

**CIAJ 19th LEGISLATIVE DRAFTING CONFERENCE**  
**Charting Legislative Courses in a Complex World**  
**Shaw Centre, Ottawa, Sept 13 & 14, 2018**

**Intersection of  
Indigenous Legal  
Traditions and Legislation**

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# Intersections of Indigenous Legal Traditions and Legislation

1. Relationship between Indigenous Legal Traditions and Legislation
2. What are Indigenous laws?
3. TRC Calls to Action for Indigenous Laws
4. Roots to Renaissance – Eras of Indigenous Laws
5. Challenges
6. Shifts
7. Methods
8. Return to Relationship



# 1. Relationship between Indigenous Legal Traditions and Legislation

## 1. State Legislation:

- a. Some legislation attempts to incorporate Indigenous legal concepts or principles:
  - Nunavut
  - New Zealand
- b. Some legislation either permits or requires engagement with Indigenous laws:
  - Canadian Human Rights Act (Act to Amend the Canadian Human Rights Act, s. 1.2)
  - Recognition and Implementation of Rights Framework?
- c. Some legislation enables limited law-making powers:
  - Indian Act, s. 81?
  - Family Homes on Reserves and Matrimonial Interests or Rights Act, ss.7-11,

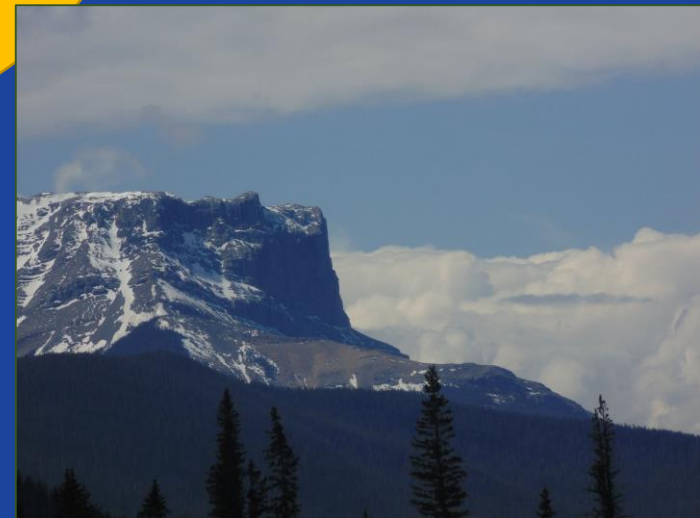
## 2. Indigenous Legislation: Where a First Nation has written laws that are a “written product of public deliberation” within that First Nation, it may be most apt to describe this as “Indigenous legislation”: *Pastion v. Dene Tha’ First Nation*, 2018 FC 648 at para. 13:

- Laws and bylaws developed under Indian Act s. 81 or FHRMIR Act, ss. 7-11
- So-called “custom” election codes, land management codes, membership codes, etc.
- Akwesasne Court and Justice Department
- Atikimaq Child Protection
- American Tribal Courts and Governments

## 2. What are Indigenous Laws: Sources (Borrows)



Sacred  
Natural  
Positive  
Customary  
Deliberative



# 1. What are Indigenous Laws: A way of life (AWN)



## 2. What are Indigenous laws?

- NOT Aboriginal Law – State law about Indigenous peoples
- Indigenous Peoples' own laws – methods and processes for public decision-making, reasoning processes, problem-solving, maintaining peace, order, safety and good governance.
- NOT just restorative justice or even “Aboriginal justice” programs.
- At one point, all Indigenous peoples had comprehensive social and legal orders with all the requirements to manage human and social life. These legal principles and legal relationships continue.

### 3. TRC Calls to Action for Indigenous Laws

- “Aboriginal peoples must be able to recover, learn, and practice their own, distinct, legal traditions.” – *TRC Final Report*, at 206.
- “Establishing Respectful Relations...requires the Revitalization of Indigenous Laws.” - *TRC Final Report*, at 213.

#### The TRC calls for:

- Law schools and law societies to teach, among other things, Indigenous laws - *TRC Calls to Action #27 and #28*
- The recognition and implementation of Aboriginal justice system – *TRC Call to Action #42*.
- The establishment of Indigenous Law Institutes for “development, use and understanding” of Indigenous laws and access to justice – *TRC Call to Action #50*.

# 4. Roots to Renaissance – Four Eras of Indigenous Laws \*

## 1. **Roots** (1000+. Years):

- A Logical Starting Point – Where there are groups of people, there is law.

## 2. **Repression and Resilience** (100-400 years):

- Forced dislocation, Externally imposed disruption and compulsory replacement of governance structures and practices
- Indigenous peoples still continued to pass down, practice, and promulgate Indigenous laws where and how it is possible to do so

## 3. **Recovery and Revitalization** (10-40 years):

- Massive failure of state justice systems, Aboriginal justice initiatives

## 4. **Resurgence and Renaissance** (1-10 years):

- Engaging with Indigenous Laws as LAWS
- Identifying, articulating and implementing Indigenous legal principles
- Questions of jurisdiction, harmonization, conflicts of law, resources, enforcement



## 5. Challenges\*

1. **Accessibility** – How are Indigenous laws accessed (e.g. resources)?
2. **Intelligibility** – Are Indigenous laws understandable enough to apply?
3. **Legitimacy**
4. **Distorting Stereotypes** (positive or negative)
5. **Applicability** – Where, and to whom do Indigenous laws apply? What are the limits and who decides this?
6. **Relevance and Utility** – Are the Indigenous laws relevant and useful in real life, for people with real problems they want solved?

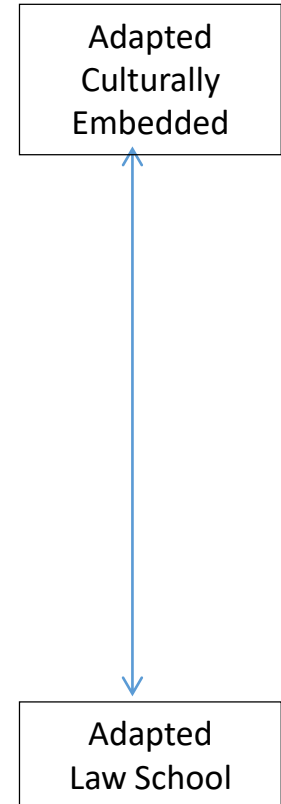
\*Borrows, Fletcher, Napoleon

## 6. Shifts: Useful QUESTIONS about Indigenous Laws:

INDIGENOUS LAWS	
From:	To:
What is aboriginal justice?	What are the legal concepts and categories within this legal tradition?
What are the cultural values?	What are the legal principles?
What are the “culturally appropriate” or “traditional” dispute resolution forms?	What are the legitimate procedures for collective decision-making?
Overall Shift	
What are the rules? What are the answers?	What are the legal principles and legal processes for reasoning through issues?

# 7. Methods of Engagement

- Land-based Learning: *Borrows, Morales, Littlechild*
- Art: *Bluesky, Kennedy, Walkem, Napoleon*
- Spiritual Activities: *Borrows, Bird, Lindberg, Mills, Boiselle*
- Community Embedded Method: *Napoleon et al*
- The Linguistic Method: *Fletcher*
- Story-based Learning: *Borrows, Bird, Napoleon & Friedland*
- The Single-Case/Story Analysis Method: *Borrows*
- ILRU Method: Legal Analysis and Synthesis in conversation with communities: *Friedland & Napoleon*



# 7. Methods of Engagement: Critical Questions

## What Methods:

- Best align with your current capacities?
- Are more or less appropriate based on your role?
- Are practicable in the short term or take long term or life long work?
- Will achieve what your client needs and wants most effectively?

## How does each Method address:

- Your objectives given the reality of the resources available to you?
- Challenges of intelligibility, accessibility, equality, applicability and legitimacy?
- Issues of relevance, utility?
- Issue of negative and positive stereotypes?

## 7. Methods of Engagement: Linguistic Method

- Default method in practice
- E.g. Legislation with Indigenous words or phrases at beginning, used as an interpretative guide

### Process (Fletcher):

- First, the tribal court judge must “identify an important and fundamental value identified by a word or phrase in the tribal language” (a primary rule).
- E.g. *hazho’ogo*
- Next, that primary rule is applied by the judge to the Anglo-American or intertribal secondary rule “as necessary to harmonize these outside rules to the tribe’s customs and traditions.”

## 7. Methods of Engagement: Linguistic Method

Understanding some words represent complex intellectual and legal concepts or are “meta-principles”:

- e.g. *Wahkohtowin* – A Fundamental Cree Doctrine of Law, Harold Cardinal.
- “Laws governing relationships” (74)
- “These laws establish the principles that govern the conduct and behaviour of individuals within their family environments, within their communities, and with others outside their communities.” (74)
- “It is one of the most comprehensive doctrines of law among the Cree people and contains a whole myriad of subsets of laws defining the individual and collective relationships of the Cree people (75).

# 7. Challenges to the Linguistic Method

Thomas Wilhelm Ahlfors, **Challenges related to the incorporation of Inuit Qaujimajatuqangit into legislation**

Briar Gordon, **Reflecting an Indigenous perspective in legislation: the challenge in New Zealand**

- Translation (Indigenous language, English, French) – Ahlfors & Gordon
- Vagueness and uncertainty
- Using Language developed in a very different context -Ahlfors
- Breadth and complexity of certain Indigenous legal and governance concepts – Ahlfors and Gordon:
  - E.g. Nunavut: *Inuit Qaujimajatuqangit*
  - E.g. New Zealand: *tikanga* or *tikanga Māori*.

## 7. Methods of Engagement: ILRU Method

### ILRU Method:

**Phase 1:** Starting with a Specific Research Question

**Phase 2:** Case Analysis – Bringing the Research Question to available resources: Stories, Descriptive accounts, Interviews, Practices

**Phase 3:** Creating a Framework –Synthesis, iterative process with community, interviews, focus groups, review, then final synthesis drafted.

**Phase 4:** Implementation, Application and Critical Evaluation



# Phase 3: Legal Synthesis – Analytical Framework – Human and Social Issues

- 1. Legal Processes:** Characteristics of legitimate decision-making/ problem-solving processes
  - **Final Decision makers:** *Who had the final say?*
  - **Procedural Steps:** *What were the steps involved in determining a response or action?*
- 2. Legal Responses and Resolutions:** *What principles govern appropriate responses to legal/ human issue?*
- 3. Legal Obligations:** *What principles govern individual and collective responsibilities? Where are the “shoulds”?*
- 4. Legal Rights:** *What should people be able to expect from others?*
  - Substantive
  - Procedural
- 5. General Underlying Principles:** *What underlying or recurrent themes emerge in the stories that might not be fully captured above?*

# Outcome Example (ILRU Method): Summary of Cree Legal Principles: Violence, Harm, Conflict

**Cree Meta-Principles** (*Reclaiming Language of Law*):

e.g. Wahkotowin (Relationality & Interdependence)

**Cree Legal Response Principles** (*AJR Cree Legal Traditions Report & Wetiko Legal Principles*):

1. Healing
2. Separation or Avoidance (Temporary or permanent)
3. Supervision
4. Natural and Spiritual Consequences
5. Acknowledging responsibility
6. Reintegration
7. Incapacitation
8. Retribution (rare)

# 8. Return to the Relationship

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*Example: An Act to Amend the Canadian Human Rights Act:*

1.2 In relation to a complaint made under the [Canadian Human Rights Act](#) against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the [Indian Act](#), this Act shall be interpreted and applied in a manner that **gives due regard to First Nations legal traditions and customary laws**, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.

## 8. Returning to the Relationship

### **Example: KUNST'AA GUU – KUNST'AAYAH RECONCILIATION PROTOCOL**

#### **WHEREAS:**

**A.** The Parties hold differing views with regard to sovereignty, title, ownership and jurisdiction over Haida Gwaii, as set out below.

The Haida Nation asserts that:  
Haida Gwaii is Haida lands, including the waters and resources, subject to the rights, sovereignty, ownership, jurisdiction and collective Title of the Haida Nation who will manage Haida Gwaii in accordance with its laws, policies, customs and traditions.

British Columbia asserts that:  
Haida Gwaii is Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia.

Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to co-existence by way of land and natural resource management on Haida Gwaii through shared decision-making and ultimately, a Reconciliation Agreement.

# 8. Return to the Relationship

“Establishing Respectful Relations...requires the Revitalization of Indigenous Laws.”-  
*TRC Final Report.*



Aseniwuche Winewak Nation of Canada

Who is instructing? Who is interpreting? What do we see? How are we learning?

# Recap: Intersections of Indigenous Legal Traditions and Legislation

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*Special thanks to the Aseniwuche Winewak Nation for guidance, advice, vision & photos.*

