

A Duty to Act

Canadian Institute for the Administration of Justice's 2021 Annual Conference: Indigenous Peoples and the Law (Vancouver, BC)

17 November 2021

Remarks of the Honourable Robert J. Bauman, Chief Justice of British Columbia

- 1 I begin with an observation, perhaps of the obvious: I am not Indigenous; I am not a scholar of Aboriginal law or Indigenous legal orders. I am reading Borrows, Morales, Craft, and Nichols¹ but I am a 1L when it comes to these issues. Yet I am here speaking to all of you. My qualification for doing so is in the fact that I am one of your target audiences. One of the sites where law is recognized, made, and contested is the courtroom of the Canadian legal system. So I am someone who some of you attempt to speak to, to educate, and to patiently bring along. Although it is my responsibility to educate myself on these matters, the only progress I've made is thanks to the generous sharing and teaching from Indigenous people and scholars offering their knowledge and experiences with me. I am grateful for that patience and for the opportunity to address this learned audience at the outset of this important colloquium.
- 2 I will be referring to “us” and “ourselves” as distinct from Indigenous peoples. But of course the Canadian judiciary and legal community includes Indigenous people, and so does this audience. So, when I speak of “our” duty to learn, “our” position as uninvited guests, “our” responsibilities, I am really speaking about me, and those in similar positions, as non-Indigenous people.

¹ See e.g. John Borrows, “Revitalizing Canada’s Indigenous Constitution” in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo: CIGI, 2017) 20; Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo: CIGI, 2017) 63; Aimée Craft, “Broken Trust: Finding Our Way Out of the Damaged Relationship Through the Rebuilding of Indigenous Legal Institutions” in Law Society of Upper Canada, *Canada at 150: The Charter and the Constitution* (Toronto: Irwin Law, 2017) 379; Joshua Nichols & Sarah Morales, “Finding Reconciliation in Dark Territory: *Coastal Gaslink, Coldwater*, and the Possible Futures of *DRIPA*” (2021) 53:4 UBC L Rev 1185.

3 Almost a decade ago, Chief Justice Lance Finch presented a paper to CLEBC on Indigenous legal orders and the common law. It was entitled, “A Duty to Learn”.² Today, it is still required reading in law courses, and its message is even more relevant today. Chief Justice Finch called on members of the largely non-Indigenous legal profession to admit uncertainty and to hold ourselves ready to learn about Indigenous legal orders, to divest ourselves of our pre-existing certainties as to the nature of the law. He encouraged us to protect the interests of all Canadians by making space for a pluralistic legal and cultural landscape. Most importantly, Chief Justice Finch reminded people like myself that it is we, as strangers and newcomers, who must find our role within the Indigenous legal orders themselves.

4 Our duty to learn is an obligation that we will continue to carry throughout our personal and professional lives. Now, after ten years, it is time for us to embrace our “Duty to Act.” While much good has been done in recent decades by tireless advocates within the existing system, and there are shining examples of legal victories for Indigenous peoples, we also know that the adversarial litigation process has in many cases failed Indigenous peoples as a suitable forum for reconciliation. For Indigenous peoples, the court system has often been a barrier to justice, rather than a critical tool in the pursuit of it. The Truth and Reconciliation Commission tells us that Canadian law has suppressed truth and deterred reconciliation.³ It is this history, and current reality, that gives urgency to our duty to act.

5 Adding to that urgency is the development and acceptance of the United Nations Declaration on the Rights of Indigenous Peoples⁴—an Indigenous instrument built by decades of bold work by Indigenous advocates and their allies.⁵ The affirmation of the applicability of UNDRIP to British Columbia and Canadian law and the government’s commitment to its implementation requires all elements of

² Honourable Chief Justice Lance SG Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (prepared for the Continuing Legal Education Society of BC, November 2012).

³ *Truth and Reconciliation Commission of Canada: Executive Summary* (Winnipeg: TRC, 2015) at 202.

⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Annex, Agenda Item 68, UN Doc A/RES/61/295 (2007).

⁵ See John Borrows, “Revitalizing Canada’s Indigenous Constitution: Two Challenges” in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo: CIGI, 2017) 20 at 25.

the state to engage with and implement its principles.⁶ Thus, in a concrete way through this new legislation, a duty to act has been layered on top of our duty to learn.

6 At the forefront of this effort is self-determination of Indigenous peoples. And in this reference to self-determination I note that the Supreme Court of Canada has recognized self-determination as a right of a people to pursue its “political, economic, social and cultural development” albeit within the framework of an existing state.⁷ It may mean more than that to you, and in the context of UNDRIP, the UN Special Rapporteur on the Rights of Indigenous Peoples has emphasized the importance of not assimilating Indigenous self-government within the existing state.⁸ Preservation of distinctive Indigenous culture and government is crucial, not only for the survival, dignity, and well-being of Indigenous peoples, but also as a valuable part of state identity.

7 As we find space for Indigenous legal orders, we must look to Indigenous peoples to determine what that space will look like. Senator Murray Sinclair has said that a process of reconciliation, including legal reconciliation, that does not include an Aboriginal perspective and approach will be doomed to fail.⁹ I couldn’t agree more. And, if I may, I would add that beyond inclusion, the Indigenous perspective should be prioritized and centered.

8 In embracing that approach, our western, liberal lifeworld¹⁰ must be supplemented—and maybe in some circumstances supplanted—and our assumptions about law and equity, questioned. We must unlearn, and, to be frank, defer. We must hold space for hard conversations, and be willing to be wrong. If there’s anything that the last 200 years of Canadian–Indigenous relations has taught us, is that our jealous need for control is destructive. Indigenous peoples forcibly learned European language and history, became

⁶ See *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

⁷ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 126.

⁸ See *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UNGAOR, 74th Sess, Supp No 69(a), UN Doc A/74/149 (2019).

⁹ See e.g. “Bill S-218, An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (great apes, elephants and certain other animals)”, 2nd reading, *Debates of the Senate*, 43-2, Vol 152, No 13 (19 November 2020) at 440 (Hon Murray Sinclair), quoting *Truth and Reconciliation Commission of Canada: Executive Summary* (Winnipeg: TRC, 2015) at 18.

¹⁰ See generally Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847.

subject to settler–colonial law, and were made to navigate a social system that did not reflect their values or traditions. The result was catastrophic. Now is the time to do what we should have done when we arrived here as uninvited guests—demonstrate that we care enough to discover and learn, and to act responsibly within the matrix of Indigenous customs, traditions, and protocols. Now is the time for humility.

9 Yet in that humility, it is also the time to act. Among other tasks, we must tackle the overrepresentation of Indigenous people throughout Canada’s criminal and child-protection systems and also the many micro-aggressions experienced by Indigenous people in the Canadian legal system—illustrated in the hard-hitting documentary “But I Was Wearing A Suit.”¹¹ We must also act by recognizing the existence of the many Indigenous legal orders overlapping with the common law and working to reconcile them with the Canadian legal system, even as these Indigenous legal orders live on and are being revitalized on their own terms.¹²

10 Engaging with Indigenous laws, on Indigenous peoples’ terms, recognizes the honour of Indigenous peoples—honour that we are responsible for attempting to erode—by responding with humility and, as Professor Sarah Morales writes: “making space for their histories, experiences, and traditions, and shielding these from further damage.”¹³ Professor Hadley Friedland also urges: there is “no logical reason to think Indigenous laws did not work well enough for thousands of years.”¹⁴ I would add that, if anything, laws developed on this land might be more just in that they found their genesis here—not on distant shores divorced from the unique reality of place. Settler–colonial law has been an instrument of harm to our relationship. Indigenous legal orders may well be the instrument of its repair.

11 It is in this context that I am compelled to reflect on my own role in our collective effort to find a way to relate today in the pre-existing Indigenous cultural

¹¹ Various contributors, “But I Was Wearing a Suit” (23 November 2017), online (video): *CLE BC* <www.youtube.com/watch?v=HTG7fi-5c3U>.

¹² See e.g. “Indigenous Law Research Unit”, online: <ilru.ca>; Asch et al, “Secwépemc Lands and Resources Law Research Project” (July 2018), online (pdf): *ILRU* <ilru.ca/wp-content/uploads/2020/08/Secwepemc-Law-Book-July-2018.pdf>.

¹³ Sarah Morales, “Speakers, Witnesses and Blanketing: The Need to Look Beyond the Courts to Achieve Reconciliation” (2017) 78 (2d) *SCLR* 139 at 158.

¹⁴ Hadley Friedland, “Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions” (Calgary: Canadian Institute of Resources Law, 2012).

landscape. I would like to share with you some of my perspective, a few practical starting points that I offer from my position as a settler.

- 12 First, whether the Canadian legal system recognizes Indigenous law (or not) has no impact on its existence in the non-state realm. As Professor Ghislain Otis writes, “the motivation behind claims for state recognition of [I]ndigenous law is not to have the existence and internal validity of [I]ndigenous law confirmed.”¹⁵ Non-recognition can serve to marginalize these legal orders, an example being the sixty-five-year potlatch ban by the Government of Canada.¹⁶
- 13 Second, it is of course a myth that a judge can always discover the substantive, real-world truth behind a matter. Pronouncement of legal truths is nonetheless a core function of the courts in their pursuit to decide the rights of the parties. When the legal truths announced in pursuit of that goal drift away from reality, courts lose their relevance. I have learned that we cannot hide behind the law—to recognize the existence of Indigenous legal orders is to accept the truth: as Professor Friedland says, “Indigenous laws exist.”¹⁷ To recognize the existence of Indigenous law as a valid system of law is simply to recognize the truth, which certainly falls within my duty as a judge, if not as a human being, even if it is yet to be determined precisely how this fact will interact with the common law legal system.
- 14 I hesitate to analogize to the common law, but part of my journey has been in recognizing the familiar. Just like the common law, Indigenous legal orders are not frozen in time; traditions evolve and build on what preceded them. Indigenous laws will persist so long as they develop and remain relevant over time. And while origins of law are important for context, the focus is on the law’s current understanding and application, separate from origins. While traditions may be inherited from long ago, we honour that legacy but do not view them as historical. There is no need to fight the fog of history. Indigenous law is living, and it is alive.
- 15 Another similarity I see between Indigenous law and the common law lies in the centering of narrative in both systems. Narratives give meaning to legal rules; it’s

¹⁵ Ghislain Otis, “Constitutional Recognition of Aboriginal and Treaty Rights: A New Framework for Managing Legal Pluralism in Canada?” (2014) 46:3 J Leg Pluralism & Unofficial Law 320 at 321.

¹⁶ See generally *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015) at 55, citing Douglas Cole & Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990).

¹⁷ Hadley Friedland, “Navigating Through Narratives of Despair: Making Space for the Cree Reasonable Person in the Canadian Justice System” (2016) 67 UNBLJ 269 at 270.

why we still use the case study method to educate law students. Stories matter. They expose the wisdom of the law, the evils that the law seeks to prevent or denounce. They tell of the evolution of the law, as well as its meaning today. Importantly, stories contextualize the law, making it relevant to our lives. Our court process, while adversarial, is a constructed form of storytelling, after all. Our technical rules regulating the admissibility of evidence signal that the law recognizes the power of storytelling. While much would need to change to create space for non-Western narratives within the court process, we know that we must avoid interpreting stories to fit the typical Western narrative. That may be the more personally comfortable path for some, but it is not one that sits well with the truth-seeking function of the courts. And as newcomers, we must acknowledge that we may be unprepared to interpret or contextualize these narratives.¹⁸

16 Sometimes, it can be daunting for an outsider like myself to think of the sheer diversity of Indigenous languages and traditions. How will I ever feel like I'm starting to get the full picture, when there is simply so much to learn and so much, which by virtue of my background, I may never understand? It is truly humbling. I have been advised, and take comfort in the advice, that I need only to take things moment by moment, case by case, and truly listen. Listen to the real stories of those Indigenous persons who stand before the court, who live by Indigenous law. Listen to Indigenous writers and researchers who have expert knowledge and lived experience of Indigenous culture. Listen to the counter-stories. Listen, question, recognize the truth, and act.

¹⁸ See e.g. Hanna Askew, "UNDRIP Implementation, Intercultural Learning and Substantive Engagement with Indigenous Legal Orders" in Centre for International Governance Innovation, *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo & Saskatoon: CIGI & Wiyasiwewin Mikiwahp Native Law Centre, 2018) 85 at 86.