
Centre for International
Governance Innovation

UNDRIP Implementation

Braiding International, Domestic and Indigenous Laws

SPECIAL REPORT

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Beyond Van der Peet

Bringing Together International, Indigenous and Constitutional Law



Brenda L. Gunn

Before Europeans arrived in North America, Indigenous peoples had thriving governments and legal systems. After many years of advocacy by a number of groups, the United Nations finally recognized that “Indigenous peoples are equal to all other peoples,” while Indigenous peoples have the right to be respected for their difference as Indigenous peoples.¹ Indigenous peoples “contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.”² Unfortunately, Indigenous peoples have been negatively impacted by colonization,³ including the imposition of a foreign legal system that was used to undermine Indigenous peoples’ own legal traditions.

Indigenous peoples have long fought against the negative impacts of colonization at both the domestic and international level, seeking to protect their fundamental human rights, according to their own legal traditions. Despite protecting Indigenous peoples’ rights in the Constitution Act, 1982, section 35(1) failed to address the harms of colonialism, including recognizing the role of Indigenous laws when determining Indigenous peoples’ rights.⁴ There is much criticism on the scope of section 35(1). This essay contributes to that body of literature by arguing that implementing UNDRIP provides an opportunity to move beyond the limited interpretations of section 35(1) to better recognize Indigenous

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007), Preamble [UNDRIP].

2 *Ibid.*

3 *Ibid.*

4 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

peoples' rights according to their own legal traditions. In this way, the essay argues that bringing together international human rights law, constitutional law and Indigenous law strengthens the protection of Indigenous peoples' rights. This process of using UNDRIP to make room for Indigenous peoples' laws within the broader Canadian legal landscape is critical for moving away from the colonial relationship toward a nation-to-nation relationship. In particular, it is important that section 35(1) be interpreted in line with UNDRIP, because UNDRIP grounds Indigenous peoples' rights in their own legal traditions.

Failings of Section 35

When the process to patriate the Canadian Constitution began, Indigenous peoples believed that the recognition and affirmation of Aboriginal and treaty rights would reset the relationship between Indigenous peoples and the Crown — moving beyond the colonial imposition of a new legal order back to a nation-to-nation relationship in which there is space for both Indigenous and Canadian laws to operate.⁵ This section briefly discusses how the Supreme Court of Canada's (SCC's) interpretation of section 35(1) has failed to provide adequate scope to Indigenous peoples' rights, especially by failing to understand Indigenous peoples' rights according to their own legal traditions.

When the first case to consider the scope of section 35(1) came before the courts, it was an opportunity for the courts to define Aboriginal rights according to Indigenous peoples' own legal traditions and to provide protection against unchecked government power.⁶ The SCC recognized that section 35(1) “represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights.... It also affords aboriginal peoples constitutional protection against provincial legislative power.”⁷ This led Chief Justice Brian Dickson to conclude that section 35(1) requires the federal power under section 91(24) of the Constitution Act, 1867⁸ to be reconciled with the federal fiduciary duty,⁹ which should have restrained the government's power to limit Indigenous peoples' constitutionally recognized rights. However, for the court, it simply meant that the government would need to justify interferences with Aboriginal rights.¹⁰ With this starting point, section 35(1) has not changed the colonial relationship between Indigenous people and the Crown — Canadian law still overruns Indigenous peoples' rights.

Judicial interpretations of section 35(1) have continued to limit the ability of section 35(1) to make space for Indigenous peoples' rights as understood in their own legal traditions. In *Van der Peet*, Chief Justice Antonio Lamer reiterated the *Sparrow* interpretive principles, including taking a purposive approach, upholding the fiduciary relationship, providing a generous and liberal interpretation, and resolving ambiguities in favour of Aboriginal claimants.¹¹ Yet, Chief Justice Lamer failed to use the principles to guide his analysis. Now, section 35(1) only protects an activity if it is an “element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”¹² Chief Justice Lamer's approach emphasizes the Aboriginal in Aboriginal peoples' rights, based on stereotypical ideas of Indigeneity.¹³ This approach undermines the recognition of Indigenous peoples as peoples who are equal to other peoples of the world. It further legitimizes the power of Canadian law over Indigenous laws.

5 James (Sa'ke'j) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights* (Saskatoon, SK: Native Law Centre, 2006) at 34.

6 *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

7 *Ibid.*

8 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

9 *Sparrow*, *supra* note 6.

10 *Ibid.*

11 *R v Van der Peet*, [1996] 2 SCR 507 at paras 22–25 [*Van der Peet*].

12 *Ibid* at para 46.

13 John Borrows, “The Trickster: Integral to a Distinctive Culture” (2005) 8:2 *Const Forum* 27 at 28–29.

In setting out the scope of section 35(1) rights, Chief Justice Lamer highlighted a new purpose of section 35(1): “what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.... [T]he aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”¹⁴

According to Chief Justice Lamer, section 35(1) does not ensure space for Indigenous peoples’ laws when defining Aboriginal rights. The purpose is to reconcile the Crown’s assertion of sovereignty (and the right to impose a new legal order) with pre-existence of Aboriginal societies.¹⁵ Chief Justice Lamer cites the US case *Johnson v M’Intosh*¹⁶ to support his understanding of the purpose of section 35 rights: “aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations.”¹⁷ Chief Justice Lamer omits to mention that Chief Justice Marshall justified his decision on the basis that Indian tribes “were fierce savages whose occupation was war.”¹⁸ Reliance on the Marshall trilogy principles without acknowledging the basis of those principles allows Chief Justice Lamer to “adopt language and propose concepts that appear enlightened on their face but that actually are limited to formalizing the process of colonization.”¹⁹ As long as Chief Justice Lamer’s approach to defining Aboriginal rights prevails, section 35(1) will fail to address the negative impacts of colonization on Indigenous peoples, including the imposition of a new legal system.

In *Van der Peet*, Chief Justice Lamer noted that the test for Aboriginal rights, which required protected activities to be traced back to the point of colonial contact, would not work for Metis people, one of the three constitutionally protected Aboriginal peoples.²⁰ This recognition that the test could not universally apply to all Aboriginal people, despite one common constitutional provision protecting rights of all Aboriginal people, is yet another indication of the flawed nature of Chief Justice Lamer’s approach. When it came time to consider the scope of Metis peoples’ rights, the court in *R v Powley* created a legal definition of Metis and modified the *Van der Peet* test to accommodate the post-contact ethnogenesis of the Metis peoples.²¹

R v Powley is yet another example in which the court placed itself in the position of defining Aboriginal people (Metis people specifically this time) and perpetuating the colonial relationship between Indigenous peoples and the state. Metis peoples’ rights are also entrenched in backward-looking ideas of indigeneity, with Metis people having to trace their rights and identity back to a period post-contact but pre-Canadian control.²² This again undermines the recognition of Metis people’s right to self-define according to their own legal traditions and prioritizes the Canadian legal system. While there has been limited recognition of Indigenous legal traditions within section 35(1) jurisprudence, the court has failed to fully accept these legal traditions as the foundations for Indigenous peoples’ rights protected under section 35(1).

14 *Van der Peet*, *supra* note 11 at para 31.

15 *Ibid* at para 57.

16 *Johnson v M’Intosh*, 21 US (8 Wheat) 543 (1823) [*Johnson*].

17 *Van der Peet*, *supra* note 11 at para 36.

18 *Johnson*, *supra* note 16.

19 D’arcy Vermette, “Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal People” (2011) 29:1 *Windsor YB Access Just* 54 at 56.

20 *Van der Peet*, *supra* note 11 at paras 66–67.

21 *R v Powley*, 2003 SCC 43 at para 36, [2003] 2 SCR 207.

22 *Ibid* at para 37.

Recently, Canada has expressed its full commitment to UNDRIP: “We intend nothing less than to adopt and implement the Declaration in accordance with the Canadian Constitution.... By adopting and implementing the Declaration, we are breathing life into section 35 and recognizing it as a full box of rights for Indigenous peoples. Canada believes that our constitutional obligations serve to fulfill all the principles of the Declaration, including ‘free, prior and informed consent.’”²³

To fully implement UNDRIP, the test to prove Aboriginal rights and the ability to justify infringements of those rights must be reconsidered. Implementing UNDRIP provides a framework for addressing the disconnect between Canadian law and Indigenous law, moving away from the current colonial relationship toward a nation-to-nation relationship, because UNDRIP recognizes that Indigenous peoples’ rights are based in Indigenous peoples’ own legal traditions.

UNDRIP

Canada’s commitment to implement UNDRIP presents another moment to reconsider the relationship between the Crown and Indigenous peoples, including how Indigenous peoples’ rights are defined and protected. At the international level, UNDRIP is necessary in part due to the failure of the general, existing human rights regimes to afford appropriate protection for Indigenous peoples’ rights. As will be discussed in this section, domestically, UNDRIP is necessary to move beyond the interpretations of section 35 that perpetuate definitions of Indigenous peoples’ rights based on a colonial understanding of those rights because UNDRIP grounds Indigenous peoples’ rights in Indigenous legal traditions.

Some may attempt to limit the impact of UNDRIP by emphasizing the non-binding nature of declarations. While a declaration does not create directly enforceable, binding legal obligations on a state in and of itself, “soft law cannot be simply dismissed as non-law.”²⁴ According to the United Nations, “a ‘declaration’ is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.”²⁵ There is a strong expectation and obligation for states to implement the rights set out in UNDRIP, which is, in part, demonstrated by the near consensus on the instrument.²⁶ Further, states and the United Nations recommitted to implementing UNDRIP at the World Conference on Indigenous Peoples in 2014, including through reaffirming their commitment “to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”²⁷ Much of the debate around the technical status of the international instrument has been a political manoeuvre to undermine its domestic application; hopefully, we can move beyond these debates, now that Canada has expressed its unconditional support, and begin the process of implementing UNDRIP in Canada.

The UNDRIP preamble tells a powerful story of the potential of UNDRIP to address the disconnect between Canadian law and Indigenous peoples’ law on defining Indigenous peoples’ rights. UNDRIP

23 Minister of Indigenous and Northern Affairs Carolyn Bennett, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples” (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: Northern Public Affairs <www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/>.

24 Mauro Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58 ICLQ 957 at 959.

25 UN Economic and Social Council, *Commission on Human Rights: Report to the Economic and Social Council on the eighteenth session of the Commission, held at United Nations Headquarters from 19 March to 14 April 1962 inclusive*, UNESCOR, 34th Sess, UN Doc E/CN.4/832 (26 April 1962) at para 105.

26 Siegfried Wiessner claims we have now “arrived at a global consensus on UNDRIP.” Siegfried Wiessner, “Re-Enchanting the World: Indigenous Peoples’ Rights as Essential Parts of a Holistic Human Rights Regime” (2010) 15:1 UCLA J Intl L & Foreign Aff 239 at 253.

27 UN General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, GA Res 69/2, UNGAOR, 69th Sess, UN Doc A/RES/69/2 (2014) at para 3 [Outcome document].

recognizes the essential humanity of Indigenous peoples: “Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.”²⁸ UNDRIP proclaims that Indigenous peoples can no longer be denied fundamental human rights based on imperialist/racist ideas that Indigenous peoples are “fierce savages whose occupation was war”²⁹ and resultant doctrines such as discovery and *terra nullius*.³⁰ The United Nations also recognized that Indigenous peoples have a right to be recognized as Indigenous and that special protections may be necessary to ensure their inherent rights are realized.³¹ UNDRIP recognizes that colonization occurred and had a negative impact on Indigenous peoples, in particular the dispossession from their lands, territories and resources.³² It further recognizes that colonization has led to the ongoing denial of basic human rights.

The path forward requires resetting the relationship between Indigenous peoples and Canada through recognizing and protecting Indigenous peoples’ rights, according to their own legal traditions. The United Nations is “convinced that the recognition of the rights of indigenous peoples in this declaration will enhance harmonious and cooperative relations between the state and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.”³³ A fundamental principle of UNDRIP is the need to move from a colonial relationship in which Canada has control over all aspects of Indigenous peoples’ lives toward self-determination of Indigenous peoples.³⁴ This is an important point because many people in Canada believe that recognizing special rights for Indigenous peoples will tear Canada apart. UNDRIP explains that the denial of Indigenous peoples’ rights, and the assertion of colonial law and doctrines, is a cause of the current divisions between Indigenous peoples and the rest of Canadians.³⁵

Finally, the United Nations “solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect.”³⁶ This is an important reminder that achieving the ends of UNDRIP requires Indigenous peoples and Canada to work together. The Canadian federal and provincial governments cannot unilaterally implement UNDRIP. In fact, unilateral action would perpetuate the problems within the current system. Rather, implementation of UNDRIP requires Indigenous peoples and Canadian governments to work together “in a spirit of partnership and mutual respect.”³⁷

A critical distinction between rights protected under section 35(1) rights and UNDRIP is that the rights recognized in UNDRIP are defined according to Indigenous peoples’ own laws, as a fundamental aspect of self-determination of peoples. This is the major difference from the section 35(1) articulation of Indigenous rights that legitimates defining these rights through Canadian common law, as described above. Many of the rights articulated in UNDRIP refer to Indigenous laws and institutions, including

28 UNDRIP, *supra* note 1, Preamble [emphasis in original].

29 Johnson, *supra* note 16.

30 UNDRIP, *supra* note 1, Preamble.

31 *Ibid*, arts 1, 2.

32 *Ibid*, Preamble.

33 *Ibid*, Preamble [emphasis in original].

34 *Ibid*, art 3.

35 *Ibid*, Preamble.

36 *Ibid*, Preamble [emphasis in original].

37 *Ibid*.

identification of and redress for violations of cultural rights,³⁸ land rights,³⁹ membership⁴⁰ and the many references to consultation and participation in decision making. Remedies for past violations are to be identified in relation to Indigenous peoples' laws⁴¹ and consultation should be carried out in accordance with Indigenous peoples' own laws.

Indigenous legal institutions are also protected under UNDRIP,⁴² including as appropriate venues for the expression or exercise of rights. Article 5 explicitly recognizes that "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." The flip side of the recognized role of Indigenous legal institutions is the need for Canadian legal institutions to exercise restraint when dealing with Indigenous peoples' rights. This is one of the greatest failures of the SCC when addressing rights under section 35(1). Rather than using Canadian law to define Indigenous rights, Canadian law should simply refer to Indigenous laws and institutions to articulate and protect the rights as indicated in UNDRIP.

Implementation is key to giving effect to UNDRIP and moving past the current colonial relationship. To implement UNDRIP, Canadian constitutional law must shift in its approach to defining Indigenous peoples' rights toward ensuring that the rights are defined according to Indigenous peoples' legal traditions. Ensuring that the rights protected under section 35(1) align with UNDRIP will mean that Indigenous peoples' rights will continue to be recognized in the highest law of the land.

States have reiterated their support for implementing UNDRIP or to "achieve the ends of the Declaration"⁴³ in the outcome document of the World Conference on Indigenous Peoples in September 2015. While Canada could be viewed as having broken international consensus when it registered its concerns with the outcome document at the World Conference, Canada has now expressed its unqualified support for UNDRIP. The question remains: how will Canada work toward implementing UNDRIP in Canada?

Moving Forward

Moving forward, beyond a colonial relationship toward a nation-to-nation relationship, requires working together to achieve the ends of UNDRIP. One of the best ways to achieve this in Canada is to reinterpret the scope of section 35(1)'s protection of Aboriginal and treaty rights to align with the

38 *Ibid*, art 11 states:

11(1) Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

11(2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

39 *Ibid*, art 26(3) states: "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." *Ibid*, art 27 states: "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."

40 *Ibid*, art 33(1) states: "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live." *Ibid*, art 33(2) states: "Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures."

41 *Ibid*, art 40 states: "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."

42 *Ibid*, Preamble.

43 *Outcome document*, *supra* note 27 at para 7.

standards set out in UNDRIP. This will require moving past the limited interpretation set out by the SCC in *Van der Peet* and ensuring the rights are defined according to Indigenous peoples' own legal traditions, as provided in UNDRIP.

This idea of revisiting an issue already decided is one that the SCC has recently confronted in the areas of assisted suicide and prostitution. When the SCC was faced with the constitutionality of the Criminal Code's prostitution provisions, the SCC held that an issue can be revisited when "new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."⁴⁴ In *Carter*, the court recognized that it had already upheld a complete prohibition against physician-assisted suicide in *Rodriguez*.⁴⁵ After reviewing ongoing debate domestically and internationally, as well as several attempts to introduce legislation, the court concluded that these ongoing debates meant the issue was a live issue and ripe for reconsideration.⁴⁶ Based on these criteria, UNDRIP presents such a fundamental shift in the paradigm for recognizing Indigenous peoples' rights that it warrants moving past the *Van der Peet* approach and finding a new, more appropriate way to articulate the scope of section 35(1).

Moving past the "central and integral to the distinctive culture" test does not require setting aside all existing jurisprudence. Greater reliance on the approaches of Justices Claire L'Heureux-Dubé and Beverley McLachlin (now Chief Justice) in *Van der Peet* would help shift the law toward recognizing Indigenous peoples' rights as rights of peoples grounded in Indigenous peoples' laws. In *Van der Peet*, Justice L'Heureux-Dubé was critical of Chief Justice Lamer's approach because "an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away."⁴⁷ Justice L'Heureux-Dubé's approach focused on the significance of the activity to Aboriginal people, and not merely on the activity itself.⁴⁸ She focused on preserving Aboriginal peoples and proposed protecting "all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies."⁴⁹ She would have extended protection to practices, traditions and customs that "maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world."⁵⁰ Justice McLachlin's approach based the rights on the prior legal regime that gave rise to these rights.⁵¹ Between these two approaches is the recognition of the need to protect the "peoples" in Indigenous peoples, based on their own legal traditions.

The SCC has recognized the ongoing role of Indigenous legal traditions in Canada. In *Mitchell*, Chief Justice McLachlin noted "the doctrine of continuity, which governed the absorption of aboriginal laws and customs into the new legal regime upon the assertion of Crown sovereignty over the region."⁵² It is important to note that it is inappropriate for the Canadian common law to take over Indigenous law. Rather, Indigenous peoples have a right to continue their own legal traditions as a basis for their rights,

⁴⁴ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 44, [2013] 3 SCR 1101.

⁴⁵ *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, cited in *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [Carter].

⁴⁶ *Carter*, *supra* note 45 at paras 6–10.

⁴⁷ *Van der Peet*, *supra* note 11 at para 154.

⁴⁸ *Ibid* at para 157.

⁴⁹ *Ibid* at para 162.

⁵⁰ *Ibid* at para 173.

⁵¹ *Ibid* at para 230.

⁵² *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 62, [2001] 1 SCR 911.

as set out in UNDRIP. According to UNDRIP, Canadian law should simply be acknowledging or ensuring space for those legal traditions.

A starting point for the conversation on how to begin making space for Indigenous legal traditions is to accept that these conversations cannot occur on the global level, but need to happen at the national and local levels. Different Indigenous peoples may have different aspirations for the extent of the operation of their legal traditions within Canada. Different Indigenous peoples will have different understandings of their rights and responsibilities, as Indigenous legal systems vary across Canada. But, throughout central Canada, making space for Indigenous legal traditions includes a need to begin to uphold the original spirit and intent of Treaties 1 to 11. While the possibilities are endless, what follows are a couple of ideas to begin the conversations.

International human rights standards, such as UNDRIP, provide guidance on how to begin the process of making space for Indigenous legal traditions. For example, a foundational aspect of UNDRIP is the right of Indigenous peoples to participate in decision making when their rights are impacted, according to their own traditional decision-making processes. If Canada were to begin to embrace this right of participation, then many more decisions (including resource development decisions) would take into consideration Indigenous laws on land and resource use.

According to UNDRIP, Indigenous peoples have the right to determine their own membership. The Canadian governments and courts must stop interfering with such internal membership decisions of Indigenous peoples, with the proviso that these internal decisions uphold fundamental human rights norms. Governments and Indigenous peoples can conclude agreements to recognize Indigenous peoples' right to control the legal systems within their own territories. This could include agreements that move beyond administering Canadian criminal law to agreements recognizing the right of Indigenous peoples to use their own criminal law within their territory.

Canadian judges need to recognize the limitations of their legal education and their ability to interpret Indigenous legal traditions. There should be continuing judicial training opportunities for learning more about Indigenous legal traditions in communities, on the land from Indigenous elders. Another suggestion is to treat Indigenous law as foreign law in Canadian courts, which removes the need for Canadian judges to interpret Indigenous law.⁵³ The Federal Court Indigenous Bar Association ~ Aboriginal Law Bar Liaison Committee developed "Practice Guidelines for Aboriginal Law Proceedings," which includes discussions on oral history and the role of elders in Aboriginal law proceedings, as well as on other practical issues in actions, judicial reviews and dispute resolution options.⁵⁴ Lawyers who work with Indigenous peoples (either through section 35(1) claims or in other areas) must have an understanding of Indigenous legal traditions. Governments should also learn about Indigenous legal traditions by going to ceremonies and sitting with Indigenous elders. To help this process of learning and using Indigenous law, Val Napoleon and Hadley Friedland have developed an approach for applying common law legal analysis and synthesis to Indigenous stories, narratives and oral histories.⁵⁵

The inclusion of Indigenous legal traditions in Canada must allow for these systems to evolve and not be frozen in time. John Borrows maintains that "traditions can be positive forces in our communities if they exist as living, contemporary systems that are revised as we learn more about how we should live

53 Karen Drake, "Decolonizing the Courtroom: A Trial Lawyer's Guide to Treating Indigenous Law as Law" (presented at Indigenous Bar Association, Academics Forum, Vancouver, 16 October 2016) [unpublished, draft on file with author].

54 Federal Court Indigenous Bar Association ~ Aboriginal Law Bar Liaison Committee, "Practice Guidelines for Aboriginal Law Proceedings: April 2016", online: <[http://cas-cdc-ww02.cas-satj.gc.ca/ftc-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20\(En\).pdf](http://cas-cdc-ww02.cas-satj.gc.ca/ftc-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf)>.

55 Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories" (2016) 61:4 McGill LJ 725 at 725.

with one another.”⁵⁶ In revitalizing Indigenous legal traditions, we must be careful to not romanticize Indigenous traditional legal systems by overstating traditional ideas of equality, as well as to be cautious when presented with fundamentalists’ views of Indigenous laws that purport to identify pure or true traditions.⁵⁷ Providing space for Indigenous legal traditions to evolve recognizes that “the teachings may be unchanging, but their application and sometimes even the interpretation changed over time.”⁵⁸ Finally, where Indigenous legal traditions did not historically meet contemporary international human rights standards, the traditions must continue to evolve.

International human rights norms should continue to guide the development of both Canadian and Indigenous legal traditions. At the general and national level, the protection of Indigenous peoples’ rights under section 35(1) should align with the broad range of international human rights, beyond just UNDRIP, for the scope of these rights to be fully appreciated. This includes the International Convention on the Elimination of All Forms of Racial Discrimination;⁵⁹ the International Covenant on Civil and Political Rights;⁶⁰ the International Covenant on Economic, Social and Cultural Rights;⁶¹ the Convention on the Elimination of All Forms of Discrimination Against Women;⁶² the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;⁶³ the Convention on the Rights of the Child;⁶⁴ and the Convention on the Rights of Persons with Disabilities.⁶⁵ At the local and practical implementation level, these general international standards must be implemented in accordance with Indigenous peoples’ own legal traditions. Bringing constitutional law and the protections of section 35(1) together with international human rights law and Indigenous laws can reset the current relationship between Indigenous peoples and the Crown, moving it toward a nation-to-nation relationship.

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⁵⁶ John Borrows, *Canada’s Indigenous Constitution* (Toronto, ON: University of Toronto Press, 2010) at 8.

⁵⁷ Emily Snyder, “Indigenous Feminist Legal Theory” (2014) 26 CJWL 365 at 398.

⁵⁸ Tracey Lindberg, “Critical Indigenous Legal Theory Part 1: The Dialogue Within,” (2015) 27 CJWL 224 at 232.

⁵⁹ 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratified by Canada 14 October 1970).

⁶⁰ 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

⁶¹ 16 December 1966, 993 UNTS 3, 6 ILM 360 (entered into force 3 January 1976).

⁶² 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

⁶³ 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, ratified by Canada 24 June 1987).

⁶⁴ 20 November 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990).

⁶⁵ 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008, ratified by Canada 11 March 2010).