

*The Truth and Reconciliation
Commission: Implications for the Legal
Profession*

By Larry Chartrand, Director,
Wiyasiwewin Mikiwahp/ Native Law Centre



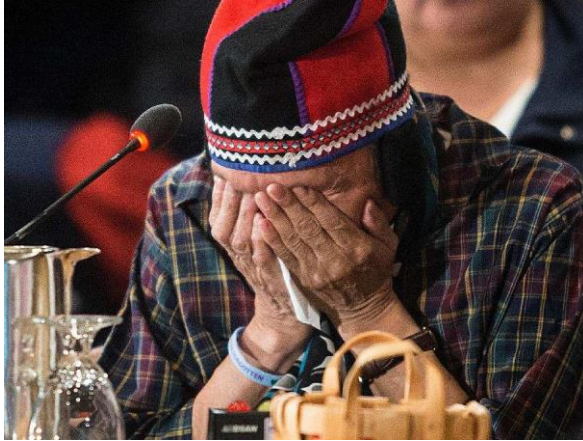
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A History of Social Disruption ...

- Canada has a long history of colonialism in relation to Indigenous peoples.
- This history and its policies of cultural genocide and assimilation have left deep scars on the lives of many Indigenous people, on Indigenous communities, as well as on Canadian society, and have deeply damaged the relationship between Aboriginal and non-Aboriginal peoples.
- The Honourable Justice Sinclair:
<https://vimeo.com/25389165>

- Canadian government policy aimed to “cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada”
- The residential school program was only one of many policies imposed to achieve the objective of cultural genocide.

Impact of Residential Schools



- Warning: These videos contain subject matter that may be disturbing to some visitors, particularly Survivors of the Residential School System. Please call the Health Canada 24-Hour National Survivors Crisis Line at 1-866-925-4419 if you need assistance.
- <http://wherearethechildren.ca/en/stories/>

The Legacy of Canada's Residential Schools

Odds of **dying** for
children in **Indian**
residential schools:

1 **in** 25

Odds of **dying** for
Canadians serving
in **WWII:**

1 **in** 26

The Legacy

- The negative social and economic circumstances that exist among Indigenous communities, families and individuals are products of the assimilation policies, of which the residential schools were one of the most significant factors and caused immeasurable harm.

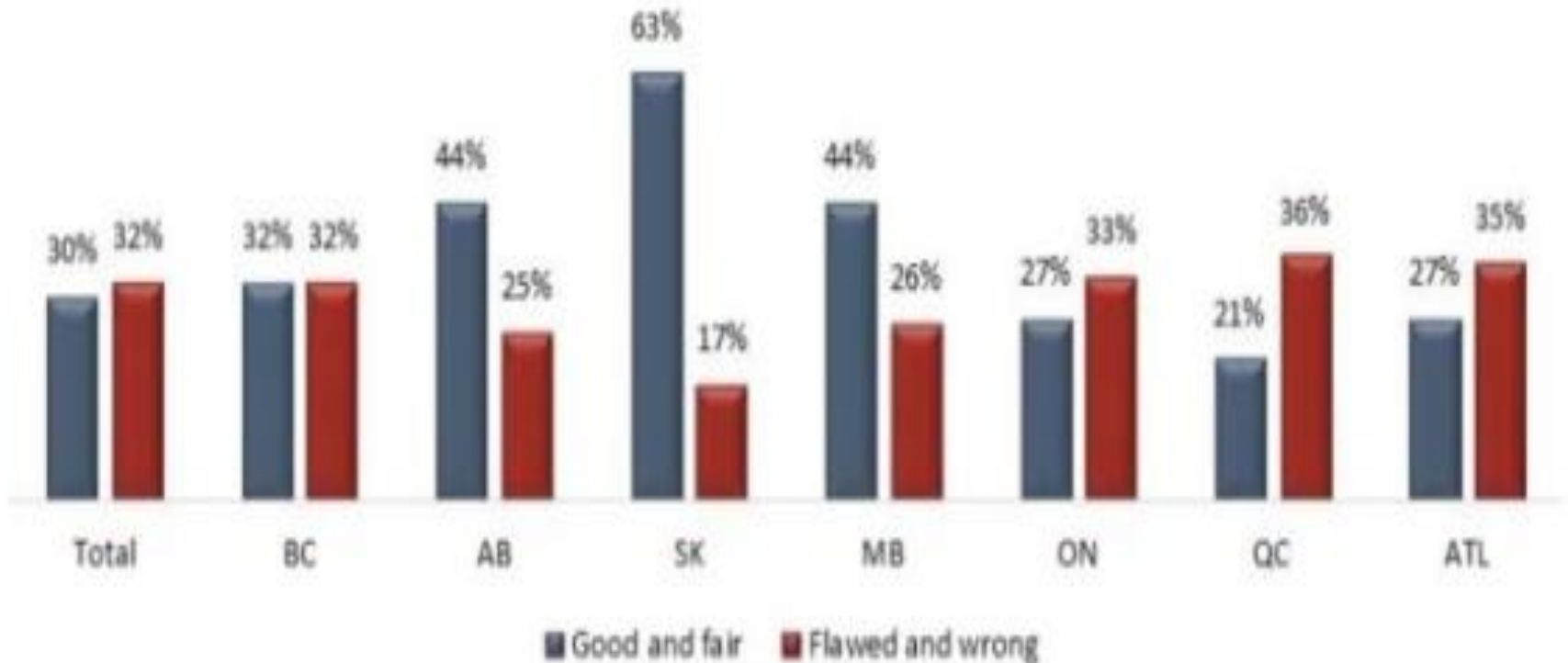


The Need for Reconciliation

“The destructive impacts of residential schools, the Indian Act , and the Crown’s failure to keep its Treaty promises have damaged the relationship between Aboriginal and non-Aboriginal peoples. The most significant damage is to the trust that has been broken between the Crown and Aboriginal peoples.”
(TRC, 2015)

Distrust and Division Remains ...

Overall, based on whatever you've seen or heard about this and on your own overall impressions, would you say that the decision of the jury in this trial was ...
(Among those who were aware of the case, N=1945)



- “This broken trust must be repaired. The vision that led to this breach in trust must be replaced with a new vision for Canada—one that fully embraces Aboriginal peoples’ right to self-determination within, and in partnership with, a viable Canadian sovereignty.” (TRC, 2016)

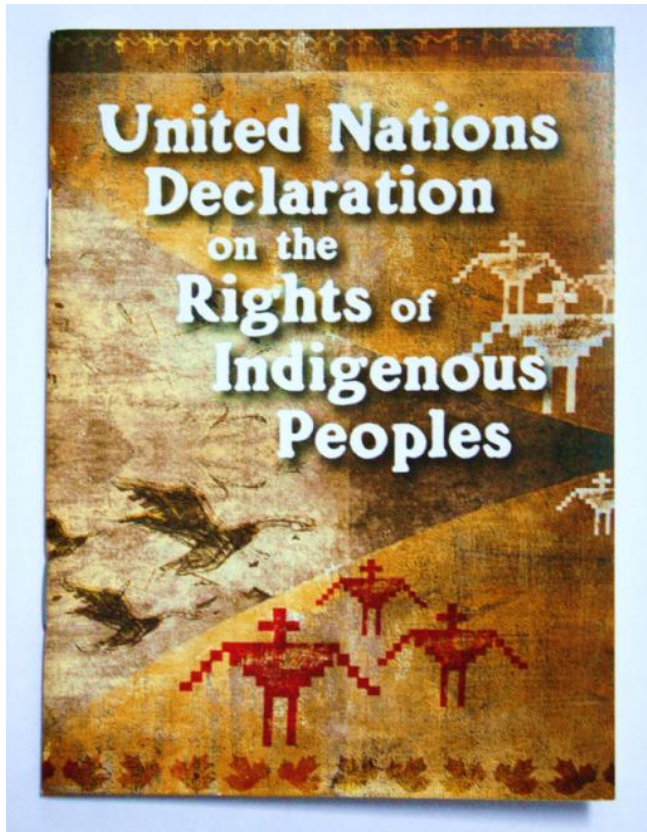


Rebuilding Foundations

- 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 the framework for reconciliation.



The UN Declaration



- A statement of minimum human rights standards for ensuring that Indigenous peoples can survive and exist with dignity.
- In 2007, after 25 years of development and negotiations, the UN General Assembly adopted the declaration.

Right to Self-Determination

- Article 3
 - a) Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Revitalizing and Recognizing Indigenous Laws

- 27. 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.



UN Declaration

- There are a number of provisions in the United Nations Declaration that are expressly relevant to the issue of Indigenous Justice recognition.
 - a) Article 9 of the *Declaration* asserts that “Indigenous peoples have the right to belong to indigenous communities or nations *according to their own traditions and customs*”.
 - b) Article 19 provides that “Indigenous peoples have the right [...] to *maintain and develop their own decision making institutions*”.
 - c) Article 33 recognizes that Indigenous peoples have the “*right to maintain a justice system in accordance with their legal traditions*”.

OAS Declaration

First International instrument to have articles entitled “Indigenous Law”. Article 16 states:

1. **Indigenous law shall be recognized as a part of the states’ legal system** and of the framework in which the social and economic development of the states takes place.
2. **Indigenous Peoples have the right to maintain and reinforce their Indigenous legal systems** and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.
3. In the jurisdiction of any state, **procedures concerning Indigenous Peoples** or their interests shall be conducted in such a way as to ensure the right of Indigenous Peoples to full representation with dignity and equality before the law. **This shall include observance of Indigenous Law and custom and, where necessary, use of their language.**

“Maintenance and Development of Indigenous Legal Systems”

- The **exercise by the Indigenous peoples** of their law-making power and the application of those laws to resolve certain internal disputes without state intervention.
- The **recognition by the State** that certain issues are rightly settled through the application of Indigenous laws, so that the State will refrain from intervening in those issues.
- Finally, there will always be situations **where the State’s legal system will need to interact with spheres of activity regulated by Indigenous laws**.
 - a) In those situations, legal actors associated with the State, (judges, government officials) will need to ascertain and understand at least certain aspects of Indigenous legal systems, in order to apply them or to take them into consideration in settling a dispute governed, at least, in part, by State law. (Sebastien Grammond, 2013)

Cultural Competency and Lawyer Ethics

Relevant Ethical Principles

1. “The lawyer owes the client a duty to be **competent** to perform any legal services ...”
2. “The lawyer must discharge with **integrity** all duties owed to clients ...”
3. “The lawyer should **encourage public respect** for and try to improve the administration of justice.”

Competence

- Is the obligation of a lawyer to be competent include a lawyer's obligation to be “culturally” competent?
- What does this mean?
 - a) Has been defined as the “ability to accurately understand and adapt behavior to cultural difference and commonality”(Adams)
 - b) The “ability to adapt, work and manage successfully in new and unfamiliar cultural settings” (Sevens)

Why?

- Increasingly diverse country in a global world,
- Prominent professional competence requirement in other professions (Social work, Business, Education and Nursing)
- Already relied on in death penalty mitigation. In *Wiggins v. Smith*, the USSC held that trial counsel's failure to investigate the defendant's life history "fell short of the professional standards that prevailed" noting that social history investigation was "standard practice".
- Ethnocentrism limits the attorney's ability to tell her client's story ...

Where common law ethical obligations must give way ...

- Without ethical competence a lawyer might not recognize that in some contexts (such as when circle sentencing processes are being employed) the ethical duty to advocate resolutely on behalf of your client which is appropriate in an adversarial setting is not at all appropriate in a community consensus decision-making format where traditional Indigenous methods of dispute resolution are applied.

Incorporating Cultural Competency

- “Being able to effectively connect with people who are different from us – not only based on our similarities, but also with respect to differences” (*Nova Scotia Barristers’ Society*)
- The *Law Society of Upper Canada* has now identified cultural competence as a “key component” in its new Certified Specialist Program in Indigenous legal issues” (June, 2016)

TRC Call to Action:

- **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.

Knowledge of the Law?

- Does this ethical duty include knowledge of Indigenous peoples' own laws?
 - a) Do lawyers violate existing professional ethical obligations to act competently on behalf of their clients when they fail to recognize and apply Indigenous legal principles (as opposed to the common law or civil law principles)?

Integrity

- The lawyer's duty to discharge with integrity at a minimum must include the obligation to do no more further harm to a client in providing legal services.
- Is there an obligation on the lawyer to challenge the unjust and discriminatory Aboriginal and Treaty rights doctrine that is currently applied by the courts?

Aboriginal Rights Doctrine as Unjust

- British/Canadian Law's Contribution to the Negative Indigenous Colonial Experience:
 - a) It is well understood that the existing judicially defined Aboriginal Rights doctrine is fundamentally harmful.
 - “Without an explicit rejection of the doctrine of discovery, and all that grew out of this poisonous root, implicit assumptions about the inferiority of Aboriginal peoples, laws and ways of life will persist in Canadian law and result in destructive policies and restrictive rights jurisprudence ... In other words, the roots of Aboriginal law are rotten and incapable of bearing anything that is sustainable”. (Justice Harry Laforme, Ontario Court of Justice, 2013)

Aboriginal Rights Doctrine as a Breach of Human Rights

- The domestic Aboriginal rights doctrine law fails to meet the minimum human rights standards recognized in the UN Declaration on the Rights of Indigenous Peoples.

Is blind participation in an unjust status quo unethical?

- At a fundamental level, ethics is about ensuring that in undertaking an activity or service one must avoid, at minimum, causing undue harm in the pursuit of that activity or service.
- Lawyers who apply Aboriginal rights doctrine in a black letter law approach by uncritically applying the tests and principles adopted by the Supreme Court of Canada as if this field of law is like any other are acting unethical in my opinion.
- The integrity of the legal profession is put at risk by blindly accepting the unjust premises and precedents of Aboriginal rights law.



**Ethics is knowing the difference
between what you have a right to
do and what is right to do.**

Potter Stewart

“We are all Treaty people”

- In most parts of Canada, the rights of Canadian non-Indigenous people are based on treaty.
- The right to be governed by a Canadian government and to live on the land is dependent on Treaty rights.



CHRISTIE, of the one part, and the Plain and Wood Cree

appointment made by the said Commissioners, been convened at meetings at Fort Carlton, Fort Pitt and Battle River, to deliberate upon certain matters of interest to **Her Most Gracious Majesty** of the one part, and the said Indians of the other;

And whereas the Indians of said land and town only have been and are being treated in Council as submitted, and being treated by **Her Majesty's** and Commissioners to some extent, and **Charles**, who should be followed, on their behalf, to conduct such negotiations and sign any treaty to be entered into, and to become obedient to **Her Majesty** for their faithful performance, by their respect and the Indians have through means for that purpose, that is to say, representing the Indians who make the treaty at **Chadron**, the several Chiefs and Commissioners who have conducted him, and representing the Indians who make the treaty at Fort Pike, the several Chiefs and Commissioners who have conducted him;

[illegible][illegible][illegible]

And, neither, the Ministry agrees to include schools for construction of which a permit is required, and the Government of the Dominion of Canada, on international Agreements shall be allowed to be introduced or sold, and all have been in force on September 1st to be enacted to govern the Indian subject including the Indians or living elsewhere within the Territory.

[illegible][illegible][illegible]

and the funds extending the put on such money by the

[illegible][illegible][illegible][illegible][illegible][illegible]

H. H. C. J. L. D. 1901.	a wark. file	JAMES M'RAY, Indian Commissioner.	NEOWASKWAN, a wark. file	WILLIAM FULL, a wark. file
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Treaty Federalism ...

- Is a conceptual framework to resolve the problems of First Nation - Crown treaty reconciliation.
- This implies that a process of political reconciliation is necessary to clarify the respective jurisdictions of the treaty partners.
- In essence then, treaties are negotiated agreements of a confederal nature akin to the terms of union that implicate the principle of federalism (i.e. the balance of autonomy with interdependence).
- Attention now must be spent on how to implement shared rule with First Nation Treaty partners.

Treaty Based Criminal Justice System?

- According to non-colonial biased Treaty interpretations, Treaty First Nations justice systems should apply not just on reserves but on the “shared” territories with the newcomers as well.
- We need to have a meaningful discussion of how to honour Treaty where the idea of self-government over justice was not surrendered in the treaty.

Legally Plural Territory

- Like the Two Row Wampum, the history of treaty negotiations here confirms that Settlers would comply with Settler law and Cree with Cree law. The shared country was to have a legally plural system of laws.
- If a Non-Cree offends against a Cree person, who's legal system applies if both Cree and Canadian governments share responsibility for the territory?
- In any event, the wholesale unilateral imposition of the Canadian Criminal justice system is a violation of Treaty. It always has been and continues to be a violation.

Conclusion – Duty to Learn



- “The Court’s judgment in *Delgamuukw* concluded with the words, ‘Let us face it, we are all here to stay.’ True enough: but if in the face of this reality we are to find space for multiple legal orders to co-exist, and if we are ultimately to achieve an equal reconciliation, we must recognize that to stay must also be to learn” – Chief Justice Finch (BCCA – former)

- Ay-Ay
- Merci
- Thanks