IPL #2 Reflections

by Cheryl Unruh

What I have learned in this course has dramatically changed my understanding of Indigenous peoples, our country and our past and current governments.

I have been a lawyer for over 30 years. In Canada, we are trained as Barristers & Solicitors in the English common law tradition. From the first days of law school, the excellence of our legal tradition and precedent was, quite frankly, pounded into us. Our common law tradition is presented not as a stuffy obsession with the past, but rather as a means of ensuring, insofar as possible, that the laws of Canada are applied equally, across time, and to all. These laws, whether federal or provincial, derive from one of two sources: statutes or formally written and enacted laws, and English common law principles which are based largely on previous court decisions. As Barristers and Solicitors, we consider ourselves to be officers of the court, with the professional responsibility of seeking truth by bringing accurate information and evidence to a sitting judge or jury, who then weigh the evidence and apply the applicable laws to reach a "just" decision. This model of advocacy is, at least in theory, less partisan than our American counterparts, who are trained as Attorneys rather than Barristers & Solicitors. While lawyers in Canada always have a duty to the client, our first duty remains to the Court - to both justice and the administration of justice. We are taught that while no system of justice can be perfect, ours is a very fine model. When I hear comments to the effect that "our justice system is broken" or "judges are soft", I internally cringe, because I don't believe that our system is broken. I also understand that our judges are bound by strict legal principles (with respect to the burden of proof and sentencing guidelines, for example) and by precedent. This is the understanding of Canadian law and the relationships between its citizens that I brought to this course.

I am convinced now more than ever that the Canadian justice system is not broken. After hundreds of years, it continues to function efficiently and do exactly what it is designed to do, and herein lies the problem. It is designed to protect and advance the property and interests of White males of European, and in particular British, descent. This is the great failure of our Canadian system to our Indigenous brethren, and it's a big one. Even the rights of women were

an afterthought (thank you, Lord Sankey, for deciding in *Edwards v. A.G. Canada* ([1930] A.C.124, 1929 UKPC 86) that women are, in fact, "persons"), but the rights of Indigenous peoples were intentionally and utterly ignored. This one-dimensional approach to our country's citizens of incredibly different cultures and experiences has continued for hundreds of years now. I echo the words of Hon. Murray Sinclair that not a word was devoted in law school to knowledge of Indigenous peoples and their "issues". I am shocked and frankly embarrassed by how much I did not know about the treatment of Indigenous people through history. I assure you that I am not the only one. That is why this course is so vitally important.

The English common law approach to relationships and law makes little sense to the Indigenous worldview, traditions and customs. One obvious example of this is the emphasis on written evidence over oral testimony in our agreements, laws and courts. Another is the absurd manipulation of laws relating to land, resulting ultimately in a presumption of Crown ownership in this country unless Indigenous claimants could prove exclusive possession for a prescribed period of time; as people who considered land to be a shared gift from the Creator, it was contrary to the nature of Indigenous peoples to exclude others and keep land to themselves. A final and perhaps more fundamental example is the English common law understanding that criminal matters represent alleged offenses against Her Majesty the Queen (therefore the style of cause for all criminal trials, *Regina v. John Smith*, or *R. v. Smith* for example), and therefore allow only limited input from a victim's family or community. It is Her Majesty, not they who may have been wronged. There are innumerable other examples that have helped me understand, finally, that our Canadian justice system works very well. It simply does not work for the rights or interests of Indigenous peoples. It is akin to trying to dress up an onion like a pineapple. It may be the finest onion that money can buy, but it will never taste like a pineapple. It is futile to try to give it a few pineapple-y attributes, for it will still be an onion. I now believe that both education with respect to Indigenous history and relationships, and changes to the legal system so as to promote and enhance Indigenous ways of thinking and knowing, are necessary courses of action in Canada.

This became particularly evident to me as I watched the film, "We All Stand Up". The film annoyed me at first, because I found the portrayal of the court, jury selection and trial processes

to be occasionally one-dimensional. There were some erroneous statements with respect to, for example, the pretrial processes and particular Criminal Code provisions. On some occasions, the narrator spoke of rights and latitude of defence counsel in Canada, but failed to mention that the prosecutor has the same rights and latitude. These issues do not detract from the film's overall impact, and I understand the narrator's frustration. The film explored a difficult topic, the death of a young man who was loved by his family and community. In the end I watched this film twice, and I realized that it annoyed me so because it crystallized my slow but steady understanding that the Canadian justice system has very little to offer Indigenous people. No wonder so many have lost faith in it.

If we are to honour our promises of equality for all Canadians and move forward with our country's journey toward reconciliation, what is needed is neither an onion nor a pineapple, but something entirely different – a new system of justice that takes both Indigenous and European (and perhaps other) world views, cultures and traditions into account. I do not yet know what fruit or vegetable this might be, but I am excited to investigate and learn more.

As a more personal reflection, I thought of my children often throughout this course. Our daughter is African American and our son is of Cherokee and African American heritage. This had nothing to do with my participation in this course, and the implications of this took me by surprise. As a mixed-race family, we understand the hurtful stares and personal questions from strangers. We understand the lasting and damaging effects of being judged and dismissed as "different". I have seen our daughter refused service at local stores while Caucasian children in front of her and behind were served, and I have seen the puzzled denials of owners or employees when I objected. My husband and I have interesting front-row seats to these encounters as they unfold; since our children look very little like us, it is often assumed that they are alone and they are treated accordingly. Thus, I fully understand the pain of racism and pre-judgement. Until taking this course, however, I was unaware of the massive scope of the harm that has been dealt to Indigenous peoples by our social, economic and legal institutions.

I recall the words of Ta Nahesi Coates. In *Between the World and Me*, he reflects on his experience growing up in a world of White dominance and power:

> "But race is the child of racism, not the father. And the process of naming "the people" has never been a matter of genealogy and physiognomy so much as one of hierarchy. Difference in hue and hair is old. But the belief in the pre-eminence of hue and hair, the notion that these factors can correctly organize a society and that they signify deeper attributes, which are indelible – this is the new idea at the heart of these new people who have been brought up hopelessly, tragically, deceitfully, to believe that they are white."

Nonetheless, I end on a note of hope. While schools and, in my particular experience, law schools, were bereft of any accurate or authentic education relating to Indigenous peoples in my day, I see now that my alma mater has several Indigenous professors (who are incidentally proud to bring elements of their cultural dress to the usual nondescript law professor's uniform!), many courses relating to Indigenous law, and even an Indigenous and Aboriginal law research department. I have attended several excellent webinars relating to UNDRIP and efforts to respond to the Truth and Reconciliation Report's *Calls to Action* in recent months. Provincial Bar associations have introduced educational requirements for all members, and the Canadian Bar Association offers and promotes several learning opportunities relating to Indigenous law and culture. Things are changing and there is much to look forward to. This course has been a vital learning opportunity for me, and I cannot wait to continue. Thank you!