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LAW & GOVERNANCE LODGE

Indigenous Legislation:

Drafting Laws that Incorporate Indigenous Legal Principles and Apply Legal Syntheses & Governance Reports

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May 25th, 2019



Indigenous Legal Traditions as among Canada's Legal Traditions:

Pastion v Dene Tha' First Nation 2018 FC 648, Justice Grammond:

Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land... In a long line of cases, from *Connolly v Woolrich* (1867), 11 LCJ 197, 17 RJRQ 75 (Que SC), aff'd (1869), 17 RJRQ 266, 1 CNLC 151 (Que QB), to *Casimel v Insurance Corp of BC* (1993), 106 DLR (4th) 720 (BCCA), **Canadian courts have recognized the existence of Indigenous legal traditions and have given effect to situations created by Indigenous law**, particularly in matters involving family relationships.

Example: Treaties and Agreements:

Example: KUNST'AA GUU – KUNST'AAYAH RECONCILIATION PROTOCOL

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WHEREAS:

A. The Parties hold differing views with regard to sovereignty, title, ownership and jurisdiction over Haida Gwaii, as set out below.

The Haida Nation asserts that:

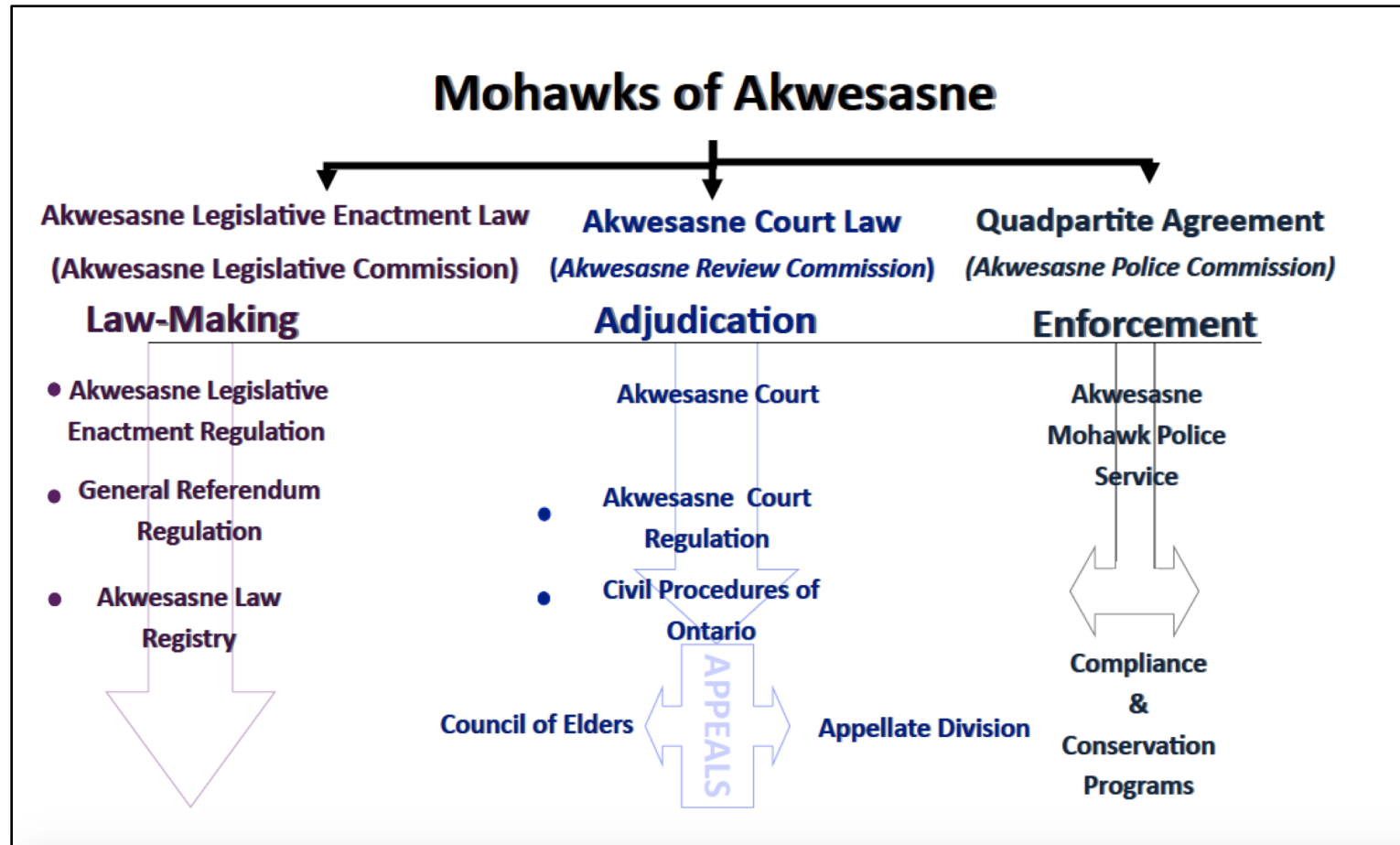
Haida Gwaii is Haida lands, including the waters and resources, subject to the rights, sovereignty, ownership, jurisdiction and collective Title of the Haida Nation who will manage Haida Gwaii in accordance with its laws, policies, customs and traditions.

British Columbia asserts that:

Haida Gwaii is Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia.

Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to co-existence by way of land and natural resource management on Haida Gwaii through shared decision-making and ultimately, a Reconciliation Agreement.

Example: Law-making and Administration of Justice



Courtesy of Joyce King, Director, Akwesasne Justice System



Indigenous Legislation

Justice Grammond: **Indigenous Legislation** “more apt than “custom””:

- “...what the *Indian Act* describes as “custom” is often **the written product of public deliberation within a First Nation**. As Professor Borrows notes, Indigenous peoples are fully entitled to use the written form to express their laws, and that does not make those laws any less Indigenous.”
[citations omitted]: *para* 13.
- “In enacting legislation... a First Nation may, if it so chooses, rely on the mechanisms of Western democracy. It may also provide for a mechanism that blends Western democracy and Indigenous tradition.... Needless to say, **the manner in which various sources of law are blended is a matter for each First Nation to decide and this Court should respect that choice**”:
para. 14

Relationship between Legal Summaries or Governance Reports and Legal Drafting:



Questions:

- How do we move from the legal synthesis to drafting, or use your legal or governance principles to amend existing declarations, policies, bylaws, legislation, codes, constitutions, agreements?
- When should we do this and when should we not?
- What are the opportunities? What do we prioritize?
- Are there aspects of your laws that should not or cannot be included in formal written expressions of law?

Tips and Techniques for drafting laws

Prepared by Janet Erasmus and David C. Elliott, CIAJ, 2004.

Organizing Sections:

1. **Application:** If (a), (b) or (c)...
2. **General Rule:** A person must/may
3. **Restrictions:** The authority may only be exercised after/if
4. **Exceptions:** As an exception to Section 1/ Despite Section 1/ Section 1 does not apply to/if
5. **Process Rules:** Where, when, who, how, how much

Can these tips and techniques of legislative drafters be applied in a way that incorporates Indigenous legal and governance principles?

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Applied to Principled Cree Leadership – Incorporating Legal Synthesis on Cree Generosity and Helping those in Need prepared May 25, 2019 in Wahkohtowin Lodge Methods Workshop:

1. **Application:** if *an individual has resources, power and/or expertise*
2. **General Rule:** *That individual must/may help other individuals or groups who are in need*
3. **Restrictions:** *However, only after/if the individual or group in need:*
 - a. *Is observed to need help for safety or meeting basic needs,*
 - b. *Asks for or willingly accepts help, and*
 - c. *Their dignity and self-determination is acknowledged and upheld.*
4. **Exceptions:** *Despite the above rule, the rule does not apply to/if the individual/group in need:*
 - a. *refuses help or denies they need help,*
 - b. *has the ability to meet their own needs but is not doing so,*
 - c. *is not willing to take responsibility for their actions that caused their situation of need.*
5. **Process Rules:** *Where, when, who, how, how much, steps*

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Legislation Blueprint/Drafting Instructions

Issue	Instructions	Questions
e.g. What is a dispute resolution or decision-making process that will be possible, effective and feel legitimate to all involved?	<ul style="list-style-type: none">• We want a decision making process that applies principles and procedures from the Cree legal tradition to the subject matter.• We want it to be clear language so people can understand it, and we want it to be understandable to communicate with fed and prov. governments for implementation and enforcement purposes.	<ul style="list-style-type: none">• Who should be involved? What circumstances require exceptions or addition?• Who has authority to make a binding or final decision?• What steps are important to include in all circumstances?• Are there exceptions or additions?



Drafting Indigenous Legislation Touchstones:

- Ancient and enduring legal traditions can be incorporated into drafting your own legislation today,
- Indigenous Governments decide whether and what aspects of your own and other law and governance principles and processes will be included in legislation, as well as how to blend other sources of law (Borrows),
- Indigenous groups can decide whether to give drafting instructions to someone else or draft laws yourself.
- Community Engagement is important for public deliberation of legislation
- We recommend legal advice prior to ratification and publication.