

Ethical Lawyering Across Canada's Legal Traditions

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Elsewhere, I have argued for reconceptualizing legal ethics from an Aretaic (or virtue) ethics perspective, moving away from the deontological (duty-based) and consequentialist paradigms that characterize traditional discourse in this area. My goal generally is to explore the ways in which personal values, cultural/community traditions and philosophical conceptions of law shape and inform legal ethics theory and legal practice. In this essay, I attempt to examine the extent to which this “reconceptualization,” even as it attempts to break from the tradition, still remains rooted in Western ideals of “self,” “law” and “society”—i.e., a notion of lawyers as understood in the common and civil law traditions. I address these issues by engaging the emerging notion of a multi-juridical Canadian legal tradition—that is, in addition to the common law and civil law traditions of the English and French, Canada’s legal inheritance includes (and thus must be harmonized with) indigenous law. The central issue is how our notions of lawyering and legal practice may have to change to accommodate this non-Western (but nevertheless Canadian) perspective.

... the strength of a tradition is not how closely it adheres to its original form but how well it develops and remains relevant under changing circumstances.

Katherine T. Bartlett¹

I Introduction: Reconceptualizing Legal Ethics in Canada

The question of what it means to be a lawyer is at the heart of the project of legal ethics theory and at the core of being and practising as an ethical lawyer. However, insofar as “most lawyers eschew the worth of legal theorizing ... [and] give little thought to the informing theory”² of legal ethics, the “traditional” conception of what it means to be an ethical lawyer remains limited to guidelines expressed by professional codes of conduct and/or as delineated by statute and common law. It has also been suggested that “careful scrutiny of the course offerings at law faculties across the land leads the observer to conclude that ‘legal ethics’ is not particularly a priority at Canadian law schools,”³ although there has been an increased focus over the last several

1 Katharine T. Bartlett, “Tradition, Change and the Idea of Progress in Feminist Legal Thought” (1995) *Wis. L. Rev.* 303 at 331.

2 Allan Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999) 17 [Hutchinson].

3 Adam Dodek, “Canadian Legal Ethics: A Subject in Search of Scholarship” (2000) *U. Toronto L.J.* 115.

years in the various Canadian law faculties to better incorporate the teaching of legal ethics in the undergraduate curriculum.⁴ But because the inculcation of values and concepts of the legal system that takes place during one's legal education invariably affects one's ideals—in the broad sense of the term—about the profession, any discussion of professional ethics thus requires some discussion about the foundational legal theory and social values of the legal system. While there may be students and practitioners that prefer to engage in as little a discussion of legal theory as possible, I would argue that we cannot have a proper conception of our role within the legal system if we have little understanding of the history and the values underlying that very system. Put simply, legal ethics can neither be taught nor learned if we do not come to terms with our legal tradition and heritage.

My interest is to explore what values and philosophical conceptions of law shape and inform legal ethics theory and legal practice. If one is to make a case for rethinking our ideas about legal ethics, one needs to understand the values that inform the extant legal tradition and how they are imparted to students and manifested in the practice of lawyers. Furthermore, one would need to make a case for incorporating an alternate (or additional) set of values into the existing system if one is to advocate for change to traditional legal ethics. I propose to explore these issues by engaging the emerging notion of a multi-juridical Canadian legal tradition—that is, that in addition to the common law and civil law traditions, Canada's legal heritage necessarily includes (and thus must be harmonized with) indigenous or chthonic law.⁵

The central project of this essay is to provide a general overview of some of the existing notions of lawyering and legal ethics and to explore how these concepts and practices would have to be modified to accommodate indigenous—i.e., non-Western but nonetheless Canadian—legal values and principles. My goal in reconceptualizing legal ethics and highlighting new modes of legal practice that harmonize Western and indigenous values and concepts of law is to suggest a more complete picture of the legal tradition and system in which we operate and to promote a better understanding of what being a legal professional means in the Canadian legal context. My hope is that this paper will provoke some discussion about how we can better acknowledge and harmonize the values and perspectives of indigenous people in the practice of law in Canada.

4 For example, a course in legal ethics is now a mandatory component of the undergraduate curriculum at the University of Western Ontario's Faculty of Law and Osgoode Hall Law School.

5 I use the terms "indigenous" or "chthonic" law to refer to the law of indigenous societies, in order to distinguish this concept from the inter-societal "Aboriginal law" of Canadian jurisprudence (for a further discussion of the latter notion, see Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) *Osgoode Hall L.J.* 624).

II The Concept of Lawyering in the Canadian Legal Tradition

A legal tradition is to be understood here as “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught.”⁶ There are two broad issues discussed within this part of the article: the elements of the dominant Canadian legal tradition and how the role of the lawyer is conceptualized within that tradition. The point is to illustrate how the history of law and lawyering in Canada has operated “as a legitimator of action and cement of group cohesion,”⁷ that is, as giving justification to particular notions of legal ethics and legal practice.

The (Euro-)Canadian Legal Tradition

Generally, what I describe as the “(Euro-)Canadian” legal tradition incorporates the common law and civil law traditions as historically received by Canada, and their associated legal institutions, concepts, values and procedures, as modified by or subjected to constitutional principles. The European legal traditions of common law and civil law were applied in Canada based on the principles of “settlement” or “conquest.”⁸ In central Canada (i.e., the former territory of New France), British laws were imposed after the conquest and France’s cession of the territory in 1763; subsequently, pre-conquest French civil law was restored by the *Quebec Act, 1774*. The rest of Canada was considered to have been settled, thus resulting in the importation of the entire body of English common law and statute law into those provinces and territories.

Despite some of the inaccuracies that are inherent in this understanding of Canada’s legal history and legal inheritances,⁹ this is the way most law students and lawyers first come to understand the legal system of which they are a part. The notion of Canada as a “bijural” or “legally pluralistic” jurisdiction—i.e., private law in Quebec is based on the French civil law

6 J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2d ed. (Stanford: Stanford University Press, 1985) at 1.

7 Eric Hobsbawm, “Introduction: Inventing Traditions” in Eric Hobsbawm and Terence Ranger, eds, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983) 1 at 13.

8 Eric Hobsbawm, “Reception of European Law” in Neil Craik *et al.*, eds, *Public Law: Cases, Materials, and Commentary* (Toronto: Emond Montgomery, 2006) 53.

9 See Peter Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Carswell, 2004), sec. 2.1, at 30-31: “The settled classification entailed the automatic reception of English law ... The three Maritime provinces [were] as a matter of historical fact acquired by cession from France ... The reception of English law into these provinces has often been explained on the patently false belief that they were ‘settled’ colonies.” Moreover, the “settlement” approach ignores the presence of indigenous communities, which is a central point of this article.

tradition; British common law is the basis of private law in the other provinces and territories; and Canadian public law is governed by common law, statute law and constitutional principles—is largely assumed and accepted by most legal scholars.¹⁰ Although there may be difficulties in transplanting certain doctrines or concepts, the civil law and common law have generally been harmonized in practice. Thus, the only sources of law and legal and professional obligations, from most lawyers' perspectives, is the mixed (Euro-)Canadian legal tradition.

The Values and Principles Underlying Canadian Law

It should be emphasized from the outset that this section of the essay is not intended to be an exhaustive account of Canadian political and legal theory. “Canadian law” is obviously much too broad a topic to expound upon and it would be beyond this present project to discuss all the nuances and hidden tensions (some might say contradictions) within Canada's legal tradition, or to provide definitions for these contested and contestable concepts. Rather, what is presented here is a very brief sketch of some of the legal principles and values that formally and informally shape our legal order. The following areas of law discussed are those with which most law students are expected to be familiar from their first year of professional legal education.

Canada's public and constitutional law is “founded upon principles that recognize the supremacy of God and the rule of law.”¹¹ The Constitution in its original form was said to be “similar in principle to that of the United Kingdom.”¹² We have a *Charter* and a *Bill of Rights* (and their provincial equivalents) which guarantee individual rights and freedoms and enshrine values such as liberty, equality, freedom of expression, and procedural justice. The Supreme Court of Canada has also enumerated other principles that are a “necessary part” of the constitution: federalism, democracy, constitutionalism, the rule of law and the protection of minorities.¹³ Criminal law is based on theories of morality and moral responsibility, guilt and innocence, and punishment, which involves retribution, restitution and rehabilitation. With respect to the governing principles of private law, property law relies on theories about the relationships between persons and things; contract law is based on notions of consent and liberty; principles of distributive justice, restitution and wrongdoing are manifested in the law of torts.

10 See Julie Bédard, “Transsystemic Teaching of Law at McGill: Radical Changes, Old and New Hats” (2001) 27 *Queen's L.J.* 237 at 243-246.

11 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, Preamble.

12 *Constitution Act, 1867* (U.K.), 30 & 31 *Vict.*, c. 3, reprinted in *R.S.C.* 1985, App. II, No. 5, Preamble.

13 *Reference re Secession of Quebec*, [1998] 2 *S.C.R.* 217 at para. 32.

The point in describing these core legal concepts and values is to illustrate the background from which legal ethics and professional responsibility are conceptualized. Insofar as knowledge of these values and principles constitutes “basic” knowledge about Canadian law, they form part of the understanding of the lawyer’s role in the Canadian legal system. Alternatively, inasmuch as lawyers are considered agents of this system, these are the values which they are obliged to uphold. It is, after all, our ideas about what the law is—and what the law requires or permits—that inform the parameters of what we can and should do when we practice law.¹⁴

The Relationship between Law and Legal Ethics

“The intersection of morals, law and ethics is nowhere more evident than in the daily affairs of those who practice law.”¹⁵ Much scholarly work has been done in recent years about the way legal ethics and professional responsibility is conceptualized in Canada. Jonnette Hamilton has examined the traditional metaphors of how the legal profession is conceived of in professional codes of conduct.¹⁶ Wesley Pue has criticized the historical and contemporary “myths” about lawyers and the legal profession.¹⁷ Gavin Mackenzie has described the growing disillusionment of the public (and of lawyers themselves) with the legal profession.¹⁸ As Harry Arthurs describes it, the challenge of legal ethics scholarship is to “understand the philosophical and socio-economic underpinnings of the existing norms of professional conduct [and] to critically evaluate their content and interpretation.”¹⁹ My attempted contribution here is to discuss how our theories about law itself give rise to expectations and rules about how lawyering should be conducted.

Codes of Conduct and Lawyers’ Duties

The promulgation of professional ethics codes is one way lawyers are reminded of the “higher calling” of the profession. For example, since 1920, the Canadian Bar Association has published a *Code of Professional Conduct*,²⁰

14 Cf. Randal Graham, “Moral Contexts” (2001) 50 U.N.B.L.J. 77 [Graham]; Hutchinson, *supra* note 2 at 198; Carrie J. Menkel-Meadow, “Can a Law Teacher Avoid Teaching Legal Ethics?” (1991) 41 J. Legal Ed. 3.

15 Graham, *supra* note 14 at 77.

16 Jonnette W. Hamilton, “Metaphors of Lawyers’ Professionalism” (1994-1995) 33 Alta. L. Rev. 833 [Hamilton].

17 W. Wesley Pue, “In Pursuit of Better Myth: Lawyers’ Histories and Histories of Lawyers” (1994-1995) 33 Alta. L. Rev. 730 [Pue].

18 Gavin Mackenzie, “The Valentine’s Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession” (1994-1995) 33 Alta. L. Rev. 859 [Mackenzie].

19 Harry Arthurs, “Foreword” in Hutchinson, *supra* note 2 at xiii.

20 Available online <<http://www.cba.org/CBA/activities/code/>> [CBA Code].

the common standards and rules of conduct expected of Canadian lawyers.²¹ However, such codes are invariably panned by practitioners and scholars for being, amongst other things, “a Valentine’s card to a heart surgeon in the operating room.”²² In other words, they are thought to be impractical and impracticable or, in the alternative, the embodiment of anachronistic values.²³

Nevertheless, let us presume for a moment that codes of ethics actually embody, as they purport to do, the “particular values of a particular culture at a particular time.”²⁴ 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.”²⁵ In other words, the core principles and values of the legal system—i.e., what “justice” means and how it should be administered—are to be manifested through legal practice. Professional ethics should complement law and not conflict with it.²⁶

Professional responsibility thus requires an understanding of the totality of the circumstances in which one is practising. To understand what it means to be an ethical lawyer, one needs to appreciate all the institutional facts and social and legal values pertinent to lawyering.²⁷ A similar point was made by Richard Wassertrom in his critique of “role-differentiated” morality:

It is clear that there are definite character traits that the professional such as the lawyer must take on if the system is to work. What is less clear is that they are admirable ones. Even if the role-differentiated morality of the professional lawyer is justified by the virtues of the adversary system, this also means that the lawyer *qua* lawyer will be competitive rather than cooperative; aggressive rather than accommodating; ruthless rather than compassionate; and pragmatic rather than principled. These are the same character traits that are emphasized and valued by the capitalist ethic. Because the ideals of professionalism and capitalism are the dominant ones within our culture, it is difficult to take seriously the suggestion

21 In some jurisdictions in Canada, the *CBA Code* has been adopted, with some modification, by the profession’s governing bodies, while other law societies use the *CBA Code* to interpret or update their own rules of conduct.

22 See Mackenzie, *supra* note 18 at 865.

23 See Hamilton, *supra* note 16 at 834.

24 *Ibid.*

25 *CBA Code*, CH. XIII. See also “Commentary” to the rule: “The admission to and continuance in the practice of law imply a basic commitment by the lawyer to the concept of equal justice for all within an open, ordered and impartial system . . . The lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities.”

26 Cf. Susan Koniak, “Law and Ethics in a World of Rights and Unsuitable Wrongs” (1996) 9 Can. J.L. & Jurisprudence 11 at 12-13.

27 See Paul J. Saguil, “A Virtuous Profession: Re-Conceptualizing Legal Ethics from a Virtue-based Moral Philosophy” (2006) 22 Windsor Rev. of Legal & Soc. Issues 1.

that radically different styles of living, kinds of occupational outlooks, and types of social institutions might be possible.²⁸

An ethical code and/or a theory of professional responsibility must consider the realities of the existing legal system and the circumstances of professional existence. The institutional facts pertinent to lawyering are various and have different implications for the role of the lawyer.²⁹ Once we accept or acknowledge the systemic parameters within which the lawyer must exercise his or her role, we can then start to discuss the aspects of these parameters which can be adapted or reconceptualized to accommodate or give way to different values.

How Canadian Legal Values Inform Legal Ethics

Legal ethics in Canada must thus be understood in light of the history of the common law and civil law traditions, and the values of liberalism, democracy, constitutionalism, capitalist economics and cultural pluralism which inform our social history and public and private law. This is perhaps best illustrated by an excerpt from a commentary by the Law Society of Alberta:

The legal profession has a unique position in the community. The distinguishing feature is that alone among the professions it is concerned with protecting the personal and property rights of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state. The protection of rights has been an historic function of the law and it is the responsibility of lawyers to carry out that function.³⁰

This historical background and the above statement about the role of lawyers within the legal system would seem to encompass or provide some justification for the duties, obligations and responsibilities that they are invested with as professionals. 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, as contemplated by Wassertrom, 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.³¹ Arguably, this is the most common conception of what lawyering should be,³² if the *Code of Professional Conduct* and the

28 Richard Wassertrom, "Lawyers as Professionals: Some Moral Issues" (1975-1976) 5 Hum. Rts. 1 at 13.

29 See Harry Arthurs, "Lawyering in Canada in the 21st Century" (1996) 15 Windsor Y.B. Access Just. 202 at 211ff.

30 Cited in Pue, *supra* note 17 at 743.

31 See David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) 74-77.

32 Cf. Gavin Mackenzie, "Breaking the Dichotomy Habit" (1996) 9 Can. J. L. & Jurisprudence 33.

profession's focus on confidentiality, conflict of interests and client-centered advocacy is any indication.

Insofar as the discourse on legal ethics is dominated by discussions about these aspects of lawyering, an obvious point can be made related to the central project of this essay: 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. Legal ethics discourse has so far only situated itself within the Euro-Canadian legal tradition and its associated social values—it has thus far failed to consider the values and perspectives of the indigenous legal traditions which, as discussed below, are inextricably connected to Canada's legal and constitutional order.

Inasmuch as traditional legal ethics only operates from a Euro-Canadian perspective, it is fundamentally inconsistent with the multi-juridical nature of the Canadian legal order. Furthermore, this professional paradigm is itself arguably a manifestation of the “colonial character of Canadian law and its capacity to silence Aboriginal peoples.”³³ Indeed, part of the solution to the crisis of legitimacy that the Canadian legal system has within Aboriginal communities may perhaps lie in the opportunity for indigenous peoples to start seeing themselves and their normative values reflected in the day-to-day practice of the “guardians” of that system, i.e., lawyers.³⁴

III Indigenous Legal Traditions

The indigenous people of North America were the first societies to establish legal systems on this continent.³⁵ These different societies each had their own language, culture and political structures, which accounts for the variety of laws and traditions among them. Like other organized societies, Aboriginal people developed norms and practices to govern their social interaction and resolve disputes (e.g., laws regarding marriage, adoption, the treatment of wrongdoers, trespassing and hunting), and to regulate trade and govern the relationships between different nations.³⁶ The sources of these laws are

33 Mary E. Turpel, “Home/Land” (1991) *Can. J. of Family L.* 17 at 21.

34 John Borrows, “Creating An Indigenous Legal Community” (2005) 50 *McGill L.J.* 153 at 167 [Borrows 2005].

35 Among many others, John Borrows identifies the ancient and contemporary nations of the Innu, Mi'kmaq, Maliseet, Cree, Anishinabek, Haudenosaunee, Dakota, Lakota, Nakota, Assinaboine, Saulteaux, Blackfoot, Secwepemec, Salish, Nuu-Chah-Nulth, Kwakwaka'wakw, Haida, Carrier, Tsimshian, Nisga'a, Gitksan, Tahltan, Tlingit, Gwichin, Dene, Inuit, and Métis. See John Borrows, “Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada” (January 2006) at 2 [Borrows Report].

36 Law Commission of Canada, “Justice Within: Indigenous Legal Traditions” (August 2006) at 1 and 3 [LCC Discussion Paper]; Law Commission of Canada, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2008); Lisa D. Chartrand, “Accommodating Indigenous Legal Traditions” (March 2005) at 7-10 [unpublished paper prepared for the Indigenous Bar Association].

outside of the common law and civil law traditions.³⁷ These laws are expressed through the teachings and behaviour of knowledgeable and respected individuals and elders and “are regarded as authoritative by their listeners, and there are natural, moral and cultural sanctions for the violation of their instructions. [The law as told through stories] encourages a basic personal and institutional adherence to underlying values and principles.”³⁸ In other words, they are more than simply customary norms and practices; indigenous laws operate with normative weight and have moral currency.

The Supreme Court of Canada has affirmed and recognized the continued existence of the laws of indigenous people.³⁹ Indeed, European settlers recognized the different communities and their laws and originally conducted their affairs with Aboriginals according to them. “Many of the more than 500 treaties entered into between Aboriginal peoples and European Crowns followed indigenous laws.”⁴⁰ Despite the changes and adaptations that have been necessarily made as a result of European contact and the colonial legacy, indigenous laws have maintained a particular character that reflects the political, economic, spiritual and social values of indigenous peoples.

Some difficulties in the project of identifying and describing indigenous law must be acknowledged. The most evident and perhaps most important feature of indigenous law is its orality and rejection of formality in the expression of law: “there has been implicit and in some cases very explicit resistance to efforts to write down [indigenous] law.”⁴¹ The written accounts of indigenous law have in the past been generally the product of European colonial administrators, anthropologists and comparative legal scholars. Moreover, indigenous peoples in Canada continue to suffer the legacy of colonial policies of assimilation through the loss of culture and thus a loss of their guiding values and principles.⁴² However, there have been efforts by contemporary indigenous peoples to provide their own account of their laws and histories⁴³

in Canada], online <<http://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>> [Chartrand].

37 Borrows 2005, *supra* note 34 at 160.

38 John Borrows, “*With or Without You: First Nations Law (in Canada)*” (1996) 41 McGill L.J. 629 at 646, 647-648 [Borrows 1996].

39 See, e.g., *R. v. Mitchell*, [2001] 1 S.C.R. 911 at para. 8: “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.” See also *Calder v. British Columbia*, [1973] S.C.R. 313 at 346-347.

40 LCC Discussion Paper, *supra* note 36 at 5; cf. Royal Proclamation of 1763, R.S.C. 1985, App. II, No. 1.

41 H. Patrick Glenn, *Legal Traditions of the World*, 2nd ed. (Oxford: Oxford University Press, 2004) 61-62 [Glenn].

42 LCC Discussion Paper, *supra* note 36 at 10-11.

43 See for example Glenn, *supra* note 41 at 62, footnote 11; Chartrand, *supra* note 36.

and indigenous laws continue to exist and remain relevant for contemporary indigenous communities in Canada.⁴⁴

What are Some of the Values and Principles Underlying Indigenous Law?

Just as with the foregoing discussion of Canadian law and legal principles, I again highlight here that I am not purporting to provide an exhaustive account of the values and principles underlying indigenous law. Like Canadian law, indigenous law is a broad categorization for a number of legal traditions that existed and continue to exist among different indigenous societies. I provide here a very brief sketch, drawing on the research of John Borrows and others on indigenous legal traditions in Canada, as well as the legal practices of indigenous communities around the world, in the hopes of identifying certain commonalities and specific values.⁴⁵

One evident characteristic, as described above, is the insistence on orality with regards to the form and substance of law. Since indigenous law is transmitted through “the dynamic process of oral education and the dialogical character of the tradition,”⁴⁶ consensus and/or input from the community in decision-making and dispute resolution—i.e., in the processes of creation, transmission and maintenance of legal norms and values—is an important value that is emphasized amongst most indigenous societies.

Although there are variations in the political structures and societal roles among different indigenous communities, both indigenous and non-indigenous commentators have asserted the “essentially egalitarian character” of chthonic law: “[it] is vested in a repository in which all, or most, share and may participate.”⁴⁷ For example, according to the Haudenosaunee, “the Great Law is built on the consensus and agreement of the people. Unanimity [is] necessary for council decisions to be adopted.”⁴⁸ Similarly, among the Anishinabek, resource management decisions were agreed upon through discussion

44 LCC Discussion Paper, *supra* note 36 at 2. The Nisga'a of British Columbia and the Inuit are but two examples.

45 Cf. Michael Jackson, “In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities” (1992) 26 U.B.C. L. Rev. 147 at 166-167; James W. Zion, “Harmony among the People: Torts and Indian Courts” (1984) 45 Mont. L. Rev. 265; Tom Tso, “The Process of Decision Making in Tribal Courts” (1989) 31 Ariz. L. Rev. 225 [Tso]; Elena Marchetti and Kathleen Daly, “Indigenous Courts and Justice Practices in Australia,” *Trends and Issues in Crime and Criminal Justice*, No. 277 (May 2004), online: Australian Institute of Criminology <<http://www.aic.gov.au/publications/tandi2/tandi277.html>>. See also Colin M. Turnbull “The Individual, Community and Society: Rights and Responsibilities from an Anthropological Perspective” (1984) 41 Wash. & Lee L. Rev. 77 at 88-92.

46 Glenn, *supra* note 41 at 63.

47 *Ibid.* It should be pointed out, however, that an individual's level of participation in the law of certain indigenous communities may nevertheless differ depending on his/her knowledge of the law and position in the community.

48 Borrows Report, *supra* note 35 at 33.

and consensus.⁴⁹ Chief Justice Robert Yazzie of the Navajo Nation likewise describes the Navajo system of justice as “a sophisticated system of egalitarian relationships ... humans are all equal and make decisions as a group.”⁵⁰ Len Sawatsky has suggested that “justice” in indigenous communities can be described as being focused on social and natural harmony, the needs of the community being met, and healing and restoration.⁵¹

Other values, though not necessarily unique to indigenous societies, are identified by some indigenous groups as having particular salience within their communities. The principle of equality and respect between genders is reflected in the practices of some indigenous societies of having women conduct important ceremonies and hold positions as leaders, advisors and teachers.⁵² Amongst the Carrier people of British Columbia, the principles of “respect,” “responsibility,” “obligation,” “compassion,” “balance,” “wisdom,” “caring,” “sharing” and “love” are said to govern individual conduct and are expected to be followed “concurrently and with equal weight.”⁵³ The Inuit have described some of the following principles as part of their system of governance: working together for a common cause; environmental stewardship; openness, acceptance and inclusiveness; caring for others; assistance and cooperation without barriers; information sharing; fair treatment; conscious understanding of others as the basis of mutual relationships; sensitivity to difference; encouragement of others; keeping order in place; restraint on personal judgment; and support for growth, development and success.⁵⁴

I recognize and emphasize that any discussion of indigenous values carries the danger of perpetuating cultural stereotypes and romanticizing the complex history of indigenous peoples. Emma LaRocque has criticized the “typologizing” of Aboriginal cultures as “being fraught with generalizations, oversimplifications, and reductionism.”⁵⁵ Similarly, Douglas Moodie has cautioned

49 *Ibid.* at 35.

50 Robert Yazzie, “‘Life Comes From It’: Navajo Justice Concepts” (1994) 24 N.M.L. Rev. 175 at 181 [Yazzie].

51 Len Sawatsky, “Self-Determination and the Criminal Justice System” in Diane Engelstad and John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord: Anansi Press, 1992) 88-97.

52 LCC Discussion Paper, *supra* note 35 at 11.

53 *Ibid.* at 60, citing Warner Adam, Travis Holyk & Parry Shawana, “*Whu Neeh Nee* (Guiders of Our People): Carrier Sekani First Nations Family Law Alternative Dispute Resolution Project” (2003) [unpublished], online: SFU Centre for Restorative Justice <<http://www.sfu.ca/cfrj/full-text/adam.pdf>>.

54 Borrows Report, *supra* note 35 at 76-77.

55 Emma LaRocque, “Re-examining Culturally Appropriate Models in Criminal Justice Applications” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1996) 75 at 77-78 [LaRocque]. She takes particular issue with comparative approaches that conceptually (and visually) juxtapose the supposed differences between Aboriginal and Euro-Canadian justice paradigms: “[There is a] tendency of reducing pan-Indianized cultural values to a handful of traits” (pp. 88-89).

that “any broad discussion of Aboriginal issues in Canada carries the inherent danger of misrepresenting the viewpoints and positions of many Aboriginal individuals and groups.”⁵⁶ One must therefore be careful to emphasize that the enumeration of these particular values does *not* imply that they all had or have the same salience in the various indigenous communities that existed and exist in Canada, nor should it be implied that they are necessarily different from non-indigenous values. Borrows himself acknowledges that “it is tempting to make broad, almost irreconcilable distinctions between Indigenous legal traditions and Western legal sources. [However] it is [also] important to note that, like Indigenous legal traditions, Canada’s [other] legal traditions also rest upon unwritten cultural assumptions.”⁵⁷ This potential for misunderstanding simply underscores the need for more discussion and engagement between non-indigenous legal scholars and professionals and indigenous law-keepers and communities in order for the legal profession, and indeed, all Canadians, to develop a better appreciation of the values that underlie the various indigenous legal traditions in Canada.

The Significance of Indigenous Legal Traditions in the Canadian Context

The present discussion is intended to contextualize our understanding of indigenous legal values and explore how these and the legal values of the Euro-Canadian system might be reconciled in the context of legal practice and professional responsibility. As discussed above, understanding what it means to be a lawyer means acknowledging the systemic parameters and foundational values of the existing legal system and the circumstances of professional existence. The point here is to recognize that “indigenous law is not simply something that continues to apply in Aboriginal communities. It is more than just private or Aboriginal community law. Indigenous law is also a part of Canada’s constitutional structure. Indigenous legal traditions shape and *are embedded within our national legal structure.*”⁵⁸

Canada was founded mainly on the interactions between European settlers and the indigenous people of North America; “treaties between Indigenous peoples and the Crown promoted peace and order across cultures and were the basis of the country’s formation.”⁵⁹ This historical and ongoing process of interaction has resulted not only in the mutual influencing and transformation of indigenous and non-indigenous legal traditions, but it has also created a

56 Douglas Moodie, “Book Note – John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*” (2004) 49 McGill L.J. 469 at 474.

57 Borrows Report, *supra* note 35 at 78.

58 Borrows 2005, *supra* note 34 at 161 [emphasis added].

59 Borrows Report, *supra* note 35 at 95.

body of inter-societal law unique to the Canadian legal system.⁶⁰ Thus, “Canada would better be described as multi-juridical or legally pluralistic. The issue of Indigenous law requires a pluralistic approach if relations between Canada’s legal traditions are to be understood. Civil and common law are not the only established legal orders in Canada; they are neither exclusive nor inherently intrinsic to maintaining peace and order.”⁶¹

There has been a steady development of recognition in Canadian jurisprudence and politics of indigenous law as an important part of Canada’s legal tradition. And quite rightly so, because recognition of the plurality of our legal inheritance requires us to examine our public institutions, their makeup, practices and symbols, to ensure that they embody the values that are owed to indigenous and non-indigenous languages and cultures alike.⁶²

However, there is still much more that could be done to effectively recognize that indigenous laws are a part of the Canadian legal tradition. There are more opportunities to facilitate the “interaction and intertwining” of indigenous legal values and the values found in the common law and in the civil law,⁶³ and thus for the full picture of Canadian law to be completed. “Much can be done to pay attention to the values that are ‘on the ground’ as we attempt to integrate common law, civil law, and indigenous legal traditions. This diversity of sources can throw new light on old problems.”⁶⁴ One of the ways this “interaction and intertwining” might occur is by discussing some of the “old problems” associated with Canadian legal ethics and professional responsibility in light of indigenous legal values.

Can Indigenous Legal Principles and Values Inform Canadian Legal Ethics?

At first glance, it may be difficult to conceptualize how indigenous values could inform legal ethics, given that legal institutions were structured differently in indigenous societies. Such thinking, however, is reminiscent of the unimaginative “frozen rights” approach to Aboriginal rights in Canada.⁶⁵

60 See Jeremy Webber, *supra* note 5. See also Borrows 1996, *supra* note 38 at 642: “Creating law that accounts for both parties’ legal interests makes sense in the context of Aboriginal- and treaty-rights litigation since these disputes necessarily involve the interaction of legal interests of both Aboriginal and non-Aboriginal societies.”

61 Borrows Report, *supra* note 35 at 77-78.

62 Royal Commission on Aboriginal Peoples, “The Principles of a Renewed Relationship” in *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1 (1996), online: <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg_e.html>; Chartrand, *supra* note 36 at 21-34.

63 Borrows 2005, *supra* note 34 at 161.

64 Borrows 2005, *supra* note 34 at 166. Borrows further argues that indigenous laws “speak to the present and future needs of all Canadians. They contain guidance about how to live peacefully in the world, how to create stronger order, and how to overcome conflict” (Borrows Report, *supra* note 35 at 3).

65 See John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997-1998) 22 *Am. Indian. L. Rev.* 37; Anthony Collony, “Judicial Conceptions of Tradition in

Reconceptualizing legal ethics means thinking about how indigenous and non-indigenous legal principles “can be consistent and co-exist without conflict”; this is possible only “when inappropriate terminology and categories of law are removed.”⁶⁶ The harmonization of the common law and civil law traditions “demonstrates the possibilities that exist for accommodation of Indigenous legal traditions. True harmonization should reflect Canada’s three legal traditions—English, French, and Indigenous.”⁶⁷

Borrows provides a salient example from the experience of the Navajo community:

The tribal president was charged with taking kickbacks and bribes from uranium and coal mining occurring on the reservation. As a result of these actions, he was charged, found guilty, and the tribal council suspended him without pay. The tribal president in effect said, “You cannot do that, that is beyond your jurisdiction, there is a separation of powers within our constitution.” This could have destroyed the Navajo nation. It was taken to their [tribal] courts, who took their statutes and talked about the responsibilities that a president has within their legal community. Then they took the common law of trust and the political trust doctrine and spoke about that as another source of authority to add to the decision-making process. But then they took the story of the Naat’aniis. When the Navajo were placed within the four corners of their sacred mountains, there was a battle between the hero twins. At the end of this battle there was a truce, which led to some agreement as to how leaders should act with their people. In fact they were the servants of the people, and were not to stand out in front of the people. [The tribal] court blended these three legal traditions together.⁶⁸

The Navajo court used different conceptions of responsibility and trust to determine the tribal president’s culpability. Had the trial taken place in a Western-style court, the issue of “how leaders should act with their people” *from the Navajo perspective* would likely not have been considered. The point here is not that considering indigenous principles in decision-making would necessarily lead to different outcomes⁶⁹—they may or they may not, depending on the circumstances—but rather it is about the importance of incorporating them into our thinking process. As Borrows has said, “[t]o go to another tradition and realize there is further guidance and wisdom from which we can learn is, I think, an incredible, imagination-opening idea.”⁷⁰

From this perspective, we might start thinking about how our notions of professional responsibility and legal practice can manifest the plurality of our legal inheritance. We might consider how our notions of duties and

Canadian Aboriginal Rights Law” (2006) *The Asia Pacific Journal of Anthropology* 7:1, 27.

66 Borrows 1996, *supra* note 38 at 638, 640.

67 Chartrand, *supra* note 36 at 26.

68 Borrows 2005, *supra* note 34 at 168-169.

69 Tso, *supra* note 45 at 233.

70 Borrows 2005, *supra* note 34 at 171.

obligations could change to accommodate other interests and perspectives. We could think about how our interactions with clients, opposing parties and counsel, and members of the bench, bar and public could be different. We could re-examine our case analysis methodology and dispute-resolution tactics. The possibilities are limited only by one's imagination and willingness to move beyond our traditional conceptions of lawyering.

IV Potential Applications of the Theory: Two Case Studies

In this section, I offer some food for thought as to how the above-discussed reconceptualization might be realized in practice by discussing two problems designed by Allan Hutchinson. Two *caveats* are acknowledged: the goal here is not to bring about a sea change overnight in our ways of conducting legal practice—this reconceptualization must necessarily take place alongside the continuing project of recognizing and accommodating indigenous law in the Canadian legal system; also, I do not intend to suggest that all indigenous peoples or lawyers would necessarily adopt the same perspectives or arrive at the same conclusions in their analysis. It is simply my hope that this brief discussion will help generate interest about these issues and lead to more systemic and detailed analysis of how to adapt these ideas into practice.

Problem 1: You are defending a client in a defamation action. Your client has alleged information about the plaintiff's odd sexual proclivities. The client maintains that the plaintiff is likely to deny this allegation initially, and then you can expose his failure to be truthful. You are convinced that the plaintiff is probably telling the truth in his evidence, but agree that these revelations, although unrelated to the dispute in hand, will severely damage the plaintiff's credibility at trial and his general public reputation. What do you do?⁷¹

This is a classic scenario testing the limits of the duty of zealous advocacy and partisanship. On one hand, winning at all costs is not only inherent in the adversary system, but it is also explicitly encouraged by the rules of professional conduct. According to the *Code of Professional Conduct*, "when acting as an advocate, the lawyer must represent the client resolutely, *honourably* and *within the limits of the law*."⁷² The *Code* goes on to state that the advocate's duty is to "fearlessly ... raise every issue, advance every argument, and ask every question, *however distasteful*" to help the client's case and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law."⁷³ However, this seems to conflict with another principle set out in a different section of the *Code*: "The lawyer should try at all times to observe a standard of conduct that *reflects credit on the legal*

71 Hutchinson, *supra* note 2 at 97.

72 *CBA Code*, CH. IX, [emphasis added].

73 *Ibid.* [emphasis added].

profession and the administration of justice generally and *inspires the confidence, respect and trust* of both clients and the community.”⁷⁴

Note that the underlying dispute in this scenario here itself raises issues about “reputation”, “honour” and “respect.” This is particularly apropos here because I would strongly suggest that these are also important values from certain indigenous perspectives, in that these concepts inform the social currency of closed-knit indigenous communities.⁷⁵ In situations like the case at hand, these may therefore be precisely the kind of values that a lawyer should consider under a reconceptualized legal ethics paradigm.

To more specifically incorporate this type of perspective about the importance of acting honourably, the lawyer in this situation might have to consider whether to adopt a ruthless tactic that would unnecessarily destroy someone’s reputation would be to act “as if one had no relatives”⁷⁶—that is, with disregard for the dignity of others or for the consequences of one’s actions. In other words, the lawyer in this scenario may have to consider not only the legal admissibility of the character evidence and whether it would be strategic to present such evidence, but also whether this strategy engenders respect for the profession and upholds the dignity of the parties involved, including the lawyer himself.

The result may in fact be the same—insofar as the evidence is “unrelated to the dispute in hand,” it is arguably *prima facie* inadmissible in any event on the ground of relevance and the lawyer would likely choose not to proffer it. However, the “additional” consideration of conducting the case in an honourable manner also advances some of the underlying policies of the evidentiary rule—that is, to keep the focus on the salient matters and not to distort the fact-finding process. Thus, in the lawyer’s very consideration of honour and respect, confidence and trust in the administration of justice are further inspired.

Problem 2: You are approached by a couple of tenants in a large urban building. They want to get their plumbing fixed. The landlord is a corporation that has a deserved reputation for keeping its many properties in bad repair. You know from experience that you can help the two tenants by threatening the landlord with legal action. However, you know this will do little to help the many other tenants in the same predicament. What could you do in this situation to help both your clients and the other tenants?⁷⁷

74 *CBA Code*, CH. XIX, s. 10 [emphasis added].

75 In the inter-societal Aboriginal law of Canadian jurisprudence, the notion of “honour of the Crown” has been emphasized by the Supreme Court in discussions about the fiduciary relationship between Aboriginal peoples and the Crown: see, e.g., *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Marshall*, [1999] 3 S.C.R. 456.

76 Cf. Yazzie, *supra* note 50 at 188, footnote 66; Alex Jacobs, “Sentencing Circles” (Nov. 14, 2006), presentation delivered at Osgoode Hall Law School as part of the *Visiting Elders Speaker Series*.

77 Hutchinson, *supra* note 2 at 186.

One approach to this problem may simply be to offer one's services to the other tenants and take them on as clients. The *Code of Professional Conduct* does not readily contemplate the interests of non-clients. Instead, it provides for the primacy of clients' goals and emphasizes the necessity of avoiding conflicts: "Before the lawyer accepts employment from more than one client in the same matter, the lawyer must advise the clients that the lawyer has been asked to act for both or all of them ... If a dispute develops that cannot be resolved, the lawyer cannot continue to act for both or all of them with respect to the matter and may have to withdraw completely."⁷⁸

The issue in the problem, however, is not that the interests of the clients and the other tenants would conflict or are necessarily opposed—it is likely that they would all be seeking the same improvements to their units from the landlord. The more important question is whether the lawyer can or should propose a solution that not only benefits the client tenants, but also the non-clients, and whether this is dependent on a formal relationship existing.

One model of legal practice that addresses this type of situation is "community lawyering":

[Community lawyering] is a method of providing legal service, advice, and representation which approaches case work or legal issues with appropriate consideration and an understanding of community values, concerns, ideas or beliefs and their impact on the treatment of the client, the treatment of the legal issues, and the final legal solution crafted. Community lawyering is working with communities and the individuals which comprise communities, not independent of them. Community lawyers do more than represent individual clients. They represent clients in definable communities. They learn about the cultures, values, beliefs of the people in the community. They see problems of individual clients in the context of the community. Individuals in communities may face all sorts of problems, but lawyers engaged in community lawyering go beyond individual cases to develop and implement community-wide solutions that will benefit others in the community who may face similar problems.⁷⁹

This approach places an additional obligation on the lawyer to consider the perspectives of similarly situated individuals in their work. It requires being attuned to other interests and going beyond the immediate client's perspective. This is not to say that individual clients' interests should always be subrogated to a community's needs—a danger that LaRocque strongly cautions against in the context of sentencing circles⁸⁰—but rather to suggest that lawyers should maintain a broad outlook for the "public interest"⁸¹ in their work. In other

78 *CBA Code*, CH. V, s. 6.

79 Christine Zuni Cruz, "[On the] Road Back In: Community Lawyering in Indigenous Communities" (1999) 5 *Clinical L. Rev.* 557 at 572-573.

80 LaRocque, *supra* note 55 at 87.

81 This term is to be given a "generous and liberal" interpretation in this context, contrary to the notion that "public interest is in practice a euphemism for specialized political interest": Duffy

words, the notion of community lawyering requires lawyers to explicitly recognize that they do not practise their craft in isolation or independently of the process of creating public policy. It recognizes and emphasizes the role of the lawyer in the overarching legal and political system.

In my view, there is some support for a model of lawyering that would not only allow, but *expect*, that the lawyer consider interests of others in his or her work, whether or not a formal relationship exists, in both indigenous notions of community and cosmic harmony⁸² and the idea that the profession of law is a public service.⁸³ It is not without its pitfalls, however, and these too must be recognized in the overall analysis of what the lawyer should do in this particular situation. To put it simply (if not tritely), the lawyer would have to appreciate all the surrounding institutional facts, not just the immediate case facts, to craft a truly just and equitable solution to the problem.

Moreover, it is not enough that the lawyer might have the intention to “do good” for the community; he or she must also consult with them to assess their needs. It may well be that the ultimate solution in some specific circumstances is not a “legal” solution *per se*, but this is the idea behind community lawyering—it shifts the framework of analysis from one that is centred around the lawyer’s expertise and a strictly adversarial focus, to that which focuses on the “big picture” and facilitates an equitable outcome for the immediate client and other interested parties.

V A “Call” to the Bar (and the Academy)

The foregoing is but a brief example of what sorts of other considerations might be taken into account if legal ethics problems were informed by indigenous legal principles and values. As mentioned above, not all indigenous peoples or lawyers will have the same perspectives on these issues. Indeed, the very project of legal ethics calls for individualized judgments and contextual analysis rather than the positing of categorical solutions. What is also needed, however, is a fresh perspective on the classic problems with which lawyers have wrestled and will continue to wrestle with in their practice.

There are clearly a significant number of questions raised by the foregoing—I do not purport to address these in this paper, or even suggest that I have answers now to most, if any, of them. My modest suggestion here is simply for legal practitioners and scholars to revisit their notions of the system of which they are a part and the way legal ethics and professional responsibility have traditionally been conceptualized. I am hopeful that members of the

Graham, *The Consciousness of the Litigator* (Ann Arbor: University of Michigan Press, 2005) 30.

82 Chartrand, *supra* note 36 at 7-8.

83 See Jerome Bickenbach, “The Redemption of the Morale Mandate of the Profession of Law” (1996) 9 Can. J. L. & Jurisprudence 51.

bar and the academy will heed the call and, as more theoretical understanding of indigenous legal principles is developed, more practical experience is established along these lines and Canadian legal ethics scholarship in general continues to mature, the possibilities for a paradigm shift in the discourse about professional responsibility will become more apparent.⁸⁴

Solon of Athens traveled to other Greek city-states and studied their legal traditions to harness their insights and improve the laws of his own community. I suggest here that we may need not to look beyond our borders—in rethinking our understanding of Canada’s legal inheritance, we can (re)discover the wealth of knowledge and the ways of understanding that are available through the indigenous legal traditions which form part of our legal history. Incorporating indigenous legal values and principles into our law and legal ethics does not undermine the Canadian legal tradition, but rather will only serve to strengthen it. “Multiple perspectives on a legal tradition are a sign that the tradition is vibrant and strong,” allowing the plurality of visions to inform and shape the tradition.⁸⁵

Indeed, if the Canadian legal system has been flexible enough to adapt new forms of understanding and incorporate indigenous legal principles in our constitutional law, penal law, property law and family law, then surely there is a way to harmonize the rules of professional conduct with indigenous values.⁸⁶ As others have suggested, this harmonization process can be facilitated “by a variety of legal institutions such as provincial law societies, provincial bar societies, and other educational and governance institutions. Practitioners are needed from both the bar and bench who can build bridges of accommodation between different legal conceptions of rights and responsibilities.”⁸⁷ Just as importantly, however, it will require the next generation of law students and practitioners to be instructed not just in the common law and civil law traditions, but also in indigenous law. This, in my view, is simply part and parcel of the ongoing process of reconciliation that has been taking place between indigenous and other Canadians.

84 Cf. Adam Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century at Last” (2008) 46 *Osgoode Hall L.J.* 1.

85 Borrows Report, *supra* note 35 at 15.

86 For examples of indigenous values being adapted into Canadian law, see *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (S.C.), aff’d as *Johnstone v. Connelly* (1869), 17 R.J.R.Q. 266 (Q.B.); *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2(e); *R. v. Gladue* [1999] 1 S.C.R. 688. See also Borrows Report, *supra* note 35 at 107, note 327.

87 Chartrand, *supra* note 36 at 30. Cf. Gloria Valencia-Weber, “Law School Training of American Indians as Legal-Warriors” (1995-1996) 20 *Am. Indian L. Rev.* 5; Kevin Dolman, “Indigenous Lawyers: Success or Sacrifice?” [1997] *Indigenous Law Bulletin* 26, online: AustLII <<http://beta.austlii.edu.au/au/journals/ILB/1997/69.html>>.

VI Conclusion: Ethical Lawyering Across Canada's Legal Traditions

Fifteen years ago, the Royal Commission on Aboriginal Peoples delivered their recommendations to the government and the people of Canada on how the relationship between Aboriginal and other Canadians could be renewed and restored, how “the terms of the original agreements under which some Aboriginal peoples agreed to become part of Canada be upheld.”⁸⁸ Those agreements are the treaties and agreements through which Canada’s political and legal order were formed.⁸⁹ In the *Manitoba Language Rights Reference*,⁹⁰ the Supreme Court of Canada stated that “protection and facilitation of the rule of law may require the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principles of normative order.”⁹¹ In other words, the very preservation of Canada’s legal order requires the explicit acknowledgment within that system of the values and principles that carry moral weight with the people of Canada, including our indigenous communities.

However, it is not only law that can become unjust and irrelevant if it is not continually reviewed and revised;⁹² our way of practising law and the very profession itself can also be rendered irrelevant if we do not consider how the communities we are called to serve regard our role in the justice system. There is nothing except the shortfall of our collective imagination and political will that prevents the legal profession from undergoing a serious soul-searching, from revisiting the myths of its history and reinventing them and from reconceptualizing its understanding of legal ethics and professional responsibility. If the practice of law and our legal ethics do not manifest the values regarded as acceptable—let alone, ideal—by the public to whom we owe the ultimate duty, the crisis of legitimacy facing the legal profession will only become more urgent. It is my hope that this essay will be the start of a conversation about the ways we can better acknowledge and harmonize the values and perspectives of Aboriginal people about law in our day-to-day legal practice and our conceptual understanding of what it means to be an ethical lawyer in Canada.

88 Royal Commission on Aboriginal Peoples, “Opening the Door” in *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1 (1996), online: <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg_e.html>.

89 As the Supreme Court of the United States in *United States v. Winans* (1905), 198 U.S. 371 at 381, recognized, treaty rights are a grant of rights *from* the indigenous people of North America, *not* a grant of rights to them.

90 [1985] 1 S.C.R. 721.

91 *Ibid.* at 749.

92 Borrows Report, *supra* note 35 at 14.

