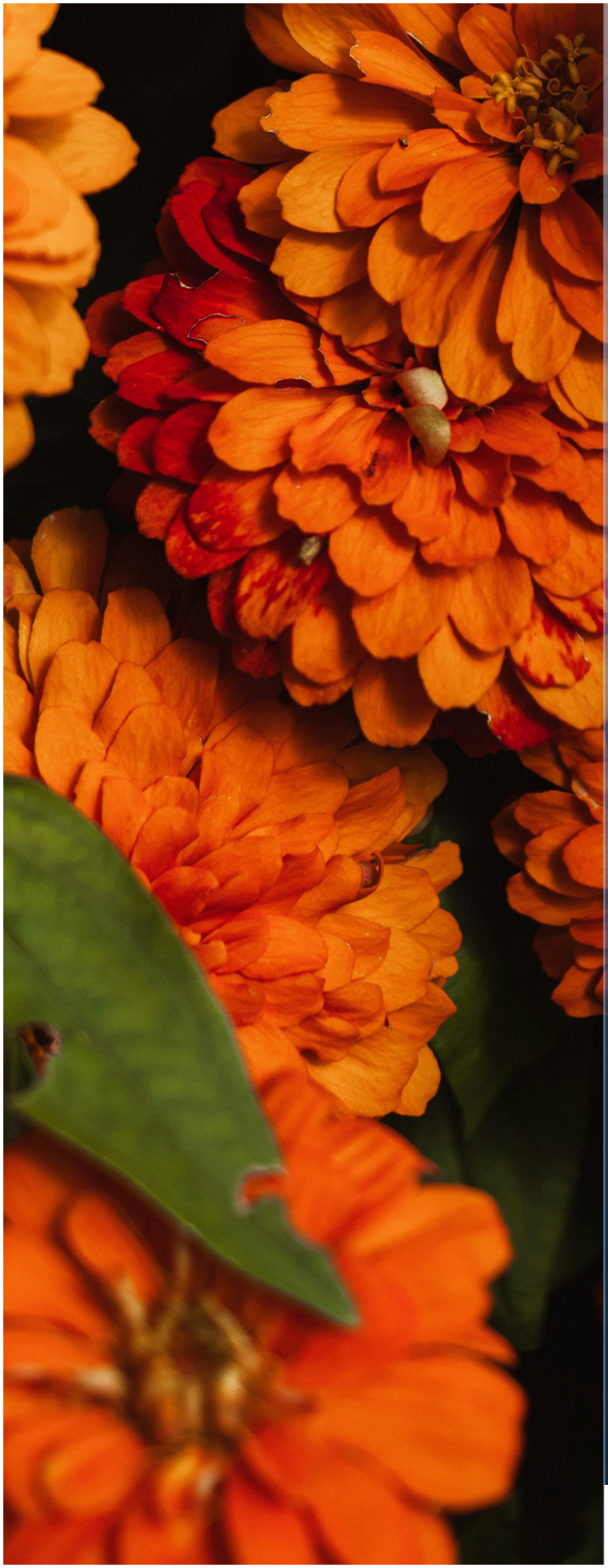

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Indigenization of Civil Litigation: Barriers and Opportunities

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INDIGENIZATION OF CIVIL LITIGATION: BARRIERS AND OPPORTUNITIES

*David Rosenberg**

CONTENTS

Abstract:

This paper considers the Indigenization of civil litigation as a means to promote decolonization and reconciliation within the Canadian legal framework. In light of the growing proximity of Indigenous to non-Indigenous communities, the task of Indigenization has taken on a new urgency. However, there are many obstacles to the goal of Indigenization. Two barriers that are examined in this paper are the secrecy and confidentiality that surrounds civil litigation under Canadian law, and a related issue, the seemingly esoteric nature of Indigenous laws—that is, laws that are not well known or easily

* Assistant Professor, Bora Laskin Faculty of Law, Lakehead University. I wish to thank Kevin Chen, Hugh Ross, Daniel Wolfe, and Ella Carr for their invaluable research assistance in preparing this article, as well as the wonderful editorial team at the *Lakehead Law Journal*, my colleagues at the Bora Laskin Faculty of Law, and fellow academics at other law schools. They generously assisted me by providing feedback on various drafts of the article and other support when needed. I would also like to thank my sister, Esther, my Aunt, Ruth Veder, and other friends and family who provided me with their insightful and meticulous editing advice on various drafts, and their steadfast support and encouragement throughout the writing process. Of course, any errors remain my own.

knowable outside of Indigenous communities. As part of that examination, this paper points to a decision of the Ontario Superior Court of Justice that gives us an early indication of how we might achieve the objective of Indigenizing civil litigation and overcome the obstacles identified. It then briefly discusses the Indigenization of civil disputes in the context of self-governance regimes, followed by a discussion of various other initiatives that promote the settlement of disputes. Settlement is promoted because it is seen as being more aligned with Indigenous legal traditions than litigation. Finally, this paper discusses a key consequence of settlement, being that settlement can cloak the manner and terms of resolution under a veil of secrecy.

I INTRODUCTION

The Final Report of the Truth and Reconciliation Commission of Canada (the TRC Report)[1] recognizes that "Indigenous law, like so many other aspects of Aboriginal peoples' lives, has been impacted by colonization."[2] This is now well accepted as historical fact. To address this reality, the TRC Report dedicated an entire chapter to traditional legal orders[3] and articulated 94 Calls to Action, three of which focused specifically on Indigenous law:

> 45) We call upon the Government of Canada to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown . . . [which] would include [a commitment] to [reconciliation in the form of] the recognition and integration of Indigenous laws and legal traditions.[4]
>
> 47) We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands . . . and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.[5]
>
> 50) [W]e call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.[6]

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1. Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 2, 1939 to 2000: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (Montreal: McGill-Queen's University Press, 2015), online: *National Center for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Volume_1_History_Part_2_English_Web.pdf> [TRC Report].

2. TRC Report, *ibid* at 52.

3. Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada,* vol 6 (Montreal: McGill-Queen's University Press, 2015), see generally 45–81, online: *National Center for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Volume_6_Reconciliation_English_Web.pdf>.

4. Truth and Reconciliation Commission of Canada, Calls to Action (2015) at 4, online: *National Center for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>.

5. *Ibid* at 5.

6. *Ibid* at 5–6.

Unfortunately, regardless of the methodology used to assess progress, the general consensus is that implementation of the Calls to Action has been sorely lacking. According to the federal government, they have completed seventeen of the Calls to Action.[7] But according to the Yellowhead Institute,[8] which meets with experts annually around the country to discuss and analyze reconciliation progress (or lack thereof), only thirteen of them have been completed.[9] Other organizations have also delivered their own perspectives on how the Calls to Action are advancing, but their assessments are, for the most part, similarly disheartening. According to the CBC, for example, only eight of the Calls to Action have been completed to date.[10] According to the May 1, 2024 update from the "Indigenous Watchdog," a federally registered non-profit organization, only 14 have been completed, and 36 per cent have not been started or have stalled.[11]

However, there have been high points, too. These include the significant progress that has been made toward funding the establishment of Indigenous law institutes[12] and toward the recognition and revitalization of Indigenous law as it applies within Indigenous communities.[13] There have also been many cases brought in Canadian courts that have, together, developed common law principles that enhance the prospects for Indigenous law to develop within the

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7. The federal government is directly or jointly accountable for 76 of the 94 Calls to Action and provides detailed explanations of actions they are delivering to advance each one. See Crown-Indigenous Relations and Northern Affairs Canada, "Delivering on Truth and Reconciliation Commission Calls to Action," (last modified 10 July 2023), online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1524494530110/1557511412801>.

8. The Yellowhead Institute is an Indigenous-led research and education centre based in the Faculty of Arts at Toronto Metropolitan University. See online: *Yellowhead Institute* <https://yellowheadinstitute.org/>.

9. Eva Jewell and Ian Mosby, "Calls to Action Accountability: A 2021 Status Update on Reconciliation" (December 2021) at 6, online: *Yellowhead Institute* <https://yellowheadinstitute.org/resources/calls-to-action-accountability-a-2021-status-update-on-reconciliation/>.

10. In March 2018, *CBC News* launched Beyond 94, a website that monitors progress on the Truth and Reconciliation Commission's 94 Calls to Action. *CBC News*, "Beyond 94: Truth and Reconciliation in Canada" (last updated 2 April 2024) online: <https://www.cbc.ca/newsinteractives/beyond-94?=&cta=1>.

11. Indigenous Watchdog, "TRC Calls to Action Status: March 1, 2024," online: *Indigenous Watchdog* <https://www.indigenouswatchdog.org/2022/04/05/trc-calls-to-action-status-may-13-2022>.

12. These include the Mino-Waabandan Inaakonigewinan Law & Justice Institute at the Bora Laskin Faculty of Law at Lakehead University, the Indigenous Law Centre at the University of Saskatchewan, the Indigenous Law Research Unit at the University of Victoria, the Wahkohtowin Law & Governance Lodge at the University of Alberta, and the Indigenous Legal Orders Institute at the Faculty Law, University of Windsor, as well as a host of community-based initiatives.

13. The revitalization of Indigenous law *within* particular communities (by the communities themselves) has received considerable attention, as has the development of administrative law principles that emphasize judicial deference to tribunal decisions involving the application of Indigenous laws. However, neither focuses on the integration of Indigenous law into Canadian law. Considerable attention has also been paid to the disproportionate representation of Indigenous peoples in the criminal justice system. This has created the impetus for a host of initiatives across the country that have attempted to address the problem, including the creation of a number of Indigenous courts. In addition, there are mechanisms available under various statutory regimes across the country now that allow for the introduction of Indigenous traditions as a valid consideration when sentencing for federal, provincial, and territorial offences. But none of these initiatives deals with civil matters.

Canadian legal system. These include cases regarding the judicial review of tribunal decisions[14] and treaty interpretation,[15] and many cases in the area of Aboriginal law, including cases articulating the criteria for establishing Aboriginal title[16] and the circumstances where there is a duty to consult.[17] They also include modifications made in some cases to the rules of evidence to permit the oral testimony of Elders[18] and the application of policies that have attempted to ameliorate some of the difficulties with litigation by encouraging settlement as an alternative to litigation.[19] However, apart from these things, most cases involving Indigenous persons focus on interpreting and articulating the rights and obligations of Indigenous persons under Canadian law, as opposed to applying Indigenous law, with the result that little progress has been made toward integration of the two legal systems.

There are notable academic discussions of civil disputes between Indigenous and non-Indigenous persons that have dealt with the integration of Indigenous law into Canadian law, which is founded in the common law and civil law traditions. These include John Borrows' work on Aboriginal title issues[20] and Sebastien Grammond's work on developing a conceptual framework for Indigenous law.[21] However, most of this discourse is fairly abstract, and few of these discussions are based on reported case law involving actual disputes that have been adjudicated by Canadian courts or tribunals. One exception that provides some visibility into Indigenous law is the *Jacob v Beamish* case,[22] which is discussed in more detail below. Otherwise, such cases are rare[23] .

An example of how such issues can manifest but remain relatively opaque to the application of Indigenous law is the *Slawsky v Isitt* decision,[24] in which there was a dispute

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14. Lorne Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012) 45:2 UBC L Rev 595. See also *Pastion v Dene Tha' First Nation*, 2018 FC 648, as well as the cases of the Federal Court and Federal Court of Appeal that followed *Pastion* such as *Porter v Boucher-Chicago*, 2021 FCA 102 and *Whitstone v Onion Lake Cree Nation*, 2022 FC 399.

15. There is considerable academic literature and jurisprudence on the principles of treaty interpretation under Canadian law. For two excellent works on this topic, see Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013), and Leonard I Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNB LJ 11.

16. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

17. *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73.

18. A recent example of this is *Restoule v Canada (Attorney General),* 2018 ONSC 7701 [*Restoule*], where the court ordered the use of a special protocol to address issues regarding the introduction of evidence from Elders.

19. See, for example, Department of Justice Canada, "The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples" (2018) at 11 [Indigenous Civil Litigation].

20. John Borrows "Aboriginal Title and Private Property" (2015) 71:2 Sup Ct L Rev 91.

21. Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1.

22. *Webequie First Nation Indian Band v Beamish,* 2008 CanLII 54316, 2008 OJ No 4175 (Ont Sup Ct J) [*Beamish*].

23. See the following two labour cases: *Re WSANEC School Board v BC Government and Service Employees' Union* [2016] CIRBD No 38 and *Gitxsan Health Society v Hospital Employees' Union* [2008] BCCAAA No 4.

24. *Slawsky v Isitt*, [2014] BCSC 1917.

between a private landowner and an Indigenous community that claimed title rights in lands that were subject to the Douglas Treaty. The case did not make it to court; instead, the conflict was resolved when the Government of British Columbia intervened to purchase the lands at issue from the plaintiff for $5.45 million. Concurrently with the purchase, the claim was withdrawn. So, the parties did not have an opportunity to argue the case. The *Slawsky v Isitt* case study is indicative of a generalized problem, which is the dearth of judicial consideration of the intersection of Canadian law with Indigenous law.

This paper takes up this gap to consider the Indigenization of civil litigation as a means to promote decolonization and reconciliation within the Canadian legal framework. The word "Indigenization" as used in this paper refers to the process of incorporating or integrating Indigenous elements, cultures, practices, and perspectives into various aspects of society, institutions, or systems. Indigenization aims to promote the recognition, preservation, and empowerment of Indigenous communities, their knowledge, and their traditional ways of life.[25] The Indigenization of civil litigation refers to the incorporation of Indigenous law into civil litigation as is practised under Canadian law.

There are many obstacles to the goal of Indigenization of our legal system. Two barriers that are examined in this paper are the secrecy and confidentiality that surrounds civil litigation under Canadian law, and a related issue, the seemingly esoteric nature of Indigenous laws—that is, laws that are not well known or easily knowable outside of Indigenous communities. This paper takes the position that, although the intersection between Indigenous law and civil litigation remains deeply unexamined, the cases that have considered this intersection show that there exist systemic challenges that Indigenous litigants encounter when accessing the Canadian justice system for civil matters. Nonetheless, considering the area of civil litigation, a private law area, through the lens of reconciliation, decolonization, and Indigenization is a significant step toward repairing legal frameworks that are colonial in nature and unresponsive to Indigenous law.

This paper will first discuss why the Indigenization of civil litigation matters as a means to promote decolonization and reconciliation, and why, given the growing proximity of Indigenous to non-Indigenous communities, the task of Indigenization has taken on a new urgency. As part of that discussion, this paper points to a decision of the Ontario Superior Court of Justice that gives us an early indication of how we might achieve the objective of Indigenizing civil litigation and overcome the obstacles identified. This paper will then briefly discuss the Indigenization of civil disputes in the context of self-governance regimes, followed by a discussion of various other initiatives that promote the settlement of disputes. Settlement is promoted because it is seen as being more aligned with Indigenous legal traditions than litigation. Finally, this paper will discuss a key consequence of settlement, being that settlement can cloak the manner and terms of resolution under a veil of secrecy.

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25. There is no clear definition of Indigenization. For more reading on the subject, see Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Eve Tuck and K Wayne Yang, "Decolonization Is Not a Metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1; Jeffery G Hewitt, "Decolonizing and Indigenizing: Some Considerations for Law Schools" (2016) 33:1 Windsor YB Access Just 65.

II A PEAK BEHIND THE VEIL: *WEBEQUIE FIRST NATION INDIAN BAND V BEAMISH*

The current Canadian civil justice system has the means to create windows of visibility for Indigenous laws by making best use of the civil law system while at the same time limiting its own involvement in civil law matters. The case of *Jacob v Beamish*[26] is one such case. *Beamish* provides a rare peek behind the veil of civil law disputes, which are often marked by confidentiality between the parties, to see an Indigenous-law-styled mechanism that the parties created contractually for resolving disputes.

In *Beamish*, the plaintiff, the Webequie First Nation, a band of 491 members, sued the defendants, the Wasaya First Nations, who were seven First Nations Bands. The dispute related to control of a regional airline. The defendant brought a motion seeking to stay the lawsuit, arguing that the dispute should be arbitrated in accordance with an arbitration provision contained in the main agreement between the parties. The arbitration provision read as follows:

- *Negotiations:* The Wasaya First Nations will endeavour to resolve any differences between them on any matter in this Agreement by negotiation between themselves, and, unless there is an emergency, no party will initiate any other procedure until negotiations have exhausted all reasonable possibilities of resolution;
- *Use of Elders:* The Wasaya First Nations may choose to facilitate their negotiations by the use of Elders. If negotiations are conducted with the assistance of Elders and no agreement is reached, then the matter shall be arbitrated by an arbitrator;
- *Arbitration:* Any arbitration will be conducted according to the rules for the conduct of arbitration of the Arbitration Institute of Canada Inc., in effect at the date of commencement of the arbitration, by one arbitrator appointed in accordance with the Institute's rules. The arbitration will be final and binding on the parties.

The defendant was successful on the motion, and the matter went to arbitration based on the court's interpretation of the dispute resolution provisions, which involved applying fairly straightforward common law principles of contractual interpretation, together with the court's interpretation of section 7 of the *Arbitration Act* (Ontario).[27]

In the course of the decision, which required the parties to return to the arbitration process they had agreed to use, the judge took the opportunity to incorporate into her reasons portions of the agreement made between the parties. Thus, we are able to see those parts of the agreement where the parties agreed to be guided by Indigenous legal principles and values in their business dealings. The following guiding principles were agreed to:

a) The Aboriginal value of sharing what one can contribute;

b) The spirit of self-reliance by use of one's own knowledge, capabilities and whatever other resources one has;

c) The spirit of working together, acknowledging each other's humanness;

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26. *Beamish, supra* note 22.

27. *Arbitration Act,* SO 1991, c 17.

> d) Respect for one's peers, supervisors, clients, and individual First Nations members;
>
> e) Respect for the Air, Land and Waters by controlling the environmental impacts of one's activities;
>
> f) Respect for the elected Chiefs and Councils of the Wasaya First Nations and other First Nations;
>
> g) Respect for the Elders of the community and depending on their wisdom for guidance;
>
> . . .
>
> k) Working cooperatively to maximize the profitability of Wasaya businesses for the collective benefit of the Wasaya First Nations people.[28]

The inclusion of these principles into the reasons serves to shed some light on the intentions of the parties. Though none of the above-noted terms were critical to the interpretation of the arbitration clause in the contract, they were set out in the decision of the court nonetheless.

The terms of the arbitration clause clearly show the parties to the agreement mixing Indigenous legal principles with Canadian law. Essentially, they used a Western-European legal mechanism, the contract, to reflect the Indigenous traditions and values of the parties to the agreement. Because the court upheld the arbitration clause, only parties to the dispute and their counsel will ever know the outcome.[29] However, the case report provides a rare glimpse into a situation where Indigenous legal traditions were combined with Canadian law. It is also important to note what the court does not do: The judge does not interpret or apply the principles contained in the contractual agreement. Thus, the court avoids stepping into the role of arbiter of Indigenous law, but instead uses the ruling to make the principles visible and affirms their legal significance.

III CIVIL DISPUTES AND SELF-GOVERNANCE

There are a number of self-governance regimes currently in place across Canada that have created frameworks for civil dispute resolution. These self-governance agreements represent a significant departure from the norms of civil law disputes that would otherwise be available to parties under the Canadian legal system. The statutes that created these self-governance regimes include agreements such as the *Nunavut Land Claims Agreement Act*,[30] the *Métis Settlements Act* (MSA),[31] and the *Nisga'a Final Agreement Act*.[32] Through these self-governance regimes, Indigenous communities determine the processes and principles of substantive law

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28. *Beamish, supra* note 22 at para 12.

29. Had the matter proceeded through the civil litigation regime available under Canadian law (instead of going to arbitration), where the proceedings are public, the likelihood of the public ever knowing the outcome would have been small. This is because most court cases will settle on a confidential basis before trial.

30. *Nunavut Land Claims Agreement Act,* SC 1993, c 29.

31. *Métis Settlements Act,* RSA 2000, c M-14 [MSA].

32. *Nisga'a Final Agreement Act,* SC 2000, c 7.

that apply to civil disputes involving community members. Creating frameworks, rules, and processes surrounding civil law matters is an essential part of self-governance, and it takes back control over aspects of law for communities.

Yet, at the same time, self-governance regimes are created within the parameters of Canadian civil law, and give Canadian provincial/territorial and federal laws paramountcy. These include laws governing the judicial review of decisions based on administrative law principles, and the *Canadian Charter of Rights and Freedom*. This means that Western-based norms, ideals, and values are afforded primacy over the norms, ideals, and values embedded in the dispute resolution mechanisms adopted under these regimes. As long as this hierarchy of values remains the standard framework governing civil dispute resolution under self-governance regimes, the prospects for integration of Indigenous legal traditions into Canadian law are limited.

Moreover, very few of the decisions made by Indigenous tribunals under self-governing regimes are reported and, of the decisions that are reported, very few reference specific Indigenous laws or traditions. Of course, the very fact that they provide mechanisms for taking back ownership and responsibility for decisions by Indigenous communities could itself be viewed as an application of Indigenous law and legal traditions. But this is a small step, and not enough to effect changes in Canadian law to make it more responsive to Indigenous law.

The Métis Settlements Appeal Tribunal (MSAT) is the appeals tribunal created under the MSA and is one of the few Indigenous appeals tribunals that publishes its decisions. Of the published MSAT decisions, so far none offer visibility into specific Métis traditions or laws. Instead, the few published decisions include consideration of issues such as interpretation of the MSA concerning membership, which has been affirmed as being within the control of the Métis community, providing the right to decide for themselves how Métis membership will be determined.

Donald McCargar v Kikino Metis Settlement is one such case.[33] When examining the scope of MSAT's jurisdiction under the MSA to make decisions regarding Métis membership, this decision makes reference to section 187.1 of the MSA, which reads as follows:

> The Appeal Tribunal shall exercise its powers and carry out its duties with a view to **preserving and enhancing Métis culture and identity**.[34] [emphasis added]

The decision also referred to the object of the MSA as being the "[promotion of] Métis identity."[35] However, apart from these general references, the decision does not provide specific details about Métis law, traditions, or legal orders. This decision—and others like it—represents a small step toward clarifying the role of the MSAT, but it does not improve visibility into Indigenous legal traditions and laws, and it is too vague and ill-defined to have any real impact on Canadian law.

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33. *Donald McCargar v Kikino Metis Settlement,* MSAT Order 372 [Order 372], aff'd 2019 ABCA 199; leave to appeal to the SCC refused 38756 (7 November 2019).

34. MSA, *supra* note 31.

35. Order 372, *supra* note 33 at para 110, citing *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 3.

Theoretically, all cases before the MSAT have the potential to provide visibility into Indigenous legal traditions and laws. Cases involving disputes between Indigenous and non-Indigenous persons (versus cases involving only Indigenous persons) have more potential for offering visibility into Indigenous legal traditions and laws than disputes involving only Indigenous persons.[36] This is because the expectations of the parties, including how they had envisaged disputes being resolved, are more likely to be different in cases involving non-Indigenous persons. However, such cases represent only a tiny percentage of the decisions made by the MSAT in any given year,[37] making their usefulness in providing the needed visibility exceedingly small.

IV INITIATIVES ENCOURAGING SETTLEMENT

Since litigation is the primary catalyst under Canadian law for stimulating changes in the common law (the other is the passage of legislation[38]), to achieve better integration, substantive (versus procedural or evidentiary) principles of Indigenous law would need to be integrated into Canadian law by the courts over time as matters are litigated. As stated above, there already exist a number of cases where procedural or evidentiary-related Indigenous traditions have been accepted as part of the litigation process, including modifications to the rules of evidence in certain cases to permit the oral testimony of Elders and the development of policies that encourage settlement as an alternative to litigation based on the premise that negotiated settlements are more consistent with Indigenous traditions than litigation.

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36. There is also a reported case of the Alberta Court of Queen's Bench from 2018 involving a non-member of the Métis Settlement Agreements, *Paramount Resources Ltd v Metis Settlement Appeal Tribunal*, [1998] AJ No 1453. In *Paramount,* the jurisdiction of the MSAT to adjudicate a dispute, and the interpretation of statutory and contractual arbitration clauses, were the main issues. However, once the decision of the court had been made affirming the jurisdiction of the MSAT, the matter went to arbitration and the public record went dark.

37. For example, of the 42 orders made in 2020 (being the last year that orders were reported), only four (order no's 372, 373, 409, and 431) involve non-members.

38. The other obvious path toward integration would be through the implementation of the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP). The recently adopted federal legislation, *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c14, is an attempt by the federal government to make headway in this area. The *Act* requires the Government of Canada to create a framework for implementation of the UNDRIP. However, until the federal government rolls out its action plan for implementation of the *Act*, it is not clear what the plan is or what impact it will have. It remains to be seen as well how many provincial and territorial governments will take similar steps. British Columbia has taken the lead on this by enacting the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 (the *BC Act*). Like its federal equivalent, the *BC Act* provides for a framework for implementation to be rolled out at a later date. Section 4 of the *BC Act* requires British Columbia to develop and implement an action plan to meet the objectives of the UNDRIP, and section 3 of the *BC Act* requires British Columbia to align its laws with the UNDRIP and to do so in consultation and cooperation with Indigenous peoples. The work to align laws with the UNDRIP has resulted in several legislative reforms with, presumably, more to come. However, unlike its federal counterpart, the BC government has acted quickly in rolling out their action plan. BC's Declaration Act Action Plan was released on 30 March 2022. It includes collectively identified goals and outcomes that form the long-term vision for implementing the UNDRIP in British Columbia. It also has 89 priority actions, which will purportedly advance this work in key areas over the next five years. See "Declaration Act Action Plan" (22 January2024) online: *Government of British Columbia* <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples/implementation>.

With the assimilative pressures resulting from increasing proximity of non-Indigenous to Indigenous communities, the task of Indigenization of civil litigation has taken on a new urgency. The shifting by colonial administrations of Indigenous peoples onto reserves has worked to keep Indigenous peoples separate from their non-Indigenous neighbours. Indigenous peoples have had their own version of separateness, too. The original two-row wampum treaty speaks to this. It recorded the agreement that the Haudenosaunee had with the Dutch settlers to live parallel to each other, in mutual respect and recognition, without interfering in each other's ways, laws, or governance. It had two parallel rows of purple wampum running along a field of white beads. The purple rows symbolized two paths or two vessels—a Haudenosaunee canoe and a European ship—travelling down the river of life together, parallel but separate.[39] Today, few reserves exist in isolation. There are likely many reasons for this, including the expansion of cities across Canada since the reserve system was first adopted under the *Indian Act*[40] in 1876. However, in 1867, the population of Canada was only 3.4 million people. Today, it has grown to more than eleven times that number.[41] Increasing proximity is also in part a consequence of the connectivity that now exists in Canada (and globally). This appears to be partially as a result of the rapid growth in cyber commerce, social media, and other internet-based communications. The pace of technological innovation we are experiencing today is nothing short of spectacular, and it brings with it increasing "virtual" proximity between Indigenous and non-Indigenous persons. As the level of interaction increases, civil disputes are also likely to increase.[42]

V PACE OF CHANGE

The lack of case law advancing the integration of Indigenous law into Canadian law, including under self-governing regimes, reflects the barriers to access to justice for Indigenous litigants. An extensive access to justice literature documenting and analyzing the Canadian justice system shows that litigation in the courts is neither accessible nor responsive to Indigenous litigants. Anyone—Indigenous and non-Indigenous persons alike—who wishes to access justice through litigation in Canada will encounter a system that is slow, often unpredictable, costly, time consuming, impersonal, complex, and incredibly stressful.

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39. The white beads between the rows represent peace, friendship, and respect. See Karine Duhamel, "Peace, Friendship and Respect: The Meaning of the Two Row Wampum," (14 November 2018) online: *The Canadian Museum for Human Rights* <https://humanrights.ca/story/peace-friendship-and-respect>.

40. *Indian Act,* RSC 1985, c. I-5.

41. Laurent Martel and Jonathan Chagnon, "Population Growth in Canada: From 1851 to 2061," Statistics Canada (February 2012), online: *Ministry of Industry* <https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-310-x/98-310-x2011003_1-eng.cfm>.

42. Evelyn Peters and Chris Anderson, eds, *In the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) and Ryan Walker et al, "Public Attitudes Towards Indigeneity in Canadian Prairie Urbanism" (2017) 61:2 Can Geographer 212.

Indigenous litigants face additional hurdles, and the integration of Indigenous laws certainly has a place in improving access to justice for Indigenous peoples.[43]

To the extent that the Canadian legal system has paid special attention to Indigenous peoples before the courts, it has done so in very particularized contexts, including the sentencing of Indigenous offenders,[44] on-reserve governance,[45] and the self-governance agreements discussed above. These mechanisms are of limited application and do not respond to the reality that Indigenous and non-Indigenous persons relate to one another in legally relevant ways in all spaces where they interact, and these interactions are not limited to specialized areas of the law. For an Indigenous person, the complexity of relationships manifests uniquely. Relationships are a product of their individual relationship with the Indigenous community to which they belong and of their relationship to the non-Indigenous community with which they typically interact. To be effective, then, Indigenization of civil litigation must be responsive to these complex relationships.

In this context, it is important to acknowledge the additional complicating factor that there is considerable variability across the country between Indigenous legal traditions, and that those traditions are themselves not static—they are constantly evolving. It is often thought to be a strength of the common law to be able to draw on multiple sources of law and do so flexibly and responsively. In that sense, the Canadian legal system is well equipped to take on these related challenges.

For the reasons discussed above, the adversarial, drawn-out, and often culturally insensitive nature of civil litigation has negative impacts on Indigenous litigants that go beyond those experienced by other litigants. For a person considering litigation, a negotiated settlement is often seen as being preferable to litigation since litigation can be time consuming and expensive and the outcome can be unpredictable. So it is often avoided, or even used as a tactical tool to gain leverage in settlement negotiations. Resolving disputes through settling rather than going to trial is also good for the governmental bodies responsible for administering the courts, since judicial and courtroom resources are expensive and are usually in high demand but spread thin.

However, for Indigenous litigants, alternative modes of dispute resolution that encourage settlement are not necessarily better than litigation. Alternatives to litigation that are considered to ameliorate the difficulties of accessing justice through litigation, such as monetary expense, extended timeframes, and the harm caused by revisiting trauma, can be reinforced by encouraging settlement or can even aggravate them. These concerns with the

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43. Sam Stevens, "Access to Civil Justice for Aboriginal Peoples" in Allan Hutchison, ed, *Access to Civil Justice* (Toronto: Carswell, 1990) at 203–212; Carlo Osi, "Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation" (2008) 10:1 Cardozo J Confl Resolution 163; Peter R Grose "An Indigenous Imperative: The Rationale for the Recognition of Aboriginal Dispute Resolution Mechanisms" (1995) 12:4 Mediation Q 327; Grammond, *supra* note 21; Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale, Ambitions" in Julia H Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Ontario, 2005) at 19.

44. A reference to *Gladue* reports, which is a "form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders," *R v Ipeelee*, 2022 SCC 13 at para 60.

45. As might be established through the adoption of a land code on the basis of the *First Nations Land Management Act*, SC 1999, c 24, as repealed by the *Framework Agreement on First Nation Land Management Act*, SC 2022, c 19, s 121.

push toward settlement as an alternative to litigation have been considered by Owen M Fiss in his article "Against Settlement."[46] Fiss argues that settlement is no more than a "forced plea deal,"[47] the details of which will depend on the power balances between the parties (including access to financial resources) and ultimately removes the remedial power of the court. Writing more recently and in the Canadian context, Nayha Acharya reflects on the increase in mandated mediation as "problematically interfering with procedural rights."[48] For an Indigenous person, settlement strategies may also often feel like revisiting a prior trauma. Trevor Farrow describes the experience aptly when writing about the experience of Indigenous litigants who brought civil claims relating to their residential school experiences. Despite the federal government having implemented an alternative dispute resolution framework that was designed to be fair, efficient, healing, and reconciling, many claimants experienced the approach taken by the government and church participants as adversarial and culturally insensitive, even humiliating.[49]

Despite the concerns around alternatives to litigation, processes leading to settlement still warrant special attention for two different reasons. First, they offer opportunities for the parties to structure the settlement procedure, which in turn opens the door to incorporating Indigenous law into the process. Second, settlement procedures promote confidentiality of process and outcome, which interferes with the development of jurisprudence that expressly incorporates Indigenous law. In short, settlement procedures offer potential for alternate mechanisms for achieving justice aims, but the implications of these processes for Indigenous persons and the development of Indigenous laws must be considered.

VI REGULATORY INITIATIVES THAT ENCOURAGE SETTLEMENT

To encourage settlement, several regulatory initiatives have been implemented that are not particular to the background of any specific litigant—that is, they apply to non-Indigenous and Indigenous persons alike. The various Rules of Civil Procedure that have been adopted in every province and territory of Canada[50] to promote settlement are examples of this. In Ontario, for example, Rule 21.01 of the *Rules of Civil Procedure* promotes the early determination of issues before trial, as a way of avoiding the matter advancing to trial altogether.[51] Rule 49 imposes a cost consequence upon an offeree who rejects a settlement offer that turns out to be as favourable, or more favourable, than the judgment awarded at trial.[52] Similarly, Rule 57 compensates the successful party at trial for some of the legal expenses they have incurred

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46. Owen M Fiss, "Against Settlement" (1984) 93:6 Yale LJ 1073.

47. *Ibid* at 1075.

48. Nayha Acharya, "Exploring the Role of Mandatory Mediation in Civil Justice" (2023) 60:3 Alberta LJ 719 at 720.

49. Trevor CW Farrow, "Truth, Reconciliation, and the Cost of Adversarial Justice" in Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: the Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 131 at 132.

50. In Ontario, they are the *Rules of Civil Procedure*, RRO 1990, Reg 194, promulgated under the *Courts of Justice Act*, RSO 1990, c C.43.

51. *Ibid,* r 21.01.

52. *Ibid,* r 49.10.

as a way to encourage settlement.[53] Rule 50 authorizes the court or any of the parties to schedule a pre-trial conference for the purpose of exploring opportunities for settling all or part of an action.[54]

Regulatory initiatives that encourage settlement also include the rules of professional conduct that apply to lawyers in every jurisdiction across the country.[55] Rule 3.2-4 of the *Model Code of Professional Conduct* from the Federation of Law Societies of Canada reflects this. It provides that:

> A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

Other initiatives that encourage settlement are specific to Indigenous persons and are discussed below.

A. Contractual Arrangements Containing Standard Form Dispute Resolution Clauses That Steer the Parties Toward Settlement

Often, the parties involved in a project or undertaking anticipate the potential for future conflicts. Therefore, in an effort to stave off the prospect of future litigation (and also sometimes to facilitate obtaining regulatory approvals), they may enter into agreements that contain dispute resolution provisions. A common, project-related form of agreement between Indigenous and non-Indigenous participants containing provisions of this kind is an impact benefit agreement,[56] but many commercial agreements contain provisions of a similar nature. Almost invariably, such arrangements involve tiers of negotiation conducted on a confidential basis, starting with negotiations by frontline representatives of each party, escalating to negotiations by senior management if the frontline negotiations are unsuccessful, and if all else fails, advancing to resolution in private by binding arbitration.

B. British Columbia Civil Resolution Tribunal

The British Columbia Civil Resolution Tribunal (BCCRT) is one of the more recent and interesting innovations for facilitating access to justice and the settlement of civil disputes.[57] It

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53. *Ibid,* r 57.01.

54. *Ibid,* r 50.02.

55. Federation of Law Societies of Canada, "Interactive Model Code of Professional Conduct" online: *FLSC* </flsc.ca/what-we-do/model-code-of-professional-conduct/interactive-model-code-of-professional-conduct/>.

56. Norah Keilland, "Supporting Aboriginal Participation in Resource Development: The Role of Impact Benefit Agreements," Parliamentary Information and Research Service, Publication No 2015-29-E (Ottawa: Library of Parliament, 2015).

57. The legislation creating this framework was the *Civil Resolution Tribunal Act,* SBC 2012, c. 25 (CRTA). The CRTA was amended in 2015 and brought into force, in part, on 13 July 2016, by BC Reg 171/2016. Aspects of the CRTA have faced constitutional challenge based on section 96 of the *Constitution Act, 1867*, which reserves the power to appoint judges at the appellate level to the governor general. I am not aware of any challenges that would affect the components of the framework that are designed to specifically address better access to civil dispute resolution for Indigenous persons per se. See *Trial Lawyers' Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348.

offers civil dispute resolution of low-dollar value claims through a streamlined, internet-based system. Initially, the parties involved in a case before the BCCRT are steered toward mediation, but if mediation fails the process moves to "facilitation." Both are presented as dialogue-based forms of resolution that are more consistent with Indigenous traditions. After that, claims are adjudicated before the Civil Resolution Tribunal, where the process and law that is applied, although streamlined, is similar to what is available in most Canadian jurisdictions in small claims courts.

The BCCRT has also adopted a detailed "Reconcili(action) Plan" to reflect its commitment to reconciliation with Indigenous peoples.[58] The plan represents a commitment to making it easier for Indigenous persons to access the speedier streamlined services provided by the BCCRT, and a commitment to make dealing with the BCCRT a better, more user-friendly experience for Indigenous persons compared to the experience of dealing with the courts. For example, it removes barriers for Indigenous persons accessing the BCCRT, and provides sensitivity training for all tribunal members on the impacts of colonization and the content and importance of treaty and Indigenous rights.[59]Other aspects of the plan that reflect this include prioritizing hiring Indigenous tribunal members, in recognition of the importance of providing equitable opportunities for Indigenous peoples within the administrative justice sector, especially as decision makers;[60] a commitment to addressing barriers that Indigenous peoples may face when accessing the BCCRT process and forms;[61] educating staff and tribunal members on the importance of flexibility and cultural sensitivity and creating space within its processes for staff and tribunal members to accommodate Indigenous worldviews;[62] training staff and members about the diverse nature of Indigenous cultures, the history of Indigenous peoples in Canada, the impacts of colonization, treaty rights, and Indigenous rights;[63] and decolonizing the language on its website and forms to ensure it is inclusive and accessible for Indigenous participants.[64]

However, despite the Indigenization content of the plan, decisions of the BCCRT at the adjudication stage are based entirely on Canadian law. The plan includes aspirational statements indicating a desire to change that. For example, the plan states that the tribunal "will support the recognition, development, and use of Indigenous laws, legal traditions and languages in the broader legal and justice systems"[65] and it recognizes "that the [BCCRT] is part of the colonial legal system."[66] However, how and when those statements will translate into the adoption of Indigenous law remains unclear. For the time being, until the aspirations reflected in such statements are realized, for cases adjudicated by the BCCRT "accessing justice" still means accessing justice as understood under Canadian law. For cases that are settled at an earlier stage in the proceedings through negotiation or facilitation, it may involve

58. Civil Resolution Tribunal, "Reconcili(action) Plan: 2021–2024" (2020), online: *Civil Resolution Tribunal* <https://civilresolutionbc.ca/wp-content/uploads/CRT-Reconciliaction-Plan-2021-2024.pdf>.

59. *Ibid*.

60. *Ibid* at 9.

61. *Ibid* at 10.

62. *Ibid*.

63. *Ibid* at 12.

64. *Ibid* at 13.

65. *Ibid* at 14.

66. *Ibid* at 15.

the application of Indigenous legal traditions, but as the details of earlier-stage proceedings and outcomes are not made available to the public it is impossible to say if this is happening.[67]

C. Federal Directive on Civil Litigation Involving Indigenous Peoples

The challenges of litigation as a model of civil dispute resolution for advancing reconciliation also served as the impetus for the decision made by Canada's first federal Attorney General of Indigenous background, Jodi Wilson-Raybould, to adopt a protocol for federal litigation involving Indigenous persons (the Federal Directive).[68] Although, only specific to litigation involving the federal government, the Federal Directive provides valuable insights into the difficulty that litigation poses as an agent of change for Indigenous peoples. Key tenets of the Federal Directive are as follows:

- Counsel's primary goal must be to resolve the issues, using the court process as a last resort and in the narrowest way possible. This is consistent with a counsel's ongoing obligation to consider means of avoiding or resolving litigation throughout a file's lifespan.[69]
- Litigation is by its nature an adversarial process and cannot be the primary forum for broad reconciliation and the renewal of the Crown–Indigenous relationship. One of the goals of reconciliation in legal matters is to make conflict and litigation the exception, by promoting respectful and meaningful dialogue outside of the courts.[70]
- Early and continuous engagement with legal services counsel and client departments is necessary to seek to avoid litigation. Where appropriate, counsel must consider whether the issues can be resolved through Indigenous legal traditions or other traditional Indigenous approaches.[71]

The extent to which there has been implementation of the Federal Directive remains unclear, and certainly its broader impact is not known. However, even if the Federal Directive proves to be effective, since the protocol only applies to litigation involving the federal government, its potential to impact private civil litigation is limited.

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67. Shortly after the BCCRT was established, the COVID-19 pandemic resulted in other courts across the country also conducting hearings virtually. Virtual access to the courts, at all levels, became a reality across the country overnight. For Indigenous litigants, this meant easier access to the courts. However, as with the BCCRT, there is a trade-off: In return for easier access, claimants submit to a process of dispute resolution where the trial or adjudication process itself is fundamentally modelled on Western-European systems of justice and where the law that ultimately applies is Canadian law. Post-pandemic, it remains to be seen whether, and to what extent, these initiatives will remain in place, but there is the potential to incorporate features of Indigenization similar to those adopted by the BCCRT as they are developed.

68. Indigenous Civil Litigation, *supra* note 19.

69. *Ibid* at 10.

70. *Ibid* at 11.

71. *Ibid* at 10–11.

D. Federal Court's Practice Guidelines for Aboriginal Law Proceedings

Another significant initiative that encourages settlement is the Federal Court's Practice Guidelines for Aboriginal Law Proceedings.[72] These guidelines were developed in consultation with Elders and reflect a preference for dispute resolution by talking things out and resolving disputes by agreement, as opposed to judicial adjudication.

The Federal Court's process starts with an initial assessment ("triage") by a member of the court. In appropriate cases, the court may then informally invite the parties to consider alternative means of proceeding, including mediation away from the court or judicially assisted dispute resolution. Other key features of the guidelines include:

- the appointment of a neutral adviser to the court called an "assessor" in cases where issues of Indigenous law or tradition have arisen or are likely to arise; and
- the establishment of an Indigenous Law Advisory Committee comprising persons who are knowledgeable in Indigenous law to assist the court in cases where the court is considering the appointment of an assessor as a neutral adviser to the court. Among other things, such assistance might relate to the reception, interpretation, or application of Indigenous law or traditions.

As part of its efforts to encourage settlement, the court has also made it clear that it is prepared to award costs in matters that settle. This may seem odd, as costs are customarily awarded to the successful party after adjudication at trial, but in appropriate cases there is precedent for it.[73]

E. *Ad Hoc* Adoption of Modified Federal Court Guidelines

There are also examples of the courts taking the lead by developing *ad hoc* protocols in individual cases for taking Elder evidence, particularly in treaty interpretation cases. A recent example of this is *Restoule v Canada (Attorney General)*,[74] where the court adopted an *ad hoc* stand-alone protocol for dealing with evidentiary issues largely based on the Federal Court's guidelines referred to above.[75] The *Procedure for Taking Elder Evidence* (the Order) seeks to "balance appropriate reception of Elder testimony and oral history evidence with the practical needs of a justice system."[76] The Order requires consideration of the way in which evidence is gathered, language needs, and provides that "Elders' evidence may be presented in a demonstrative manner: songs, dances, culturally significant objects or activities on the land."[77] This Order is a positive development, but one that was adopted for the specific purposes of the *Restoule* case. Whether other courts across the country will adopt these protocols is unclear.

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72. See Federal Court, "Practice Guidelines for Aboriginal Law Proceedings," 4th ed, September 2021, online: Federal Court <www.fct-cf.gc.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20Sept-2021%20(ENG)%20FINAL.pdf> [Practice Guidelines].

73. See *Knebush v Mayguard*, 2014 FC 1247 [*Mayguard*].

74. *Restoule, supra* note 18.

75. Practice Guidelines, *supra* note 72.

76. *Elders' Protocol for Restoule et al v Canada and Ontario*, Court File Nos C-3512-14 & C- 3512-14A.

77. *Ibid* at 3.

So, for the time being, except in the Federal Court, there is still no standard approach across the country for dealing with evidentiary matters in cases involving Indigenous persons.

VII CONSEQUENCES OF SETTLEMENT

Most dispute resolution mechanisms encourage settlement against a backdrop of potential litigation, very few claims that give rise to litigation are actually resolved at trial.[78] Even fewer are deemed to have sufficient precedential value to be reported. Of the small subset of cases that go to trial and are reported, the chances that one of those cases will involve an Indigenous person is even smaller given the very small population of Indigenous persons residing in Canada.[79] Of that small number of cases, the bulk of the cases will involve constitutional considerations that contribute to the body of Canadian law known as "Aboriginal law", but contribute little to our understanding of Indigenous law.

When cases settle, they do so on confidential terms, and so we also often do not have visibility into the process by which the issues in dispute were resolved or the terms of settlement. This gap leaves huge blind spots, making it challenging to fully understand how issues were dealt with and the solution that was ultimately adopted by the parties. Essentially, the effect is to cloak the manner and terms of resolution under a veil of secrecy. It may be that the settlement process, because it engages with dialogue, is more aligned with Indigenous legal traditions than litigation and may itself be seen as an application of Indigenous legal traditions. But without visibility into how negotiations were carried out, what principles of law were raised during the negotiations, what traditions and historical facts played a part in the discussions, or details of the negotiated outcome, the decision to engage in settlement discussions or the achievement of a negotiated settlement otherwise tells us very little of substance about Indigenous law.

A challenge related to the issue of confidentiality is that often there is little available in the form of a written record for identifying Indigenous law.[80] This is because Indigenous law has historically followed an oral tradition, and while there is a lively debate among Indigenous people about what (if anything) should be done about that (for some, creating a written record is an unwelcome move toward adopting a more Western-European-oriented system

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78. This basic fact is noted in numerous places in Canadian legal academic literature. For a fairly recent example, see Janet Walker et al, *The Civil Litigation Process: Cases and Materials*, 9th ed (Toronto: Emond, 2022) at 60.

79. According to Statistics Canada, in 2021 Indigenous peoples accounted for 5.0 per cent of the total population in Canada. See Statistics Canada, "Canada's Indigenous Population" (21 June 2023), online: *Statistics Canada* <https://www.statcan.gc.ca/o1/en/plus/3920-canadas-indigenous-population>.

80. This may be addressed by the parties if they articulate those principles as part of a contractual dispute resolution provision or if they articulate those principles in another part of their contract, but unless their dispute is litigated, there is no public access to the principles they have articulated. Some efforts have been made to address this through the creation of publicly available websites where decisions made by Indigenous tribunals are reported and made accessible, but these are not well known to the public and, so far, have not shown themselves to be rich sources of Indigenous law. The following two websites are of particular note: "First Nations Gazette," online: <https://fng.ca/> and "Metis Settlements Appeal Tribunal," online: <http://www.msat.gov.ab.ca/appeals/MSATDecisions.asp>.

of governance and law making[81]), the fact remains that Indigenous law is not well known or easily knowable outside of Indigenous communities.[82] The importance of these oral histories to the resolution of disputes has been recognized and acknowledged by the Federal Court,[83] which as discussed above, has developed guidelines for taking evidence from Elders that may challenge the historical record as documented by non-Indigenous people.[84] However, in the absence of a record documenting the settlement proceedings, it is exceedingly difficult to piece together what laws, Indigenous or otherwise, factored into a settlement or in the future may guide the negotiation and settlement process.

Moreover, oral histories are complex and are not necessarily as readily accessed or captured faithfully in private settlement discussions as they are in a judicial process with a well-developed protocol for dealing with such things and the means to apply it. Such complex customs may include dances, feasts, songs, and poems and often give importance to place and geographic space.[85] Given this complexity, it is hard to imagine that the Federal Court's guidelines could even be replicated in a private process funded by the parties themselves.

Resolution of matters on confidential terms has the effect of driving visibility of Indigenous law underground, making it difficult to assess what role, if any, Indigenous legal traditions played in resolving those matters. If the parties settle, there is generally little or no visibility into the solution the parties reached. Similarly, if a matter is arbitrated, that process is usually private and the decision is rarely made public.

The Federal Court is on the forefront of recognizing the power of this kind of visibility. It has included in its guidelines the suggestion that there may be some value to the parties in Aboriginal law proceedings to making the terms of settlement agreements, or at least summaries of the process and final agreement, public, as publication may provide a model—of both the process and the outcome—for other communities who may be open to resolving similar disputes by way of a settlement.[86] But, to date, it appears that no community has acted on this suggestion.

VIII CONCLUSION

The endeavour to Indigenize civil litigation within the Canadian justice system is an intricate and formidable undertaking; yet it would be a pivotal stride toward the goals of decolonization and reconciliation. The analyses and insights proffered in this paper aim to augment the ongoing discourse surrounding these objectives and to invigorate further

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81. See generally, Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006), online: *Government of Canada* <https://publications.gc.ca/pub?id=9.667883&sl=0>. See also Bryan P Schwartz, "Oral History, Indigenous Peoples, and the Law: Selected Bibliography by Subject Matter" (2018) 41:2 Man LJ 397.

82. David Laidlaw, "The Challenge of Aboriginal Traditional Knowledge in the Courtroom" in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, AB: University of Calgary Press, 2019) at 1.

83. *Mayguard, supra* note 73.

84. Practice Guidelines, *supra* note 72.

85. John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19:1 Wash UJL & Pol'y 167 at 191.

86. Practice Guidelines, *supra* note 72 at 10–11.

transformation of civil dispute resolution practices in Canada, thereby edging us nearer to the realization of this goal.

To facilitate this crucial transition, it is important to dismantle the cloak of confidentiality that typically veils the resolution of civil disputes and to concurrently demystify Indigenous law for those positioned outside Indigenous communities. These challenges are inherently interconnected; the habitual secrecy that encapsulates civil dispute resolution amplifies the obscurity of Indigenous law, thereby perpetuating impediments for Indigenous litigants and precluding a deeper, more nuanced understanding of Indigenous legal principles within the mainstream legal community. Yet, undertaking such paradigmatic shifts is critical for mitigating the disadvantages confronted in civil litigation by Indigenous persons.

The *Beamish* case[87] offers an instructive window through which we can glimpse the potential for the integration of Indigenous law into contractual relationships. As we chart a course toward a future characterized by decolonization and reconciliation, the degree of transparency exemplified in this case emerges as an indispensable asset. Such transparency, sheds light on the unique challenges and opportunities presented by this important cross-cultural intersection, aiding us in our efforts to foster the integration of Indigenous law into the fabric of the Canadian justice system.

87. *Supra* note 22.