

ASSERTING SELF-GOVERNANCE REPORT FROM CIAJ'S ANNUAL CONFERENCE ON INDIGENOUS PEOPLES AND THE LAW

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By Nathan Afilalo, June 2022



Sacred Circle, by Coast Salish artist from the Lyackson First Nation, Dylan Thomas

Asserting Self-Governance

Report From CIAJ's Annual Conference on Indigenous Peoples and the Law

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PART I

INTRODUCTION

From November 17th-19th 2021, the Canadian Institute for the Administration of Justice (CIAJ) hosted its 45th Annual Conference. The topic was Indigenous People and the Law. Over the course of the three days eight panels composed of Indigenous elders, judges, lawyers, academics as well as non-Indigenous legal professionals discussed issues ranging from Indigenous self-governance and legal orders to child welfare and the experiences of Indigenous students in law school. Collectively between in-person and virtual attendance, close to 500 people were able to participate.

Throughout the various topics discussed and the experiences and wisdom shared a fundamental issue arose: Indigenous self-government. Not a panel passed without its mention. Self-determination was the narrative either from which discussion began or culminated to. The following report reproduces the aspects of Indigenous self-government that were highlighted and reoccurred throughout the conference. Three general areas were covered: the United Nations Declaration on the Rights of Indigenous Peoples as a legal instrument, the legal narratives of Indigenous self-governance, and Indigenous laws and the inherent right to self-governance. The following report turns its attention to these topics.

THE VISION OF THE REPORT

Following the conference's opening remarks, Chief Dr. Robert Joseph, OC, OBC, Ambassador for Reconciliation Canada and former Executive Director of the Indian Residential School Survivors Society, spoke to great lengths about reconciliation and the importance of the role of the individual beyond governmental sanction or mandate. He said reconciliation is more than politics and law, it is about "you and me ... about how we begin to figure out how we see, hear, and understand each other," and where the inaugural act towards it is education. He urged the audience members to reach out to Indigenous resources and educate themselves about Indigenous and promote this act amongst colleagues.

The original plan for this report was to discuss what self-government was by linking each of the conference's eight panels topics to correlative recommendations from various reports and inquiries produced over the past 30 years. The purpose of such an exercise was to give readers, namely, non-Indigenous actors in the justice system, a resource that

could direct them on *how to act and change the Canadian legal landscape*. The document would have acted as a guide to justice actors based on authoritative Indigenous voices.

However, providing a series of instructions, recommendations and rules was not *how* Indigenous self-determination and self-government were strictly discussed at the conference. This is not to say, for example, that the 94 Calls to Action of the Truth and Reconciliation Commission of Canada (TRC) were neglected. On the contrary, they were often cited, particularly in the context of addressing how Canadian governments, through colonial institutions, legal structures, and cultural myths, refused to recognize the ability and inherent right of Indigenous peoples to self-government.

However, accompanying discussions concerning what Canadian governments and institutions have been called upon by Indigenous people to do in recognition of Indigenous jurisdiction were conversations on Indigenous governance institutions and legal orders themselves. Thus, the discussions often turned to examples of Indigenous laws, legal traditions, understandings of self-government, and practices thereof.

Exploration of Indigenous self-government involved examples of Indigenous communities weaving their traditions outside, between and within the bounds of the Canadian legal system. A large accent was placed on Indigenous communities revitalizing their legal institutions or giving new expression to their laws as well as the limits and spaces within the Canadian legal framework and imagination for Indigenous laws, legal orders, and jurisdiction to exist.

The following report therefore follows the currents of those discussions on Indigenous self-determination, reproducing the recurring thoughts, ideas and examples of Indigenous self-government expressed at the conference.

TAKING ACTION

On the first morning of the conference, the words of the Honourable Murray Sinclair, rang clearly as he spoke in clear terms of the need for change amongst the legal community in Canada. The change required is simple as it is imperative: taking action to recognize and substantiate Indigenous self-governance.

The Honourable Sinclair related the concerns of an Indigenous student who asked him why Indigenous people ought to respect Canadian law when Canadian law offers no such courtesy to Indigenous laws. The Honourable Sinclair impressed upon the audience that until these conflicts are redressed, citing as examples the ongoing issues with the Coastal Gaslink project and the Mi'kmaw lobster fishing disputes, Indigenous people will continue

to be frustrated and produce more significant confrontation with greater tools at their disposal. The sentiment very much echoed that of the *Manitoba Aboriginal Justice Inquiry* (AJI) in its advocacy for Indigenous self-government amongst other reforms to begin to reconcile and heal historical and ongoing harm from the colonial relationship between Indigenous peoples and Canada.¹

Opening the conference, Deborah Sparrow, Knowledge Keeper of the Musqueam First Nation, reminded those in attendance why action is necessary. She said that “the laws of this land have been overlooked.” Action is required to change the abiding situation where the legal orders, traditions and inherent right of self-government of the First Nations, Inuit and Métis is ignored by Canadian law—those who make it, and those who interpret it. Canadian history up to the present day demonstrates the cost of ignoring “the laws of this land.” Indigenous people have lived with coercive historical treaties, broken treaties,² and expensive and slow modern treaty processes.³ Indigenous people have endured the institution of residential schools and its ongoing legacies, such as the disproportionate rates of Indigenous incarceration,⁴ the significant number of children apprehended in foster care,⁵ and disparities in education, income, and health between Indigenous people and other Canadians.⁶

The remarks of the Honourable Robert J. Bauman, Chief Justice of British Columbia and Chief Justice of the Court of Appeal for the Yukon, anticipated and responded to the calls for education, action and exchange of the elders opening the conference. The Chief Justice expressed emphatically to the audience, and in particular to the Indigenous experts and speakers in attendance, that he and the attendant non-Indigenous legal practitioners are “one of your target audiences.” They were here to learn.

Chief Justice Bauman recognized that “the adversarial process has failed Indigenous people as a forum for reconciliation” while courts can act as “barriers to justice.” He

¹ Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, vol. 1, The Justice System and Aboriginal People*. (Winnipeg: The Inquiry, 1991) [AJI].

² Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015 at 1 [TRC, “Summary”]. Also see overview at chapter 1 “The History.”

³ Dirk Meissner, “B.C treaty process too slow says governments, native leaders” (12 April, 2015), online: *Canadian Broadcasting Corporation*: <<https://www.cbc.ca/news/canada/british-columbia/b-c-treaty-process-too-slow-say-governments-native-leaders-1.302988>>

⁴ Justice Canada, “Indigenous overrepresentation in the criminal justice system,” (May, 2019), online: Department of Justice, Reports and Publications. <<https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/may01.html>>

⁵ Government of Canada, “Reducing the number of Indigenous children in care,” (January 17, 2022) online: *First Nations Child and Family Services* ≤ 2016 Census Data: <https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851>.

⁶ TRC “Summary,” *supra* note 2 at 136, see full discussion at chapter entitled “Legacy.”

continued, saying that the “Canadian law has suppressed truth and deterred reconciliation” and that this reality “gives us the urgency and the duty to act.” The Chief Justice pressed that at the forefront of the duty to act is the issue of Indigenous self-determination. The change required is more space within the Canadian legal landscape for Indigenous laws and expressions of self-governance.

The Chief Justice in these remarks evoked the words of former Chief Justice of the British Columbia Court of Appeal, Justice Finch, in his article “The Duty to Learn: Taking Account of Indigenous Orders in Legal Practice.” In that paper, Justice Finch argues that it is necessary to “make space” for Indigenous legal orders in Canadian law.⁷ He opens with a sentiment also shared at the beginning of CIAJ’s conference:

“Like the majority of the practitioners attending this conference, I am concerned with the question of *how*, from a practical perspective, to effect this recognition (to ‘make space’). And of central—and indeed paramount—concern on this point is the present and the future ability of individual judges, and lawyers, to approach this task, in a principled and effective manner.”⁸

In their respective paper and opening remarks, both the former and current Chief Justice stressed that the duty to act depends on learning the limitations that frame the duty to learn. Chief Justice Bowman explained that the role of the judge is to “recognize the truth,” and accept the authority of Indigenous legal orders and laws, and finally, to understand not how to interpret Indigenous laws, but how to “braid these [legal] systems together.”

The *duty to learn* manifests itself in learning of the Indigenous perspective. The goal is not to set few Indigenous laws as rare gems into the pluralistic diadem of the Canadian legal tradition but to “... find a way to exist together with a pre-existing cultural landscape.”⁹ The dialogic exchange between legal traditions must not simply be that Canadian law opens its legal imagination to incorporate Indigenous legal traditions. Rather, the Canadian legal system ought in turn recognize that it must be accepted within Indigenous legal landscapes and traditions.¹⁰

Chief Justice Bauman turned to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) as an example of what Indigenous space in the Canadian legal order can look like. Chief Justice Bauman echoed the words of the UN Special

⁷ [Lance S.G. Finch, “The Duty to Learn: taking Account of Indigenous Legal Orders in Practice” prepared for the Continuing Legal Education Society of British Columbia \(November 2012\) at 2.1.1.](#)

⁸ *Ibid* at 2.1.1.

⁹ *Ibid* at 2.1.8.

¹⁰ *Ibid*.

Rapporteur on the right of Indigenous people¹¹ and of UNDRIP itself¹²: The self-government of Indigenous people cannot be assimilated within the Canadian state. Brenda Young, Community Justice Director, Chippewas of the Thames First Nation asked, in the rebuilding of Indigenous laws, is Indigenous jurisdiction and sovereignty lost when these are taken into the Canadian court system?

To prevent acts of reconciliation turning into acts of assimilation, the Chief Justice urged judges and lawyers to familiarize themselves with the relevant Indigenous laws presented before them.¹³ Doing so permits legal professionals to “recognize the cultural foundations” of Indigenous laws and knowledge, aiding them in recognizing their own biases so as to not “oversimplify” and treat reductively the Indigenous systems they may encounter.¹⁴ At the same time, those same legal actors must recognize Indigenous expertise, authority and jurisdiction over a matter to determine it correctly.¹⁵ Jurisdiction must be shared, the proper sources of knowledge and authorities must be consulted, and Indigenous laws recognized. The Chief Justice stressed that to effectuate this, action is required.

PART II: UNDRIP as an Instrument for Self-Determination

THE CONTEXT OF REPORTS, INQUIRIES AND COMMISSION IN CANADA

The demand for action by Indigenous communities from non-Indigenous decision makers is poignantly captured in the nomenclature of the 94 recommendations made by the TRC: “94 Calls to Action.” The language chosen by the TRC of a “call to action” over something more traditional such as a “recommendation” inherently speaks to the necessity of change required. Note that the *National Inquiry for Murdered and Missing Indigenous Women and Girls* (NIMMIWG) as well as the *Public Inquiry Commission on Relations Between Indigenous Peoples and Certain Public Services in Québec: Listening, Reconciliation and Progress* (Viens Report), both released in 2019, use similarly evocative language to frame their proposed changes as “Calls for Justice” and “Calls for Action.” We can contrast that language with the 2011 report *First Nations Representation on Ontario Juries* which makes recommendations. It is important to note, while these reports might not all be equal

¹¹ Special Rapporteur on the rights of indigenous peoples, “Purpose of the Mandate” online: United Nations Human rights Special Procedures <<https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx>>.

¹² [UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 at art 8\(1\) \[UN Declaration\]](#).

¹³ Finch, *supra* note 7 at 2.1.4

¹⁴ John Burrows, *Canada’s Indigenous Constitution*, (Toronto, University of Toronto Press, 2010) at 23–24 [Borrow, “Constitution”].

¹⁵ Finch, *supra* note 7 at 2.1.5–2.1.7.

in scope, each is profound in the depth of the issues explored. Rather the point here is to highlight the TRC's narrative: (1) calling upon another with power to (2) act to ameliorate the current circumstance by issuing Calls to Action.

Published in 2015, the TRC's final report cemented Indigenous issues into Canadian political and juridical discourse, due to either the sheer potency of the report or the persistent decades of Indigenous activism and leadership.¹⁶ However, one needs only to look at the slow pace of the implementation of the TRC's 94 Calls to Action to understand that discourse alone has not spurred action.¹⁷ Depending on which source is consulted and what metrics¹⁸ are used to qualify the "completion" of individual Calls to Action, to date between 10¹⁹ to 13²⁰ of the 94 have been completed since 2015.²¹

The systemic nature of the lethargy relative to action on well-documented and evidenced issues affecting Indigenous People in Canada is made clearer when the scope of calls to actions is expanded beyond the 94 Calls to Action. As the former Assembly of First Nations National Chief and Former Co-Chair for the Royal Commission on Aboriginal Peoples, George Erasmus, OC, reminded the audience, the TRC stands in conversation with a much larger set of calls to action and recommendations from various commissions and inquiries built upon the needs of Indigenous communities in Canada. If one considers the state of implementation of the recommendations and calls for action of the AJI,²² RCAP,²³ NIMMIWG, and Viens Report, it becomes clear that even the most charitable reading of the implementation of the 94 Calls to Action is nothing to be proud of. The point is further made when one considers the reports and inquiries that go in depth in more specific fields that make further findings and recommendations calling for action and change.²⁴ However, the undertakings of these commissions and inquiries have not been in vain.

¹⁶ [Eva Jewell and Ian Mosby, "Calls to Action Accountability: A 2021 Status Update on Reconciliation" \(Yellowhead Institute, 2021\), Yellowhead Institute at 9 \[Jewell and Mosby\].](#)

¹⁷ *Ibid* at 1.

¹⁸ *Ibid* at 4, 5.

¹⁹ [Indigenous Watchdog, "What's happening with Reconciliation? Indigenous Watchdog Updates: Dec 5, 2021 \(5 December 2021\), online \(blog\): Indigenous Watchdog <https://indigenouwatchdog.org/2021/12/07/whats-happening-with-reconciliation-indigenous-watchdog-Indigenous Watchdog, \[Indigenous Watchdog\].](#)

²⁰ [CBC News, "Beyond 94: Truth and Reconciliation in Canada" \(19 March 2018\), online \(blog\): <https://newsinteractives.cbc.ca/longform-single/beyond-94?&cta=> \[Beyond 94\].](#)

²¹ A sample of resources can be found at the above notes: Jewell and Mosby, *supra* note 16. Indigenous Watchdog, *supra* note 19. Beyond 94, *supra* note 20.

²² AJI, *supra* note 1.

²³ [Report of the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: volume 1: looking forward, looking back*, \(Ottawa: Canada Communication Group- Publishing, 1996\) \[RCAP, vol 1\].](#)

²⁴ Ardith Walpetko We'dalx Walkem, [Expanding Our Visions: Cultural Equality, Indigenous Peoples and Human Rights, *In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in B.C. Health*](#)

THE ADOPTION OF UNDRIP IN CANADA

One of the many enduring legacies of the TRC discussed in the final panel of the first day of the conference was how the TRC thrust UNDRIP into Canadian legal and political discourse. In 2019 British Columbia enacted the *Declaration on the Rights of Indigenous Peoples Act*²⁵ (*DRIPA*) whose purpose is to ensure all laws in the province are consistent with UNDRIP.²⁶ The TRC identified UNDRIP as the framework for reconciliation to be adopted by federal, provincial, territorial and municipal governments.²⁷ Adopted by the United Nations General Assembly in 2007, the 46 articles comprising the UNDRIP present a structure of minimum standards elaborating on “existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous peoples.”²⁸ In the summer of 2021, the federal government passed the *United Nations Declaration on the Rights of Indigenous Peoples Act*²⁹ with the purpose of affirming UNDRIP’s application in Canada,³⁰ providing a framework for its implementation at the federal level³¹ and ensuring that “the laws of Canada are consistent with the Declaration.”³² Further, UNDRIP increasingly is being used as a normative source for the interpretation of rights, notably being used by the Quebec Court of Appeal in a reference decision to interpret s.35 of the *Constitution Act, 1982* as containing an inherent right of self-government (explored further below).³³ These advancements demonstrate that despite the slow implementation of the recommendations of the TRC, RCAP, AJI and NIMMIWG, UNDRIP is showing promise as an instrument.

Care, (Vancouver: British Columbia Human rights Tribunal, 2020). Frank Iacobucci, First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci, (Toronto: Ontario Ministry of the Attorney General, 2013).

²⁵ Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44 [BC Declaration].

²⁶ *Ibid* at ss 2,3.

²⁷ Truth and Reconciliation Commission Canada “Truth and Reconciliation Commission of Canada: 94 Calls to Action” (2015), online: <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_act>.

²⁸ United Nations, “United Nations Declaration on the Rights of Indigenous Peoples,” (2022) online: Department of Economic and Social Affairs: Indigenous Peoples ≤ <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>≥.

²⁹ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, [Federal Declaration].

³⁰ *Ibid* at s 4 (a).

³¹ *Ibid* at s 4 (b).

³² *Ibid* at s 5.

³³ *Renvoi à la Court d’appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at para 513 [Renvoi].

However, many speakers decried the slow pace of UNDRIP implementation in those jurisdictions in which it was passed into law.³⁴ The TRC stresses taking sustained action as the key to achieving the goals of UNDRIP. The TRC'S Call to Action 43 is instructive:

“We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.”³⁵

The TRC highlights that a series of continued and collaborative actions, “strategies” and “concrete measures” are required to establish a new relationship of mutual respect, recognition and protection between Indigenous peoples and Canadian societal norms and government structures. The success of UNDRIP and any of the calls to action, justice, and recommendations of the reports and inquiries previously mentioned above is their substantive effect and not their mere formal adoption or governmental acknowledgement. Much discussion was had at the conference as to how to produce the substantive change the adoption of UNDRIP promises, particularly in relation to self-government. It is to its use as a legal instrument that we now turn.

UNDRIP AS A LEGAL INSTRUMENT

The International Context

In international law *self-determination* refers to the legal right of a people to govern themselves without external interference from nation states.³⁶ It is a general and core principle that arises from customary international law.³⁷ Today self-determination is enshrined in many international treaties and legal instruments³⁸ though first adopted in the Charter of the United Nations in 1948.³⁹ A general definition of the right is expressed

³⁴ Jacob Cardinal, “First Nation leaders say BC implementation of UNDRIP is too slow” (2 January 2022) online: *The Toronto Star* < <https://www.thestar.com/news/canada/2022/01/02/first-nation-leaders-say-bc-implementation-of-undrip-is-too-slow.html> >.

³⁵ *Supra* note 27 at Call to Action 43.

³⁶ *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among states in Accordance with the Charter of the United Nations*, UNGA Res 2696 (XXV), UN GAOR, 25th Sess, Supp No 28, at 121, Un Doc A-8028 (1971), adopted by consensus on October 24th 1970. See also at *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res. 50/6, 9 November 1995.

³⁷ *Reference re Succession of Quebec*, [1999] 2 SCR 217, 1998 CanLII 793 (SCC) at para 114 [Succession Reference].

³⁸ *Ibis* at paras 117, 120.

³⁹ *Charter of the United Nations*, 1945, 1 UNTS XVI at art 1 (2): To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...” [UN Charter]. See also *UN Charter*, *supra* note 39 at art 55.

article 1 of both the U.N's *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCP)*, which holds that:

“All people have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”⁴⁰

Note, self-determination is here defined as a legal concept and right. Thus, reference to it in legal documents does not mean that Indigenous people were not exercising or seeking to establish forms of self-determination and governance prior to its introduction as a right into Canadian law. Rather, as is evidenced in the reasons of the recent Québec Court of Appeal reference case *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*,⁴¹ self-determination as a right that is substantiated and given force by the persistent activity of Indigenous peoples prior to it becoming so in Canada.

UNDRIP and Self-Governance

UNDRIP is the product of near 25 years of deliberation by Indigenous groups and UN member states on the articulation of self-determination in a rights context for Indigenous people.⁴² UNDRIP sets out a universal framework of minimum standards for the “survival, dignity and well-being of Indigenous peoples of the world” that elaborates on existent human rights standards, focusing on collective rights and the enduring histories of colonial relationships between Indigenous people and settler states.⁴³

Importantly, UNDRIP's preamble states that nothing in the *Declaration* can be used to deny peoples their right to self-determination. Article 3 sets out that Indigenous people have the right to self-determination, repeating the language of the ICPR.⁴⁴ Article 4 elaborates that:

⁴⁰ *International Covenant on Civil and Political Rights* 999 U.N.T.S. 171 at art 1 [ICCPR]. *International Covenant on Economic, Social and Cultural Rights*, 999 U.N.T.S.3 at art 1 [ICESCP]. See discussion in *Reference re Secession of Quebec*, *supra* note 37 at paras 111–123. See [UN Declaration](#), *supra* note 12 at art 3.

⁴¹ Meissner, *supra* note 3.

⁴² *Supra* note 28 at “Historical Overview.”

⁴³ [UN Declaration](#), *supra* note 12, Preamble, para 6: “Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonisation and dispossession of their lands, territories, and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.”

⁴⁴ *Ibid* at art 3 repeats the language of the ICCPR, ICESCR, the Vienna Declaration and Programme of Action, which are also affirmed along with the UN Charter in its preamble: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”⁴⁵

Article 4 can be understood to promote a form of internal self-determination in its reference to “internal and local affairs.” This can be implicitly understood of UNDRIP as a whole by the very nature of the document in its negotiation of Indigenous rights. This points to what some have argued are the compromises⁴⁶ Indigenous people had to make in the drafting of the UNDRIP in conjunction with states who themselves would not promote a compromise to their territorial integrity in the elaboration of self-determination or strong collective rights.⁴⁷

Free, Prior and Informed Consent

Despite this, UNDRIP nevertheless presents a system of strong rights and obligations tied to the self-determination of Indigenous peoples.⁴⁸ One such concept articulated in the declaration is the international norm⁴⁹ developed by Indigenous people of “free prior and informed consent” (FPIC).⁵⁰ FPIC is a right that pertains to Indigenous peoples to “give or withhold consent to a project that may affect them or their territories” as well as the ability to withdraw consent and negotiate conditions under which the project is designed, implemented, monitored and evaluated.⁵¹ While there is no universal definition of FPIC, it commonly applies to decision-making processes in the field of resource

⁴⁵ *Ibid* at art 4.

⁴⁶ Claire Charters, “A, Self-Determination Approach to Justifying Indigenous Peoples’ Participation in International Law and Policy,” (2010) *International Journal on Minority and Group Rights* 17 at 219. See also Karen Engle, “On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights” (2011) 22:1 *Eur J Intl L* 141.

⁴⁷ *Succession Reference*, *supra* note 37 at para 126.

⁴⁸ Michael Murphy, “Indigenous Peoples and the Struggle of Self-Determination: A Relational Strategy,” (2019), 8-1 *Canadian Journal of Human Rights* at 67 (CanLII) at 69 [Murphy].

⁴⁹ FPIC has been recognized in UNDRIP, the ILO Convention 169, and the Convention on Biological Diversity (CBD), as well as other international instruments which have been interpreted to include it such as the ICCPR, the ICESCR, the ICERD (International convention on the elimination of All forms of Racial Discrimination), amongst others: <https://www.fao.org/3/i6190e/i6190e.pdf>

⁵⁰ *UN Declaration*, *supra* note 12 arts 10, 11 (2), 19, 28, 29 (2) and 32 for examples of FPIC in UNDRIP.

⁵¹ Food and Agriculture Organization of the United Nations, “Free Prior and Informed Consent: an Indigenous people’s right and a practice for local communities: Manual for Project Practitioners: Food and Agriculture Organization of the United Nations” (2016), at 31–32, online: *Free Prior and Informed Consent Manual* ≤<https://www.fao.org/3/i6190e/i6190e.pdf>≥.

extraction on Indigenous lands.⁵² UNDRIP article 32 provides an example of FPIC as a general principle, stating that:

- “1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of minerals, water or other resources.”

Speaking on the conference’s penultimate panel discussing Indigenous self-governance, Merle Alexander explained that “consent” in FPIC entails the elaboration of “relational and ongoing” decision-making processes established between an Indigenous community, project proponent and-or Crown intermediaries. FPIC allows for the application of a First Nation’s laws to a project by using its legal norms and institutions as the basis for the decision-making and dispute resolution-based processes set out in legally binding language.

Alexander explained that “consent” does not imply a veto but rather refers to mechanisms to contextualize a project that impacts Indigenous people within their own norms, institutions, and jurisdiction.⁵³ Consent based processes means that the Indigenous community establishes with a project proponent the conditions for the progression of the project as well as subsequent dispute resolution processes should disagreements arise. This is done before physical work on a project begins and carried out throughout its life. The twofold benefit is that the nation exercises self-determination while the project is granted greater legal certainty as Indigenous input is directly given throughout a project’s life through clearly established and culturally relevant consent mechanisms.⁵⁴

A consent model moves away from the current model of consultation and accommodation. Articulated in 2004 by the Supreme Court of Canada, *Haida Nation v British Columbia (Minister of Forests)*⁵⁵ established that the duty of the government is to “substantially address” Indigenous concerns through consultation on projects that affect Indigenous lands inclusive of instances where title is contested without an obligation to

⁵² [UN Declaration, supra note 12](#). FPIC is not restricted to resource extraction, as is demonstrated in UNDRIP articles 10 and 11 (2).

⁵³ [The Honourable Jacques Viens, Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Quebec: Listening, reconciliation and progress: Final Report, \(Quebec, 2019\) at 220-223.](#)

⁵⁴ [John R. Woen and Deanna Kemp, “Free prior and informed consent’, social complexity and the mining industry: Establishing a knowledge” \(2014\) 1 Resources Policy 41 \(Science Direct\) at 91.](#)

⁵⁵ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

come to an agreement with the impacted Indigenous community.⁵⁶ This duty is grounded in the Crown's role as a fiduciary of Indigenous people. In contrast, FPIC obligations stem from a community's own jurisdiction, putting that community in direct partnership with a project proponent instead of tertiary actors.

As stated in article 4 of UNDRIP, self-determination encompasses the notion of self-government, and FPIC demonstrates one strong framework of doing so. As a modality or an aspect of self-determination, self-government can be understood as the exertion of jurisdiction by Indigenous people through design and control of governing institutions that are directly accountable to their own citizens, responsive to Indigenous needs and priorities and reflective of their own institutions and cultures.⁵⁷ While the form of self-government is not monolithic, in Canada Indigenous self-government implies jurisdiction that exceeds the territorial limits of a reservation and/or the legal limits prescribed to an "Indian Band" under the *Indian Act* based.⁵⁸ Even this statement, however, is not universal as there are those without status under the *Indian Act*, the Métis have only recently been included to bear s.35 rights as Indigenous people, and those claiming to have never ceded territory to the Canadian government within and without the context of treaties.⁵⁹

PART III Self-Determination and Self-Governance

THE NARRATIVES OF SELF-DETERMINATION

At the very heart of the issue of Indigenous self-determination and self-governance in Canada lies what lawyer Jason T. Madden, Métis lawyer and Co-Managing partner at Pape Salter Teillet L.L.P, called the elephant in the room: the pre-existence of Indigenous societies, governance and laws upon the land over which the Crown asserted sovereignty.⁶⁰ This historical reality remains an "elephant in the room" as the pre-existence of laws and jurisdiction of Indigenous societies has either been denied in Canadian law or when recognized, not given effect to the satisfaction of many Indigenous peoples. As many of the speakers detailed, the history of Indigenous self-determination and governance from its existence prior to the claim of sovereignty by the Canadian state to the modern day is, in Madden's words, one of endurance in the face of "dispossession,

⁵⁶ *Ibid* at paras 37, 42 and 49.

⁵⁷ Murphy, *supra* note 48 at 69.

⁵⁸ Alan Hanna, "spaces for Sharing: searching for Indigenous Law on the Canadian Legal Landscape, 51 U.B.C. L. Rev 105 (2018) at 136. *Indian Act*, RSC 1985, c I-5.

⁵⁹ Christopher Curtis, "No running water, no electricity: Kicisakik struggles to be heard in this election," (16 September 2021) online: *Ricochet* <<https://ricochet.media/en/3781/no-running-water-no-electricity-kitcisakik-struggles-to-be-heard-in-this-election>>.

⁶⁰ *UN Declaration*, *supra* note 12, Preamble, para 6.

erasure and denial”⁶¹ of Indigenous peoples and jurisdiction.⁶² Speaking in the afternoon of the conference’s first day, Professor Val Napoleon, Law Foundation Chair of Indigenous Justice and Governance at the University of Victoria, captured the heart of the matter poignantly, explaining that “ ... much of Indigenous law has been trampled, made invisible or disregarded, nonetheless, it is still at its heart a part of Canada, and the work is about rebuilding.”⁶³

Discussions of Indigenous self-determination do not simply involve the policies, mechanism and legal structures that give self-governance positive effect. Rather, the discussion includes negotiating the tension between a diverse series of peoples, histories, relationships, legal orders and societal structures claiming to maintain their right of self-government against a system of law that acts as if these diverse people uniformly lost and surrendered that right and ability to a colonial government to exercise it on their behalf.⁶⁴ Made clear at the conference was the necessity for discussion of self-determination and governance to involve questions of how to reconcile social, national and historical narratives, the laws and governance structures these narratives degenerate and the very real consequences of those structures upon the lives of Indigenous people.

DISCUSSIONS OF SELF-GOVERNMENT

As explained by Merle Alexander, Principal at Miller Titerle and member and Hereditary Chief of the Kitasoo Xai’xais First Nation, various Indigenous peoples, communities, and nations have adopted different methods of self-government in reaction to Canadian law. This is true even within a province, and more so across Canada. Consider the various models through which Indigenous peoples have pursued self-governance in relation to Canada: historic treaties, modern-day treaties, self-governing agreements, land claim agreements, reconciliation agreements, laws relating to Child and Family care under the *Act respecting First Nations, Inuit and Métis children, youth and families* or through Aboriginal rights and title to name a few.⁶⁵

While instruments such as the *Indian Act* sought to treat all Indigenous people as the same, the experience of colonialism differs amongst and with the First Nations Inuit and Métis. On the final panel of the conference, Me Denis-Boileau detailed the unique

⁶¹ RCAP vol 1, *supra* note 23 at vol 1.

⁶² *Succession Reference*, *supra* note 37 at para 376.

⁶³ Professor Napoléon continued on to discuss the important work of the [JD/JID program](#) (joint *juris doctor* and Indigenous law degree program) at the faculty of law at the University of Victoria.

⁶⁴ RCAP vol 1, *supra* note 23 vol 1 at 8.

⁶⁵ [Act respecting First Nations, Inuit and Métis children, youth and families](#) at s.18 [*First Nations, Inuit and M/tis children youth and families*].

historical and linguistic circumstances for Indigenous people in Quebec set out in the Viens Report which is also detailed in the work the NIMMIWG supplementary report on Quebec which itself contains many First Nations and Inuit communities.

Ideas of Indigenous self-government are neither monolithic nor static. In turn, neither are the visions of Indigenous self-government. However, this reality does not prevent generalized discussions of the topic. Me Nadir André, member of the Matimekush-Lac John First Nation and lawyer at Borden Ladner Gervais L.L.P, explained to the audience on the conference's final day that nations are composed of 3 elements: people, territory and governments. Colonization through instruments such as the *Indian Act*, sought to reduce these 3 elements. A territory became a reservation, governments became Indian bands, and people became wards of the federal government. Thus, the narrative of the federal government was articulated through the *Indian Act*.

From many Indigenous perspectives, the purview of Indigenous laws is profoundly incongruent with the limited scope of governance imposed upon Indigenous people. Me André was not alone in punctuating that Indigenous laws apply on ancestral territory, on its waters, animals, and resources. These are bounds far vaster than what is currently recognized. The scope of this reality was captured by the RCAP where it opened its report with the following:

"The legitimate claims of Aboriginal peoples challenge Canada's sense of justice and its capacity to accommodate both multinational citizenship and universal respect for human rights. More effective Aboriginal participation in Canadian institutions should be supplemented by legitimate Aboriginal institutions, thus combining self-rule and shared-rule. The Commission's proposals are not concerned with multicultural policy but with a vision of a just multinational federation that recognizes its historical foundations and values its historical nations as an integral part of the Canadian identity and the Canadian political fabric."⁶⁶

While not all Indigenous ideas of self-government may be represented in the above statement, the focus on UNDRIP by the TRC as well as the many and repeated efforts of various Indigenous people in Canada speaks to at least the universality of the willingness for self-determination in spirit. Thus, we can discuss self-governance in the context of how its avenues in the Canadian legal order are constrained. Further, those avenues relate to Indigenous laws and law-making capacity, in relation to governments, lands and peoples. Put plainly by Me André, the discussion of Indigenous self-governance has to take place in relation to areas of jurisdictions that were once Indigenous and given over to federal and provincial powers. With this acknowledgement, we can mark that self-

⁶⁶ [RCAP vol 1, *supra* note 23](#) at 7.

determination in the context of the conference referred to (1) jurisdiction and decision-making powers, (2) that exceeds the territorial and legal limits allocated by the settler state as a result of its assumption of sovereignty (3) where those laws are based on the specific legal orders, institutions, culture and tradition of a particular Indigenous people and (4) grounded in that power being inherent to the Indigenous group in question.⁶⁷

Part IV: Indigenous Law

WHAT IS INDIGENOUS LAW

It is just as complex to define what is Indigenous law as it is to prescribe a definition of law itself as a concept and social phenomenon. This is particularly so given the plurality of Indigenous legal traditions in Canada. However, we can demonstrate the examples provided by the conference speakers of *what is or is not* considered as Indigenous laws. Indeed, understanding what is *not meant* when referring to Indigenous laws and legal orders is of fundamental importance to an audience of legal practitioners trained in Canadian expressions of the common and civil law system.

Aboriginal Law

We begin with a delineation set out by Alexander Merle and Me Nadir André in the organizational discussions held prior to the conference of what is “Aboriginal law” and what is “Indigenous law.” Operating within the Canadian legal system, Aboriginal law is a branch of law made by Canadian legislatures and courts concerned with the relationship between Indigenous peoples and the Crown.⁶⁸ It is the purpose of Aboriginal law to define the nature of and scope of aboriginal rights, title and treaty rights under s.35 of *Constitution Act, 1982*, detail the corresponding obligation of the Crown and promote the “reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”⁶⁹ Put simply by Professor Tuma Young in the NIMMIWG, “Aboriginal law, as taught in law school, is really Canadian law as it applies to Indigenous people. It is not Indigenous law.”⁷⁰

⁶⁷ Alan Hanna, “spaces for Sharing: searching for Indigenous Law on the Canadian Legal Landscape, 51 U.B.C. L. Rev 105 (2018) at 136.

⁶⁸ *R v Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507 at para 31 [*Van der Peet*].

⁶⁹ *Ibid* at para 31.

⁷⁰ [Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls vol 1a, \(Canada 2019\) at 130.](#)

Aboriginal law is not law made by Indigenous peoples. Rather, aboriginal law is a branch of Canadian law that originates from the Canadian common law's colonial interaction with Indigenous people.⁷¹ While this is clear when considering laws such as the *Indian Act*, this point can be less so with some rights protected by s.35 of the *Constitution Act, 1982* such as aboriginal rights and title. In 1996, the Supreme Court in *R v Van Der Peet* explained the purpose of s.35:

"In order to fulfil the purpose underlying s. 35 (1) — i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions — the test for identifying the aboriginal rights recognized and affirmed by s. 35 (1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans."⁷²

The court highlights the source of the aboriginal rights, Indigenous pre-existence,⁷³ specifically practices, traditions and customs deemed central to do Aboriginal society in question. However, determining the right scope of a given aboriginal rights, for example a right to hunt, fish or trap, the court requires considering "the perspective of the aboriginal people" on the meaning of the right.⁷⁴ Further, that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure."⁷⁵

The same consideration of the "aboriginal perspective" applies for aboriginal title. From the assertion of Canadian sovereignty in 1867 until the *Calder et al. v Attorney-General of British Columbia* decision in 1973, and subsequent decisions setting out the framework for Aboriginal rights and title such as *Guerin v the Queen*, *R v Sparrow*, *Van der Peet* and *Delgamuukw v British Columbia*, the origin and nature of Aboriginal rights and title was "unclear."⁷⁶ *Calder* was instrumental as six of the seven judges agreed that Aboriginal title was a right derived from Indigenous people's historic occupation and possession of the land and not solely as a result of the *Royal Proclamation* as was

⁷¹ *Guerin v The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335 at 379-82 [*Guerin*]. *Van der Peet*, *supra* note 68 at 31.

⁷² *Van der Peet*, *supra* note 68 at 44.

⁷³ *Van der Peet*, *supra* note 68 at para 31 and 49. *Guerin*, *supra* note 71 at 379-82.

⁷⁴ *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075 at 1112 [*Sparrow*]. *Van der Peet*, *supra* note 68 at para 49.

⁷⁵ *Van der Peet*, *supra* note 68 at para 49.

⁷⁶ Patrick J. Monahan and Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law Inc., 2013) at 475. *Calder v Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313, at 383 [*Calder*]. *Guerin*, *supra* note 71. *Sparrow*, *supra* note 74. *Van der Peet*, *supra* note 68. *Delgamuukw*, *infra* note 80.

previously held.⁷⁷ Discussing the nature of aboriginal title, Dickson J. writing in 1984 for the majority in *Guerin* described Aboriginal title as “a legal right to occupy and possess certain lands,” (while) the ultimate title belongs to the Crown.⁷⁸

Determining the test for Aboriginal title as a manifestation or “sub-category”⁷⁹ of Aboriginal rights, the Supreme Court in *Delgamuukw* held that:

“The source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.”⁸⁰

The court described Aboriginal title as “*sui generis*.”⁸¹ Its legal nature as a s.35 right cannot be explained by either common law concepts of real property *nor* “the rules of property found in aboriginal legal systems.”⁸² Importantly, aboriginal title and aboriginal rights arise from the “prior occupation of land” of Indigenous people but differ in scope. Aboriginal title is an “exclusive right to occupy and use land” with two limitations: (1) the “lands held pursuant to (that) title cannot be used in a manner that is irreconcilable with the nature of the claimant’s attachment to those lands” and (2) those lands cannot be alienated and only “surrendered” to the Crown.⁸³ It has been suggested that in contrast to aboriginal rights which are established on a case-by-case basis,⁸⁴ aboriginal title provides a generic right that is invariable amongst claimants. Aboriginal rights can arise from the prior occupation of land. However, they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land.⁸⁵ Thus, one can find Aboriginal rights where there is no title. More importantly, while both take root from prior Indigenous occupations to land and involve legal analyses that consider the “aboriginal perspectives” they are both not Indigenous laws. While Indigenous legal traditions and sources may be consulted to set out the scope and nature of an Aboriginal right, the exercise of the right is mediated by the common law and bound within the Canadian legal system.

⁷⁷ *Calder*, *supra* note 76 at 475. *Guerin*, *supra* note 71 at 377. *R v Van der Peet*, *supra* note 68 at para 107. *Infra* note 80 at 114. ROYAL PROCLAMATION?

⁷⁸ *Guerin*, *supra* note 71 at 383.

⁷⁹ *Van der Peet*, *supra* note 68 at para 74.

⁸⁰ *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 [*Delgamuukw*].

⁸¹ *Ibid* at para 112.

⁸² *Ibid* at para 112.

⁸³ *Renvoi*, *supra* note 33 at para 418. *Delgamuukw*, *supra* note 81 at paras 125–132.

⁸⁴ *Van der Peet*, *supra* note 68 at para 69.

⁸⁵ *Delgamuukw*, *supra* note 80 at para 141. *Van der Peet*, *supra* note 69 at para 74.

The Supreme Court has not expressed whether s.35 includes an inherent right of self-government despite being a live issue. The recently decided reference decision by the Québec Court of Appeal *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis* challenges this, which is explored further on.⁸⁶ In *R v Pamajewon* the Supreme Court treats the analysis for a right of self-determination through the test for aboriginal rights set out in *Van der Peet*.⁸⁷ It has been suggested that should the Supreme Court reconsider self-determination as an inherent right in light, the approach may be similar to that adopted in *Delgamuukw*, as a generic right.⁸⁸ This is the approach taken by the Quebec Court of Appeal which is explored below.

Many speakers noted that the elaboration and definition of the scope of aboriginal rights have many issues. We will not address them all here. However, one issue which was consistently discussed at the conference was the part of the test of aboriginal rights that requires the right to be based on an “element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right.”⁸⁹ This aspect of the test has been widely critiqued by Indigenous scholars and legal experts, and even by the dissenting decision in written by justice L’Heureux-Dubé in *Van der Peet*.⁹⁰ The test arbitrarily discounts the continuity and importance of Indigenous practices and traditions throughout contact with colonial powers to this very day. Further the evidential difficulty in proving the continuity of a “pre-contract” practice to its survival in the face of hostile laws and policies to today and their pre-existing legal rights.⁹¹

Indigenous Laws

In contrast to “Aboriginal law” Indigenous law refers to an Indigenous people’s laws made through their own legal systems and processes.⁹² Many speakers elaborated at the conference that “Indigenous law” refers to the rights and obligations developed by Indigenous legal orders, decision-making processes, and jurisdictional authorities. Indigenous laws bear upon the management of Indigenous lands and waters, conflicts with a legal system as well as conflicts with others, be these other Indigenous legal

⁸⁶ *Delgamuukw*, *supra* note 78 at para 503. *Renvoi*, *supra* note 33 at para 429.

⁸⁷ *R v Pamajewon*, 1996 CanLII 161 (SCC), [1996] 2 SCR 821 at para 24.

⁸⁸ *Renvoi*, *supra* note 33 at paras 429-422.

⁸⁹ *Ibid* at para 46.

⁹⁰ *Van der Peet*, *supra* note 68 at paras 165–167.

⁹¹ *Ibid* at para 89.

⁹² John Borrows, “Indigenous Legal Traditions in Canada,” (2005) 19, Wash. U. J.L. & Poly 167 at 205 [Borrows, “Traditions”].

systems or not. To use Me André's terms, these are laws that govern a nation's people, government and lands.

While the laws of the many Indigenous peoples in Canada may differ, the speakers at the conference repeated that the importance of existence, preservation and continuity of those laws was a uniting force. The nearly unanimous message was that Indigenous laws are indispensable to Indigenous cultures, identities, language, institutions, and relationships.⁹³ While not present at the conference, Professor John Borrows has elaborated in his paper on Indigenous legal traditions in Canada a function of the laws of the First Nations, Inuit and Métis in Canada. He wrote:

"Indigenous culture is preserved and adapts through legal tradition.

Indigenous identity is developed and passed on through indigenous law.

Indigenous languages embody indigenous juridical approaches in their very structure and organization.

Indigenous institutions are held together by indigenous custom and law.

Indigenous peoples' relationships with lands and resources stems from their legal traditions."⁹⁴

While this list does not explain the substantive content of a given Indigenous law, it explains the importance of Indigenous law to Indigenous communities. Borrows makes clear that Indigenous laws and legal orders are required for self-governance,⁹⁵ and that same message was delivered on nearly every panel of the conference. This understanding of the role of Indigenous laws is clearly shared in the above-mentioned recommendations of the TRC and RCAP, which we explore further.

Regarding what *is* Indigenous law, Professor Val Napoleon at the conference explained that:

"Law is many things, it includes philosophy, ceremony, rules, looking to the past ... law we can understand as an intergenerational conversation, but it is not *just* any of these things, but it is all of them integrated—the hard work of law must take place inside collective human relationships."

She noted that there are many questions about Indigenous laws that do not yet have answers, such as how does Indigenous law operate through existing adjudicative processes, how will it work through *UNDRIP* and *DRIPA* and how will it continue to develop?

⁹³ *Ibid* at 205.

⁹⁴ *Ibid* at 206

⁹⁵ *Ibid* at 205.

To answer these questions, Professor Napoleon suggested an approach not to merely describe Indigenous laws, but to encounter, understand and develop them that demands specificity, inclusivity, and nuance. When considering an Indigenous law and legal orders, Napoleon asked the audience to look carefully at the institutions and processes that structure those collective human relationships in which law operates. This means asking: (1) what is the legal order that a given law belongs to or what community is the law working within, (2) how does that order understand the legal issue at hand, (3) who are the authorities and decision makers within that system, (4) through what mechanisms and institutions do they operate and (5) what are the processes that make a legal decision legitimate?

Further, what is the range of legal responses, remedies, and sanctions, and how does that system look to the past, or does not, to apply its rules to current issues? Professor Napoleon asked the audience to begin from a framework of inquiry rather than assumption, and not presume to understand the kinds of relationships that exist to the land, kin, or resources. Adopting what can arguably be understood as a legal positivist approach helps parse a system that might otherwise challenge someone unfamiliar with that system, whether it operates orally or through stories and storytelling.⁹⁶ Indeed, careful, and rigorous approaches can combat othering and harmful stereotypes of Indigenous laws that mask their similarity and function of law in the civil and common law traditions that inhabit Canada.⁹⁷

We can now turn to questions of Indigenous self-governance in Canada and see how Indigenous laws, rights and orders express themselves in and between the Canadian legal landscape.

WHAT DO INDIGENOUS LAWS MEAN IN CANADA

Right of Identity and Self-Determination

A prevalent discussion point at the conference was the interaction and relationship between past and present. Opening the conference, the Honourable Murray Sinclair drew the audience to the work of the AJI. He pointed out that while other reports have perhaps overshadowed the AJI, the RCAP, the TRC and the NIMMIWG have looked back to many of the issues that the AJI confronted.

⁹⁶ *Ibis* at 191.

⁹⁷ *Ibid* at 183.

One of these issues discussed by the AJI was that of Indigenous self-determination and its link to Indigenous identity and relation to the land. Opening its discussion on Aboriginal rights, Crown relations, treaty rights and international law the AJI noted that “for Aboriginal peoples, the land was part of their identity as a people.” The report further explains how Indigenous culture is grounded in Indigenous lands and waters which leads to philosophies that conceptualize in “holistic” terms as opposed to strict dichotomies and categorization. The AJI expounds that this epistemological tradition of Indigenous thought frames rights in “broad, conceptual terms.”⁹⁸ The most fundamental of these rights are the “right to an identity” as “Aboriginal people.”

The AJI elaborates that the right of identity was derived in large part from the land used and occupied by Indigenous people. Identity is linked to the land as upon and within it, a variety of activities were, and are still, such as “hunting, fishing, trapping, gathering food and medicines, or for any other traditional pursuits.” It is from this fundamental right of identity comes self-determination. The AJI explains:

“This right to identity also implies the further right to self-determination, for it is through self-determination that a people preserves their collective identity. The right to self-determination can take several forms. It includes, among many other things, the authority to retain one’s culture in the face of threatened assimilation, the right of a child to be raised in his or her own language and culture, and the right to choose between an Aboriginal and a non-Aboriginal way of life. This latter right is violated if the traditional economy of an Aboriginal group is disrupted severely or damaged by the encroachments of a civilization that exploits or abuses natural resources on a large scale, such as a hydroelectric project, a pipeline or a strip mine. Further, the right to self-determination implies the right to take charge of one’s own affairs so as to ensure effectively that Aboriginal identity and culture will be respected in the political sphere. These are the Aboriginal rights of the indigenous people of Canada.”⁹⁹

In its discussion of the ties between identity and self-determination, the AJI presents a vision of Indigenous law-making power that challenges Canada’s current jurisdictional map. George Erasmus explained this vision and goal at the conference, stating that what is required is a fair distribution of land, where Indigenous people can be self-reliant, and exercise traditional and contemporary activities and ways of life.

The right of “self-determination” envisioned by the AJI implies a vast conversation in which the “right of self-determination” encompasses much more than what is provided in Canadian law. To do Indigenous people justice requires revaluations of legal and indeed, constitutional status quo. While the precision of the RCAP recommendations exceeds the

⁹⁸ AJI, *supra* note 1.

⁹⁹ *Ibid.*

scope of this report, Erasmus noted that the RCAP spoke of structures where Indigenous laws could be brought into the legally pluralistic fabric of Canada. He remarked, not all decisions would have final appeal in Canadian courts such as the SCC but remain within Indigenous systems.

Such works would mean a radical change to the current Canadian constitutional order. However, many at the conference stressed that jurisdictional change simply continues the foundational constitutional work of Canadian federalism. The RCAP in the opening portion of its voluminous work styled that vision in the following way:

“Aboriginal peoples anticipate and desire a process for continuing the historical work of Confederation. Their goal is not to undo the Canadian federation; their goal is to complete it. It is well known that the Aboriginal peoples in whose ancient homelands Canada was created have not had an opportunity to participate in creating Canada’s federal union; they seek now a just accommodation within it. The goal is the realization for everyone in Canada of the principles upon which the constitution and the treaties both rest, that is, a genuinely participatory and democratic society made up of peoples who have chosen freely to confederate.”¹⁰⁰

The TRC takes up the vision returning to the past to continue Canadian constitutional work in its 45th recommendation, echoing RCAP by calling for a Royal Proclamation and Covenant of Reconciliation:

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

1. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.
2. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.
3. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.
4. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.”

¹⁰⁰ RCAP vol 1, *supra* note 23 at 6.

Professor Craft explained that honouring treaties, which came from Indigenous lands and territories, are the grounds from which new relationships must be built. Because they were the fulcrums around which the long relationships between Indigenous peoples and the Crown began, they must be returned to and used as foundations for moving forward. Call to action 45 establishes the 1763 *Royal Proclamation* as a model for how to continue to develop Canadian constitutionalism in recognition of Indigenous self-governance, acting in conjunction with articles 43 and 44 which as stated places UNRIP as the framework for that process of reconciliation. The Call to Action draws upon the RCAP's discussion of the 1763 *Royal Proclamation* in Volume 1 of its final report and the constitutional amendments it proposes in Volume 5, in which it calls for a new or *renewed* relationship.¹⁰¹

The Royal Proclamation

The TRC explained that the *Royal Proclamation* of 1763¹⁰² and its subsequent ratification in the Treaty of Niagara¹⁰³ forms the basis for recognition of the right of Indigenous people of self-government.¹⁰⁴ The factual and historic pillars of the recognition of self-government of Indigenous people by the Canadian state are thereby twofold:¹⁰⁵ 1) Indigenous people existed as sovereign nations prior to the assumption of sovereignty of the Crown¹⁰⁶ and 2) the Crown's recognition of sovereign Indigenous pre-existence in the *Royal Proclamation*. As mentioned above regarding the *Calder* case, the role of the *Royal Proclamation* has been long debated and at play in discussions of Indigenous jurisdictions. The *Royal Proclamation* influenced the historic trilogy of cases in which the Supreme Court of the United States recognized the right of Indigenous peoples to govern themselves under the doctrines of "dependent domestic nations" and "residual aboriginal sovereignty," cases that in turn influenced the jurisprudence of aboriginal rights in Canada.¹⁰⁷ Most recently the Quebec Court of Appeal explained, citing the TRC, that the autonomy of Indigenous people was an implicit fact that formed the very basis of the *Royal Proclamation*,¹⁰⁸ joining a long line of court cases and commentary on the matter.¹⁰⁹

¹⁰¹ *Ibid* at 105 and Vol 5.

¹⁰² [TRC, "Summary," supra note 2 at 53](#). George R, *Proclamation*, 7 October 1763, reprinted in RSC 1985, App II, No.1.

¹⁰³ *Ibid* at 196.

¹⁰⁴ *Ibid* at 53.

¹⁰⁵ *Renvoi*, *supra* note 33 at paras 366 and 367.

¹⁰⁶ *Ibid* at para 402. *Van Der Peet*, *supra* note 68 at para 29.

¹⁰⁷ *Renvoi*, *supra* note 33 at para 368.

¹⁰⁸ *Ibid* at paras 367–368.

¹⁰⁹ *St. Catharine's Milling and Lumber Co. v R.* (1887), 1887 CanLII 3 (SCC), 13 S.C.R. 577.

While the Crown would subsequently not respect the relationship set out in the *Royal Proclamation*,¹¹⁰ the history of which is documented by the TRC and RCAP, the *Proclamation* remains the ground for the recognition of Indigenous sovereignty by the Crown.¹¹¹ The *Royal Proclamation* held that any alienation or transfer of “Indian land” would be done by treaty between the British Crown and the appropriate Indigenous nation and that “all lands west of the established colonies belonged to Aboriginal peoples.”¹¹² As such, the TRC understands the *Royal Proclamation* and the Treaty of Niagara of 1764 as having established “the legal and political foundation of Canada and the principles of Treaty making based on mutual agreement and respect”¹¹³ viewing them as the foundation of Canadian federalism. The Quebec Court of Appeal recently discussed that the recognition of sovereignty is evidenced by the numerous treaties the Crown made with Indigenous people before and after signing the *Proclamation* as a treaty presupposes the sovereign people with the ability to make a binding agreement.¹¹⁴

Professor Craft emphasized that treaties form the only legitimate basis for the jurisdiction of settler governments. Treaties mark the relationship between sovereign entities and act as instances of legal recognition from Indigenous people of settler presences. Therefore, attendant to the *Royal Proclamation* is the discussion of historical treaties or “numbered treaties.” Following confederation, eleven of these treaties were entered into between 1871 and 1921 covering lands in Northern Ontario, Manitoba, Saskatchewan, Alberta and portions of the Yukon, Northwest Territories and British Columbia. These remain fundamental to the discussion of Indigenous jurisdiction particularly as an expression of self-government as:

“Whereas Aboriginal rights flow from the historic use and occupation of land by Aboriginal people, treaty rights find their sources in official agreements between the Crown and aboriginal peoples. Treaties thus create enforceable obligations based primarily on the mutual consent of the parties.”¹¹⁵

Many speakers at the conference highlighted the historic and modern-day importance of treaties as the basis of consent between Indigenous peoples and the Crown. The TRC emphasized that:

¹¹⁰ RCAP vol 1, *supra* note 23 at 196.

¹¹¹ [TRC “Summary,”](#) *supra* note 2 at 196.

¹¹² [Ibid at 196.](#)

¹¹³ *Ibid* at 199.

¹¹⁴ *Renvoi*, *supra* note 33 at para par 375. John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right”, (2005) 38:2 *U.B.C. L. Rev.* 285 at 296–298; Brian Slattery, “Aboriginal Sovereignty and Imperial Claims”, (1991) 29:4 *Osgoode Hall L.J.* at 684 and 690–691.

¹¹⁵ Monahan and Shaw, *supra* note 76 at 482.

“Indigenous peoples have kept the history and ongoing relevance of the Treaties alive in their own oral histories and legal traditions ... This story cannot simply be told as the story of how Crown officials unilateral imposed Treaties on Aboriginal Peoples; they were also active participants in treaty negotiation.”¹¹⁶

While time did not permit for in-depth examinations of the vast scope of treaty history, negotiation, and litigation, many speakers punctuated their importance as documents of recognition and legitimacy. Crucially, treaties remain fundamental to Indigenous claims of self-governance and as sources of Indigenous rights and correlative government obligations on behalf of the Crown.

Modern Treaties and Self-Government

Treaty relationships persists to this day, not only by virtue of the historical and numbered treaties, but through “modern treaties.” The 1995 *Self-Government Policy*¹¹⁷ of the Federal Government mediates the exercise of Indigenous self-government through “modern treaties” and self-government agreements. One can access the federal government website and read the following:

“The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown’s relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.”

On an initial reading, one might question the above assertion that the courts have not yet decidedly dealt with the issue of Indigenous self-government. Indeed, the brief elaboration of the purview of self-determination seems to be coherent with UNDRIP due to its focus on the inherent nature of the right.

At issue with the *Self-Government Policy* is that self-determination remains in the hands of the federal government who must be negotiated with to be placed in the hands of

¹¹⁶ TRC “Summary,” *supra* note 2 at 53 and 196.

¹¹⁷ Department of Indian and Northern Affairs Canada, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of aboriginal Self-Government,” (15 September, 2010) online: *Crown-Indigenous Relations and Northern Affairs Canada-Treaties, agreements and negotiations, Self-government* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#inhrrsg>>.

Indigenous people. Currently there are a number of land claims and self-government agreements in Canada¹¹⁸ where Indigenous people have acquired varying degrees of decision-making power.¹¹⁹ These range from the geographically smaller agreements such as in BC and Ontario, to the vast swaths of land in Quebec and the many treaties in the Yukon, to a form of self-rule in the creation of the territory of Nunavut.¹²⁰ However, land claims policies tend to be written in strict contractual terms and self-government still requires costly negotiation between Crown and Indigenous groups. In short, self-government under this policy instrument remains in the federal hands, to be delegated to Indigenous peoples notwithstanding the recognition of the inherent right of self-government.¹²¹

Modern treaties define an Indigenous nation's Aboriginal rights in an agreement between the nation and the relevant levels of government. Modern treaties, which are better described as comprehensive land claim agreements, are written in strict language so as to "exhaustively set out the scope and limits of a First Nation's legal rights, authority and lands."¹²² Through a land-claim agreement, Indigenous people are "delegated" governance and exercise of jurisdiction informed by Indigenous laws over agreed upon lands, land management and practices. The agreements set out when Indigenous laws prevail over federal and provincial laws.

Self-governing agreements differ to comprehensive land claims in their relationship to land. Self-governing agreements are:

"... applied to the First Nation's existing reserve lands, although they have the power to exchange lands or apply to add to the reserves under the federal process. In comparison, these agreements also delegate reasonably broad lawmaking jurisdiction over matters including lands, cultural practices, government, and taxation without limiting or modifying the Nation's Aboriginal rights or title."¹²³

Self-governing agreements, as well as comprehensive land claim, can differ greatly in their applicability to the various parties that negotiated them. However, the former do not bear upon renegotiation of title to the land in the direct way that comprehensive land

¹¹⁸ Government of Canada, "Advancing Indigenous self-government" (August 25, 2020) online: *Self-government* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314#chp4>> at "Self-government agreements."

¹¹⁹ *Ibid.*

¹²⁰ Murphy, *supra* note 48 at 84.

¹²¹ *Van der Peet*, *supra* note 68 at 144.

¹²² Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape," (2018) 51 UBCLR 105 (HeinOnline) at 142.

¹²³ *Ibid* at 143.

claims do, but rather to the governing structures and services applicable to a First Nation.¹²⁴

Me André pointed to the innovative and collaborative framework of the *James Bay and Northern Quebec Agreement (JBNQA)* and its successive developments¹²⁵, such as the inclusion of the Naskapi in 1978,¹²⁶ as an example of how future agreements and management of lands and self-governance can take place. The *JBNQA* was the first comprehensive land claim agreement in Canada, signed in 1975 between the Cree and Inuit representatives and those of the federal government and province of Québec. The terms of the agreement “exchanged” the rights and territorial interests for “other rights and benefits” set out in the agreement of the Indigenous parties to include rights in resource management, economic development, policing, administration of justice, health and social services and environmental protection. The treaty set out categories of land governed by the land claim, determining the applicable laws, jurisdiction and dispute resolution process. Me André held it up as an example of how land can be redistributed to Indigenous people in which Indigenous laws govern land and also work with provincial and federal laws and processes in the applicable circumstances.

The discussion points remained at the conference that while modern treaties are avenues to self-determination, they involve long, costly, and uncertain processes. Indigenous people under working with those mechanisms must still go to provincial and federal governments and negotiate jurisdiction from them.

The Impact of the Act respecting First Nations, Inuit and Métis children, youth and families on the Inherent Right of Self-Government

The *Act respecting First Nations, Inuit and Métis children, youth and families* is the first law¹²⁷ to recognize the “right of self-determination of Indigenous peoples in Canada, including the inherent right of self-government which includes jurisdiction in relation to child and family services.”¹²⁸ Professor Sarah Morales, Associate Professor at the Faculty of Law at the University of Victoria, explained that the law provides the ability of an Indigenous “group, community or people” to exercise legislative authority in relation to

¹²⁴ *Ibid* at 143, 144.

¹²⁵ *James Bay and Northern Québec Agreement*, 11 November 1975, <<https://www.rcaanc-cirnac.gc.ca/eng/1407867973532/1542984538197>> [JBNQA]. See also, *Act approving the Agreement concerning James Bay and Northern Québec*, CQLR c C-67.

¹²⁶ Government of Canada, *The James Bay and Northern Québec Agreement and the Northeastern Quebec Agreement— Annual Reports 2008–2009/2009–2010*, (2014) online: *Quebec: Final Agreements and Related Implementation Matters ≤ Québec ≥*, such as the *Northern Québec Agreement*.

¹²⁷ Jewell and Mosby, *supra* note 16 at 16.

¹²⁸ *First Nations, Inuit and Métis children youth and families*, *supra* note 68, Preamble, at para 7.

child and family services (CFS). The law in section 18 (1) includes self-determination and the right of self-government in section 35 of the *Constitution Act, 1982* stating:

“18 (1) The inherent right of self-government recognized and affirmed by [section 35](#) of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.”¹²⁹

The act recognizes the ability for a “group, community or people” to draft and enforce their own child and family services laws in s.18 (1) as well as dispute resolution mechanisms 18 (2). This is done through a coordination agreement entered into with the relevant minister and government of the province in which the Indigenous group is located.

The Quebec Court of Appeal in its reference decision,¹³⁰ in which the Quebec Minister of Justice contested the constitutionality of the *Act*, affirmed that s.35 contains a generic right of Indigenous people to self-determination in relation to child and family services.¹³¹ Unlike an aboriginal right to hunt, the right to self-determination with regards to child and family services applies uniformly as a generic right. This means that every Indigenous “group, community or people” has that same right, whose existence does not need to be negotiated, through its exercise may be. The court relies on many forms of evidence, in particular the string of case law of *Calder*, *Sparrow*, *Van Der Peet* and *Delgamuukw*, grounding its reasoning that Indigenous people have since prior to the assertion of Canadian sovereignty and throughout it maintained a form of self-government based on original Indigenous sovereignty over “the territory” and that this is enshrined in s.35.¹³²

In its decision, the Quebec Court of Appeal recognizes that Indigenous jurisdiction in relation to child and family matter has long been held by Indigenous people. The Quebec Court of Appeal elaborates a similar reasoning, explaining that:

[484] ... Canadian courts have recognized Aboriginal customary law in matters relating to Aboriginal conjugal relationships, family and children, including in *Connolly v. Woolrich* [502], confirmed by this Court in *Johnstone c. Connolly*, [503] and in the British Columbia Court of Appeal judgment in *Casimel*. [504] This customary law is also recognized in legislation, [505] notably in the *Civil Code of Québec* provisions on adoption [506] and in the *Youth Protection Act*. [507] The existence of these normative systems, therefore, cannot be denied. The fact that they have been recognized by the courts and in legislation shows that they have not been extinguished and still maintain their vigour.¹³³

¹²⁹ *Ibid* at ss.18 (1) and 8 (1).

¹³⁰ *Renvoi*, *supra* note 33 at para185.

¹³¹ *Ibid* at para 494, and discussion from 486–494.

¹³² *Ibid* at para 484.

¹³³ *Ibid*.

The decision is grounded not only in Canadian jurisprudence, but also in the maintained practices of Indigenous peoples regarding child and family services. This framework presents a very different understanding of self-determination than the one at work with regards to modern treaties as this jurisdiction is maintained to have always been within the nation's power. It is not a concession from the state.

In their discussion of the *Act respecting First Nations, Inuit and Métis children, youth and families*, Professor Morales and Haley Bruce, lawyer at Cedar & Sage Law directed the audience's attention to the document "Wrapping Our Ways Around Them: Indigenous Communities and Child Welfare Guidebook" (WOW).¹³⁴ The document is a resource meant to empower Indigenous nations and communities in drafting and implementing their own laws recognized by the *Act*. It also serves as a resource for lawyers and judges to understand the processes set out in the law. The document is unique as it at once provides guidance to Indigenous nations as to how to articulate their laws relating to child and family services, while also guiding the non-Indigenous legal community.

As was discussed at the conference, the endurance of Indigenous laws includes the internal work done within communities to articulate, explain, adapt or refine them. Thus, in the WOW document one can find discussions of Indigenous laws, and moreover, where an Indigenous community can look to sources to articulate their laws.¹³⁵ It is worth reproducing that discussion here, as we can see how the WOW document approaches law in a rigorous method similar to that discussed by Professor Napoleon. The law draws on 5 sources of Indigenous laws as discussed by John Borrows, sacred, natural, deliberative, positivistic, and customary, elaborating that:¹³⁶

1. "Sacred laws are those which stem from the Creator, including creation stories or revered ancient teachings that have withstood the test of time.
2. Natural law is based upon observations of the physical world and seeks to develop rules for regulation and conflict resolution from studying the behaviour of the world.
3. Deliberative law is a broad source that is formed through processes of persuasion, deliberation, council and discussion.
4. Positivistic law is described as the proclamations, regulations, rules, codes, teachings and axioms that are considering binding on behaviour.
5. Customary law can be defined as practices developed through repetitive patterns of social interaction that are also accepted as binding."

¹³⁴ Ardith Walkem, *Wrapping Our Ways Around Them: Indigenous Communities and Child Welfare Guidebook*, 2nd edition, (ScheEma-mee.tky Project, 2020).

¹³⁵ *Ibid* at 47.

¹³⁶ *Ibid* at 48. Borrows, "Traditions," *supra* note 93 at 33,66.

The WOW document presents a grounded, explorative, and action-oriented approach to learning how to engage with Indigenous laws. We can look at the WOW as a document at once that elaborates an *intra*-cultural examination of one's own laws as well as a document that in turn helps cross cultural interpretation of those laws. It ferries the connection between Indigenous legal orders asserting jurisdiction to the Canadian legal order that hitherto has been reluctant to acknowledge that jurisdiction.

Other such expressions of Indigenous laws were brought up at the conference. These included the already mentioned reference to FPIC, and we return to it briefly to demonstrate how it uses Indigenous law. As Merle Alexander explained, the FPIC processes operate like subject matter jurisdiction where the Indigenous group and the project proponent agree upon areas that trigger the consent mechanics. Thus, not every issue refers back to the duty to consult nor every issue required consent. Merle demonstrated an example where the consent areas were:

- (1) Water management and project
- (2) Tailings storage Facility management
- (3) Cultural Heritage Preservation and Restoration
- (4) Fish and Fish Habitat Protection and Restoration
- (5) Closure, Reclamation and end Land Use Requirements

The criteria for these areas would be revaluated throughout the life of the process, and as mentioned, would have predetermined dispute resolution processes. However, those criteria as well as dispute resolution processes are, in this example, based on the First Nations' laws, legal orders and sources for normative interpretation. Looking at WOW's presentation of Borrows' 5 sources for Indigenous law provides insight into how this process can be done.

PART V: Conclusion

A Word of Gratitude

CIAJ is not an Indigenous organization, although it has the input of Indigenous experts in its operations as well as the CIAJ Circle of Indigenous People to advise it. Further, in the organization of the conference, CIAJ benefited from the wisdom of elders such as Elder Kathy Louis, OBC, and experts like the Honourable Murray Sinclair, Scott Robertson, Chief Clifford White, First Nations Summit elected Commission, BC Treaty Commission, amongst many generous others in the conference's organization. CIAJ cannot presume to be immune to the reproduction of harms towards Indigenous people. One such harm, particularly in the context of a conference, is the exploitative use of Indigenous issues. Taken together, the participation of Indigenous experts and community members can be understood as an act of extending trust to the organizers and participants, particularly the legal actors, that they will not only make the effort to listen and learn, but further to act upon what they have learned. CIAJ sincerely hopes to advance action and change called for by the Indigenous participants present at the conference.

The conference succeeded due to the time, effort, and trust Indigenous legal experts, community members and leaders generously offered, and this gift cannot be received gratuitously no matter how graciously given. Indigenous experts and participants discussed and were privy to discussions that can bring up difficult and traumatic topics. Further, the information shared at these events swam in the depth of knowledge and work produced by testimonies, findings, evidence, recommendations, and calls to actions made by public commissions, reports, and inquiries such as the MAJI, RCAP, the TRC, the NIMMIWG and the Viens Report, to name but a few.

INDIGENOUS PEOPLES AND THE LAW

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Dylan Thomas

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Chair

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Robert J. Bauman
Chief Justice of
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Court of Appeal of Yukon*

CIAJ's 45th Annual Conference on Indigenous Peoples and the Law will explore the current state and future of the self-government of Indigenous Peoples in Canada. Vital to the discussion will be the issues of the decolonization of legal institutions, reconciliation with Indigenous Peoples and the enduring legacy of a colonial relationship.

The recent finding of unmarked graves at residential school sites only reaffirms the Truth and Reconciliation Commission's vision of an "ongoing process of establishing and maintaining respectful relationships" with Indigenous Peoples. This conference will be a space for dialogue and exchange on the continuation of active education and exploration of the TRC's message.

Registration: <https://ciaj-icaj.ca/en/upcoming-programs/2021-annual-conference/>

NOTE: Participants may choose to attend in person at the Fairmont Hotel Vancouver or online. The number of participants admitted on site will depend on public health measures. See full note on page 2.

- This program is offered by an accredited provider of professional content and is accredited in provinces where CLE requirements for lawyers are mandatory.
- Participation in this conference is approved under Section 41 (1) of the Judges Act.

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IMPORTANT NOTE: Participants may choose to attend in person at the Fairmont Hotel Vancouver or online. The number of participants admitted on site will depend on public health measures. If in-person attendance is limited, priority will be given to the first registrants. If public health does not allow in-person events, the program will remain the same but will be held entirely online. The program is set on Pacific Time.

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Court of Appeal, Nova Scotia
Second Vice-President, CIAJ

DAY 1 | WEDNESDAY, NOVEMBER 17, 2021 – Pacific Time Zone

8:00 – 9:00 am **REGISTRATION AND BREAKFAST – PACIFIC BALLROOM**
LOG IN & ONLINE PROGRAM SET UP

9:00 – 10:00 am **LAND ACKNOWLEDGEMENT AND WELCOME REMARKS**

- Program Co-Chair Knowledge Keeper* • The Honourable Justice James W. O'Reilly, Federal Court, CIAJ's President
• Debra Sparrow, Knowledge Keeper of the Musqueam First Nation, weaver and artist, Vancouver
- Chair* • The Honourable Robert J. Bauman, Chief Justice of British Columbia and of the Court of Appeal of Yukon
- Program Co-Chair* • The Honourable Justice P. Colleen Suche, Court of Queen's Bench of Manitoba, CIAJ's First Vice-President
- Honorary Chair* • The Honourable Murray Sinclair
- Special Guest* • Chief Dr. Robert Joseph, OBC, OC, Reconciliation Canada
- Master of Ceremonies* • Scott Robertson, Senior Associate, Nahwegahbow, Corbiere

10:00 – 11:30 am **PANEL ONE | Voices Past, Present and Future**

Keywords: people's experiences, aspirational and inspirational panel

- Panel Chair* • The Honourable Justice Michelle O'Bonsawin, Superior Court of Justice (Ontario)
- Speakers* • Georges Erasmus, OC, Former Assembly of First Nations National Chief; Former Royal Commission on Aboriginal Peoples Co-Chair
• Phil Fontaine, OC, OM, Former Assembly of First Nations National Chief
• Elder Kathy Louis, OBC

11:30 – Noon **LUNCH BREAK** (lunch boxes will be served to on-site participants)

Noon – 2:00 pm **PANEL TWO | Review of the Legacy and Impact of the *Truth and Reconciliation Commission of Canada* (TRC)**

Keywords: review of ongoing initiatives, changes at the governmental and legislative levels from the TRC's final report, access to justice, decolonialization, "Land Back" movement, preserving and restoring languages

- Panel Chair* • The Honourable Judge Alexander Wolf, Provincial Court of British Columbia
- Speakers* • Professor Aimée Craft, Faculty of Law – Common Law Section, University of Ottawa
• The Honourable Justice Shannon Smallwood, Northwest Territories' first Dene Supreme Court Judge
• Professor Sheryl Lightfoot, Senior Advisor to the President on Indigenous Affairs; Canada Research Chair in Global Indigenous Rights and Politics; Associate Professor, First Nations and Indigenous Studies and Political Science, University of British Columbia

2:30 – 3:00 pm **CIAJ MEMBERS ANNUAL GENERAL MEETING**

5:00 – 7:00 pm **NETWORKING COCKTAIL | VANCOUVER ROOM**

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DAY 2 | THURSDAY, NOVEMBER 18, 2021 – Pacific Time Zone

8:00 – 9:00 am CONTINENTAL BREAKFAST – LOG IN & ONLINE PROGRAM SET UP

Master of Ceremonies • Scott Robertson, Senior Associate, Nahwegahbow, Corbiere

9:00 – 10:30 am PANEL THREE | Indigenous Laws and Justice System

Keywords: United Nations Declaration on the Rights of Indigenous People, decolonialization, national UNDRIP implementation, legal pluralism, self-determination, s.35 of the Canadian Charter, Indigenous legal orders, Indigenous jurisdiction

Panel Chair

- Professor Bradford Morse, Faculty of Law, Thompson Rivers University

Speakers

- Professor Val Napoleon, Director, JD/JID program; Law Foundation Chair of Indigenous Justice and Governance, University of Victoria
- Joyce King, Director of Justice for the Mohawk Council of Akwesasne, Akwesasne Court; Justice of the Peace under section 107 of the *Indian Act*
- The Honourable Judge Garth Smith, First Nation Court of New Westminster, British Columbia

10:30 – 10:45 am BREAK

10:45 am – Noon PANEL FOUR | Student Panel: Navigating Law School as an Indigenous Student

Keywords: cultural competency, cross-cultural training, Indigenous perspectives on education, place of Indigenous law in law school curriculum, Indigenous expertise and authority

Panel Chair

- Mark Gervin, Lawyer; Director of the Indigenous Legal Clinic, Peter A. Allard School of Law, University of British Columbia

Speakers

- Jamie-Lee Keith, student, Faculty of law, Thompson Rivers University
- Shayla Praud, student, Faculty of law, University of Victoria
- Verukah Poirier, student, Peter A. Allard School of Law, University of British Columbia
- Cassandra Sawers, student, Peter A. Allard School of Law, University of British Columbia
- Justin Thompson, student, Osgoode Hall Law School, York University

Noon – 12:30 pm LUNCH BREAK (lunch boxes will be served to on-site participants)

12:30 – 2:00 pm PANEL FIVE | Child Welfare and Reforms

Keywords: what is being done, what we can do, An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, how different communities are trying to incorporate Indigenous laws and decisions into their child welfare system

Panel Chair

- The Honourable Justice Tracy Engelking, Superior Court of Justice (Ontario)

Speakers

- Professor Sarah Morales, Associate Professor, Faculty of law, University of Victoria
- Halie Bruce, J.D., Barrister & Solicitor, ADR Mediator, Cedar & Sage Law, British Columbia
- Dr. Cindy Blackstock, OC, FRSC, Executive Director, First Nations Child & Family Caring Society of Canada

DAY 3 | FRIDAY, NOVEMBER 19, 2021 – Pacific Time Zone

8:00 – 9:00 am CONTINENTAL BREAKFAST – LOG IN & ONLINE PROGRAM SET UP

Master of Ceremonies • Scott Robertson, Senior Associate, Nahwegahbow, Corbiere

9:00 – 10:15 am PANEL SIX | **Canada's Treatment of Indigenous Offenders**

Keywords: incarceration rate, the approach of the courts, the results of the Gladue process, introducing cultural tradition in the mainstream court process

- Panel Chair* • The Honourable Justice James W. O'Reilly, Federal Court, CIAJ's President
- Speakers* • The Honourable Justice Michelle O'Bonsawin, Superior Court of Justice (Ontario)
• The Honourable Kim Pate, OC, Senator, Senate of Canada
• Professor Kent Roach, Faculty of Law, University of Toronto
• Jonathan Rudin, Lawyer, Program Director, Aboriginal Legal Services, Toronto

10:15 – 10:30 am BREAK

10:30 am – Noon PANEL SEVEN | **First Nation, Metis, Inuit Governments and Self-Government**

Keywords: towards reconciliation, setbacks and future of the modern treaty process, ongoing land claims, new emerging avenues through which Indigenous Peoples can exercise jurisdiction, sovereignty on the lands, how far will the mainstream society create space for Indigenous sovereignty/natural resources

- Panel Chair* • The Honourable Judge Tina Dion, Provincial Court of British Columbia
- Speakers* • Jason T. Madden, Métis Lawyer, Co-Managing Partner, Pape Salter Teillet LLP
• Merle Alexander, QC+, Principal, Indigenous Law Group, Miller Titerle Law Corporation
• Brenda Young, Community Justice Director, Chippewas of the Thames First Nation
• Nadir André, Indigenous Law Lawyer, Partner, BLG, Montreal Office

Noon – 12:30 pm LUNCH BREAK (lunch boxes will be served to on-site participants)

12:30 – 2:00 pm PANEL EIGHT | **Reports and Inquiries on Indigenous Peoples and Systemic Racism**

Keywords: National Inquiry into Murdered and Missing Indigenous Women and Girls, Calls for Justice, Calls to Action, changing the life of Indigenous women, what are the calls to action, what needs to be done next

- Panel Chair* • The Honourable Justice Leonard Marchand, Court of Appeal for British Columbia
- Speakers* • The Honourable Douglas R. Campbell
• The Honourable Judge Diana Vandor, Provincial Court of British Columbia
• Marie-Andrée Denis-Boileau, lawyer; former Counsel, Viens Commission, Quebec; former Gladue Lawyer, Legal Aid BC
• Professor Mary Ellen Turpel-Lafond, Director, Indian Residential School History and Dialogue Centre, Peter A. Allard School of Law, University of British Columbia

CLOSING REMARKS AND CEREMONY

- Program Co-Chair* • The Honourable Justice P. Colleen Suche, Court of Queen's Bench of Manitoba, CIAJ's First Vice-President
• Chancellor Steven Lewis Point, University of British Columbia

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