

Three interfaces between Indigenous law and the Canadian courts



PRESENTED BY

The Honorable Sébastien Grammond

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This presentation by Sébastien Grammond focuses on the actions of the courts to establish a line of communication between the Canadian and Indigenous legal orders. Judge Grammond specifies that, by Indigenous legal order, he means endogenous Indigenous law, in other words the law produced by communities rather than the positive state-created law that has been imposed on them. He looks at three interfaces. The first is created when Canadian courts apply Indigenous law; the second, when the courts, in exercising their discretionary powers, take Indigenous law into account or draw inspiration from it; and the third when, by delegation, Indigenous decision-makers apply Indigenous law subject to judicial review by the courts.

Application of Indigenous law by the courts

First, Sébastien Grammond looks at the application of Indigenous law by the courts. He examines the way in which judges have recognized the validity of so-called “customary” marriages and adoptions¹, and then refers to the decision *Tsilhqot'in Nation*², in which the judge relies on his knowledge of the governance system of the First Nation concerned to rule on who should hold Aboriginal rights under Canadian law. Last, in *Restoule*³, the court bases its decision on its understanding of Anishinabe legal principles to interpret a treaty between the Nation and the Crown. In this jurisprudential context, judges must work hard to understand Indigenous law, both in terms of its nature and content but also in terms of its context, while taking care not to slip into an ethnocentric search for equivalents in Canadian law.

Consideration for Indigenous law by the courts

Next, Sébastien Grammond examines the cases in which judges, exercising their discretionary power, draw inspiration from Indigenous law and attempt to integrate it into their work. He gives examples of adapted processes, such as the establishment of sentencing circles or specialized courts for Indigenous offenders. He also looks at cases of substantial adaptation, where the court takes the Indigenous conception of punishment into account in sentencing⁴. This way of taking the Indigenous perspective into account has the advantage of flexibility, but has not been formalized and remains dependent on the judge involved. Within this framework, Indigenous law remains little-known and little-recognized, which increases the risk of a deformed view.

Application of Indigenous law by an Indigenous decision-maker, with judicial review by the courts

Last, Sébastien Grammond turns to the cases in which the decision, based on Indigenous law, is delegated to an Indigenous decision-maker. He gives the example of recognition for customary adoptions, first introduced in the Northwest Territories and Nunavut, and more recently incorporated into the Civil Code of Québec, where an Indigenous decision-maker, selected on the basis of knowledge of Indigenous law, examines situations of customary adoption and issues a certificate with legal effects recognized by the state. In another example, the electoral courts selected by First Nations hear disputes and certify election results. Grammond emphasizes that this mechanism ensures greater respect for the governmental and decision-making autonomy of the Indigenous peoples. However, the Canadian courts retain the power to review the decisions made by the Indigenous decision-makers, although they generally exercise this power with great reserve. All these mechanisms contribute to a more respectful relationship between the various legal orders.

¹ *Johnstone et al. v. Connolly*, Quebec Queen’s Bench – [1869], 17 R.J.R.Q.; *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22 (B.C.C.A.).

² *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.

³ *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701.

⁴ *R. v. Gladue*, [1999] 1 SCR 688; *R. v. Ipeelee*, 2012 CSC 13, [2012] 1 SCR 433.

