

SECTION 2

Methods for Revitalizing Indigenous Laws

Just as there are various sources of Indigenous laws and those sources may vary among First Nations, so too there are various means for revitalizing and asserting those Indigenous laws.

Some First Nations may choose to preserve their laws orally and others in writing. There are different frameworks and tools that First Nations use to preserve their laws, such as oral histories, consultation protocols, or written legal codes. Any and all of these may be used by First Nations when engaging in EA processes.

Whatever the framework, a First Nation may first want to engage in a process of identifying the central principles of their

Indigenous law in order to then revitalize and assert that law. This section summarizes two suggested methods for doing so: the participatory method and the case brief model.

1. A Participatory Method of Revitalizing Laws

The aim of the work of revitalizing Indigenous law is to identify Indigenous legal principles from various community sources, such as interviews with Elders and Knowledge Holders and research about oral traditions and histories. Then, that information is put into a format that can be used in Canadian legal frameworks, such as an EA process.

Typically (though not always), that is in a written format such as a statement of legal principles, a consultation or engagement protocol, or a declaration.

On the following page is a summary of one method that draws on best practices from organizations that work with First Nations on revitalizing their Indigenous laws – namely, the Indigenous Law Resource Unit⁵⁷ and West Coast Environmental Law.⁵⁸

⁵⁷ Indigenous Law Research Unit: A research unit at the University of Victoria's Faculty of Law. ilru.ca

⁵⁸ West Coast Environmental Law: Transforming the legal landscape. wcel.org

A Participatory Method for Revitalizing Laws



What is your First Nation's goal?

- Write down your laws to give to others?
- Create a Land Code?
- Develop a Consultation Protocol?



Gather your resources

- Where can you find about oral history, land-based learnings and other teachings?
- E.g., interview Elders, find historical records, transcripts from court claims



Analyze your sources to understand the legal principles

- What legal principles are in the information you collected?
- E.g., what do the oral histories and stories tell you about how to care for the environment or how to interact with others?



Gather the legal principles and create a framework

- Develop a clear framework, keeping in mind your goal. Clearly state the legal principles so that they can be asserted and enforced
- E.g., draft your law, Land Code or protocol



Report back to your First Nation

- Take the framework back to your First Nation for comment and feedback
- E.g., hold workshops, host engagement sessions



Revise the framework and report back

- Incorporate feedback and comments and report back to your First Nation

2. Case Brief Model for Revitalizing Indigenous Laws

Dr. Borrows provided a model for synthesizing Indigenous law⁵⁹ that treats First Nations stories as similar to case law from Canadian courts, and those stories are used to inform and create legal principles. Canadian law that comes from court cases is referred to as **precedent**.

Dr. Borrows describes how First Nations stories are similar to case law precedent, as they provide a reason for and reinforce consensus about broad principles. They justify deviations from generally accepted standards, and provide moral and cultural sanctions if precedent is violated.⁶⁰ As with court cases, oral stories can be used as a record of fact patterns and the moral sanctions for breaking Indigenous law.⁶¹

Dr. Hadley Friedland, an associate law professor at the University of Alberta, and

⁵⁹ Borrows, J. 1996. With or without you: First Nations law (in Canada). 41 *McGill L.J.* 629, at 646-665.

⁶⁰ Borrows, J. 1996. With or without you: First Nations law (in Canada). 41 *McGill L.J.* 629, at 647.

⁶¹ Borrows, J. 1996. With or without you: First Nations law (in Canada). 41 *McGill L.J.* 629, at 647.

Dr. Val Napoleon, a legal scholar and a member of the Saulteau First Nation and adopted member of the Gitanyow (Gitxan) House of Luuxhan, have built on Dr. Borrows' practice of "briefing" Indigenous oral stories.⁶² The case brief model is similar to what lawyers practising Canadian law do to summarize the legal principles that have been established or discussed in a court decision. You can use the case brief model to summarize the legal principles of oral history in a story.

This process for creating a set of legal standards from oral history can take place through two steps:

Step 1 – Identify single Indigenous oral histories and consider their legal meaning through the case brief model; and

Step 2 – Collect several oral stories and find the legal standard that comes from all of those stories.

Step 1 – Case Brief Model: Individual Oral Stories

The following is how you would structure a **Case Brief** for each individual oral story.⁶³

Case Brief:

- What is the name of the story?

Issue/Problem:

- What is the main human problem you are looking at within the story?
- What is the story trying to tell you?

Facts:

- What are the main parts of the story?
- Focus on the parts that matter to the issue or the main problem that you are looking at within the story.

Decision/Resolution:

- What is the resolution to the problem? Is there a decision that resolves the problem? If there is no clear human decision, what action resolves the problem?
- It is important to think back to the issue or problem you identified. Most stories have many decisions, and the key is focusing on what decision or action leads to the resolution to the particular issue or problem you are looking at.

Reason:

- What is the reason behind the decision or resolution? Is there an explanation in the story? If not, can you infer what the reasons are?

It is the shared and collective reasoning that makes this a legal analysis. Sometimes the stories state the reasons explicitly, meaning the reasons are stated clearly, and at other times the reasons are implicit, meaning you have to do some thinking to figure out the reasons. In either case, the task is to consider **the "why"** behind the decision or response.

After "briefing" an individual oral story, First Nations can then either use the individual law or moral teaching provided in the law, or move on to Step 2 as a way to continue building a larger legal framework based on multiple stories.

Step 2 – Case Brief Model: Multiple Oral Cases

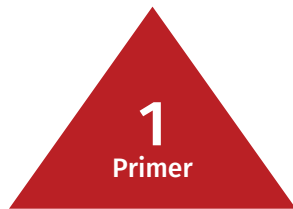
Dr. Friedland and Dr. Napoleon suggest a second step that has three stages: (1) Primer, (2) Synthesis, and (3) Preliminary Legal Theory.

1. Primer

Contextualize the story within the po-

⁶² Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16.

⁶³ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 23.



litical structure, legal order and history of the First Nations in order to inform the legal analysis. This is like a back-grounder on the individual First Nation so you can understand how the story fits within the culture and so you can understand the relevance of the story.

2. Synthesis

The synthesis stage is crucial. At this stage, First Nations can consider different elements of stories together and develop useful standards that explain, justify or are consistent with a group of particular legal decisions.⁶⁴ During synthesis, you are pulling standards from individual stories; together, these standards inform what the First Nation's law is and how it operates in response to a particular issue or in a particular context.⁶⁵

Through processing multiple stories from multiple Elders and Knowledge Holders, you can develop a broad analytical framework, that includes the following information:

1) Legal processes: Who are the primary decision makers? What are the steps involved in coming to a decision or resolution?

2) Legal responses and resolutions: What principles govern appropriate resolutions to harms and conflicts between people?

3) Legal obligations: What are the 'shoulds'? What principles govern individual and collective responsibilities?

4) Legal rights: What should people be able to expect from others – procedurally and/or substantively?

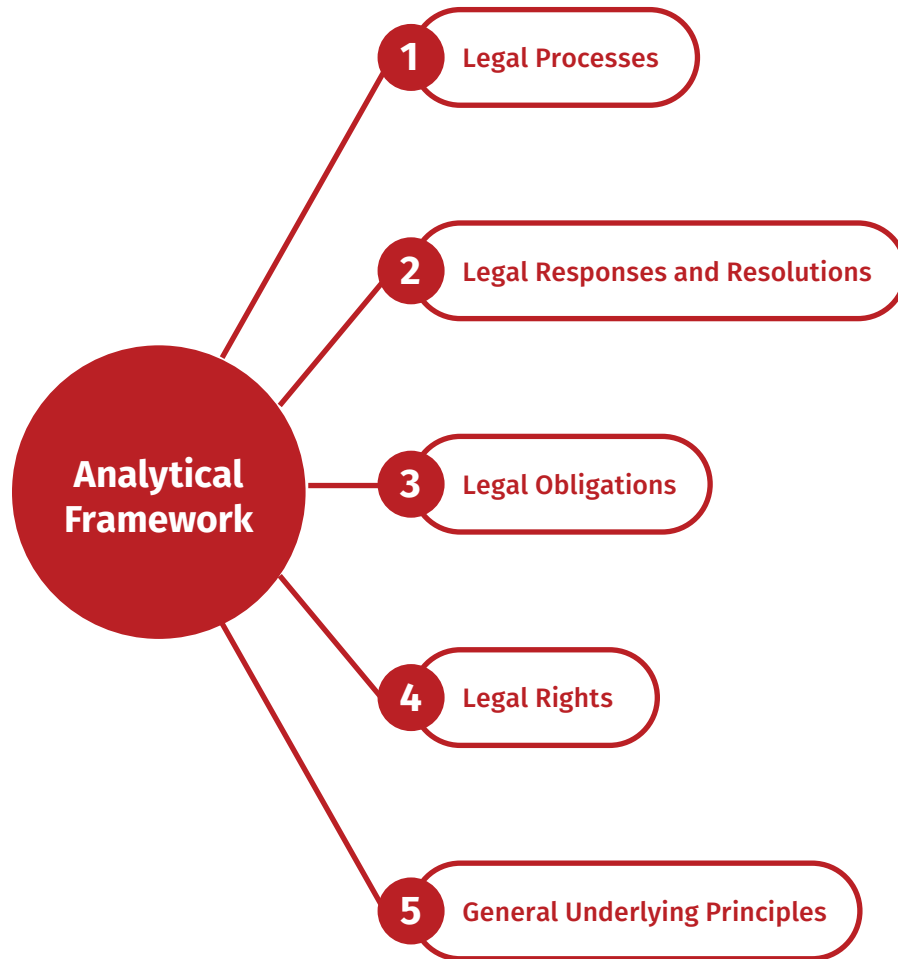
5) General underlying principles: What are other recurring themes? What are the principles that guide the expression and application of the law?

This system organizes information about the Indigenous law, whether collected through the case brief method or through observing other sources of law discussed earlier in this Indigenous Laws Module, and allows the information to be applied, added and adapted to present circumstances.⁶⁶

⁶⁴ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 28.

⁶⁵ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 28.

⁶⁶ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 28 and 29.



3. Preliminary Legal Theory

The synthesis of Indigenous law through the compilation of relevant oral history can also support the development of a broader statement of a First Nation's legal theory or their Indigenous law. This can be helpful for First Nations interested in fully developing a legal code to be applied in different contexts – for example, in an EA process.

Resources to Help with the Process

First Nations approach the task of revitalizing Indigenous laws in different ways. For example, the Anishinaabek Nation's Legal Department launched the Revitalization of Anishinaabek Legal Traditions initiative. That initiative brought together Knowledge Holders from each of the Anishinaabek First Nations to share knowledge and to dialogue as to how Indigenous laws and customs might be successfully revitalized and implemented into the modern context.⁶⁷

Organizations and academic institutions are also good resources for First Nations. The Indigenous Law Research Unit (ILRU) is an academic institute dedicated to the revitalization of Indigenous laws and governance. ILRU partners with Indigenous communities to articulate their own legal principles and processes, on their own terms. ILRU collaborates with communities by invitation and focuses on the legal questions that drive the Nation's needs and goals.⁶⁸

⁶⁷ Ontario, Union of Ontario Indians. 2018. *Revitalization of Anishinabek legal traditions – Regional sessions – Final summary report*. North Bay: Anishinabek Nation Legal Department, at 4.

⁶⁸ University of Victoria. 2022. *Indigenous Law Research Unit (ILRU)*. University of Victoria Law. <https://www.uvic.ca/law/about/indigenous/indigenoulawresearchunit/index.php>