – physically, sexually, psychologically and spiritually. Many children did not survive their ordeal, and those who did survive were traumatized by the abuse they endured.

The Truth and Reconciliation Commission of Canada (TRC) examined the history and legacy of Indian Residential Schools. The TRC described Residential Schools as being:

> created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society […].
>
> For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide."[39]

The experiences suffered by Residential School Victims and Survivors have continued to be passed down to subsequent generations – through what is known as "intergenerational

[38] Final Report of the Truth and Reconciliation Commission, Executive Summary (online: (http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf) at Preface to p. 161.
[39] Final Report of the Truth and Reconciliation Commission, Executive Summary (online: (http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf) at pp. v, 1.

trauma or "historical trauma".[40] Kevin Berube, director of the Mental Health and Addictions Program at the Sioux Lookout Meno Ya Win Health Centre, and member of Flying Post First Nation, defines intergenerational trauma and its unique expressions with respect to Indigenous Peoples:[41]

> Intergenerational trauma, or transgenerational trauma, is what happens when untreated trauma-related stress experienced by survivors is passed on to second and subsequent generations. […] Intergenerational trauma is usually seen within one family in which the parents or grandparents were traumatized, and each generation of that family continues to experience trauma in some form. In these cases the source can usually be traced back to a devastating event, and the trauma is unique to that family.
>
> What makes the intergenerational trauma in the case of First Nations people different is that it wasn't the result of a targeted event against an individual – it was a set of government policies that targeted and affected a whole generation. Children were traumatized when they were taken from their parents and placed into either government-funded, church-controlled, residential learning institutions or into foster homes. Many children suffered horrific abuse while in these homes and institutions. And parents and communities were traumatized when their children were taken away from them with little or no idea if or when they would return.
>
> Direct survivors of these experiences often transmit the trauma they experienced to later generations when they don't recognize or have the opportunity to address their issues. Over the course of time these behaviours, often destructive, become normalized within the family and their community, leading to the next generation suffering the same problems.
>
> Many self-destructive behaviours can result from unresolved trauma. Depression, anxiety, family violence, suicidal and homicidal thoughts and addictions are some of the behaviours […] mental health therapists see when working with clients who have experienced direct or intergenerational trauma.

To each traumatic part of Canada's colonial history, Indigenous people have responded with resistance and resilience.

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[40] The term "historical trauma" was coined by Dr. Maria Yellow Horse Brave Heart.

[41] Kevin Berube, "The intergenerational trauma of First Nations still runs deep" *The Globe & Mail* (16 February 2015), online: <http://www.theglobeandmail.com/life/health-and-fitness/health-advisor/the-intergenerational-trauma-of-first-nations-still-runs-deep/article23013789/> at paras 6-10. See also the summary of the testimony of Dr. Amy Bombay on intergenerational trauma in *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 (CanLII), paras. 415-427.

Therefore, in order to provide culturally competent legal services, lawyers must be mindful of the painful history of colonization, including that of Residential Schools, and how the intergenerational trauma endured by Indigenous Peoples and communities may continue to inform Indigenous clients' perceptions towards the justice system and those who operate within it.

2.2.2.4 The importance of the land and water to Indigenous cultures, spiritual practices and economies

Many legal issues involving Indigenous Peoples will have dimensions related to land and water, and the associated rights and activities engaged in by those communities. Indeed, land and water represent important aspects of Indigenous cultures, spiritual practices and economies. For example, the Assembly of First Nations (AFN) notes:

> Indigenous peoples are caretakers of Mother Earth and realize and respect her gifts of water, air and fire. First Nations peoples' have a special relationship with the earth and all living things in it. This relationship is based on a profound spiritual connection to Mother Earth that guided indigenous peoples to practice reverence, humility and reciprocity. It is also based on the subsistence needs and values extending back thousands of years. Hunting, gathering, and fishing to secure food includes harvesting food for self, family, the elderly, widows, the community, and for ceremonial purposes. Everything is taken and used with the understanding that we take only what we need, and we must use great care and be aware of how we take and how much of it so that future generations will not be put in peril.[42]

In addition to land, these sacred relationships also extend to water. As the AFN notes:

> Water is the most life sustaining gift on Mother Earth and is the interconnection among all living beings. Water sustains us, flows between us, within us, and replenishes us. Water is the blood of Mother Earth and, as such, cleanses not only herself, but all living things. […] Water gives us the spiritual teaching that we too flow into the Great Ocean at the end of our life journey. […] All life requires water and yet our global water supplies are quickly being dried up and polluted. The First Nations peoples of North America have a special relationship with water, built on our subsistence ways of life that extends back thousands of years. Our traditional activities depend on water for transportation, for drinking, cleaning, purification, and provides habitat for the plants and animals we gather as medicines and foods. Our ability to access good water shapes these traditional activities and our relationships with our surroundings. As Indigenous peoples, First

[42] AFN, "Honouring Earth," online <http://www.afn.ca/en/honoring-earth> at para 2.

> Nations recognize the sacredness of our water, the interconnectedness of all life and the importance of protecting our water from pollution, drought and waste. […] Water is the giver of all life and without clean water all life will perish.[43]

In some Indigenous societies, women are recognized as keepers/protectors of the water because of their sacred role in bringing forth and carrying life in their birth water. The close relationship and proximity between Indigenous Peoples and the land and water means that land and water often play a pivotal role in both the subsistence and commercial economies of Indigenous communities, for example, through the development of natural resources and commercial fisheries. When working with and advising Indigenous clients, it is important for lawyers to understand and appreciate the significance that land and water have for Indigenous communities both culturally and spiritually, and to understand that these unique relationships may inform the priorities, policies and practices of a given community with respect to economic development.

2.2.2.5 The collective nature and importance of Indigenous rights, including Aboriginal and Treaty rights and Constitutional status

2.2.2.5.1 Contributions by Indigenous Peoples to Canada's Colonial Justice System

Indigenous legal traditions were the first laws of the land in the area that is now known as Canada, and they continue to form part of the legal fabric of Canada. Val Napoleon provides the following definition of law:

> Law is one of the ways we govern ourselves. It is law that enables large groups of people to manage themselves. Law is something that people actually do. Indigenous peoples applied law to harvesting fish and game, the access and distribution of berries, the management of rivers, and the management of all other aspects of political, economic, and social life. Since our legal orders and law are entirely created within our cultures, it is difficult to see and understand law in other cultures. In other words, law is culturally bound—it is only law within the culture that created it.[...] And most importantly, law is about thinking.[44]

Professor John Borrows describes Indigenous law as follows:

> Despite centuries of dispossession, Indigenous legal traditions are vibrant sources of knowledge. They pragmatically assist in finding answers to complex and pressing legal questions and contain significant sources of authority. They are

[43] AFN, "Honouring Water," online <http://www.afn.ca/en/honoring-water> at paras 1-3.
[44] Val Napoleon, *Thinking About Indigenous Legal Orders*, http://fngovernance.org/ncfng_research/val_napoleon.pdf

> precedential, that is, standard setting, and generate criteria for making sound judgments. Indigenous law helps produce binding measurements through persuasion and compulsion, is attentive to ethical redress and remedial actions when harm has occurred, and facilitates genuine gift giving and bequests. Indigenous laws can be constitutional. They can support the creation of internally binding obligations. Indigenous peoples' own legal systems also undergird the creation of intersocietal commitments with external bodies. Evidence of Indigenous laws' force is found in various agreements related to consultation, accommodation, contractual matters, and treaties. Indigenous laws are also a key ingredient in protecting group and individual privileges and freedoms.[45]

John Borrows has identified five sources of indigenous law: (1) Sacred, (2) Natural, (3) Deliberative, (4) Positivistic, and (5) Customary.[46] While a detailed exploration of these concepts is beyond the scope of this Guide, they provide some indication of the depth, complexity and diversity of Indigenous law as its own family of legal orders.

Indigenous Peoples have made a fundamental contribution to Canada's colonial justice system and Indigenous legal traditions form part of the basis upon which the current system stands. From the Indigenous perspective, Indigenous legal traditions stand alongside the civil and common law, and assist in the organization and structure of communities. They guide interactions, provide rights and obligations, and mediate relationships.

The oral traditions that continue in Indigenous communities to this day are the laws in and of themselves.[47] Evidence of Indigenous legal traditions may be found in the written words of treaties. Unfortunately, the contributions of Indigenous Peoples to Canada's justice system have been and continue to be routinely diminished, and are often unacknowledged. However, they have survived and continue to influence legal relationships and notions of justice, most notably with the Crown.

2.2.2.5.2 Aboriginal and Treaty Rights

Generally speaking, Aboriginal and Treaty rights are collective in nature.[48] However, certain rights may be exercised by or assigned to individual members and may therefore

[45] John Borrows, *Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education*, 61 McGill L.J. 795 (footnotes removed).
[46] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), p. 23-58.
[47] See: Val Napoleon & Hadley Friedland, *An Inside Job: Engaging with Indigenous Legal Traditions Through Stories*, 61 McGill L.J. 725
[48] See *R v Sparrow*, [1990] 1 SCR 1075 at p. 1112; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para. 115; *R v Sundown*, [1999] 1 SCR 393 at para. 36; *R v Marshall*, [1999] 3 SCR 533 at paras. 17 and 37; *R v Sappier*, [2006] 2 SCR 686, at para. 31.

have both collective and individual aspects – for example, the treaty entitlement to annuity payments.[49]

Aboriginal title is a particular species of aboriginal rights, which is a right to the land itself encompassing a right to exclusive use and occupation.[50] The Supreme Court of Canada observed in *Delgamuukw:*

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.[51]

The maintenance and protection of Aboriginal and Treaty rights is important to Indigenous Peoples as well as non-Indigenous peoples, as the Supreme Court of Canada recognized in *Van der Peet*:

> [T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1) [of the *Constitution Act*, 1982], because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status. More specifically, what s.(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.[52]

2.2.3 The *consequences* of a lack of understanding of Indigenous cultures

The formal state legal system is a cultural institution that is informed by the dominant cultural behaviour, attitudes and values which are perpetuated by its participants. The

[49] *Behn v Moulton Contracting Ltd*., [2013] 2 SCR 227, 2013 SCC 26 at para 33.
[50] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para. 137.
[51] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para. 115 [emphasis in original].
[52] *R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 (SCC) at paras 30-31 [emphasis in original]. The rulings in *Delgamuukw* and *Van der Peet* on Aboriginal title were recently re-affirmed in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

cultural backgrounds of many lawyers and judges often are not representative of Canadian society.[53]

Understanding the cultural underpinnings of Canada's legal history is important because legal professionals, historically, were deliberate in which cultures they sought to promote and which cultures they attempted to eradicate. Whether consciously or unconsciously, within today's context, lawyers, judges, and others in legal professions still develop, implement and enforce laws drawing from their cultural frames of reference.

As the law has developed in Canada, many Indigenous peoples have grown to distrust Canadian legal systems and the professionals working within them. From Indigenous perspectives, the law was only designed and meant to be enforced against Indigenous peoples, and never designed or meant to serve them. One need only review the disproportionately high levels of Indigenous children and families involved with Child and Family Services,[54] or the overrepresentation of Indigenous peoples in the criminal justice system and in our jails and prisons, as examples of the consequences of a lack of cultural competency. The history and impact of attempts at colonialization, the dispossession of land and forced relocation, including the Indian Residential School System, form a demonstrable basis for the distrust.

These unacceptable trends will continue unless lawyers, judges and others in legal professions acknowledge the institutional and systemic cultural biases historically perpetuated through the legal system, and become more culturally competent in Indigenous cultures, with a view to implementing cultural changes within legal systems.

2.2.4 The *relevance and need* for all participants in the legal system to increase their cultural competency

It should be the objective of all participants in the Canadian legal system, from lawyers to judges to administrative staff, to become increasingly culturally competent. This objective is based on certain key needs:

- to avoid the negative consequences identified above
- to ensure that lawyers are competently representing and interacting with Indigenous persons
- to ensure judges understand the context of Indigenous realities and issues and the options available for administering and determining disputes

[53] See e.g. ADVANCING THE JUSTICE ETHIC THROUGH CULTURAL COMPETENCE. Rose Voyvodic, Faculty of Law, University of Windsor.

[54] See for example *First Nations Child and Family Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (CanLII) and *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 7.

- to ensure Indigenous persons have meaningful access to justice, fair treatment and confidence in the justice system
- to facilitate the development of better laws though learning across different legal systems (common law, civil law and Indigenous legal orders)

Lawyers and judges understand the need to be competent in any area of the law in which they practice. According to the Law Society of Ontario's *Rules of Professional Conduct,* lawyers are required to be competent, or to have and apply "relevant knowledge, skills and attributes in a manner appropriate to each matter on behalf of a client…"[55] Cultural competency should be considered as an integral component to any competency in a substantive area of law. In fact, the Law Society of Ontario asks lawyers to consider whether they have the requisite degree of knowledge and skill, which include factors such as:

a) the complexity and specialized nature of the matter;
b) the lawyer's general experience;
c) the lawyer's training and experience in the field;
d) the preparation and study the lawyer is able to give the matter; and
e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.[56]

Lawyers are encouraged to take advantage of a multitude of learning opportunities from different sources that are rooted in different Indigenous cultures. At a minimum, lawyers should read the TRC Report Executive Summary and Calls to Action, familiarize themselves with the United Nations Declaration on the Rights of Indigenous Peoples, take CPD courses, read books by Indigenous authors, attend Indigenous community events, and engage with and support Indigenous communities and grassroots initiatives. These examples may also become sources of information about appropriate protocol and caution against violations of these protocols.

Cultural competency alone will not, and could never, erase past harms. However, moving forward, culturally competent lawyers, judges and other legal professionals can assist to mitigate some of those past harms, do better for this generation, and set the basis for what is to come.

Having said that, just as no lawyer can ever be fully competent in every area of law, no lawyer can ever be fully culturally competent in every culture.

[55] Law Society of Ontario (previously Law Society of Upper Canada) Rules of Professional Conduct, Rule 3.1-1. The Law Society of Ontario also offers a program whereby lawyers can become Certified Specialists in Indigenous Legal Issues. See Section 4, Resources for further information.
[56] Law Society of Ontario Rules of Professional Conduct, Rule 3.1-2, Commentary [3].

2.2.5 Obtaining Cultural Information

With the above in mind, a basic first step is to start with your client as a source of relevant cultural information, even if you also obtain information from third parties and other sources as outlined later in this Guide.

To obtain cultural information it is important to be aware, accept and appreciate the differences that exist between the lawyer's and the client's cultures. In the example of a non-Indigenous lawyer and an Indigenous client, lawyers should take the necessary steps to increase their level of cultural competence by learning more about the client's particular Indigenous culture. What is the language called? What community is the client from? How do you pronounce the language or community's name in the client's language? What other communities belong to that culture? By increasing knowledge of the client's Indigenous culture, the lawyer thereby increases his/her appreciation and respect for the cultural differences as between the lawyer and the client.

It is important for the lawyer to objectively and honestly evaluate his/her own cultural biases and stereotypes, and to identify them as potential barriers to effective communication with the client. In order to prepare to effectively communicate with an Indigenous client, the lawyer should reflect on his/her own cultural values in an effort to accept the differences that exist between the lawyer's culture and the client's Indigenous culture. The lawyer should not approach the client from a position of asserted superiority, nor should the lawyer trivialize or minimize the cultural differences, but rather the lawyer should remain curious about the cultural differences and learn to deal with them in a respectful, diplomatic and professional manner. What do I currently know about Indigenous people? Where have I gained this knowledge about Indigenous people? Have I ever learned anything about Indigenous people directly from an Indigenous person? This proposed self-evaluation would reveal a lawyer's cultural lens, the filter through which a lawyer observes and forms an opinion about different cultures. By acknowledging that a cultural lens exists, the lawyer can then begin to identify the barriers and begin to break them down in an effort to have non-judgmental and unbiased communication with the client.

For a detailed example of how to learn cultural information from a client, please see Section 3.1.4 below, "Learning about your client's heritage".

2.2.6 Practical Examples of Cultural Competency

While not an immutable set of practices, beliefs or meanings, cultural identifications, together with life experiences and histories, influence the ways in which those who hold them might see the world, communicate, and inform how they approach legal problems, make decisions and how they relate to the legal system and lawyers.[57]

Some examples of legal practices that have cultural competency components to them are the following:[58]

- Understanding that Indigenous cultures are dynamic, living and evolving cultures;
- Understanding that Indigenous peoples are individuals with a broad range of individual, familial, collective, and cultural experiences;
- Identifying and acknowledging cultural intersections (e.g. women, LGTBQ2S, persons with invisible or visible disabilities, class, age, etc.);
- Identifying and adjusting for "cultural blindness" (treating everyone as the same regardless of their background may result in continued marginalization of Indigenous peoples);
- Recognizing whether you, consciously or unconsciously, make positive or negative assumptions about an individual based solely on their cultural background, including using assessment tools to measure cultural bias;
- Recognizing that behaviours and body language may have different meanings in different cultures (e.g. eye contact, handshakes, speaking in turn, value of silence, decision making processes, vocalizing for understanding vs vocalizing for agreement, time management, language barriers, other communication differences or barriers);
- Learning how the legal system has individually or collectively impacted the individual that you are working with;
- Understanding the roots of any guardedness, mistrust, estrangement, suspicion, or defensiveness, resistance, hesitancy or non-compliance;
- Supporting your firm or organization to set goals, policies and practices for cultural competence, including for Indigenous Peoples;
- Developing awareness of the definitions and dynamics of racism, discrimination and cultural oppression;

[57] ADVANCING THE JUSTICE ETHIC THROUGH CULTURAL COMPETENCE. Rose Voyvodic, Faculty of Law, University of Windsor

[58] These examples are drawn from a few sources. Georgetown University Center for Child & Human Development, National Center for Cultural Competence. *A Guide to Infusing Cultural & Linguistic Competence in Health Promotion Training*, ed; ADVANCING THE JUSTICE ETHIC THROUGH CULTURAL COMPETENCE. Rose Voyvodic, Faculty of Law, University of Windsor; Pay, Cynthia. "Teaching Cultural Competency in Legal Clinics." *Journal of Law and Social Policy* 23. (2014): 188-219. Online:<http://digitalcommons.osgoode.yorku.ca/jlsp/vol23/iss1/12>.

- Participating in self-assessment in cultural competency;
- Practising community engagement resulting in reciprocal transfer of knowledge and skills;
- Establishing and maintaining partnerships with diverse partners within the profession; and
- Reflecting on one's own self-location within an Indigenous issue, community or conflict.

2.3 Understanding Indigenous Relationships

Lawyers should have a good understanding of the unique and multi-faceted nature of Indigenous relationships that exist among, between and within groups of Indigenous peoples. In particular, lawyers ought to give special consideration to intersectional experiences when representing Indigenous women, children, Elders, and Indigenous people who are Two Spirit.

This section is intended to provide an overview of the special considerations that ought to be given to each of these different groups within Indigenous communities, as well as to highlight the unique ways they have been affected by colonization.

2.3.1 Roles and Responsibilities

In many Indigenous communities, family and community networks are developed and maintained through an interconnected web of roles and responsibilities that each person has to others within their families and communities.

The roles and responsibilities of Indigenous women, children, Elders, and people who are Two Spirit were often viewed as different, but equal, and often respected. However, over time, these roles were forced to change in order to align with European values and, subsequently, the corresponding responsibilities both to and of members of these groups were also changed.

Examples of this phenomenon are provided below.

2.3.1.1 Indigenous women

Volume 4 of RCAP, which is entitled *Perspectives and Realities*, begins with "Women's Perspectives". The rationale for this, as intimated by the Commissioners, is as follows:

> We have been told by Aboriginal people that all things – creation, life – begin with women. All the issues mentioned in our terms of reference have a fundamental

> impact on women, and women are involved in all the perspectives identified here. We place their perspective at the beginning of this volume. (p. 3)

In this passage, the RCAP Report alludes to the significant role women played in traditional Indigenous societies. Women were recognized as essential and equal economic, political, social, and cultural contributors within their respective societies. In many societies, women were at the core of formal governance structures – for example in Haudenosaunee (Iroquois Confederacy) societies. Amongst the Anishinaabe, the governance role of women was less formal, but equally important. These roles stood in stark contrast to the imposed settler attitudes and political structures that deliberately excluded women of all origins.

The role of Indigenous women within their respective families and communities was undermined as a result of Indian Residential Schools and the assimilationist policies of the *Indian Act.* Residential schools took children away and Indigenous women were made to feel backward and inadequate as mothers and nurturers. The *Indian Act* was even more direct in attacking the role of Indigenous women in Indigenous societies: their status as Indians and members of their communities was taken away when they married out, according to the infamous section 12 (1)(b).

But, just as "all things … begin with women", RCAP also noted as one of its themes that the healing of Indigenous societies must also begin with women. According to RCAP,

> The need for healing is a recurring theme for Aboriginal women. Healing will bring about the full inclusion of Aboriginal women in all areas of Aboriginal society. For many Aboriginal women and, indeed, for many Aboriginal people, healing is a necessary first step in rebuilding their nations. (p. 3)

Indigenous women are at the forefront of the struggle to address social issues, from murdered and missing women and girls to efforts to reverse the overrepresentation of Indigenous children in the child welfare system. They are also at the forefront of environmental issues, as keepers/protectors of the water.

2.3.1.2 Indigenous children

Many Indigenous cultures view children as the centre of their universe. The well-being of a child is paramount to both the children and the community. The expression "it takes a community to raise a child" was very true for Indigenous societies.

For example, as Chief Robert Joseph recalled during his testimony at a Canadian Human Rights Tribunal hearing, the Kwakwaka'wakw people had a special ceremony called Heiltsu gula(ph) for the children in their community once they "reached 10 moons" to

celebrate them and welcome them as permanent members of their family.[59] Other Indigenous communities practise other types of ceremonies specifically for children, such as the "Walking Out" ceremony or Rites of Passage, each of which is also intended to formally welcome children into their respective societies and support them as they mature into adulthood.

These ceremonies highlight the significance that Indigenous children have within their respective communities. With the high number of Indigenous children currently involved with the child welfare system, it is important for lawyers to situate the current situation within its historical context. Chief Joseph states it well:

> And I think it's going to be important in the context of our discussion to understand that there were reasons, of course, for this loss of ability to care for our children like we had always had before this current time that, as a result of experiences of newcomers coming to our Territory, of Residential Schools and colonization, in general, that there was a huge, huge harm upon our families and communities.
>
> And I just want to say that in spite of all of those things that were broken and the things that we were not able to do for our children anymore, that we still deeply, deeply love them, that we still deeply, deeply desire to re-empower ourselves to raise our children in a way that we want to.[60]

2.3.1.3 Elders

Indigenous peoples put a high level of importance on the wisdom, knowledge and perspective of their Elders.

Being old does not necessarily make one an "Elder". Not all elderly Indigenous people are considered Elders. Rather, Elders are those individuals who have been recognized, either formally or informally, by their community as having deep and/or specialized knowledge related to a community or Nation's culture, language, history, ceremonies, spirituality, land, animals, plants, and/or medicines. Not all Elders will know everything about each of these. For example, some Elders may be highly familiar with a community or Nation's language and history, but may not be as familiar with ceremonies and spirituality.

Indigenous Elders, as the keepers of traditional knowledge, are seen to have a key role in the revitalization of Indigenous cultures and societies, and in reconciliation. Elder Robert Joseph, referred to above is a prime example. Despite his horrendous

[59] Chief Bobby Joseph, testimony Canadian Human Rights Tribunal, 2013/01/13 Ottawa, Ontario, Volume 42 transcripts, *FNCFCS et al. v Canada*
[60] Chief Bobby Joseph, testimony Canadian Human Rights Tribunal, 2013/01/13 Ottawa, Ontario, Volume 42 transcripts, *FNCFCS et al. v Canada*

experiences at Indian Residential School, he is one the greatest proponents of forgiveness and reconciliation.

The importance of Elder testimony will be outlined further in Section 3.2.2.

2.3.1.4 Indigenous Peoples who identify as Two Spirit

The term "LGTBQ2S" is often used to refer to people who are Lesbian, Gay, Transgender, Transsexual, Bisexual, Queer and/or Two Spirit (2S).[61] Two Spirit is a unique Indigenous-coined term that encapsulates a number of gender and/or sexual identities and expressions. It is not just another word for Indigenous LGBT peoples, but instead reflects the fluidity of sexuality and gender diversity within Indigenous cultures in connection with spirituality and traditional world views.[62]

Indigenous peoples who are Two Spirit often face intersectional marginalization within the justice system.[63] They often face discrimination and violence not only from the larger Canadian society, but also from within Indigenous communities that have drifted from traditional values. Suicide rates among Two Spirit peoples are especially high.

Legal practitioners should familiarize themselves with these terms and their meanings as used within specific Indigenous community contexts. Community resources are available in some locations and educational tools are available on-line.[64] Further, it is important for legal practitioners to be aware of the possible implications of an Indigenous client's gender and/or sexual identities and/or expressions in the situation in which they are seeking assistance.

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[61] https://www.glaad.org/reference/transgender

[62] National Aboriginal Health Organization, "Suicide Prevention and Two-Spirited People": http://www.naho.ca/documents/fnc/english/2012_04_%20Guidebook_Suicide_Prevention.pdf

[63] https://www.uvic.ca/law/assets/docs/ilru/Gender%20Inside%20Indigenous%20Law%20Toolkit%2001.16.pdf

[64] Egale Canada Human Rights Trust, "Two Spirits One Voice": https://egale.ca/portfolio/two-spirits-one-voice/; TransCare BC Provincial Health Services Authority, "Two Spirit": http://transhealth.phsa.ca/trans-101/two-spirit

2.3.2 Displacement

As previously noted, colonization and the introduction and imposition of Western values on Indigenous communities displaced Indigenous ways and fundamentally changed the way that Indigenous people related to each other.

Here are some examples of the ways that Indigenous people had their roles and responsibilities displaced.

When Canada enacted the *Indian Act*, it created a definition of "Indian" which was developed "according to the worth [First Nations] were perceived to have in the new colonial world."[65] Under the *Indian Act*, First Nations women were marginalized, historically devalued[66] and legally diminished[67] to become "ancillary actors, inferior on three levels: to White men, to White women and to Indigenous men" which resulted in a "legislatively ascribed legal insignificance."

Canadian society, unfortunately, through a lack of historical and cultural understanding of Indigenous women's experiences, tends to normalize violence against Indigenous women while at the same time ignoring their vulnerability, rendering them "relatively invisible to the larger society."[68]

The social issues created by displacement of Indigenous women are at the fore in the National Inquiry into Missing and Murdered Indigenous Women and Girls, which aims to examine the systemic causes of the disappearance and murder of Indigenous women and girls.[69] Lawyers aiming to practice law in this area need to be familiar with these issues.

In addition to negative experiences with law enforcement generally, Indigenous women may not be as likely to seek police intervention due to fear of not being believed, risk of arrest or having children taken away or, in extreme situations, fear of possible assault or sexual assault.[70]

At the same time, Indigenous women are incarcerated at disproportional rates. Indigenous people make up approximately 4% of the Canadian population, with approximately half that number being Indigenous women. Yet Indigenous women

[65] Lindberg, p 159
[66] Lindberg, p 160.
[67] Lindberg, Tracey. Critical Indigenous Legal Theory. Library and Archives Canada, 2008. P 137. Online: < https://ruor.uottawa.ca/handle/10393/29478>. P 158.
[68] Sheehy, p 141-142.
[69] National Inquiry into Missing and Murdered Indigenous Women and Girls. Online: < http://www.mmiwg-ffada.ca/
[70] Sheehy, p. 142-143.

comprise about 35% of the female prison population[71] and that number has risen 109% since 2001.[72]

Displacement also affected Indigenous persons who are Two Spirit:

> Due to colonization, two-spirit peoples' traditions have been lost or hidden. As a direct result, two-spirit people experience violence in their own communities due to our own internalization of racism, homophobia and transphobia. Two-spirit people are often forced to move to larger cities in an attempt to find a more accepting community and build positive support networks. Two-spirit people still experience homophobia, discrimination and prejudice in the city as well as other issues such as racism. Being disconnected from family, community and culture as well as experiencing homophobia, transphobia and discrimination means that many two-spirit people and youth particularly, are considered to be at risk.[73]

Many of today's Elders have also been affected by displacement, being survivors of Indian Residential Schools or having been somehow impacted by the policies of the *Indian Act*. According to the TRC Final Report:

> The process of assimilation also profoundly disrespected parents, grandparents, and Elders in their rightful roles as the carriers of memory, through which culture, language, and identity are transmitted from one generation to the next.[74]

The impacts on Elders and Indigenous women have in turn had impacts on children, as noted by the TRC:

> Residential schools deprived children of access to cultural and spiritual teachings and disrupted Aboriginal women's traditional roles as "mothers, grandmothers, caregivers, nurturers, teachers, and family decision-makers."[75]

2.3.3 Reconciliation of Roles

Lawyers who work with Indigenous peoples ought to be aware that there are numerous intersections to an Indigenous person's experience. Legal practitioners should understand the broader political and historical implications in addition to the legal

[71] http://www.cbc.ca/news/canada/thunder-bay/aboriginal-women-now-make-up-one-third-of-canadian-female-prison-population-1.3089050
[72] https://www.vice.com/en_ca/article/5gj8vb/why-indigenous-women-are-canadas-fastest-growing-prison-population
[73] "Two Spirit Aboriginal People," Building Inclusive Communities: Honour Life, End Violence. Ontario Federation of Indigenous Friendship Centres. Online: <http://Kanawayhitowin.ca>
[74] TRC (p.271, Executive Summary)
[75] TRC (p259, v5)

implications when dealing with, advocating for, or representing Indigenous women, children, elders, people who are Two Spirit, and persons with disabilities, within their respective practices.

It is important for lawyers and judges to seek to understand the contexts and intersectionality and work to compensate for the multiple biases against these peoples in the justice system. Even if options are limited due to community resources, the specific facts of a case or other reasons, creative solutions involving lawyers working in partnership with Indigenous peoples and communities will be required to counteract some of the harmful legal legacies.

Significantly, as RCAP pointed out and as reinforced by the TRC, despite the social issues facing Indigenous women, children, Elders and communities, healing and reconciliation are dominant themes and reasons for optimism. Legal practitioners need to be mindful of these positive undercurrents as they face harsh realities. Lawyers have an important role in the healing and reconciliation process by being open, helpful, understanding and respectful.

2.4 Understanding differences in language

2.4.1 Geographic Survey of Indigenous Languages in Canada

There are a number of colonial and practical reasons for this, but it is difficult to know exactly how many Indigenous languages are spoken in Canada. We rely on census data to survey the topic below, but it should be noted that many Indigenous people do not participate in federal censuses, and that the variety of dialectical difference complicates matters, particularly as disagreements in classifications abound.

According to the 2011 Canadian Census of Population, there were over 60 Indigenous languages grouped into 12 language families. Almost 213,400 people reported speaking an Indigenous language most often or regularly at home.

In Ontario, there are three main Indigenous languages spoken: Mohawk, Cree and Anishinaabe/Ojibway. The Mohawk people are part of the Haudenosaunee (Six Nations) Confederacy, and their language is part of the Iroquoian family of languages, which also includes Seneca, Cayuga, Oneida, Onondaga and Tuscarora.

The other major of Indigenous languages in Ontario is Algonquian. They make up the largest language grouping in Canada, including Cree, Ojibway/Anishinaabe, Innu/Montagnais, and Oji-Cree. Algonquian speaking people live across Canada, with Anishinaabe/Ojibway and Cree speakers in Ontario, Manitoba, Saskatchewan, Alberta, and Quebec; Oji-Cree speakers in Ontario and Manitoba; and Innu/Montagnais and Atikamekw speakers in Quebec. There are also “Algonquin” First Nation communities that

are part of the “Algonquian” linguistic family, whose traditional territories straddle the Ontario/Quebec border and include such areas as Ottawa and Parliament Hill. Algonquian languages also include Mi’kmaq who live mainly in Nova Scotia or New Brunswick, and Blackfoot who live mainly in Alberta.

Inuktitut is the most spoken language within the Inuit languages and informs Inuit Qaujimajatuqangit.[76] Inuktitut speakers live mainly in Nunavut, Labrador and Quebec. There is also a large Inuvialuit population in the Northwest Territories. The Inuvialuit are an Inuit group who speak Inuvialuktun, a dialect of Inuktitut.

In the Northwest Territories and the northern prairies, the largest language grouping is the Athapaskan (or Athabaskan) languages. These languages (such as Chipewyan) are spoken by the Dene peoples, including the Gwich’in, the Sahtu Dene, the Tłįchǫ, the Deh Cho (South Slavey), and the Akaitcho Treaty 8 peoples.

Michif, the traditional language of the Métis, is spoken mainly in Saskatchewan, Manitoba and Alberta.

The Yukon First Nations speak primarily either Athapaskan or Tlingit based languages.

British Columbia alone is home to over 30 different Indigenous languages.

It should be noted that some Indigenous languages are known by or are referred to by more than one name. Sometimes speakers have more than one name for their language, or names have been assigned by people outside the language group. For instance, the Ojibway language is known by its speakers as Anishinaabemowin.

Further, many of the languages spoken are spoken in several dialects. For example, Anishinaabemowin has at least a dozen dialectical variants found in many communities through central Canada and into the United States. Each dialect, and within dialects, each local variety differs in pronunciation, vocabulary, spelling and grammar, with differences being great enough to impede understanding between two Anishinaabemowin speakers.[77]

2.4.2 Language and Culture

Language is one of the primary means by which we transfer culture and cultural knowledge. This could include place, history, spirituality, but should be spoken of more

[76] This is Inuit traditional knowledge and encompasses teachings many Inuit live by.
[77] For full picture of the variety of Indigenous languages in Canada please see Site for Language Management in Canada, University of Ottawa: https://slmc.uottawa.ca/?q=native_peoples_languages.

generally as a cohesive worldview. This worldview encompasses a person's way of seeing and understanding the world.

Therefore, language is more than just words used to describe a common or universal concept, but rather encapsulates unique ways of thinking and being in the world. Understanding an Indigenous language, or speaking with a client in your own mother language (such as English or French), does not guarantee that a common understanding is being formed. One can use a common language and yet easily misinterpret meaning.

It is essential for lawyers not to have pre-judgment or cultural biases when considering language issues for Indigenous peoples. There are cultural distinctions and wide diversity which should be kept in mind.

2.4.3 Competent Interpretation

The requirement for competent interpretation, of course, does not arise only with Indigenous persons interacting with the justice system. It is an ongoing issue for all participants across the justice system, and for the full range of legal environments (including policing and custody, courts and tribunals, government and community agencies and lawyer offices). Section 27 of the *Canadian Charter of Rights and Freedoms* requires the source language to be interpreted in a manner "consistent with the preservation and enhancement of the multicultural heritage of Canadians".

Counsel should ensure that interpreters are properly qualified. Any interpreter should be cautioned about the potential to misconstrue evidence, inappropriately summarize the evidence or testimony, and/or failing to translate legal arguments with precision. Most Indigenous languages are metaphorical, and many concepts and terms are not translatable. At times, there may need to be a discussion between the witness and the interpreter before the question and answer are accurately conveyed. This discussion is helpful as long as it is explained during the process. The failure to provide meaningful interpretation can and has led to injustice and a diminished respect for the legal system.

As with any case, in addition to vigilance in ensuring competence, counsel should act to protect an interpreter in a court setting and otherwise. Based on the experience of those who have worked with interpreters, stretches of more than 40 minutes are taxing and breaks are necessary. Further, adequate compensation is key to retaining people qualified to do the work.

The need for interpretation may not be limited to court proceedings. Band meetings, administrative hearings, school board meetings, and the signing of documents may all require interpretation.

Family members as interpreters generally should be avoided. Aside from the issue of potential bias, there are issues related to confidentiality and the quality of translation. That said, in some cases, an Elder who is able or required to be helpful for assistance and support can also act as an interpreter.

2.5 Understanding the relationship between Indigenous Peoples and Canada

This section is only a very brief introduction to some of the important aspects of the relationship between Indigenous people and Canada. It is not intended to be a comprehensive guide to building cultural competency. To begin to understand the relationship between Indigenous peoples and Canada, it is helpful to look at the historical context of this relationship. Below is a brief overview of some of the milestones which underpin Canada's relationship with Indigenous peoples.[78]

2.5.1 Royal Proclamation (1763)

The Royal Proclamation of 1763 was issued by King George III to establish the core elements of the relationship between the Indigenous peoples and the Crown.

The Proclamation represented the Crown's formal recognition of the Indigenous peoples' prior entitlement to land. The Proclamation required the Crown to "treat with [Indigenous peoples] and obtain their consent before their lands could be occupied".[79] The Proclamation maintained that Indigenous peoples had title to any unceded lands and in order for British settlers to occupy such land, it had to be voluntarily ceded to the Crown by way of a treaty.[80] However, it has been observed that the Proclamation also included language which did not accord with Indigenous peoples' understanding of their relationship with the Crown.[81] Accordingly, while the Proclamation appeared to reinforce Indigenous peoples' rights to their lands, it also opened the door for the erosion of these rights by giving the British "dominion" and "sovereignty" over Indigenous territories.[82]

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[78] This list of treaties is not intended to be comprehensive, but it sets out some of the treaty events influencing the relationship between Indigenous Peoples and Canada. You are encouraged to consider additional treaties, constitutional and statutory provisions depending on the geographic, political, cultural and other circumstances of each case. For example, the early Peace and Friendship Treaties are not canvassed in this list, but were premised on a relationship between Indigenous Peoples and European settlers that did not involve surrender. For more information, see: aadnc-aandc.gc.ca/eng/1100100028589/1100100028591

[79] Right Honourable Beverly McLachlin, P.C., Chief Justice of Canada, "Aboriginal peoples and Reconciliation" (2003) 9 Canterbury L. Rev. 240.

[80] Thomas Isaac, *Aboriginal Law* 5th ed (Toronto: Thompson Reuters Canada Limited, 2016) at 67.

[81] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 155.

[82] *Borrows.*

2.5.2 Treaty of Niagara (1764)

The Treaty of Niagara was entered into in July and August 1764, one year after the Royal Proclamation was issued. The Treaty of Niagara is often viewed as a companion to the Proclamation. The Treaty was entered into at a nation-to-nation meeting between the Superintendent of Indian Affairs and at least 24 First Nations.[83] At the gathering, the Proclamation was presented for affirmation and accepted by the First Nations.[84] A Wampum Belt affirms this meeting in 1764 of the Crown and various Indigenous nations. For the Haudenosaunee, the Two Row Wampum or Guswenta made in the previous century with the Dutch affirms peace and friendship, and illustrates two vessels travelling down the same river together, each respecting the other and neither attempting to steer the other's vessel.[85] The Two Row Wampum is an integral aspect of the Treaty of Niagara and of the Royal Proclamation, and provides important insight into the intentions of Canada's Indigenous Peoples at the time.

2.5.3 *Constitution Act, 1867* and the *Indian Act*

Section 91(24) of the *Constitution Act, 1867* reads:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by the Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …
>
> 24. Indians, and Lands reserved for the Indians.

Under this constitutional head of power, Parliament first passed the *Indian Act* in 1876. The *Indian Act* governs how Canada interacts with First Nations and has been amended

[83] *Borrows*. See also "250th Anniversary of the Treaty of Niagara", *Chiefs of Ontario* (1 August 2014), online: <http://www.chiefs-of-ontario.org/node/920>. First Nations represented included "Seneca, Cayuga, Onondaga, Oneida, Mohawk, and Tuscarora of the Haudenosaunee Confederacy; Akwesasne, Kahnawake, Kahnasatake, and others of the Seven Nations of Canada; Wyandot of Detroit; Algonquin, Nipissing, Mississauga, Odawa, Ojibway and other Anishinaabe Nations; Menominee, and others who were part of the Western Lakes Confederacy."
[84] *Borrows*.
[85] *Borrows.*

numerous times.[86] It remains an obvious and controversial example of colonial attitudes toward Indigenous peoples, but with current force and effect.

The application of provincial laws and regulation to Indigenous peoples and property, notwithstanding the federal head under section 91(24), is frequently a source of litigation and is also beyond the scope of this Guide.

2.5.4 The Robinson Treaties (1850) and The Numbered Treaties (1871-1921)

Pursuant to the Royal Proclamation, Indigenous peoples held continuing rights to their lands except where the land has been voluntarily shared or ceded. In 1850, the Province of Canada entered into two major treaties north of Lakes Huron and Superior, known as the Robinson Huron Treaty and the Robinson Superior Treaty. Between 1871 and 1921, Canada undertook a series of land sharing/surrender treaties in order to open the land for settlement and development.[87] The Crown negotiated 11 treaties covering Northern and Western Ontario, the three Prairie Provinces (Alberta, Saskatchewan, and Manitoba), and the Northwest Territories.[88]

Understanding Indigenous history begins with knowing the treaties, and knowing which treaty covers the area one lives in. The Numbered Treaties all contain similar provisions, including the setting aside of reserve lands, and ensuring the continued right to hunt and fish on unoccupied Crown lands in exchange for Aboriginal title, allowances for education, and annual ammunition.[89] It is said that many Indigenous leaders entered into treaties as a way to adapt to the destruction of their traditional economies (e.g. the decimation of the buffalo on the Prairies).[90] There have been several disputes about the terms of the Numbered Treaties. For example, it has been argued that Indigenous leaders did not truly agree to treaty terms such as "cede, release, yield up and surrender",[91] given that the oral versions of treaties were different from written versions, and Indigenous conceptions of the land could not comprehend the idea of "cede and surrender".[92] Thus, like the Royal

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[86] Regarding the *Indian Act*, see especially: *St. Ann's Island Shooting And Fishing Club v. The King*, [1950] S.C.R. 211 (which holds "Indians" are wards of the state and the government of Canada is responsible for them); and *Tyendinaga Mohawk Council v. Brant*, 2014 ONCA 565 (regarding the confines and special status of Indians and their reserve lands).
[87] "Numbered Treaties" in *The Canadian Encyclopedia* by Michelle Filice (Canada, The Canadian Encyclopedia, 2016) online: <http://www.thecanadianencyclopedia.ca/en/article/numbered-treaties/>.
[88] Numbered Treaties.
[89] Isaac at 156.
[90] Numbered Treaties.
[91] Numbered Treaties.
[92] For a good overview of some of the disagreements in Indigenous-Settler understandings of the numbered treaties see: said Michael Asch, *From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution,* 17 No. 2 Can. J.L. & Soc'y 23

Proclamation, some see the Numbered Treaties as a way that the Crown has eroded Indigenous peoples' rights rather than respected them.[93]

2.5.5 The Statement of the Government of Canada on Indian Policy (the "1969 White Paper")

In 1963, the Canadian federal government commissioned UBC anthropologist Harry B. Hawthorn to investigate the socio-economic situation of the Aboriginal population. In 1966, he published his report, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*. The report concluded that Canada's Aboriginal peoples were the most marginalized and disadvantaged group among the Canadian public. It called them "citizens minus".

Hawthorne blamed years of bad government policy, especially the Indian residential school system, which failed to provide students with the necessary skills to do well in the modern economy. Hawthorne proposed that all forced assimilation programs such as the residential schools should be abolished and that Aboriginal peoples should be seen as "citizens plus" and given the opportunities and resources for self – determination.

After the consultations with Indigenous leaders, the federal government released the White Paper in June 1969. The 1969 White Paper was a Canadian policy paper proposal which was made by Prime Minister Pierre Trudeau and Minister of Indian Affairs Jean Chrétien. The White Paper proposed to abolish the *Indian Act* under the rationale that doing so would promote equality among all Canadians.

The White Paper was soundly rejected by First Nations people, in part because it contained no provisions to recognize and honour First Nations' special rights, or to recognize and deal with historical grievances such as title to the land and Aboriginal and treaty rights, or to facilitate meaningful Indigenous participation in Canadian policy making. Indigenous people viewed the policy statement as the culmination of Canada's longstanding goal of assimilation. The response of many First Nations was coordinated in what is described as "The Red Paper". The White Paper was abandoned in 1970 after opposition from many Indigenous leaders.

2.5.6 Sections 25 and 35 of the *Constitution Act, 1982*

Section 35 is viewed as a recognition and affirmation of Aboriginal peoples generally and their distinctive cultures.[94] It affirms that the Crown's acquisition of North American

[93] With respect to disputes about the terms, see, e.g., *Re Paulette*, [1973] 6 W.W.R. 97 (sub nom *Paulette v. Canada (Registrar of Titles) (No. 2)*) 42 D.L.R. (3d) 8 (N.W.T.S.C.)).
[94] Isaac at 3.

territories was governed by a principle of continuity, whereby the "property rights, customary laws, and governmental institutions of the native peoples were presumed to survive, so far as this result was compatible with the Crown's ultimate title, and subject to lawful dispositions to the contrary".[95]

Through a number of decisions, the Supreme Court of Canada has set out the meaning and significance of the constitutional recognition and affirmation of Aboriginal and Treaty rights in s. 35(1). These decisions also confirm that Aboriginal rights exist at common law. Any federal or provincial laws, acts, or decisions that infringe on existing Aboriginal and Treaty rights may be constitutionally challenged. However, once infringement has been established, the Crown has the opportunity to show that its laws, acts or decisions can be justified.[96]

Pursuant to section 25, the Charter guarantees (sections 1 to 34 inclusive) shall not be construed to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to Indigenous peoples – expressly including rights under the Royal Proclamation (1763).

In 1984, in *Guerin v. The Queen*,[97] the Supreme Court of Canada recognized a fiduciary relationship between First Nations and the Crown. More information on this case is in Section 4.2 below.

2.5.7 Nunavut Land Claims Agreement (1993)

The *Nunavut Land Claims Agreement* (NLCA) was signed in May 1993 and led to the *Nunavut Act*, 1993, S.C. 1993, c. 28.[98] The NLCA is significant in many respects. For instance, the NLCA is the largest land claim in the history of Canada – it covers 1.9 million square kilometres.[99] Additionally, the NLCA established Nunavut as a separate territory with its own legislative assembly and a public government, which was a first in Canada.[100]

The negotiations culminating in the NLCA spanned 20 years and the terms of four prime ministers – these extensive negotiations were required for the Inuit negotiators to obtain their goal of a separate government and a separate territory.[101] In exchange for

[95] Menno Boldt & J. Anthony Long, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto, University of Toronto Press, 1985) at 118.
[96] *R v Sparrow*, [1990] 1 SCR 1075 at para 65.
[97] [1984] 2 SCR 335.
[98] *Nunavut Land Claims Agreement*, enacted by the *Nunavut Land Claims Agreement Act*, SC 1993, c. 29.
[99] *Nunavut Land Claims Agreement*.
[100] "Nunavut Land Claims Agreement Turns Twenty – 10 Fast Facts", *Working Effectively with Indigenous Peoples* (9 July 2013), online: <http://www.ictinc.ca>.
[101] "Nunavut Land Claims Agreement Turns Twenty – 10 Fast Facts".

government, distinct territory, joint membership on management boards, and money for compensation and contribution to the development of Inuit programs, the Inuit agreed to surrender any Aboriginal claims, rights, title, and interests in any Canadian land and not to assert any claim based on these interests.[102] The agreement also addresses a range of topics including wildlife, harvesting, land, water and environmental regimes, conservation areas and heritage resources.[103]

2.5.8 United Nations Declaration on the Rights of Indigenous Peoples (2007), endorsed by Canada (2010)

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by resolution of the United Nations General Assembly on September 13, 2007.[104] It is an international human rights document that delineates both the rights and fundamental freedoms of Indigenous peoples globally, offering guidance on harmonious and cooperative relationships based on the principles of equality, partnership, good faith and mutual respect. It addresses such issues as culture, identity, religion, language, health, education and community.[105]

The Declaration was adopted by a majority of 144 states in favour, with four (including Canada) votes against it. As a General Assembly Declaration however, it is not a legally binding instrument under international law. In November 2010, Canada issued a Statement of Support endorsing the principles of UNDRIP[106] but it wasn't until May 2016 that Canada officially removed its objector status to the Declaration.[107]

2.6 Understanding the implications of leading legal directives

This section briefly summarizes the main legal directives concerning the rights of Aboriginal peoples in Canada. It also provides a list of additional sources that may be useful when researching an Aboriginal law issue.

[102] Isaac at 186-190.
[103] As stated, this list of treaties and agreements is illustrative and by no means comprehensive.
[104] United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007).
[105] "United Nations Declaration on the Rights of Indigenous Peoples", *Indigenous and Northern Affairs Canada* (9 May 2016) online: <http://www.aadnc-aandc.gc.ca>.
[106] "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", *Indigenous and Northern Affairs Canada* (12 November 2010), online: <http://www.aadnc-aandc.gc.ca>.
[107] Indigenous and Northern Affairs.

2.6.1 Constitutional Protections

Some of the main constitutional protections for Indigenous Peoples are cited in Resources at **Section 4.1 below.**

2.6.2 Leading Cases

There is now a lengthy set of judicial directives that are essential to an understanding of the Indigenous legal framework. A summary of these issues and cases is included in Resources at **Section 4.2 below.**

2.6.3 Non-Judicial Sources

Many non-judicial sources are also important for a better understanding of the Indigenous legal framework. A list of these sources is included in Resources at **Section 4.3 below.**

3 PUTTING LEARNING INTO PRACTICE

3.1 Meetings, interviews and engagement

3.1.1 The role of a lawyer in the justice system will be new to many Indigenous persons and may be met with a level of distrust

When working with Indigenous Peoples and communities, counsel should be mindful of how the unique circumstances and history of Indigenous Peoples may impact their understanding of, and attitudes towards, both the justice system generally and those who operate within it.

For example, Indigenous communities may hold a level of distrust towards the legal system as legal institutions have been used historically as a means to colonize Indigenous lands, peoples and communities. Jonathan Rudin, Program Director at Aboriginal Legal Services notes "[a]s a non-Indigenous lawyer […] you need to understand that even though you may see yourself as his advocate, your Indigenous client may see you instead as 'part of the system'."[108] Triers of fact are nearly never Indigenous in Canada.[109] The Aboriginal Justice Inquiry of Manitoba[110] highlighted this tension in its Final Report:

> For Aboriginal people, the essential problem is that the Canadian system of justice is an imposed and foreign system. In order for a society to accept a justice system as part of its life and its community, it must see the system and experience it as being a positive influence working for that society. Aboriginal people do not.[111]

The Honourable Murray Sinclair spoke as follows regarding the lack of trust by Indigenous people in the legal system:

> Thousands upon thousands of Indigenous children were wrongfully imprisoned in institutions in this country without having been convicted of anything beyond being Aboriginal. And that raises the very same issues about one's sense of justice and sense of injustice about our legal system that those who have been wrongly convicted feel about our system and the lack of trust that . . . we have in the exercise of discretion, the lack of trust that we have in police officers, in defence

[108] Nora Rock, "Providing high-quality service to Indigenous clients." LawPRO Magazine Volume 15, Issue 1 at p. 12 [online at: http://www.practicepro.ca/LawPROmag/High_Quality_Service_Indigenous_Clients.pdf].
[109] For more context see: *R v Kokopenace,* 2015 SCC 28
[110] Final Report available online at: http://www.ajic.mb.ca/volume.html
[111] *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1, chapter 7 (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991).

> counsel, the legal aid system, judges, the courts, it's the very same comments and the very same feelings that we have been hearing from the survivors of residential schools to this point in time.[112]

Conversely, in some cases, Indigenous people may be over-trusting of lawyers. Business suits can be a sign of unquestioned authority.

David Nahwegahbow, a lawyer from Whitefish River First Nation and partner at the law firm Nahwegahbow Corbiere in Rama, Ontario, advises that it is particularly important for non-Indigenous lawyers to understand that Indigenous clients may hold values and perspectives that are fundamentally different from their own.[113] Indeed, the operational norms of the Canadian legal system often conflict with the values, worldviews and legal traditions of many Indigenous communities. In 1996, the Royal Commission on Aboriginal Peoples (RCAP), for example, observed that "[m]any bands see the existing justice system as a foreign one, less a protector than an enforcer of an alien and inappropriate system of law."[114]

The adversarial nature of the legal system, and by extension the conventional role of lawyers, is often at odds with the values and legal traditions of many Indigenous communities who often employ more conciliatory approaches to conflict resolution. Many Indigenous peoples cannot understand the adversarial system, nor do they see the benefit of it. Lawyers, therefore, must be mindful of Indigenous clients' cultural values, explain the purpose of adversarial approaches where they are necessary, and obtain clients' consent to adopt such strategies to protect their clients' legal interests while also respecting their cultural values and ensuring they do not further undermine Indigenous clients' experience with the legal system.[115]

3.1.2 Take the time needed to explain your role and to act with empathy

As with every client, it is important to take the time to explain the rights of the client in the solicitor-client relationship. The concept of "client-centered lawyering" should be at the forefront to provide the foundation for an Indigenous person to make well-informed and

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[112] Murray Sinclair, "Not One of Us: Wrongly Accused and the Role of Bias" (Presentation delivered at Innocence Canada Conference Back to the Future: Looking Back to the Past to Change the Future 23 November 2013) online: https://vimeo.com/96210810

[113] Nora Rock, "Providing high-quality service to Indigenous clients." LawPRO Magazine Volume 15, Issue 1 at p. 12 [online at: http://www.practicepro.ca/LawPROmag/High_Quality_Service_Indigenous_Clients.pdf].

[114] Royal Commission on Aboriginal Peoples. Final Report (Ottawa: Minister of Supply and Services Canada, 1996) vol 1, at p. 267 [online at: http://www.bac-lac.gc.ca/eng/discover/Aboriginal-heritage/royal-commission-Aboriginal-peoples/Pages/final-report.aspx].

[115] Nora Rock, "Providing high-quality service to Indigenous clients." LawPRO Magazine Volume 15, Issue 1 at pp. 12-13 [online at: http://www.practicepro.ca/LawPROmag/High_Quality_Service_Indigenous_Clients.pdf].

autonomous legal decisions. A lawyer should explain his or her professional obligations to the client (i.e., solicitor-client privilege, including duty of loyalty and confidentiality) and the client's entitlement to know the details of fees and payment. For clients in northern and remote areas, regular in-person meetings may be rare, difficult or expensive. For clients without reliable communications technology, regular phone or video communications also may be rare, difficult or expensive. In all cases, lawyers should consider how best to ensure a meaningful relationship of trust with effective advice and instructions.

While helping Indigenous clients navigate the legal system, it is important for lawyers to be mindful of the fact that many Indigenous Peoples may have had negative experiences with the legal system in the past – including with their own lawyers. Lawyers should seek to ascertain clients' values, feelings, and expectations by inquiring into the client's previous experience with and understanding of the legal system.[116] In order to avoid re-victimizing clients who may have had negative experiences, lawyers should take the time to explain the various stages of the process, including the roles of different participants in the legal system, in order to ensure clients are fully informed and comfortable with the progress of their legal matter. For example, lawyers should indicate that as legal counsel, their role is to advocate on behalf of the client and to serve and protect clients' legal interests.[117]

The degree to which a lawyer may need to explain the legal system and the role of counsel will be highly dependent on the circumstances and level of sophistication of the particular client. For example, an individual client from a remote community who speaks primarily or solely in their traditional Indigenous language may require a greater level of explanation as to the role of counsel than officials from an affluent community with developed business infrastructure who may have more experience navigating legal issues. Indigenous people also may take the view that there are two different systems of law and that Canadian law is not Indigenous law. Moreover, where there are potential language barriers, lawyers may need to engage interpreters to ensure clients fully comprehend their legal rights, options, the gravity and potential consequences of their legal matters, and the role of the lawyer and the legal system in resolving their issues. In all cases, lawyers should proceed with patience, empathy and regard to the unique needs and circumstances of clients. Take the time that is needed, and budget the time that is needed when constructing a litigation plan and meeting schedules.

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[116] Nora Rock, "Providing high-quality service to Indigenous clients." LawPRO Magazine Volume 15, Issue 1 at p. 7-9 [online at: http://www.practicepro.ca/LawPROmag/High_Quality_Service_Indigenous_Clients.pdf].

[117] For additional guidance on respectful representation in residential school matters, see the Law Society of Ontario's Guidelines for Lawyers Acting in Cases involving Claims of Aboriginal Residential School Abuse: http://www.lsuc.on.ca/media/guideline_aboriginal_res.pdf.

It is important to understand that trust and cadence play a key role in the initial contact with a client. It is also important to take a few minutes to understand which community or Nation a client is from, which will help to gain trust. It is important that the lawyer ensure that his or her client knows it is safe to self-identify whether they are First Nations, Inuit or Metis (many clients will not disclose for fear of a harsher sentence). A lawyer must also inform his or her client about the client's rights with respect to *R. v. Gladue* (discussed further below) and ascertain (without assuming) whether the client understands. A lawyer must also be cautious of opening old wounds of intergenerational and systemic traumas and the need for closure after traumatic or intensive questioning.

The concept of "Aboriginal English" may also impact on a lawyer's ability to understand and effectively serve the client. This concept is reviewed by Amanda Carling who cites a passage from Dr. Lorna Fadden:

> Discourse behaviour typical of Canadian Aboriginal speakers, namely the preference for being short on words, may give police and later on juries, the impression that Aboriginal suspects are not defending themselves or that they unwittingly appear untrustworthy, or have information they wish to conceal . . . It is reasonable to assume that if legal professionals and jury members are not aware of Aboriginal speakers' dispreference for verbosity, then Aboriginal suspects will be at a greater disadvantage compared to non-Aboriginal suspects in an investigation.[118]

It may be important to determine whether an Elder would be helpful or required for assistance and support.

3.1.3 Understanding what is involved in engaging with an Indigenous community

Recalling that Indigenous Peoples and communities are not monolithic, lawyers should be sensitive to each case, client and community and willing and prepared to adopt flexible approaches to meet client needs:

- Take the time to review and research the relevant community.
- Avoid making assumptions, drawing generalizations or ascribing objectives to the client.
- Take appropriate measures to properly ascertain the client's expectations and be mindful of that community's values and traditions when developing legal strategies.
- Due to this collective nature of Aboriginal rights, it is important for lawyers to exercise due care in handling these claims as the outcome of these matters can

[118] Amanda Carling, A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions, 2017 64 C.L.Q. 415

have broader implications for rights holders beyond the narrow interests of the lawyer's own clients.

- Care must also be taken to identify the various governance structures that may exist in an Indigenous community, including the interaction (and possible conflict) between band council governance (e.g. under the *Indian Act*) and historical governance bodies.
- Know your client. Is it the individual, or is it the band? Who is giving instructions? If the lawyer is retained by a band, council resolutions may be required.
- Investigate local options early. For example, for criminal matters in fly-in courts, there may be "advance days" in the community (sometimes the day before the court day) which provide a good opportunity for education and investigation.[119] Court interpreters are often a good source of cultural information and guidance as well as language interpretation.
- Slow down, observe and ask questions. If necessary, consult with other lawyers more experienced with the issues and the cultural nuances at play, or other experts in the field.
- Show respect for the community as well as your client. Especially where the lawyer is from outside the community, recognize that you are a guest. Your words and actions will be noticed. One Elder's advice: "Watch twice, speak once."

3.1.4 Learning about Indigenous Ancestry

When asking a client about their ancestry, a lawyer must bear in mind that an Indigenous client may hesitate to provide the answer to the question "are you Indigenous?" How a client refers to him or herself is a sensitive issue, and the term "Indigenous" may be threatening to certain clients. Some clients may hesitate to embrace the term "Indigenous" because they have been victimized as a result in the past. As the Ontario legal insurer LawPRO advises:

> Jonathan Rudin of Aboriginal Legal Services of Toronto (ALST) explains that some clients may hesitate to volunteer that they are Indigenous. "For many, being identified as aboriginal has not, in their lives so far, been an advantage." Clients may even be suspicious of the motives of a lawyer who seems overly nosy. "The question needs to be asked in an expansive way," advises Rudin, "and, the lawyer needs to explain why he or she is asking it."[120]

[119] For context, as Fall 2017, there were about 30 fly-in court locations in northern Ontario, and many more across the country.

[120] Nora Rock, "Providing high-quality service to Indigenous clients." LawPRO Magazine Volume 15, Issue 1 at p. 12 [online at: http://www.practicepro.ca/LawPROmag/High_Quality_Service_Indigenous_Clients.pdf].

For example, the lawyer may say to the client "The situation we are talking about happens to have occurred close to Ohsweken, which I understand is an Indigenous community. Are you familiar with Ohsweken?" An expansive method requires using indirect questions to develop an idea of an answer that the client may be reluctant to provide, but this method could be followed up with a direct question to the client, which should be put to the client in a respectful manner after a sense of trust has developed between the lawyer and client. For example, "Over the course of our discussion, it appears that you may have a close connection to Ohsweken. Would you mind if I asked you about your heritage?" Admittedly, several presumptions are made in these examples, such as the lawyer knowing that Ohsweken is a Haudenosaunee community, but it would be important for the lawyer to do some preliminary research about the client's potential Indigenous heritage if there is reason to believe there may be a connection. For example, the client may have provided their address to the lawyer, which a lawyer may then locate as being close in proximity to Ohsweken. Similarly, the client's name may be an indication of potential Indigenous roots. This type of preparation, driven also by a lawyer's curiosity, taken beforehand is part of what it means to become culturally competent.

In some cases where a lawyer has had the opportunity to review ahead of time his or her client's background and has established a mutual trust, then a simple "Do you self-identify as First Nations?", "Do you self-identify as Inuit?", or "Do you self-identify as Metis?" is a safe and accepted approach. Note that some clients will state they are non-status and/or status and some client will state they don't identify because they do not consider themselves traditional or because they hold a different faith.

If the client is forthcoming and provides a straight answer that they are Indigenous, then a lawyer may take the necessary time to discuss with the client their Indigenous roots, keeping in mind that further discussion is only warranted if the client being an Indigenous person is relevant to the matter at hand. If it is relevant, then the lawyer should ask focused questions with the intent on acquiring the information the lawyer needs to serve the client. Before asking the questions, the lawyer should ask the client if he/she is comfortable having a discussion about the client's Indigenous roots, and affirm to the client that the discussion is protected by solicitor-client privilege.

Generally, most Indigenous people prefer to be identified by the name of their specific Nation or Community. To continue the example above, the client may respond "Yes, I am Indigenous, but I prefer Mohawk." The client may also respond "Yes, I am Indigenous, but I prefer Kanien'kehá:ka" . A non-Indigenous lawyer who has not heard the language should ask the client, in a respectful manner, "You appear to have used a word in your language, what language is that?" A typical and tempting follow-up question to be avoided is "Are you fluent in your language?" because the question is often immaterial, and because fluency in some Indigenous languages is not widespread. In other words, it has the potential to create a negative emotional response. If the question ("Are you fluent?") is a relevant one (*i.e.* to assess whether or not a translator would be necessary), then a

lawyer should express empathy, show an understanding of historic efforts by colonial governments to eradicate Indigenous language. We should keep in mind that many Indigenous communities encourage their members to use their language every day.

Once the lawyer has established the client's connection to an Indigenous community, then it may be helpful to ask for the client's family name. "Are both of your parents Kanien'kehá:ka? What is your family name?" The lawyer may ask to simply confirm the name the client provided earlier. However, another reason to ask this question is because there may be a different family name in the client's Indigenous language. For example, the client may respond with an answer in English, "My family's name is _____", or the client may provide the family name in their own language. Again, it is the same answer. The lawyer may wish to ask "Does ____ in your language mean _____ in English?" to confirm that the answer is one and the same.

There are many Indigenous people who use their English name, which may be reflected on their driver's license, birth certificate, etc., but their "real" (given or birth) name is in an Indigenous language. It is quite possible that the first and last name are in an Indigenous language. Usually, however, it is only the last name that may be in an Indigenous language. It is important to note that people from Indigenous communities, First Nations communities in particular, usually know the "real" names of the people who live there or are from there, which means that for someone from an Indigenous community, it is generally known that the English name and the Indigenous name refer to the same family. To a non-Indigenous lawyer, this may be confusing, so it may be advisable to record both names if it is relevant, and according to the client's instructions and preference as to which name to use. It is also essential to record any names a client uses in order to effectively conduct document or other searches. In any event, a lawyer is typically required, under provincial or territorial legislation or regulation, to ascertain all names by which a client is or has been known.

After the family name is provided, it may be helpful to ask for the name of the person's family community. Indigenous communities tend to have several dominant family names, so it is quite possible the client's family name is widespread in their particular community. The lawyer may wish to ask the client, "your last name is _____, how large is this family in your community?" – keeping in mind that Indigenous people live both on and off-reserve, with the majority living off-reserve in urban areas. It would be important to avoid presuming the client's family is confined to one particular area. A non-Indigenous lawyer may not be familiar with the dominant family names in the community, so it may be helpful to ask, in a respectful manner, for the names of the client's parents and grandparents as well, to avoid misidentification.

Once an Indigenous client's identity, name and community are determined, if a solid trust has been established, an Indigenous client may wish to share with the lawyer other cultural information about themselves such as significant family history, their clan, or

particular and significant details about their community, such as whether it is part of a treaty. These types of details may be given to the lawyer even though the lawyer did not ask for them. In such circumstances, it is best to avoid taking written notes and to just simply converse with the client, let the client speak, because the client is attempting to share something special with the lawyer that the client may not be inclined to share in the ordinary course. Active listening is an important asset on such an occasion. A lawyer may also wish to use voice-to-text recording during these types of interview. In any event, a lawyer should write a memo to file after the client interview, including a note about whether a client's community is party to a treaty.

3.1.5 Understanding that client interview practices may require adaptation

When working with Indigenous Peoples and communities, client interview practices may also require adaptation due to special considerations that arise when representing particular Indigenous clients and communities. For example, a disproportionate number of Indigenous Peoples do not possess photo identification. Therefore, when verifying clients' identities at the intake stage, lawyers may need to rely on alternative documents to satisfy themselves of prospective clients' identities and to meet their professional obligations under the rules of their respective provincial law societies.

Moreover, in considering the clients' perspective, lawyers should be mindful of the unique values and perspectives that Indigenous clients may hold and how these cultural elements may inform a client's behaviour. For example, the Aboriginal Justice Inquiry of Manitoba noted some of the ways that the Canadian adversarial system is in tension with many Indigenous cultural values:

> The value systems of most Aboriginal societies hold in high esteem the interrelated principles of individual autonomy and freedom, consistent with the preservation of relationships and community harmony, respect for other human (and non-human) beings, reluctance to criticize or interfere with others, and avoidance of confrontation and adversarial positions.[121]

Indigenous clients, therefore, may hold cultural values that can influence the type of information they feel comfortable disclosing, even to legal counsel, and the types of legal strategies they may feel (un)comfortable adopting. When eliciting information from Indigenous clients, lawyers should be mindful of clients' cultural values and should navigate these areas carefully and respectfully.

[121] *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1, chapter 2 (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991). Final Report available online at: http://www.ajic.mb.ca/volume.html.

Specific interview techniques may require adaptation when applied with respect to Indigenous clients. Common interview techniques include the use of the following:

1) Open-ended questions (e.g. "*How can I help you*?" or "*What brings you here today*?")

At the outset, lawyers should explain the interview process and ask if the client is comfortable with the process before proceeding (and if not, express a commitment to accommodate the client to the best of the lawyer's ability). It may also be useful to provide assurance to clients that if anything is making the client uncomfortable in the interview, clients can feel free to express their discomfort as the interview is intended to be a safe space that exists exclusively between the lawyer and client. Lawyers should support Indigenous clients' understanding of the litigation process and challenges associated with litigation fatigue.

Open-ended questions are broad in nature and are used to establish the topic of conversation. They allow the client to expand on the topic with information they consider relevant. Lawyers should listen attentively to the client's answers as they may provide an indication of their expectations and priorities. Lawyers should also pay close attention to non-verbal communication cues like the client's demeanor, tone of voice and body language, as these may suggest the client's level of comfort with the question or interview process generally. Lawyers should be attuned to how cultural factors, like a reluctance to interfere with others or to criticize, may influence a client's behaviour and the type of information a client is comfortable disclosing at this stage. Where clients may be reluctant to provide information, lawyers should remind them of their role as the client's advocate and reassure them that they are acting to protect the client's legal interests.

Lawyers should also be aware of how non-verbal communication cues may be misinterpreted from a non-Indigenous perspective. One common example is the issue of eye contact. Many Indigenous peoples may be reluctant to make or maintain eye contact during an interview or interaction. This may be interpreted in any number of ways from a non-Indigenous perspective, including, for example, as a lack of respect or engagement. However, in many Indigenous traditions, sustained eye contact may be considered disrespectful, and therefore avoiding eye contact may be a non-verbal way of conveying respect. Similarly, Indigenous clients may have rules or protocols that govern how they speak of the dead, family members and/or community politics. Lawyers should be mindful of these types of cultural protocols and how they may impact the information an Indigenous client may be prepared to disclose during the interview process.

2) Probing questions (e.g. "What happened next?" or "Why do you say that?")

Probing questions are used to encourage a client to expand on a topic. They can also be used to allow the lawyer to summarize and test what they believe the client's feelings or issues to be, and invite clarification, for example, by prefacing questions with "it seems that you…" or "it appears that…" Encouraging statements like "I see" or "tell me more" can help clients feel more comfortable and encourage them to continue providing information.

While probing questions may be a useful strategy to elicit or clarify information, lawyers should be careful not to be overbearing or dominate the discussion. For example, lawyers should be careful not to interrupt Indigenous clients – as this may encourage a client to withdraw and become more passive. Similarly, Indigenous clients may be reluctant to interrupt the lawyer in order to make or clarify a point. Allowing Indigenous clients to speak and provide information at their own pace is often the most effective way to elicit information. For example, non-Indigenous people are often uncomfortable with periods of silence in discussion, and much more so than many Indigenous peoples. Resisting the instinct to habitually fill moments of silence may encourage Indigenous clients to feel more at ease and may foster a more productive exchange.

3) Narrow/closed questions (e.g. "When did that happen?")

Narrow questions are used to elicit specific information (i.e. to clarify details or confirm facts) as they confine the subject matter of the discussion. However, these questions should be used judiciously and with caution as they may encourage clients to be passive. For example, a series of narrow questions may suggest to the client that the lawyer is only interested in their responses to specific questions which may discourage the client from actively volunteering information. This risk may be particularly present when working with Indigenous clients who may already be reluctant to disclose certain information deemed taboo; for example, information that is critical of others or that may lead to confrontation. Lawyers should use narrow questions appropriately, for example, to clarify facts as needed, while encouraging clients to remain actively involved in the interview process.

4) Leading questions (e.g. "That's not what you wanted, was it?")

A leading question is one that prompts the individual to respond in a certain way. Leading questions should be used with caution as they also encourage a client to be passive and risk eliciting information that is incorrect, for example, if a client feels it is easier to simply agree with a lawyer's suggestion than to disagree with them. This risk is particularly present when working with Indigenous clients who may seek to avoid confrontation or overly assertive positions as a result of their communities' cultural norms and values.

3.1.6 Lawyer as Opposing Counsel

Lawyers should be conscious of their professional obligations not only when working with Indigenous peoples as clients, but also when acting as opposing counsel to Indigenous peoples. Lawyers must be civil and professional when working with Indigenous peoples and bear in mind considerations related to reconciliation and access to justice. Issues such as allowing testimony by video, allowing for adjournments in appropriate cases, raising spurious procedural issues, and dealing with parties in remote areas should be given due consideration. A lawyer must respect his or her role as an officer of the court and not engage in behaviour which would discourage the use of the justice system. Advocacy does not always need to be adversarial.

An understanding of a lawyer's obligations as opposing counsel with regard to Indigenous persons is particularly important for Crown counsel. The Crown will find itself across the table from Indigenous persons in a number of very sensitive legal situations, including those related to criminal law, family law, and land claims. Crown counsel may find the information in Section 3.2 below on evidentiary considerations, and in particular the specific adaptations discussed in Section 3.2.4, helpful in their interactions with Indigenous peoples.

3.2 Adapting the laws of evidence

3.2.1 Key Principles of Evidence and Proving Your Case

The leading cases and other directives outlined in the preceding section require or suggest several key principles for evidentiary proceedings involving Indigenous peoples and claims:

- The rules of evidence should facilitate, and not hinder, justice.
- Strict adherence to the rules of evidence may not be productive.
- The rules of evidence may need to be adapted to ensure that the Indigenous perspective is given due weight.
- Reconciliation requires that the specific claims of Indigenous peoples be addressed.

The machinery and tactics of the court process may not always reflect these principles. Given the complex and historical nature of many Indigenous claims, the ensuing litigation can be made commensurately complex, as well as long, expensive and inaccessible. Contrary to judicial directives and the principles above, in some cases the practical effect has been to increase the burden (both evidentiary and otherwise) for Indigenous claimants to almost unattainable degrees. As only one example, in *Tsilhqot'in Nation v.*

British Columbia, 2014 SCC 44, for the first time in Canadian history, the Supreme Court of Canada unanimously granted a declaration of Aboriginal title over lands outside of a reserve. However, that result came at a steep price for the claimants and the legal system at large. Before the long appeal process began, the trial spanned five years and 339 days of evidence and argument, with a trial decision of 473 pages. More than thirty-five lawyers appeared on the case.

It is fair to question whether protracted legal proceedings do anything to promote the objectives of reconciliation. Counsel are encouraged to bear in mind the principles above and, whenever appropriate, take steps to ensure they are taken into account.

3.2.2 Understanding the Role and Importance of Oral Histories and Elder Evidence

Elder and oral history testimony is essential to understand history from the perspective of Indigenous peoples in relation to their cultures and their traditional lands. Archived historical documents and scientific reports, in their conventional forms, provide the basis of the documentary record in litigation, but there are important gaps in reflecting the Indigenous experience. Due to the Eurocentric views of government officials and turn of the century historians, oral history and Elder evidence has become crucial in addressing gaps in the written historical record. Some Indigenous histories were never intended to be written at all. Oral histories are also important due to a lack of records (e.g. birth, marriage, addresses). Lawyers should learn and respect cultural protocols for speaking with knowledge keepers and understand their responsibility once possessed of this knowledge.[122]

Much of the Indigenous perspective of history, especially in the period of pre-contact and the early 1900's, is scarce because traditional knowledge is primarily transmitted through the generations in the oral form.[123] Oral history has been described as "…the unwritten cultural, historical and spiritual knowledge passed down by family and community members to others over time…"[124] It has also been described as a "coherent, open-ended system for constructing and transmitting knowledge.[125] Oral traditions can include: storytelling, political discourse, ceremony, song, prayer, teachings, and daily conversation.

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[122]For example, see the Government of the Northwest Territories' Traditional Knowledge Policy: http://www.enr.gov.nt.ca/en/services/traditional-knowledge.

[123] See Darwin Hanna, "Oral Traditions: Practical Considerations for Communities in Light of the *Delgamuukw* Decision" (Assembly of First Nations, 2000). See also, Darwin Hanna, "Appropriation of Aboriginal Oral Traditions", University of British Columbia Law Review Special Issue 165 (1995).

[124] Leigh Ogsten, editor, Researching the Indian Land Question in B.C.: An Introduction to Research Strategies & Archival Research for Band Researchers (Vancouver: Union of British Columbia Indian Chiefs, 1998) at section 6.01 [un-published].

[125] See Bruce Granville Miller, "Oral History on Trial: Recognizing Aboriginal Narratives in the Courts", UBC Press (2011) at page 12.

Elders are the primary holders of the knowledge that is required to provide the communities' perspective of the unfolding of events as well as the traditional practices of a particular Indigenous group. Thus the importance of Elder and oral history evidence cannot be overemphasized for its valuable role in seeking truth and justice. The Elders are the most revered members of their communities and have held on to the knowledge and histories of their ancestors that have been passed down for centuries.

It is important to note that oral traditions and history are not "pan-Aboriginal" in that each group is distinct from one another. Nuances in terms of the region, topography, the migration patterns of animals, native flora and fauna, and historical movements of the group are all aspects that are intricately interconnected to the relationship each group has with the land and their surroundings. This notion is perhaps best described as follows:

> First Nations perspectives and accounts on Treaties convey an understanding that is fundamentally a sacred trust relationship founded from the Indigenous people's perspective in relation to Creation [of] the universe, territories lands and waters with special localities or points of connection in the region or territories experienced as a balanced orderly system.[126]

The importance of oral history and Elder evidence has been recognized by the courts. This has led to a number of effective initiatives aimed at assisting the judiciary and Aboriginal law practitioners in properly preparing, utilizing and assessing such evidence.

For instance, the Federal Court of Canada has acknowledged the need for assessing Elder and oral history evidence in light of the rules of evidence and the procedures established by the *Federal Court Rules*. The Federal Court – Aboriginal Law Bar Liaison Committee was established among members of the Federal Court judiciary and Aboriginal law practitioners to introduce practice guidelines that should be applied by the Court in Aboriginal litigation. The guiding principles provide that the *Federal Court Rules* should be applied in a flexible manner. In addition, the guiding principles require that the rules of procedure should be adapted to ensure the Aboriginal perspective is given its due weight, that Elders who testify should be treated with respect, and that Elder testimony should be approached with dignity, respect, and sensitivity.[127]

In addition, recent legislation concerning treaty rights and entitlement claims has also recognized the importance of Elder and oral history evidence. The Specific Claims Tribunal established through the *Specific Claims Tribunal Act*, SC 2008, c.22, recognizes that it is in the interests of all Canadians that the specific claims of First Nations be addressed, and that resolving specific claims will promote reconciliation between First

[126] Irene Linklater, "Treaty Reconciliation -– Kiiway- Dibamahdiiwin" (Paper presented at the Canadian Bar Associate Aboriginal Law Conference, Winnipeg, April 28, 2011) [un-published].
[127] Federal Court - Aboriginal Bar Liaison Committee, "Aboriginal Litigation Practice Guidelines", (Federal Court of Canada, October 16, 2012).

Nations and the Crown. Reconciliation requires courts and tribunals to find ways of making rules of procedure relevant to the Indigenous peoples' perspectives, and to properly provide useful, reliable and fair evidence for a court or tribunal to comprehensively consider all evidence on both sides and make a determination of the issues.

The *Federal Court Rules* inform the procedure of Specific Claims litigation. Under section 5 of the *Specific Claims Tribunal Rules of Practice and Procedure*, where rules of procedure are not provided for in the regulations, the *Federal Court Rules* can be applied to address any deficiencies.[128] In addition, it has become common practice that the Aboriginal Litigation Practice Guidelines are often accepted by all parties as direction in Specific Claims Tribunal proceedings. Specifically, the Aboriginal Litigation Guidelines are often accepted in the context of drafting the hearing process for Elder and oral history, including preparation, submission, examination and treatment of such evidence.

3.2.3 Understanding That Appropriate Admissibility and Weight Must Be Given to Indigenous Perspectives

In the 1990's, the courts began to make formal attempts to guide judges on the reception, weight and admission of oral history and Elder testimony. Until this point, rules of evidence often discounted such evidence from proceedings because it had been classified as hearsay or had been assessed as being unreliable in comparison to conventional forms of historic evidence. Thus, little or no weight was placed on evidence establishing Indigenous perspectives from Indigenous peoples themselves.

The Supreme Court of Canada sought to begin addressing this issue in the latter part of the 1990's. In *R. v. Van der Peet,* the Court grappled with the competing notions of historical evidence and the fact that existing evidentiary rules were incompatible with the Court's assessment of evidence from Indigenous perspectives. The Court directed lower courts to approach oral history and Elder evidence "in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims."[129] In addition, the Court pointed out that this kind of evidence should not be undervalued.

In *Delgamuukw v. British Columbia,* the Supreme Court of Canada, went further to accept oral history and Elder evidence as valid and useful information in assessing Aboriginal claims. The Court recognized that Indigenous communities did not keep written records and thus the "Court must come to terms with oral histories of Aboriginal societies".[130] The Court stressed that Indigenous perspectives as provided through oral and Elder testimony should be placed "on equal footing" with the historical evidence:

[128] SOR/2011-119, s 5.
[129] *R v. Van der Peet*, [1996] 2 S.C.R. 507 at para 68.
[130] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para 86.

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.[131]

In *Mitchell v. Canada,*[132] the Supreme Court of Canada stated that "the rules of evidence should facilitate justice, not stand in its way."[133] Despite this statement, the Court also held that there is no blanket admission and/or automatic weight attached to the oral history and Elder evidence before the Court. In providing some guidance on the issue of admissibility, the Court identified three guiding principles for assessing oral history and Elder evidence:

> First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.[134]

In *William et al. v. British Columbia et al.*, Justice Vickers helped to shape the notions of necessity and reliability as they relate to oral history and Elder evidence. Where an event occurred and all who witnessed that event are now dead, then the necessity of admitting the oral history or Elder evidence into evidence in court will most likely be established.[135] This tends to be the case for most, if not all, Aboriginal rights litigation cases because of the timing of events.

Further, in relation to reliability, the oral history evidence will be tested and assessed in the same manner as all other evidence. As with all forms of evidence, oral history and Elder evidence must be tested through direct and cross-examination and compared with the written record. In assessing reliability, Justice Vickers provided his method for how he would assess reliability of oral history evidence. These factors include:

> … the age of the story-teller, the traditional knowledge of the person who raised the story-teller, whether he or she has lived and experienced a traditional life,

[131] *Delgamuukw* at para. 87.
[132] *Mitchell v. MNR*, 2001 SCC 33.
[133] *Mitchell* at para 30.
[134] *Mitchell* at para. 30.
[135] *William et al. v. British Columbia et al.,* 2004 BCSC 148 at paras 18-20.

whether her or she speaks the [Aboriginal] language and his or her general reputation in the community.[136]

With regard to weighing of oral history and Elder evidence, a framework has yet to be established by the courts.[137] The issue of weight remains within the discretion of the presiding judge as the available evidence in each case is contextual and unique. As in other cases, more weight will be placed on evidence that is internally consistent, consistent with other forms of evidence, and that can address gaps in the historical record and offer a more comprehensive narrative.

3.2.4 Examples of Specific Adaptations

For the reasons above, strict adherence to rules of evidence and procedure may not be productive or appropriate in cases involving Indigenous Peoples and issues. It may be important to see if an Elder will be helpful or required for assistance and support. Often times the Elder can also act as interpreter.

Once a lawyer learns and gains a comfort level with the cultural protocols, he or she should take an active role to arrange for these cultural protocols in the courtroom.

The following are examples of specific adaptations designed to facilitate, not frustrate, the search for truth.

1. The Oath or Solemn Affirmation

To testify, a witness must give some formal indication that he or she will be truthful. The oath and solemn affirmation are mainstays of formal evidence in legal proceedings. Some Indigenous witnesses may choose to take the oath using an Eagle Feather.[138] For some, this is the equivalent of an oath on a holy book and may be done on the record. Other Indigenous court participants will ask that the Eagle Feather be present in the courtroom while they are present (as accused, witness or victim), as they believe that it assists participants to participate in the court process with courage and truth. There may be some individuals who will also wish to hold onto traditional medicines such as sweetgrass, tobacco, or other medicine while giving an oath or testimony. There are often traditional teachings that accompany the use of these medicines. Care should be taken to

[136] *William* at para. 25.

[137] These matters continue to evolve and are not without some debate. For example, even post-*Delgamuukw*, there have been instances where oral histories have not been relied upon or accepted by the courts: *Benoit v. Canada*, [2003] F.C.J. No. 923 (F.C.A.), *Newfoundland v. Drew*, [2001] 2 C.N.L.R. 256 (N.S.C.A.) and *Bernard v. The Queen*, [2003] 55 (N.B.C.A.). See also Val Napoleon, *Delgamuukw : A Legal Straightjacket for Oral Histories?* 20 No. 2 Can. J.L. & Soc'y 123.

[138] The best way to obtain a proper Eagle Feather (or other cultural elements discussed in this section) is through an Elder. Most First Nations and Indigenous organizations – especially Indigenous/Native Friendship Centres – can assist in contacting an Elder.

understand these teachings and traditions. For example, there are protocols for the care, use, maintenance and safe-keeping of the Eagle Feather which should be respected if an advocate has responsibility for it in court.

Counsel in cases with Indigenous witnesses should make enquiries and take a purposive approach to the oath and inform themselves of alternatives that accomplish the goal of acknowledging the solemnity of the occasion and the importance of truth-telling. In some cases, a community may wish to begin court with a ceremony or a prayer. These could be conducted before court is opened. The use of smudging during a hearing may also be important within some traditions (*e.g.* smudging of the hearing room or courtroom before evidence is given).

2. Expert Evidence

Common law and statutory tests for the admissibility of expert evidence may not be appropriate for witnesses in Aboriginal law cases who do not fit neatly into the "expert" or "layperson" category.

Elders giving evidence about their community's oral traditions and history, for example, may not qualify as "experts". They are different from non-Indigenous historical or academic experts because they have direct knowledge of their community's traditions and teachings. It is therefore inappropriate to treat their evidence as expert evidence.[139]

There may also be cases where an Elder or other informally-qualified witness is capable of giving evidence about a community's current norms and practices. The guidelines and expert witness rules permitting "experiential" experts should be adapted as necessary to meet the requirements of receiving *relevant and necessary* cultural context evidence. In deciding what is relevant and necessary, counsel should be prepared to explain to the tribunal why the witness' evidence is not easily understood or intuited by the trier of fact.

3. Demeanour, Cross-Examination and Credibility

Demeanour evidence – a witness' appearance, tone, mannerisms and attitude while testifying – was traditionally recognized as an important aspect of the credibility assessment. More recently, however, courts have acknowledged that demeanour is not always a reliable, or sufficient, indicator of credibility. "The assessment can be affected by cultural assumptions and stereotypes. Directness of speech and eye contact may connote honesty in one culture but rudeness in another."[140] One culture may expect offenders pleading guilty to show remorse, while another may demand that the offender

[139] Practice Guidelines for Aboriginal Law Proceedings of the Federal Court (April 2016), p. 37.
[140] Hamish Stewart, Evidence: A Canadian Casebook (Toronto Canada: Emond Montgomery Publications, 2016).

accept the penalty without emotion. Counsel should ensure their cultural competency extends to appreciating cultural differences in demeanour and presentation in formal proceedings.

Counsel should also be mindful of the potentially limited value of cross-examination as a way of uncovering the truth. Cross-examination is an essential part of the adversarial process.[141] But its value may be more limited in cases with Indigenous participants. The examination and cross-examination of Elders may require special care and preparation because it is commonly believed that an Elder should be neither questioned nor interrupted.

Counsel in cases involving Elders or analogous testimony should consider modifying their approach to witness examination (to the extent compatible with the duty to zealously defend a client's interest). They may want to ask the judge or chair of the tribunal to begin the evidence by expressing respect and appreciation for the witnesses. In some cases, alternative methods of questioning should be explored.[142] In cases where a standard cross-examination would be ineffective or inappropriate, counsel should consider the impact this would have on weight and make appropriate submissions.

Often, Indigenous people do not want to say anything bad about another person. Lawyers might consider conducting their own investigations because there is a distrust of police and the legal system.

4. Interpretation Services

The right to understand and fully participate is essential to natural justice. For a hearing to be fair, a party must understand the proceedings and be understood.[143] In criminal cases (where s. 14 of the *Charter* guarantees defendants the right to an interpreter), failure to provide a qualified interpreter is a breach of the right to be "present" at trial.[144]

Judges typically inquire into an interpreter's qualifications. Those who do not have formal accreditation and qualifications, or who are not independent from the proceedings, are rejected. The interpreters translate evidence simultaneously without commenting on it. The rules of court in many provinces have specific requirements for interpreters and translators.

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[141] The Supreme Court has said "a full and pointed cross-examination" is the "most effective tool [a litigant] possesse[s] to get at the truth": *R. v. Shearing,* 2002 SCC 58 at para. 76.
[142] Practice Guidelines for Aboriginal Law Proceedings of the Federal Court (April 2016) at pp. 35-36.
[143] *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, and *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460.
[144] *R. v. Tran,* [1994] 2. S.C.R. 951.

Counsel in cases with Indigenous participants may need the tribunal to take a flexible approach to the qualification and participation of interpreters. In some cases, the language of the participants cannot easily be translated into the language of the court. Some traditional languages, for example, cannot translate words like “guilty” or “innocent” as they have no analogues.[145] In such cases, the interpreter could play a substantive role in explaining differences in meaning and nuance that might not be captured by a direct translation. In other cases, the language requiring translation is uncommon and it is impossible to find an officially ‘accredited’ or independent interpreter. When this happens, tribunals may seek the help of the parties’ friends, family members or community to ensure all parties understand the proceedings.

5. Exclusion of Witnesses

Orders excluding witnesses are a frequent feature of court and tribunal proceedings. But they are not always appropriate in cases with Indigenous litigants and witnesses. Elders, for example, may wish to testify in the presence of other Elders or community members in accordance with their custom. Elders may also prefer to testify as a panel or have someone accompany them while they testify. Such preferences should be accommodated where possible.

6. Privilege: Settlement Discussions

Settlement discussions are generally privileged, meaning that they are without prejudice and not to be entered into evidence or disclosed to the court. In Aboriginal law proceedings, however, the Federal Court has recognized that there may be value in publishing the terms of the agreement or a summary of the process. This provides transparency for any affected communities as well as a model of process and outcome for others who may want to settle cases the same way. In some cases, settlement may be accompanied by a court order that endorses the outcome and provides legal finality to the proceeding.[146]

Admitting or otherwise publishing evidence of the settlement process acknowledges the importance of negotiation to the outcome of Aboriginal claims. Court-ordered remedies after adversarial litigation may be hollow or unsatisfying to all parties involved. In *Delgamuukw*, for example, the Supreme Court reluctantly ordered a new trial. Chief Justice Lamer held as follows:

[145] For examples, see the Report of the Aboriginal Justice Inquiry of Manitoba, Aboriginal Justice Implementation Commission, November 1999, Vol. 1, Ch. 2, online at: http://www.ajic.mb.ca/volumel/chapter2.html#6.

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

> [T]his litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in Sparrow, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.[147]

Fair negotiations between Aboriginal communities and the Crown may "best vindicate the values expressed in the [constitution] and provide the form of remedy to those whose rights have been violated that best achieves that objective."[148]

Publishing settlement discussions in this context has the added benefit of protecting litigants with less bargaining power by ensuring the process is accountable. Lawyers representing Indigenous clients in disputes with the Crown should be mindful of the warning that negotiation "may not be an appropriate way to implement existing constitutional provisions where great disparities of bargaining power exist among groups…Aboriginal peoples have found it difficult to negotiate with their oppressors."[149] In cases with such disparities, the courts can even the balance of power by facilitating the publication of settlement discussions.[150]

In the context of settlement discussions occurring in private civil litigation, lawyers representing Indigenous clients should consider advising opposing counsel of the need for disclosure of the settlement discussions at the outset of any such discussions, such that the parties can work collaboratively to develop a negotiated framework for agreed-upon disclosure of the discussions.

It is worth noting that the TRC Call to Action 51 calls on the federal government to publish any legal opinions it develops, and upon which it intends to act, in regard to the scope and extent of Aboriginal and Treaty rights.

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[147] *Delgamuukw* at para. 186.
[148] *Osborne v. Canada (Treasury Board),* [1991] 2 S.C.R. 69, 82 D.L.R. (4th) 321 at p. 346.
[149] James (Sakej) Youngblood Henderson et al., *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont.: Carswell, 2000), p. 394.
[150] For a discussion of the courts' role in minimizing power imbalances in negotiation, see Dwight Newman, "Negotiated Rights Enforcement" (2006), 69 Sask. L.Rev. 119.

3.2.5 Understanding different elements of demonstrative evidence, including songs, stories, maps, the Wampum Belt and other cultural artifacts

Where evidence has already been filed, "demonstrative" or "illustrative" evidence may be admitted to assist the trier of fact in understanding and evaluating that evidence.[151] This type of evidence can serve multiple purposes, which include:[152]

1. Promoting trial efficiency;
2. Organizing information already received in the trial;
3. Decreasing the potential for confusion among the triers of fact; and
4. Streamlining the task of the triers of fact.

There are several types of demonstrative evidence that may be adduced in cases involving Indigenous Peoples, including songs, stories, maps, Wampum Belts and other cultural artifacts.

Story-telling is an important part of many Indigenous cultures and communities. In *Tsilhqot'in Nation v. British Columbia*,[153] Justice Vickers explained the value of stories as evidentiary tools:

> I distinguish legends from stories. Stories are recordings of actual events in an historical period of time. […] Stories are told to remind people of significant events and are not necessarily designed to carry a life directing message.[154]

Another form of demonstrative evidence is the Wampum Belt. The Royal Commission on Aboriginal Peoples (RCAP) observed that "[w]ampum belts, [were] given and received to confirm agreements, [and] depicted symbols of the dynamic state of international relationships."[155] Indeed, much like written records, Wampum Belts are read and used for the transmission of knowledge.[156] Prominent examples of Wampum Belts include the Two Row Wampum; "a belt consisting of two rows of coloured wampum […] [which] recorded a treaty between the Haudenosaunee and Dutch colonists in 1613, as well as subsequent

[151] *R v Kanagasivam*, 2016 ONSC 2250, [2016] O.J. No. 1932 at para 41.
[152] *R v Kanagasivam*, 2016 ONSC 2250, [2016] O.J. No. 1932 at para 45.
[153] 2007 BCSC 1700
[154] *Tsilhqot'in Nation v British Columbia,* 2007 BCSC 1700 at para 435.
[155] Royal Commission on Aboriginal Peoples. Final Report (Ottawa: Minister of Supply and Services Canada, 1996) vol 1, at p. 116 [online at: http://www.bac-lac.gc.ca/eng/discover/Aboriginal-heritage/royal-commission-Aboriginal-peoples/Pages/final-report.aspx].
[156] Jeffery G. Hewitt, "Reconsidering Reconciliation: The Long Game." (2014) 67 SCLR 259 at 263.

agreements concluded with the French and the British"[157] and the "One Dish" or "Dish with One Spoon" – an agreement between the Anishinabe and Haudenosaunee Confederacy, reflected in a wampum belt, "which symbolized the understanding that both Nations would share the bounty of the land without interference in the other's sovereignty."[158]

Generally speaking, the decision as to whether or not to admit demonstrative evidence is left to the discretion of the trial judge, who will weigh the probative value of the evidence against any potential prejudicial effect.[159]

Aboriginal rights claims raise unique and challenging evidentiary issues due to the fact that the rights being asserted often originated in times where there were no written records of the practices, customs and traditions engaged in.[160] The evidentiary difficulties in Aboriginal rights claims has been considered by the Supreme Court of Canada in multiple cases.

Some traditions call the oral history of an Indigenous house or community its "adaawx" or "kungax". In *Delgamuukw v British Columbia*, the trial judge grappled with the admissibility of the communities' "adaawx", describing it as follows:

> An adaawx is the important information of a house which is passed on orally from generation to generation. An adaawx includes both the spiritual or mythological history of a house such as the legend of the supernatural bear, and the actual fact of dispersal or migration. Also included in the adaawx are the totem poles, crests and blankets of a house; the honoured chiefly names of a house, its customs; and a description, by reference to landmarks, of its hunting and fishing grounds or territory.[161]

At trial, the judge admitted this evidence "out of necessity as exceptions to the hearsay rule because they cannot be proven in any other way."[162] Later in its own decision, the Supreme Court of Canada affirmed the judge's ruling on this point of evidence:

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[157] Royal Commission on Aboriginal Peoples. Final Report (Ottawa: Minister of Supply and Services Canada, 1996) vol 1, at p. 116 [online at: http://www.bac-lac.gc.ca/eng/discover/Aboriginal-heritage/royal-commission-Aboriginal-peoples/Pages/final-report.aspx].
[158] Jeffery G. Hewitt, "Reconsidering Reconciliation: The Long Game." (2014) 67 SCLR 259 at 263.
[159] *Draper v Jacklyn*, [1970] SCR 92 at pp. 96-97.
[160] *R v Van der Peet*, [1996] 2 SCR 507 at para 68.
[161] *Delgamuukw v The Queen*, 1987 CanLII 2980 (BC SC) at para 47 [emphasis added] (online at: https://www.canlii.org/en/bc/bcsc/doc/1987/1987canlii2980/1987canlii2980.html?autocompleteStr=%5B1987%5D%206%20W.W.R.%20155&autocompletePos=1).
[162] *Delgamuukw v British Columbia*, 1991 CanLII 2372 (BC SC) at p. 148 (online at: https://www.canlii.org/en/bc/bcsc/doc/1991/1991canlii2372/1991canlii2372.pdf).

> The admissibility of the adaawx and kungax was the subject of a general decision of the trial judge handed down during the course of the trial regarding the admissibility of all oral histories […] Although the trial judge recognized that the evidence at issue was a form of hearsay, he ruled it admissible on the basis of the recognized exception that declarations made by deceased persons could be given in evidence by witnesses as proof of public or general rights […] He affirmed that earlier ruling in his trial judgment, correctly in my view, by stating […] the adaawk and kungax were admissible 'out of necessity as exceptions to the hearsay rule' because there was no other way to prove the history of the Gitksan and Wet'suwet'en nations.[163]

In *R v Van der Peet,* the Supreme Court of Canada similarly held that courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal rights claims:

> [A] court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.[164]

3.3 Gaining specific guidance in particular areas of law

The scope of this Guide does not permit specific guidance in every area of law and practice. Further, the intersectionality of different legal issues (e.g. matrimonial real property, child custody) and locations (on/off reserve, different provinces) means that it will be particularly important to deal with each situation on its specific facts. The areas canvassed below are illustrative only.

[163] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 95 (online at: https://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html?autocompleteStr=delga&autocompletePos=1).
[164] *R v Van der Peet*, [1996] 2 SCR 507 at para 68.

3.3.1 Criminal

Indigenous Peoples are over-represented in the criminal justice system,[165] in large part due to "widespread bias against Aboriginal people within Canada" that "has translated into systemic discrimination in the criminal justice system."[166] The Supreme Court has called this a "crisis" and a "sad and pressing social problem." Canadian law encourages courts to be part of the solution.

As early as 1971, the Ontario Court of Appeal held that cultural background and social relationships should be recognized and considered in assessing the fitness of sentence for an Indigenous offender.[167] The *Criminal Code* and *Youth Criminal Justice Act* govern the conduct of criminal cases and now require courts to take Indigenous heritage into account in making decisions.[168] Note that in some Indigenous cultures (e.g. Anishinabe), there is no word for "guilty" or "innocent". Euro-Canadian concepts like these are not shared by all cultures.

R. v. Gladue is the leading decision on the importance of considering Indigenous heritage when determining the appropriate sentence for an Indigenous offender. In *Gladue*, the Supreme Court acknowledged that...

> the circumstances of Aboriginal offenders differ from those of the majority because 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. Moreover, as has been emphasized repeatedly in studies and commission reports, Aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate.[169]

The *Gladue* decision directed judges in criminal cases to consider these systemic background factors as mitigating on sentence.[170] This direction has since been extended to decisions involving Indigenous defendants/respondents outside the classic criminal sentencing context. The *Gladue* regime applies whenever an Aboriginal person's liberty is at stake, which has been given a broad interpretation by the courts.

It is important to note that *Gladue* systemic factors are not only for sentencing. *Gladue* factors will be relevant to a number of different stages of a criminal proceeding. How the

[165] *R. v. Gladue,* [1999] 1 S.C.R. 688 at para. 58.
[166] *Gladue* at para. 61, *R. v. Williams,* [1998] 1 SC.R. 1128 at para. 58.
[167] *R. v. Fireman*, [1971] O.J. No. 1642 (C.A.) at paras. 2-18
[168] See, for example, s. 718.2(e) of the *Criminal Code* and s. 38(2)(d) of the *Youth Criminal Justice Act*.
[169] *Gladue* at para. 68
[170] See *R. v. Ipeelee* at para. 73 following *R. v. Wells* at para. 38.

Gladue factors are considered will depend on the nature and stage of the proceeding, and should be approached in a contextual manner. For example, readers also cautioned against equating the systemic factors affecting bail and judicial interim release with those factors affecting sentencing, given that different principles are at stake. While guilt will have been established in the sentencing context, a presumption of guilt should not be imported into the bail context or for other purposes before guilt has been established beyond a reasonable doubt.

Lawyers taking on a criminal file should determine early if a client identifies as Indigenous[171] because this will influence the way the court approaches the case, or even which court hears it: some provinces have "*Gladue* Courts" (more recently referred to as "Indigenous Peoples Courts") with Aboriginal court workers and judges and prosecutors who have familiarity with Indigenous legal issues. There are 14 Indigenous Peoples Courts in Ontario, and more across the country.

Counsel investigating a client's cultural background should bear in mind that Indigenous heritage is relevant even where there is no formal legal proof of status or strong connection to a particular community. It is also relevant even where the person learned only recently that they are in fact Indigenous. In some cases, recent awareness of Indigenous heritage occurs precisely because of the "60's Scoop" or because they were brought up to hide their heritage.

Lawyers may need to work through the politics of identification. Identifying as Indigenous within the criminal justice system has historically been, and in many instances continues to be, a negative experience that does not assist an accused person. The Donald Marshall inquiry provides a sobering example of a case where all participants in the justice system, including defence lawyers, were found to have contributed to a wrongful conviction because of bias or racism.[172] Indeed, Kent Roach noted:

> The Indigenous experience of wrongful convictions cannot be easily separated from broader and pervasive issues of colonialism, racism and systemic discrimination that contribute to gross overrepresentation of Indigenous people in Australian and Canadian prisons as well as disproportionate rates of Indigenous crime victimisation. The close connection between Indigenous wrongful convictions and these larger socio-economic and systemic factors allows wrongful convictions to be approached through a broader lens.[173]

[171] *R. v. Kreko*, 2016 ONCA 367
[172] See the Marshall Inquiry Report at: https://novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf
[173] Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015), 17 Flinders Law Journal 203, p. 205

Kent Roach found that "Indigenous people are grossly over-represented among the wrongfully convicted in relation to their small percentage in the Australian and Canadian populations."[174]

Indigenous heritage may be proven through informally-gathered information from the client, friends and relatives, or the community, either by defence counsel or in the form of a court-ordered *Gladue* report. It is the obligation of counsel for both the prosecution and defense to adduce this evidence (*R v Wells*, 2000 SCC 10 at para 54, and *Kakekagamick*, 2006 CanLII 28549 (Ont. C.A.) at para. 44).

Imprisonment embitters those who are imprisoned and their communities. Lawyers should consider restorative solutions. These solutions may involve a consensus-based instead of adversarial process (e.g. including through the use of a circle in which everyone speaks).

For Crown counsel practising in this area, resources and training are available, including Bimickaway (referred to in the Resources section of this Guide at Section 4.12). As of the date of publication of this Guide, Bimickaway has been delivered to over 1,600 Ontario Public Service employees, most of whom work in justice sector ministries.

The following are common areas of criminal law where Indigenous heritage is an important consideration, although practitioners should be aware that *Gladue* factors and other elements apply differently throughout the stages of a criminal justice process. As elsewhere, counsel are encouraged to seek experienced guidance:

Bail: Courts considering the release of an Indigenous accused on bail must consider the relevant systemic *Gladue* factors. Bail decisions must not be made to "perpetuate systemic racial discrimination."[175] This is especially important for accused persons with a weak "release plan." Bail decisions often turn on the strength of the proposed plan for supervision in the community, which in turn depends on the accused person's connection to an established and well-resourced support network. Courts must be careful not to over-emphasize the importance of a release plan for an Indigenous accused for whom community support may be non-traditional or unavailable due to systemic *Gladue* factors. Lawyers pursuing bail for Indigenous accused should inform the presiding justice about

[174] Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015), 17 Flinders Law Journal 203, p. 226. See also: Amanda Carling, *A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions*, 2017 64 C.L.Q. 415
[175] *R. v. Robinson*, 2009 ONCA 205 at para. 13; *R. v. Magill*, 2013 YKTC 8 at paras. 23 to 31

the client's heritage and explore the availability of bail programs and other release options that do not require established or well-resourced community support.[176]

Juries: Indigenous defendants, like other accused persons, have a *Charter* right to an impartial and representative jury. In Canada, however, there are limited legal tools available to protect this right. With respect to impartiality, Canadian courts permit a limited inquiry into potential jurors' racial or cultural biases, in the form of a sanitized one-question interrogation known as the '*Parks* question'.[177] Under *Parks,* Indigenous defendants will almost always have the right to ask potential jurors if they hold an anti-Indigenous bias that would impact their ability to decide the case impartially.[178] There is no right to ask follow-up questions or probe a potential juror's unconscious bias. With respect to the representativeness of the roll from which panels are drawn and juries selected, the Supreme Court has said defendants have a right to a representative *process,* not a representative roll or jury.[179] It declined to recognize an enhanced obligation on government to ensure an Indigenous perspective is represented on juries deciding cases involving Indigenous defendants or communities. The government must make 'reasonable efforts' to create a representative roll, but disproportionately low Indigenous participation will not, on its own, support a finding that a defendant's right to a representative jury has been violated.

Sentence: The need to take Indigenous heritage into account on sentence is codified in s. 718.2(e) of the *Criminal Code*. Sentence hearings for Indigenous offenders must acknowledge the over-representation of Indigenous peoples in Canadian prisons and seek out culturally meaningful alternatives to incarceration.[180] The Supreme Court recently reminded trial judges that "[t]o the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities."[181] Judges in Indigenous Peoples Courts incorporate traditional approaches to sentencing, such as healing and sentencing circles,

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[176] For a recent example of a successful bail application involving consideration of Indigenous heritage, see R. v Sledz, 2017 ONCJ 151 per Nakatsuru J. Readers are also cautioned against equating the systemic factors affecting bail and judicial interim release with those factors affecting sentencing, given that different principles are at stake. See the bail report of the Canadian Civil Liberties Association (at pages 76-79): https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf

[177] *R. v. Parks,* (1993), 15 O.R. (3d) 324 (C.A.)

[178] Lawyers representing Indigenous clients can ask each potential juror whether they may favour the Crown over the Accused in the case where the Accused is Aboriginal. Potential jurors who admit bias, or show discomfort in answering the question, can lead a lawyer to exclude the juror from the panel. The Supreme Court of Canada has acknowledged that potential jurors could hold conscious or unconscious biases against an Indigenous person charged with an offence due to widespread prejudice against Aboriginal people. This could deprive the accused of the presumption of innocence (*Sheehy*, p. 146; *R v Williams,* [1998] 1 SCR 1128).

[179] *R. v. Kokopenace,* 2015 SCC 28

[180] *Gladue* at para. 38.

[181] *R. v. Ipeelee,* 2012 SCC 13 at para. 66-67.

and community council programs. Counsel with Indigenous clients should inform themselves about and advocate for innovative sentencing options that may be relevant to a client. *Gladue*, importantly, is about finding a "different" approach to sentencing Indigenous offenders. It is not about an offender's "Indigenousness" amounting to a "mitigation" factor on the length of sentence.[182]

Parole: Indigenous heritage is relevant to Parole Board decisions about whether to grant, refuse or revoke parole. Sections 80 to 84 of the *Corrections and Conditional Release Act* created a process for involving First Nations communities in release planning for Indigenous offenders. The Federal Court has held that the Parole Board's jurisdiction and decisions about parole are an important component of Canada's criminal justice system and must therefore be subject to the remedial mandate described in *Gladue*.[183] Both the Parole Board of Canada[184] and the Ontario Parole Board[185] have adopted protocols for the incorporation of Elders and Indigenous culture in parole hearings.

Reference can also be made to the role of Indigenous heritage in long-term offender hearings (*R v Standingwater*, 2013 SKCA 78) and dangerous offender hearings (*R v Jennings*, 2016 BCCA 127)

3.3.2 Quasi-criminal

The question of Indigenous heritage and rights is relevant to quasi-criminal proceedings. In some regulatory prosecutions (e.g., under hunting and fishing regulations), it is a defence to the charge that the defendant was exercising a treaty right or a communal Aboriginal right to fish or hunt for food, sustenance, social or ceremonial purposes. Where the offence-creating provision violates an Aboriginal or treaty right, the defendant is acquitted because the regulation is inconsistent with s. 35 of the *Constitution Act* and because s. 88 of the *Indian Act* operates to prevent the regulation from applying to him or her.[186] These rights-based defences are fact-specific and must be assessed on a case-by-case basis.

Indigenous heritage is relevant to outcomes in a number of other quasi-criminal proceedings. The Ontario Court of Appeal in particular has endorsed widespread application of the *Gladue* principles (discussed above) in an effort to ensure Indigenous

[182] The preparation of a *Gladue* Report will require specialized assistance: see Resources, below, at section 4.10.
[183] *Twins v. Canada (Attorney General),* 2016 FC 537 at para. 47-67
[184] For Parole Board of Canada, see: http://www.slasto.gov.on.ca/en/OPB/Documents/OPB%20-%20An%20Active%20Partner%20in%20Canada%27s%20Journey%20to%20Reconciliation.html.
[185] For Ontario Parole Board, see: https://www.canada.ca/en/parole-board/corporate/publications-and-forms/fact-sheets/elder-assisted-hearings.html.
[186] *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Marshall,* [1999] 3 S.C.R. 533; *R. v. Sundown,* [1999] 1 S.C.R. 393*; R. v. Sappier; R. v. Gray*, 2006 SCC 54

people are appropriately treated in other interactions with the justice system.[187] *Gladue* principles have also been recognized in the professional discipline context: see *Law Society of Upper Canada v. Robinson*, 2013 ONLSAP 18, *Law Society of Upper Canada v. Batstone*, 2015 ONLSTH 214.

The following are some types of quasi-criminal and non-criminal proceedings where Indigenous heritage and *Gladue* background factors should be considered:

Review Board proceedings: Indigenous persons who are found not criminally responsible for a crime on account of mental disorder (NCR) are subject to the jurisdiction of provincial review boards. In *Sim,* the Court held that *Gladue* principles are not limited to the sentencing process and that the provincial review board had an obligation to consider them when making decisions about an Indigenous offender's detention and discharge from a mental health facility.[188]

Civil contempt: In *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, the Court applied *Gladue* in a civil contempt proceeding, saying: "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."[189] In that case, the law of civil contempt applied to Indigenous persons and communities that violated a court injunction by engaging in peaceful protest. The violation exposed them to the civil contempt sanctions of imprisonment and fines. The Court set aside the sanctions imposed by the court below, holding that it should have taken *Gladue* principles into account in deciding whether to impose a civil contempt penalty.

Extradition*:* Although the ministerial decision to extradite is an executive decision entitled to considerable deference, the Minister is required to take *Gladue* factors into account when exercising his or her discretion in relation to the extradition of Indigenous defendants. *Gladue* factors must also be considered by prosecutors in deciding whether to prosecute Indigenous defendants in Canada or elsewhere.[190]

3.3.3 Class Proceedings and Public Law

Counsel who seek to assert claims on behalf of classes of affected Indigenous peoples should be aware that in general, class proceedings are intended to respond to claims on behalf of numbers of individuals rather than collectives; that is, they contemplate aggregating claims tied to an individual right rather than a collective right based upon

[187] *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation,* 2008 ONCA 534 leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 357 at para. 57.
[188] *R. v. Sim* (2005), 78 O.R. (3d) 183 (C.A.) at paras. 15-16.
[189] *Frontenac* at para. 57
[190] *United States of America v. Leonard,* 2012 ONCA 622

membership in a particular band or nation. Plaintiffs' counsel should consider whether a particular claim should be asserted through a class proceeding, or possibly by way of a representative action brought on behalf of a particular band council or nation.

By way of illustration, a claim based upon abuse at a residential school might be brought as a class action because the underlying cause of action is individual in nature, while a claim to lands ceded under treaty would be collective in nature and would not normally be asserted as a class proceeding.

In general, counsel asserting a class action will wish to define a class that is as inclusive as possible. Where appropriate, this may involve a national class. However, when dealing with Indigenous claimants, it will be important to frame the claim in such a way as to take into account the significant cultural, social and historical distinctions which are likely to exist among the proposed class members in such a case. Differences in the treatment of the proposed class from province to province to territory and over time must also be considered.

Given the historic and continuing roles played by the federal, provincial and territorial governments in regard to Indigenous peoples, consideration may be given to joining one or other levels of government in such actions.

Such claims will often be based upon assertions of fiduciary duty, regulatory negligence, intentional tort, or Aboriginal rights, under Section 35 of the Constitution Act or the common law. In fiduciary duty claims, it will be important to consider that while there is a fiduciary relationship between the Crown and Indigenous peoples, not every aspect of dealings between the two is subject to a fiduciary duty.

Certain Indigenous communities have their own courts. The Akwesasne Mohawk Court, for example, deals with community laws including election appeals, ethical conduct of elected officials, community residency, membership board, peace bonds, and property law.

3.3.4 Family Law: Child Welfare Claims

Lawyers need to understand the different conceptions of the family and child-rearing that exist within Indigenous communities, in order to identify their own biases and provide effective services to Indigenous families and children.

Family law is a multi-faceted, legislation-driven area of the law, covering child welfare, family homes on reserves, property, divorce, custody and access, and more. Family law is highly governed by frequently-changing federal and provincial legislation. This section will focus on considerations related to child welfare as one example of family law issues related to Indigenous peoples.

Both historically and in the present day, issues have arisen in regard to the removal of Indigenous children from their homes as children in need of protection – including the infamous "Sixties Scoop" (the forcible removal of Indigenous children in the 1960s).[191] In many cases the complaints relate to abuse suffered in adoptive or foster homes, or more generally in relation to the loss of Indigenous identity suffered where children are placed with non-Aboriginal families. Val Napoleon has described Indigenous peoples' experiences with child welfare as follows:

> There is a long sad history in Canada regarding the treatment of Aboriginal children and families by actors representing non-Aboriginal society. The residential schools, in motive and abuses, are notorious, as is the "sixties scoop" that saw many Aboriginal children forcibly removed from their families and communities. This history is part of a longer story of massive social upheaval caused by colonial imposition, dispossession and oppression. The trauma created by these colonial mechanisms, whether deliberately or blindly, would be difficult to underestimate. While there is a huge diversity of Aboriginal communities, cultures and responses to colonialism across the continent, to my knowledge, no community has completely escaped the devastating impacts of this painful legacy. Above all else, the legacy of Canadian government intervention in the lives of Aboriginal children has been one of loss. The most public of these losses have been the absolute losses: those Aboriginal children who have died while in government care. These public and absolute losses are accompanied by many less public and less permanent losses, which are nonetheless as disruptive for community survival and individual children and families. However, as government policies shift to an increasing emphasis on keeping Aboriginal children in Aboriginal families, and as community control over children's services increases, there have been some equally public deaths of Aboriginal children in the care of Aboriginal families or Aboriginal agencies, with accompanying losses of a less permanent and public kind.[192]

Lawyers should also be aware of the current "millennial scoop" and the ongoing discriminatory apprehension of Indigenous children.[193] There are more children in care now than in the 1960s.

Many family lawyers seem to take as a given that the "best interests of the child" is an ideologically and culturally neutral concept, however, critics have shown it is premised on Euro-centric and liberal notions of childhood and law. It is a highly individualistic approach

[191] *Brown v. Canada (AG),* 2017 ONSC 251.
[192] Val Napoleon, *Tragic Choices and the Division of Sorrow: Speaking about Race, Culture and Community Traumatisation in the Lives of Children*, 25 Can. J. Fam. L. 223 (footnotes removed).
[193] Baskin, Strike, McPherson, *Long Time Overdue: An Examination of the Destructive Impacts of Policy and Legislation on Pregnant and Parenting Aboriginal Women and their Children*.

to the family that does not reflect many Indigenous practices of child-rearing or family structures. It is important for lawyers to understand that the best interests of the child is not neutral, and that it has been used as a legal tool to legitimate the destruction of Indigenous families. Patricia Monture Angus provides an analysis of how racism is constituted and legitimated through the legal structures of the child welfare system in the application of "best interests" tests that do not respect different cultural approaches to child-rearing and the family.[194] Indigenous communities have been developing their own "child well-being" laws.

A number of proposed class proceedings in this regard are ongoing across the country. Work is underway to improve cultural competency within statutory child welfare organizations.

The following tips from Australian authorities on providing culturally competent services to Indigenous Australians may be relevant:

- Deliver services in a creative and flexible manner in response to the changing needs of the community. This includes flexibility not only in the ways that services are provided, but also where they take place.
- Involve Indigenous community members in the planning of the service structure.
- Conduct programs in informal, non-threatening settings such as in a person's home (even if only initially).
- Ensure that costs to service users are kept to a minimum.
- Conduct services "in language" (the first language of local people) or, failing this, have translators or people who can present information in plain, accessible English. It is also important to ensure that any metaphors or examples used take account of Indigenous world views and experiences.
- Involve cultural artefacts in services and everyday activities (e.g., traditional Indigenous tools, foods, and artwork).
- Consult and involve family, extended kin networks, and community members in service delivery.
- Invite Indigenous Elders to participate in the program delivery.[195]

[194] P.A. Monture, *A Vicious Circle: Child Welfare Law and the First Nations* (1989-90) 3 C.J.W.L. 1. See also: Marlee Kline, "'Best Interests of the Child' Ideology, and First Nations" (1992) 30 Osgoode Hall L.J.
[195] Rhys Price-Robertson and Myfanwy McDonald, *Working with Indigenous children, families, and communities: Lessons from practice,* available here: https://aifs.gov.au/cfca/publications/working-indigenous-children-families-and-communities

Recommendations for improving Indigenous people's experiences in child welfare from *The Aboriginal Advisor's Report on the status of Aboriginal child welfare in Ontario*[196] may also be helpful.

The Ontario *Child and Family Services Act* names First Nations as parties to proceedings in which members of their communities are involved. In addition to this statutory requirement to consult, several First Nations have passed resolutions requiring they be consulted prior to any crown wardship applications being concluded. The *Act* contains multiple provisions that deal with Indigenous people.[197] Lawyers are also advised to consider the requirement to hear from Band representatives in child welfare cases.

As only one example of specialized practice, counsel should be aware that the Indian Band is a named respondent in child protection hearings. Counsel should check with the Band to identify the correct representative and to investigate customary care, counselling and other local options.

3.4 Understanding and using existing Indigenous issue protocols

Various protocols already exist for working with Indigenous peoples and issues in different legal contexts. Depending on the case and parties involved, the protocol may provide an additional overlay of procedural steps to follow, or may provide assistance for swifter and more effective outcomes. Many Indigenous, government and institutional entities have their own protocols.

A sample list of protocols is included in **Section 4.4 below**. This list is intended to be illustrative, not comprehensive, and counsel should consider if there are analogous protocols in place for the case at hand. Counsel should also consider if the protocol at issue is appropriate or sufficient, bearing in mind the learnings introduced elsewhere in this Guide.

This area is evolving rapidly as governmental and non-governmental actors develop or work to improve policies and protocols. Manitoba recently passed *"The Path to Reconciliation Act"* which requires all Crown corporations and departments to address

[196] Available here: http://www.children.gov.on.ca/htdocs/English/professionals/indigenous/child_welfare-2011.aspx

[197] For example, the Ontario legislation establishes Native Child and Family Services (Part X); sets out Indigenous-specific purposes in s. 1(2) "that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family"; and provides in s. 37 that "Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person, the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural identity." Legislation in other provincial and territorial jurisdictions should be investigated for parallel provisions, as applicable.

reconciliation. New rights may arise from such legislation if a government department acts in a way that ignores this new statutory responsibility. There are indications that Ontario is considering similar legislation.

4 RESOURCES

This Guide is intended to be an iterative and living document. It will be supplemented and amended from time to time with a continued view towards reconciliation. Additional ideas for resources which should be included in the Guide are welcome and may be sent to policy@advocates.ca.

4.1 Constitutional Protections

Section 25 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11:

Aboriginal rights and freedoms not affected by Charter

The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11:

Recognition of existing Aboriginal and treaty rights

(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "Aboriginal peoples of Canada"

(2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed

(4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

equally to both sexes

Section 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3

Legislative Authority of Parliament of Canada	**91.**	It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, … 24. Indians, and Lands reserved for the Indians.

4.2 Leading Cases

In this section, we have attempted to identify some of the leading cases in each enumerated sub-section in a brief and practical way. Readers who have additional suggestions for cases should email policy@advocates.ca.

1. Who is included in the definition of "Indian" under Section 91(24) of the Constitution Act, 1867

Reference re Eskimos, [1939] SCR 104

- Section 91(24) includes the Inuit.

Daniels v Canada (Indian Affairs and Northern Developments), 2016 SCC 12

- Section 91(24) includes all Aboriginal peoples, including non-status Indians and Métis.

2. Jurisdiction over Aboriginal Peoples

St. Catharines Milling and Lumber Co v R, (1887) 13 SCR 577

- The Supreme Court of Canada, in a ruling upheld by the Privy Council, held that Aboriginal title over land, except for land covered by Indian reserves, was vested in the Crown and could be taken away at the Crown's discretion.
- This case still stands for the proposition that Aboriginal lands acquired by the Crown through a treaty belong to the Crown in Right of the Province.

Kruger v R, [1978] 1 SCR 104

- Provincial laws apply to Aboriginal people so long as the law extends uniformly through the territory and does not target a status or capacity of a particular group.

Derrickson v Derrickson, [1986] 1 SCR 285

- Provisions of the British Columbia *Family Relations Act* dealing with the right of ownership and possession of lands on a reserve do not apply.

Paul v British Columbia (Forest Appeals Commission), 2003 SCC 55

- Provincial administrative bodies have jurisdiction to adjudicate s. 35 Aboriginal rights matters.

NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, 2010 SCC 45, [2010] 2 S.C.R. 696

- There is no reason to approach jurisdiction in labour relations matters differently where s. 91(24) of the *Constitution Act*, *1982* is engaged. Courts should still apply a functional test by examining the nature, operations and activities of the entity. Only if this inquiry is inconclusive should a court proceed to an examination of whether provincial regulation of the entity's labour relations would impair the core of the federal head of power at issue.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

- The doctrine of interjurisdictional immunity no longer applies in the context of section 35 rights, post-1982.
- Provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework (see *R v Sparrow*).

Tyendinaga Mohawk Council v. Brant, 2014 ONCA 565

- Provincial superior courts have inherent jurisdiction over cases that come before them, notwithstanding the *Indian Act.*
- Indian Bands have jurisdiction under section 89(1) of the *Indian Act* to seize or execute upon the real or personal property of an Indian situated on reserve.

3. Aboriginal / Treaty Rights

Nowegijick v. The Queen, [1983] 1 SCR 29

- The words of the treaty must be given the sense which they would naturally have held for the parties at the time.

R v Sioui, [1990] 1 SCR 1025

- The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed;

R v Sparrow, [1990] 1 SCR 1075

- Delineates criteria under which infringement of constitutionally protected Aboriginal rights (including Treaty rights) will be justified.
- Aboriginal rights in existence at the time that s. 35 of the *Constitution Act, 1982* was enacted are constitutionally protected.
- To determine whether Aboriginal and/or Treaty rights have been interfered with such as to constitute a *prima facie* infringement of s. 35, certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.
- If a *prima facie* interference is found, analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional Aboriginal right.
- The justification analysis would proceed as follows:
    1) Is there a valid legislative objective? (e.g. environmental conservation)
    2) The honour of the Crown is at stake in dealings with Aboriginal peoples. Aboriginal group in question must have been consulted, and priority should be given to the Aboriginal/Treaty rights; and
    3) Has there been as little infringement as possible to effect the desired result?

R v Badger, [1996] 1 SCR 771

- Provides guidelines for interpreting Aboriginal Treaties.
- Treaties represent “an exchange of solemn promises […] whose nature is sacred.”
- Both Aboriginal and treaty rights possess in common a unique, *sui generis* nature
- Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories;
- In searching for the common intention of the parties, the integrity and honour of the Crown is presumed;
- No appearance of “sharp dealing” will be sanctioned.
- In determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
- A technical or contractual interpretation of treaty wording should be avoided:

- While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.

R v Van der Peet, [1996] 2 SCR 507

- "[T]he doctrine of Aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."
- To be a protected Aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right at the time of first contact with Europeans, and the practice must still presently exist in some form.

R. v. Gladstone, [1996] 2 S.C.R. 723

- In the aftermath of *R v Sparrow*, the SCC clarified that in the context of fishery rights where the Aboriginal right has no internal limitation, "priority" does not mean an exclusive right. Rather, the government is required to demonstrate that, in allocating resources, it has taken the existence of Aboriginal rights into consideration and allocated resources in a manner consistent with the fact that such rights have priority over exploitation by other users.

R. v. Côté, [1996] 3 S.C.R. 139

- Aboriginal rights can exist independently of title such that it is not always necessary to prove aboriginal title over an area (either at common law or under the *Royal Proclamation, 1763*) as a precondition to demonstrating the existence of an ancestral right.
- To the extent that an Aboriginal group can demonstrate that a particular practice, custom, or tradition taking place on land is integral to the distinctive culture of that group, that may be sufficient to ground an Aboriginal right to engage in the practice, custom, or tradition.

Delgamuukw v British Columbia, [1997] 3 SCR 1010

- The nature of Aboriginal rights are "aimed at the reconciliation of the prior occupation of North America by distinctive Aboriginal societies with the assertion of Crown sovereignty."
- s. 35(1) has accorded constitutional status to common law Aboriginal title.
- "[A]lthough Aboriginal title is a species of Aboriginal right recognized and affirmed by s. 35(1), it is distinct from other Aboriginal rights because it arises where the connection of a group with a piece of land 'was of a central significance to their distinctive culture'"
- "[A]boriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those Aboriginal rights which are practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not

"sufficient to support a claim of title to the land" […] Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an Aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. […] At the other end of the spectrum, there is Aboriginal title itself [that] confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive Aboriginal cultures. Site-specific rights can be made out even if title cannot. What Aboriginal title confers is the right to the land itself."

R v Sundown, [1999] 1 SCR 393

- Treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.

R v Marshall, [1999] 3 SCR 456

- For a concise summary of the principles governing treaty interpretation listed below, see *Marshall* at paragraph 78.

R. v. Powley, [2003] 2 S.C.R. 207, 2003 SCC 43

- In determining Aboriginal rights under s. 35 of the *Constitution Act*, *1982*, there are special considerations where applicants are Métis because of the distinctive history and post-contact ethnogenesis of the Métis.
- The fact that the Métis emerged between first contact and the effective imposition of European control must be considered in determining the relevant date for finding effective European control in the relevant area.

Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53

- "The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982.*"
- This decision builds on the prior Mikisew Cree decision by setting out how the duty to consult applies to federal, provincial and territorial government conduct that may adversely impact lands and resources covered by more recent Land Claim Agreements. The Court held that the duty of consultation stems from the honour of the Crown and operates in law independently to treaties. A duty to consult can apply where Crown conduct may adversely impact treaty rights. The Little Salmon Carmacks First Nation (LSCFN) Treaty was not a "complete code" of all of the obligations that may exists as between the parties.
- When assessing how the duty to consult applies to matters covered by a treaty, the first place to look is at the specific treaty terms. Treaties may shape how consultation is to be addressed.

- The Court reiterated the importance of the honour of the Crown as a constitutional principle that informs all Crown dealings with Aboriginal people, including the interpretation and implementation of treaties. The Court reiterated the importance of treaties as part of the process of reconciliation and as providing guidance for the on-going relationship of the Crown and Aboriginal groups.

Lax Kw'alaams Indian Band v. Canada (Attorney General), 2011 SCC 56, [2011] 3 S.C.R. 535

- While Aboriginal rights are not frozen in time, the right in question must not be quantitatively or qualitatively different from the ancestral right in question.
- Showing that trade was part of a band's ancestors' pre-contact "way of life", whether or not distinctive or integral, may be insufficient to ground a broad commercial right.
- Aboriginal claimants will be held a reasonable standard in respect of pleadings and evidence. In Aboriginal litigation, courts should not go too far beyond the pleadings and make inquiries into historic practices and way of life.

Grassy Narrows First Nation v Ontario (Natural Resources), 2014 SCC 48

- Ontario has jurisdiction and ownership of Crown lands in Ontario.
- Crown obligations to First Nations are owed by both levels of government.
- See also "Land Claims" below.

4. Self-Government (also see above section on "Aboriginal rights"):

R v Pamajewon, [1996] 2 SCR 821

- *Pamajewon* represents the only direct treatment the Supreme Court of Canada has given the issue of the right of self-government.
- The SCC "assum[ed] without deciding that s. 35(1) includes self-government claims" and found that "[i]n so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of Aboriginal rights and must, as such, be measured against the same standard."
- "[T]he applicable legal standard is […] that laid out in *Van der Peet*."

Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al, 2000 BCSC 1123

- "Section 35 of the *Constitution Act, 1982* […] constitutionally guarantees, among other things, the limited form of self-government which remained with the [claimants] after the assertion of sovereignty."
- "[A]boriginal rights, and in particular a right to self-government […] survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division "internal" to the Crown."
- "[A]lthough the right of Aboriginal people to govern themselves was diminished [post-Confederation], it was not extinguished. Any Aboriginal right to self-government could be extinguished after Confederation and before l982 by federal

legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty."

5. Land and "Land Claims" (also see above section on "Aboriginal rights")

Calder v British Columbia (AG), [1973] SCR 313

- Aboriginal peoples' historic occupation of the land (not the Royal Proclamation of 1763) is the source of the legal rights of Aboriginal peoples in the land;
- Once Aboriginal title is established, it is presumed to continue unless extinguished by surrender or legislative enactment.

Guerin v The Queen, [1984] 2 SCR 335

- The nature of Aboriginal title is unique in law, or *sui generis*.

Delgamuukw v British Columbia, [1997] 3 SCR 1010

- What makes Aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas other estates, like fee simple, arise afterward.
- Three general features of Aboriginal title include:
    1) The source of Aboriginal title is the prior occupation by Aboriginal peoples of what is now Canada (and not, for example, the Royal Proclamation of 1763 which merely recognizes Aboriginal title);
    2) Although on surrender of Aboriginal title the province would take absolute title, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment;
    3) Aboriginal title cannot be held by individual Aboriginal persons; it is a collective right to land held by all members of an Aboriginal nation.
- "[T]he content of Aboriginal title can be summarized by two propositions: first, that Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land."

Tsilhqot'in v British Columbia, 2014 SCC 44

- *Tsilhqot'in* marks the first and only time the Supreme Court of Canada has made a declaration of Aboriginal title.
- Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.
- To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show:
    1) that it discharged its procedural duty to consult and accommodate;

2) that its actions were backed by a compelling and substantial objective; and
3) that the governmental action is consistent with the Crown's fiduciary obligation to the group.

- Importantly, the declaration of Aboriginal title did not apply to "privately owned or underwater lands."

Grassy Narrows First Nation v Ontario (Natural Resources), [2014] 2 SCR 447, 2014 SCC 48

- Although jurisdiction over "Indians and lands reserved for the Indians" is assigned to the federal government under s. 91(24) of the *Constitution Act, 1867*, by virtue of ss. 109, 92A, and 92(5) of the *Constitution Act, 1867*, the province alone has the ability to "take up" lands under treaty and regulate them in accordance with the treaty and its obligations under s. 35 of the *Constitution Act, 1982*.
- Though the treaty only referred to the "Government of the Dominion of Canada" – the treaty was between the "Crown" and the Aboriginal group.
- The "Crown" is a concept that includes all government power. The reference to Canada reflects the fact that the lands at the time were in Canada, not the province of Ontario.
- The Crown's right to "take up" lands under Treaty is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand.
- If the province's "taking up" of treaty lands amounts to an infringement of the treaty, the *Sparrow/Badger* analysis under s. 35 of the *Constitution Act, 1982* will determine whether the infringement is justified.

6. Fiduciary Relationship

Guerin v. The Queen, [1984] 2 SCR 335

- Fiduciary obligations are a permanent feature of the Crown-First Nation relationship, first undertaken by the Crown in the *Royal Proclamation of 1763*, when it made Indian lands inalienable to anyone but the Crown.
- "[W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct."

R v Sparrow, [1990] 1 SCR 1075

- The Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples.
- The relationship between the Government and Aboriginal peoples is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344

- Where reserve lands are sold even if the fiduciary duty associated with the administration of the reserve is terminated, there exists an ongoing fiduciary duty of the Crown to act to correct any error(s) that may have been made (i.e. a duty to continue to act in the best interests of the band).

Wewaykum Indian Band v. Canada, [2002] 4 S.C.R. 245, 2002 SCC 79

- The principle that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature applies to the relationship between the Crown and Aboriginal peoples.
- The content of the Crown's fiduciary duty varies with the nature and importance of the interest sought to be protected and does not provide for general immunity. In particular, different/ lesser duties are owed before a reserve is created than after it has been created.
- Provincial limitation periods apply to Aboriginal claims (*obiter*).

Ermineskin Indian Band and Nation v. Canada, 2009 SCC 9, [2009] 1 S.C.R. 222

- Under 1876 Treaty No. 6, the Crown's fiduciary obligations in respect of a bands' royalties does not include the power or duty to invest the royalties. While the relationship is "trust like in nature", the treaty did not express an intention to impose on the Crown the duties of a common law trustee.

7. Duty to Consult & Accommodate

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73

- When does the duty to consult arise? Three-part test:
    1) The Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title […]
    2) […] and contemplates conduct […]
    3) […] that might adversely affect it […].
- "The duty to consult exists on a spectrum. "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. […] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. […] Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually [and] flexibly."

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 SCR 388, 2005 SCC 69

- "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case."
- "[T]he honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with [constructing a winter road] without fair consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.
- "In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum [as established under *Haida*]. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary.

Beckman v Little Salmon/Carmacks First Nation, [2010] 3 SCR 103, 2010 SCC 53

- The duty to consult and accommodate should not be viewed independently from its purpose, which is reconciliation and upholding the honour of the Crown.

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, [2010] 2 SCR 650, 2010 SCC 43

- "The legislature may choose to delegate to a tribunal the Crown's duty to consult. […] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether fair consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand."

- Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction […] As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

- "The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right."

Clyde River (Hamlet) v. Petroleum Geo Services Inc., 2017 SCC 40

- "In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult […] and […] accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate."
- "Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments […]. Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered."

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41

- This decision confirms that the Crown may rely on steps taken by an administrative body to fulfill its duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances. If the agency's statutory powers are insufficient in the circumstances, or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval
- If the Crown's duty to consult has been triggered, a decision maker may proceed to approve a project only if Crown consultation is adequate.

8. Criminal Law

R v Gladue, [1999] 1 SCR 688

- "The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The

sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the *Criminal Code* and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e) [of the *Criminal Code*], sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

- Section 718.2(e) applies to all aboriginal offenders wherever they reside, whether on or off-reserve, in a large city or a rural area.
- It will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders.

R v Ipeelee, 2012 SCC 13

- The *Gladue* principles apply in <u>any</u> case sentencing an Aboriginal offender, including in determining a fit sentence for an Aboriginal offender who breaches a long-term supervision order.

R v Kokopenace, 2015 SCC 28

- Considers the requirements of adequate jury representation in the context of Aboriginal offenders.
- "Representativeness is an important feature of the jury; however, its meaning is circumscribed. What is required is a 'representative cross-section of society, honestly and fairly chosen.' […] There is no right to a jury roll of a particular composition, nor to one that proportionately represents all the diverse groups in Canadian society. Courts have consistently rejected the idea that an accused is entitled to a particular number of individuals of his or her race on either the jury roll or petit jury."
- *Note:* McLachlin C.J. and Cromwell J. in dissent: "An Aboriginal man on trial for murder was forced to select a jury from a roll which excluded a significant part of the community on the basis of race – his race. This in my view is an affront to the administration of justice and undermines public confidence in the fairness of the criminal process. I would dismiss the appeal. […] While there are many deeply seated causes which contribute to Aboriginal under-representation on jury rolls, the *Charter* in my view ought to be read as providing an impetus for change, not an excuse for saying that the remedy lies elsewhere."

R v. Sim, 78 OR (3d) 183, 67 WCB (2d) 431 (ONCA)

- the Ontario Court of Appeal extended the reach of *Gladue* to decisions of the Ontario Review Board. *Gladue* principles are engaged whenever a decision-maker is dealing with the liberty of an Aboriginal person at any stage of the justice system.

R v. Jensens, [1997] 1 SCR 304, 1997 CanLII 368 (SCC)

- *Gladue* considerations are to be considered even where the issue is the period of parole ineligibilty following a conviction for second degree murder.

R v. Brizard, 68 W.C.B. (2d) 556, 2006 CanLII 5444 (ONCA)

- The Court of Appeal reaffirms that s. 718.2(e) and *Gladue* apply to all Aboriginal offenders, even those who are not connected to the Aboriginal community.

R v. Kakekagamick (I), 69 WCB (2d) 157 (ONCA)

- If a sentencing judge does not take into account s. 718.2(e) in sentencing an Aboriginal offender, then the appeal court can request a *Gladue* Report.

R v. Kakekagamick (II), 70 WCB (2d) 470, 214 OAC 127 (ONCA)

- The Court of Appeal expands on its decision in Brizard and indicates that sentencing judges must do more than merely mention the fact that an offender is Aboriginal to meet the criteria of s. 718.2(e). The Court also restates the methodology around the sentencing of an Aboriginal offender and discusses the information that the judge should obtain and consider.

9. Jurisdiction of the Specific Claims Tribunal

Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2008 SCC 4

- The First Nation sought leave to appeal a decision of the Federal Court of Appeal (Canada had applied for judicial review of the Specific Claims Tribunal's decision to the FCA). The Supreme Court of Canada granted leave and the appeal was the first time for the SCC to consider Canada's specific claims policies, the *Specific Claims Tribunal Act* and the standard of review of the Tribunal. The Court ruled that the Tribunal's decisions on matters of fact, mixed fact and law, and law are entitled to deference and a reasonableness review applies.

4.3 Leading Non-Judicial Sources

Library and Archives Canada: Treaties, Surrenders and Agreements: http://www.bac-lac.gc.ca/eng/discover/Aboriginal-heritage/first-nations/treaties-surrenders-agreements/Pages/introduction.aspx

Royal Commission on the Donald Marshall, Jr., Prosecution (Digest of Findings and Recommendations, 1989): https://novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf

Royal Commission on Aboriginal Peoples (Final Report, 1996): http://www.bac-lac.gc.ca/eng/discover/Aboriginal-heritage/royal-commission-Aboriginal-peoples/Pages/final-report.aspx

Aboriginal Justice Implementation Commission (Manitoba), *Report of the Aboriginal Justice Inquiry of Manitoba* (1999): http://www.ajic.mb.ca/volume.html

Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada* (2004): https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf

Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild (Final Report, 2004): http://www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Stonechild/Stonechild-FinalReport.pdf

Ipperwash Inquiry (Final Report, 2007): https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_1/pdf/E_Vol_1_Full.pdf

UN Declaration on the Rights of Indigenous Peoples (2007): http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Human Rights Watch, *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada* (2013): https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women

Report of the Independent Review Conducted by The Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries* (2013): https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html

Canadian Human Rights Commission, *Honour the Strength of Our Sisters: Increasing Access to Human Rights Justice for Indigenous Women and Girls* (2013-2014): http://www.chrc-ccdp.gc.ca/sites/default/files/roundtable_summary_report_eng_0.pdf

Indigenous Bar Association, *Accessing Justice and Reconciliation Project* (Final Report, 2014): http://Indigenousbar.ca/Indigenouslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf

Truth and Reconciliation Commission of Canada (Final Report, 2015): http://nctr.ca/reports.php

4.4 Protocols for Dealings with Indigenous Peoples and Issues

1. Government Protocols

- Principles respecting the Government of Canada's relationship with Indigenous peoples (July 2017): http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html
- Government of Canada, Indigenous and Northern Affairs Canada – Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011: https://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675
- Government of Canada, Major Projects Management Office – Early Aboriginal Engagement: A Guide for Proponents of Major Resource Projects: http://mpmo.gc.ca/project-description/79
- Government of the Northwest Territories' Traditional Knowledge Policy: http://www.enr.gov.nt.ca/en/services/traditional-knowledge.
- Government of British Columbia, Consulting with First Nations: http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations
- Government of Alberta, Aboriginal Consultation Office Policy Guidelines: http://www.Indigenous.alberta.ca/policy-guidelines.cfm
- Government of Saskatchewan, First Nation and Metis Consultation Policy Framework (June 2010): http://publications.gov.sk.ca/documents/313/98187-Consultation%20Policy%20Framework.pdf
- Government of Manitoba, Crown Consultation Policy: https://www.gov.mb.ca/imr/ir/reconciliation-strategy/duty-to-consult-framework.html
- Government of Ontario, Draft guidelines for ministries on consultation with Aboriginal Peoples related to Aboriginal rights and treaty rights: https://www.ontario.ca/page/draft-guidelines-ministries-consultation-Aboriginal-peoples-related-Aboriginal-rights-and-treaty
- Government of New Brunswick, Duty to Consult Policy: http://www2.gnb.ca/content/gnb/en/departments/Aboriginal_affairs/duty_to_consult.html
- Government of Nova Scotia, Consultation: https://novascotia.ca/abor/office/what-we-do/consultation/
- Mi'kmaq-Prince Edward Island Consultation Agreement:

http://www.gov.pe.ca/photos/original/aas_consult.pdf

- Government of Newfoundland and Labrador Aboriginal Consultation Policy (April 2013): http://www.laa.gov.nl.ca/laa/publications/Aboriginal_consultation.pdf

2. First Nations Protocols

- Six Nations of the Grand River Consultation & Accommodation Policy: http://www.sixnations.ca/LRConsultationPolicySept2413.pdf
- Curve Lake First Nation, Consultation and Accommodation Standards: http://www.curvelakefirstnation.ca/documents/CLFN%20Consultation%20and%20Accommodation%20Standards%202016.pdf
- shíshálh Nation Lands and resources Decision-Making Policy: http://www.shishalh.com/docuploads/forms-and-applications/Lands-and-Resources-Decision-Making-Policy-1416383564-1.pdf
- First Nations of Quebec and Labrador Consultations Protocol (October 2005): http://fnqlsdi.ca/wp-content/uploads/2013/05/protocole_consultation_2005_en.pdf
- Alderville First Nation Consultation Protocol: http://alderville.ca/wp-content/uploads/2017/02/AFNProtocol2.pdf
- Walpole Island First Nation Consultation and Accommodation Protocol: http://wifncap.weebly.com/uploads/2/6/0/8/2608010/wifn_cap_06_29_09.pdf
- Nishnawbe Aski Nation: A Handbook on Consultation in Natural Resource Development (3rd edition, 2007): http://www.nan.on.ca/upload/documents/pub---nan-handbook-on-consultation---3rd.pdf
- Ginoogaming First Nation, Consultation and Accommodation Protocol: http://www.ginoogamingfn.ca/wp-content/uploads/2015/07/2014_03_24_Consultation-and-Accommodation-Protocol_GFN_Final.pdf
- Taykwa Tagamou Nation, Consultation and Accommodation Protocol (January 2011): http://taykwatagamounation.com/ttn/images/ttnconsultationprotocol.pdf
- National Centre for First Nations Governance – Crown Consultation Policies and Practices Across Canada (2009): http://fngovernance.org/publication_docs/NCFNG_Crown_Consultation_Practices.pdf
- National Centre for First Nations Governance – First Nation Consultation Framework (2008): http://fngovernance.org/resources_docs/First_Nation_ConsultationFramework.pdf

3. Private Organization Protocols

- Association for Mineral Exploration British Columbia, Aboriginal Engagement Guidebook: A Practical and Principled Approach for Mineral Explorers: http://www.amebc.ca/docs/default-source/AE-Guidebook/Aboriginal-engagement-guidebook-(revised-may-2015).pdf
- Ontario Power Generation, Indigenous Relations Policy: http://www.opg.com/communities-and-partners/Indigenous-communities/RelationsPolicy/Pages/Relations-Policy.aspx

4. Law Enforcement Protocols

- Nishnawbe-Aski Legal Services Corporation and Ontario Provincial Police: http://www.nanlegal.on.ca/upload/documents/protocols/nalsc-opp-nw-region-police-protocol-august-10-2012.pdf
- Assembly of First Nations and Royal Canadian Mounted Police: http://www.afn.ca/uploads/files/afn-rcmp.pdf http://www.mwpr.ca/cgi-bin/show_article_attachment.cgi?ID=9776&F=RCMP_safety_protocol_with_AFN.pdf&X=1387808273000/RCMP_safety_protocol_with_AFN.pdf
- Public Safety Canada: First Nations Policing Program – Community Tripartite Agreement Toolkit: http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/agreements/community-consultative-group-toolkit.pdf
- Public Safety Canada: International Comparison of Indigenous Policing Models: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/cmprsn-ndgns-plcng/cmprsn-ndgns-plcng-eng.pdf
- Canadian Association of Police Governance: Governance of Policing and First Nations Communities: A National Perspective: http://capg.ca/wp-content/uploads/2013/05/Governance-of-Policing-and-First-Nations-Communities-Report-2015.pdf
- Canadian Innovations in the Provision of Policing Services to Aboriginal Peoples (John H. Hylton): https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/John_Hylton_Canadian_Innovations.pdf
- Best Practices on Policing Aboriginal Occupations arising from the Ipperwash Inquiry: https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_2/pdf/E_Vol_2_CH09.pdf
- SPVM and Montreal Urban Aboriginal Community Strategy Network http://reseaumtlnetwork.com/wp-content/uploads/2015/02/Collaborative-Agreement-SPVM-NETWORK.pdf

- Toronto Police: Policing a World Within a City: http://www.torontopolice.on.ca/publications/files/reports/2003.02.13-policingaworldwithinacity.pdf
- Peterborough Domestic Abuse Network: Domestic Violence Response Protocol for the Peterborough Region http://www.pdan.ca/pdf/DVRP_final07.pdf
- Ontario North East Region Police and School Protocol: http://www.hscdsb.on.ca/wp-content/uploads/2016/10/policeandschool_protocol2016.pdf
- Police/School Board Protocol: https://www.pvnccdsb.on.ca/en/ourschools/resources/PoliceSchoolBoardProtocolDocumentFINAL-September2016.pdf

5. Education/Workforce Protocols

- "Best Practices in Increasing Aboriginal Postsecondary Enrolment Rates", Council of Ministers of Education (May 2002)
- "Understanding the Value, Challenges, and Opportunities of Engaging Métis, Inuit, and First Nations Workers" Conference Board of Canada (July 2012)
- "Successful Practices in First Nations, Métis, and Inuit Education", Alberta Government (2012)
- "Knowledge Synthesis: Aboriginal Workplace Integration in the North" Social Sciences and Humanities Research Council (November 2015) (see "Best Practices" at pp. 15-19)

6. Energy/Natural Resource Protocols

- "Collaboration between Aboriginal peoples and the Canadian forestry industry: a dynamic relationship" Sustainable Forest Management Network (2010)
- "First Nations Engagement in the Energy Sector in Western Canada" Indian Resource Council (2016)
- "Partnerships in Procurement Understanding Aboriginal business engagement in the Canadian mining industry" Canadian Council for Aboriginal Business (2016) (see "A Framework for partnerships in procurement" on p. 20)

7. Business Protocols

- "Aboriginal Economic Development in Canada: Best Practices, Policies and Strategies", First Peoples Group (2009)
- "The Duty to Consult with Aboriginal Peoples: A Patchwork of Canadian Policies", Fraser Institute (May 2016)

- "Building Relationships with First Nations: Respecting Rights and Doing Good Business", BC Ministry of Aboriginal Relations and Reconciliation [Year TBC]

8. Health Care/Social Work Protocols

- "Working with First Nations, Inuit and Métis Families who have Experiences Family Violence: A Practice guide for Child Welfare Professionals", Government of Ontario
- "Health Professionals Working With First Nations, Inuit, and Métis Consensus Guideline", Journal of Obstetrics and Gynaecology (June 2013)
- "Towards a New Relationship: Toolkit for Reconciliation/Decolonization of Social Work Practice at the Individual, Workplace, and Community Level", BC Association of Social Workers (May 2016)

4.5 Annotated Map of Indigenous communities in Canada

1. Government Maps

https://www.aadnc-aandc.gc.ca/eng/1290453474688/1290453673970

http://fnpim-cippn.aandc-aadnc.gc.ca/index-eng.html

2. Community Maps

Modern Treaty Map: http://www.moxiemedia.ca/NVision/map.html

First Nations in Québec:
http://www.reseaujeunessepn.com/nations_carte_communautes_plein_ecran.php

4.6 Glossary of terms

This section provides links to resources which in turn provide extensive glossaries of terms. This list of resources is not intended to be exhaustive. The listing of different resources illustrates that there are often different views with regard to the definition of a particular term.

i. Indigenous and Northern Affairs Canada[198]
ii. First Nations Education Steering Committee[199]
iii. Cape Breton University[200]
iv. Strategic Alliance of Broadcasters for Aboriginal Reflection(SABAR)[201]
v. Legal Aid Ontario[202]

4.7 List of Organizations and Agencies

The Strategic Alliance of Broadcasters for Aboriginal Reflection (SABAR) above provides helpful links to a variety of organizations and other resources:

Quick Links

- Specific Claims Tribunal for land claims: http://www.sct-trp.ca/hom/index_e.htm
- Reporting in Indigenous Communities: www.riic.ca/
- First Nations History and Timeline: www.ubcic.bc.ca/Resources/timeline.htm
- Indian Status: www.aadnc-aandc.gc.ca/eng/1100100032374
- Historic Treaties: www.aadnc-aandc.gc.ca/eng/1100100028574
- Acts bills and regulations: www.aadnc-aandc.gc.ca/eng/1100100032311
- First Nation Community Profiles: http://pse5-esd5.aincinac.gc.ca/fnp/Main/index.aspx?lang=eng
- First Nation Community Profiles Maps: http://fnpim-cippn.inac-ainc.gc.ca/index-eng.asp
- Interviewing Elders Guidelines (NAHO): www.naho.ca/media-centre/interviewing-eldersguidelines/
- Aboriginal Affairs and Northern Development Canada: www.aadncaandc.gc.ca/eng/1100100014187/1100100014191

First Nations, Métis and Political Organizations

National

- Assembly of First Nations, Ottawa, ON www.afn.ca/index.php/en
- Inuit Tapiriit Kanatami, Ottawa, ON www.itk.ca/
- Métis National Council, Ottawa, ON www.metisnation.ca/

Yukon

- Council of Yukon First Nations, Whitehorse, YK www.cyfn.ca
- YK Tribal Councils: http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/TCListGrid.aspx?lang=eng

198 http://www.aadnc-aandc.gc.ca/eng/1100100014642/1100100014643
199 http://www.fnesc.ca/wp/wp-content/uploads/2015/07/IRSR10-Glossary.pdf
200 https://www.cbu.ca/indigenous-affairs/unamaki-college/mikmaq-resource-centre/miscellany/glossary-of-terms-used-in-aboriginal-historical-research/
201 http://www.sabar.ca/wp-content/uploads/2012/06/SABAR-Glossary-English-Final.pdf
202 http://www.legalaid.on.ca/en/info/ASIQ-quickfactsglossary.asp

- Champagne and Aishihik First Nations http://cafn.ca/
- First Nation of Na-Cho Nyäk Dun http://www.nndfn.com/
- Teslin Tlingit Council http://www.ttc-teslin.com/
- Vuntut Gwitchin First Nation http://www.vgfn.ca/
- Little Salmon/Carmacks First Nation http://www.lscfn.ca/
- Selkirk First Nation http://www.selkirkfn.com/
- Tr'ondëk Hwëch'in http://www.trondek.ca/
- Ta'an Kwäch'än Council http://taan.ca/
- Kluane First Nation http://www.kfn.ca/
- Kwanlin Dün First Nation http://www.kwanlindun.com/
- Carcross/Tagish First Nation http://www.ctfn.ca/

Northwest Territories

- Dene Nation, Yellowknife, NWT www.facebook.com/pages/Dene-Nation/12608943308
- Inuvialut Regional Corporation, Inuvik, NT: http://www.irc.inuvialuit.com/
- Northwest Territory Métis Nation, Fort Smith, NT: http://nwtmetisnation.ca/
- North Slave Métis Alliance, Yellowknife, NT: http://nsma.net/
- NWT Tribal Councils: http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/TCListGrid.aspx?lang=eng
- Akaitcho Territory Government, Ndilo, NT: https://akaitcho.info/
- Dehcho First Nations, Fort Simpson, NT: http://dehcho.org
- Gwich'in Tribal Council: https://gwichintribal.ca
- Sahtu Secretariat Incorporated: https://www.sahtu.ca/
- Tlicho Government: www.tlicho.ca/

Nunavut

- Nunavut Tunngavik Incorporated: http://www.tunngavik.com/]

British Columbia

- Union of BC Indian Chiefs, Vancouver, BC www.ubcic.bc.ca
- First Nations Summit (BC), West Vancouver, BC www.fns.bc.ca
- Métis Nation of BC, Surrey, BC: https://www.mnbc.ca/
- BC Tribal Councils: http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/TCListGrid.aspx?lang=eng

Alberta

- Confederacy of Treaty No. 6 First Nations, Edmonton, AB www.treaty6.ca
- Treaty No. 7 Management Corporation, Tsuu T'ina, AB www.treaty7.org
- Treaty 8 First Nations of Alberta, Edmonton, AB www.treaty8.ca
- Métis Nation of Alberta, Edmonton, AB: http://albertametis.com/

- Alberta Tribal Councils: http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/TCListGrid.aspx?lang=eng

Saskatchewan

- Federation of Saskatchewan Indian Nations, Saskatoon, SK www.fsin.com
- Métis Nation Saskatchewan, Saskatoon, SK: http://metisnationsk.com/
- Aboriginal Friendship Centres of Saskatchewan: http://www.afcs.ca/
- Saskatchewan Tribal Councils: http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/TCListGrid.aspx?lang=eng

Manitoba

- Assembly of Manitoba Chiefs, Winnipeg, MB www.manitobachiefs.com
- Manitoba Métis Federation:
- Manitoba Association of Friendship Centres:
- Manitoba Keewatinowi Okimakanak, Thompson, MB www.mkonorth.com
- Southern Chiefs Organization, Winnipeg, MB www.scoinc.mb.ca
- Manitoba Tribal Councils: http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/TCListGrid.aspx?lang=eng

Ontario

- Chiefs of Ontario, Toronto, ON www.chiefs-of-ontario.org
- Ontario Federation of Indigenous Friendship Centres, Toronto, ON: www.ofifc.org
- Métis Nation of Ontario, Ottawa, ON: http://www.metisnation.org/
- First Nations Political/Territorial Organizations
    - Anishinabek Nation, Union of Ontario Indians, North Bay, ON www.anishinabek.ca
    - Association of Iroquois & Allied Indians, London, ON www.aiai.on.ca
    - Grand Council Treaty No. 3, Kenora, ON www.gct3.net/
    - Nishnabwe-Aski Nation, Thunder Bay ON www.nan.on.ca
    - Independent First Nations Alliance: http://www.ifna.ca/
- Ontario Tribal Councils: http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/TCListGrid.aspx?lang=eng
- Tungasuvvingat Inuit (Ottawa Inuit Centre), Ottawa, ON: http://tungasuvvingatinuit.ca/

Quebec / Labrador

- Grand Council of the Crees (Quebec), Nemaska, PQ www.gcc.ca
- Makivik Corporation, Kuujjuaq, QC: http://www.makivik.org/
- Innu Nation, Sheshatsiu, Newfoundland www.innu.ca
- Québec Tribal Councils: http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/TCListGrid.aspx?lang=eng

New Brunswick

- Union of New Brunswick Indians, Fredericton, NB www.unbi.org

Prince Edward Island

- Mi'kmaq Confederacy of PEI, Lennox Island, PE www.mcpei.ca

Nova Scotia

- Confederacy of Mainland Micmacs, Truro, NS www.cmmns.com
- Union of Nova Scotia Indians, Membertou, NS www.unsi.ns.ca

Newfoundland/Labrador

- Miawpukek First Nation, Conne River, NL www.mfngov.ca
- Nunatsiavut (Inuit) Government, Nain, NL: http://www.nunatsiavut.com/
- Qalipu First Nation, Cornerbrook, NL: http://qalipu.ca/

Atlantic

- Atlantic Policy Congress of First Nations Chiefs, Dartmouth, NS www.apcfnc.ca
- Atlantic Tribal Councils: http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/TCListGrid.aspx?lang=eng

Other Organizations

- Aboriginal Financial Officers Association www.afoa.ca/ (finance, management, business)
- Aboriginal Healing Foundation www.ahf.ca/announcements (Residential schools, healing, violence, survivors, reconciliation)
- Aboriginal Human Resource Council www.aboriginalhr.ca/en/home (labour, jobs, workforce, human resources, economy)
- Aboriginal Nurses Association of Canada www.anac.on.ca/ (health, nursing, hospital, labour)
- Arctic Children and Youth Foundation www.acyf.ca/ (Arctic, education, health, youth, children, north)
- Arctic Co-operatives Limited www.arcticco-op.com/ (Arctic, economy, jobs, arts, cooperative, business, north)
- Canadian Aboriginal AIDS Network http://caan.ca/?lang=en (health, healing, HIV/AIDS, research, treatment)
- Canadian Aboriginal Minerals Association www.aboriginalminerals.com/ (mining, lands, resources, development)
- Canadian Council for Aboriginal Business www.ccab.com/ (business, economic development, entrepreneurs, jobs, youth, human resources)
- Canadian Métis Council www.canadianmetis.com/ (Métis, economic, political, cultural)
- CESO/SACO www.cesosaco.com/Home.aspx?aspxerrorpath=/english/national/aboriginal/index.php (development, social, economic, governance, entrepreneur, human resources)
- Congress of Aboriginal Peoples www.abo-peoples.org (non-status Indian, off-reserve, urban)

- Council for the Advancement of Native Development Officers (CANDO) www.edo.ca/home (economic, development, business, human resources)
- First Nations Chiefs of Police Association www.fncpa.ca/ (policing, law, crime, human resources)
- First Nations Child and Family Caring Society of Canada www.fncfcs.com/ (children, adoption, protection, foster care, health, family)
- First Nations Environmental Network www.fnen.org/ (environment)
- First Peoples National Party of Canada www.fpnpoc.ca/ (politics, culture)
- Frontiers Foundation http://frontiersfoundation.ca/ (economic, social development, poverty reduction, housing, education)
- Indigenous Bar Association www.indigenousbar.ca/main_e.html (law, justice, social issues, spirit)
- Indigenous Physicians Association of Canada www.ipac-amic.org/ (health, medicine, human resources, physicians)
- Indspire (formerly National Aboriginal Achievement Foundation) http://indspire.ca/ (education, culture, spirit, development, economic, arts, awards)
- Inuit Art Foundation www.inuitart.org/foundation/home.html (Inuit, art, economic development)
- National Aboriginal Capital Corporation Association (NACCA) www.nacca.net/home_e.htm (finance, economic development, business, banking
- National Aboriginal Circle Against Family Violence http://nacafv.ca/en/mandate (violence, family, health, advocacy, training, women)
- National Aboriginal Diabetes Association www.nada.ca/ (health, diabetes, culture)
- National Aboriginal Lands Managers Association https://nalma.ca/
- Managers Association Native Women's Association of Canada (NWAC) www.nwac.ca (women, health, education, human rights, culture, social, economic development)
- Truth and Reconciliation Commission www.trc.ca (residential schools, healing, reconciliation, research, health)
- National Centre for Truth and Reconciliation: http://reconciliationcanada.ca/?gclid=Cj0KEQjwoZTNBRCWg6TbrNu9z6gBEiQA4xkeYcOPMguDM81hPW-oo3Q4XO3xPc7QUgJTzVhclEgsImAaAlSi8P8HAQ
- Pauktuutit (Inuit Women of Canada), Ottawa, ON: http://pauktuutit.ca/

4.8 Friendship Centres

Friendship Centres are found throughout Canada. They provide services to off-reserve Indigenous people. The National Association of Friendship Centres represents 118 Friendship Centres and seven Provincial and Territorial Associations. The links to the National Association of Friendship Centres and the Provincial and Territorial Associations are found below:

- National Association of Friendship Centres: http://nafc.ca/en/friendship-centres/
- Skookum Jim Friendship Centre, Whitehorse, YK: https://skookumjim.com/
- Northwest Territories/Nunavut Council of Friendship Centres, Yellowknife, NWT : Phone - 867-873-4332
- BC Association of Aboriginal Friendship Centres: www.bcaafc.com
- Alberta Native Friendship Centres Association: www.anfca.com
- Aboriginal Friendship Centres of Saskatchewan: www.afcs.ca
- Manitoba Association of Friendship Centres, Winnipeg, MB: http://www.friendshipcentres.ca
- Ontario Federation of Indigenous Friendship Centres (not a member of the NAFC): www.ofifc.org
- Regroupement des centres d'amitié autochtones du Québec: www.rcaaq.info
- Mi'kmaw Native Friendship Centre, Halifax, NS: http://www.mymnfc.com/
- St. John's Native Friendship Centre: www.sjnfc.com

4.9 Health and community resources

National

Canada Mental Health Association (facilitates access to the resources people require to maintain and improve mental health and community integration, build resilience, and support recovery from mental illness). Locations: http://www.cmha.ca/get-involved/find-your-cmha/

National Aboriginal Health Organization (now closed. Website with resources will stay available until December 22, 2017): www.naho.ca (health, research, traditional knowledge, medicine)

British Columbia

Aboriginal Legal Aid in BC:
http://aboriginal.legalaid.bc.ca/legal_aid/contactUs.php
- Large bank of free publications: http://aboriginal.legalaid.bc.ca/pubs/
Vancouver Community College:
http://www.vcc.ca/about/college-information/news/article/media-release-vcc-to-offer-gladue-report-writing-program.html

Ontario

IndiGenius & Associates Inc. Indigenous Justice Consulting Firm specializing in Gladue Services and Training 613-366-2268/Toll free-1-866-406-5865
http://www.indigeniusandassociates.com/

Equay-wuk (Women's Group: provider of community wellness, support, and education programs for FNMI women and families in 31 northwestern NAN communities): http://www.equaywuk.ca/ Toll free: 1-800-261-8294

Nishnawbe-Aski Services Corporation Gladue Database (lists various services in Northwestern and Northeastern Ontario, and programs offered through Correctional Service Canada): http://www.nanlegal.on.ca/upload/documents/database/gladue-social-service-database-2016-08-2.pdf

Ontario Addiction Treatment Centres (drug addiction harm reduction). Locations: http://www.oatc.ca/clinic-locations/

Ontario Mental Health Helpline (information about counselling services in your community) 1-866-531-2600, http://www.mentalhealthhelpline.ca/Home/About

Ontario Ministry of Municipal Affairs and Housing (who to contact to be put on list for affordable housing) - http://www.mah.gov.on.ca/Page1202.aspx

Ontario Non-Profit Housing Association (how to apply for housing, join waiting list, coordinated access centres) - http://www.onpha.on.ca/

Talk4Healing (Toll-free telephone helpline for FNMI women and their families living in Northern Ontario. Provides crisis counselling, advice, personalized information and referrals, 24 hours a day, in English, Cree, Ojibway, and Oji-Cree): www.talk4healing.com - Toll Free: 1-855-554-4325

Toronto

Aboriginal Legal Services (supports and advocates for Aboriginal community): http://www.aboriginallegal.ca/

City of Toronto - Listing of Aboriginal Support Services - http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=7b7964445c780410VgnVCM10000071d60f89RCRD&vgnextchannel=5e018fb738780410VgnVCM10000071d60f89RCRD

4.10 Resources on writing a *Gladue* report

Title	Link
R. v. Gladue, [1999] 1 S.C.R. 688	http://www.canlii.org/en/ca/scc/doc/1999/1999canlii679/1999canlii679.html
R. v. Ipeelee, [2012] 1 S.C.R. 433	http://www.canlii.org/en/ca/scc/doc/2012/2012scc13/2012scc13.html
IndiGenius & Associates Inc. Gladue Trainers & Writers Mark Marsolais-Nahwegahbow	www.indigeniusandassociates.com
VCC-Vancouver Community College Tami Pierce-Director Aboriginal Education And Community Engagement Gladue Writing Program	http://www.vcc.ca/about/college-information/news/article/media-release-vcc-to-offer-gladue-report-writing-program.html
Debra Parkes, David Milward, Steven Keesic, and Janine Seymour, "Manitoba Gladue Handbook" University of Manitoba Faculty of Law, September 2012	http://law.robsonhall.com/wp-content/uploads/2015/10/Gladue_Handbook_2012_Final-1.pdf
Legal Services Society, BC "Gladue Primer", British Columbia: 2011	http://aboriginal.legalaid.bc.ca/resources/pdfs/pubs/Gladue-Primer-eng.pdf Also available at: http://www.cba.org/CBA/cle/PDF/JUST13_Paper_Shields_GladuePrimer.pdf
Legal Services Society BC, "What Gladue Reports Must Contain: A guide to the content, style, formatting and	http://gladuereports.org/wp-content/uploads/2014/04/2014-LSS-Guide-to-Gladue-reports.pdf

proofreading of Gladue reports," January 2014.	
Cunliffe Barnett, "Judge Barnett's Guide to Understanding the Decisions of the Supreme Court of Canada in the Gladue and Ipeelee/Ladue Cases", January 2014	http://gladuereports.org/wp-content/uploads/2014/04/C-Barnetts-Guide-to-Ipeelee-and-Gladue-rev-2014.pdf
BearPaw legal Education & Resource Centre, "Writing a Gladue Report", undated.	http://lgdata.s3-website-us-east-1.amazonaws.com/docs/3978/1397006/Gladue_Booklet_rev4_FINAL_COVER_DESIGN.pdf
Tripartite Working Group of the National Aboriginal Court Worker Program, "Gladue Sentencing Principles", Undated.	http://www.gladueprinciples.ca/welcome

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
- Unbroken cycles

- 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

4.11 List of interpreters

INTERPRETERS	
Nunavut Interpreter/Translator Society[203]	The Nunavut Interpreter/Translator Society is a resource for researchers requiring translation services in the territory. Most of its members specialize in Inuktitut/English and English/Inuktitut interpretation, although Inuinnaqtun/English - English/Inuinnaqtun and French/English - English/French are also available as a specialization.
Tusaajiit Translations[204]	Depending on the audience, a translation can be tailored to reach a vast majority of bilingual Inuktitut-English readers and listeners, including many whose first language is English. They provide all current Word formatting applications for many different styles of required documents that include statues, laws, correspondence, listings in Excel sheets, Power Point productions for an audience, pdfs for printing and reports created as Word applications. Tusaajiit Translations has been bonded, frequently works under conditions of confidentiality, has access to secure communication methods and provides timely service in

[203] http://www.arcticcollege.ca/careers/item/5105-translation-services
[204] https://tusaajiit.ca/our-services

	accepting contracts and delivering the results professionally.
Multilingual Community Interpreter Services (Cross Canada)[205]	MCIS is a social enterprise which provides professional interpretation, translation and training for new interpreters in the Greater Toronto Area (GTA). The different types of interpretation services provided include face-to-face, group, and telephone interpretation. Interpretation services are provided across the public sector. Presently, interpretation services are offered in 96 languages. Additional services include sight translation of key documents, translation and audio/video transcription services and training and orientation for all service providers working with interpreters and translators. MCIS offers services to over 630 agencies in South Central Ontario across all sectors including the medical sector. They train an average of 200 interpreters every year to work in the medical and legal sectors. They all pass a standardized language proficiency test and undergo 100 hours of training. In addition, they complete glossaries, work on online language labs, go on site visits, complete homework assignments and participate on online forums.
Access Alliance (Toronto)[206]	Access Alliance works to promote health & well-being and improve access to services for immigrants and refugees in GTA. They provide interpretation and document translation to diverse range of customers. Some interpreters are internationally trained and also hold certificates in court interpreting. Services include face-to-face interpretation at an agency or in a client's home, telephone message relay, conference calls, and group interpretation. The only Aboriginal language service offered is Miqmaq interpretation over the phone.
Interpretation/Translation Associations (General)	**Find a professional through an association of interpreters:** • Society of Translators and Interpreters of British Columbia (STIBC)[207]

[205] http://www.mcislanguages.com/
[206] http://accessalliance.ca/programs-services/language-services/
[207] http://www.stibc.org/page/directory.aspx

	• Association of Translators, Terminologists and Interpreters of Manitoba (ATIM)[208] • Corporation of Translators, Terminologists and Interpreters of New Brunswick (CTINB)[209] • Association of Translators and Interpreters of Nova Scotia (ATINS)[210] • Association of Translators and Interpreters of Ontario (ATIO)[211] • Association of Translators and Interpreters of Saskatchewan (ATIS)[212] • Association of Translators and Interpreters of Alberta.[213] • The Canadian Translators, Terminologists and Interpreters Council, [214] generally recognized as the national body representing professional translators, interpreters and terminologists, contributes to high quality inter-language and intercultural communication.

The Ontario Ministry of the Attorney General provides information about Court Interpretation Services on its website:

https://www.attorneygeneral.jus.gov.on.ca/english/courts/interpreters/

4.12 Cultural Training Programs / Organizations

Bimickaway

In response to the 2013 report by The Honourable Frank Iacobucci entitled “First Nations Representation on Ontario Juries” (the Report) and the 2015 Truth and Reconciliation Commission of Canada's Final Report, the Indigenous Justice Division of the Ministry of the Attorney General (“IJD”) is responsible for the development of “Indigenous Cultural Competency Training” for justice-sector workers. The name of the training is Bimickaway, which is an Anishinabemowin word that means to leave footprints. The delivery of Bimickaway is unique as it is delivered to small groups and uses participatory exercises in an attempt to challenge the participants to consider what they think they know about Indigenous peoples and the history of Canada.

[208] http://atim.mb.ca/en/directory.htm
[209] http://ctinb.nb.ca/index.php?option=com_sobi2&catid=2&Itemid=21&lang=en
[210] http://www.atins.org/index.php?option=com_content&view=article&id=122
[211] https://atio.on.ca/about/
[212] http://www.atisask.ca
[213] https://www.atia.ab.ca/
[214] http://www.cttic.org/mission.asp

There are 4 three hour modules to Bimickaway.

Module 1 focuses on pre-contact history and challenges the participants to consider where and what they have learned about Indigenous people. Specifically, it focuses on:

- Appropriate terminology (including legal definitions of “Indian,” “Aboriginal,” “Indigenous”, “Métis”)
- Government laws and policies that have been enacted for the purpose of cultural genocide including, enfranchisement laws under the *Indian Act*, discriminatory membership provisions in the *Indian Act*
- Pre-contact, numbered and modern day treaties
- Indigenous Legal Systems
- The How, Who and What of the IJD – in this part, we talk about the difference between coroners’ inquest juries and criminal juries, the exclusion of First Nations people on reserve from the Ontario jury roll.
- Assimilation Policies used in attempts at colonization – Annihilation, Forced Relocation, Indian Act, 60s Scoop, Millennium Scoop, Child welfare, criminal justice interaction.

Module 2 is the IJD version of Kairos' Blanket Exercise. This exercise is an experiential, participatory exercise designed to take participants through the history of assimilative government laws and policies so that participants experience a visceral reaction to the taking of land and the imposition of policies and laws, such as the Indian Residential School System. Where possible, Modules 1 and 2 are delivered in a full day session.

Module 3 focuses on the realities of access to justice for Indigenous people living in the North. In addition, participants learn about anti-racism and anti-colonialism and are challenged to look at their own biases and assumptions relating to Indigenous people.

Module 4 is the final session that is tailored to the specific needs of the group / division / team to which Bimickaway is being delivered. In this session, the curriculum and activities are geared towards the day-to-day application of the previous modules to the work of the division.

Bimickaway uses an Indigenized and Indigenous Methodological approach to its delivery. It is delivered in settings of up to 25 participants to ensure meaningful group discussions and activities. An Indigenous Elder from the Elders' Council, if available, is invited to attend and add their meaningful life experiences to the curriculum.

San’yas Indigenous Cultural Safety Training
http://www.sanyas.ca/

4.13 Legal Specializations

Law Society of Ontario: Certified Specialist in Indigenous Legal Issues: http://www.lsuc.on.ca/For-Lawyers/About-Your-Licence/Certified-Specialist-Application-Materials/

5 FOR FURTHER READING

This Guide is intended to be an iterative and living document. It will be supplemented and amended from time to time with a continued view towards reconciliation. Additional ideas for resources which should be included in the Guide are welcome and may be sent to policy@advocates.ca.

Truth and Reconciliation Report

- Truth and Reconciliation Commission of Canada, "The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada," 2015[215]

- "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada"[216] May 31, 2015

- References listed on the TRC Website:
    - Alberta Online Encyclopedia: The making of Treaty 8 in Canada's Northwest: Residential Schools[217]
    - Canada in the Making: Aboriginal Residential Schools[218]
    - Canadian Human Rights Museum[219]
    - Canadian Museum of Civilization[220]
    - Inter-generational Effects on Professional First Nations Women Whose Mothers are Residential School Survivors[221]
    - Libraries and Archives Canada: Native Residential Schools in Canada: A Selective Bibliography[222]
    - Project of Heart[223]
    - The Canadian Encyclopedia: Residential Schools[224]
    - UBC Library: Chronology of Federal Policy Towards Aboriginal People and Education in Canada[225]

[215] http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Survivors_Speak_2015_05_30_web_o.pdf
[216] http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf
[217] http://wayback.archive-it.org/2217/20101208174512/http://www.albertasource.ca/treaty8/eng/1899_and_After/Implications_and_Contentions/residential_schools.html
[218] http://www.canadiana.ca/
[219] https://humanrights.ca/
[220] http://www.historymuseum.ca/
[221] http://www.trc.ca/websites/trcinstitution/File/pdfs/kiskino_Intergenerational%20Effect%20of%20IRS%20on%20Prof%20Women.pdf
[222] http://www.collectionscanada.gc.ca/native-residential/index-e.html
[223] http://projectofheart.ca/
[224] http://www.thecanadianencyclopedia.com/en/article/residential-schools/
[225] http://education.library.ubc.ca/

Books

John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).

Sebastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013).

John H Hylton, *Aboriginal Sexual Offending in Canada* (Ottawa: Aboriginal Healing Foundation, 2002).

Shin Imai, *Annotated Aboriginal Law: The Constitution, Legislation and Treaties 2017* (Toronto: Thomson Reuters, 2016).

Laurence J Kirmayer, Caroline L Tait & Cori Simpson, "The Mental Health of Aboriginal People in Canada: Transformations of Identity and Community" in Laurence J Kirmayer & Gail Guthrie Valaskakis eds, *Healing Traditions: The Mental Health of Aboriginal Peoples in Canada* (Vancouver: UBC Press, 2009) 3.

Justice Harry LaForme, "Section 25 of the Charter; Section 35 of the Constitution Act, 1982: Aboriginal and Treaty Rights; 30 Years of Recognition and Affirmation" in Stéphan Beaulac & Errol Mendes, eds, *Canadian Charter of Rights and Freedoms,* 5th ed (Markham: LexisNexis, 2013).
Arthur Manuel, *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines, 2015).

Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 225.

Arthur J Ray, *Telling It To the Judge: Taking Native History to Court* (Montreal and Kingston: McGill-Queens University Press, 2012).

Benjamin J Richardson, Shin Imai & Kent McNeil, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009).
Rupert Ross, *Indigenous Healing: Exploring Traditional Paths* (Toronto: Penguin Canada, 2014).

John Ralston Saul, *The Comeback* (Toronto: Viking, 2014).

Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014).

Chelsea Vowel, *Indigenous Writes: A Guide to First Nations, Métis & Inuit Issues in Canada* (Winnipeg: HighWater Press, 2016).

Articles

Amy Bombay, Kimberly Matheson & Hymie Anisman, "The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma" (2014) 51:3 Transcultural Psychiatry 320.

John Borrows, "Listening for Change: The Courts and Oral Tradition" (2001) 39:1 Osgood Hall LJ 1.

Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6:1 Ind LJ 13.

Hadley Friedland and Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead LJ 16.

Justice Harry S LaForme, "The Justice System in Canada: Does it Work for Aboriginal People?" (2005) 4:1 Ind LJ 1.

Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders" (2016) 61:4 McGill LJ 847.

Jonathan Rudin, "Aboriginal Over-representation and R v Gladue: Where We Were, Where We Are and Where We Might Be Going" (2008) 40 SCLR: Osgoode's Annual Constitutional Cases Conference 687.

Papers and Reports

Lisa D Chartrand, "Accommodating Indigenous Legal Traditions" (Paper prepared for the Indigenous Bar Association, March 31, 2005), online: http://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf.

Hadley Friedland, "Accessing Justice and Reconciliation" Indigenous Bar Association Accessing Justice and Reconciliation Project: Final Report (2014), online: http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf.

Indigenous protocols for lawyers, Law Society Northern Territory, Second edition, 2015 by Law Society Northern Territory, Darwin, Northern Territory, Australia[226]

[226] http://lawsocietynt.asn.au/images/stories/publications/indigenous_protocols_for_lawyers.pdf

Judges in a Multicultural Society by The Right Honorable Chief Justice Beverley McLachlin, P.C.[227]

Justice Within: Indigenous Legal Traditions, A Discussion Paper, Law Commission of Canada, August 2006[228]

Law Commission of Canada, *Transforming Relationships Through Participatory Justice*, 2003[229]

Living arrangements of Aboriginal children aged 14 and under (2016) (Annie Turner, Statistics Canada): This paper uses data from the National Household Survey to examine the living conditions of Aboriginal children aged 15 and under. The study looked at parenting relationships, family size, and participation with child welfare agencies. Online: http://www.statcan.gc.ca/pub/75-006-x/2016001/article/14547-eng.pdf

Missing and Murdered Aboriginal Women: A National Operational Overview (2014) (Royal Canadian Mounted Police}: This report summarizes the findings of an RCMP-led study of incidents of missing and murdered Aboriginal women from across Canada. It is organized around four topics: the numbers of murdered and missing Aboriginal females; homicide perpetrator characteristics; what we understand about the outstanding cases; and, victim circumstances. Online: http://www.rcmp-grc.gc.ca/wam/media/460/original/0cbd8968a049aa0b44d343e76b4a9478.pdf

Ontario Hospital Association, "A Practical Guide to Mental Health and the Law in Ontario", revised edition, September 2016[230]

Report for the Law Commission of Canada, Professor John Borrows, Law v Foundation Chair in Aboriginal Justice and Governance, Faculty of Law, University of Victoria, January 2006

Revitalizing Indigenous Laws: Accessing Justice and Reconciliation, October 17, 2012, Indigenous Bar Association Conference Descriptive Report[231]

Kirsten Manley-Casimir, "Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law" (2016) 61 McGill L.J. 939

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[227] http://www.lsuc.on.ca/media/mclachlin_judges_multicultura_society.pdf
[228] http://publications.gc.ca/site/eng/9.667883/publication.html
[229] http://www.aboriginallegal.ca/assets/transformingrelationships.pdf
[230] http://psychiatry.queensu.ca/assets/A_Practical_Guide_to_Mental_Health_and_the_Law_in_Ontario_Revised_Edition_September_2016.pdf
[231] http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/RM-Final-Descriptive-report-Oct-2012-Laws-conf1.pdf

Online Resources and Training Programs

Chelsea Vowel blog: http://apihtawikosisan.com/

Reconciliation Syllabus: TRC-inspired resources for teaching law: https://reconciliationsyllabus.wordpress.com/

Modern Land Claims Coalition (includes 1 hour training course on Modern Treaties) http://www.landclaimscoalition.ca/

1 hour training course video on Modern land claims: http://www.moxiemedia.ca/NVision/

8th Fire (CBC): Aboriginal 101, Maps, Profiles of Community Leaders, and other Resources- http://www.cbc.ca/8thfire/index.html

DOCIP (https://www.docip.org/en/) - DOCIP Searchable database on Indigenous Peoples issues in the United Nations international mechanisms - http://cendoc.docip.org/cgi-bin/library.cgi?a=p&p=home&l=en&w=utf-8

National Film Board - Alanis Obomsawin movies (some available to stream for free): https://www.nfb.ca/explore-all-directors/alanis-obomsawin/

- Incident at Restigouche (Quebec Police raids on Restigouche and fall out)
- Is the Crown at War with Us? (about commercial fishing and Aboriginal rights)
- Trick or Treaty (History of Treaty 9)
- We Can't Make the Same Mistake Twice (about Child Welfare human rights complaint)

From Historical Trauma to Resilience (2016) (Laurence J. Kirmayer, MD): This presentation was given at the PolicyWise for Children and Family "Mental Health Promotion, Suicide Prevention and Strengthening Resilience among Indigenous Youth" event in Edmonton, Alberta. This presentation discusses the adversities that Aboriginal peoples have faced, notably colonialization, rapid cultural change, racism, and marginalization. It also explores trauma theory and the intergenerational effects of trauma. Online: https://vimeo.com/166805192

Terminology (2017) (Pam Palmater, Associate Professor, Ryerson University): This webpage contains a number of definitions of key terms used in discussing Indigenous peoples. It also includes a section on writing tips. Online: http://www.pampalmater.com/terminology/

Law 340: Indigenous Lands, Rights and Governments (2015) (University of Victoria, John Borrows): This is a recording of John Borrows's 2015 course "Indigenous Lands, Rights and Governments" at the University of Victoria. Online: https://www.youtube.com/channel/UC3GVqsk_81azYxiGda4j6iQ/videos

The accompanying slides are available at: https://onlineacademiccommunity.uvic.ca/indigenouslandsrightsandgovernments/youtube-video-channel/ (Note: This lecture series starts at Lecture 2).

Native Youth Sexual Health Network

http://www.nativeyouthsexualhealth.com/

Canadian Aboriginal Aids Network

http://caan.ca/

No More Silence advocacy on MMIWG2S

http://itstartswithus-mmiw.com/

This short video resource designed for service providers of Indigenous women who have experienced violence and funded by the Law Foundation:

Don't Need Saving: Aboriginal Women and Access to Justice: https://www.youtube.com/watch?v=e5bqUjdbzls

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[232] Not all Working Group members participated in all aspects of the Guide, nor do individual members necessarily subscribe to all views expressed on substantive law matters that may be the subject of litigation. We thank everyone for their contributions.