

Providing high-quality service to Indigenous clients

Just as the final research for this article was being completed in November, newly-elected Prime Minister Justin Trudeau announced his Cabinet, including the appointment of Jody Wilson-Raybould as Minister of Justice and Attorney General. The next morning, a cautiously hopeful mood filled the room as a group of Aboriginal lawyers gathered at the Law Society of Upper Canada for the 2015 continuing education program on Indigenous issues.

Ms. Wilson-Raybould is one of two new Aboriginal cabinet ministers. Many Indigenous Ontarians believe that the Trudeau appointments may herald a new era of “nation-to-nation” relations between the government of Canada and Indigenous leadership. These are hopeful times, but the task of improving the lives of Indigenous people in the province is sobering. Speaking at the Law Society program, Chief Kelly LaRocca of the Mississaugas of Scugog Island First Nation noted that her nation’s reserve – located just 90 kilometres east of the Law Society’s Osgoode Hall – has been under a boil-water advisory since 2008. “But we’re thinking of building a water-treatment plant,” explained an upbeat LaRocca. “Sell services to the other islanders. They could use it.”

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The water treatment plant development project, which will likely employ a lawyer or two, is not the kind of work that comes immediately to mind when we think of Aboriginal law. Lawyers who have never had an Indigenous client are more likely to think about land claims, the Indian Residential Schools Settlement, or *Gladue* reports in criminal court. But for many Indigenous communities, the most promising approaches to infrastructure deficiencies and social inequality lie in the self-help remedies of economic and resource development. As many Aboriginal communities are gathering economic strength, non-Indigenous industries are shopping for resources, territory and labour. It won't be long before lawyers in every area of practice will be practising Aboriginal law in the broadest sense of that vague term: that the client sitting across the desk is an Indigenous person.

Some aspects of practice never change: lawyers' best strategy for remaining relevant, useful, and employed continues to be providing high quality legal work that meets clients' needs. While each client has his or her own specific interests and objectives, some Aboriginal clients may have certain interests in common.

Collaborative and development skills needed

Traditional advocacy will always be an important part of a lawyer's cadre of skills, but as the needs of Aboriginal clients evolve, it will not be enough. Instead of simply giving voice to their clients, effective lawyers will need to develop their skills as educators and collaborators.

One of the most common criticisms Indigenous clients have of the Canadian legal system is that it provides few opportunities for parties to be heard directly (see, for example, Caitlyn Kasper's comments in the child protection sidebar on page 10).

Aboriginal communities are increasingly demanding the opportunity to negotiate with government on a nation-to-nation basis and with industry as equal partners. Chief Kelly LaRocca of the Mississaugas of Scugog Island First Nation has noted that lawyers can best support these initiatives by working collaboratively with community members to develop the legal and business acumen of their own leaders and spokespeople.

Serving Aboriginal clients effectively has the potential not only to assist individual clients and their families, but also to contribute to the development of a better understanding of issues facing Indigenous people. It can also help lawyers avoid malpractice, since problems with lawyer-client communication continue to be the leading cause of claims.

Is my client Aboriginal?

As a threshold issue, lawyers should be aware that not all clients who are Aboriginal will necessarily disclose this fact. However, because certain laws apply differently to some Aboriginal people (especially "Status Indians"), as part of the routine information-gathering process, lawyers should ask questions to find out whether a client is an Indigenous person.

Jonathan Rudin of Aboriginal Legal Services of Toronto (ALST) explains that some clients may hesitate to volunteer that they are Indigenous. "For many, being identified as Aboriginal has not, in their lives so far, been an advantage." Clients may even be suspicious of the motives of a lawyer who seems overly nosy. "The question needs to be asked in an expansive way," advises Rudin, "and the lawyer needs to explain why he or she is asking it."

Learning that a client is an Aboriginal person is just a basic first step. There are dozens of distinct Indigenous cultures in Canada, and within cultures, individuals have many different ways of life. A downtown-Toronto resident of Inuit heritage may have very little in common with a First Nations person who identifies as Haudenosaunee and lives on-reserve, or with a woman with one Cree parent who lives off-reserve and farms land outside Sioux Lookout. Understanding a client as an individual and not just as an Indigenous person requires avoiding what Karen Drake, Assistant Professor in the Faculty of Law at Lakehead University calls "pan-Aboriginalism": the tendency to assume that Indigenous cultures are sufficiently alike that knowledge of one culture can readily be applied to another culture.

Rudin adds that non-Indigenous lawyers can be too quick to make broad assumptions about Indigenous clients. "Most Canadians," he says, "believe we know things about Aboriginal people, but much of what we know is wrong." There is also a tendency to make judgments about whether a person is or is not "really Aboriginal": for example, some lawyers assume that a person who lives off reserve, in an urban setting, lacks the same attachment to her culture than one would expect in a person who lives in an Aboriginal community, but this is not the case. Also many First Nations people, despite living on a reserve, feel a deep disconnection from their culture as a result of the disruption of intergenerational cultural transmission caused by the residential school system.

Lawyers should make room for clients to define their individual identities, and should be accepting of a wide range of diversity in heritage, beliefs, and values, rather than making assumptions about how an Aboriginal client should act, or what he should want from the legal system. Aboriginal cultures are not, after all, frozen in historical context – they are living and growing cultures like any other. Speaking at the Law Society of Upper Canada’s Indigenous Law Issues 2015 program, Randall Kahgee, former Chief of the Saugeen First Nation and now practising law in affiliation with Pape Salter Teillet LLP, urges lawyers to understand that the rights of Aboriginal people, like the rights of all people, are continually evolving. These rights will continue to be defined by Aboriginal people themselves, and should be allowed to achieve a natural expression.

To avoid making limiting assumptions, lawyers should ask relevant questions about a client’s daily life and his or her previous exposure to and understanding of the legal system. This can include questions about values and even feelings, where the answers might help the lawyer develop a clear understanding of the client’s expectations and concerns.

Am I qualified to serve this person?

Once a lawyer has determined that a new client is an Aboriginal person, the next line of inquiry should turn inward: am I qualified to serve this person?

Whether or not a lawyer is ready to represent an Aboriginal client is a question with both practical and deeply personal components; it will also depend on the area of practice involved.

Objective readiness: substantive competence

First, as with any client, the lawyer must be familiar with the relevant law, including those aspects of the law that have unique application to some Aboriginal people. The federal *Indian Act*, for example, applies to Status Indians (a defined term, and not including “non-status Indians” nor Inuit or Métis people), and many sections do not apply to First Nations people living off-reserve. It applies to many aspects of life including band governance, enfranchisement and disenfranchisement, property on reserve, expropriation and seizure, wills and estates, education, taxes, and more.

The *Indian Act* is not the only legislation specific to Aboriginal people – the *First Nations Land Management Act* (SC 1999) provides a framework for First Nations to develop regimes for resource development, succession, and other important issues; the *First Nations Fiscal Management Act* (SC 2005) prescribes certain reporting requirements with respect to real property taxation; and the recently passed *Family Homes on Reserves and Matrimonial Interests or Rights Act* (SC 2013) seeks to provide protections to parties living on reserves in the context of family breakdown. There are also dozens of specific references to Aboriginal people in other

Aboriginal language rights now recognized in the *Rules of Professional Conduct*

At its September 24, 2015 Convocation, the Law Society of Upper Canada announced new amendments to the *Rules of Professional Conduct* that recognize the right of First Nations, Métis or Inuit (FNMI) clients to use Aboriginal languages, in appropriate circumstances, when accessing legal services. Lawyers serving these clients are responsible for bringing this right to the attention of clients who may wish to exercise it. The amended language rule provides as follows:

Language Rights

3.2-2A A lawyer shall, when appropriate, advise a client of the client’s language rights, including the right to use

- (i) the official language of the client’s choice; and
- (ii) a language recognized in provincial or territorial legislation as a language in which a matter may be pursued, including, where applicable, Aboriginal languages.

3.2-2B If a client proposes to use a language of his or her choice and, the lawyer is not competent in that language to provide the required services, the lawyer shall not undertake the matter unless he or she is otherwise able to competently provide those services and the client consents in writing.

These amendments have also been incorporated into the *Law Society’s Guidelines for Lawyers Acting in Aboriginal Residential School Cases* (see guideline 11).

Canadian legislation at all levels – from s. 35 of the *Constitution Act, 1982*; through the *Criminal Code*, labour, and natural resources statutes at the federal level; to child protection, family law, education, employment, and other statutes at the provincial level.

Finally, there are special procedures that apply to Aboriginal people in certain Canadian courts. In Ontario, these are called *Gladue* courts, after the name of the defendant in *R. v. Gladue* ([1999] 1 S.C.R. 688). Proceedings in a *Gladue* court can differ significantly

Gladue reports admissible in lawyer discipline matters

In *R. v. Gladue* ([1999] 1 SCR 688, 1999 CanLII 679 (SCC)) the Supreme Court highlighted the application of s. 718.2(e) of the *Criminal Code*, which requires sentencing judges to pay special attention to the circumstances of Aboriginal offenders and to consider all available sanctions other than imprisonment. In their reasons for judgment, the court mandated the use of a special pre-sentence report, prepared by the defence, setting out information that would assist the court in understanding the accused's circumstances, and in particular "[t]he unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts" (from s. 718.2(e)).

These reports have since come to be known as *Gladue* reports, and a system for obtaining them from specialist preparers has been established (see below for tips on using *Gladue* reports). They are regularly introduced in criminal cases. However, a recent decision of the Ontario Law Society Appeal Panel (ONSLAP) made it clear that the duty to take into account the circumstances of Indigenous people extends beyond the criminal justice system. In their reasons in *Law Society of Upper Canada v. Terence John Robinson* (2013 ONLSAP 18 (CanLII)), the ONSLAP members noted that *Gladue* factors had already been recognized as relevant in, for example, decisions about extradition, or civil contempt of court. In considering whether evidence of *Gladue* factors was admissible in a lawyer discipline proceeding, the ONSLAP held (at paras. 72 and 73):

"... hearing panels are concerned with the seriousness of misconduct or conduct unbecoming and circumstances that offer aggravation or mitigation. They are concerned with the culpability or moral blameworthiness of the licensee, and any facts that bear on those issues. They are concerned about the character of the licensee who appears before them. And they are concerned about crafting dispositions that meet the required objectives while promoting access to justice for everyone, including of course, the Aboriginal community. The latter is especially true for the Aboriginal community and others whose access to justice has been deeply problematic.

None of the above concerns are incompatible with maintaining public confidence in the legal profession. Indeed, consideration of unique systemic and background factors, as they reflect upon the seriousness of a licensee's conduct, and his or her culpability or moral blameworthiness, is necessary to enhance respect for, and confidence in our profession and the self-regulation of all of its members."

After considering the circumstances of the lawyer subject to discipline, the ONSLAP held that the hearing panel had erred in finding that *Gladue* factors had not influenced the lawyer's conduct (for instance, his hesitation in reporting a threat to the police), and reduced his penalty from a 2-year suspension to the 1-year period already served.

from "traditional" criminal proceedings, and lawyers should familiarize themselves with these procedures before appearing before one. Even in a court not specifically created as a *Gladue* court, a lawyer who is making representations in respect of a sentence or other disposition (for example, an extradition proceeding) that affects the liberty of an Aboriginal person is encouraged to arrange for the preparation of a specialized "*Gladue* report." These reports set out the factors for consideration in sentencing Aboriginal offenders as per *Gladue* and s. 718.2(e) of the *Criminal Code*. A *Gladue* report is prepared by a qualified member of a *Gladue* roster, and must be ordered several weeks before it is required.

Finally, where an Ontario lawyer seeks to represent a client in accessing a remedy prescribed under the Indian Residential Schools Settlement Agreement announced by the federal government in 2006, he or she is expected to comply with the Law Society's "Guidelines for Lawyers Acting in Aboriginal Residential School Cases."

Philosophical readiness: cultural competency and sensitivity

As explained in the sidebar on page 12, the effective representation of Aboriginal clients requires an appropriate awareness of the Indigenous experience to avoid re-victimizing clients who have had

negative experiences with the legal and other government systems. While many Aboriginal people believe that non-Indigenous Canadians will never be able to fully understand the Indigenous experience, cultural competence training for lawyers and others who work with Indigenous people can make a difference.

The Indian Residential Schools Settlement Agreement prescribed, at Schedule N, the establishment of the Truth and Reconciliation Commission of Canada (TRC). In June 2015, the TRC published a 94-item list of Calls to Action, put forward as steps toward reconciliation of the relationship between Aboriginal people and the Crown. Call to action #27 deals specifically with lawyer education:

“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.”

A separate call to action, #28, recommends that a similar program of education be a required element of a law school education.

In response to Call to Action #27, Law Society Treasurer Janet E. Minor reported, in a June 4, 2015 press release, that the Society is “...committed to enhancing cultural competency within the legal professions” and to taking steps to improve the services provided by lawyers and licensed paralegals to Métis, First Nations, and Inuit people, as well as access to those services.



As Karen Drake explains, these traditions are best learned through long-term cultural immersion. She notes that “Anishinaabe tradition is passed down typically through storytelling (Nanabush the trickster is a prominent character); while Métis legal tradition often incorporates songs, and is somewhat more likely to follow a prescriptive format.” While elders play an important role in communicating legal custom and tradition, they are not lawmakers; their role is closer to that of wise interpreters. And according to Aboriginal legal scholar Hannah Askew, for non-Indigenous learners, understanding Indigenous legal traditions will require not only finding a way to access the content of these traditions, but also learning how to interpret a completely different style of legal system – one that substitutes “a set of interlocking and overlapping processes” for rigid rules, and that requires that those processes be understood via the full range of senses: sound, touch, sight, taste and smell.

At the Law Society’s recent Indigenous Law Issues program, Grant Wedge, Executive Director, Policy, Equity & Public Affairs asked panel members what ought to be included in an Indigenous issues curriculum for lawyers.

Elizabeth Jordan, National Director, Aboriginal Markets at the Royal Bank of Canada answered that a well-rounded cultural competence curriculum ought to explore the legal aspects of the roots of the fractured relationship between Indigenous people and the Canadian government. “It needs to include a critical review of the many legal fictions that have been developed to deny the rights of Aboriginal

Practical advice for complex problems: Managing a mountain of evidence

Some of the most important barriers to justice for Aboriginal people are the same ones that plague all litigants... but multiplied: for example, the high cost and increasing complexity of litigation.

Establishing a right to Aboriginal title to territory is a time- and evidence-intensive process. Parties must first agree on a strategy and come to a consensus about the focus and parameters of the litigation, a process that requires strong communication and negotiation skills on the part of both clients and their lawyers. Next, many hours must be spent in researching, documenting, and organizing decades’ – or even centuries’ – worth of evidence. Compiling the evidence required to establish a land claim requires both a significant degree of analytical ability on the part of researchers, and a document organization system that is both reliable and flexible. Rama, Ontario firm Nahwegahbow, Corbière employs a dedicated researcher and uses state-of-the-art evidence compilation software to organize and analyze land claim and Aboriginal rights evidence.

Dabbling in Aboriginal land claims law is not a realistic option: when developing a land claims or Aboriginal rights practice, lawyers will need to have in place both research capacity and up-to-date technology.

“Paralyzing”: The impact of child protection proceedings on Aboriginal families and communities



Perhaps the most challenging impact that law has on the lives of Ontario Indigenous people comes via the child protection system. Despite the requirement, under the Ontario *Child and Family Services Act* (CFSA), that a child's Indigenous heritage be taken into account when making decisions about interventions and placements, Caitlyn Kasper of Aboriginal Legal Services of Toronto describes the threat of having a child removed from his family and community as “paralyzing” for parents.

Given what is now known about the impact of the Indian Residential School system on Aboriginal families, it's clear that the removal of children from their homes has unique and profound implications for Indigenous people. Katherine Hensel of Hensel Barristers, speaking at the Law Society's 2015 Indigenous Law Issues program, described First Nations' jurisdiction over the care of their children as “an element of self-government that has never been ceded or surrendered.” Hensel believes that allowing First Nations to resume care for their children is a critical aspect of the process of reconciliation agreed to by the government under the Indian Residential Schools Settlement Agreement.

When an Aboriginal child does come to the attention of a child protection agency, says Kasper, the role of the lawyer representing the parents is critical. Aboriginal parents are often shocked to discover the lack of opportunities to have a voice in the system – a deficiency that is only partly remedied by the requirement, under the CFSA, that a representative of the child's band or community have notice of certain proceedings (see s. 39). A parent's lawyer, says Kasper, can do his or her best to reduce the stress of involvement with the child protection system by educating the parents as much as possible about the relevant procedures, by suggesting steps the parent can take to improve his or her position, and by recommending resources that may offer help. “Above all,” adds Kasper, “a lawyer needs to keep in touch with the client: call often, provide updates as soon as they are available, explain processes, and do everything possible to remind the client that he or she is there for them.”

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people.” Kimberley Murray, Ontario Assistant Deputy Attorney General, Aboriginal Justice Division added that instead of simply providing interesting information about “sweat lodges and medicines,” lawyer education programs must focus on the more serious – and difficult – work of relationship building. As the professional indemnity insurer for Ontario lawyers, we at LAWPRO agree with this prescription, because healthy lawyer-client relationships help prevent the communication failures at the heart of many claims.

What does my client want out of the legal or justice system?

A lawyer may be much more familiar with the problem an Indigenous client is having – for example, a marital separation, a criminal charge, or a human rights complaint – than with the kind of person his or her client is. This greater comfort with the legal context than with the personal context can lead lawyers to quickly zero-in on the familiar (legal) details and to launch immediately into pursuit of the “usual” remedy, instead of taking the time to determine whether the usual remedy is actually what the client wants.

This narrow focus can lead to misunderstandings or even malpractice claims based on a client's allegations that the lawyer acted without, or contrary to, the client's instructions.

Determining what a client wants requires a two-way conversation in which both parties speak and listen. Most lawyers believe themselves to be skilled interviewers, and might protest that they always ask questions about what a client wants. But what if the client can't articulate those wants because he or she lacks information about the available options? When a client is new to the legal system, a first meeting with a lawyer can feel like having to answer a quiz before taking a course. Obtaining thoughtful and informed instructions from a new client requires that the lawyer have the patience to thoroughly explain the substantive law, the procedures for applying it, and the range of remedies available.

There are no shortcuts for this process. It requires patience, the characteristic identified by both Jonathan Rudin and Caitlyn Kasper of Aboriginal Legal Services of Toronto as the most important for lawyers who work with Aboriginal people. Says Rudin, “it's essential, instead of immediately having all the answers, to really be aware of what you *don't* know. Take the time to fully unpack why a person thinks the way he or she thinks.”

Where a client has a history of oppression or lack of opportunities, his or her expectations of what is possible may be unfavourable or limited. If the lawyer believes that the client's expectations are unnecessarily low, it's appropriate to say so; but it is never appropriate for a lawyer to substitute his or her own judgment for the client's.

Grappling with terminology

Many terms have been used, historically, to describe Canada's original inhabitants. Because labels influence our understanding of cultural identity, it is important for lawyers to make thoughtful choices about terminology when interacting with clients and when presenting clients' cases in court.

There are a range of opinions about the most appropriate terms for describing cultures, and usage evolves over time. For example, after taking office, the most recent Canadian government adopted a new name, "Indigenous and Northern Affairs Canada", for the department formerly called "Aboriginal Affairs and Northern Development Canada."

Here are basic definitions for some of the terms used in this article.

Aboriginal:

In Canada, this term includes First Nations, Métis, and Inuit people. "Aboriginal" is used in certain other countries to describe original inhabitants of a territory. It describes a historic context rather than an ethnicity.

Anishinaabe:

This term describes a subset of Indigenous peoples who are the descendants of speakers of Anishinaabemowin-Anishinaabe languages. It includes the Odawa, Ojibwa, Potawatomi, and Algonquin peoples, as well as certain Métis peoples; but excludes the Inuit and Haudenosaunee peoples (Haudenosaunee peoples include the Mohawk, Cayuga, and Oneida, among others).

First Nations:

A term used in Canada to denote Indigenous people who are neither Métis nor Inuit.

FNMI (First Nations, Métis, Inuit):

Because this acronym is specific to the Canadian context, it is preferred by some to the more generic Aboriginal or Indigenous.

Indigenous*:

An adjective used globally to describe the original inhabitants of a place

Inuit:

A people indigenous to northern North America and Greenland. An individual member of this people is called an Inuk.

Métis:

In the Canadian context, the Métis are a nation separate from other Aboriginal cultures. Members of the Métis nation are descended from individuals who, many generations back, had mixed Aboriginal/European parentage, and whose descendants intermarried and produced a distinct people.

Status Indian:

This term refers to a legal status applied to certain First Nations individuals who are registered under the *Indian Act* on the Indian Register. The *Indian Act* places restrictions on who can be registered, and the Canadian government has not historically recognized Métis or Inuk individuals as eligible for registration.

* The term "indigenous" is not capitalized by some publishers in contexts where it is used as a generic adjective. Because it is used more narrowly in this article to refer to specific peoples, and because some individuals may adopt it in preference to the alternatives as a cultural identifier, we have chosen to capitalize the initial "I."

Randall Kahgee agrees that lawyers must be careful to avoid making assumptions about which course of action is best for a client. In the context of resource development consultations in particular, he explains that the jurisprudence that has developed under s. 35 of the *Constitution Act, 1982* makes it clear that Aboriginal people must not only be consulted, but also accommodated – which goes well beyond simply being heard. Accommodation means allowing Aboriginal people to be full decision-makers with respect to their own land, and requires that their concerns, as articulated by them, be substantially addressed.

Taking into account Indigenous legal traditions

Multiple legal traditions exist in Canada

Taking the time to understand an Indigenous client is a very important step, but there is much more lawyers can do. In her paper "Indigenous Legal Traditions and the Challenge of Intercultural Legal Education in Canadian Law Schools," Hannah Askew describes

Do it right or not at all



“As a non-Indigenous lawyer,” Jonathan Rudin warns, “you need to understand that even though you may see yourself as his advocate, your Indigenous client may see you instead as ‘part of the system’.”

This perspective means that if the client’s interaction with his lawyer is stressful, shaming, or otherwise negative, despite the fact that the lawyer is ostensibly on the client’s side, the overall result of the client’s interaction with the law will be to perpetuate hundreds of years of colonialism – and the lawyer will be a part of that harm.

Taking on an Indigenous client without being properly prepared to do so and without investing appropriate time to learn about the client’s circumstances, beliefs and needs is to do the client a disservice – and in the worst cases, to re-traumatize the client.

It’s the importance of avoiding this re-traumatization that prompted the Law Society, for example, to develop guidelines for lawyers seeking to represent clients who wish to assert claims under the Indian Residential Schools Settlement Agreement.

Says Rudin: “if, as a lawyer, you are willing to take the time to learn how to support Indigenous clients in a manner that is respectful, you should take this work on. But if not – then don’t do it. We just don’t have time to do this badly.”

the growing recognition, in Canada, that the development and protection of the rights of Indigenous people must draw not only on common law and civil law, but also on Indigenous legal traditions.

This recognition of Canadian legal pluralism was also reflected in the Canadian Bar Association’s (CBA) 2005 resolution (Resolution 05-01-A) calling for representation of all Canadian legal traditions when making judicial appointments. The resolution expresses the CBA’s view that to achieve “a reconciliation of the prior occupation of Canada by Indigenous societies with the subsequent assertion of Crown sovereignty” as required by s. 35 of the *Constitution Act, 1982*, an effort must be made to appoint Aboriginal judges to appellate-level Canadian courts, including the Supreme Court of Canada.

In 2013, the CBA introduced another resolution (Resolution 13-03-M) urging “judges, lawyers, lawmakers and legal academics” to affirm the promise contained in s. 35 and to recognize and comply with the *United Nations Declaration of the Rights of Indigenous Peoples* in concrete and specific ways:

BE IT RESOLVED THAT the Canadian Bar Association:

1. urge judges, lawyers, law-makers and legal academics to recognize and value Indigenous legal traditions within the Canadian legal system;
2. advance and support initiatives to recognize and advance Indigenous legal traditions in Canada, including:
 - participation in working groups, advisory committees and other organizations;
 - continuing professional development and training for lawyers and law students; and
 - public education and information.

Understanding Indigenous perspectives



David Nahwegahbow is a lawyer from Whitefish River First Nation and a partner in Rama, Ontario firm Nahwegahbow, Corbière. He recently represented the Indigenous Bar Association when it participated as an intervener before the Supreme Court of Canada in the *Tsilhqot’in Nation v. British Columbia* land claim case. He believes that the most important thing for non-Indigenous lawyers to be aware of when representing Indigenous people is that they may be working with clients with a perspective and worldview radically different from their own.

Nahwegahbow explains that Aboriginal history, customs and culture continue to influence the way Indigenous people experience the Canadian legal system.

Non-Indigenous parties and lawyers, notes Nahwegahbow, are comfortable with the adversarial design of the system, and they trust that if they have a conflict, “the system will take care of it: the adversarial process will produce justice.” But Indigenous people often struggle to understand and to trust adversarial processes. “The Indigenous way,” explains Nahwegahbow, “is to view everyone as being related.” Indigenous people approach disputes not as an adversarial exercise, but instead as a process of negotiation between related parties. “Respect is very important. You don’t burn bridges.”

For example, many legal system participants readily take advantage of legal loopholes or errors made by an opponent to advance their own causes. This behaviour is seen as clever legal strategy by non-Indigenous parties, but may be perceived by Indigenous clients as dishonourable trickery. If used effectively by the opposing party, these tactics may lead to results that Indigenous clients consider

fundamentally unjust, further eroding their trust in the system. From a malpractice perspective, this creates a potential for claims. Lawyers representing Indigenous clients may have to carefully explain the role of adversarial strategies so as not to lose an important advantage (and to avoid dangerous communication gaps).

“But at the same time,” notes Nahwegahbow, “lawyers must be mindful not to totally compromise clients’ culture when obtaining their consent to use these strategies.” Nahwegahbow believes that lawyers who represent Aboriginal clients have a responsibility for helping the system to adapt to the Aboriginal perspective. The fundamental challenge for the courts, as he sees it, is how to grapple with the growing realization that the Crown’s *de facto* sovereignty has been illegitimately overlaid on the sovereignty of pre-existing societies. Courts are required, both morally and under s. 35 of the *Constitution Act, 1982*, to find a way to reconcile Indigenous sovereignty with the authority of the Canadian state. He sees signs of willingness, on the part of judges, to take on that challenge – most recently in the context of the *Tsilhqot’in Nation* litigation. “You really get a sense that judges who have listened to the many

hours of evidence presented in these cases come to understand it, and want to do the right thing – despite the wide-ranging implications of issuing a declaration of Aboriginal title.”

“We are all treaty people” – the lawyer’s role in reconciliation

Ultimately, a lawyer’s responsibility with respect to providing professional legal services to Aboriginal people can perhaps best be understood as just one facet of the same lawyer’s general responsibility, as a Canadian, to honour Canada’s agreements with our land’s first peoples. The phrase “we are all treaty people” has been widely used by Indigenous groups to communicate a belief that individual Canadians cannot fully support decolonization without first accepting personal responsibility for benefiting from that colonization.

On November 3, 2015, the government of Canada established the National Centre for Truth and Reconciliation at the University of

Taking Indigenous legal traditions into account – an example

An example of how a lawyer can take Indigenous legal traditions into account is offered in the reasons for decision in *Lemaigre v. Première nation des Dénés de Clearwater River* (2015 FC 601 (CanLII)). *Lemaigre* was a Federal Court application for judicial review of a Dene band decision made under the *Clearwater River Dene Nation Election Act and Regulation*. The “decision” was a vote about whether or not a band chief had forfeited his position as chief by failing to move onto the band’s main reserve as required under the Act.

The vote by the Election Committee of the Clearwater River Dene Nation (CRDN) had ended in a 3-3 tie, and the court was being asked to rule on the implications of the tie. In doing so, Mr. Justice de Montigny – presumably at the suggestion of counsel – considered the historical use of the processes of consensus-building and majority rule by the CRDN. He noted that “...one could object that the general principles of majoritarian democracy do not sit well in an Aboriginal context, where the prevalent tradition (at least among many First Nations) is to rule by consensus...”. He found that an inquiry into a band’s historical processes were “...particularly apposite where a First Nation continues to select its leadership based on its own custom. In such a case, the principles applicable to the interpretation of these customs should be derived first and foremost from that First Nation’s own law and customs, instead of borrowing blindly from the principles and the jurisprudence

applicable to decision-making in legislative assemblies or municipal councils.”

A review of past decisions by CRDN panels revealed, however, that the band had an established history of deciding by majority vote, and that they had incorporated tie-breaking rules into their election statute. These rules prescribed that when a vote on a yes/no decision ended in a tie, the results would be treated as a negative result – which, in this case, meant that the chief had forfeited his position.

This case presented a clear opportunity to allow Indigenous legal tradition to inform a decision. Opportunities will not always present themselves so readily. However, any time a lawyer can obtain an answer to the question “how would this issue be decided according to the culture’s custom?”, he or she ought to consider how that answer might best form part of the arguments made on the client’s behalf.

Ensuring that proceedings take into account and are informed by the principles and traditions of the client’s own legal tradition can help the client feel ownership of the result – even if it is ultimately unfavourable – because it may better align with his or her own views of what is fair. A client who considers a result to be fair – or at least logical – is less likely to bring a claim against the lawyer.

Law Society to offer specialist certification in Aboriginal law

The Law Society's Professional Development and Competence Division is engaged in the development of a new area of specialization in Aboriginal law that will be recognized under the Certified Specialist Program for lawyers. The process has involved working with subject matter experts and practitioners from across Ontario to establish standards and criteria that will form the basis for credentialing as a certified specialist in this area. The development of the new Aboriginal law specialization is expected to be completed by the fall of 2016. For more information about the Certified Specialist Program, please visit the website at: lsuc.on.ca/For-Lawyers/About-Your-Licence/About-the-Certified-Specialist-Program/.

Manitoba, in recognition that achieving reconciliation with Indigenous peoples goes beyond the mandate of the Indian Residential Schools Settlement Agreement and will continue beyond the December 2015 release of the Truth and Reconciliation Report.

Lawyers who take on the work of representing Indigenous people have a special opportunity to contribute to the reconciliation process. Whether by assisting Indigenous clients in exercising their rights, by supporting Aboriginal economic development, or even just by improving the level of understanding of a client's perspective within the system, lawyers can support the progress of Indigenous families and communities toward self-determination and a better standard of living.

Speaking at the recent Law Society Indigenous Law Issues program, Signa Daum Shanks, Assistant Professor at Osgoode Hall Law School and Director of York University's Indigenous Outreach program, suggested that the most useful approach for lawyers working with Indigenous people is to "have a bigger ear," in the sense of actively resisting the tendency to rely on our assumptions and preconceptions. As challenging as listening can be for lawyers, it's a skill with the potential to both reduce malpractice risk and to improve the quality of client service. We owe it to ourselves and to our clients to learn how to slow down, to delay moving into familiar problem-solving mode, and to listen to other perspectives with a bigger ear. ■

Nora Rock is Corporate Writer & Policy Analyst at LAWPRO.

About the cover

The cover image features a close-up of the mosaic table top entitled *The Gathering of the Clans*. This permanent outdoor work on display at Todmorden Historic Site depicts the original Anishinaabe Clan governance system as a wheel with checks and balances. The whole community is involved in decision-making with each animal clan representing a specific responsibility for the growth and care of the community.

Animals in the mosaic are shown in white. White is a sign of entering the eighth fire – a time that is prophesied to be when western and Indigenous thinking will come together to build a new understanding.

"We are all Relatives," says Rebecca Baird as she describes the artwork. "The whole community is involved and has a place. We share this land with all the creatures and the respect we give to

each other needs to include the animals. In our Creation Stories, the animals were here first. We were the last to be put on the earth and required the help of all the other creatures to survive. We look to the natural world to understand our place and responsibilities in this lived experience."

The mosaic table is an artistic collaboration with design by Phillip Cote, facilitated by Rebecca Baird and Red Pepper Spectacle Arts, in partnership with Todmorden Mills and the Tecumseh Collective. Funds for the project were received through the Toronto Arts Council's "Animating Historic Sites" program.

