UVic’s Proposed Indigenous Law Program: An Overview

Introduction:

This memorandum conveys the principal elements of the proposed program in Indigenous Law and sketches the human and material resources necessary to support each element. In summary, the program consists of the following, each of which will be discussed in turn in the pages that follow:

1. **Joint degree in Canadian Common Law and Indigenous Legal Orders (JD/JID).** This is the heart of the program, unprecedented worldwide, which will have a transformative effect on the relationship between Indigenous legal traditions and state law in the world today. Because of its centrality to the proposal, both conceptually and in amassing the resources necessary to deliver the other elements, this document will explain its rationale and structure at some length.

2. **Intensive community-engaged teaching and research on Indigenous law.** UVic’s Indigenous Law Research Unit already works closely with many Indigenous communities to identify resources within their legal traditions for addressing the challenges they face, using intensive workshops and a well-developed and robust methodology. That work will expand, establishing the partnerships on which the program will be based. It will stimulate the discussion, study, and use of Indigenous legal traditions in Indigenous communities, build the body of research on Indigenous legal orders, test insights against the challenges of practical action, disseminate the program’s expertise among Indigenous peoples, and provide community-engaged learning opportunities for students.

3. **Masters-level coursework graduate program in Indigenous legal orders (MIL).** There will be many people who already possess a law degree – either Canadians who obtained a law degree prior to the establishment of the JD/JID or international students – who will want to gain the benefit of the revolutionary new program and the critical mass of Indigenous scholars associated with the JD/JID, but who will not be in a position to take the full four-year program. The MIL is designed to accommodate them. It is designed to be a true coursework program, without intensive research and supervisory demands.

4. **Expansion of UVic’s existing research masters and doctoral programs in Indigenous legal orders (LLM and PhD).** UVic is the current leader in supervising masters and doctoral research on Indigenous legal orders and on those orders’ relationship to state law, and has trained many of the early-career scholars now teaching in law schools in Canada and internationally. The large and vibrant intellectual community established by the JD/JID will attract more research higher degree students, who will go on to become the next generation of teachers and scholars in the field.
5. **Research on Indigenous legal orders.** The significant community of researchers and students established by this program will greatly stimulate research and publication on Indigenous legal orders through the Indigenous Law Research Unit, the individual research of faculty members, and research undertaken by students.

6. **Continuing professional development.** There is also a strong appetite for continuing professional development for government leaders and public servants, judges, lawyers, community workers, and a wide variety of professions. The program’s expertise will also be deployed to these purposes.

We explore each of these elements in turn.

1. **Joint Degree in Canadian Common Law and Indigenous Legal Orders (JD/JID):**

   **A. Rationale:**

   This is the core of the proposal. It would engage with Indigenous legal orders with the depth, rigour, and critical focus that law schools bring to non-Indigenous law. It would prepare students to access Indigenous legal knowledge in a manner that is robust and dependable; to reason and resolve disputes using Indigenous forms of rhetoric and deliberation; to explore the potential for these forms of reasoning to shape Canadian law; to understand and work within Indigenous legal institutions; to build upon Indigenous principles, forms of deliberation, and institutions to construct legal orders and structures adapted to Indigenous peoples’ circumstances today; to exercise self-government in a manner that draws upon indigenous norms and procedures; to develop institutions, negotiations, forms of consultation, and modes of reasoning that can operate at the interface between Indigenous and non-Indigenous legal orders and address differences and disputes among Indigenous orders; and, finally, to work from those skills, learned primarily in the North American context, to engage with non-state and customary legal orders in the world at large.

   It would, in short, train students to work with Indigenous legal orders with the range, sophistication, critical spirit, and practical professionalism to which law schools aspire in teaching non-Indigenous law. It would furnish students – especially Indigenous students – with tools to engage productively and deeply with Indigenous legal traditions and to incorporate that training into their expertise in non-Indigenous law. Law schools would no longer be delivering what is now, despite our best efforts, an education of displacement, in which non-Indigenous crowd out Indigenous forms of legality.

   This program would be unique in the world. Currently, Canadian, New Zealand, Australian, American, Scandinavian and increasingly Latin American law schools teach state law or international law as it
relates to Indigenous peoples, but they can do little more than introduce Indigenous legality conceived in its own terms. Anthropologists have studied Indigenous legal orders in depth, but their approach is analogous to the sociology of law: extraordinarily useful at understanding the system as a whole in its relationship to its societies, but not directed at training practitioners who can then reason within those orders. Law schools in some African and Oceanic countries incorporate customary law into their legal education, but this is generally limited to certain areas (e.g., family or property law) and customary law is generally taught as a set of norms that is encompassed and applied by state institutions.

Nevertheless, international organizations and state institutions worldwide increasingly recognize the need to understand and engage with Indigenous law. Not only is reconciliation with Indigenous peoples one of the great questions of our age, but as Indigenous peoples gain control of their lands and accede to greater self-government, they need to develop institutions and laws, anchored in their traditions, that can carry out those powers. Principles and mechanisms have to be established for handling the interaction between Indigenous and non-Indigenous orders.

Although the JD/JID program is unprecedented, it builds upon an extensive body of experience. First, in the last two decades, a generation of scholars, especially Indigenous scholars, have extended legal scholarship to include Indigenous legal traditions. Two UVic scholars, John Borrows and Val Napoleon, are clear leaders in that orientation and stand at the centre of Canadian and international networks in the field. Second, an extensive body of research has been developed on certain North American Indigenous legal traditions, especially by UVic’s Indigenous Law Research Unit. Third, UVic Law has long experience in related projects, notably Akitsiraq (which drew upon a network of scholars from across Canada to deliver a full JD to a cohort of students in Iqaluit, incorporating elements of Inuit law), two summer programs in Indigenous law, and numerous courses exploring dimensions of the program. Fourth, the program draws upon and will in turn contribute to interaction among the impressive array of scholars across disciplines working in the field at UVic, especially Taiaiake Alfred, Jeff Corntassel, and Heidi Stark – Indigenous scholars in Political Science and Indigenous Governance who work on Indigenous politics and nationhood. Fifth, UVic law draws upon the expertise of the National Consortium for Indigenous Economic Development, established jointly by UVic Law and UVic’s Gustavson School of Business. Sixth, the program benefits from the experience of the Faculty of Law at McGill University in teaching through intensive comparison two legal traditions, in McGill’s case the Civil Law and the Common Law. That experience must be heavily adapted to the Indigenous context, but McGill’s experience has been instructive.

One particular challenge is how to address the number and diversity of Indigenous legal orders. The program must engage with the legal orders in their specificity, not presuppose a common pan-Indigenous approach to legal ordering. Only then will the actual principles, methods of transmission, modes of reasoning, procedures, forms of decision-making, and nature of the decision-makers become clear. Only then will the particular society’s debates, methods of criticism and reform, history of reforms, disputes over meaning, and mechanisms for resolving those disputes be identified. The
program will therefore examine a few representative traditions with sufficient depth to introduce their modes of operation. The traditions will be chosen to reveal an array of institutional approaches and a selection of First Nations, Inuit, and Métis forms of legality. In this manner, we expect students to obtain skills for working with a range of Indigenous traditions. We expect that many skills will be relevant to multiple peoples in Canada and abroad given the non-state nature of Indigenous societies, approaches to decision-making that are similar in different societies (the dispersion of authority; the use of oral histories and stories to convey legal knowledge; the use of ceremonies for deliberation and decision-making; the role of elders and other knowledge-keepers; and so on), and similarities in their relationship to the newcomers’ legal order.

B. Structure:

The joint program would have the following features:

- Students would be trained both in the ordinary content of a Common Law degree (JD) and North American Indigenous legal orders (JID).
- The JD/JID program will be a four-year dual-degree program (one year more than the JD alone).
- The program would be offered to cohorts of 24 students selected through a special admissions process, with (after an initial trial period) one cohort admitted each September. Mechanisms would also be developed for fostering interaction between the JD/JID students and UVic’s regular JD students.
- Important elements of the program, especially some core first-year subjects, will be taught trans-systemically – through intensive, mutually-illuminating comparison in courses that deal with Canadian law and one or more Indigenous traditions.
- Upper-year courses will be drawn from the Common-Law curriculum and specialized courses designed to complement the JD/JID.
- Two full terms will be devoted to field schools, in which students will benefit from organized instruction and experiential learning within Indigenous orders.

C. Summary of Resource Requirements:

Substantial new resources will be required to deliver this program through external support for operational and capital needs:

- Once the program achieves steady-state (year 6), overall JD student load in the Faculty will have increased by 26 percent. If the faculty complement were increased proportionately, seven and a half faculty members would be added. Given the mode of delivery and the possibility of economies of scale in the upper years, we propose the addition of six faculty members. Estimated cost: $900,000 annually at current rates.
- The program will require intensive engagement by Indigenous community members in classroom teaching, the Salish camp, and particularly the field schools. This teaching role must
be compensated. Moreover, activities like the field schools will involve high travel and accommodation costs. Estimated cost for both these elements: $587,000.

- The program will particularly appeal to Indigenous students. As a rule, they do not come from wealthy families, they have to incur substantial travel costs from remote communities, they often carry significant familial responsibilities, and they sometimes have special needs for academic and cultural support. There is, then, a substantial student aid and support budget. Estimated cost: $322,000 annually.

- The program will also present sizeable administrative demands, given the need to maintain close relations with Indigenous peoples and to deliver important dimensions of the program in Indigenous communities. The proposal contemplates significant additions in program and student administration. Estimated cost: $315,000 annually.

- Finally, the increased faculty and student complement will require more space, given that our current facilities are at capacity. A separate addition to the current building is therefore planned. Estimated cost: $23 million.

Total cost for the joint JD/JID once the program reaches steady state: $1,802,000 in annual operating costs; $322,000 in student support and financial aid; capital costs of $23 million.

2. **Intensive community-engaged teaching and research on Indigenous law:**

A. **Rationale:**

Community engagement is built into the very essence of this program. Indigenous legal knowledge is and will continue to be held within Indigenous communities, especially given the non-state nature of Indigenous societies; the fact that legal knowledge is therefore maintained and transmitted by a number of families, clans, office-holders, elders, and knowledge-keepers in each society; the role of community institutions (ceremonies, family councils, negotiation and mediation) in testing and interpreting legal principles; and the complex interaction between traditional institutions and the elective institutions of band, municipal, treaty-beneficiary, and territorial government.

Students in the program must therefore engage with communities in depth. Course materials, classroom teaching, and research collections must accurately reflect communities’ ways of working with law. Moreover, the program is designed to provide immediate, continuing support for communities’ efforts to draw upon their own legal traditions. Hence the prevalence, throughout the program’s design, of community engagement.

An essential element in that engagement is the work of UVic’s Indigenous Law Research Unit (ILRU).
B. Structure:

ILRU already has a distinguished record of community-engaged research on Indigenous Law. It builds upon a long history of contributions by scholars and graduate students associated with the program, and upon the national and international networks of those scholars and students. It took its present form as a result of a major project in which ILRU collaborated with the Indian Residential Schools Truth and Reconciliation Commission and the Indigenous Bar Association, funded by the Ontario Law Foundation, which had a significant impact on the TRC’s recommendations, especially Recommendation 50.

In this work, ILRU developed methodologies for community engagement that involve a) the identification of areas of interest by the communities themselves; b) careful training of researchers (generally Indigenous student researchers) in how to approach Indigenous legal knowledge; c) the systematic examination of published accounts of stories and other sources from the peoples that address the peoples’ areas of interest; d) workshop of the results of that research with the communities in order to supplement and correct published accounts and stimulate reflection on how the legal tradition might be deployed today; e) the preparation of detailed reports back to the communities, which are checked with the communities and may only be disseminated with the communities’ permission. ILRU has engaged in a remarkable array of forms of communication, including workshops, conferences, formal reports, graphic novels, videos, posters, and academic publications, addressing a wide variety of constituencies.

Moreover, we expect that the modes of research will continue to expand and diversify. Any program that seeks to address Indigenous legal orders with the seriousness and rigour that universities bring to non-Indigenous law must allow for a range of approaches and methodologies. That is this program’s aim.

ILRU will serve as the privileged vehicle for community-engaged teaching and research associated with the program. Its activities, with communities, in researching and workshop of the communities’ law will directly support the communities’ own developments in that field. The relationships that it establishes will provide a natural framework for the program’s field schools and other teaching. Its materials will, with the communities’ permission, serve as course materials for the JD/JID. And its research contribution will lead the research efforts of those associated with the program.

C. Summary of Resource Requirements:

ILRU already has held and now holds significant grants (including its researchers’ participation in two successive MCRI/SSHRC Partnership grants). Many of its community projects are funded by the communities concerned. Since October 2015 it has been engaged in a significant and successful fundraising campaign, with dedicated fundraising support.
Because ILRU has an on-going, substantially autonomous, and successful fundraising effort, its requirements are not included in the Indigenous Law program’s budget. Nevertheless, its work is foundational. The principal actors in ILRU are principal actors in the Indigenous Law program. ILRU’s activities and research will continue to grow in order to respond to the great community interest in its work and as a result of the expansion of UVic Law’s faculty and graduate-student complement due to the creation of the Indigenous Law program.

3. Masters-level coursework graduate program in Indigenous legal orders (MIL):

A. Rationale:

The JD/JID is directed at students as they first enter law school. Its principal feature is its intensive engagement, concurrently and with rough equality, with both the Common Law and Indigenous legal orders. Not only will the JD/JID treat each set of traditions with rough equivalence, but it will encourage its students, virtually from their first day, to compare the Common Law and Indigenous forms of legality, draw on each tradition to ask searching questions of the other, consider how the legal orders might interact productively, and explore innovative ways of structuring their interface.

These objectives cannot be attained, to anything like the same degree, by students pursuing a graduate degree after having completed a Common-Law degree. Nevertheless, there will be students who will want to benefit from UVic’s focus on Indigenous Law to increase their understanding of Indigenous legal orders, engage in comparative work, and experience the program in order to introduce aspects into their home institutions. This will be true of Canadian students who already have law degrees, but also international students who wish to address questions relating to Indigenous peoples, customary law, and national minorities in their home countries. The proposed coursework master’s program in Indigenous Law (MIL) will provide a framework for these students.

B. Structure:

The MIL will draw upon the resources assembled for the JD/JID. One or two courses, specifically designed for the MIL, will introduce students to the purposes of the JD/JID and the range of approaches to Indigenous legal orders pursued by scholars teaching in the program, allowing them an opportunity to experience the trans-systemic method. The balance of the students’ programs will consist of upper-year courses designed for the JD/JID or that will otherwise complement their interests. The MIL will be designed to be completed within one year.

C. Summary of Resource Requirements:

The MIL is designed to piggyback upon and introduce students to the intellectual community created by the JD/JID. We expect, then, that it will not require significant additional resources to deliver. The faculty complement created for the JD/JID, supplemented by the participation of PhD students, will
provide the teaching and administrative resources necessary for the program. The MIL-specific teaching resources have therefore been included at the rate of two courses, taught by sessional instructors: $20,000 annually.

It is difficult to estimate the amount of student financial aid required for MIL students given their potentially diverse origin. Moreover, the fact that the program can be completed within one year reduces the need for financial aid, permitting students to self-fund more easily or obtain support from their employers or other sources. Thus, there is no special amount for MIL student aid built into the core budget of the Indigenous Law program. Nevertheless, we have included two full scholarships for MIL students in the “would like to have” portion of the student aid budget: total $50,000.

The amounts above are the only special financial provision for the MIL. Students’ fees will, we anticipate, offset the core expenditures required for the JD/JID.

4. Expansion of UVic’s existing research masters and doctoral programs in Indigenous legal orders (LLM and PhD):

A. Rationale and Structure:

UVic Law has high-quality research masters and doctoral programs that have a very strong Indigenous component.

- Since the first intake of students in 2004, approximately 25 percent of UVic Law’s 123 graduate students have been Indigenous. This does not include a significant number of non-Indigenous graduate students also working on Indigenous legal issues.
- Four of these students (including three Indigenous students) have obtained highly-coveted Trudeau doctoral scholarships – a remarkable record given that the total enrolment in UVic Law’s graduate program over its 12 years of existence is 123, and only 14 or 15 Trudeau scholarships are awarded in any year across all the disciplines of the Humanities and Social Sciences.
- Eleven graduate students working in the area of Indigenous law (including eight Indigenous students) have been appointed to teaching positions at Canadian, New Zealand/Aotearoa, and Thai universities (Alberta; UBC; Manitoba; New Brunswick; Osgoode Hall Law School; Ottawa; Shingwauk Institute; Vancouver Island University; Chiang Mai; Otago; Victoria University of Wellington). One of these graduates is the first Maori legal scholar in New Zealand/Aotearoa to hold a university appointment at the rank of Professor (Otago). Three more graduates who hold JD/LLB degrees from UVic Law (including two Indigenous graduates) hold positions dealing with Indigenous Law at Canadian universities (Saskatchewan; Thompson Rivers University; Vancouver Island University). Finally, three of our LLM graduates working in the area of Indigenous Law
(including two Indigenous graduates) are currently enrolled in doctoral programs at other Canadian universities (UBC; Osgoode Hall Law School; McGill).

- UVic Law’s graduate programs have a sizeable interdisciplinary dimension. Among other things, a Graduate Certificate in Indigenous Nationhood is currently being created by the Faculty of Law and the departments of Political Science and Indigenous Governance. The proposed Indigenous Law Program will substantially expand the offerings in this interdisciplinary program.

- UVic Law’s presence in this field is international. Graduate students with an interest in Indigenous Law have enrolled in our programs from New Zealand/Aotearoa, Thailand, Malaysia, and Peru. Doctoral students enrolled at other institutions (including in Australia and China) have spent periods of residence at UVic Law.

UVic Law’s graduate program can reasonably claim, then, to have made very substantial contributions to training early-career scholars in Indigenous law. Those contributions will greatly increase with the advent of the Indigenous Law program at UVic Law, given the expansion in the number of scholars (and therefore supervisory capacity) at UVic Law and the creation of an unprecedented group of students working on Indigenous law.

The Indigenous Law program will therefore have an important projection in Canada and around the world through its development of the next generation of scholars in Indigenous Law.

B. Summary of Resource Requirements:

Faculty members are expected to supervise graduate students as part of their regular responsibilities. UVic Law scholars working in this field have commonly supervised or served on the supervisory committees of between six and twelve graduate students at any one time. The increase in faculty numbers associated with the program will therefore carry with it a large increase in supervisory capacity.

Many of UVic Law’s graduate students are funded by outside agencies. We expect that the same would be true here. Nevertheless, two sources of additional funding are contemplated in the proposal:

- Highly-prepared, advanced-level PhD students are likely to play a teaching role in the program, especially as teaching assistants. The budgetary provision is $28,000 annually.
- The proposal also includes doctoral scholarships in the “would like to have” portion of the student aid budget: for each scholarship, $25,000 per year for three years.

5. Research on Indigenous legal orders:

The activity of the Indigenous Law Research Unit (ILRU) is signalled above. The research performed by ILRU is directly related to the objectives of the Indigenous Law program. It is important to realize,
however, that the research stimulated by this program will not be limited to ILRU’s contributions, important as the latter will be. Individual faculty and graduate students also pursue their own research agendas, some of which extend beyond the purview of ILRU.

For example:

• In recent years, the Consortium on Democratic Constitutionalism (“Demcon”: a joint venture between UVic Law, Political Science, and Philosophy) has held five conferences and served as a junior sponsor of two more, resulting in four books of essays. Part of the mission of Demcon is to bring insights derived from Indigenous/non-Indigenous interaction into major debates in political and legal theory. Five of the conferences and three of the books have included significant Indigenous dimensions. One of the conferences was organized with the Cowichan Tribes and held on Cowichan Territory in accordance with Cowichan protocols.

• UVic Law has an established pattern of engagement with Asian legal systems. Two newly-hired members of faculty, who are supporters of the Indigenous Law program although not directly associated with it, work on issues of legal pluralism in Asia and the Adivasis in India (tribal peoples, considered by some to be Indigenous).

• UVic Law has a distinguished record of legal historical scholarship on the relations between Indigenous and non-Indigenous peoples in Canada.

• The National Consortium on Indigenous Economic Development, jointly housed in Business and Law at UVic, is led by the Haida leader, Miles Richardson, has an advisory board recruited from across Canada, and specifically addresses questions of Indigenous economic development.

• Beyond these collective projects, scholars at UVic Law have drawn upon Indigenous dimensions in their research on family law, environmental law, property law, intellectual property law, taxation, criminal law, international law, constitutional law, and legal theory.

The breadth of engagement of UVic faculty members with Indigenous questions is one of the great strengths of the Faculty in pursuing this project. It also forms part of an ethic of engagement across the Indigenous/non-Indigenous divide that the new Indigenous Law Program will exemplify.

6. Continuing professional development:

Finally, especially as a result of the recommendations of the Indian Residential School Truth and Reconciliation Commission, there is very strong interest in further training for legal professionals and judges in Indigenous law. Scholars at the University of Victoria have long been involved in delivering that training. That work will increase with the development of the Indigenous Law Program, and will constitute a further contribution to fulfilling the recommendations of the Truth and Reconciliation Commission and to Indigenous/non-Indigenous reconciliation generally.
The courts and the legal profession commonly bear the cost of continuing professional development themselves. We anticipate that the financial return from providing this training will assist in supporting the program generally.

Final Comments:

In its report and in several of its recommendations, the Indian Residential School Truth and Reconciliation Commission makes clear that it is time for law schools and the legal profession to pay much greater attention to Indigenous Law. The proposed Indigenous Law Program responds to that call. It builds upon a long history of engagement with these issues at UVic Law and across Canada. It has yet to proceed through the full process of approval within the University but, if duly approved, it will have built upon ten years of study, research, and experimentation at UVic Law, an effort to which scholars from across the country, Indigenous and non-Indigenous, have contributed greatly.

The proposal is ambitious, although it builds upon a long process of preparation, including many programmatic innovations that have laid the foundation for this proposal – especially the Akitsiraq program; the summer programs in Indigenous law; the Indigenous dimension of our graduate program; the Faculty’s long experience with specialized support for Indigenous students; and the activities of the Indigenous Law Research Unit.

The proposal is ambitious. But it is time to seize that ambition and ensure that education in Indigenous Law – in the world at large – is no longer an education in displacement.