Legal Ethics and First Nation Economic Development:

A Duty to Move from Colonialism to Reconciliation

Prepared by: **Christopher Devlin and Peter Nyhuus**

Presented at: **Canadian Institute's Indigenous Consultation BC**
September 19th, 2017
Prince George, BC

Introduction

For over 150 years the administration of Canadian justice has been anything but just towards Indigenous peoples. The Canadian legal system participated in the colonizing and delegitimizing of Indigenous laws and governments, the forced displacement of Indigenous communities from their lands, and, as the Truth and Reconciliation Commission of Canada (the "Commission") recently exposed, the physical, sexual, and cultural abuse of generations of Indigenous children. Rather than providing justice, the laws of Canada have been used to "suppress truth and deter reconciliation."[1]

This is a truth that Canada's legal profession needs to accept and actively reflect upon. Given the complicity of the law in the "cultural genocide"[2] of Canada's Indigenous peoples, lawyers, as the prime administrators and protectors of Canada's laws and legal system, need to have a hard, critical look at their role in the historic and ongoing colonization of Indigenous societies and laws. How can the legal profession change to positively contribute to "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples" in Canada?[3] Reconciliation is a Canadian project, not an Aboriginal one, and lawyers play a pivotal role in moving this project forward.[4]

This paper explores an early step on that path. We examine how the Commission's Calls to Action, within the context of Canada's multi-juridical legal heritage, affect the professional ethical obligations of lawyers, including in the context of resource development negotiations.[5]

The economic development of Indigenous lands is an area of legal practice that is entirely relevant to the Commission's findings regarding the pathway to reconciliation:

> In the face of growing conflicts over lands, resources, and economic development, the scope of reconciliation must extend beyond residential schools to encompass all aspects of Aboriginal and non-Aboriginal relations and connections to the land.[6]

---

[1] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (June 2015) at 202 ["Report"].
[2] Report at 1.
[3] Report at 6-7.
[4] Report at 1.
[5] We do not consider other areas of law, including criminal law, also in deep need for reform.

Lawyers are at the centre of resource development negotiations between Indigenous communities and (mostly) non-Indigenous resource developers. The legal profession plays an active and guiding role in these negotiations and agreements (and in disagreements and litigation) between First Nations and proponents hoping to develop Indigenous lands. Lawyers advise First Nations in their interactions with industry, and lawyers advise industry in their interactions with First Nations. According to the Commission, reconciliation requires re-examination of these interactions, and the lawyer's roles in facilitating them.

In this paper, we argue that the Commission's Report, and its accompanying Calls to Action, should serve as a stimulus for the legal profession to actively reassess its conception of ethical lawyering.[7] We see from the Report, the Calls to Action, and also repeatedly through Supreme Court rulings, that "Canadian" law is not a bi-juridical amalgamation of the common and civil law traditions; rather, our legal inheritance as a country also includes Indigenous legal orders. Indigenous laws are part of the Canadian legal landscape. The values of the common and civil law traditions inform professional legal ethics; so too must lawyers work to ensure their professional ethics are also informed by Indigenous legal traditions.

Regulating bodies such as the Federation of Law Societies, the Law Society of BC, and the Canadian Bar Association have accepted the Commission's Calls to Action—they are in the process of determining what reconciliation means for the legal profession.[8] Change is coming. But lawyers do not have to wait for the regulators' reports or their amendments to professional codes of conduct to begin the process of reconciliation. Since lawyers have an ongoing professional obligation to uphold the administration of justice and the rule of law, by accepting the truth that Indigenous legal traditions form a part of Canadian law, lawyers become professionally obligated to vigorously defend the administration of these Indigenous legal orders as well. We argue that lawyers have a professional ethical obligation to avoid perpetuating colonialism. Lawyers must engage in the administration of justice in a manner that promotes reconciliation not colonialism. Ethically, lawyers can no longer countenance conduct that perpetuates a colonizing outcome.

---

[6] Report at 190.
[7] We limit our discussion to the context of the lawyer's involvement in negotiations between First Nations and industrial project proponents.
[8] See for instance: The Law Society of British Columbia, "Responding to the Truth and Reconciliation Commission's Calls to Action" online: <https://www.lawsociety.bc.ca/our-initiatives/truth-and-reconciliation/>

We begin this paper by briefly examining the role that lawyers play in the administration of justice and the manner in which legal and societal values inform legal ethics theory and practice.

Second, we examine certain Calls to Action and assess how answering these calls will affect legal ethics in the context of IBA negotiations and resource development. This discussion, we hope, will reveal the need for a new de-colonized perspective of legal ethics, one that promotes humility and listening in the face of legal and jurisdictional uncertainty.

Third, we examine the practical implications and challenges of this new ethical perspective. We argue that the content of the duties this perspective will create must be informed by discussions with the individual Indigenous community involved in the negotiations (in other words, there is no "one size fits all approach" to professional legal ethics). We also argue that this ethical perspective is reconcilable with other professional obligations inherited from European legal orders, by making an analogy to other instances in which the lawyer's duty of undivided loyalty to his/her client is qualified by other ethical obligations, such as when acting against an unrepresented litigant.

The Relationship between Legal Heritage, Values, and Professional Ethics

> *The intersection of morals, law and ethics is nowhere more evident than in the daily affairs of those who practice law.*[9]

In his 2010 article, "Ethical Lawyering Across Canada's Legal Traditions," lawyer Paul Jonathan Saguil builds a strong case for Canada's legal profession to undergo a "serious soul-searching" when it comes to ethical practice.[10] He argues that lawyers must revisit the myths of Canada's legal heritage—myths that lionize our common and civil law traditions and marginalize our Indigenous ones. This project is necessary, he argues, since legal ethics and professional responsibilities reflect the values of the legal system in which lawyers practice—by ignoring entire legal orders (the Indigenous ones), lawyers are limiting the effectiveness and legitimacy of their profession.[11] "Our notions of lawyering and legal practice may have to change to

[9] Paul Jonathan Saguil, "Ethical Lawyering Across Canada's Legal Traditions" (2010) 9:1 Indigenous LJ 167 at 172 ["Saguil"], citing Randal Graham, "Moral Contexts" (2001) 50 UNB LJ 77.
[10] Saguil at 187.
[11] *Ibid* at 187.

accommodate this non-Western (but nevertheless Canadian) perspective."[12] We concur with Saguil's argument, finding it to be especially prescient seven years prior to the Commission's findings and Calls to Action.

Lawyers as Agents of the Legal System and How Societal Values Inform Legal Ethics

Saguil charted the relationship between law, legal values, and professional ethics in order to understand how the emergence of Canada's multi-juridical legal tradition necessitates a re-conceptualization of professional ethics. The ideal ethical conduct of a lawyer is informed by the values of the legal system in which he or she practices.[13] Lawyers are considered agents of the legal system, and are obliged to act in a manner consistent with the system's core legal concepts and values.[14]

In Canada, this has generally meant that lawyer's must act consistently with the values and principles underlying the Euro-Canadian legal traditions of the common law and civil law.[15] The values underpinning our social history and public and private law include, for instance, liberalism, democracy, constitutionalism, capitalist economics and cultural pluralism.[16] These values, in turn, have provided "justification for the duties, obligations and responsibilities" that lawyers are invested with. Saguil provides an example:

> One very clear example of this is the duty of zealous partisanship, which arose from the historical context of trials by ordeal in Anglo-Saxon legal procedure, which eventually gave way to the modern adversary system. This duty may be further justified […] by the virtues of the capitalist ethic, and is, according to some, demanded by the lawyer's role as a representative advocating for the legal rights or freedoms of his or her client. Arguably, this is the most common conception of what lawyering should be, if the *Code of Professional Conduct* and the profession's focus on confidentiality, conflict of interests and client-centered advocacy is any indication.[17]

[12] *Ibid* at 168.
[13] *Ibid* at 172.
[14] *Ibid*.
[15] *Ibid* at 174.
[16] *Ibid*.
[17] *Ibid* at 175.

This example indicates how various values within Canada's European legal heritage have influenced current legal professional practice. It highlights how professional ethical practices of lawyers are not objective moral truths, arising out of thin air; rather, they were inherited from, and are normative to, this European legal heritage.

But this legal tradition is not the only operative one within Canada's modern legal system.

The Emergence of Canada's Multi-Juridical Legal Landscape: Including Indigenous Legal Orders

Saguil argues that "the values and perspectives of traditional legal ethics has thus far only involved a consideration of one aspect of Canada's legal heritage and tradition," namely, the Euro-Canadian legal traditions of the common and civilian laws.[18] However, the Canadian legal system is, albeit slowly, acknowledging that the Indigenous legal systems continue to exist and form part of Canada's juridical heritage. In 2001, the Supreme Court of Canada found, in its decision of *R v. Mitchell*:

> European settlement did not terminate the interests of Aboriginal peoples arising from their historical occupation and use of the land. To the contrary, Aboriginal interests and customary laws were presumed to survive the assertion of sovereignty. [19]

In *Tsilhqot'in Nation v. British Columbia*, the Supreme Court of Canada noted that decisions regarding land must take into account the Aboriginal perspective, which includes Aboriginal laws.[20] Not only do Indigenous laws exist—they must be applied as a matter of Canadian law.

The Commission's Report further acknowledges the continued existence and application of Indigenous legal orders. Its view is that "the right to self-determination is a central right for indigenous peoples from which all other rights flow," and that this right of self-determination "affirms their right to maintain and strengthen indigenous legal institutions, and to apply their own customs and laws."[21]

---

[18] *Ibid* at 175.
[19] *R v. Mitchell*, [2001] 1 S.C.R. 911 at para 8, cited in Saguil at 176.
[20] *Tsilhqot'in v. British Columbia*, SCC 2014 44 at paras 34-5.
[21] Report at 204.

The Commission finds that "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. Canada's Constitution must become truly a constitution for all of Canada. Aboriginal peoples need to become the law's architects and interpreters where it applies to their collective rights and interests. Aboriginal peoples need to have more formal influence on national legal matters to advance and realize their diverse goals.
>
> At the same time, First Nations, Inuit, and Métis peoples need greater control of their own regulatory laws and dispute-resolution mechanisms. Aboriginal peoples must be recognized as possessing the responsibility, authority, and capability to address their disagreements by making laws within their communities. This is necessary to facilitating truth and reconciliation within Aboriginal societies. [22]

Between this finding of the Commission and the jurisprudence at the SCC, there is now a clearer picture of our true legal heritage. This is a wake-up call to the legal profession: Canada's juridical heritage includes more than the inheritance of English and French legal traditions.

The administration of justice, informed only by Euro-legal traditions, administers injustice to Indigenous Canadians. "Law must cease to be a tool for the dispossession and dismantling of Aboriginal societies."[23] As the wielders of this tool, lawyers must acknowledge Canada's multi-juridical heritage and allow it to inform their legal practice. The myth of a (Euro-)Canadian law is debunked.

But what are the contents of these Indigenous legal orders? The Commission's Report refers to nine distinct Indigenous legal orders as examples of the plethora of laws that make up Canada's multi-juridical system.[24] It is beyond the scope of this paper to provide an account of the values and principles underlying every Indigenous legal system in Canada. In fact, any kind of

[22] *Ibid* at 205.
[23] *Ibid*.
[24] Truth and Reconciliation Commission of Canada, "Canada's Residential Schools: Reconciliation" *The Final Report of the Truth and Reconciliation Commission of Canada*, Vol 6 (June 2015) at 54-74.

generalizing effort risks "perpetuating cultural stereotypes and romanticizing the complex history of indigenous peoples."[25] It would be false to suggest that there is some kind of unitary Indigenous legal order, or that there are broadly-held values informing every Indigenous legal tradition. "Like Canadian law," Saguil writes, "indigenous law is a broad categorization for a number of legal traditions that existed and continue to exist among different indigenous societies."[26] Rather, our point is to observe that numerous Indigenous communities within Canada have their own values which inform their own laws; these values and laws are part of Canada's legal inheritance and its contemporary legal landscape. A view of the Canadian landscape that is multi-juridical, not bi-juridical, is the view that supports reconciliation—it is also the view that is accurate.

We suggest that it may be the duty of legal counsel acting for or against an Indigenous community to discern the context of the particular Indigenous legal tradition that is engaged by the issue of the day. Because there is no one Indigenous legal order, there is no ethical room for a cookie-cutter approach to dealing with Indigenous groups. Ethical professional practice requires lawyers to inform themselves, and to be informed, of the existence and substance of the values and laws that are specific to each Indigenous party they are working for or against.

A Multi-Juridical Legal Landscape Requires a Re-conceptualizing of our Notions of Professional Ethics

Professional ethics are informed by the legal and social values of our legal system. Lawyers are obliged to act in a manner that is consistent with the core legal concepts and values of society. The Canadian legal landscape has, until very recently, privileged its European legal heritage and marginalized its Indigenous ones despite their "inextricabl[e] connect[ion] to Canada's legal and constitutional order."[27] It is not surprising then that the discourse on professional legal ethics "has thus far failed to consider the values and perspectives of the indigenous traditions."[28] We now argue that acknowledgement of Canada's multi-juridical landscape requires the legal profession to reassess how lawyers travel within it.

[25] Saguil at 178. For a survey of some of the questions around the engagement with Indigenous laws by the legal academy, see: McGill Law Journal's issue on Indigenous Law and Legal Pluralism: 61 McGill LJ 721
[26] *Ibid* at 177
[27] *Ibid* at 175.
[28] *Ibid*.

Currently, that travel is largely guided by various Codes of Professional Conduct ("Codes"). Saguil writes:

> Codes are intended to provide a framework, bounded by the ideals of the profession and the extant legal system, within which the lawyer may practice law. This perspective is embodied by the rule that the lawyer should encourage public respect for and try to improve the administration of justice.[29]

Codes provide lawyers with a reminder of the "higher calling" of the profession.[30] As an example, the *BC Code of Professional Conduct* (the "*BC Code*") begins with an introduction that speaks to this higher calling, stating that "a special ethical responsibility comes with membership in the legal profession," and that the *BC Code* "attempts to define and illustrate that responsibility in terms of a lawyer's professional relationships with clients, the justice system and other members of the profession."[31] Lawyers are "participants in a justice system that advances the rule of law," and because of this, they "hold a unique and important role in society."[32]

It is likely that the various Codes of Canada will soon be updated to reflect the Indigenous legal heritages they have traditionally not considered. The Federation of Law Societies and other legal professional organizations have committed to answer the Calls to Action. The process is underway. However, lawyers should not wait for regulators to begin the process of reconciliation. Even as currently written, the Codes may be understood through a multi-juridical, reconciliatory lens in a manner that begins to de-colonize Indigenous societies and Canada generally.

Lawyers can start this process by looking at their most fundamental role under the Codes: to advance the rule of law. This leads to the existential question: what is the law that must be advanced? Since Indigenous legal orders form a part of the legal landscape of Canada, we argue that lawyers have a duty to uphold Indigenous laws when they apply. Lawyers can no longer

---

[29] *Ibid* at 173, citations omitted.
[30] Saguil at 172
[31] The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, (2013) at Introduction para (1) ["BC Code"].
[32] BC Code at Introduction para 1.

countenance actions that ignore the existence and application of Indigenous legal orders. For example, if an Indigenous community has enacted a consultation protocol that involves its own legal concepts and procedures, lawyers must advise their clients that the protocol is as equally valid a law and process that applies as any rules or procedures adopted by the Crown. While a lawyer for a proponent must still advise his or her client with undivided loyalty, the lawyer must also acknowledge that the legal arena is no longer solely predicated on values inherited from European legal traditions.

There are many areas in Canada with Indigenous jurisdictions. In those places, lawyers cannot privilege values solely derived from Euro-Canadian legal norms as the supreme legal order to be upheld. For a lawyer to advise his or her client that it is acceptable to attempt to bypass Indigenous legal systems is to promote colonialism and the undermining of Canadian rule of law. To be an ethical lawyer in Canada, to administer Canadian justice, lawyers are required to uphold as well the rule of Indigenous laws.

In our view, a profession that acknowledges Indigenous legal traditions and strives to uphold them equally with non-Indigenous legal traditions makes a step in the right direction towards meaningful reconciliation and a post-colonial ethical practice. It is not the only work that needs to be done, but it is work that can be started immediately.

Ethically Engaging with the Calls to Action

Acknowledgement of Canada's multi-juridical legal heritage should provide enough impetus to engage in a re-conceptualizing of what it means to practice law ethically. Lawyers need to investigate the values that they must protect when they strive to uphold the administration of justice.

Thanks to the Commission, there are specific Calls to Action on the legal profession that can serve as a guide to a new understanding of ethical practice in the context of negotiations with First Nations over resource development. Four specific Calls to Action are particularly relevant to this context, Calls #27, #28, #43, and #92.

Calls to Action #27 and #28: Learning Intercultural Competency

Calls to Action #27 and #28 are specifically directed at the legal profession. #27 reads:

> We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.[33]

Call #28 is similarly phrased but is directed at Canada's law schools. These Calls were inspired by the criminal prosecutions of, and civil lawsuits against, abusers in residential schools. The Commission found some of the lawyers involved in these cases to have demonstrated a "lack of sensitivity" in dealing with residential school Survivors.[34] However, the Calls for cultural competency training of lawyers and law students extend beyond the context of the litigation surrounding residential schools—they are broadly aimed at the entire profession.

Hannah Askew, in her article "Learning from Bear-Walker: Indigenous Legal Orders and Intercultural Legal Education in Canadian Law Schools," points out that the shape of the profession's response to the Calls is still uncertain:

> While the recommendation itself is clear, the steps required to effectively implement it are much murkier and raise challenging questions: what is Indigenous law; how is Indigenous law taught; who can teach Indigenous law; and where can Indigenous law be learned?[35]

Askew considers these questions and the educational strategies that law schools could implement to provide "effective and enriching opportunities to learn about Indigenous legal orders"—

[33] Report at 168.
[34] *Ibid* at 168.
[35] Hannah Askew, "Learning from Bear-Walker: Indigenous Legal Orders and Intercultural Legal Education in Canadian Law Schools" (2016) 33 Windsor YB Access Just 29 at 31 ["Askew"].

opportunities that "decolonize and build healthy, mutually enhancing relationships between Indigenous nations and the Canadian legal system."[36]

These important pedagogical questions also lie beyond the scope of this paper. We respectfully leave these important tasks to our country's First Nations, law schools, and professional regulators. However, we do note Askew's suggested approach for developing learning opportunities for emerging legal professionals:

> There is an enormous amount of work to be done to repair the relationship [between Indigenous communities and the Canadian legal system], and law schools need to proceed cautiously, respectfully, and with humility as they seek to incorporate teachings on Indigenous legal traditions into their curricula to ensure that Indigenous/non-Indigenous relations are strengthened and not harmed by these initiatives.[37]

This kind of cautious, respectful, and humble approach should be the ethical norm for lawyers who are engaging with, or representing, Indigenous communities in resource development negotiations. Lawyers need not wait for their law societies to develop formal skills-based training before taking real, meaningful steps to demonstrate respect and deference to Indigenous legal orders.

An attitude of humility is an attitude that can foster reconciliation. Lindsay Borrows, in her article, "*Dabaadendiziwin*: Practices of Humility in a Multi-Juridical Legal Landscape," argues that "in spaces of interaction between legal orders—such as Canada with the common, Civilian, and Indigenous legal traditions—[…]humility should be more actively developed."[38] Borrows defines humility as:

> a state of positioning oneself in a way that does not favour one's own importance over another's. Humility is a condition of being teachable. Humility allows us to recognize our dependence upon others and to consider their perspectives along with our own. A humble

[36] Askew at 32 and 45.
[37] Askew at 45.
[38] Lindsay Borrows, "*Dabaadendiziwin*: Practices of Humility in a Multi-Juridical Legal Landscape" (2016) 33 Windsor YB Access Just 149 at 152 ["Borrows"].

> opinion may be given in a spirit of deference or submission. The antonym is expressed in terms such as arrogant, elevated, or prideful.[39]

Borrows imagines that if legal actors practiced humility in a more rigorous way, they "would see themselves as life-long students as they continually interact with new people in new situations in their work and personal lives […] The varying legal orders in Canada could interact less destructively and, instead, learn from the strengths of others to replace their own weaknesses."[40]

Legal practitioners working for or against Indigenous communities should approach their client or opposing party with humility, showing deference to, and a willingness to learn, that community's relevant legal principles and procedures. Lawyers should recognize that the laws governing the land subject to the negotiations are Indigenous, and that they more likely than not do not have the cultural competency to engage in the laws in a manner that promotes reconciliation—at least not without assistance from the Indigenous party.

While we do not yet know the form or forum of the intercultural training that lawyers will be obliged to undertake in the near future, lawyers can, in the meantime, prepare themselves to be taught. We submit that ethical engagement with Calls #27 and #28 should include, in the very least, fostering humility within the professional practice when engaging with Indigenous communities.

Calls to Action #43 and #92

The image of Canada's legal heritage as being multi-juridical is a view shared by the Commission. The need to determine the relevant laws of the land in question is further highlighted by Call to Action #43:

> We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations *Declaration on the Rights of Indigenous Peoples* as a framework for reconciliation.[41]

[39] Borrows at 153-4.
[40] *Ibid* at 155.
[41] Report at 191.

The *Declaration on the Rights of Indigenous Peoples* (the "Declaration") provides a set of "minimum standards" expressed in forty-six Articles "for the survival, dignity and well-being of the indigenous peoples of the world."[42] The Declaration arose out of the UN's concern that "indigenous peoples have suffered from historic injustice as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."[43]

The Commission wholeheartedly endorsed the Declaration, calling it the "appropriate framework for reconciliation in twenty-first-century Canada."[44] The Commission stated further:

> Aboriginal peoples' right to self-determination must be integrated into Canada's constitutional and legal framework and civic institutions, in a manner consistent with the principles, norms, and standards of the *Declaration.* Aboriginal peoples in Canada have Aboriginal and Treaty rights. They have the right to access and revitalize their own laws and governance systems within their own communities and in their dealings with governments. They have a right to protect and revitalize their cultures, languages, and ways of life. They have the right to reparations for historical harms.[45]

The Commission also highlights the Supreme Court of Canada's decision in *Tsilhqot'in*, where the Court emphasized the importance of obtaining an Aboriginal group's consent before engaging in resource development: "Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."[46]

While the Commission's Call to use the Declaration's framework is directed towards governments, it also provides guidance to lawyers for facilitating reconciliation even in the context of industrial development of natural resources in Indigenous territories. This is made

---

[42] *Ibid* at 187.
[43] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by General Assembly* (2 October 2007), A/RES/61/295 at 2 ["Declaration"].
[44] Report at 190.
[45] *Ibid*.
[46] *Ibid*; *Tsilhqot'in* at para 97

explicit in the Commission's Call #92, aimed at the corporate sector. It too refers to the need for cultural competency training, like Calls #27 and #28. Call #92 reads:

> We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:
>
> > i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.
> >
> > ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.
> >
> > iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.[47]

Just like the *BC Code*, the Declaration provides the legal profession with another source to guide ethical professional conduct. Lawyers can look to the Declaration to assist them in practicing law in a manner that promotes reconciliation and de-colonization. Lawyers should encourage their clients to adopt this framework of consultation that promotes reconciliation.

On top of the ethical value of this kind of advising, there is also a strong economic argument to make for obtaining the consent of Indigenous peoples on development projects. The Commission

[47] Report at 306.

quotes from the United Nations Global Compact, a 2013 business guide that set out practical actions that corporations and businesses can undertake in compliance with the Declaration:

> Positive engagement with indigenous peoples can also contribute to the success of resource development initiatives—from granting and maintaining social licenses to actively participating in business ventures as owners, contractors and employees. Failing to respect the rights of indigenous peoples can put businesses at significant legal, financial and reputational risk.... Continuing dialogue between business and indigenous peoples can potentially strengthen indigenous peoples' confidence in partnering with business and building healthy relationships.[48]

One does not need to look very hard to find examples of economic projects that have collapsed as a result of inadequate engagement with First Nations. Just this summer, the Supreme Court of Canada released a decision *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*,[49] in which it quashed the National Energy Board's ("NEB") authorization for an exploration company to conduct offshore seismic testing for oil and gas in Nunavut due to inadequate consultation with the Inuit community of Clyde River. The proponents had consulted with the community largely by posting a 3,926 page document on the NEB's website and by delivering copies of the document to the hamlet's offices.[50] The Court points out that internet speed is slow in Nunavut and that bandwidth is expensive; the former mayor could not download the document because it was too large. Only a small part of the document was translated to Inuktitut, the predominant language of the community. The Court summarized the inadequacy of the proponent's approach:

> To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. Consultation, in its least technical definition is talking together for mutual understanding.[51]

Simply put, the proponent engaged with the Inuit community in a colonial manner. It did not engage with the Inuit of Clyde River on the community's own terms. The ethical deficiencies to

[48] *Ibid* at 305.
[49] 2017 SCC 40 ("*Clyde River*").
[50] *Clyde River* at para 49.
[51] *Clyde River* at para 49.

this approach should be self-evident. This process was antithetical to reconciliation. This process was also ineffective: the project approvals were quashed. The business risk to proponents by persisting with colonial engagement with Indigenous communities should not be underestimated. It should also find a place in the advice solicitors provide to their clients on such projects.

Ethical practice is also effective practice. Canadian jurisprudence is not heading in the direction of acknowledging *fewer* rights of Indigenous peoples. While the federal government's acceptance of the Declaration as a framework for reconciliation has been disappointingly subdued and qualified, the path before the legal profession is clear.[52] Whether a government may be dragging its feet or not does not mean that the legal profession should be equally timid. Hesitation perpetuates colonialism not reconciliation. While the government makes the law, lawyers are the ones who practice law: lawyers know that Indigenous laws are laws that must be followed. The path advocated by the Declaration is the path that promotes the rule of Indigenous law. And cases like *Clyde River* demonstrate the perils of straying from the path of the rule of law.

Practical Implications: Reconciling this New Duty with the Euro-Canadian Ethical Practice

The legal profession may draw on analogies to other ethical imperatives already at play in guiding the practice. Legal ethics has often grappled with what appear at first blush to be competing ethical constraints, and have reconciled them within the Codes.

For example, the duty of zealous advocacy to client may seem to be at odds with a lawyer's status as officer of the court. Yet a lawyer may not mislead the court in the guise of speaking for a client, nor can a lawyer advise or allow a client to give false testimony. Similarly, lawyers face constraints on their duty of zealous advocacy when interacting with a self-represented litigant. In those circumstances, a lawyer may have to provide legal information, often at the court's request, to that litigant respecting procedural aspects of the law. The legal system thus accommodates the self-represented party in order to ensure that the administration of justice is upheld.

In our view, there is often a similar imbalance that exists in the context of project negotiations respecting resource development between Indigenous communities and proponents that triggers

[52] Report at 188.

ethical considerations. There are often practical and financial imbalances: the financial capacity of the Indigenous community is almost always significantly inferior to that of the proponent. If litigation is required to resolve an impasse, the Indigenous community may be in real risk of being bankrupted to protect its territory as obliged by its Indigenous laws and customs.

While a lawyer for a proponent can represent his/her client with undivided loyalty, that lawyer must be mindful that he or she also has a duty to uphold the administration of justice and the rule of law of the lands in question. When those lands belong to, or are claimed by, an Indigenous community (even if unacknowledged by the Crown), the Indigenous community's laws and legal processes form part of the laws and legal processes that the lawyer has an ethical duty to uphold. Thus, for example, a lawyer cannot ethically counsel a client to avoid an Indigenous community's decision-making processes. To do so would be, in our view, unethical and contrary to the lawyer's duty to uphold the administration of justice and the rule of law.

Similarly, a lawyer cannot approach an Indigenous community with a cookie-cutter negotiating policy. There is no "one-size-fits-all" approach to dealing with Indigenous communities. Canada's multi-juridical heritage acknowledges that each Indigenous community has its own, equally valid legal traditions. A lawyer must be willing to listen to each Indigenous community with which they are engaging in order to understand that Indigenous community's legal principles and processes involved in the particular project in question. Having engaged an Indigenous community with humility, a lawyer must advise his/her client about those relevant Indigenous laws and procedures to be followed. To do so is to promote reconciliation and to uphold the proper administration of justice. To do so is to be an ethical lawyer.

Conclusion

Lawyers representing Indigenous communities and resource proponents must keep the Commission's Calls to Action at the forefront of their minds. Law cannot and should not be used by lawyers on either side to perpetuate the evils of colonialism so well documented by the Commission. Law and legal process should instead acknowledge Canada's multi-juridical heritage, embrace Indigenous legal orders, and strive to create a post-colonial Canada that measures success along the path of reconciliation. And lawyers, we humbly submit, should be at the vanguard of this effort.

The final word belongs to the Commission:

> In Canada, law must cease to be a tool for the dispossession and dismantling of Aboriginal societies. It must dramatically change if it is going to have any legitimacy within First Nations, Inuit, and Metis communities. Until Canadian law becomes an instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force. 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. Canada's Constitution must become truly a constitution for all of Canada. Aboriginal peoples need to become the law's architects and interpreters where it applies to their collective rights and interests. Aboriginal peoples need to have more formal influence on national legal matters to advance and realize their diverse goals.
>
> ….
>
> The Commission believes that the revitalization and application of Indigenous law will benefit First Nations, Inuit, and Métis communities, Aboriginal–Crown relations, and the nation as a whole. For this to happen, Aboriginal peoples must be able to recover, learn, and practise their own, distinct, legal traditions.[53]

[53] Report at 205.