CLEBC Indigenous Legal Orders Conference
June 14, 2024
Chief Justice Marchand's Remarks – "Pluralism and Inclusion"
(Abridged Version)

Introduction

limləmt. Thank you for the kind introduction and for the opportunity to be together with you all today.

I accepted the invitation to deliver this keynote without a set topic but eventually settled on topics that have been on my mind, in one way or another, for a long time: pluralism and inclusion.

I want to start with a story about my father.

My Dad

Like me, and probably many of you, my dad often felt that he inhabited more than one world.

One of his worlds was made up of his Syilx family, people, culture, language and traditions. The other was what I'll call his "Canadian" world that included the education he received in the Six Mile Creek Federal Indian Day School on our reserve, the Kamloops Indian Residential School and, eventually, the public school system, along with the impact of political, economic, legal and other forces on the land, his family, his community and his people.

My dad was culturally grounded. *nsyilxcən* was his first language. He grew up on the land. His family had some cattle, horses and chickens, grew hay, had a nice garden, and also hunted, fished and gathered edibles—not the kind you find at the corner cannabis store, but berries, roots and other things.

Against all the odds, my dad completed bachelor's and master's degrees in Agriculture at a time when obtaining that type of higher education was quite rare among Indigenous people in Canada. And, he became a range management research scientist. He was unique, at least at that time, as a person who knew the *nsyilxcən*, scientific and common names of all the flora and fauna of the southern interior of British Columbia.

He was as comfortable calling a grizzly bear *kiʔlǽw'naʔ* (that's *nsyilxcən*) as he was calling a yellow-bellied marmot *marmota flaviventris* (that's Latin). He knew what was good to eat and what leaves to chew up to make a salve if you got stung by a bee, but also which plants were haploid and which were diploid, and how to optimize the productivity of grasslands. He had a great array of bird and animal calls, and taught his grandchildren all about the natural world. He was what we would today call an ecologist, which wasn't very different from just being himself as a Syilx person.

My dad was also active politically as he tried to right injustice. One of the greatest hurts in his life was not being able to vote in his own country. He fought to change that and many other inequities.

In 1965 or so, my dad was at a meeting with others involved in the North American Indian Brotherhood. The late, great George Manuel said they needed someone in Ottawa, someone who was grounded in Indigenous ways but educated in Canadian ones. My dad was the obvious choice and soon became the first "Indian" to work as a special assistant to the Minister, ironically, of Citizenship, who was responsible for the Department of Indian Affairs.

That job in Ottawa led to a bunch of other political firsts, as my dad did his best to bridge two worlds and bring them together in a good way.

I'd like to think he never approached the two spheres of his life hierarchically. Rather, he saw how one could complement and enhance his understanding of and life in the other, and vice versa. I will say a bit more about this later.

Pluralism and Inclusion Overview

Let's now turn more directly to the topics being discussed at this conference: Indigenous legal orders, language, culture, and transforming legal institutions. I don't profess to be an expert in any of these topics but they are all of deep interest to me.

It has been impressive hearing—today and on other occasions—about the work being done to preserve and promote Indigenous languages, laws, traditions and cultures. All of this work is playing an important role in advancing another subject that is of deep interest to me, and I hope to all of you: reconciliation.

The Truth and Reconciliation Commission of Canada ("TRC") defined reconciliation as an ongoing process of establishing and maintaining mutually respectful relationships.[1] They recognized that a critical part of the process had to involve revitalizing Indigenous law and legal traditions. They saw how important it was for all Canadians to understand how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships could inform the reconciliation process.

The TRC saw the value in both: (1) making space for the implementation of Indigenous legal orders; and (2) reforming Canadian legal orders by taking account of Indigenous ones. The first of these approaches we recognize and label as "pluralism" and the second as "inclusion".

I am going to speak about both.

[1] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015), online (pdf): <ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>.

Legal Pluralism

I'll start with legal pluralism.

The British Columbia Law Institute provides a workable definition of legal pluralism: it is "the operation of two or more legal orders within the same geographical jurisdiction or social space."[2]

Various courts, including the Supreme Court of Canada ("SCC"), have already recognized legal pluralism as a fact in Canada—it exists and is not something foreign or new. The best known and most obvious example of legal pluralism is the co-existence of the common law and civil law in Canada.

We also see examples of legal pluralism in the context of Indigenous legal orders all around us. Some Indigenous laws flow from powers delegated to Band Councils via s. 91(24) of the *Constitution Act, 1867*[3] and the *Indian Act*,[4] some are recognized under s. 35 of the *Constitution Act, 1982*[5] and some stand entirely on their own.[6]

To date, the SCC has not discussed legal pluralism extensively, but the Court has long acknowledged its existence, for example, in the family law context where each province defines the effect of common law relationships differently. The Court has said these differences are "a mark of Canadian legal pluralism."[7]

One notable piece of recent SCC commentary can be found in *Dickson v. Vuntut Gwitchin First Nation*[8] where Justices Martin and O'Bonsawin, in dissent, stated: "The *Constitution Act, 1982*, which includes the *Charter*, is a pluralist document that is capable of incorporating and reflecting Indigenous and non-Indigenous perspectives alike. The living tree interpretive doctrine ensures that these perspectives can be built upon in the future."[9]

Although the justices were in dissent, the recognition of pluralism in the specific context of Indigenous laws falls within a long line of SCC cases. For example, although accompanied by some limiting words, former Chief Justice McLachlin confirmed in *Mitchell v. M.N.R.*[10] that Indigenous laws are presumed to have survived sovereignty and to continue as part of the law of Canada.

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[2] British Columbia Law Institute, "Legal Pluralism in Canada: Reconciling Crown Legal Frameworks Program, Primer 3" (September 2023) at 3, online (pdf): *British Columbia Law Institute* <www.bcli.org/wp-content/uploads/PRIMER-3-Legal-Pluralism-in-Canada.pdf>.
[3] (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5
[4] R.S.C. 1985, c. I-5.
[5] Being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
[6] See Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1.
[7] *Quebec (Attorney General) v. A.*, 2013 SCC 5 at para. 279.
[8] 2024 SCC 10.
[9] *Ibid* at para. 323.
[10] 2001 SCC 33.

The jurisprudence and commentary on the emergence—or, better, re-emergence—and continuation of Indigenous legal orders are growing. Judges are relying on scholars like John Borrows and many others to apply an evolving understanding of what law is and how different legal orders interact and co-exist.

In a judgment now 10 years old, *Alderville First Nation v. Canada*,[11] Justice Mandamin of the Federal Court provided a useful overview of the existence of Indigenous legal orders as recognized through a legal pluralist lens, starting with *Connolly v. Woolrich*,[12] which was decided in Canada's birthyear, 1867. In that case, the Quebec Superior Court held that a Cree marriage conducted in accordance with Cree custom was legally valid, thus recognizing the co-existence of Indigenous law alongside, and as part of, Canadian law.

Justice Mandamin went on to enumerate the various other common law, statutory law and constitutional law contexts providing for the operation of more than one legal order in the same social and geographical space (consistent with the British Columbia Law Institute's definition of legal pluralism). He commented that an aspect of reconciliation is that, when Canadian law recognizes Indigenous law, it may at times have the effect of altering or transforming Indigenous law so that it and Canadian law are aligned.

This Federal Court jurisprudence has been built on by Justice Grammond both in his decisions and his commentary. In *George v. Heiltsuk First Nation*,[13] Justice Grammond discusses the independent coexistence of Canadian and Indigenous laws, while also acknowledging that there may be contact points between the two systems. He concluded in that case that the court did not have jurisdiction to review decisions made solely pursuant to Indigenous laws.

In *Pastion v. Dene Tha' First Nation*,[14] Justice Grammond observes that First Nations law might blend Indigenous traditions with Western democratic traditions, and that the court's role is to respect the manner in which various sources of law might be blended as a matter for each First Nation to decide.

In his paper "Recognizing Indigenous Law: A Conceptual Framework",[15] Justice Grammond develops these ideas further. For example, he talks about Indigenous people's right to define their laws based on internal deliberation. He observes that Indigenous law, like the common law and civil law, is continuously evolving and borrowing from other traditions.

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[11] 2014 FC 747 [*Alderville*].
[12] 17 R.J.R.Q. 75 (Qc Sup. Ct.), cited in *Alderville*, *supra* note 11 at para. 26.
[13] 2023 FC 1705.
[14] 2018 FC 648.
[15] Grammond, *supra* note 6.

And most recently, Justice Grammond delivered a judgment in *Way v. Nunatsiavut Government*[16] where he spoke about the need for courts to show deference in the Indigenous law context. He wrote that "deference towards Indigenous decision-makers reinforces self-determination"[17] and that "deference may be especially warranted where an Indigenous decision-maker is applying unwritten Indigenous law."[18]

While my focus here has been on jurisprudential developments, I note as an aside that independently the British Columbian government has explicitly recognized the existence of legal pluralism. In its *Declaration on the Rights of Indigenous Peoples Act Action Plan: 2022–2027*[19] it says: "there are multiple legal orders, including Indigenous laws and legal orders with distinct roles, responsibilities and authorities."[20]

In a number of cases, pluralism is depicted as only achievable where "people of all groups understand and tolerate each other."[21] I personally don't prefer or use the word "tolerate". The word connotes to me a group that considers itself to be superior "putting up" with a group it considers to be inferior. I have never thought that is something we should aspire to.

I prefer an equality lens where difference is acknowledged, accepted, understood, accommodated and perhaps even celebrated. I like to think of pluralism as a harmonious co-existence.

The British Columbia Law Institute has said that "applying a legal pluralist analysis to coexisting legal orders can help with both understanding existing arrangements and building and maintaining respectful relationships between legal orders."[22]

For me, the key words here are <u>understanding</u> and <u>respect</u>, which go hand in hand. For those who don't see Indigenous peoples as having "real laws", there is much learning to do and, I believe, with that learning, respect will be built. I would say the same thing to anyone who says the Canadian justice system has little of value to offer.

Professor Val Napoleon has offered some observations that, to me, go to the heart of reconciliation between legal orders: what matters is learning to see the law of others as law in its own right, which may push the boundaries of our understanding of what law is, in order to make visible and intelligible the laws beyond our own perspectives.[23]

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[16] 2024 FC 886.
[17] *Ibid* at para. 24.
[18] *Ibid* at para. 25.
[19] British Columbia, Ministry of Indigenous Relations and Reconciliation, *Declaration on the Rights of Indigenous Peoples Act Action Plan: 2022–2027*, (Victoria: British Columbia Ministry of Indigenous Relations and Reconciliation, 2022), online (pdf): <www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf>.
[20] *Ibid* at 6.
[21] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 47, quoting *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 212, 1996 CanLII 148 (McLachlin J. dissenting in part).
[22] *Supra* note 2 at 3.
[23] Val Napoleon, "Did I Break It? Recording Indigenous (Customary) Law" (2019) 22:1 Potchefstroom Elec LJ 1 at 25–26.

Canada[24] and British Columbia's[25] adoption and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*'[26], specifically its declaration of the right of Indigenous people to develop and maintain their juridical systems and customs[27] will not get far if we are unable to see the very existence of those systems and customs in the first place.

Inclusion

Is delegation, recognition, acknowledgement, accommodation, emergence or re-emergence of Indigenous laws and legal orders all we need? I say "no" and this is where "inclusion" comes in.

Speaking as the Chief Justice, it should be self-evident that I believe in and am invested in the integrity and value of the Canadian justice system. This is not to say I don't see flaws in the existing system as it is and as it has been historically.

On the contrary, I see the system's many strengths but also its weaknesses. I also see the breadth of its impact on us all and its important role in preserving all that is good and improving all that is not good in our society. And, as much as we know Indigenous legal orders are not going anywhere, neither are Canadian ones.

So, we can and must do better to ensure the Canadian justice system lives up to its promise. We must recognize that the way forward has to involve making the Canadian system more inclusive and welcoming.

It's no big secret, especially to the people in this room, that Indigenous people in Canada come into conflict with the law in negative ways in grossly disproportionate numbers. In particular, incarceration and child apprehension rates are astronomically higher for Indigenous people than for other people in Canada.[28]

Yet, in other areas, Indigenous people experience barriers to accessing the justice system.[29] When faced with a legal issue, many Indigenous people do not turn to the justice system for help.

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[24] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.
[25] *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44.
[26] *United Nations Declaration on the Rights of Indigenous Peoples*, OHCHR, 61st Sess, UN Doc A/RES/61/295 (2007) GA Res 61/295 [*UNDRIP*].
[27] *Ibid* at art. 34.
[28] See e.g. Paul Robinson et al, "Over-representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021" (12 July 2023), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2023001/article/00004-eng.htm>; Tara Hahmann, Hyunji Lee & Sylvie Godin, "Indigenous Foster Children Living in Private Households: Rates and Sociodemographic Characteristics of Foster Children and Their Households" (18 April 2024), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/41-20-0002/412000022024001-eng.htm>.
[29] See e.g. Ardith Walkem, *Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights*, (Vancouver: British Columbia Human Rights Tribunal, 2020), online: <www.bchrt.bc.ca/app/uploads/sites/876/2023/03/expanding-our-vision.pdf>.

The reasons for both of these phenomena are rooted in our colonial and post-colonial history of misguided notions of superiority, and the twin, opposing but equally harmful policies of assimilation and exclusion. I pause to ask you, how did the colonial and post-colonial powers in Canada expect to assimilate Indigenous people while excluding them at the same time? Both policies were deeply flawed.

Many Indigenous people in Canada see an adversarial justice system focused on correction and punishment that does not reflect their histories, cultures, customs and values. Many have historically experienced a system that is unjust and unfair, where they do not feel respected or understood, and where they usually lose. As a result, even though we have taken a number of very positive strides, many Indigenous people do not exercise their rights or participate as a plaintiff, complainant, witness or juror. Why bother?

For example, why would an Indigenous person think to turn to a human rights tribunal when it's "normal" to face discrimination? Why would an Indigenous person file a criminal complaint when they don't expect to be treated with respect? Why would an Indigenous witness attend court when they don't expect to be believed? Why would an Indigenous person show up to serve on a jury when they, their families and their communities have not had good experiences in the justice system?

The result is isolation, division and conflict, which isn't in anyone's interest.

Clearly, we have some heavy lifting to do to demonstrate that we have a justice system for all. But, I am optimistic that we can make real progress. My optimism is not a rose-coloured glasses kind of optimism. It is a realistic optimism based not only on my observations of the real progress being made to revitalize Indigenous legal orders but also my experiences in the Canadian justice system.

Here is an example to demonstrate what is possible within the Canadian justice system.

I began working for residential school survivors in the late 1990s. At the time, standard civil litigation was the only real recourse available. Given how the Canadian justice system had so negatively affected Indigenous people in Canada for such a long time, my residential school clients were understandably very reluctant to go to court.

Just going through examinations for discovery was pretty awful for them. Despite testifying with honesty, dignity and integrity, they often felt disbelieved and disrespected. No offence to the individual Department of Justice counsel who were doing their best, but many of my clients were shredded by that experience.

A lot of questions focused on causation issues so my clients felt like Canada was trying to blame other traumas they experienced outside of residential school for the difficulties they were experiencing in their lives. In other words, it felt like Canada was arguing that, as Indigenous people in Canada, life was going to be pretty crummy for them regardless

of their residential school experiences. Who could possibly feel good about the prospect of going to court expecting to be treated like that?

And, what about the forever relationship between Canada and Indigenous people? How was that relationship going to improve by Canada defending the indefensible in an adversarial setting?

From the start, I knew we needed to find a better way. Fortunately, I was not alone. In time, to its credit, Canada invited me and other like-minded claimants' counsel to work on various committees looking for a more proportional, supportive, less adversarial and, frankly, less damaging way of resolving residential school claims. And, I have to say that we did find a better way through the *Indian Residential Schools Settlement Agreement*[30] and the adoption of the Independent Assessment Process ("IAP").[31]

The IAP was informed by restorative justice principles. It was a supportive and non-adversarial process that awarded compensation to claimants who suffered specific types of sexual, physical and emotional abuse.

Was the IAP perfect? Of course not. But, it developed such credibility that over 30,000 of about 80,000 living former residential school students advanced claims.
And, the vast majority of the claims were validated by independent adjudicators. Although money was no substitute for what survivors experienced and lost, the validation, recognition, support, treatment, compensation and apologies they received through the process made a big difference in many lives.

If not for the non-adversarial and claimant-centred nature of the process, there's absolutely no way that 30,000 plus former students would have come forward and there's absolutely no way the Canadian justice system could have adequately addressed the thousands of claims that had been filed in the courts. Access to justice would have been severely undermined for everyone—with many survivors not seeking justice and many non-Indigenous parties being slowed down or prevented from accessing a justice system clogged with the complex claims of the survivors who had filed claims.

Another example of what is possible is the launching of many Indigenous sentencing courts all across British Columbia—and Canada for that matter.

I loved serving as a Provincial Court judge. The greatest highlight was sitting in the Cknúcwentn Indigenous Sentencing Court in Kamloops. *Cknúcwentn* means "the place where help is given" in *Secwepemctsín*, and that's what we did. With the input of Elders and others, we developed healing plans to help Indigenous offenders turn their lives

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[30] [Settlement Agreement] (2006), online (pdf): <www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf>.
[31] See Indian Residential Schools Adjudication Secretariat, "A Guide for Claimants in the Independent Assessment Process" (10 April 2019), online (pdf): *Prince Edward Island* <www.iap-pei.ca/former-ancien/iap/claimant_guide-eng.pdf>.

around for the benefit of themselves, their families, their communities and, really, all of us, including victims.

Let me bring home the benefits of Indigenous sentencing courts by telling you about a particularly memorable case.

An Elder from a local reserve pled guilty to one count of aggravated assault. During an evening of drinking at his home on the “rez”, the Elder stabbed a drinking buddy six times. The wounds required numerous sutures but luckily the friend recovered without incident.

The usual range of sentence for an aggravated assault is 16 months to six years, with unprovoked attacks involving a weapon typically landing at the higher end of the range.[32]

The Elder had a pretty extensive record and the Crown proceeded by indictment. In the not-so-very old days, the Elder could have expected to be incarcerated for four, five or six years.

But, a Gladue report informed me of the many traumas the Elder and the Elder’s family had endured, including those endured as a result of attending residential school. The complainant attended court to say he had forgiven his friend and did not want him to be incarcerated. The Elder’s counsellor attended court and shared that he had successfully completed violence prevention and anger management programs.

The Chief of the community attended court and informed me:

- when sober, the Elder was a valued community member with important traditional knowledge;

- the community wanted the Elder to be accountable to the community, and proposed that he do so by working for the community and sharing his traditional knowledge with youth; and

- the community did not want to lose the Elder through a custodial sentence, and was prepared to provide the Elder with housing, income support and access to traditional healing opportunities as well as counselling.

The Cknúcwentn First Nations Court Elders recommended the offender attend the sweatlodge and complete residential trauma and substance use programs designed specifically for residential school survivors.

After considering all of the information and input from others, I concluded the right approach was to emphasize rehabilitation and restoration.

[32] See *R. v. Craig*, 2005 BCCA 484 at para. 10.

At the time, a conditional sentence order was not available, so I imposed a 3-year period of probation with 6 months of house arrest, followed by 12 months of curfew and 100 hours of community work service, abstention, and leave-on-request terms. In my view, the terms of the probation order adequately addressed denunciation, deterrence and protection of the public.

I attached a healing plan to the probation order, including terms that the offender participate in a community restorative justice program, attend a peace-making circle, attend counselling, make best efforts to attend an identified trauma and substance use program for residential school survivors, participate in the sweatlodge and work with community youth.

Subsequent reviews in the Cknúcwentn Indigenous Sentencing Court indicated that:

- The Elder was doing well and was complying with all conditions, including the abstention term.

- The Elder had written a formal letter of apology to the complainant.

- With the Chief's help, the Elder had enrolled in the "Choices" program and was on a waiting list to attend the trauma program at Tsow Tun Le Lum.

- The Elder had worked with youth at a summer camp.

- The Elder would be fulfilling his community work service hours through construction of corrals for the benefit of the community.

- The Elder was happy to have the support of Chief and Council.

- Chief and Council were proud of the Elder.

This was obviously a great outcome for the Elder and the community… and taxpayers did not have to foot the high cost of housing the Elder for up to two years for no apparent benefit.

Through these experiences, I have learned that the Canadian justice system can be improved if we listen, learn, are open-minded to including Indigenous perspectives, and take action—even if, or maybe especially when, that takes some out of their comfort zones.

Courts are learning gradually, and I'm now aware of a number of instances across Canada where Indigenous perspectives and practices have been incorporated into proceedings. For example:

- In this jurisdiction, Indigenous parties have been provided the opportunity for Elders to attend and perform smudging or cleansing ceremonies in the courtrooms where the hearings take place;[33] and

- Courts in a variety of other jurisdictions have incorporated Indigenous ceremonies and symbols such as smudging, blanketing, drumming, and eagle feathers into their proceedings.[34]

Given that Indigenous incarceration rates remain stubbornly and grotesquely high, some may argue that inclusion has failed, but I don't think we can say that—we simply don't know where the justice system would be now if we hadn't made the efforts we have. My educated guess is that things would be worse.

We have taken some important strides, but there is still a long way to go.

Back to Dad

Let me now take a moment to relate things back to my opening comments about my dear old dad.

As a sitting judge, it is not my place to say what the future role of Indigenous laws will be in our society. I have personal views of course, including that judges have a duty to learn more about what is heading our way. But, like my dad and his approach to the natural world, I do not see the future of law as a matter of hierarchy between two (or more) competing systems.

As things develop, and without pre-judging anything, I expect to see:

- core values like fairness, informed decision-making and transparency will transcend and be reflected in both systems;

- the systems will complement one another so that justice is done in a meaningful way for all parties involved;

- the Canadian justice system will learn from and improve because of the development and implementation of Indigenous legal orders; and

- Indigenous legal orders will be able to borrow from or depend on the Canadian justice system as they evolve, get stronger and become more established.

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[33] See e.g. The Provincial Court of British Columbia "Reconciliation in Action: Report on New Westminster First Nations Court" (January 2024) at 8, online (pdf): *The Provincial Court of British Columbia* <www.provincialcourt.bc.ca/downloads/FirstNationsCourt/Reconciliation%20in%20Action_Report%20on%20New%20Westminster%20First%20Nations%20Court%20Provincial%20Court%20of%20BC.pd>.

[34] See e.g. The Provincial Court of Saskatchewan, "Protocol: Indigenous Smudging Ceremony" (13 February 2023), online (pdf): *Saskatchewan Law Courts* <sasklawcourts.ca/wp-content/uploads/2023/02/PC_Smudging_Protocol.pdf>.

Conclusion

It's not lost on me that the British Columbia First Nations Justice Council has structured its work along two "tracks".[35] "Track one" is about reforming the Canadian justice system to be safer and more responsive to Indigenous peoples. "Track two" is about restoring Indigenous justice systems, legal traditions and structures. To me "track one" is what I have referred to as "inclusion" while "track two" is all about "pluralism". We need both.

So, let's continue to encourage all actors within the Canadian justice system to learn more about their local Indigenous communities, their histories, their ways, their challenges and their resources. How else can we meaningfully understand, accommodate and meet the needs of the Indigenous people who are interacting with the justice system?

Let's work hard to build mutually respectful relationships with lots of space for Indigenous people, communities, customs, traditions and laws. How else can we demonstrate that we can deliver justice for everyone?

Let's take responsibility for our own learning, and show humility by really listening to the perspective and wishes of Indigenous people and communities. Let's not make harmful assumptions or think we know best. And, let's not allow ourselves to be passive bystanders to inequity. Instead, let's take action aimed at achieving a harmonious co-existence.

These calls were raised by one of my predecessors, former Chief Justice Lance Finch, in "A Duty to Learn: Taking Account of Indigenous Legal Orders in Practice",[36] where he stated there is a legal obligation to take account of the Aboriginal perspective, and that the courts must be capable of understanding the nature of Aboriginal rights and interests.

And these calls were reinforced and advanced further by my immediate predecessor, former Chief Justice Robert Bauman, in "A Duty to Act",[37] where he stated that "…our assumptions about law and equity" must be questioned; we must unlearn and defer; and we must hold space for hard conversations and be willing to be wrong.[38]

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[35] British Columbia First Nations Justice Council, "BC First Nations Justice Strategy" (February 2020), online (pdf): *BCFNJC* <bcfnjc.com/wp-content/uploads/2022/04/BCFNJC_Justice-Strategy_February-2020.pdf>.

[36] (November 2012), online (pdf): *Queen's University* <law.queensu.ca/sites/lawwww/files/Finch%20CJ%20Lance%20S.G.%20-%20The%20Duty%20to%20Learn.pdf>.

[37] (Paper delivered at the Canadian Institute for the Administration of Justice's 2021 Annual Conference: Indigenous Peoples and the Law, Vancouver, 17 November 2021) [unpublished] online (pdf): <www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/speeches/A_Duty_to_Act_CIAJ_%20Indigenous_Peoples_and_the_Law.pdf>.

[38] *Ibid* at para. 8.

The image of braiding has been invoked by many to illustrate the strengthening of the individual “strands” of law through their joining together in mutual respect, each preserving their unique identity and purpose while complementing the whole.[39]

This conference and similar opportunities to deepen our understanding of Indigenous legal orders and their legal and theoretical underpinnings give us the “technique” or the “methodology” for braiding that is essential to our path of reconciliation. Let’s use them.

Thank you to the organizers, presenters and participants for your important work, and thank you for inviting me to be a small part of it today.

[39] See e.g. Canadian Justice Institute for the Administration of Justice, “Episode 85: 2024 Public Law Conference: Rights, Duties, and Powers” (48 May 2024) at 10m:00s–10m:54s, online (podcast): *CIAJ* <ciaj-icaj.ca/en/podcasts/2024-public-law-conference>; Gordon Christie, “Indigenous Legal Orders, Canadian Law and UNDRIP” in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation Press, 2019) 47 at 47–48.