

**THE FEASIBILITY OF INDIGENOUS DECOLONIALITY THROUGH LAW SCHOOL
EDUCATION**

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Incorporating Indigenous legal education within law school curriculums allows for the next generation of legal scholars to account for, and promote, Indigenous thought within Canada's Judicial system. Keeping in mind that civil and common law traditions have overwhelmingly dominated legal education, the Canadian Bar Association and the Truth and Reconciliation Commission have made clear recommendations aimed to "indigenize the academy".¹ However, given that faculty members and administrators on university campuses across Canada have run their programs through the standard "Western" way for centuries, can law schools adapt? This essay seeks to determine the feasibility with which law schools can aid in the process of decoloniality through teaching Indigenous legal traditions (ILT) within their curriculums.

Colonization Impacts on Indigenous Communities

In the mid to late nineteenth century, English and French settlers consolidated their colonial dominion over vast First Nations' territories to form a Canadian federal state. In the process, they created Indian Status and Indian Land as judicial categories that irrevocably would allow them to dominate, define and regulate the lives of First Nations people.² The first Prime Minister of Canada and founder of the 1876 Indian Act, Sir John A. Macdonald described his aim of the Indian Act as "to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change".³ This irrevocably led to the creation of systems, institutions, and forms of order that purposefully

¹ John Borrows. 2005, 'Indigenous Legal Traditions in Canada' *Washington University Journal of Law and Policy* 19:1, 167.

² Brenna Bhandar. 2016, 'Status as Property: Identity, Land and the Dispossession of First Nations Women in Canada' *darkmatter Journal*, 14

³ From Erin Hanson. 2009, *The Indian Act*. Retrieved from Indigenous Foundations: https://indigenousfoundations.arts.ubc.ca/the_indian_act/

ignored, and continue to ignore, Indigenous thought. Therefore, Indigenous law, like other aspects of Indigenous peoples' lives, has been silenced by colonization.

With this in mind, it is important to recognize the need for change. The most graphic and disturbing impact of colonization is its effect on the livelihood of Indigenous people in present day society. Indigenous people are disproportionately over-represented in the Canadian criminal justice system both as victims/survivors and accused/convicted persons.⁴ Further Indigenous people are constantly involved within legal processes due to higher rates of mental health and cognitive impairment, physical and sexual abuse, alcohol and drug abuse, interpersonal violence and family breakdowns. This reality has urged the justice system to create new relationships with Indigenous communities and challenge any underlying colonial assumptions or relations. In order to conceptualize changes in how Indigenous laws are practiced, we must first look into how it can be taught.

Understanding Indigenous Law

Canadian Indigenous people speak over fifty different Aboriginal languages that vary among different groups and regions, resulting in a wide variety of laws among Indigenous communities.¹ This diversity has led scholars to examine what constitutes “law” and whether Indigenous peoples in Canada practiced law prior to the arrival of European settlers and governance structures. For legal positivists, centralized authority and explicit command are necessary for a functional legal system. However, this characterization in Indigenous societies can be harmful because it makes indigenous principles and traditions appear overly subjective and “non-legal” due to its “broad social role”.¹

⁴ Department of Justice. 2019, ‘Understanding the Overrepresentation of Indigenous People in the Criminal Justice System.’ *Government of Canada*, Department of Justice, Retrieved from: www.justice.gc.ca/socjs-esjp/en/ind-aut/uo-cs.

Written Law

Indigenous people engaged in treaties, inter-marriages, re-settlements, war and extended periods of peace prior to the Europeans entering the territories now known as Canada.¹ Since then, over 500 treaties have been entered into, many drawn from Indigenous legal traditions.⁵ Since the 1982 Constitution Act, these treaties hold the highest possible status in Canada's legal order. In addition to treaties, prior to the consolidation of the Dominion of Canada, Indigenous legal traditions and laws had also been incredibly prominent. Literature has indicated that fur trade transactions, the giving of gifts, the standards of trade and the extension of credit were conducted under the wreath of Indigenous legal thought. Marriages between European men and Indigenous women were also often conducted according to Indigenous legal traditions.⁶

Spiritual and Social Law

Memory devices are widely exercised within Indigenous legal traditions to ensure important ideas are preserved.⁷ Devices include wampum belts, masks, totem poles, medicine bundles, culturally modified trees, birch bark scrolls, button blankets, etc. Indigenous traditions pertaining to language, political structures, kinship, economic systems, and clans are recorded orally. These records are held by memorized speech, epics, tales, proverbs, sayings, and personal reminiscences. Indigenous legal traditions are also carried through the knowledge of elders or sanctioned wisdom keepers who identify and communicate law. Sacred ceremonies are another form of legal tradition wherein participants can celebrate, renew, transfer or abandon legal relationships.⁷

⁵ Justice Douglas Lambert. 2006, 'The Future of Indigenous Laws in the Canadian Legal System', in "Honouring a Brave Jurist: The Lambert Tribute," *The Advocate* 64: 216.

⁶ Katherine T. Bartlett. 1995, 'Tradition, Change and the Idea of Progress in Feminist Legal Thought' *Wisconsin Law Review* 303 at 331.

⁷ Keith Carlson. 2010, *The power of place, the problem of time: Aboriginal identity and historical consciousness in the cauldron of colonialism*. Toronto: University of Toronto Press.

All of the above-noted traditions pave the way for the possibility of a less centralized proclamation and enforcement of law, as compared to civil or common law traditions. However, Indigenous legal traditions require the same form of the translation process that civil and common law legislations have had in the Canadian legal system. Just as judges and lawyers interpret cases through common and civil law principles, in order for the legal system to be able to address Indigenous populations, practitioners must also learn to interpret cases through Indigenous legal principles. They need to learn how to derive meaning and decode principles from sacred Indigenous legal literature. The following pages will suggest various ways in which Indigenous legal thought can be decoded and taught within law schools.

Teaching ILT to Law Students

There are multiple benefits derived from teaching law students about Indigenous legal traditions. At a baseline, it will help Indigenous communities exert their section 35 treaty rights under the Constitution Act, 1982, which outlines that: “The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed”.⁸ This right has been largely ignored or misapplied. Both the Truth and Reconciliation Commission 2015, as well as the Canadian Bar Association,⁹ recognize that in many instances, judges have failed to accommodate Indigenous law within their courtrooms.¹⁰ Through integrating ILT into mainstream legal education, the next generation of lawyers and judges will be equipped to apply

⁸ Canadian Charter of Rights and Freedoms, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

⁹ Michael Coyle. 2017, ‘Indigenous Legal Orders in Canada - a literature review’ *Law Publications* 92. Retrieved from: <https://ir.lib.uwo.ca/lawpub/92>

¹⁰ Karen Drake. 2017, ‘Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom’ *Canadian Bar Review* 95:1, 9-46.

and interpret Indigenous law to Indigenous legal issues. The following three teaching models represent what is currently being suggested in the existing literature.

Place-Based Learning

Place-based learning, which is heavily endorsed by the Truth and Reconciliation Commission, allows for the voices of local Indigenous communities to be heard.¹⁰ A place-based approach to learning requires that members of the Indigenous community whose laws are being studied in class be directly involved in shaping and teaching of course material. This mode of learning limits the risk of perpetuating a colonial approach where Indigenous peoples are treated as subjects as opposed to agents and knowledge-holders. Further, students are able to develop relationships with Indigenous community members. This allows for the dismantling of stereotypes and allows students to ask key questions that can help foster their learning.¹⁰ Both the University of Victoria Law School and Lakehead University Faculty of Law have recognized the value of place-based learning and incorporated it into its curriculums.¹¹

Epistemologies

Scholars have suggested that the standard Western conception of truth, “is that that truth is objective and absolute... by repeatedly refining our theories, we will draw closer to the truth”.¹⁰ However, Indigenous conceptions of truth are that truth is not absolute; truth can be circumstantial depending on the speaker's experience, knowledge, perception, and command.¹²

¹¹ Waaseyaa'sin Christine Sy. 2018, 'Relationship with Land in Anishinaabeg Womxn's Historical Research.' In *Reshaping Women's History: Voices of Nontraditional Historians*, Julie Gallagher and Barbara Winslow (eds.). Chicago: University of Illinois Press, 222-236. See also Donald Nicolson. 1994, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse.' *The Modern Law Review* 57: 5, 726-44; Jesús Vega. 2018, 'Legal philosophy as practical philosophy' *Revus* [Online] 34. Retrieved from : <http://journals.openedition.org/revus/3859> ; DOI : 10.4000/revus.3859

¹² Jarrad, Reddekop. 2014, 'Thinking Across Worlds: Indigenous Thought, Relational Ontology, and the Politics of Nature; Or, If Only Nietzsche Could Meet A Yachaj' Electronic Thesis and Dissertation Repository. 2082. Retrieved from: <https://ir.lib.uwo.ca/etd/2082>

Nevertheless, Indigenous laws have underlying rationales, ontologies, epistemologies, ethics, and logic. Therefore, Indigenous laws taught within law school curriculums challenge the idea that law can be regarded as a mere list of rules or principles. Unlike common or civil law, Indigenous legal thought cannot be subjected to groups such as “tort law” or “criminal law”. John Borrows suggests that it is important to use categories inherited to the Indigenous tradition in question. Therefore, for Anishinaabe law, Borrows suggests that “subjects” can be organized as Heroes, Tricksters, Monsters, and Caretakers.¹³ This way, subject areas will be able to capture the epistemologies, ethics, and logic that underlie all aspects of Indigenous legal thought that may not be taught in a stand-alone ILT course.

Class Structures

Learning through active personal engagement is a common theme in Indigenous traditions.¹⁰ Therefore, to truly understand Indigenous legal traditions, scholars suggest that it must be done in a way that supports Indigenous epistemologies. Karen Drake, a former professor at the Bora Laskin Faculty of Law at Lakehead University, suggests that “talking circles” are a great way to learn collectively and through active engagement. In her talking circles, she divides the class into two groups of 15, wherein one group discusses several Indigenous stories while the other group act as witnesses to the circle. Then the groups switch roles. These stories rarely contain positivistic forms of legal principles. Rather, the listeners are tasked with discovering the principles and generating meaning from them.¹⁰ This not only allows for teaching to be done in a way that supports Indigenous ways of knowing. Comprehending Indigenous stories and

¹³ John Borrows (Kegeedonce). 2010, *Drawing Out Law: A Spirit's Guide*. Toronto; Buffalo; London: University of Toronto Press.

storytelling teaches future legal practitioners to solve legal problems through practical experiences and the normative principles contained in stories passed on through generations.

Relationship between legal traditions

The system of analyzing and decoding Indigenous legal thought is not too different from common or civil law traditions.¹⁴ As noted by Napoleon and Friedland, the tool of legal analysis first developed by Christopher Langdell, Dean of Harvard Law School in 1870, is still prominently the central methodology in legal scholarship and education.¹⁴

It has been noted that legal cases in Western law are formed as stories.¹⁴ Legal professionals are aware of the “practical nuts and bolts of ‘how arguments are fashioned and deployed within legal practice’”.¹⁴ With this information, they can summarize and interpret cases. This form of legal analysis also encompasses legal synthesis. Legal synthesis “fuses disparate elements of cases and statutes together into coherent or useful legal standards or general rules”.¹⁴ Synthesis further helps to criticize, explain, correct and direct legal doctrine.

This same form of legal analysis and synthesis that law students are already being taught can be taught in an ILT course. As noted above, while epistemologies, teachers, and class structures may be a little different from existing lecture-based courses, the tools that a student needs to be able to “decode” legal principles are similar to what is being taught already. Thus, incorporating ILT within curriculums is feasible for both professors to teach, and students to learn.

¹⁴ Val Napoleon, et al. 2016, ‘An Inside Job: Engaging with Indigenous Legal Traditions through Stories’ *McGill Law Journal* 61:4, 725–754.

Current Law School Initiatives

Consistent with the Truth and Reconciliation Report's recommendation #28, most Canadian law schools now teach students about Indigenous law. Many schools have initiated programs and specializations to ensure meaningful and effective engagement with Indigenous Legal Traditions.

The Bora Laskin Faculty of Law at Lakehead University requires all students to take two courses, both in class and on the field, in Indigenous Law.¹⁵ Classes include teachings about treaties, Aboriginal-Crown relations, and skilled-based training in talking circles as a form of conflict resolution. The training requires students to engage in 36 hours of activities to introduce students to Indigenous culture, traditions, and perspectives.¹⁶

The Peter A. Allard School of Law at UBC has a mandatory first-year course on Aboriginal and treaty rights. Additionally, they have an Indigenous Community Legal Clinic, a cultural competency certificate program and an Indigenous orientation camp. Their faculty includes several tenured Indigenous professors. They also incorporate Indigenous legal professionals to teach as Adjunct professors.¹⁷

The University of Ottawa Faculty of Law actively includes Indigenous legal traditions into common law courses.¹⁸ They also offer students an Indigenous Law Tradition specialization upon completion of their JD.¹⁹

¹⁵ Council of Canadian Law Deans. 2018, "Council of Canadian Law Deans TRC Report" *Council of Canadian Law Deans* Retrieved from: <https://cclld-cdfdc.ca/wp-content/uploads/2018/07/CCLD-TRC-REPORT-V2.pdf>

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Kerry Sloan. 2013, *A Global Survey of Indigenous Legal Education and Research* (prepared for UVIC Indigenous Law Unit and the Truth and Reconciliation Commission), Retrieved from Indigenous Bar Association: http://indigenousbar.ca/indigenoulaw/wpcontent/uploads/2012/12/kls_world_indigenous_legal_education_comple te.pdf

¹⁹ Council of Law Deans, 2018.

The University of Toronto Faculty of Law publishes the *Indigenous Law Journal*, Canada's first and only (student-run) legal journal regarding Indigenous legal issues in Canada and Internationally.²⁰ The University of Toronto Faculty of Law have made efforts to include Indigenous content throughout courses, adding particular courses that focus on Indigenous issues. In one of their courses, students learned about Anishinaabe legal traditions by on-site reference to treaties, and stories about how to interact with the water, rocks, plants, and animals.¹⁸

In addition to the above-noted schools, there have been efforts made from every law school in Canada to incorporate Indigenous Legal Traditions and the Truth and Reconciliation Committee's recommendation into their curriculums. The integration of relevant material across law school curriculums and increased exposure to Indigenous culture and practices through blanket exercises, interactions with Indigenous elders, camps and other similar events give students, faculty and staff opportunities to spend time in and to learn from Indigenous communities.¹⁰ This has further increased the Indigenous legal knowledge of students while uplifting and supporting nearby Indigenous communities. These schools continue to publish scholarship relating to Indigenous legal thought, while establishing specialized committees and councils to further enhance curriculums.

Recognizing that the incorporation of Indigenous legal tradition is beneficial to all students, courses and legal sectors, schools are promoting the fact that it is inaccurate to speak of a single "Indigenous perspective" on the law.¹⁰ While standalone courses and specializations are beneficial, it is important to recognize and treat Indigenous legal traditions the same way as common and civil law traditions are taught. As stated by Karen Drake, "students who have no

²⁰ Home Page, Indigenous Law Journal (ILJ). University of Toronto. Retrieved from: <https://ilj.law.utoronto.ca/>

interest whatsoever in Indigenous issues and have no intention of practicing in the area of Indigenous legal issues may one day become judges. And as judges, they may be required to discern and apply Indigenous laws”.¹⁰ Therefore, academia is starting to recognize the importance of enhancing all students’ knowledge of Indigenous legal traditions.

Shortcomings of teaching ILT in Law School

Before exploring the extent to which law school education can aid in the process of decoloniality, it is important to acknowledge that while teaching Indigenous legal thought has benefits, there is room for improvement.

As noted by Anishinaabe elder, Harry Bone, “If someday you cannot speak the Anishinaabe language, then you will lose your Anishinaabe way of thinking”.¹⁰ Within Indigenous thought, it is widely believed that language is a sacred gift from the creator that helps people understand laws, views of the world, and history.²¹ Therefore, if law students are not learning the language to which Indigenous laws are applied, they may not fully be able to understand and interpret Indigenous legal traditions. However, this shortcoming provides opportunities. Through hiring Indigenous professionals in law school faculties, incorporating Indigenous community members into lesson plans, and both admitting and providing resources to Indigenous law students, barriers to understanding Indigenous epistemology may not be as prominent.

Another challenge arising from teaching Indigenous legal traditions within law school curriculums is that non-Indigenous courses often control parameters of how things are taught and learned.²² As noted by professors McLaughlin and Whatman, classic law school courses (i.e.

²¹ Kathy Whitson. 1993, Review of *All My Relations: An Anthology of Contemporary Canadian Native Fiction* ed. by Thomas King. *Western American Literature* 28: 3, 263-263.

²² Juliana M. McLaughlin, and Sue L. Whatman. 2007, ‘Embedding indigenous perspectives in university teaching and learning: lessons learnt and possibilities of reforming / decolonising curriculum.’ In *Proceedings 4th*

criminal law, constitutional law, tort law) cannot “‘see’ Indigenous knowledge outside the colonizer interface... [they] accept that Indigenous knowledge is ‘out there’, but have no idea how it articulates with Western knowledge systems”.²² As such, it is difficult for law faculties to change their existing practices to welcome new systems of teaching knowledge and understanding how to recognize and reward such knowledge.²² As noted above, while stand-alone courses and certifications in Indigenous law are a step in the right direction, universities must also continue to take steps to decolonize legal education as a whole. Through normalizing and expanding the ILT concept, students can hold Indigenous legal traditions to the same level of importance as other forms of Western legal education. Therefore, once law students need to apply legal concepts to real-life cases, they will not question the admissibility or use of Indigenous Legal Traditions.

Feasibility of Decoloniality through Law school Education?

Law schools can help the process of decolonization because in Canada, “legal education has been in large part... an imperial project of the legal profession”.²³ Through the production of legal actors, law schools serve as a site of colonization as the law has been, and continues to be, a “vehicle to oppress Indigenous people”.²⁴ Jeffery Hewitt, Assistant Professor at the University of Windsor Law School, describes the result of colonization as Indigenous people being reduced to non-human, legal, status. This led lands and resources to be taken away from such “non-humans” by the settler population “who control the education and legal systems, thereby establishing a

International Conference on Indigenous Education: Asia/ Pacific. Vancouver, Canada. Retrieved from: <https://eprints.qut.edu.au/10350/1/10350.pdf>

²³ Jeffery Hewitt. 2016, ‘Decolonizing and Indigenizing: some considerations for law schools.’ *Windsor Yearbook of Access to Justice*, 33:1, 65–84.

²⁴ *Ibid.*

master narrative”.²⁵ For this reason, legal and political systems have had, and continue to have, a large part to play in the colonization processes supporting the superiority of the Crown and assumption of sovereignty over Indigenous peoples.

Statistics reveal that, along with entering private practice and serving as in-house counsel, a large percentage of law school graduates become politicians, public servants, financial analysts, CEO’s of real estate development corporations, and so on.²⁶ A former Dean of Osgoode Hall Law School, Harry Arthurs, explains the work legal scholars do as lobbyist work, “employed to design, implement, influence, or frustrate public policy”.²⁷ Therefore, if law students begin to recognize, learn and respect Indigenous legal traditions through law school curriculums, they will have the opportunity to extend that knowledge into their professional practices.

At a minimum, the very act of law schools including Indigenous legal traditions as valid law is initiating an important step towards a system of wide recognition. While we have not yet achieved full decolonization, education plays a vital step in this movement.

²⁵ Ibid.

²⁶ Roderick A. Macdonald and Thomas B. McMorrow. 2014, ‘Decolonizing Law School’ *Alberta Law Review*, 51:4.

²⁷ Harry W. Arthurs. 2013, ‘The Future of Legal Education: Three Visions and a Prediction’ *Comparative Research in Law & Political Economy. Research Paper No. 49/2013*. Retrieved from: <https://digitalcommons.osgoode.yorku.ca/clpe/291>

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