



Contributing to Canada's social and economic prosperity:

**A proposal for an innovative
common law/Indigenous law program**

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Executive Summary

The Canadian government has clearly prioritized its commitment to healing the relationship with Indigenous peoples and to supporting the development of Indigenous governance structures in partnership with Indigenous peoples. The Prime Minister indicated to all Ministers in their mandate letters that: *"No relationship is more important to me and to Canada than the one with Indigenous peoples. It is time for a renewed relationship with Indigenous peoples based on recognition of rights, respect, cooperation and partnership."* In May, Canada also became a full supporter of the UN Declaration on Rights of Indigenous Peoples, which begins a process of harmonizing Canada's laws with the standards set in the declaration.

Universities have a key role to play in addressing these priorities and in supporting reconciliation and a renewed relationship with Indigenous and non-Indigenous people of Canada. Universities Canada has committed to a number of principles including to: *"Recognize the importance of indigenization of curricula through responsive academic programming, support programs, orientations, and pedagogies."*

The University of Victoria's (UVic) Budget 2017 submission responds to this charge and proposes a Joint Program in Canadian Common Law and Indigenous Legal Orders (JD/JID) as a means to help Canadians, and specifically Indigenous peoples, maximize, in the manner of their choosing, their contributions to Canada, specifically to its social, political, and economic growth.

As the first professional program of its kind, the JD/JID will be a national and world-leading program, training professionals to work across Indigenous and non-Indigenous legal traditions. UVic Law has the commitment, imagination, capability and expertise to develop and implement the JD/JID. Of equal importance, we have the passion, courage, and desire to play a leadership role in healing the relationship between Indigenous/non-Indigenous peoples.

The JD/JID program presents a solution to the challenge of transforming our institutions and processes based on shared principles for the benefit of all Canadians, honouring Indigenous peoples' rightful place in a common and inclusive society.

Context

In recent years, there has been widespread and growing recognition of the importance of Indigenous legal traditions to Indigenous societies. This is particularly relevant as those societies establish and implement self-government. The resurgence of Indigenous law has been driven by Indigenous people themselves as they draw on their own legal traditions to re-establish order in their societies, secure a healthy future for their children, govern their lands, build their economic relationships, and organize their institutions.

Indigenous governments are crucial interlocutors of non-Indigenous governments, citizens, and businesses with regard to Aboriginal title lands, consultations on developmental projects, environmental assessment, resource management, and

government-to-government treaty negotiations. These arrangements all put a premium on Indigenous governments' internal organization and legitimacy.

Indigenous legal traditions are of critical importance to areas of non-Indigenous law with a large impact on Indigenous peoples – not only issues of Aboriginal lands and governance, but also the administration of criminal law, child protection, water stewardship, and many other areas.

Truth and Reconciliation Commission

The recommendations of the Truth and Reconciliation Commission (TRC) acknowledge the vital importance of Indigenous law. The report states: *“A commitment to truth and reconciliation demands that Canada’s legal system be transformed. It must ensure that Aboriginal peoples have greater ownership of, participation in, and access to its central driving forces... Aboriginal peoples need to become the law’s architects and interpreters where it applies to their collective rights and interests.”*

Call to Action #50 in the TRC Recommendations states: *“In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.”*

The JD/JID program responds directly to needs expressed by Indigenous communities and to the recommendations of the TRC. It goes further by creating practical skills for building new patterns of productive and fulfilling relationships between Indigenous/non-Indigenous societies.

Indigenous Governance

Indigenous peoples now exercise significant control over resources and governance functions as a result of the enforcement of historical treaties, the conclusion of modern-day treaties, the adoption of self-government agreements, the creation of co-management structures, and the assumption of control over resources on-reserve. They seek to exercise those jurisdictions in ways that are anchored within Indigenous forms of ordering and that can interact productively with non-Indigenous institutions. Yet legal education today focuses overwhelmingly on the civil law or common law without paying anything like the same attention to how to access, reason with, build upon, and develop Indigenous legal orders – or how to develop institutions that can work effectively between Indigenous and non-Indigenous institutions. This JD/JID will provide excellent professional training in common-law and Indigenous legal traditions, developing the skills for working across those traditions.

Duty to Consult and Accommodate

Moreover, the Supreme Court of Canada has made clear that governments owe a constitutional duty to consult and accommodate with Aboriginal peoples. The duty comes into effect when the Crown contemplates actions or decisions that may affect

Indigenous peoples' Aboriginal or Treaty rights. It arises often in the context of natural resource extraction such as mining, forestry, oil, and gas.

The current government has committed that Indigenous peoples will be meaningfully consulted and their rights and interests accommodated and that decisions will be based on science and evidence including traditional Indigenous knowledge. The duty to consult has increased Indigenous authority and has led to new collaborations as well as impact and benefit agreements.

The need for both Indigenous and non-Indigenous people trained in Indigenous legal traditions is vital to support the government's duty to consult and to ensure a fair consultation process. Empowering better scholarship and training of people to navigate that duty to consult would help ensure mutually beneficial outcomes and shared success.

Economic Impact

Partnerships with Indigenous peoples are increasingly important to economic development through the management of natural resources, protection of lands, oceans and environment, and issues of health and justice. Initiatives in these areas require coordinated and effective action. Education will build capacity for people, communities and businesses. Effective partnerships bridging the gap between Indigenous and non-Indigenous laws will help clarify and coordinate land use, consultations, and assessments of environmental and cultural issues. Canada has a significant need to develop advanced governance structures and build the capacity for people to manage development, investment, and economic diversification.

JID Program Overview

The JD/JID is the first of its kind in Canada and is unique globally. The program responds to the need to understand, refine and develop Indigenous legal orders and governance structures. More importantly, it fills a critical intellectual, cultural and professional gap that would persist without this world-leading program.

Indigenous laws and legal orders are comprehensive and enjoy legitimacy and coherence like Canadian law. The JD/JID will bring Indigenous law into an academic setting working within well-established community connections.

This unprecedented program will train Indigenous and non-Indigenous students to work across Indigenous legal traditions and the common law. The program will work with two sets of traditions, comparing them, using one to illuminate the other, and exploring potential connections and relationships. Since Indigenous legal traditions are rooted in Indigenous communities, students will participate in Field Schools and work on Indigenous territories, learn from local knowledge holders and experience Indigenous institutions.

Students will graduate in four years with two professional degrees and a deep understanding of Indigenous law and governance, the knowledge and experience to pursue a career in common law, and a strong sense of how to create and manage institutions functioning across both spheres.

Outcomes

The JD/JID will provide students with tools to engage in Indigenous legal orders with the depth, rigour and critical focus law schools bring to non-Indigenous law. It will prepare students to:

- Access both Indigenous and non-Indigenous legal knowledge;
- Reason and resolve disputes using Indigenous forms of rhetoric and deliberation;
- Explore the potential for these forms of reasoning to shape Canadian law;
- Understand and work within Indigenous legal institutions;
- Build on Indigenous principles, forms of deliberation and institutions to construct legal orders and structures adapted to Indigenous peoples' circumstances;
- Help communities exercise self-government drawing on Indigenous norms and procedures;
- Support the development of institutions, negotiations, forms of consultation and modes of reasoning between Indigenous and non-Indigenous legal orders and address differences and disputes; and
- Engage with legal orders around the world using the skills learned in the North American context.

Graduates will contribute to the country's economic development by playing a central role in co-creating the decision-making structures and processes affecting Indigenous communities. As Indigenous people exercise powers of self-government, the JD/JID promotes expertise related to the design and operation of these diverse, inventive and increasingly prominent institutions. Graduates will address the social and economic disadvantage faced by Indigenous peoples by creating institutional capacity and legal forms to devise effective solutions. Finally, the program will serve as a model for engagement across Indigenous and non-Indigenous traditions and will facilitate a more fruitful and productive relationship among them.

Budget

The first cohort of students could be admitted in September 2017 and would graduate in June 2021. The program will train 250 legal professionals each decade who will work in close collaboration with First Nations, facilitating reflection and innovation within communities.

The University of Victoria is requesting funding from the federal government for a capital investment in the proposed new Indigenous wing, built onto the existing Law building at UVic, which will house the JD/JID program. The **one-time contribution of \$18.5 million** would create the new purpose built building including exterior and interior features for use in lectures, study, research, conferences, gathering, reflection, interaction, and access by Indigenous communities to the knowledge developed through the program.

The total annual cost of running the program, once it reaches steady state in 2020, will be \$1.8 million in operating costs and \$350,000 in student support and financial aid to be raised from contributions from UVic, the BC Provincial Government, and private donors.

UVic's Unique Expertise

The University of Victoria has earned a national and international reputation for excellence in Indigenous education programs, both graduate and undergraduate. Legal Indigenous leaders who graduated from UVic's Law programs are now contributing nationally to addressing Indigenous opportunities and challenges. These programs build on the presence of UVic's Indigenous faculty members and many long-standing relationships with Indigenous peoples.

UVic's Faculty of Law is an international leader in research and teaching on Indigenous law. Working with colleagues worldwide, UVic's faculty members, including prominent scholars John Borrows and Val Napoleon, have been instrumental in advancing the discussion of Indigenous law in its own terms in Canadian and international law schools. They also play a key role in describing how Indigenous peoples' own legal principles should be used in exercising the jurisdictions and in structuring relations among Indigenous and Canadian legal orders.

The Faculty of Law's commitment to Indigenous education laid the foundation for the JD/JID program including the Akitsiraq program, summer programs in Indigenous law, the Indigenous dimension of our graduate program, and the Faculty's experience with specialized support for Indigenous students. The Indigenous Law Research Unit at UVic has developed significant research on North American Indigenous legal traditions.

We acknowledge and respect the Songhees, Esquimalt and WSÁNEĆ peoples on whose traditional territories the University of Victoria stands and whose historical relationships with the land continue to this day.

Conclusion

The JD/JID program responds to the critical need articulated by the federal government, Indigenous leaders, industry partners, the legal profession and the public for serious engagement with Indigenous forms of law and governance. The legal professionals graduating from the program will have a transformative effect on the relationship between Indigenous legal traditions and common law. The program will build capacity to help Indigenous people participate as full partners in the economic agenda, create a genuine partnership for the benefit of all Canadians and make Canada a world leader in Indigenous law.

The University of Victoria offers innovative programs for more than 20,000 students. Dynamic, hands-on learning, research that makes a vital impact, and discovery and innovation in Canada's most extraordinary academic environment provide an Edge that can't be found anywhere else.