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RECOGNIZING INDIGENOUS LAW: A CONCEPTUAL FRAMEWORK

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Current efforts towards the revitalization of Indigenous law are likely to translate into greater demands for recognition by the Canadian legal system. This paper aims to provide a conceptual framework for the analysis of such claims. It first clarifies the concept of Indigenous law and highlights certain challenges raised by the interaction of Indigenous and Canadian law. It then distinguishes the Canadian legal system's delegation of law-making authority to Indigenous bodies from its recognition of Indigenous peoples' pre-existing, or inherent, law-making powers. For each model, four aspects of the interface between legal systems are analyzed: which Canadian legal actor takes the initiative of establishing a relationship with Indigenous law? How is Indigenous law expressed so as to be intelligible for non-Indigenous jurists? To whom, and to what territory is Indigenous law applicable? And what constraints does the relationship impose on the contents of Indigenous law? Lastly, the paper describes how Canadian courts judicially review decisions made by Indigenous decision-makers regarding Indigenous law.

En raison des efforts actuels de redynamisation du droit autochtone, le système juridique canadien sera probablement de plus en plus confronté à des demandes de reconnaissance. Le présent article vise à proposer un cadre conceptuel pour l'analyse de telles revendications. Il clarifie d'abord le concept de droit autochtone et identifie certains problèmes posés par l'interaction entre le droit autochtone et le droit canadien. Il établit ensuite une distinction entre la délégation de pouvoirs législatifs du système

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juridique canadien aux organismes autochtones et la reconnaissance, par ce même système, des pouvoirs législatifs préexistants, ou inhérents, des peuples autochtones. Pour chaque modèle, quatre aspects de l'interface entre systèmes juridiques font l'objet de l'analyse : Quel acteur juridique canadien prend l'initiative d'établir un lien avec le droit autochtone? Comment le droit autochtone est-il exprimé de manière à être intelligible pour les juristes non autochtones? À qui et à quels territoires le droit autochtone s'applique-t-il? Quelles sont les contraintes que ce lien impose au contenu du droit autochtone? Enfin, l'article présente une description des moyens par lesquels les tribunaux canadiens effectuent le contrôle judiciaire des décisions prises par des décideurs autochtones au sujet du droit autochtone.

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Introduction

Canadian courts are increasingly called upon to recognize Indigenous law. While such recognition has deep historical roots, recent events have brought it to the forefront of the legal scene. The Truth and Reconciliation Commission made several recommendations regarding

Indigenous legal traditions.[1] Parliament recently endorsed the United Nations' *Declaration on the Rights of Indigenous Peoples*,[2] article 34 of which recognizes Indigenous peoples' right to "promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs." Meanwhile, many Indigenous communities across the country have embarked on a variety of projects aimed at revitalizing their legal traditions. More and more law schools offer courses in Indigenous legal traditions. The University of Victoria now offers a joint degree in common law and Indigenous legal orders and the University of Ottawa, a certificate in Indigenous law.

While the existence of Indigenous law does not depend on the approval of the Canadian state, current efforts towards its revitalization are likely to translate into greater demands for recognition by the Canadian legal system. Thus, Canadian legislatures, governments and courts will face the challenge of establishing respectful relationships between the Canadian and Indigenous legal systems and institutions. This paper seeks to make a modest contribution towards this task, focusing on the role of the judiciary.

The nature of this contribution is twofold. First, I intend to offer a general survey of the demands for recognition that have been made by Indigenous litigants, and how courts have responded to them. Second, building on this data, I attempt to provide a conceptual structure that will facilitate comparisons between cases, the drawing of analogies and the identification of recurring issues and general trends.

In this endeavour, I do not seek to be prescriptive. In other words, I do not wish to suggest how judges should decide specific cases. This paper aims at clarifying the issues and structuring the dialogue, not prescribing answers or outcomes. If anything, it will show that demands for recognition raise difficult and complex issues. How reconciliation is achieved in specific cases is beyond the scope of this paper.

I begin by clarifying a number of concepts, including Indigenous law and legal traditions, from the perspective of legal pluralism. I then compare two models of relationships between legal systems that Canadian

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[1] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal: Queen's University Press, 2015) at calls for action nos 4, 27, 28, 45, 50.

[2] UNGAOR, 61st Sess, 107th Mtg, UN Doc A/RES/61/295 (2007). See the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. See also the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

courts use to carve space for Indigenous laws: delegation and recognition. For each model, I analyse the issues of who makes the decision to delegate or recognize, how the contents of Indigenous law are conveyed, its scope of application and constraints on its contents. Lastly, I address briefly the establishment of respectful relationships between decision-makers, especially in the context of administrative law.

1. Recognition and Legal Pluralism

Indigenous legal traditions have been the subject of significant interest and study over the last two decades. Most of these studies are based, explicitly or implicitly, on the theory of legal pluralism, which accepts that law is produced in many sites that are not associated with, or dependent on the state.[3] Giving an account of this research would far exceed the scope of this paper.[4] Instead, this section will attempt to provide a general understanding of key concepts and challenges related to the recognition of Indigenous law.

A) Indigenous Law

The first task is to reach a working definition of Indigenous law. I propose to define Indigenous law mainly by its authorship—it is law made by Indigenous communities, organizations or peoples. An inclusive definition is preferable because of the many ways in which Indigenous law manifests itself. Indigenous law may be oral or written. Its sources are multiple. They may include sources that are familiar to Canadian jurists, such as enactment by an official body, and others that are less familiar, such as stories. In this regard, Professor John Borrows suggested that the

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[3] For a general overview of legal pluralism, see Brian Z Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (New York: Oxford University Press, 2021) [Tamanaha, *Legal Pluralism*]; Ghislain Otis, Jean Leclair & Sophie Thériault, *Applied Legal Pluralism: Processes, Driving Forces and Effects* (New York: Routledge, 2022).

[4] The most significant reference on the topic is John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitution*]. Other references include Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) [Cardinal & Hildebrandt, *Our Dream*]; Jean-Paul Lacasse, *Les Innus et le territoire: Innu tipenitamun* (Sillery, QC: Septentrion, 2004) [Lacasse, *Les Innus*]; Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013) [Craft, *Breathing Life*]; Hadley Louise Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018); Kayanesenh Paul Williams, *Kayanerenkó:wa: The Great Law of Peace* (Winnipeg: University of Manitoba Press, 2018). The Indigenous Law Research Unit at the University of Victoria has undertaken several collaborative research projects regarding Indigenous laws: https://ilru.ca.

sources of Indigenous law include sacred, natural, deliberative, positivistic and customary sources.[5]

An inclusive definition respects Indigenous agency and choice in the design of their own legal systems. Indigenous peoples may choose to borrow tools and concepts from Western legal traditions. This does not make their laws less Indigenous or less deserving of recognition. A narrow definition would run the risk of forcing Indigenous peoples to stick to stereotypical forms of their laws. As I will explain below, defining Indigenous laws by their authorship prevents non-Indigenous jurists from passing judgments as to authenticity or whether laws are Indigenous enough to be recognized as such. It also highlights the link between Indigenous law-making and self-determination.

An inclusive definition also avoids controversies about the definition of law. It is not possible to define "law" in the abstract. Each legal system defines for itself what it considers law. Thus, Canadian jurists typically adhere to a positivistic conception of law focusing on rules made by the state or pursuant to its authority. Rules or norms not directly linked to the state are usually relegated to the non-legal sphere. In this perspective, law is centralized and professionalized. Applying such a conception to Indigenous legal traditions, which do not share these characteristics, often results in the use of non-legal terms to describe Indigenous laws, such as "oral history evidence" or "Indigenous perspective", and in the downplaying of their status and normative character.[6]

In this regard, Canadian legislation and other legal sources frequently use the concept of "custom" to describe Indigenous legal systems or norms.[7] In Western legal traditions, "custom" is usually understood as a practice generally accepted as being binding.[8] Yet, not all Indigenous

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5 Borrows, *Indigenous Constitution*, *supra* note 4 at 23–58; Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues About Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 229 [Napoleon, "Indigenous Legal Orders"].

6 Napoleon, "Indigenous Legal Orders", *supra* note 5.

7 See e.g. *Indian Act*, RSC 1985, c I-5, s 2 (see definitions of "child" and "council of the band") [*Indian Act*]; Arts 199.10, 543.1 CCQ; *Aboriginal Custom Adoption Recognition Act*, SNWT 1994, c 26 (see definition of the variant "customary law") [*Aboriginal Custom Adoption Recognition Act*].

8 *Statute of the International Court of Justice*, Can TS 1945 No 7, art 38(1)(b). See also Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579 (who puts forward the concept of "tacit deliberation" to explain how custom acquires its binding force).

law is "customary" in this sense.[9] To avoid a reductionist vision, it is preferable to consider these references to "custom" as encompassing all forms of Indigenous law, and to cease using the concept of "custom" as an all-encompassing term to describe Indigenous law.[10]

B) Indigenous Legal Traditions

Indigenous laws are usually embedded in Indigenous legal traditions. Professor Patrick Glenn likens a legal tradition to a "pool" or network of legal information, all the elements of which are interconnected and their meaning informed by the whole.[11] Moreover, a legal tradition is usually rooted in a particular culture, society or world view and cannot easily be dissociated from it.[12]

Understanding Indigenous laws in the context of the tradition they belong to presents a considerable challenge for Canadian jurists trained in the common law or civil law traditions, who are asked only occasionally to interact with Indigenous legal traditions. This situation gives rise to the problems of severance and distortion identified by Chief Justice Lance Finch of the British Columbia Court of Appeal in his famous address, *The Duty to Learn*.[13]

Severance occurs where a non-Indigenous jurist seeks to employ a discrete element of an Indigenous legal tradition in common law or civil law legal reasoning. The Indigenous element is severed from its linguistic

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9 Borrows, *Indigenous Constitution*, *supra* note 4 at 24, 51–52; in particular, "customary" election codes do not stem from custom in the strict sense of the term: *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at para 32 [*Whalen*].

10 *Henry v Roseau River Anishinabe First Nation*, 2017 FC 1038 at para 11 [*Henry*]; *Alexander v Roseau River Anishinabe First Nation Custom Council*, 2019 FC 124 at para 18 [*Alexander*].

11 H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed (Oxford: Oxford University Press, 2014) at 13–14 [Glenn, *Legal Traditions*]. Glenn's conception of a legal tradition is broadly consistent with the manner in which social science has viewed culture over the last fifty years: Denys Cuche, *La notion de culture dans les sciences sociales*, 3e éd (Paris: La Découverte, 2004).

12 Napoleon, "Indigenous Legal Orders", *supra* note 5; Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

13 The Honourable Chief Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper presented at the *Indigenous Legal Orders and the Common Law* symposium of the Continuing Legal Education Society of British Columbia, November 2012), online (pdf): <www.cerp.gouv.qc.ca> [perma.cc/8VLG-B95Q]. See also Alan Hanna, "Going Circular: Indigenous Legal Research Methodology as Legal Practice" (2020) 65:4 McGill LJ 671 at 689–97; Tamanaha, *Legal Pluralism*, *supra* note 3 at 68–69.

context of enunciation and is usually expressed with English or French words that can only approximate its original meaning. For example, rendering the Innu concept of *ne kupaniem* by "customary adoption" does not give an accurate idea of how this institution works.[14]

Severing Indigenous legal concepts from the broader legal tradition in which they are embedded also deprives them of their connections to the network of meanings that constitutes the legal tradition. It is difficult for the non-Indigenous jurist to understand and apply a discrete Indigenous concept without this broader understanding. To return to the example of "customary adoption", we realized that the Innu legal institution of *ne kupaniem* could not be severed from a broader understanding of Innu family law and is better described as a rearrangement of responsibilities within the Innu extended family than as an "adoption".[15]

Distortion results from the fact that information about an Indigenous legal tradition is often conveyed by non-Indigenous persons, be they jurists, historians or anthropologists. Thus, descriptions of Indigenous law may be laden with stereotypes, generalizations or mere repetition of historical mistakes. There is also a tendency to understand and describe Indigenous law according to the categories of Western law, therefore obscuring structural differences or concepts that have no direct equivalent.[16] Moreover, the authority associated with case law or academic publications may eclipse the authority of Indigenous knowledge keepers and deprive Indigenous peoples of control over their own laws.

The Supreme Court of Canada provided an example of severance and distortion in the *Sundown* case,[17] which recognized that a treaty right to hunt on Crown land included the right to build a cabin to facilitate hunting expeditions. Justice Cory, however, went on to say that "any interest in the hunting cabin is a collective right"[18] that belongs to the First Nation and not to Mr. Sundown who built it, so that Mr. Sundown could not exclude other members of the First Nation from the cabin. Apparently, this was based on evidence that hunting expeditions were communal. It is far from

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14 This point is made at length in Sébastien Grammond & Christiane Guay, "Comprendre et reconnaître le droit innu du *ne kupaniem/ne kupanishkuem*" (2021) 62:2 C de D 467. See also *Restoule v Canada (AG)*, 2018 ONSC 7701 at paras 444–48, rev'd in part, 2021 ONCA 779 [*Restoule*].

15 *Ibid*. See also Christiane Guay, Sébastien Grammond & Catherine Delisle-L'Heureux, "La famille élargie, incontournable chez les Innus" (2018) 64:1 Service soc 103; *K (SK) v S (J)*, [1999] NWTJ No 94 (NWTSC), 1999 CarswellNWT 95.

16 John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795.

17 *R v Sundown*, [1999] 1 SCR 393, 170 DLR (4th) 385.

18 *Ibid* at para 36.

clear, however, whether Justice Cory's deduction accurately reflects the community's law. Yet, given its authority as a Supreme Court judgment, *Sundown* risks being considered as an accurate expression of Cree law and, in the end, distorting Cree law. Moreover, one could be tempted to generalize *Sundown*'s holding to Indigenous communities elsewhere in the country, regardless of their actual laws. For example, Innu law entrusts the stewardship of a particular area to an experienced hunter who may decide who may hunt in the area.[19]

C) Evolution and Authenticity

In settler imagination, Indigenous peoples are often associated with the past, and modernity is seen as inherently non-Indigenous. This may explain why Canadian law tends to limit recognition of Indigenous culture or law to those aspects considered authentic because they are anchored in the past. A well-known example is the focus on "pre-contact practices" in aboriginal rights jurisprudence. From this perspective, evolution would be the opposite of authenticity.

Yet, like other elements of culture, law is in a constant process of change. Legal traditions are constantly evolving and, in this process, they are not immune from external influences.[20] All legal traditions borrow from other traditions. In this regard, Indigenous legal traditions are not different from the common law or the civil law. One example of evolution of Indigenous legal traditions pertains to fundamental rights. Several Indigenous communities have adopted constitutions that protect fundamental rights.[21] Traditions contrary to fundamental rights have been abandoned.[22]

For these reasons, authenticity is a problematic concept when applied to legal traditions. Judging authenticity by reference to a distant past would freeze Indigenous legal traditions and judging it by reference to an

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19 Lacasse, *Les Innus*, *supra* note 4 at 41–44, 73–74. For similar themes with respect to a different Indigenous group, see Sarah Morales & Brian Thom, "The Principle of Sharing and the Shadow of Canadian Property Law" in Angela Cameron, Sari Graben & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights and Relationships* (Toronto: University of Toronto Press, 2020) 120 at 130.

20 Glenn, *Legal Traditions*, *supra* note 11 at 23–27.

21 Christopher Alcantara & Greg Whitfield, "Aboriginal Self-Government through Constitutional Design: A Survey of Fourteen Aboriginal Constitutions in Canada" (2010) 44:2 J Can Studies 122; Alex Geddes, "Indigenous Constitutionalism Beyond Section 35 and Section 91(24): The Significance of First Nations Constitutions in Canadian Law" (2019) 3:1 Lakehead LJ 1.

22 Borrows, *Indigenous Constitution*, *supra* note 4 at 45. See also *Harpe v Massie and Ta'an Kwäch'än Council*, 2006 YKSC 1 at paras 85–91 [*Harpe*].

ideal "authentic" content risks imposing settler stereotypes. To be sure, revitalizing Indigenous legal traditions may aim at making them more authentic, that is, more in conformity with Indigenous worldviews. In this process, Indigenous peoples may choose which parts of the past will guide their future. This, however, does not mean that non-Indigenous jurists should impose a test of authenticity for the recognition of Indigenous laws. Instead, they should accept that Indigenous legal traditions may evolve through internal deliberation.[23] It is for the community to decide what it will consider authentic. What is important is not the end result but who controls the process.

2. Relationships Between Legal Systems

In the following pages, I compare two models of interaction between the Canadian and Indigenous legal systems, namely the Canadian legal system's *delegation* of law-making authority to Indigenous bodies and its *recognition* of Indigenous peoples' pre-existing, or inherent, law-making powers. The comparison is organized along four questions: which Canadian legal actor takes the initiative of establishing a relationship with Indigenous law? How is Indigenous law expressed so as to be intelligible for non-Indigenous jurists? To whom, and to what territory is Indigenous law applicable? And what constraints does the relationship impose on the contents of Indigenous law?

In drawing this comparison, I do not wish to suggest that the delegation model is inferior or should be abandoned. Indigenous peoples may find advantages in using existing mechanisms of delegation or negotiating new ones. Nevertheless, the untapped potential of recognition should become readily apparent.

I also do not wish to suggest that delegation and recognition are the only ways of establishing respectful relationships between Canadian and Indigenous law. The exercise of discretionary powers by Canadian legal actors is fertile ground for the incorporation of teachings from Indigenous legal traditions, most notably in matters of sentencing or family law.[24] The legal nature of these teachings, however, is not always clearly acknowledged, for example when the Supreme Court mentions "traditional aboriginal

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[23] Borrows, *Indigenous Constitution*, *supra* note 4, 38–39; Napoleon, "Indigenous Legal Orders", *supra* note 5.

[24] Sébastien Grammond & Christiane Guay, "L'interaction entre le droit innu et le droit québécois de l'adoption" (2018) 48:1 RGD 123; Benjamin Ralston, "Legal Pluralism in the sentencing of Indigenous Persons in Canada: the nascent jurisprudence" in Barreau du Québec, *Développements récents en droit des autochtones (2021)* (Cowansville: Yvon Blais, 2021) 47 at 49 [Ralston, "Legal Pluralism"]; Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548.

conceptions of sentencing"[25] or "world views"[26]. Legal institutions have also adapted their own processes in manners inspired to a varying degree by Indigenous legal traditions. One need only think about sentencing circles, *Gladue* courts or Indigenous courts.[27] Mediation may also facilitate the expression of Indigenous legal traditions.[28]

Moreover, Indigenous peoples may sometimes consciously refrain from seeking recognition of their legal traditions by the Canadian legal system. One example is the definition of "law" in the Nisga'a Final Agreement, which explicitly excludes "*Ayuukhl Nisga'a* or *Ayuuk*," described as the "traditional laws and practices of the Nisga'a Nation." This was purposely done to protect these traditions from the risk of distortion that would arise if Canadian courts were to interpret and apply them.[29]

A) The Delegation Model

The delegation model is the most familiar to jurists trained in Canadian law. It relies on the well-known concept of delegation of administrative powers to explain Indigenous law-making. It is a form of legal pluralism within the state. Its first manifestation was the conferral of limited powers of local government on band councils in early versions of the *Indian Act*.[30] Coupled with the imposition of elections to select Indigenous leaders, the intention was to suppress Indigenous legal traditions and integrate Indigenous peoples in the state system as municipalities.

Over the last forty years, many self-government initiatives were implemented by widening the range of powers delegated to First Nations. For example, First Nations may opt out of certain sections of the *Indian Act* and enjoy broader powers regarding land management or taxation.[31] An

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25 *R v Gladue*, [1999] 1 SCR 688 at para 70, 171 DLR (4th) 385.

26 *R v Ipeelee*, 2012 SCC 13 at para 74.

27 Ralston, "Legal Pluralism", *supra* note 24.

28 See e.g. *Henry*, *supra* note 10.

29 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 L 320.

30 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6, s 10.

31 See especially *First Nations Land Management Act*, SC 1999, c 24 [*First Nations Land Management Act*]; *First Nations Fiscal Management Act*, SC 2005, c 9 [*First Nations Fiscal Management Act*]; *First Nations Elections Act*, SC 2014, c 5 [*First Nations Elections Act*]. See also *Mi'kmaq Education Act*, SC 1998, c 24 [*Mi'kmaq Education Act*]; *First Nations Jurisdiction over Education in British Columbia Act*, SC 2006, c 10; *Anishinabek Nation Education Agreement Act*, SC 2017, c 32.

increasing number of self-government agreements and treaties recognize a broad array of jurisdictions to participating First Nations governments.[32] Professor Naiomi Metallic even suggested that greater and more creative use could be made of the existing *Indian Act* powers.[33]

1) Initiative

Under the delegation model, courts do not take the initiative of recognizing Indigenous law. This is rather the result of decisions made by the legislative or executive branch and expressed in legislation or treaties, which I will call "statutory cues". Indigenous law made pursuant to a delegation is considered part of Canadian law, and Canadian courts may apply it. The recognizing legislation may indicate which court is competent.[34]

While the delegated model is usually viewed from a public law perspective, Indigenous laws may also be recognized through private law channels.[35] For example, the constitutive documents of a corporation could embody or refer to Indigenous law principles.[36]

2) Mode of Expression

Under the delegation model, there is no ambiguity as to the identity of the Indigenous entity having the power to make laws—it is identified in the delegating legislation. Almost invariably, it is the council of a local First Nation, whether constituted under the *Indian Act* or more recent self-government legislation. In addition, the enactment of significant laws, such as a membership code or a land code, must be approved by the

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[32] See, among others, *Yukon First Nations Self-Government Act*, SC 1994, c 35 [*Yukon First Nations Self-Government Act*]; *Nisga'a Final Agreement*, 27 April 1999, online (pdf): *Nisga'a Lisims Government* <www.nisgaanation.ca> [perma.cc/Q59M-SYHU] [*Nisga'a Final Agreement*]; *Labrador Inuit Land Claims Agreement*, online (pdf): *Nunatsiavut* <www.nunatsiavut.com> [perma.cc/GT7T-6Z94] [*Labrador Inuit Land Claims Agreement*]. Whether treaties are instruments of delegation or recognition is a matter of debate. However, to the extent that they are validated by federal and provincial or territorial legislation and purport to grant power to Indigenous governments, Canadian law may have a tendency to view them mainly as effecting a form of delegation. See e.g. *Sga'nism Sim'augit (Chief Mountain) v Canada (AG)*, 2013 BCCA 49.

[33] Naiomi Metallic, "*Indian Act* By-Laws: A Viable Means for First Nations to (Re) Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211.

[34] See e.g. *Yukon First Nations Self-Government Act*, *supra* note 32, s 15.

[35] Douglas Sanderson, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, But How Do You Build It in Canada?" (2011) 53:1 Can Bus LJ 94.

[36] *Big River First Nation v Agency Chiefs Tribal Council Inc*, 2020 SKQB 273 at paras 4, 16, rev'd 2022 SKCA 16 [*Big River First Nation*].

members of the First Nation voting in a referendum.[37] In rare cases, other entities are involved in the law-making process[38] or powers are conferred to a regional entity.[39]

Indigenous law-making pursuant to the delegated model must abide by the formal requirements of Western law. Thus, under this model, Indigenous laws are typically required to be written and made accessible to the public.[40] This is certainly useful for citizens who must comply with them and judges who must apply them. Moreover, the precise identification of the body empowered to make law significantly reduces the potential for conflict between competing sources of authority within Indigenous communities.

In fact, these features of the delegated model make Indigenous law readable for non-Indigenous judges, lawyers and bureaucrats. In other words, Indigenous communities bear the burden of expressing their laws in a manner understandable to non-Indigenous society or making their laws fit in the Western mould. This may be unavoidable where these laws are intended to bind non-Indigenous persons.[41] Requiring Indigenous communities to employ the language of Western law, however, makes it more difficult to enact laws that draw on the full range of sources and practices of Indigenous legal traditions.

3) Scope of Application

Under the delegation model, the territorial and personal scope of delegated powers is defined, explicitly or implicitly, by the terms of the delegating statute. Most powers granted by the *Indian Act* are territorially limited to the First Nation's reserve.[42] Thus, while an *Indian Act* by-law would apply to non-members who are present on the reserve, it would not apply to members who are outside the reserve.

More recent self-government schemes resort to a combination of territorial and personal powers to tailor an Indigenous community's powers to the circumstances. For example, the *Yukon First Nations Self-*

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37 *Indian Act*, *supra* note 7, s 10; *First Nations Land Management Act*, *supra* note 31, s 12.

38 See e.g. *First Nations Land Management Act*, *supra* note 31, s 8; *First Nations Fiscal Management Act*, *supra* note 31, s 16 ff (creating the First Nations Tax Commission).

39 See e.g. *Nisga'a Final Agreement*, *supra* note 32; *Cree Nation of Eeyou Istchee Governance Agreement Act*, SC 2018, c 4, s 1.

40 See e.g. *Mi'kmaq Education Act*, *supra* note 31, s 9.

41 Such as pursuant to the *First Nations Fiscal Management Act*, *supra* note 31.

42 *R v Lewis*, [1996] 1 SCR 921, 133 DLR (4th) 700 [*Lewis*]; *St Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 657, 147 DLR (4th) 385 [*St Mary's Indian Band*].

Government Act establishes three main categories of legislative powers. Powers regarding a First Nation's internal management are not subject to any territorial limitation. Powers regarding the provision of services to the citizens of a First Nation or certain matters related to the citizens' personal status (such as adoption or inheritance) apply throughout the Yukon, not only on the First Nation's lands; in other words, the scope of jurisdiction is defined mainly in personal, not territorial terms. Then, powers related to local matters may be exercised with respect to any person present on the lands of a First Nation, whether a citizen or not; the scope of jurisdiction is then defined in territorial, not personal terms. When powers are granted on a personal basis, a recurring question is whether the jurisdiction is optional or, in other words, whether members of an Indigenous group may "opt out" of the group's laws.[43]

4) Constraints

Exercising a delegated power comes with a number of constraints, the most important of which is that it must stay within the confines of the delegation. Thus, disputes may arise as to the interpretation of the scope of the powers delegated to Indigenous groups. In some cases, courts have given these powers a narrow interpretation,[44] especially when the *Indian Act* is involved.[45] A wider scope tends to be given to legislation implementing various forms of self-government.[46]

Self-government agreements or legislation sometimes set out substantive constraints on the exercise of delegated powers. For example, the Nisga'a Final Agreement confers a broad range of legislative powers on the Nisga'a Lisims Government, but also sets out certain standards for their exercise. Thus, the power to legislate with respect to education and child and family services is subject to a requirement to meet provincial standards.[47] Yet, there is little clarity as to how this and other similar requirements are to be enforced.

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43 Ghislain Otis, "Individual Choice of Law for Indigenous Peoples in Canada: Reconciling Legal Pluralism with Human Rights" (2018) 8:2 UC Irvine L Rev 207; Ghislain Otis, "L'autonomie gouvernementale autochtone et l'option de loi en matière de statut personnel" (2014) 55:3 C de D 583.

44 See e.g. *Kikino Metis Settlement v Abtosway*, 2018 ABCA 199.

45 See e.g. *LaForme v Mississaugas of the New Credit First Nation Band Council*, [2000] 4 CNLR 118, 181 FTR 264 (FCA).

46 *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at paras 18, 52–53, 144, 122 DLR (4th) 129; *Ontario Lottery and Gaming Corp v Mississaugas of Scugog Island First Nation*, 2019 FC 813 at paras 46–51; *Canadian Natural Resources Limited v Fishing Lake Métis Settlement*, 2022 ABQB 53 at paras 49–78.

47 *Nisga'a Final Agreement*, *supra* note 32, c 11, ss 89, 100, 104.

Like any exercise of delegated power, Indigenous laws made under the delegated model are subject to the *Canadian Charter of Rights and Freedoms*.[48] Many recent treaties or self-government agreements make this explicit.[49] The application of the Charter to Indigenous laws raises a number of issues that cannot be fully analyzed here, including the contextual application of section 1, which provides that Charter rights may be subject to reasonable limits,[50] and the impact of section 25, which provides that Charter rights do not abrogate or derogate from Aboriginal, treaty and other rights of Indigenous peoples.[51]

To summarize, the delegation model provides an interface allowing some space for Indigenous laws within a framework familiar to non-Indigenous jurists. For that reason, however, it is unable to fully embrace Indigenous legal traditions.

B) The Recognition Model

While the delegated model requires Indigenous law to fit within the pyramid of norms culminating in the Constitution, there is another possibility. Indigenous law may rest upon its own political legitimacy, independent of the Constitution of the state or the legal order it creates. Indigenous law would be in a position similar to that of foreign laws, which the national legal system may recognize even though their source of validity lies elsewhere. Recognition, in this context, means a legal system's decision that a particular situation is governed by another, independent legal system. Private international law is a web of rules of recognition. Although the technical rules of conflicts of laws may not directly govern the relations between Canadian law and Indigenous law,[52] the general concept of recognition remains relevant.

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48 See e.g. *R v Campbell* (1996), 142 DLR (4th) 496, 112 CCC (3d) 107 (Man CA); *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 FC 513, 68 CRR (2d) 295 (TD); *R v Winter*, 2008 CanLII 66155 (Ont SCJ); *Band (Eeyouch) v Napash*, 2014 QCCQ 10367.

49 See e.g. *Nisga'a Final Agreement*, *supra* note 32, c 2, s 9; *Tlicho Constitution*, s 2.3, online (pdf): *Tlicho Government* <tlicho.ca> [perma.cc/R59E-5AWQ]; *Labrador Inuit Land Claims Agreement*, *supra* note 32, s 2.18.1; *Tsawwassen First Nation Final Agreement*, c 2, s 9, online (pdf): *Tsawwassen First Nation*<tsawwassenfirstnation.com> [perma.cc/THP4-M5UC]; *Maa-Nulth First Nations Final Agreement*, 9 April 2009, s 1.3.2, online (pdf): *Toquaht* <www.uchucklesaht.ca> [perma.cc/5UX7-7CES].

50 See e.g. *Grismer v Squamish First Nation*, 2006 FC 1088; *Miller c Mohawk Council of Kahnawà:ke*, 2018 QCCS 1784.

51 *R v Kapp*, 2008 SCC 41; *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 [*Dickson*].

52 *Beaver v Hill*, 2018 ONCA 816 at paras 17-18 [*Beaver*].

State institutions retain a significant role under this model. Decisions have to be made as to which Indigenous laws should be recognized, how the contents of these laws can be conveyed to non-Indigenous legal actors, who will be subject to these laws and whether Indigenous laws or legal decisions will be subject to some form of review. These choices may be the result of legislation, agreement or judicial decision.

Since its early days, the United States has adopted this model, based on Indigenous peoples' "residual sovereignty". Other countries, such as South Africa, broadly recognize Indigenous "customary law".[53] In Canada, the British colonizers' initial recognition of Indigenous laws was brushed aside by the assimilative policies of the 19th and 20th centuries epitomized by the *Indian Act*. Nowadays, the recognition paradigm is regaining favour.[54]

1) Initiative

In what situations does the Canadian legal system recognize Indigenous laws outside of the delegation model? Sometimes Canadian courts do it on their own. In theory, this is the default position. By and large, however, Canadian courts have failed to bring this possibility to its full potential. Rather, they have usually waited for "statutory cues" and are slowly beginning to draw out the implications of section 35 of the *Constitution Act, 1982* for the recognition of Indigenous laws.

British imperial law provides the conceptual foundation for the recognition of Indigenous laws. In its colonial endeavours, Great Britain typically allowed Indigenous peoples to retain their legal systems, at least with respect to internal matters.[55] In this regard, the Supreme Court of Canada noted that "aboriginal interests and customary laws were

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53 See *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, art 211(3): "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." See also Charlotte Chicoine-Wilson, "La reconnaissance de l'autonomie judiciaire autochtone en Colombie : entre réconciliation et convivialité" (2017) 48:2 Ottawa L Rev 447.

54 Kent McNeil, "Shared Indigenous and Crown Sovereignty: Modifying the State Model" (2020), online (pdf): *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca> [perma.cc/AG4C-PQAT].

55 Mark D Walters, "The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44:2 McGill LJ 711; Tamanaha, *Legal Pluralism*, *supra* note 3 at 58–66; Ralston, "Legal Pluralism", *supra* note 24.

presumed to survive the assertion of sovereignty."[56] This came to be known as the doctrine of continuity.

For reasons that may be related to the changing demographic balance between Indigenous peoples and the non-Indigenous Canadian population, however, this principle was more often breached than honoured.[57] From the early days of Confederation until recently, Canadian courts recognized Indigenous laws almost exclusively with respect to marriage and adoption.[58] In particular, substantive Canadian criminal law was imposed on the Indigenous peoples without any concession to Indigenous legal traditions.[59] More recently, courts declined to give effect to assertions of Indigenous laws with respect to corporate governance[60] and environmental issues.[61]

In fact, courts and other legal actors have mainly recognized Indigenous laws following "statutory cues". Thus, from the beginning, the *Indian Act* has stated that a council could be "chosen according to the custom of the band" and that a child includes "a child adopted in accordance with Indian custom." The treaties made with the Inuit define their beneficiaries as a person considered as "an Inuk as determined in

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56 *Mitchell v MNR*, 2001 SCC 33 at para 10 [*Mitchell*]. See also *R v Van der Peet*, [1996] 2 SCR 507 at para 263, 137 DLR (4th) 289, McLachlin J, dissenting.

57 Sébastien Grammond, "The Reception of Indigenous Legal Systems in Canada" in Albert Breton, Anne Des Ormeaux, Katharina Pistor & Pierre Salmon, eds, *Multijuralism: Manifestations, Causes, and Consequences* (Burlington: Ashgate Publishing, 2009) 45; Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2018) 51:1 UBC L Rev 105.

58 Cynthia L Baldassi, "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences" (2006) 39:1 UBC L Rev 63; Ghislain Otis, ed, *L'adoption coutumière autochtone et les défis du pluralisme juridique* (Quebec City: Presses de l'Université Laval, 2013). The most famous cases are *Connolly v Woolrich* (1867), 11 LCJ 197, 17 RJRQ 75 (Que SC), aff'd *sub nom Connolly v Johnstone* (1869), 17 RJRQ 266, 1 CNLC 151 (Que QB); *Casimel v Insurance Corp of British Columbia* (1993), 106 DLR (4th) 720, [1993] BCJ No 1834 (BCCA) [*Casimel*].

59 Hugues Melançon, "Une analyse pluraliste des conceptions juridiques autochtones devant les tribunaux de juridiction pénale au Canada" (1997) 12:2 CJLS 159; Val Napoleon & Jim Henshaw, *Mikomosis and the Wetiko* (Victoria: University of Victoria, 2013). See also *Thomas v Norris*, [1992] 2 CNLR 139, 1992 CanLII 354 (BCSC) [*Thomas*].

60 *Gitga'at Development Corp v Hill*, 2007 BCCA 158; *Council of the Wasauksing First Nation v Wasausink Lands Inc*, [2004] 2 CNLR 355 at paras 94–98, [2004] OJ No 810 (QL) (Ont CA). But see *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16 at paras 51–54, 63–64 [*Spookw*]; *Big River First Nation*, *supra* note 36.

61 *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 at paras 127ff [*Coastal*].

accordance with Inuit customs and usages."[62] Nunavut's *Wildlife Act*[63] names and defines eight concepts of Inuit Qaujimajatuqangit which are applicable under that Act. A mechanism for the recognition of Indigenous "customary adoption" is now in place in several provinces and territories.[64] The reference to "Indigenous knowledge" in the recent *Impact Assessment Act*[65] could include legal traditions. All these examples have in common the fact that they target a relatively narrow legal issue and instruct judges or other legal officials to resolve it through the application of Indigenous laws. A more ambitious form of recognition derives from the Nunatsiavut Constitution, which makes Inuit customary law the "underlying law" of the Inuit and provides for its concurrent application with written laws.[66]

In addition, as mentioned above,[67] the grant of a discretionary power to courts or other Canadian legal actors may provide an implicit "cue" for the recognition of Indigenous laws. In other words, Indigenous law or the outcome of an Indigenous legal process may be considered relevant to the exercise of a Canadian legal actor's discretionary power.

It has been suggested that the recognition of Indigenous laws is an aboriginal right protected by section 35 of the *Constitution Act, 1982*.[68] However, in *R v Pamajewon*,[69] the Supreme Court of Canada subjected such claims to the strict test for the proof of aboriginal rights, which requires evidence of a practice existing before the arrival of the Europeans and integral to the Indigenous group's distinctive culture. As a result,

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62 *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada as amended*, 25 May 2018, s 35.3.1, online (pdf): *Nunavut Tunngavik* <www.tunngavik.com> [perma.cc/YL9M-QZRZ] (*Nunavut Land Claims Agreement*); *Labrador Inuit Land Claims Agreement*, *supra* note 32, s 3.1.1, 3.3.2; *James Bay and Northern Quebec Agreement*, c 3A, online (pdf): *Naskapi* <www.naskapi.ca> [perma.cc/3YUP-QDSQ]. See Sébastien Grammond, "L'appartenance aux communautés inuit du Nunavik: un cas de réception de l'ordre juridique inuit?" (2008) 23:1/2 CJLS 93.

63 See *Wildlife Act*, SNu 2003, c 26, s 8 [*Wildlife Act*]. See also *Education Act*, SNu 2008, c 15, s 1(2) [*Education Act*]; *Inuit Language Protection Act*, SNu 2008, c 17, s 27.1 [*Inuit Language Protection Act*].

64 *Adoption Act*, RSBC 1996, c 5, s 46; Arts 132.0.1, 199.10, 543.1 CCQ; *Child and Family Services Act*, SY 2008, c 1, s 134; *Aboriginal Custom Adoption Recognition Act*, *supra* note 7 (also applicable in Nunavut); see, in this regard, *IA (Guardian ad litem of) v SK and DK*, 2017 NUCJ 5.

65 SC 2019, c 28, s 1.

66 See *Nunatsiavut Constitution Act, c 9*, online (pdf): *Nunatsiavut* <www.nunatsiavut.com> [perma.cc/ZLP9-BA6L].

67 See the text accompanying note 24.

68 See e.g. *Casimel*, *supra* note 58. See also "Principles respecting the Government of Canada's relationship with Indigenous Peoples" (2018), online: *Government of Canada* <www.justice.gc.ca> [perma.cc/TY5W-HPNK] (especially principle no 4).

69 [1996] 2 SCR 821, 25 OR (3d) 824.

the willingness to put forward such claims was severely dampened and the few attempts to have Indigenous laws recognized through section 35 resulted in failure.[70]

Nevertheless, section 35 has led to the recognition of certain forms of Indigenous laws outside of the *Pamajewon* framework. This results from the collective nature of aboriginal rights, which calls for a form of collective management of their exercise, through laws made by the rights-holding community. Thus, in *R v Powley*,[71] the Supreme Court of Canada invited Métis organizations to enact membership criteria that would identify who can exercise Métis section 35 rights.[72] The British Columbia Court of Appeal held that one should look to Indigenous laws to decide who is the proper holder of aboriginal rights.[73] The Ontario Court of Appeal also recognized that an Indigenous group could "invite" members of another group to exercise its treaty hunting rights, according to its own laws.[74]

The potential of section 35 has yet to be fully explored. A recent case highlights the fact that treaties are as much instruments of Indigenous law as Canadian law and integrates the Indigenous legal perspective in their interpretation.[75] The duty to consult flowing from section 35 may provide a gateway for the recognition of Indigenous laws regarding land management.[76] The Quebec Court of Appeal recently endorsed the idea that the recognition of certain categories of Indigenous laws is a "generic" aboriginal right not subjected to the *Pamajewon* test.[77] This

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70 *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814; *Conseil des Innus de Pessamit v Association des policiers et policières de Pessamit*, 2010 FCA 306.

71 2003 SCC 43.

72 See Kelly Saunders & Janique Dubois, *Métis Politics and Governance in Canada* (Vancouver: UBC Press, 2019).

73 *William v British Columbia*, 2012 BCCA 285 at para 149, rev'd on other grounds, *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

74 *R v Meshake*, 2007 ONCA 337; *R v Shipman*, 2007 ONCA 338.

75 *Restoule*, *supra* note 14 at paras 412–23 (on appeal to the Ontario Court of Appeal, 2021 ONCA 779, the issue was not discussed). For examples of an Indigenous legal perspective on treaties, see Cardinal & Hildebrandt, *Our Dream*, *supra* note 4; Leanne Simpson, "Looking After Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships" (2008) 23:2 Wicazo Sa Rev 29; Craft, *Breathing Life*, *supra* note 4.

76 Jean Leclair, Martin Papillon & Hubert Forget, "Les protocoles de consultation autochtones au Canada: Un modèle de convergence des systèmes juridiques autochtones et étatique?" (2020) 49:2 Recherches amérindiennes au Québec 25.

77 *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*, 2022 QCCA 185 at paras 468–94, under appeal to the SCC; Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79:2 Can Bar Rev 196 at 212–15. See also *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2016 CHRT 2 at para 106, [2016] 2 CNLR 270.

follows on the heels of Parliament's recent statement to the effect that "[t]he 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."[78] The effects of such forms of recognition remain to be clarified. Likewise, courts have yet to explore the implications of Parliament's endorsement of the United Nations' *Declaration on the Rights of Indigenous Peoples*.

2) Mode of Expression

Unlike delegation, recognition mechanisms do not require Indigenous laws to be written and to take the form of an enactment. In principle, recognition may take into account a wide range of sources. Yet this openness comes at a cost. Jurists trained in the Western legal traditions are usually not well equipped to understand Indigenous legal sources without giving rise to the problems of distortion and severance mentioned above. Thus, there is a need for "translation," so to speak, of Indigenous laws into something intelligible to Canadian legal institutions.

This translation may take various forms, ranging from assertions made by an individual litigant to evidence of current community practices to the testimony of Elders regarding a people's founding stories. I can only highlight certain issues raised by this process, as the solutions will have to be worked out as we collectively gain experience.

The most obvious challenge is for non-Indigenous judges to identify a legitimate spokesperson within the Indigenous community. This is especially difficult in cases of internal disagreement or where Indigenous individuals appear to act without any form of community support.[79] Courts will likely have to devise validation processes to ensure that evidence of Indigenous laws is presented by legitimate representatives. In this regard, the Federal Court recently introduced a process for the appointment of Indigenous law assessors to help it grapple with such issues.[80] Once appropriate witnesses have been identified, procedural accommodations may have to be made for their testimony, in particular to ensure the manner in which evidence is presented complies with Indigenous protocols.[81]

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78 *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s 18. Likewise, the preamble of Ontario's *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, sch 1, recognizes that First Nation, Inuit and Métis peoples have their own laws.

79 See e.g. *R v Itturiligaq*, 2020 NUCA 6 at para 78.

80 *Practice Guidelines for Aboriginal Law Proceedings*, 4th ed (2021), online (pdf): *Federal Court* <www.fct-cf.gc.ca> [perma.cc/88NA-J3L9].

81 Ibid. See also *Ignace v British Columbia (AG)*, 2019 BCSC 10.

Courts may also be called upon to choose between competing sources of Indigenous law, for example where one party alleges custom and the other relies on written laws. In this case, the Federal Court seeks to ascertain which of the competing laws attracts the community's "broad consensus" or general acceptance.[82] This consensus may be proved by the enactment of written law by a democratic process or by the tacit acceptance of a practice by a First Nation's membership; the views of a First Nation's council are not determinative.[83] This test could possibly be applied in other circumstances.[84] Thus, where the parties put forward competing sources of Indigenous law, say one based on natural law and the other on deliberative custom (to use Borrows' classification[85]), a court could inquire as to which one of these sources attracts a broad consensus. Consensus could be presumed in appropriate cases, for example where there is no internal disagreement regarding the law in question.

Some of these issues can be avoided, at least in part, where legislation provides a more structured process for the recognition of Indigenous laws. An example is provided by the Nunavut and Quebec legislation for the recognition of "customary adoption"[86] or the provisions of the Inuit treaties governing membership.[87] Two features of these systems must be highlighted. First, legislation provides for the appointment of a person or body who can certify an Indigenous legal situation or outcome, for example that a particular child was adopted. Such person or body is expected to have knowledge of the relevant Indigenous laws. Second, when providing such a certification, the person or body is not required to disclose the contents of the relevant Indigenous laws or to describe them in a manner understandable to non-Indigenous jurists. Thus, courts are relieved from the need to identify a legitimate spokesperson and understand the contents of Indigenous law, which reduces the risks of distortion and severance and preserves the community's control over its own law.

3) Scope of Application

Compared to the United States, where the scope of application of tribal law has given rise to extensive case law, there is little Canadian precedent on the issue. The usual assumption is that Indigenous law is a matter

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82 For a summary, see *Whalen*, *supra* note 9; *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 at paras 36–42.

83 *Engstrom v Peters First Nation*, 2020 FC 286 at para 15.

84 See e.g. *Harpe*, *supra* note 22 at para 82; *Louie v Canada (Indigenous Services)*, 2021 FC 650 at para 40 (under appeal).

85 Borrows, *Indigenous Constitution*, *supra* note 4.

86 *Wildlife Act*, *supra* note 63, s 8; *Education Act*, *supra* note 63, s 1(2); *Inuit Language Protection Act*, *supra* note 63, s 27.1.

87 *Coastal*, *supra* note 61.

internal to an Indigenous community and that it can only apply as between its members.[88] Recognition legislation may provide more precise answers. The difficult issue is whether an Indigenous person can opt out of Indigenous law and choose to be governed by Canadian law.[89]

Likewise, there is little clarity as to the territorial application of Indigenous laws. It is sometimes said that they should apply on a First Nation's reserve only,[90] although this provides little guidance with respect to the Inuit and Métis. However, this is a matter for debate,[91] and there is no principled reason why laws regarding personal status should apply only on reserves. For example, once a "customary adoption" is recognized, it should be effective everywhere. On the other hand, some Indigenous laws bear a strong territorial dimension. There may be a tendency to channel claims for their recognition through the doctrines regarding aboriginal rights and title.

4) Constraints

At first blush, one might think that the recognition model removes all the constraints on the contents of Indigenous laws associated with the delegation model. This is not necessarily so, as recognition will usually carry with it a requirement to comply with basic features of Canadian law and may sometimes add more specific constraints.

Thus, recognition of Indigenous law will usually be subject to the *Canadian Charter of Rights and Freedoms*, as it would be difficult for legislatures and courts to recognize a source of law that conflicts with the Constitution.[92] As in the delegation model, this is subject to sections 1 and 25 of the Charter.

When legislation mandates recognition, additional constraints are sometimes imposed. For example, the *Civil Code of Québec* recognizes Indigenous adoptions only if they are compatible with the best interests of the child. Constraints can also be less visible, such as where the government reviews the contents of Indigenous laws before making the decision to

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88 See *Corrigan Estate (Re)*, 2013 MBQB 77, [2013] 3 CNLR 235 (Man QB). But see *JBDK v TAB*, 2017 BCSC 1186; the Inuit treaties also provide for the recognition of Inuit adoption between different jurisdictions.

89 See e.g. the situation in *Beaver*, *supra* note 52.

90 Borrows, *Indigenous Constitution*, *supra* note 4 at 163–64. See also *Beaver*, *supra* note 52 at para 68; *Lewis*, *supra* note 42; *St Mary's Indian Band*, *supra* note 42.

91 Napoleon, "Indigenous Legal Orders", *supra* note 5.

92 *Dickson*, *supra* note 51 at paras 82–98; *Linklater v Thunderchild First Nation*, 2020 FC 1065. For the treatment of a similar issue in South Africa, see *Bhe v Khayelitsha Magistrate*, [2004] ZACC 17, 2005 (1) BCLR 1 (CC).

recognize them. Thus, before allowing a First Nation to "revert to custom," the government makes sure that the custom is a democratically enacted election code that meets certain criteria.[93]

British colonial law also declined to recognize Indigenous laws contrary to British sovereignty or "natural justice, equity and good conscience".[94] The extent to which such an ill-defined exception remains relevant in the modern context is debatable, especially where recognition is mandated by legislation.

3. Relationships Between Decision-Makers

The discussion so far assumes that Canadian courts will be asked to apply Indigenous law themselves. Yet, this should not foreclose the development of Indigenous decision-making bodies. Indeed, First Nations who hold "customary" elections already have election appeal bodies, and many other kinds of decisions are made by First Nation councils. Several modern treaties empower their Indigenous signatories to create their own courts, and the Mohawk community of Akwesasne has done so on its own authority.[95] It is fair to say, however, that the development of Indigenous decision-making bodies is still at an early stage.

In many cases, Indigenous decision-making bodies are comprised of persons who are familiar with Indigenous legal traditions. Thus, the issues of distortion and severance that arise when Canadian courts are called upon to consider these traditions are mitigated when an Indigenous decision-maker is given jurisdiction over such questions. It is perhaps preferable that Indigenous laws be applied by Indigenous decision-makers rather than Canadian courts. Indeed, this would be consistent with the idea that decision-making is a component of self-government.

Nevertheless, Indigenous decision-makers remain subject to judicial review by Canadian courts. Judicial review is meant to ensure the rule of law. In this regard, when he was a member of the Federal Court, Justice Marshall Rothstein once remarked that Indigenous persons are no less entitled to procedural fairness than other Canadian citizens.[96] In the same breath, however, he noted that administrative law doctrines had

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93 This is the result of internal government policies; a similar process is expressly provided by section 42 of the *First Nations Elections Act*, *supra* note 31.

94 *Eleko v Government of Nigeria*, [1931] AC 662 (PC) at 673, [1931] All ER 44; in Canada, see *Mitchell*, *supra* note 56 at paras 149–154; *Thomas*, *supra* note 59.

95 *Akwesasne Tekaia'torehthà:ke Kaianerénhsera (Akwesasne Court Law)* (12 February 2016), MCR 2015/2016-#332, online: *Mohawk Council of Akwesasne* <webdev.akwesasne.ca> [perma.cc/847D-WUK4].

96 *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142 (TD) at 161, 63 FTR 242.

to be applied in a manner sensitive to the circumstances of Indigenous communities.[97] This suggests that judicial review can be performed in a manner that preserves both the rule of law and the autonomy of Indigenous decision-makers.[98] In other words, administrative law can be applied in a way that fosters respectful relationships between decision-makers and, beyond this, between legal systems.

For example, judicial review is only available when applicants have exhausted all their administrative remedies. In the Indigenous context, this would require applicants to put their cases before Indigenous decision-makers before turning to the courts. For example, in *Edzerza v Kwanlin Dün First Nation*, the Yukon Court of Appeal declined to hear a challenge to the validity of a First Nation law, because the applicant failed to pursue the challenge before the Kwanlin Dün Judicial Council. In giving full effect to a provision of the Kwanlin Dün Constitution requiring the exhaustion of internal remedies, the Court noted the link between this requirement and self-governance:

> This literal interpretation of section 52 is consistent with the purpose and intent of the Constitution, the federal and territorial Acts and the self-government agreement among Kwanlin Dün and the two levels of government. It has been agreed and legislated that Kwanlin Dün is to be a self-governing first nation, and section 52 should not be given a narrow interpretation that restricts the ability of Kwanlin Dün to be self-governing.[99]

A similar approach may be adopted with respect to substantive judicial review.[100] It would seem natural to defer to Indigenous decision-makers explicitly tasked with applying legal sources that would be unfamiliar to Western jurists. Even when they apply written laws, such as First Nation by-laws or election codes, Indigenous decision-makers may be in a better position to discern when these written laws, "which are typically drafted with the guidance of respected knowledge keepers,"[101] reflect Indigenous legal traditions or they may simply be better aware of the political and social circumstances of Indigenous communities.

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97 *Ibid* at 168.

98 See, among others, John Borrows, "Stewardship and the First Nations Governance Act" (2003) 29:1 Queen's LJ 103; Lorne Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012) 45:2 UBC L Rev 595.

99 *Edzerza v Kwanlin Dün First Nation*, 2008 YKCA 8 at para 26. See also *Whalen*, *supra* note 9 at para 19; *Potts v Alexis Nakota Sioux Nation*, 2019 FC 1121 at paras 36–42.

100 *Porter v Boucher-Chicago*, 2021 FCA 102 at paras 27–28; *Pastion v Dene Tha' First Nation*, 2018 FC 648.

101 *Alexander*, *supra* note 10 at para 18.

This suggests that respect for Indigenous self-government, in its political, law-making and decision-making aspects, has become a factor that judges consider when assessing various discretionary aspects of judicial review.[102] This is particularly apparent with respect to remedial discretion, for example in a decision of the British Columbia Court of Appeal that noted that the relief sought "would involve the court in interfering in internal political disagreement within the Gitxsan nation, contrary to … the principle of self-government."[103]

Courts have also begun to develop principles to help delineating the jurisdiction of Indigenous decision-makers. Thus, the Kwanlin Dün Judicial Council was held to have jurisdiction to apply territorial laws where this is incidental to the exercise of its enumerated jurisdictions.[104] When they have broad jurisdiction like this, Indigenous decision-makers may be considered more as courts than as administrative decision-makers, and the doctrines that govern relationships between courts—such as issue estoppel—could be used instead of the principles of administrative law.[105]

Conclusion

I have highlighted two manners of establishing an interface between Indigenous law and Canadian law. The delegation paradigm affords Indigenous peoples the power to enact certain laws within the Canadian legal system. While this affords a certain degree of self-government, it imposes significant constraints on the expression of Indigenous legal traditions. The recognition paradigm, which considers Indigenous and Canadian law as interacting on more equal terms, holds greater promise, but poses difficult challenges in terms of the understanding of Indigenous legal traditions by non-Indigenous institutions.

One way of resolving this challenge is to implement a structured interface in which an Indigenous decision-maker knowledgeable about Indigenous law is tasked with applying it to specific situations and communicating the outcome to the Canadian legal system. This shifts the focus from relationships between legal systems to relationships between decision-makers. Courts are currently adapting the principles

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[102] Or perhaps an "administrative law value:" Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford: Oxford University Press, 2021) (especially chapters 5 and 6).

[103] *Spookw*, *supra* note 60 at para 47. See also *Gadwa v Joly*, 2018 FC 568 at paras 71–72.

[104] *Kwanlin Dün First Nation v Kwanlin Dün First Nation Judicial Council*, 2016 YKSC 35.

[105] See e.g. *Lafferty v Tlicho Government*, 2009 NWTSC 35.

of administrative law in order to ensure the respectful character of this relationship.

Whatever path is chosen, it is hoped that greater conceptual clarity and awareness of the issues raised by the recognition of Indigenous law will help judges and lawyers in their attempts to reconcile the Canadian and Indigenous legal systems.