

TOWARD AN EXPANDED ROLE FOR INDIGENOUS LAW IN THE ASSESSMENT OF MORAL BLAMEWORTHINESS IN CRIMINAL MATTERS

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This article provides a critique of Canadian courts' attempted integration of Indigenous laws into sentencing for criminal matters. First, it examines Canadian courts' approach to resolving conflicts between Indigenous and Canadian laws in the context of recent criminal contempt proceedings in British Columbia, contrasting this approach with other legal domains. Second, it argues that Canada's recognition of Indigenous laws creates an obligation to incorporate them into determinations of moral blameworthiness. Third, it analyzes the normative rationales underpinning Canada's sentencing regime. Fourth, it argues that a failure to consider conflicts of Indigenous and Canadian laws in sentencing compromises the principle of proportionality. Fifth, it proposes a relaxed standard for admitting evidence of a conflict of Indigenous and Canadian laws at sentencing.

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INTRODUCTION

Canada is a pluralistic country with common, civil, and Indigenous legal systems operating within its borders.¹ Indigenous legal systems, which together comprise what this paper calls the Indigenous legal order, include the oldest living law in the country.² Their laws have been recognized by the Supreme Court of Canada,³ and have influenced Aboriginal law, including title claims,⁴ rights claims,⁵ and proceedings under the *Criminal Code*.⁶ Like Canada's other legal systems, Indigenous legal systems guide their adherents⁷ and regulate a broad range of social conduct.⁸ However, unlike civil law and common law, pre-contact Indigenous legal systems have a "shadowy and aspirational" place among Canada's legal traditions,⁹ and do not have a recognized jurisdiction within Canadian law. This raises

¹ Canada, Department of Justice, *The Supreme Court of Canada and Its Impact on the Expression of Bijuralism*, (Paper), Frances Allard (Ottawa: DoJ, 2016), online: [perma.cc/AJ7R-M42B] [Canada, "Bijuralism"]; Law Reform Commission of Canada, *Indigenous Legal Traditions in Canada* (Ottawa: LRC, 2006) (Chair: John Borrows) at 100, 107, online (pdf): [perma.cc/5BGT-HL4J] [Law Reform Commission, "Indigenous Legal Traditions"]; Frankie Young, "Positioning Indigenous Law in the Legally Pluralistic State of Canada" (2021) 6:1 Cambridge L Rev 30 at 30.

² Law Reform Commission, "Indigenous Legal Traditions", *supra* note 1; Kate Gunn & Cody O'Neil, "Indigenous Law & Canadian Courts" (20 January 2021), online: [perma.cc/DUP7-Y9UV]. The Indigenous legal order includes a great diversity of First Nations, Métis, and Inuit legal systems, and the use of a single term to refer to all these systems should not be understood as overlooking the diversity among them.

³ Sebastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1 at 15–16, citing *Mitchell v MNR*, 2001 SCC 33 at para 10 [*Mitchell*]; *R v Van der Peet*, 1996 CanLII 216 at para 263 (SCC), McLachlin J, dissenting [*Van der Peet*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 35 [*Tsilhqot'in*]; *Delgamuukw v British Columbia*, 1997 CanLII 302 at para 148 (SCC) [*Delgamuukw*].

⁴ *Tsilhqot'in*, *supra* note 3 at para 14.

⁵ John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 McGill LJ 629 at 636 [Borrows, "With or Without You"]; *Mitchell*, *supra* note 3 at paras 9–10, citing Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727.

⁶ RSC 1985, c C-46 [*Criminal Code*]; *R v Gladue*, 1999 1 CanLII 679 at paras 66, 70, 73 (SCC) [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 at para 74 [*Ipeelee*].

⁷ In this article, an adherent is a person who follows a particular set of Indigenous law. This term is not meant to create the illusion that Indigenous people can freely drift between legal systems, nor to ignore the social pressures and institutions which constrain social conduct or the consequences for failing to follow a given community's laws.

⁸ Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 865–66; Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015–2016) 1:1 Lakehead LJ 16 at 17; Kent Roach, "Plan B for Implementing *Gladue*: The Need to Apply Background Factors to the Punitive Sentencing Purposes" (2020) 67:4 Crim LQ 375 at 394–95; Leo Baskatawang, "Sacred Teachings, Sacred Law: Truth and Reconciliation of Indigenous Legal Orders in Canada" (2024) 32:1 Mich State Intl L Rev 1 at 5–6, citing David Bouchard & Joseph Martin, *The Seven Sacred Teachings of White Buffalo Calf Woman* (North Vancouver: More Than Words Publishers, 2009).

⁹ Mark D Walters, "The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150" (2017) 22:3 Rev Const Stud 347 at 355.

legitimate questions about how pluralistic Canada really is.¹⁰ It also creates potential for conflict.¹¹

Where multiple legal systems regulate the same social conduct within the same jurisdiction, it is almost inevitable that rules will conflict. When laws are incommensurate, obeying one means disobeying another,¹² and a person must choose which law to follow. How do people manage these conflicts?

A person facing an incommensurate conflict of laws, as between Indigenous and Canadian laws, confronts more than a simple question of obedience and disobedience. Law “carries a sense of obligation within [a] particular social setting,” and “operates as a standard for evaluating and controlling” conduct.¹³ Therefore, no matter the jurisdiction, a person must reckon with the moral or spiritual authority attached to the laws in conflict. Can Canadian courts appreciate the cultural, moral, and legal struggles often tracing to the root of identity that people confront when deciding which laws to uphold and which to break? Such struggles deserve attention where the state uses criminal law to sanction disobedience and punish what it calls wrongdoing.

Even where laws conflict, disobedience can carry serious consequences. For example, where Indigenous law compels a person to resist certain industrial practices, and Canadian law — in the form of a court order, such as an injunction — forbids resistance, an adherent to Indigenous law may face a charge of criminal contempt, which can lead to a criminal record and jail time. A judge sentencing criminal contempt must determine how serious the offence is and how morally blameworthy the convicted person is for their conduct.¹⁴ Where the offence emerges from a conflict between Indigenous and Canadian laws, the judge may receive evidence of the dilemma the convicted person faced in deciding which law to follow, and may hear competing arguments about right and wrong which go to the core of the convicted person’s being and the roots of Canada’s pluralistic justice system.

Despite the complexity and stakes of incommensurate conflicts between Indigenous and Canadian laws, they remain unanalyzed with respect to moral blameworthiness. Scholars have written on the value and manner of engagement with the Indigenous legal order in a variety of contexts.¹⁵ Don Couturier has examined judges’ attempts to incorporate Indigenous

¹⁰ For a discussion of how rhetorical pluralism can rise to the level of actual pluralism, see Patrick Macklem, “Indigenous Peoples and the Ethos of Legal Pluralism in Canada” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 17.

¹¹ The term *conflict of laws* in this article refers to a situation in which, in a common set of circumstances, laws direct their subjects to pursue different courses of action. It should not be understood as labelling one law foreign and the other domestic, or as importing any conflict management techniques from the field of private international law.

¹² Don Couturier, “Judicial Reasoning Across Legal Orders: Lessons from Nunavut” (2020) 45:2 Queen’s LJ 319 at 334, citing Henry S Mather, “Law-Making and Incommensurability” (2002) 47:2 McGill LJ 345.

¹³ Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44:1 Osgoode Hall LJ 167 at 171–72.

¹⁴ *Ipeelee*, *supra* note 6 at para 37.

¹⁵ Alan Hanna, “Reconciliation through Relationality in Indigenous Legal Orders” (2019) 56:3 Alta L Rev 817; Emma C Howes, “Living Tree Doctrines of the Canadian Constitution and Indigenous Law” (2022) 31 Dal J Leg Stud 31; Grammond, *supra* note 3.

law into their sentencing decisions in criminal matters, and whether and how courts should engage with Indigenous law, concluding that pluralism reduces oppression.¹⁶ For example, Couturier examines *R. v. Itturiligaq*,¹⁷ where a Nunavut judge used Inuit law and worldview to inform the community's perspective in a section 12 *Charter* challenge.¹⁸ Couturier ultimately advocates for increasing deference to Indigenous justice processes in criminal matters.¹⁹ Yet, the impact of incommensurate conflicts on moral blameworthiness at sentencing remains unaddressed, and solutions to this problem within the confines of Canadian law remain elusive.

This issue deserves attention because questions about pluralism, conflict management, and moral blameworthiness are prominent now, and promise to remain prominent in the future. Resource development projects have brought Canadian and Indigenous legal systems into conflict many times in recent decades. The federal government's plan to hasten approval for what it calls nation-building projects²⁰ has raised questions among Indigenous leaders who worry that faster approvals will rush consultations, ignore Indigenous opposition, and amplify conflict.²¹ Where these plans lead to incommensurate conflicts of laws that put people before the courts, Canada will once again reckon with its pluralistic identity.

The Supreme Court of Canada has rejected a series of applications for leave to appeal in matters where Indigenous protesters convicted of criminal contempt for protesting in violation of an injunction followed Indigenous law in arriving at their decisions to protest. In the most recent of these applications, *James Leyden v. His Majesty the King*,²² the applicants argued that the sentencing judges failed to appreciate the impact of a conflict between Indigenous and Canadian laws on their moral blameworthiness at sentencing. The volume of similar cases making their way through the courts assures that it is a question of when, not if, the Supreme Court of Canada will hear a case on this issue.

This article argues that Canada's recognition of the Indigenous legal order and its impact on Canadian law implies an acceptance of the moral authority that Indigenous law carries for its adherents. This makes incommensurate conflicts between Indigenous law and Canadian

¹⁶ Couturier, *supra* note 12 at 327–31, 339, 349.

¹⁷ 2018 NUCJ 31.

¹⁸ Couturier, *supra* note 12 at 327–32.

¹⁹ *Ibid* at 339, 342–43, citing Alan Hanna, “Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape” (2018) 51:1 UBC L Rev 105 at 144, 149; Emma Cunliffe & Angela Cameron, “Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice” (2007) 19:1 CJWL 1; Val Napoleon & Hadley Friedland, “Indigenous Legal Traditions: Roots to Renaissance” in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 225 at 239; Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) 195 at 213; Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories” (2016) 61:4 McGill LJ 725 at 754.

²⁰ David Thurton & Darren Major, “Ottawa Planning ‘Up-Front’ Approval for Projects Deemed in the National Interest”, *CBC News* (29 May 2025), online: [perma.cc/ZU6L-QX2D].

²¹ David Thurton, “Some First Nations Worry Carney’s Major Projects Bill Will Only Lead to More Conflict”, *CBC News* (30 May 2025), online: [perma.cc/2ER5-372A].

²² Supreme Court of Canada, “Case information 41342 *James Leyden, et al. v. His Majesty the King, et al.*” (25 March 2025), online: [perma.cc/9AM5-NXQY] [*Leyden SCC*].

law highly relevant to the assessment of moral blameworthiness at sentencing, including when sentencing criminal contempt.

Part I introduces both theoretical and practical approaches to pluralism, and examines how courts have approached sentencing for criminal contempt motivated by a conflict between Indigenous and Canadian laws. Part II explains the status and sources of Indigenous laws in Canada, with attention to criminal law, and argues that Canada's recognition of Indigenous laws creates an obligation to incorporate them into legal reasoning when evaluating conduct in criminal matters, including criminal contempt. Part III examines the role of moral blameworthiness at sentencing, how that role changes when sentencing criminal contempt, and the normative rationales that underpin Canada's sentencing regime in this respect. It also argues that motive is highly relevant when sentencing an offence motivated by adherence to Indigenous law. Part IV applies the same argument to case law to demonstrate that a judge's failure to consider a relevant conflict of laws compromises the proportionality principle. Part V proposes a new approach to consider conflicts of laws at sentencing. Considering other efforts to integrate Indigenous and Canadian laws, and in light of the narrow range of offences for which conflicts of laws are relevant at sentencing, it argues that evidence of conflict should be admissible by the same relaxed standard as other evidence tendered at sentencing. Finally, Part VI addresses several anticipated objections.

I. CONFLICTS OF LAWS IN CANADA

Conflicts of laws are an issue in Canadian courts because Canada is juristically pluralistic. Canada has long recognized autonomous civil and common legal systems,²³ and recognition of pre-contact Indigenous legal systems in post-Confederation Canada dates back to Canada's first year as an independent country, when the Superior Court of Quebec recognized the ongoing authority of Cree law and applied it to resolve a marriage dispute.²⁴ The fact that Canada has never given equal treatment to traditional Indigenous laws does not change the fact that they operate on this land, carry great meaning to those who follow them, and thus play a role in difficult conflicts.

Conflicts of laws can challenge courts and threaten social cohesion. Where multiple rules exist to govern the same conduct, authorities and actors must choose which rules to follow.²⁵ This may be more difficult where certain rules are culturally significant for a set of actors in a particular jurisdiction.²⁶ Absent a clear order, courts have the difficult task of deciding or articulating a hierarchy among conflicting laws. This task is more challenging because those who appear before them have reasonable claims that their conduct was appropriate based on a preferred legal source. Courts' denials of such claims may anger the claimants and their communities, disrupting their relationships with other groups in society.

²³ Canada, "Bijuralism", *supra* note 1.

²⁴ Walters, *supra* note 9 at 348, citing *Connolly v Woolrich and Johnson*, 1867 CanLII 13 (QCCS), *aff'd* *Johnstone v Connolly*, 1869 CanLII 123 (QCQB).

²⁵ Sally Engle Merry, "Legal Pluralism" (1988) 22:5 *Law & Soc'y Rev* 869 at 871.

²⁶ *Ibid* at 871-72.

**A. RECENT CRIMINAL CONTEMPT CASES IN BRITISH COLUMBIA
ILLUSTRATE SENTENCING JUDGES' TREATMENT OF CONFLICTS
OF LAWS**

Sentencing judges have heard cases where persons convicted of criminal contempt explain that obedience to Indigenous law motivated them to commit their offences. In essence, these cases²⁷ show what happens when people bound by multiple legal systems invoke a conflict of laws at sentencing.

In *Leyden BCSC*, three people were convicted of criminal contempt for breaching an injunction prohibiting them from interfering with Trans Mountain's pipeline expansion project.²⁸ Each had an Indigenous background from a different region of Canada,²⁹ but each also had strong connections to First Nations near the protest site.³⁰ The three explained that their decision to protest in violation of the injunction was largely related to their adherence to Indigenous law,³¹ which gave rise to a duty to protect the land, people, and the rest of the natural world.³² They highlighted the conflict between their Indigenous law and the Canadian injunction.³³ Nonetheless, the sentencing judge did not accept any arguments about the conflict of laws, concluding that the conflict did not distinguish the parties from other protesters and did not mitigate their sentences at all.³⁴ Each was sentenced to 28 days in jail.³⁵ On appeal, the British Columbia Court of Appeal affirmed the sentencing judge's finding that the parties' beliefs and motives did not mitigate their sentences,³⁶ held that no Indigenous law directed the parties to violate the injunction,³⁷ and therefore concluded that the conflict of laws the parties experienced did not diminish their moral blameworthiness for their offences.³⁸ The British Columbia Court of Appeal dismissed the appeals³⁹ and the Supreme Court of Canada dismissed the parties' application for leave to appeal.⁴⁰

In *Nelson*, N blocked a road in violation of an injunction and was convicted of criminal contempt.⁴¹ N argued that she acted in accordance with "obligations imposed on her by

²⁷ *Teal Cedar Products Ltd v Rainforest Flying Squad*, 2022 BCSC 2328 [*Nelson BCSC*] and *Trans Mountain Pipeline ULC v Mivasair*, 2020 BCSC 1512 [*Leyden BCSC*] are illustrative examples, but do not represent an exhaustive summary of cases that have engaged this area of law. *Trans Mountain Pipeline ULC v Mivasair*, 2022 BCSC 791 [*TMP*] is one example of another highly relevant case in British Columbia. The Ontario decision *R v Williams*, 2024 ONSC 5550 engages some of the same issues at para 36 where the judge affirmatively cited the British Columbia Court of Appeal's treatment of Indigenous law in *R v Nelson*, 2024 BCCA 72 [*Nelson BCCA*] and *R v Leyden*, 2024 BCCA 227 [*Leyden BCCA*].

²⁸ *Leyden BCSC*, *supra* note 27 at paras 2, 7. Out of respect for the parties' privacy, I have provided only the minimum necessary details of their personal lives and beliefs.

²⁹ *Ibid* at paras 36, 42–43, 52.

³⁰ *Ibid* at paras 41, 46, 57.

³¹ *Ibid* at para 100; *Trans Mountain Pipeline ULC v Mivasair*, 2019 BCSC 2472 at paras 44, 48.

³² *Leyden BCSC*, *supra* note 27 at paras 104, 141.

³³ *Ibid* at para 104.

³⁴ *Ibid* at paras 112, 118–19.

³⁵ *Ibid* at paras 169–71.

³⁶ *Leyden BCCA*, *supra* note 27 at para 57.

³⁷ *Ibid* at para 67.

³⁸ *Ibid* at paras 67, 69.

³⁹ *Ibid* at para 72.

⁴⁰ *Leyden SCC*, *supra* note 22.

⁴¹ *Nelson BCSC*, *supra* note 27 at paras 2–4, 12.

Indigenous law,⁴² and that this ought to reduce her moral blameworthiness relative to other people who committed a similar offence for different reasons.⁴³ The sentencing judge recognized that a conflict between Canadian and St'át'imc law reduced N's moral blameworthiness, but felt bound to impose the same sentence as had been imposed on others who had not shared N's specific motivations.⁴⁴ The British Columbia Court of Appeal performed a fresh sentencing analysis,⁴⁵ where it accepted that an Indigenous convicted person's beliefs "rooted in or informed by their Indigenous background" are relevant at sentencing.⁴⁶ However, the Court found that N's explanation as to how her adherence to St'át'imc law led her to commit her offence was "very general,"⁴⁷ and did not explain why she protested in the specific manner of her choosing. The British Columbia Court of Appeal implied that it sought a very high degree of specificity from Indigenous legal sources, noting that N had not identified "an Indigenous law that compelled, or even permitted" her manner of protest, which was "to illegally impede traffic by attaching herself to a buried cable."⁴⁸ The British Columbia Court of Appeal dismissed N's appeal,⁴⁹ and the Supreme Court of Canada dismissed N's application for leave to appeal.⁵⁰

These cases show that courts resist attempts to invoke conflicts of laws at sentencing. In *Leyden* and *Nelson*, convicted persons bound by Indigenous law confronted moral dilemmas arising from competing obligations based on differing ideas of right and wrong. Yet, with the exception of N's sentencing judge, the judges who heard these cases either ignored the conflicts of laws and resulting dilemmas or set up evidentiary obstacles to make them difficult to prove. As a result, though the conflicts and resulting dilemmas impacted the decision to engage in criminal conduct, the sentencing judges generally did not find that they affected the convicted parties' moral blameworthiness and did not factor them into the sentences imposed.

B. TOOLS EXIST TO MANAGE CONFLICTS OF LAWS IN OTHER LEGAL DOMAINS

The resistance displayed in the *Leyden* and *Nelson* cases is but one of many paths legal actors can take in pluralistic settings. There are a variety of theoretical and practical approaches available to Canadian actors, some of which Canada has used or currently uses.

With a focus on post-conflict settings,⁵¹ Geoffrey Swenson describes pluralism as either "combative," defined by open hostility between systems,⁵² "cooperative" or "competitive," defined by significant autonomy for non-state actors with or without the endorsement of the

⁴² *Ibid* at para 12.

⁴³ *Ibid* at para 14.

⁴⁴ *Ibid* at paras 9–10, 16, 22–23.

⁴⁵ *Nelson* BCCA, *supra* note 27 at para 40.

⁴⁶ *Ibid* at para 47.

⁴⁷ *Ibid* at para 52.

⁴⁸ *Ibid* at para 53.

⁴⁹ *Ibid* at para 58.

⁵⁰ Supreme Court of Canada, "Case information 41261 *Lexlixatkw7 Nelson v. His Majesty the King*" (27 February 2025), online: [perma.cc/SB6K-TCUV].

⁵¹ Geoffrey Swenson, "Legal Pluralism in Theory and Practice" (2018) 20:3 *Intl Studies Rev* 438 at 441.

⁵² *Ibid* at 443.

state, respectively,⁵³ or “complementary,” defined by subordination of non-state actors by the state system.⁵⁴ Swenson proposes techniques for addressing non-state legal systems. *Bridging* allows for the allocation of legal cases between state and non-state justice systems, with the state courts handling the most serious matters.⁵⁵ *Harmonization* sees the non-state system “incorporated and legitimized to some extent,” so long as it remains consistent with the state system’s core values.⁵⁶ *Incorporation* sees the non-state system and its courts incorporated into and regulated by the state system.⁵⁷ *Subsidization* mostly ignores the non-state system while promoting the state system through various initiatives designed to make it more capable and appealing.⁵⁸ *Repression* seeks to “undermine and ... eliminate” the non-state system, possibly by making it illegal.⁵⁹

Canada is not a post-conflict setting, so there is some immediate incongruity with Swenson’s model, but the model still applies on a limited and modified basis. Canada’s pluralistic relationship with the Indigenous legal order has arguably been combative, competitive or cooperative, and complementary at various points in history, and perhaps remains so today. As subsequent sections will discuss, *subsidization* and *repression* have historically been the dominant techniques employed to address Indigenous-Canadian pluralism. However, Canada has recognized Indigenous law and selectively adopted it in a manner consistent with Canadian law, borrowing features of *harmonization*, and practising *incorporation* through delegation of self-government powers. Swenson’s model includes parts of Canada’s piecemeal approach to management of pluralistic conflicts.

In more concrete terms, where there is assigned jurisdiction, Canada has plenty of experience managing conflicts between legal authorities. Defined jurisdictions can promote peaceful coexistence between otherwise competing sets of law, but disagreement can arise even where lawmakers act under the same enabling legislation, such as the Constitution’s division of powers.⁶⁰ Canada has tools to manage these conflicts, including the doctrine of interjurisdictional immunity, which protects the “basic, minimum and unassailable content” of a legislative power from intrusion by another level of government,⁶¹ and the doctrine of paramountcy, which dictates that a validly enacted provincial law is inoperative to the extent that it is inconsistent with a validly enacted federal law.⁶²

There are also methods for managing conflicts with treaties and laws made through contemporary Indigenous self-government powers. Sebastien Grammond’s *delegation model* for interaction between Canadian and Indigenous law incorporates Indigenous law drafted by delegated authority into Canadian law.⁶³ As an example, the Supreme Court of Canada has upheld a federal law governing child welfare which rendered itself inferior to the provisions

⁵³ *Ibid* at 444–45.

⁵⁴ *Ibid* at 445.

⁵⁵ *Ibid* at 446.

⁵⁶ *Ibid* at 447.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* at 448.

⁵⁹ *Ibid*.

⁶⁰ *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 2.

⁶¹ *Ibid* at para 35.

⁶² *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 at para 11.

⁶³ Grammond, *supra* note 3 at 10–11.

of treaties and Indigenous self-government agreements.⁶⁴ One such agreement is the Nisga'a Final Agreement between the governments of Canada, British Columbia, and the Nisga'a Nation. The Agreement empowers the Nisga'a governments to draft a constitution that gives the Nisga'a authority to make their own laws⁶⁵ about culture and language,⁶⁶ certain property matters,⁶⁷ and public order,⁶⁸ among other areas, though not criminal law.⁶⁹ This merger of Indigenous and Canadian systems shows features of Swenson's *incorporation*. Notably, though, to protect traditional Nisga'a law from "the risk of distortion" through Canadian courts' interpretation, the Nisga'a intentionally excluded their traditional laws and practices from the definition of law within the Agreement.⁷⁰

Adapted to the Canadian context and informed by existing theories and tools, in general terms, this article envisions three ways to deal with a conflict of laws in a domestic setting. First, in an *equality* scenario, decision-makers can rule that all laws are equal, and that there is no issue as long as an actor obeys one set of laws. Second, in a *paramountcy* scenario, decision-makers can rule that only one set of laws is authoritative, and that all actors must obey the authoritative set. Third, in a *compromise* scenario, decision-makers can rule that one set of laws is privileged over the other(s), but that courts will still recognize alternative sets of laws in some way. From among these options, Canada takes different approaches in different legal conflicts.

Canada has conflict-management tools for laws made or recognized in recent years, but their operation is more complex when dealing with pre-contact and pre-Confederation Indigenous laws made apart from treaties and self-government agreements. Historically, because the latter is the sort of law that conflicts with Canadian criminal law, it has been invoked to show a conflict of laws and a resulting moral dilemma at sentencing. Although they can pose difficult challenges, pre-contact and pre-Confederation Indigenous laws have roles in Canadian law, including at sentencing, so they deserve attention.

II. INDIGENOUS LAW HAS UNIQUE SOURCES AND RECOGNIZED STATUS, BUT RECEIVES MIXED TREATMENT

Canada's actions do not always match its rhetoric about Indigenous law, though potential for growth remains.⁷¹ As Part III explains, Canada appears to be a juristically pluralistic country with recognized common, civil, and Indigenous legal systems, with the latter dating back before Confederation.⁷² It is an open question whether this is merely a "facade of

⁶⁴ *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 27.

⁶⁵ *Nisga'a Final Agreement*, 27 April 1999 at ch 11, s 9(b), online (pdf): [perma.cc/UU92-WJLG] [NEA].

⁶⁶ *Ibid* at ch 11, ss 41–43.

⁶⁷ *Ibid* at ch 11, s 44.

⁶⁸ *Ibid* at ch 11, ss 59–62.

⁶⁹ *Ibid* at ch 11, s 61.

⁷⁰ Grammond, *supra* note 3 at 10, citing Ghislain Otis, "Constitutional Recognition of Aboriginal and Treaty Rights: a New Framework for Managing Legal Pluralism in Canada?" (2014) 46:3 J Leg Pluralism & Unofficial L 320.

⁷¹ Macklem, *supra* note 10 at 33.

⁷² Law Reform Commission, "Indigenous Legal Traditions", *supra* note 1 at 100, 107; Young, *supra* note 1 at 30.

pluralism’ ... or a true acknowledgement of legal otherness.”⁷³ At times in the past, embodying Swenson’s *repression*, Canada has denied the existence of Indigenous legal systems.⁷⁴ As Ghislain Otis writes, “[I]ndigenous law and state law have long coexisted and interacted without any formal system of coordination due to the state’s general indifference and even hostility toward [I]ndigenous law.”⁷⁵ The nature of Indigenous law and its unsettled⁷⁶ place in Canada’s legal mosaic foreshadows its roles in Canadian law, including at sentencing, where Canada’s historically “subordinating” approach to pluralism has incorporated Indigenous elements.⁷⁷ There is room to expand the role of Indigenous law in this regard.

While “pan-Indigenous accounts of Indigenous laws” cannot capture the “depth, nuance, scope, and complexity” that shape Indigenous legal systems,⁷⁸ there are some generalizable differences between Indigenous law and Canadian law, including their sources and forms. Principles of Indigenous law are often “enunciated in ... rich stories, ceremonies and traditions”⁷⁹ which are both similar to and different from case law.⁸⁰ For example, like case law, they provide the facts and solutions associated with disputes, and encourage “a basic personal and institutional adherence to underlying values and principles.”⁸¹ However, whereas Canadian law is largely written and recorded in case law or statute, “elders or sanctioned wisdom keepers ... identify and communicate” Indigenous law, which relies “less on centralized proclamation.”⁸² Unlike case law, which is fixed once recorded, the stories which communicate Indigenous law can change in order “to convey contextual meaning relevant to the times and the needs of the listeners.”⁸³ This demonstrates that Indigenous law, like common and civil law, can evolve over time through “internal deliberation.”⁸⁴ Considering these differences, legal decision-makers may be unfamiliar with certain features of Indigenous law,⁸⁵ and cannot expect Indigenous laws to look like Canadian laws.

The foundations of Indigenous and Canadian law also differ. With a focus on Anishinaabe traditions, Aaron Mills writes that Indigenous law grows from legal traditions connected to a constitutional order, rooted in what he calls a lifeworld, which includes Indigenous creation stories.⁸⁶ In contrast to the Canadian lifeworld, which Mills describes in terms of separation — separation of people from one another, other beings, and Earth itself⁸⁷ — Indigenous

⁷³ Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, “*Ipeelee* and the Duty to Resist” (2018) 51:2 UBC L Rev 548 at 551.

⁷⁴ *Ibid* at 550, citing Mylène Jaccoud, “La justice pénale et les Autochtones: d’une justice imposée au transfert de pouvoirs” (2002) 17:2 CJLS 107.

⁷⁵ Ghislain Otis, “Individual Choice of Law for Indigenous People in Canada: Reconciling Legal Pluralism with Human Rights” (2018) 8:2 UC Irvine L Rev 207 at 209.

⁷⁶ Young, *supra* note 1 at 40.

⁷⁷ Denis-Boileau & Sylvestre, *supra* note 73 at 551–52.

⁷⁸ Friedland & Napoleon, *supra* note 8 at 19.

⁷⁹ Borrows, “With or Without You”, *supra* note 5 at 646; Friedland & Napoleon, *supra* note 8 at 21.

⁸⁰ Borrows, “With or Without You”, *supra* note 5 at 647.

⁸¹ *Ibid*.

⁸² John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Wash UJL & Pol’y 167 at 191–92.

⁸³ Borrows, “With or Without You”, *supra* note 5 at 648.

⁸⁴ Grammond, *supra* note 3 at 9, citing John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 38–39; Val Napoleon, “Thinking About Indigenous Legal Orders” in René Provost & Colleen Sheppard, eds, *Dialogues About Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013).

⁸⁵ Grammond, *supra* note 3 at 4.

⁸⁶ Mills, *supra* note 8 at 862–63.

⁸⁷ *Ibid* at 865.

lifeworlds are connected to Earth, view life as “interdependent,” and encourage communal relationships.⁸⁸ Although Mills acknowledges that this model is “oversimplified,”⁸⁹ it is notable that many Indigenous peoples across the country use the tree-grounded-in-Earth analogy to describe their law,⁹⁰ with some viewing their legal systems like trees which must grow and develop “while maintaining the roots that give them life.”⁹¹ In contrast, though the living tree vision of Canada’s constitution suggests law is “capable of change and growth,” this metaphor does not have “the same meaning or weight as tree metaphors in Indigenous law.”⁹² Without touching on specifics, it suffices to observe these fundamental differences in the way some Indigenous and Canadian sources portray their relationships with law and living beings. Once again, this may make Indigenous law seem unfamiliar to a person who has been trained in common or civil law.

With different forms, sources, and foundations, it is unsurprising that Indigenous and Canadian laws regulate conduct in their own styles.⁹³ For example, whereas Canada has criminal law recorded in the *Criminal Code*, an Indigenous group may have informal responsibilities that people must uphold, such as the “mino-bimaadziwin” or “good life,” of the Anishinaabe, which encourages people to follow the Seven Sacred Teachings by cultivating “respect, humility, honesty, bravery, love, wisdom, and truth.”⁹⁴ Whereas Canada may place a person in prison for breaking a criminal law, a First Nation may censure a person who fails to uphold their responsibilities.⁹⁵

Despite these differences, speaking the language of pluralism, Canada’s highest court has been clear that Indigenous law exists. Through the doctrine of continuity, the Supreme Court of Canada presumed that Indigenous laws “survive[d] the assertion of sovereignty.”⁹⁶ In *Mitchell*, the Supreme Court of Canada wrote that pre-contact Indigenous law was incorporated into Canadian law in the form of Aboriginal rights,⁹⁷ where Indigenous law gave “meaning to the content of Aboriginal rights,”⁹⁸ provided they were neither incompatible with Crown sovereignty, surrendered voluntarily through treaty, or extinguished.⁹⁹ The incorporation or legitimization of Indigenous law to the extent that it is consistent with Crown sovereignty could constitute a version of Swenson’s *harmonization*. Today, section 35 of *Constitution Act, 1982* gives these rights constitutional protection.¹⁰⁰ Patrick Macklem argues that this recognition “suggests that at least part of the reason something is an Aboriginal right

⁸⁸ *Ibid* at 865–67.

⁸⁹ *Ibid* at 867.

⁹⁰ Howes, *supra* note 15 at 32, 40–41, citing Don Monet & Skanu’u (Ardythe Wilson), *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet’suwet’en Sovereignty Case* (Gabriola Island, BC: New Society Publishers, 1992) at 101, and AC Parker, *The Constitution of the Five Nations, or, The Iroquois Book of the Great Law* (Ohsweken, ON: Irocrafts, 1984) at 30.

⁹¹ Howes, *supra* note 15 at 42, citing John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 151–53.

⁹² Howes, *supra* note 15 at 47.

⁹³ Webber, *supra* note 13 at 191.

⁹⁴ Baskatawang, *supra* note 8 at 6, citing Bouchard & Martin, *supra* note 8.

⁹⁵ Mills, *supra* note 8 at 865–66.

⁹⁶ Grammond, *supra* note 3 at 16, citing *Mitchell*, *supra* note 3 at para 10, and *Van der Peet*, *supra* note 3 at para 263.

⁹⁷ *Mitchell*, *supra* note 3 at para 9.

⁹⁸ Borrows, “With or Without You”, *supra* note 5 at 636.

⁹⁹ *Mitchell*, *supra* note 3 at para 10, citing Slattery, *supra* note 5.

¹⁰⁰ *Mitchell*, *supra* note 3 at para 11.

in Canadian law is that it was an Indigenous legal norm at the time of the assertion of Crown sovereignty,” and that, “[u]nderstanding Aboriginal rights as Indigenous legal norms renders section 35(1) a provision performative of legal pluralism by formally acknowledging the constitutional significance of Indigenous legal orders.”¹⁰¹ While this does not mean that Canada has achieved deep, meaningful pluralism with respect to Indigenous law, in practice, Canadian courts occasionally use Aboriginal rights to acknowledge the authority of Indigenous law.

In certain circumstances, Aboriginal rights as an embodiment of Indigenous law can achieve limited *paramountcy* by shielding Indigenous rights holders from Canadian law. For example, in *R. v. Sparrow*, the appellant fished with a net longer than that permitted by provincial regulations, and was charged under the *Fisheries Act*.¹⁰² However, the Supreme Court of Canada found that the appellant had an Aboriginal right to fish for food and for social and ceremonial purposes.¹⁰³ *Sparrow* outlines a process for determining whether Canadian law has infringed an Aboriginal right, and whether any infringement can be justified.¹⁰⁴ For the purpose of the argument advanced in this article, it is sufficient to note that Aboriginal rights, informed by Indigenous law, are protected to some degree from the exercise of Canadian law. This contextual *paramountcy* is visible in the *Sparrow* appellant’s attempt to use an Aboriginal right as a defence against his criminal charge at trial,¹⁰⁵ and the Supreme Court of Canada’s order for a new trial to determine whether the appellant’s right had been infringed and if any infringement was justified.¹⁰⁶ Such impactful shielding of Indigenous law is a strong endorsement of its value.

Beyond Aboriginal rights, Indigenous law is a special source of legal influence and authority in Canadian law. The Supreme Court of Canada has given authority to Indigenous perspectives, including Indigenous laws,¹⁰⁷ when considering cases involving Indigenous land claims,¹⁰⁸ and has articulated an objective not to “lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts” in such circumstances.¹⁰⁹ Macklem writes that the interpretation of Aboriginal title as a constitutional right “extends constitutional validity to Indigenous legal norms ... [and] ensures that state power will be exercised in a manner that respects these Indigenous legal norms and the Indigenous legal orders to which they owe their existence.”¹¹⁰ Separately, through *R. v. Gladue*, the Supreme Court of Canada has given authority to the wide range¹¹¹ of “traditional aboriginal conceptions of sentencing” when sentencing an Indigenous person,¹¹² and has directed judges to find compromise between Canadian and Indigenous perspectives when choosing procedures and sanctions.¹¹³ Marie-Andrée Denis-Boileau and Marie-Ève Sylvestre argue that this creates a “contact zone within which [Indigenous and

¹⁰¹ Macklem, *supra* note 10 at 31–32, citing *Mitchell*, *supra* note 3 at para 10.

¹⁰² *R v Sparrow*, [1990] 1 SCR 1075 at 1083, 1088 [*Sparrow*].

¹⁰³ *Ibid* at 1101.

¹⁰⁴ *Ibid* at 1111–13.

¹⁰⁵ *Ibid* at 1120.

¹⁰⁶ *Ibid* at 1121.

¹⁰⁷ *Tsilhqot’in*, *supra* note 3 at para 35; *Delgamuukw*, *supra* note 3 at para 148.

¹⁰⁸ *Tsilhqot’in*, *supra* note 3 at para 14.

¹⁰⁹ *Ibid* at para 32.

¹¹⁰ Macklem, *supra* note 10 at 31.

¹¹¹ *Gladue*, *supra* note 6 at para 73.

¹¹² *Ibid* at paras 66, 70.

¹¹³ *lpeelee*, *supra* note 6 at para 74.

Canadian] legal systems can intersect.”¹¹⁴ Viewed as an incorporation and legitimization of certain features of Indigenous legal systems, this too borrows from Swenson’s *harmonization*.

Although the Supreme Court of Canada has stopped short of calling Aboriginal perspectives laws, sometimes referring to them instead as “values” and “world views”¹¹⁵ — a habit that can result from lack of familiarity with the characteristics of Indigenous laws¹¹⁶ — they surely emerge from legal sources. In their concurring reasons in *R. v. Marshall; R. v. Bernard*, Justices LeBel and Fish made this connection, writing that “aboriginal customary laws” inform Indigenous perspectives on land rights.¹¹⁷ The *Delgamuukw* majority’s reference to “aboriginal legal systems”¹¹⁸ and “systems of aboriginal law”¹¹⁹ as the roots of Indigenous perspectives supports this position. Quoting John Borrows, Justices LeBel and Fish compelled the Supreme Court to acknowledge Indigenous law as law, not just evidence.¹²⁰

The foregoing examples show that Indigenous law can repel or complement Canadian law, indicating that, despite the dominant position of Canadian law in the legal hierarchy created by Canada’s settler colonial legal system, Indigenous law exists and shapes legal outcomes in both Indigenous communities and Canadian legal settings.

Once again, this does not mean that Canada has embraced a durable, complete version of pluralism with respect to Indigenous law. What it means is that Canada’s mixed treatment of Indigenous law has recently included acknowledgement of the existence of Indigenous legal systems and their significance to Indigenous people, alongside a variety of roles for Indigenous law, including roles where Indigenous law shapes or overrides Canadian law.

This observation should not constitute a limit on the potential role Indigenous laws and legal systems might play in disputes. On the contrary, the growing role and recognition of Indigenous legal sources in recent years suggests that the landscape is not fixed. Similar to what transpired in *Leyden* and *Nelson*, Frankie Young foresees that the “longstanding recognition” of Indigenous law in Canada may lead an Indigenous person to invoke their laws to resolve a dispute, and that, though it is unclear how courts would respond, we ought to find a way to “give effect” to Indigenous laws in such a scenario.¹²¹

Criminal matters provide fertile ground to account for Indigenous law’s influence. Alongside the broad recognition that Canada has given to Indigenous laws through section 35 and when resolving land claim disputes, Canada’s highest court has signalled that Indigenous laws have value as cultural and legal sources, and has incorporated them into sentencing law. Of course, as Jeremy Webber writes, law has normative features, and functions to create obligations and as a tool to evaluate conduct.¹²² This is inevitably true of

¹¹⁴ Denis-Boileau & Sylvestre, *supra* note 73 at 554–55.

¹¹⁵ *Ipeelee*, *supra* note 6 at para 74.

¹¹⁶ Grammond, *supra* note 3 at 5.

¹¹⁷ *R v Marshall; R v Bernard*, 2005 SCC 43 at para 128 [*Marshall and Bernard*].

¹¹⁸ *Delgamuukw*, *supra* note 3 at para 112.

¹¹⁹ *Ibid* at para 114.

¹²⁰ *Marshall and Bernard*, *supra* note 117 at para 128.

¹²¹ Young, *supra* note 1 at 44.

¹²² Webber, *supra* note 13 at 171–72, 177.

Indigenous law in Canada, and is partly what makes Indigenous legal systems significant for their adherents. It follows that the dynamic between Indigenous and Canadian laws can be highly relevant when a court is evaluating conduct, as it does when making sentencing decisions. Prospectively, then, where Indigenous law casts light on the factors which influence sentencing outcomes, it makes sense to factor that impact into the sentence imposed.

III. MORAL BLAMEWORTHINESS, PROPORTIONALITY, AND CRIMINAL CONTEMPT

Along those lines, the assessment of moral blameworthiness at sentencing presents an opportunity to expand the role of Indigenous law. Through recognition of Indigenous law, Canada has acknowledged the moral direction Indigenous law provides and the moral authority that it exercises over its adherents. The assessment of moral blameworthiness should reflect this acknowledgement. Special considerations when sentencing criminal contempt should not limit the influence of Indigenous law in this regard.

A. THE ROLE OF MORAL BLAMEWORTHINESS

The principle of proportionality, the fundamental principle of sentencing in Canada,¹²³ is retributive, meaning that it is founded on the idea that punishment “honours” a convicted person as a “rational being with intrinsic value.”¹²⁴ It is also deserts-based, because it considers both the gravity of criminal conduct and the convicted person’s degree of moral responsibility for that conduct,¹²⁵ and thus treats the convicted person as “an agent capable of moral deliberation and response” who gets what they deserve.¹²⁶ According to traditional deserts theory, motive is a factor to consider when evaluating moral responsibility.¹²⁷

The moral blameworthiness element of the proportionality assessment rests on the belief that criminal responsibility flows from the conscious choice to commit criminal conduct despite available alternative courses of action.¹²⁸ As Morris Fish writes, with Kantian roots, proportionality stands for the idea that a person who commits a crime in such a scenario deserves to be punished¹²⁹ proportionate to their “internal wickedness.”¹³⁰ Recently, the

¹²³ Marie-Ève Sylvestre, “The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility” (2013) 63 SCLR (2d) at 461, citing *R v Proulx*, 2000 SCC 5 at para 54, *R v Nasogaluak*, 2010 SCC 6 at paras 40–41, *R v Pham*, 2013 SCC 15 at paras 6–7.

¹²⁴ Marie Manikis, “The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions” (2022) 59:3 Osgoode Hall LJ 587 at 590.

¹²⁵ *Ibid* at 594.

¹²⁶ *Ibid* at 594, 605; Sujung Lee, “Re-Evaluating Moral Culpability in the Wake of Gladue” (2020) 78:2 UT Fac L Rev 109 at 112.

¹²⁷ Manikis, *supra* note 124 at 597.

¹²⁸ Bruce P Archibald, “Fault, Penalty and Proportionality: Connecting Sentencing to Subjective and Objective Standards of Criminal Liability (with Ruminations on Restorative Justice)” (1998) 40:3&4 Crim LQ 263 at 268.

¹²⁹ Morris J Fish, “An Eye for an Eye: Proportionality as a Moral Principle of Punishment” (2008) 28:1 Oxford J Leg Stud 57 at 63, citing Immanuel Kant, *Metaphysical Elements of Justice: Part I of The Metaphysics of Morals*, translated by John Ladd (Cambridge, Mass: Hackett, 1965) at 331.

¹³⁰ Fish, *supra* note 129 at 63, citing Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, translated by W Hastie (Edinburgh: T & T Clark, 1887) at 198.

Supreme Court of Canada has described proportionality as “founded in ‘fairness and justice.’”¹³¹

There are many factors that can influence a court’s perception of a convicted person’s moral blameworthiness. In *R. v. Hills*, the Supreme Court of Canada wrote that the substantive elements of the offence, the convicted person’s conduct in committing the offence, their motive for doing so, and aspects of background, including personal circumstances and mental capacity, are relevant considerations.¹³² The Supreme Court of Canada clarified that a proportionate sentence cannot focus solely on the gravity of the offence while ignoring the circumstances of the person who committed it.¹³³ This is consistent with Canada’s individualized approach to sentencing.¹³⁴

Since *Gladue* and *Ipeelee*, it has been clear that systemic and background factors are uniquely relevant to an Indigenous convicted person’s moral blameworthiness, insofar as they limit voluntariness of criminal conduct.¹³⁵ This can happen where a person’s circumstances limit the choices and opportunities available to them,¹³⁶ effectively pushing them toward crime. Such factors may diminish a convicted person’s degree of responsibility for their conduct.¹³⁷

Considering voluntariness, the British Columbia Court of Appeal, Saskatchewan Court of Appeal, and Ontario Court of Appeal have found reduced moral blameworthiness where there is a nexus between Indigenous identity and background circumstances, as through childhood trauma, intellectual disability, exposure to violence, family breakdown, substance abuse, and reduced social and economic opportunity.¹³⁸ The Alberta Court of Appeal has found reduced moral blameworthiness arising from similar background factors,¹³⁹ and has also listed factors that are relevant to the assessment of moral blameworthiness in this context, including the motivation behind the offence.¹⁴⁰

B. CONFLICT WITH INDIGENOUS LAW CHANGES THE NATURE OF CRIMINAL CONTEMPT

Yet, as the cases addressed in Part II illustrate, courts have rejected attempts to invoke adherence to Indigenous law in order to reduce moral blameworthiness. This reticence may trace back to the way scholars and courts characterize the offence of criminal contempt, which

¹³¹ *R v Hills*, 2023 SCC 2 at para 57 [*Hills*], citing *R v Priest*, 1996 CanLII 1381 at 546 (ONCA).

¹³² *Hills*, *supra* note 131 at para 58, citing *R v Hamilton*, 2004 CanLII 5549 at para 91 (ONCA), *R v Boudreault*, 2018 SCC 58 at para 68, and *Ipeelee*, *supra* note 6 at para 73.

¹³³ *Hills*, *supra* note 131 at para 61.

¹³⁴ *Ibid* at para 62.

¹³⁵ *Ipeelee*, *supra* note 6 at para 73.

¹³⁶ *Ibid* at paras 73–74; Noah S Wernikowski, “Negative Retributivism: A Response to *R. v. Ipeelee*’s Innovative Call” (2020) 67:4 *Crim LQ* 407 at 420.

¹³⁷ *Ipeelee*, *supra* note 6 at para 73.

¹³⁸ *R v Sellars*, 2018 BCCA 195 at para 35; *R v Hiscock*, 2020 BCCA 355 at para 40; *R v Mero*, 2021 BCCA 399 at paras 87–88; *R v Kehoe*, 2023 BCCA 2 at para 70; *R v Slippery*, 2015 SKCA 149 at para 46; *R v JP*, 2020 SKCA 52 at para 52; *R v FHL*, 2018 ONCA 83 at para 40; *R v Altman*, 2019 ONCA 511 at para 79.

¹³⁹ *R v Okimaw*, 2016 ABCA 246 at paras 70, 80 [*Okimaw*]; *R v Swampy*, 2017 ABCA 134 at para 37.

¹⁴⁰ *Okimaw*, *supra* note 139 at para 85, citing *R v Ominayak*, 2007 ABQB 442 at para 237.

is often the charge — as it was in the *Leyden* and *Nelson* cases — in situations where collisions between Indigenous law and Canadian law lead to a criminal process.

The foundation of criminal contempt traces to the root of the justice system and the desire to uphold law. Originally conceived “as a sanction against disrespect for or disruption of established authority,”¹⁴¹ the law of contempt was founded on an “obsessive concern with shielding the judicial system from public scrutiny.”¹⁴² It was not so much concerned with defending courts’ dignity as it was with defending “the fundamental supremacy of the law.”¹⁴³ Criminal contempt has never been codified, and therefore remains the only common law offence in Canada.¹⁴⁴ It exists today to ensure “fairness and impartiality in judicial proceedings” and for “promotion and support of the public’s faith in the proper administration of justice and in the authority of the law.”¹⁴⁵

Although it has not been a topic of much debate in recent years, policy analysts in Canada have faced criticism for seeking to strengthen the law of criminal contempt. In 1982, the Law Reform Commission of Canada lamented the public’s “negative and inaccurate perception of contempt,”¹⁴⁶ and advocated for hardline reforms to stamp out those who, “seek to put in question the integrity of Canada’s judicial system.”¹⁴⁷ Robert Martin wrote that this stance misrepresented contemnors as, “eager to lay waste [to] our judicial system,”¹⁴⁸ and that a democratic society ought to permit criticism that those in authority consider neither “legitimate [n]or constructive.”¹⁴⁹ Barry J. Cavanaugh wrote that the contempt power would not be necessary at all if “the law and its administration” were “philosophically in tune with society.”¹⁵⁰

Despite this criticism, and considering the roots of the offence, it is unsurprising that courts treat criminal contempt as a layer of protection for both the justice system and the integrity of broader society. Unlike civil contempt, which involves mere breach of a court order, criminal contempt involves a breach with “open, continuous and flagrant” public defiance “in a way calculated to lessen societal respect for the courts.”¹⁵¹ In *United Nurses*, the Supreme Court of Canada described criminal contempt as a tool by which a court can

¹⁴¹ Barry J Cavanaugh, “Civil Liberties and the Criminal Contempt Power” (1977) 19:3 & 4 *Crim LQ* 349 at 349, citing Ronald L Goldfarb, *The Contempt Power* (New York: Columbia University Press, 1963) at 10.

¹⁴² Robert Martin, “Several Steps Backward: The Law Reform Commission of Canada and Contempt of Court” (1983) 21:2 *UWO L Rev* 307 at 308.

¹⁴³ Deborah K Lovett, “Criminal Contempt of Court Orders” (1994) 52:3 *Advocate* 387 at 389, citing Lord President Clyde in *Johnston v Grant*, [1923] 55 *Scot LR* 508 at 509 (HCJ).

¹⁴⁴ Martin, *supra* note 142 at 310; Helen Kersley, “Criminal Contempt: Proposals for Reform” (1984) 42:2 *UT Fac L Rev* 41 at 41; Canada, Law Reform Commission of Canada, *Contempt of Court, Report #17* (Ottawa: LRC, 1982) at 4, online: [perma.cc/8UQP-FZXT] [Law Reform Commission, *Contempt of Court*].

¹⁴⁵ Cavanaugh, *supra* note 141 at 350, citing Gordon Borrie & Nigel Lowe, *The Law of Contempt*, (London: Butterworths, 1973) at 1.

¹⁴⁶ Law Reform Commission, *Contempt of Court*, *supra* note 144 at 4.

¹⁴⁷ Martin, *supra* note 142 at 307.

¹⁴⁸ *Ibid* at 309.

¹⁴⁹ *Ibid* at 308.

¹⁵⁰ Cavanaugh, *supra* note 141 at 351.

¹⁵¹ *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 *SCR* 901 at 931–32 [*United Nurses*].

“uphold its dignity and process,” and which protects “rule of law,” “peace,” and “good government.”¹⁵²

As a consequence, some judges have expressed the view that, exceptionally, a contemnor’s beliefs in the cause which motivated their offence of contempt are not relevant to the court’s assessment of the contemnor’s moral blameworthiness.¹⁵³ This exceptional treatment mirrors early attitudes toward criminal contempt which restricted the accused’s procedural rights relative to accused charged with other offences.¹⁵⁴

At face value, courts’ concerns about rule of law are understandable. A person’s moral blameworthiness flows from their decision to act in a way that they know is wrong. Where their action threatens the integrity of the justice system, the person has decided to cast doubt on the order that members of a society take for granted. One could argue that the person has invited a form of chaos. That is a type of decision that the justice system reasonably wants to discourage.

However, upon deeper analysis, this approach to sentencing cases with Indigenous-Canadian conflicts of laws is self-defeating. As a general rule, the evaluation of moral blameworthiness should consider the factors which weighed on the convicted person’s moral conscience. Where there is an incommensurate conflict between Indigenous and Canadian laws, and a person feels an impossible pressure to obey both, they experience a legitimate moral dilemma. Courts’ refusal to recognize this moral dilemma does not make it disappear. On the contrary, it raises questions about whether they are evaluating moral blameworthiness at all. Is the internal wickedness that the moral blameworthiness inquiry seeks to identify present? Is it fair and just to condemn a person for having a divided moral conscience? These questions are especially relevant because the justice system has recognized that the Indigenous laws that gave rise to the moral dilemma exist and carry legal authority, both within and outside the criminal law.

A court’s failure to account for the moral authority of Indigenous law when assessing moral blameworthiness may lead observers to doubt the integrity of the justice system. Indigenous law carries moral authority for its adherents. Acknowledgement of that law implies acknowledgement of its moral authority. A sentence which ignores that moral authority thus raises questions about the sincerity of the acknowledgement of the law, and whether the justice system acts consistently.

Separately, failure to account for the moral authority of Indigenous law may generate disproportionate sentences.

¹⁵² *Ibid* at 931.

¹⁵³ *TMP*, *supra* note 27 at para 43, citing *Peter Kiewit Sons Co v Perry*, 2007 BCSC 305 at para 16.

¹⁵⁴ Kersley, *supra* note 144 at 42.

IV. IGNORING THE MORAL DILEMMA COMPROMISES PROPORTIONALITY

The courts' evaluations of moral blameworthiness in *Leyden* and *Nelson* fell into many of the traps identified above. The convicted persons in those cases declared and demonstrated that Indigenous law motivated them to protest. Putting aside their finer differences, it is clear that each of these people faced competing obligations under Indigenous and Canadian laws and had to make a choice about which to follow. This was not the choice the classic morally blameworthy individual faces between a *good* course of action and a *bad* course of action. On the contrary, for the convicted persons in these cases, and, we may imagine, in similar past and future cases, both protesting and not protesting would break law. A moral dilemma arises from a conflict of laws, and the person experiencing the dilemma has to make a compromise.

Yet only the sentencing judge in *Nelson* recognized the presence and impact of the moral dilemma. Other judges, including those on the British Columbia Court of Appeal, brushed the issue aside by deciding that there was no conflict of laws, and therefore no moral issue to discuss. In doing so, they decided that they were the ultimate interpreters of the relevant Indigenous laws. Where judges lack Indigenous social, political, and legal knowledge,¹⁵⁵ this stance is undesirable.

The judges' approach exemplifies some of the challenges of pluralism. As Webber writes, law does not come from universally accepted normative order, but rather from the desire to create such order in the face of normative diversity.¹⁵⁶ Although Indigenous peoples have a strong claim "to live by their traditions"¹⁵⁷ and to receive "substantial respect" for their "independent normative authority,"¹⁵⁸ decision-makers may nonetheless prefer their own authority.¹⁵⁹ This "subordinating" position, historically common in Canada in criminal matters,¹⁶⁰ appears to define judges' approaches to date.

In such circumstances, as in *Leyden* and *Nelson*, the sentences imposed suffer from two errors: one pragmatic, and the other legal. Pragmatically, where judges ignore the moral dilemmas that flowed from Indigenous law, they dilute the status afforded to Indigenous legal systems by centuries of case law. Legally, because the sentences imposed fail to account for the impact of the moral dilemmas, the judges effectively manufacture the convicted parties' internal wickedness, resulting in incorrect assessments of moral blameworthiness, and ultimately disproportionate sanctions.

¹⁵⁵ Hanna, *supra* note 15 at 825, citing James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, 2006) at 206.

¹⁵⁶ Webber, *supra* note 13 at 177.

¹⁵⁷ *Ibid* at 187.

¹⁵⁸ *Ibid* at 191.

¹⁵⁹ *Ibid* at 188.

¹⁶⁰ Denis-Boileau & Sylvestre, *supra* note 73 at 551.

A. THE DANGER OF MIXING THE ELEMENTS OF PROPORTIONALITY

The reason for these errors may be that courts sentencing criminal contempt are allowing their well-articulated ideas about the seriousness of the offence to influence their perception of the convicted person's moral blameworthiness. This threatens proportionality.

Although there is some facial crossover between the factors that influence the two components of the proportionality assessment, they remain distinct. For example, the "normative character" of the conduct,¹⁶¹ the consequences of the offence, and the harm it creates, both actual and potential, all influence the seriousness of the offence.¹⁶² The "wrongfulness and harmfulness" of conduct may also influence moral blameworthiness,¹⁶³ though usually because the convicted person knew or should have known the consequences of their actions, or showed a malicious intention through their conduct.¹⁶⁴ Therefore, while the factors influencing both lines of inquiry look similar, their foundations differ, with the seriousness of the offence focusing on the offence itself, and moral blameworthiness focusing on the convicted person's mindset in committing the offence.

A sentencing judge dilutes proportionality by allowing the nature of the offence of criminal contempt to restrict a contemnor's ability to invoke motive to reduce moral blameworthiness. As the Ontario Court of Appeal wrote in *R. v. Morris*, to respect the core of the principle of proportionality, the seriousness of the offence and the moral blameworthiness of the convicted person should remain distinct lines of inquiry.¹⁶⁵ This is consistent with Canada's individualized approach to proportionality.¹⁶⁶ Notwithstanding any of the flaws in the *Morris* decision, the case provides a useful analogy. Just as the Ontario Court of Appeal wrote that experience of racism does not make possession of a handgun less "serious, dangerous, [or] harmful to the community,"¹⁶⁷ the potential impacts of disobeying a court order should not restrict a person's ability to explain their conscience and attenuate their moral blameworthiness for the offence of criminal contempt.

Returning to the *Leyden* and *Nelson* examples, it is wrong to conclude that convicted persons who face moral dilemmas arising from Indigenous-Canadian legal conflicts are just like any others who protest in violation of an injunction. For those who are neither connected to nor bound by Indigenous law, there would be no moral imperative to consider it in their actions related to protest. Such protesters may have other moral beliefs that compel them to violate the injunction, but those beliefs are legally distinct from Indigenous law because they are neither recognized nor given authority by the Canadian justice system. Treating adherence to Indigenous law as if it were any other moral imperative disregards the status Indigenous law has achieved.

¹⁶¹ *R v Friesen*, 2020 SCC 9 at para 76 [*Friesen*].

¹⁶² *Ibid* at paras 79, 85; *Hills*, *supra* note 131 at para 58.

¹⁶³ *Friesen*, *supra* note 161 at para 87.

¹⁶⁴ *Ibid* at paras 88–90.

¹⁶⁵ *R v Morris*, 2021 ONCA 680 at para 77 [*Morris*].

¹⁶⁶ Roach, *supra* note 8 at 390.

¹⁶⁷ *Morris*, *supra* note 165 at para 76.

V. MOVING FORWARD

It makes sense for courts to accept the role that Indigenous law plays in moral decision-making,¹⁶⁸ and to recognize its impact on moral blameworthiness. We know that Indigenous law guides decision-making, and we have carved out space in our law to account for its impacts. While this has not created an *equality* scenario between Indigenous and Canadian laws, it compels us to find a way to “give effect” to Indigenous laws when they are invoked to resolve certain legal disputes.¹⁶⁹ There is an open invitation awaiting jurists in Canada.

Although it would not be unprecedented to create another *paramountcy* scenario in which Indigenous law shielded protesters from criminal conviction, such a solution would sidestep the moral blameworthiness question at the heart of this discussion. This article focuses on how conflicts between Indigenous law and Canadian law ought to influence the evaluation of moral blameworthiness at sentencing. This assumes that a person has been convicted of a crime, which would not be the case if Indigenous law were paramount.

In this context, a *compromise* scenario is the most promising route forward. Where Canadian law leads to a conviction, Indigenous law may explain motive for conduct at sentencing. The Supreme Court of Canada’s decision in *R. v. Friesen* supports updating the law in this sort of situation in order to bring it in line with society’s understanding and to assist sentencing judges.¹⁷⁰ This solution accepts that Indigenous people are “subjects of law called upon to negotiate for themselves between and among the multiple legal orders that compete for their attention.”¹⁷¹ They face unique moral dilemmas because they feel bound by multiple authoritative legal systems. A compromise is a fitting response in such circumstances.

A. GIVE EACH LEGAL SYSTEM A ROLE

A simple compromise option is one which recognizes the authority of both Canadian and Indigenous law. Borrowing the incorporation and legitimization features of Swenson’s *harmonization*, and similar to Grammond’s *recognition model*, this proposal recognizes Indigenous law’s political legitimacy despite its origin outside the formal body of Canadian criminal law.¹⁷² In a case featuring criminal contempt, an Indigenous person might be convicted under Canadian law for protesting in violation of an injunction. However, having followed Indigenous law in their decision to protest, the conflict of laws they navigated could then mitigate their moral blameworthiness. Each set of laws plays a role in the outcome.

In the spirit of compromise, the burden to prove that a person experienced a moral dilemma arising from a conflict of laws should not exceed the usual relaxed standards for admission of evidence at sentencing, which seek to give the sentencing judge access to as much information as possible.¹⁷³

¹⁶⁸ Webber, *supra* note 13 at 191.

¹⁶⁹ Young, *supra* note 1 at 44.

¹⁷⁰ *Friesen*, *supra* note 161 at para 35.

¹⁷¹ Nicholas Kasirer, “Legal Education as *Métissage*” (2003) 78:1&2 Tul L Rev 481 at 487.

¹⁷² Grammond, *supra* note 3 at 14.

¹⁷³ *R v Lévesque*, 2000 SCC 47 at para 30.

There should not be any need to call special witnesses to testify as to the existence of Indigenous law. Courts know that Indigenous law exists. *Gladue* reports can provide the necessary information. Where cost or other barriers restrict a convicted person's access to a *Gladue* report,¹⁷⁴ a written document in the style of a letter of support from an authoritative source, as determined by the relevant community, should suffice.

A convicted person should not have to point to a specific Indigenous law that compelled them to act exactly as they did in the circumstances. As Kent Roach recollects, Indigenous law may involve interpretation of stories, such as the Cree tale "The Markings of the Birch Trees," and opinions on general principles may vary somewhat.¹⁷⁵ Just as the Supreme Court of Canada in *Ipeelee* made clear that judges could not require that a convicted person show an explicit link between the various parts of their life history and the circumstances of the offence¹⁷⁶ when introducing evidence to show limited voluntariness, it would once again be wise to reject such a rigid, formal requirement here. As Grammond suggests for recognition of Indigenous law,¹⁷⁷ the authenticity of a conflict of laws should be a question for the relevant Indigenous community. Where an authoritative source from a relevant Indigenous community confirms, either in person or in writing, that a convicted person faced a conflict of laws scenario, a judge should defer to this assessment and give it due weight in arriving at a fit sentence.

There is also no need for a system to identify "broad consensus" from among competing visions of Indigenous law in a given conflict, as is present in the Federal Court system.¹⁷⁸ As the issue is one of personal moral conscience, it does not matter if a community has a unanimous agreement as to how to interpret the relevant law. It should suffice that a convicted person acted within a range of plausible interpretations, as determined by an authoritative source.

B. GENEROUS, FLEXIBLE EVIDENTIARY BURDEN TIED TO BACKGROUND

Should there be a limit on who can invoke Indigenous law at sentencing to explain their conduct?

At a bare minimum, it would be hard to justify allowing a non-Indigenous person with no demonstrable ties to an Indigenous group to argue that the group's law bound their conscience when deciding whether or not to commit a criminal offence. This would not be a genuine moral dilemma because this person would not experience a genuine conflict of laws.

Still, as the *Leyden* appeal shows, people of mixed Indigenous background from different regions can develop strong ties to a particular community, and can accept direction from the

¹⁷⁴ Alexandra Hebert, "Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice" (2017) 43:1 Queen's LJ at 168; Benjamin Ralston, "Gladue Awareness Project: Final Report" (2020) at 79, online (pdf): [perma.cc/GD8V-YM94]; Denis-Boileau & Sylvestre, *supra* note 73 at 589.

¹⁷⁵ Roach, *supra* note 8 at 394–95.

¹⁷⁶ *Ipeelee*, *supra* note 6 at paras 81–83.

¹⁷⁷ Grammond, *supra* note 3 at 9.

¹⁷⁸ *Ibid* at 20.

community's law and leadership when deciding whether to engage in protest. Where such bonds form, they could easily influence moral decision-making.

Therefore, rather than setting an arbitrary threshold based on heredity, a colonial designation like band membership, or geography — especially given what we know about the wide-ranging impacts of environmental concerns which often lead to protests — it would be sensible to have a general rule that anyone can attempt to prove that Indigenous law influenced their decision-making, but that the standard for succeeding in such a claim will vary based on the person's background. A person with no known Indigenous background and no obvious ties to a local community would face a very heavy burden, whereas a person who decided to follow their own Nation's law when protesting on their own Nation's territory would face a much lighter burden. Where a convicted person has connections through Indigenous background or to Indigenous communities, consistent with the general principles governing Crown-Indigenous legal disputes,¹⁷⁹ sentencing judges should take a generous, flexible approach that trends toward accepting, not rejecting, claims of conflicts of laws.

VI. ADDRESSING OBJECTIONS

Clarity about this proposal and its consequences should ease concerns that may arise.

This proposal may come across as wishful thinking for those who argue that there is no way Canadian courts will change their approach to sentencing, especially for contempt. That is a political discussion beyond the scope of the proposal itself. There are many reasons why courts may wish to continue existing practices or to ignore this issue, and they may have nothing to do with the status and moral authority of Indigenous law. This article exposes the flaws in existing practices, and grounded in current law, extends an invitation to jurists to update and improve the assessment of moral blameworthiness at sentencing. Whether or not this will happen, the argument is that it can and should.

Some may fear that considering how conflicts of laws influence moral blameworthiness props the doors wide open for any convicted person to invoke cultural, religious, or political differences to justify their violation of Canadian court orders and law in general. Such fears are misplaced. The proposal advanced in this article does not suggest that courts should change the way they assess moral blameworthiness for any imaginable conflict of laws. Rather, it focuses on conflicts between Indigenous and Canadian laws because of the special status the former has in this country, and the historic dynamic between Canadian law, the Canadian state, and Indigenous peoples and laws. It could take centuries for alternative legal systems to integrate into the Canadian justice system, so those who express this concern have plenty of time to address it.

We can also resolve any concerns about this proposal distorting the moral compass of the Canadian justice system. The foundations of the moral blameworthiness inquiry — moral and practical agency, internal wickedness, and fairness and justice — remain unchanged. Assigning a role to conflicts between Indigenous and Canadian laws when assessing moral blameworthiness does not change the moral principles which guide sentencing in Canada.

¹⁷⁹ *Van der Peet*, *supra* note 3 at para 23.

This proposal merely affirms the status that the justice system has given to Indigenous legal systems and respects the moral diversity that necessarily exists in a pluralistic state.

There may be concern that this proposal could lead to courts mishandling Indigenous law. This too is resolvable. In order to avoid the risk of misinterpretation of Indigenous law, sentencing judges should accept convicted persons' and Indigenous communities' reasonable claims about what the law directs and how it impacts moral decision-making. It is true that judges who are unfamiliar with Indigenous law are ill-equipped to gatekeep these claims. They are predisposed to view Indigenous law through a liberal Canadian lens, distorting and misunderstanding it, misusing it,¹⁸⁰ mischaracterizing protesters who comply with Indigenous law,¹⁸¹ and imposing improper sentences. It would be unreasonable, if not impossible, to expect judges to develop an understanding of all the Indigenous legal systems they might encounter. By deferring to Indigenous communities to interpret their own laws, this proposal takes that weight off judges, and allows them to focus on credibility and reliability of evidence and how that evidence interacts with the relevant sentencing principles in a given case.

Finally, we can set aside concerns that this proposal disarms the justice system and invites illegal protest. A sentencing judge's ability to consider how conflicts between Indigenous and Canadian law influence morality in decision-making does not undermine a finding of guilt. Sentencing takes place after conviction, and moral blameworthiness is only half of the proportionality assessment, which is itself only one of several sentencing principles which a judge will consider in arriving at an appropriate sentence. Allowing judges to perform a comprehensive assessment of moral blameworthiness gives the justice system greater legitimacy and does not dismiss criminal conduct.

VII. CONCLUSION

Canada hosts a wide range of cultures and beliefs, and takes pride in the idea of meaningful coexistence. However, as Canada's relationship with Indigenous people and laws shows, it takes a concrete effort to turn the idea of meaningful coexistence into a practical reality. An expanded role for Indigenous law in the assessment of moral blameworthiness at sentencing is a small part of that effort which is consistent with the diversity of people and ideas on this land.

A person who has moved to Canada may be said to have voluntarily accepted Canada's laws and systems, and someone who has always lived here as a member of the dominant cultural group, or a group that shares characteristics with such a group, has greater implied ties to the way Canada looks and operates today. However, those whose roots here trace back before Canada, but who were not invited into Canada's nation-building project, have a right to view this country through a different lens.

After centuries of imposed colonial law, oppression, and carceral overrepresentation, the recognition of Indigenous legal orders creates a unique opening to change the way the

¹⁸⁰ Mills, *supra* note 8 at 868, 872; Grammond, *supra* note 3 at 19.

¹⁸¹ Mills, *supra* note 8 at 871.

Canadian legal system evaluates motivations for criminal conduct. What the Supreme Court of Canada called “the distinct history of Aboriginal peoples”¹⁸² justifies this change. In these conditions, sincere engagement with Indigenous law could be a step toward reconciliation.¹⁸³

By recognizing how Indigenous ways of thinking influence morality, Canada’s sentencing regime could acknowledge that identity empowers Indigenous people to make decisions in their lives. Whether or not those decisions ultimately agree with Canadian laws, and whether they adhere to the western European sense of morality embedded in Canadian law, we can see that they are part of a reflective thought process. We can accept the legitimacy of that thought process as a sign of respect. In doing so, we can build a sentencing regime that better identifies true moral blameworthiness: a regime which better accomplishes its own goals.

¹⁸² *Ipeelee*, *supra* note 6 at para 77.

¹⁸³ *Hanna*, *supra* note 15 at 839.