



# Action Committee on Modernizing Court Operations

## INDIGENOUS ELDERS IN THE COURTS

### A Statement from the Action Committee

*Our Committee supports Canada’s courts in their modernization efforts. It provides guidance for addressing challenges, and highlights opportunities and innovative practices to modernize court operations and improve access to justice for court users.*

### 1. CONTEXT AND BACKGROUND

Indigenous Elders and Knowledge Keepers play a central role in their communities, and it is likely courts will interact with these community leaders either as participants in litigation or as interested parties in any initiative aimed at reconciliation and improving Indigenous peoples’ experiences in the justice system. Because of their significance, everyone can benefit if those in the system understand Elders’ importance in their communities and what they can offer to the courts. This guidance will outline the different ways courts might work with Elders and Knowledge Keepers and provide considerations to help judges and court administrators engage with them in respectful and culturally appropriate ways.

### 2. ELDERS AND KNOWLEDGE KEEPERS IN INDIGENOUS SOCIETIES

Not all elderly Indigenous people are considered Elders. An individual identifying as an Elder (with a capital “E”) may have been appointed, sanctioned, or have simply arisen as an advisor, role model, and leader within a given community. This may happen formally through a traditional ceremony or commemoration or informally through a gradual process over time. Most importantly, an Elder is recognized and identified as such by the community though, even within a community, different individuals may not recognize the same person as having the authority of an Elder. Elders hold a prominent and deeply respected position within their communities, serving as pillars of wisdom and support. Beyond their roles as custodians of traditional wisdom, Elders often act as mentors, mediators, and teachers, offering guidance on both personal and community matters. Their expertise spans a wide range of areas, from language and history to beliefs and worldviews, making them indispensable to the social and cultural fabric of their communities. Through their leadership and experience, Elders ensure the continuity and resilience of Indigenous cultures and ways of life.

“Knowledge Keeper” or “Knowledge Holder” is a widely used term that generally describes an individual with traditional or cultural knowledge or expertise. This may include land-based knowledge, singing, or drumming. A similar role that exists in some Indigenous communities is “Faith Keeper,” while other communities have “Societies” and “Pipe Carriers.” Individuals who have extensive cultural knowledge and experience but are not yet ready to be considered an “Elder” may be identified as a Knowledge Keeper or Knowledge Holder. An Indigenous person with extensive knowledge and experience in academic, political, or economic settings may also be considered a Knowledge Holder.

For simplicity, this publication will use the term “Elder” throughout but, in many situations, its guidance will be equally relevant for interactions with Knowledge Keepers.



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### 3. WAYS ELDERS MAY ENGAGE WITH THE COURT

Elders can become involved with the courts either as a participant in court-led initiatives or as a litigant or support for a litigant or other court user. Elders bring knowledge about local customs and ways of life that the court – and Indigenous litigants – may not be aware of. This knowledge can both help resolve cases in a way that will support healing and growth and support the court in identifying systemic changes that would improve access to justice for Indigenous people. In addition, Elders carry a level of respect within their community or ceremony and can therefore encourage introspection and change in Indigenous people facing legal conflict in a way an outsider cannot. For these reasons, understanding the role of Elders in their communities, as well as culturally appropriate protocols for interacting with them, can be a powerful tool in improving the experience for Indigenous court users in all types of matters. Elders can be a valuable addition to all court teams, and not just to those operating specialized Indigenous courts.

For a more in-depth profile of many of the examples outlined below, please visit the Action Committee's publications, [Indigenous Practices in the Courts](#) and [Indigenous Practices in the Courts: Repository of Canadian Examples](#).

#### 3.1 Contributing to Case Resolution

Some Canadian courts have programs in which Indigenous Elders provide input and recommendations to the judge and the litigants to support case resolutions that are both culturally appropriate and tailored to the needs of the individual. While this model – which can be used at the pre-trial case management stage as well as later in the proceeding – is most commonly used in the sentencing stage of criminal cases, it can also be beneficial for civil, family, or child welfare matters. A neutral Elder who is agreed upon by the parties may assist in resolving disputes between people from the same Indigenous community.

- A number of criminal courts across the country, including the Provincial Court of British Columbia's [Indigenous Sentencing Courts](#), [Indigenous Courts](#) of the Alberta Court of Justice in [Calgary](#) and [Edmonton](#), and Nova Scotia's Wagmatcook Provincial Court's [Gladue Court](#) provide opportunities for Elders to recommend culturally appropriate and healing-focused sentences for Indigenous offenders.
- Indigenous families who have a child protection matter at the New Westminster courthouse in British Columbia have the opportunity to participate in an [Aboriginal Family Healing Case Conference](#). Elders take a leading role in developing a Healing and Wellness Plan, providing advice to the family, and helping to establish an environment of trust in which participants feel comfortable speaking from the heart. If the parties agree, the judge may include parts of the Healing and Wellness Plan in a court order.

#### 3.2 Advising on Indigenous Practices and Reconciliation Initiatives

Courts that wish to establish a Reconciliation Committee or develop an Indigenous Justice Strategy could benefit from the knowledge and wisdom of local Elders. Elders, along with other Indigenous leaders, can also identify – and recommend solutions for – challenges with court processes faced by members of their communities. While a court may reach out to an Elder to



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address a court-identified problem, many successful collaborations between the courts and Indigenous communities have been instigated by the Elders, rather than the court. In these situations, Elders have often approached the court within a pre-existing relationship of communication and trust.

- Both the British Columbia [\*\*Aboriginal Family Healing Case Conference\*\*](#) program and the Nova Scotia [\*\*Wagmatcook Provincial Court\*\*](#), highlighted above, were developed in response to the identification of community needs by Elders.

Elders can also be key resources to teach the judiciary and court staff about both community-led programs that could support diversion out of the courts and the beliefs, practices, and lives of the Indigenous people who may come before them, as well as to support the [\*\*change management\*\*](#) necessary to successfully integrate Indigenous practices into court operations or introduce court programs intended to serve Indigenous people.

## 3.3 Leading Ceremony

Courts that serve a significant Indigenous population may wish to become more welcoming by integrating Indigenous ceremonies such as smudging or using an eagle feather for oath-taking into the rhythm of their operations. As outlined in the Action Committee's guidance on [\*\*Indigenous Practices in the Courts\*\*](#), Elders are well placed to play an essential role in providing guidance and direction on how to incorporate such practices into a court's activities, including in ensuring sacred objects are treated with appropriate respect.

- An **Elder advisory committee** was integral to the development of the Thunder Bay Courthouse. One of the roles of the Elders was to lead ceremonies such as a Sweat Lodge, Shaking Tent, Pipe Ceremony, and Cleansing Ceremony, to guide the process.

## 3.4 Supporting Indigenous Court Users

Whether they are before the court as a criminally accused person, a victim of crime, or a litigant in a family or civil proceeding, Indigenous court users may benefit from the support of an Elder. Elders can provide wisdom and a calming presence in a stressful situation and help Indigenous people feel both welcome in court and rooted to their community. By sharing culturally relevant teachings about how to live a good life and supporting a sense of belonging, an Elder can help someone who is involved in court find the strength to make healthier choices. Some courts or community justice programs may connect court users to someone who can play this role, while other individuals will come to court with an Elder with whom they already have personal ties.

- The support network for **Elsipogtog First Nation's Healing to Wellness Court** in New Brunswick includes Elders from the Elsipogtog First Nation. These Elders support both participants and victims in the court's judicially supervised therapeutic program. This support can include, for example, assisting a court participant in the development of a healing plan and monitoring their progress against the plan.
- The Native Counselling Services of Alberta has an **Elder advisory group** that supports their work in the Edmonton Indigenous Court. The Elders' presence contributes to a feeling of cultural safety for people who come before the court. Further, the judge will often give the Elder who is present an opportunity to speak: the guidance the Elders



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share, rooted in their knowledge of the traditional ways of their people, can provide those they are supporting with healthier options than the choices that contributed to their involvement in the criminal justice system.

## 3.5 Providing Expertise on Indigenous Practices, History, and Law

Given their role as the keepers of history and law, Elders often provide essential testimony if their community is involved in litigation concerning treaty or Aboriginal rights. Elders' knowledge can also help the court craft an appropriate sentence for Indigenous offenders by shedding light on traditional ways the community resolves disputes. This can, in turn, facilitate a trauma-informed approach to integrating the principles from *R. v. Gladue* into these sentences, as outlined in the [Action Committee's guidance](#) on this topic.

Because of the revered position Elders – and the oral traditions they carry – hold in their society, it may be appropriate to adapt standard procedures to respectfully receive Elder testimony.

- The [Federal Court's Practice Guidelines for Aboriginal Law Proceedings](#) contain practical guidance on many issues that may arise when a court is hearing oral history evidence from an Indigenous Elder, including holding a proceeding in an alternate venue; incorporating Indigenous ceremony into court proceedings; and adjusting decorum or court set-up to facilitate testimony.

## 4. GUIDING PRINCIPLES

The principles that will guide effective work with Elders overlap significantly with those that are useful for courts when integrating [Indigenous practices](#) more generally. As with all cross-cultural experiences, a court's interactions with Indigenous Elders will be strengthened if they are approached in a spirit of curiosity and with a non-transactional focus on building relationships. A list of considerations and questions that arise from the application of these principles is annexed to this document.

### 4.1 Ground Cooperation in Mutual Trust and Understanding

Elders have much to offer to both courts and members of their communities who are involved with the court, but an atmosphere of trust and understanding is necessary for these benefits to be fully recognized. Courts that take the time to get to know the Elders in their community will be in a better position to work with them to support Indigenous court users, as well as to know which Elders may be best suited to offer this support. Attending community events and ceremonies, if invited, is one way that court leadership can establish the essential linkages that will ground an effective relationship with Elders. In areas where few Elders are located near court locations, a regional council of Elders may be able to help establish the links necessary to grow this network more broadly.

Further, everyone will benefit if each court-affiliated Elder is as fully integrated into the community of justice professionals as possible, as this will both help the Elder to feel more comfortable providing input and equip them with the information they need to make the best recommendation possible. Indigenous courtworkers and community justice programs are invaluable resources to support this integration. Counsel also have a role to play in facilitating Elder participation, and the court can set an example by, for example, seeking consensus or



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encouraging joint proposals for Elder inclusion. Once an Elder program has been established, partners can work together to design an evaluation framework that will ensure it continues to be a positive experience for both the clients it serves and the Elders providing support.

## 4.2 Provide Adequate Support to Elders

Elders who are going to support court programs such as sentencing circles should receive training or resources on the relevant law so they understand the options available to the court. Likewise, Elders will benefit from the opportunity to build relationships with any other Elders who work in the same court, so they can pool their knowledge and work together to connect each individual with the Elder who is best placed to support them.

In addition, being involved in court processes could be triggering for an Elder whose own past experiences mirror those of the parties they are working with. Just like anyone else who is working in the court, court-affiliated Elders will benefit from support to minimize burn-out and a trauma-informed approach that seeks to protect their mental and spiritual wellness.

## 4.3 Adopt an Orientation of Humility, Respect, and Receptivity

Elders are highly respected members of their communities. Whether in the courtroom or in the context of other court-related activities, this societal position can be honoured by ensuring the Elder has a place to sit and by addressing them with the title used in their community. Where appropriate, creating space for an Elder to speak can show respect for their expertise. Courts can also create space for Elder participation by being as flexible as possible, including by adapting formal procedures that may be alienating to the Elder and other Indigenous participants.

Elders are busy people who are called upon to perform many duties. This challenge is exacerbated in regions where there are few Elders relative to the size of the Indigenous population. Like anyone, Elders will be in a better position to respond to requests for advice or guidance if they have time to consider the question and their response, rather than being put on the spot. While in some situations it may be appropriate for the parties to bear the cost of the Elder's time, an Elder who is leading a ceremony at the request of the court or participating in a formal court program such as a sentencing circle should be compensated by the court for their time at a level that reflects the specialized knowledge and expertise they possess. Consider whether special payment processes are required to ensure that Elders can be paid in a timely manner.

## 4.4 Recognize and Honour Distinctions

While there are some similarities in the role of Elders and Knowledge Keepers across Indigenous communities, the specifics will vary between First Nations, Inuit, and Métis Elders, as well as among communities within those distinctions. Understanding local practices will help the court to know:

- How Elders or Knowledge Keepers are recognized in their community
- What assistance an Elder may be qualified and comfortable to provide the court



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- What expectations an Elder may have around offerings, gifts, or other protocols associated with their services

A court that provides Elder support programs for people from different Indigenous backgrounds may wish to offer access to Elders from a range of traditions. While it is ideal to be connected with supports from one's own tradition, Elders can still support individuals from a different tradition by helping them to apply foundational teachings, such as the medicine wheel, mino bimaadiziwin (the Good Life), and Karwiio (the Good Message), to their own context.

Conversations with both the local court user community and the Elders themselves will help to determine the extent to which an Elder from one community or tradition can assist an individual from another.

### 4.5 Comprehend Cultural and Spiritual Significance

There is a spiritual connectedness to both the relationship between an Indigenous Elders and their community and the knowledge they carry. Having an understanding of an Elder's spiritual beliefs, as well as the way that spirituality is connected to the community's history and laws, will help a court to better understand the advice the Elder provides to both the court and the people who appear before it. Common Elder practices, like providing advice in the form of a story, may also be more accessible to those who have taken time to learn about Indigenous traditions.

Likewise, understanding the spiritual significance behind practices like tobacco offerings or gift-giving will help a court to interact with an Elder with cultural awareness and respect. Depending on the circumstances, this understanding could be built by:

- Asking the Elder or other members of their community about their practices, and creating the space to listen to the responses
- Attending training on Indigenous practices and issues provided by the court
- Attending cultural events in the community, such as pow-wows, socials, round dances, or other festivals that are open to the broader public or the court has been specifically invited to
- Engaging with art and literature by people from the same community as the Elder



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## ANNEX 1

### CONSIDERATIONS FOR ENGAGING WITH ELDERS

#### Elders as Participants in Court-Led Programs

If a court would like to engage with an Indigenous Elder – either to contribute to a dispute-resolution program, support the integration of Indigenous practices in the court, or lead Indigenous ceremonies – it may wish to consider the following questions:

1. What would the court like the Elder to do?
  - How an Elder can help a court and its users will depend on the specific knowledge that individual holds – some Elders will be specialized in areas such as traditional medicines, ceremony, or language, while others may know about how their community traditionally resolves disputes, for example.
2. Who can best connect the court with an Elder who will have legitimacy in the eyes of the local community?
  - Possible initial points of connection include the local elected Indigenous government and organizations like friendship centres or Indigenous justice programs.
  - Awareness of power dynamics in the community will help to maximize the benefits of Elder participation for all participants in a court matter.
  - Once a court has developed a connection with an initial Elder or group of Elders, they may be able to identify additional Elders who can support the court.
3. What are the Elder's – and the community's – expectations for protocol and ceremony?
  - How would the Elder like to be addressed?
  - Will the Elder be accompanied by a helper or escort?
  - What offerings, gifts, or remuneration are appropriate? For example, does the Elder come from a tradition that uses tobacco offerings? If so, is a tobacco offering expected in this situation?
4. What conditions will create space for the Elder to share their expertise?
  - Has the necessary level of trust been established for the Elder to feel comfortable sharing their wisdom and recommendations?
  - Does the program include the flexibility for the Elder to speak when they are ready to do so?
  - Is it necessary to modify procedures in any way to facilitate Elder participation?
  - What role should counsel play in facilitating Elder participation? How can the court support this role?



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5. What support does the Elder need to be able to provide the best assistance possible to the court and its users?
  - What should the Elder know about the event or program they are being asked to participate in?
  - If the Elder will be supporting dispute resolution through, for example, participating in a sentencing circle, what do they need to know about the law and the options available to the court?
  - What does the court need to do to make sure the Elder has the knowledge they need? Should there be training or an orientation program for the Elders the court works with?
  - How can the court protect the mental and spiritual wellness of the Elders it works with? What practices are in place during Elder recruitment or ongoing interactions to minimize burn-out or the effects of triggering subjects?
  - What does the court need to know about the Elder to ensure that their participation will be helpful for the litigants in a given case?
  - How can the Elder program be evaluated to ensure that it continues to be a positive experience for both the client and the Elder?

## Elders as Witnesses or Litigant Support

If an Elder has come to the court either to participate in litigation as a witness or to support a court user from their community, the court may wish to consider the following questions:

1. Can the court reasonably introduce procedural modifications to facilitate Elder witness testimony?
  - Should Elder witnesses be provided with the opportunity to testify as a panel?
  - Should the layout of the courtroom be modified during Elder testimony?
  - Should the court travel to the community to hear the testimony of Elders? This may be particularly important if the community is remote or travel would be difficult for the Elders because of their age.
  - Should the process for cross-examination be modified in any way to appropriately balance the truth-seeking function of this exercise with the respect the Elder carries?
  - Who will bear the costs of procedural modifications intended to support Elder participation?
2. How will the court recognize and welcome an Elder who is accompanying a hearing participant?
  - Does counsel have an opportunity to tell the court that there is an Elder attending the court proceeding as a witness or litigant support?
  - Is there a natural time in the proceeding when the Elder's presence could be acknowledged from the bench?



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- Is there a place for the Elder to sit that acknowledges their importance to the community and the person they are supporting?
- Is there a time when the Elder can have an opportunity to speak?
- Are the court's protocols and policies around Elder participation easily accessible and understandable to the public?