
RECONCILIATION IN THE CORPORATE COMMERCIAL CLASSROOM

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CONTENTS

I	Introduction	49
II	Individual Contributions: Innovating and Experimenting in the Corporate Commercial Classroom	50
III	Themes and Tentative Conclusions	61

I INTRODUCTION

The 28th Call to Action of the Truth and Reconciliation Commission (“TRC”) is for law schools to “require all law students to take a course in Aboriginal people and the law, 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.”¹ A number of Canadian law schools have developed institutional responses, offering dedicated courses in Aboriginal people and the law, and examining their admissions policies, faculty appointments, and student culture.² Professors have responded too.³ Faculty have significant scope to select the materials to include in their courses, and many have experimented, or are looking to experiment, with new ways to cover topics relevant to Aboriginal people and the law.

Professors teaching corporate and commercial law may want to respond to the TRC’s Call to Action, but the connection between Aboriginal people and the law in these courses is less obvious than in public law courses. Although less obvious, making the connection is important in order to graduate students who are competent and comfortable advising First Nation, Métis, and Inuit clients, as well as clients entering into transactions or otherwise doing business with or in First Nations, Métis, or Inuit communities.⁴

¹ Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada, Volume 1: Summary* (Toronto: James Lorimer & Company, 2015) at 323 [Truth and Reconciliation Commission of Canada].

² For example in February 2016, faculty at the University of Saskatchewan, College of Law, committed to the development and delivery of a first year course in Aboriginal people and the law. Scheduled to launch in 2017–18, the course will be equal in credits to other first year courses, and will play a foundational role in the greater law school curriculum.

³ See especially Reconciliation Syllabus—a TRC-Inspired Gathering of Materials for Teaching Law (blog) (moderated by Gillian Calder & Rebecca Johnson, Faculty of Law, University of Victoria), online: ReconciliationSyllabus <<https://reconciliationsyllabus.wordpress.com>>.

⁴ Truth and Reconciliation Commission of Canada, *supra* note 1 at 336–37 (Call to Action 92).

Indigenizing the corporate-commercial curriculum is not only an act of deconstructing the legacy of colonialism, but also an opportunity to engage in legal education reform. We wanted to provide space for professors working in these areas to share ideas about how to draw these connections and to better prepare students for practice. To this end, we organized a roundtable of corporate and commercial law faculty members, held as part of the 2016 annual meeting of Canadian Association of Law Teachers (CALT) in Calgary. Participants were invited to describe their own efforts to integrate reconciliation and other issues relevant to Aboriginal peoples into the corporate commercial curriculum, the obstacles they faced, and the resources they found helpful. The participants were Clayton Bangsund from the University of Saskatchewan, Gail Henderson from the University of Alberta (now at Queen's University), Anna Lund from the University of Alberta, Shanthi Senthe from Thompson Rivers University, and Rebecca Johnson, Freya Kodar, and Carol Liao from the University of Victoria.⁵

This article aims to continue the conversation that began in Calgary. It is divided into two sections. First, the roundtable participants describe their own innovations and experiments at their respective law faculties. Second, themes emerging from the perspectives of participants and from the roundtable at CALT are identified. We do not claim to have definitive—or even entirely correct—answers about how to respond to Call to Action 28. This article instead is intended to promote the sharing of ideas, experimentation by law professors across the country, and ultimately, reflection on how corporate and commercial law professors as individuals can advance the project of reconciliation.

II INDIVIDUAL CONTRIBUTIONS: INNOVATING AND EXPERIMENTING IN THE CORPORATE COMMERCIAL CLASSROOM

Personal Property Security Law Clayton Bangsund (University of Saskatchewan)⁶

At the University of Saskatchewan, Personal Property Security Law (“PPSL”) is an optional, upper-year course that teaches students the law of secured lending, including how to grant a lender a security interest in collateral to secure a debt, how to decide priority disputes between multiple parties with interests in the same collateral, and how to enforce on a security interest when a borrower defaults. To gain comprehension of personal property security law, one must entertain—though not necessarily embrace or accept—the capitalist ideal as well as a series of foundational “PPSL values.” These values include facility, transparency, flexibility, simplicity, efficiency, predictability, certainty, clarity, equality, balance, comprehensiveness, uniformity, and coherence.⁷ The basic assumption underlying the *Personal Property Security Act*⁸ (“PPSA”) is that market-based secured credit activity serves a useful societal purpose, and that a personal property security regime ought to facilitate secured transactions under which debtors grant,

⁵ Douglas Sanderson from the University of Toronto had planned to attend, but unfortunately was unable to.

⁶ BEd, JD, LL.M. Bangsund is Assistant Professor at University of Saskatchewan, College of Law.

⁷ Clayton Bangsund, “PPSL Values” (2015) 57:2 Can Business LJ 184.

⁸ RSO 1990, c P-10 [PPSL].

and secured creditors acquire, proprietary interests in debtors' personal property.⁹ The PPSA enables debtors to "use the full value inherent in their assets to support credit,"¹⁰ thereby embracing the classical liberal philosophy that one ought to be free to deal with his or her property as one sees fit.¹¹

But the PPSA's basic premise is not universally embraced. Tensions arise, for instance, in the PPSA's interaction with provisions of the *Indian Act*.¹² Among other things, subsection 89(1) of the *Indian Act* constrains a creditor who is not an Indian or a band (a "non-indigenous creditor") from taking security in property of an Indian or a band that is situated on a reserve.¹³ One aim of this statutory provision is to protect the property of Indians and bands.¹⁴ However, by shielding reserve property from non-Indigenous creditor recourse, subsection 89(1) runs directly counter to the PPSL values, making it more difficult for status Indians and bands to access affordable credit. Can a status Indian living on reserve subject herself and her property to general standards of personal property security law? Or must she live by different standards and in a more expensive credit market? Some provincial courts have held that she may "opt in" to general commercial standards.¹⁵ By explicitly waiving the protection of subsection 89(1), an Indigenous person covered by the provision can counteract its protective effect thereby gaining access to the same level playing field enjoyed by everyone else in Canada—an apparent victory for PPSL values.

The substantive law described in the preceding paragraphs, and covered in my survey course on personal property security law, is important because it impacts commercial relationships between status Indians, bands, and non-Indigenous creditors.¹⁶ I wonder, though, whether the TRC had content of this sort in mind when it declared its calls to action on law school curricula reform. Indeed, I am troubled that the Aboriginal component of my course focusses on circumvention of a statutory scheme aimed, ostensibly,

⁹ This assumption is explicitly stated at the outset of my course in personal property security law. I invite and encourage students to question and even challenge the assumption, in the form of a minor paper, for example. But, given time constraints and curricular volume, I only afford several minutes of class time to discussion of the secured credit utility question, which, incidentally, remains an open one. See Bangsund, *supra* note 7 at 188.

¹⁰ UNCITRAL, *Legislative Guide on Secured Transactions*, 2010, *United Nations Commission on International Trade Law* (Vienna: UNCITRAL, 2010) at 19, online: UNCITRAL <https://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf>.

¹¹ See Steven L Harris & Charles W Mooney Jr, "A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously" (1994) 80:8 *Va L Rev* 2021 at 2022. See also Friedrich A Hayek, *The Road to Serfdom* (London: The Institute of Economic Affairs, 2005) at 41.

¹² RSC, c I-15.

¹³ The prohibition is not absolute. Subsection 89(2) of the *Indian Act* furnishes an exemption for a non-Indigenous seller who grants purchase money credit to an Indian or a band, allowing such a seller to acquire an effective security interest in the sales item despite its being situated on a reserve.

¹⁴ Truth and Reconciliation Commission of Canada, *supra* note 1 at 55.

¹⁵ See e.g. *Brooks (JE) and Associates Ltd v Kingsclear Indian Band et al* [1991] NBJ No 816, 118 NBR (2d) 290. See also *Tribal Wi-Chi-Way-Win Capital Corp v Stevenson*, 2009 MBQB 32, [2009] MJ No 53 (aff'd 2009 MBCA 72, [2009] MJ No 232).

¹⁶ Indigenous creditors are treated differently than non-Indigenous creditors. Section 89 of the *Indian Act* contemplates that Indians and bands can take security in and enforce against on-reserve property owned by other Indians or bands.

at protecting reserve property and resources. It strikes me that the TRC calls for deeper, more meaningful engagement.

In response to the TRC, the University of Saskatchewan, College of Law is developing a first-year course in Aboriginal people and the law. Building on this institutional response, Aboriginal content will continue to play an important role in commercial law courses at the University of Saskatchewan. For instance, I will continue to cover section 89 of the *Indian Act* in my course on personal property security law. My hope is that the knowledge and skills students acquire in their first-year course in Aboriginal people and the law will better enable them to critically engage with this legislative provision. For example, students should develop the tools to approach the subject from the perspective of critical race theory. They should recognize that even if a status Indian can gain equal access to credit markets by waiving her section 89 protection, she only realizes theoretical equality. Section 89's opt-out feature, while perhaps serving a worthwhile purpose, leaves unaddressed the impact of latent, subconscious, or even overt racism and stereotyping that informs the credit granting decisions of non-Indigenous creditors. Empirical data may be available to help students understand, from a law and economics perspective, the actual impact section 89 has had on credit availability for Indians and bands. These perspectives can be introduced as part of the pedagogy of a first-year course in Aboriginal people and the law and further developed and applied in upper-year courses such as personal property security law.

Judgment Enforcement Law

Anna Lund (University of Alberta)¹⁷

At the University of Alberta Faculty of Law, Judgment Enforcement Law is an optional, upper-year course that teaches students about how to collect a judgment once a litigant has succeeded in a lawsuit. The course covers different collection mechanisms (seizure and sale of personal property, sale of real property, garnishment, receivers), the priorities amongst creditors with competing interests, the enforcement of foreign judgments, impeachment powers under provincial fraudulent conveyance and preference legislation, and exemptions.

Exemptions are the rules specifying what property a creditor cannot seize during enforcement proceedings. Many exemptions are set out in provincial legislation; however, as discussed by Clayton Bangsund, above, the *Indian Act* contains exemptions specific to status Indians and bands.¹⁸ Traditionally, these exemptions have been taught alongside the other exemptions. I wanted to respond to the TRC's Call to Action by including more coverage of Aboriginal people and the law in my course, and I decided to do this by expanding the coverage of the *Indian Act* exemptions. I dedicated a class to discussing them in-depth.

We reviewed a number of cases that have interpreted the application of the *Indian Act* exemptions, culminating in a lengthy discussion of the 2006 Supreme Court of Canada decision in *McDiarmid Lumber Ltd v. God's Lake First Nation*.¹⁹ The issue in the case was whether a payment made by the federal government to an Indian band could be garnished. The answer turned on the interpretation of the breadth of an exemption covering some types of

¹⁷ BA, LLB, LLM, PhD. Lund is Assistant Professor at the University of Alberta, Faculty of Law.

¹⁸ *Indian Act*, *supra* note 12, s 89–90.

¹⁹ 2006 SCC 58, [2006] 2 SCR 846 [*McDiarmid*].

funds paid to a band by the federal government. If the Court interpreted the provision broadly, the fund would be exempt. If the Court interpreted it narrowly, the fund could be garnished.

Chief Justice McLachlin, writing for the majority, interpreted the provision narrowly, and held that the funds were subject to being garnished. In so deciding, she voiced concern that a broader interpretation would make creditors unwilling to extend credit to Indian bands, because the creditors would have recourse to fewer assets if the bands defaulted. She further noted that access to credit is an important tool for Indian bands to develop their economies and provide their members with greater financial prosperity.

Justice Binnie wrote a lengthy dissent. He would have interpreted the provision more broadly, and held that the funds were exempt from garnishment. He acknowledged the importance of enabling Aboriginal economic development, but he was more concerned with the situation immediately facing the God's Lake Band. Moreover, Binnie J. viewed the promise of financial prosperity as being more speculative than real. The government funds were needed to provide for basic social services on reserve. The Band was located in a remote part of Northern Manitoba, and had few foreseeable opportunities to engage in economic development.

McLachlin C.J. and Binnie J.'s reasons present students with an invitation to consider the competing policies implicated by the exemptions in the *Indian Act*: paternalism, self-determination, self-government, and protection of vulnerable people. It is a rich starting point for considering how settler commercial law shapes the economic lives of Indigenous peoples in Canada. At the same time, a class on *Indian Act* exemptions is limited to settler commercial laws. It does not ask students to engage with Indigenous law, one of the topics specifically mentioned by the TRC in Call to Action 28. As I continue to pursue the project of reconciliation in the commercial classroom, I am interested in learning more about Indigenous law and exploring how to incorporate it into my classroom.

Debtor and Creditor Relations

Freya Kodar (University of Victoria)²⁰

I teach two courses in the University of Victoria Faculty of Law's corporate commercial curriculum: Debtor and Creditor Relations and Pension Law and Policy. It is in the former that I have most consciously looked at the ways colonial commercial law impacts Indigenous communities. "Debtor-Creditor," as it is known around the law school, currently does triple duty in the curriculum. While at its core a judgment enforcement course, it also covers the regulation of consumer credit and concludes with an overview of the bankruptcy and insolvency process.

Like Anna Lund, I spend a full class on the question of enforcing money judgments on reserve land, and the interplay of provincial judgment enforcement legislation and the *Indian Act*.²¹ Like Clayton Bangsund, I discuss the challenges that section 89 of the *Indian Act* creates for Indigenous people, businesses, and governments on reserve in accessing credit because on-reserve property and land cannot be given as security for loans, nor can be seized during

²⁰ BA, LLB, LL.M. Kodar is Associate Professor and Associate Dean, Administration and Research at the University of Victoria, Faculty of Law.

²¹ In British Columbia, the enforcement legislation is the *Court Order Enforcement Act*, RSBC 1996, c 78. See also *Indian Act*, *supra* note 12, s 89–90.

enforcement proceedings.²² We then turn our attention to section 90, which deems certain personal property purchased or given by the federal Crown to be situated on reserve and therefore exempt from judgment enforcement proceedings.²³

After reviewing the provincial case law on the question of whether sections 89 and 90 exempt federal government funding held in off-reserve bank accounts from garnishment,²⁴ we discuss the Supreme Court of Canada's decision in *McDiarmid Lumber Ltd v. God's Lake First Nation*.²⁵ The decision canvasses the history of the *Indian Act* exemptions, discusses the ways in which the colonial history of dispossession disrupted Indigenous economies and reduced the land and resource base, and considers how the exemptions constrain Indigenous economic development. As Anna notes above, it is a "rich starting point for considering how settler commercial law shapes the economic lives of Aboriginal people."

In the fall, I will be teaching "Debtor-Creditor" for the first time since the TRC's Final Report and Calls to Action came out, and in teaching this section of the course I plan to draw on the TRC's discussion of the fact that the "the scope of reconciliation must extend beyond residential schools to encompass all aspects of Aboriginal and non-Aboriginal relations and connections to the land" and in particular the TRC's discussion of what reconciliation means for the corporate sector.²⁶

I would like to provide more material on current Indigenous economic development initiatives and how businesses and governments navigate the financing constraints created by the *Indian Act*. As mentioned in the roundtable discussion, it is challenging to find introductory-level material on Indigenous economic development and business structures, and I have been thinking about inviting a speaker involved in Indigenous economic development initiatives to discuss their work with the class.²⁷

And finally, I want to think carefully about responding to TRC Call to Action 28's challenge to bring Indigenous law into "Debtor-Creditor," and indeed into all of my courses. I am both conscious of my lack of knowledge of Indigenous understandings of debt, credit, markets, business, and economic development, and Indigenous laws that regulate them. At the same time, I am anxious about the dangers of seeking to map colonial concepts and laws onto Indigenous concepts and laws

²² The section provides that "the real and personal property of an Indian or band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour ... of any person other than an Indian or a band."

²³ Section 90(1) of the *Indian Act* states that, for the purposes of sections 87 and 89, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situated on a reserve.

²⁴ See e.g. *Fricke v Moricetown Indian Band* [1985] BCJ No 2825, 67 BCLR 227.

²⁵ *McDiarmid*, *supra* note 19.

²⁶ Truth and Reconciliation Commission of Canada, *supra* note 1 at 190, 300–06.

²⁷ In the 2015 fall term, Gail Henderson invited Edmonton lawyer Scott Watson of Field Law LLP to speak to her University of Alberta Corporations class about serving the corporate needs of First Nations clients. She received positive feedback from her students, who found the lecture to be accessible and engaging, while still conveying the complexity of the topic.

Business Associations, Corporate Governance, Secured Transactions & Remedies Shanthi Senthe (Thompson Rivers University)²⁸

I have worked to bring Indigenous legal topics into each of the courses I teach.²⁹ I teach upper-level courses, such as Business Associations, Corporate Governance, Secured Transactions, and Remedies (with a corporate-commercial focus). All courses are rooted in private law principles, and are based primarily on a casebook methodology, which does not specifically address Indigenous legal perspectives or transactional legal considerations. I address this potential gap in the course coverage by using materials from other disciplines, as well as Indigenous experts and guest speakers to integrate reconciliation and other topics related to Aboriginal people and the law. As our university is situated on unceded Secwepemc Territory,³⁰ I can use local issues to help illustrate the topics covered in class and engage students.³¹ The primary struggle for me personally to achieve this type of pedagogical diversity is finding “time” in the semester to cover materials, create case studies and problems, as well as to ensure that the course objectives, which include corporate-commercial transactions in an Indigenous context, have been met.

In all of my courses, I aim to enhance critical thinking and engagement. A method that has been successful is the use of group presentations as an evaluation tool. Twenty to thirty percent of each student’s final grade is assessed based on the student’s participation in a group presentation. Depending on the course, the group presentations are based on business case studies or legal issues surrounding commercial relationships, in which each group must design and develop specific legal remedies and business strategies while considering divergent stakeholder interests. Students receive their group allocation, case study, or problem by the second week of the course and are expected to work on the case study for the entire semester. Towards the end of the course, all groups present their findings. Students are also expected to submit a one-page reflection piece describing their personal views on the process, team dynamics, as well as objections to substantive legal issues raised by group members or the problem, or my pedagogical approach. The problem-solving component serves as an opportunity for me to include relevant Indigenous legal topics, thereby allowing students to gain a more thorough understanding of Canadian commercial issues.

²⁸ BA, JD, LLM, PhD Candidate. Senthe is Assistant Professor at Thompson Rivers University, Faculty of Law.

²⁹ Professors Janna Promislow and Nicole Schabus have graciously guided me along the way in attempting to include Indigenous content in my courses.

³⁰ See Emma Cunliffe, “General Principles of Reconciliation Syllabus” (27 June 2015), ReconciliationSyllabus (blog), online: ReconciliationSyllabus <<https://reconciliationsyllabus.wordpress.com/2015/06/27/general-principles-of-reconciliation-syllabus/>>. In this article, Professor Cunliffe articulates how local geography can reconfigure and influence our pedagogical approaches.

³¹ In my Corporate Governance course, students are encouraged to explore issues surrounding the Economic and Community Development Agreement (ECDA) mine revenue-sharing agreement between the Province of British Columbia with Tk'emlúps te Secwepemc and Skeetchestn Indian Band of the Stk'emlúps te Secwepemc Nation (SSN) as a result of the New Gold Mine Inc. operations. See Ministry of Aboriginal Relations and Reconciliation, News Release, 2013ARR0047-001565, “Mining revenues flow to First Nations following first-ever agreement” (17 October 2013), online: BC Ministry of Aboriginal Relations and Reconciliation <https://archive.news.gov.bc.ca/releases/news_releases_2013-2017/2013arr0047-001565.htm>.

Business Associations, a mandatory upper-year course, aims to provide students with a basic understanding of the legal regulation of business structures in Canada and the ability to articulate and place legal rules in their historical, social, and economic context. I use conceptual frames and excerpts from *Legal Aspects of Aboriginal Business Development* by Dwight Dorey and Joseph Magnet.³²

Secured Transactions is an optional upper-year course, akin to Clayton Bangsund's PPSL course. In this course, I assign Douglas Sanderson's article, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, but How Do You Build It in Canada?"³³ as required reading; in addition, I have students tackle a legal problem involving a secured transaction on reserve land.

Remedies is an optional upper-year course that covers the various and diverse legal remedies available to commercial and individual litigants in response to a violation of that party's legal rights. These "legal remedies" represent the juridical response to a legal wrong or injury. It is this concrete response that is ultimately most valued by the client. This course surveys the available remedies, including equitable remedies, by examining their scope, purposes, and limitations. The ultimate aim of the course is to provide students with a broad overview of the most significant legal remedies available in the Canadian legal system. I developed a section within the syllabus to explore the inclusion of cultural evidence with respect to commercial litigation strategies and whether this can be applicable to contractual issues.³⁴ During this portion of the syllabus, I facilitate a discussion on Indigenous issues surrounding residential school litigation.

Corporate Governance is an optional, upper-year course, where I have had the luxury of creating my own course materials. This course attempts to explore Indigenous shareholder activism, the business case for and against mining and oil and gas development in Indigenous communities, board accountability from various viewpoints, and the tensions between business objectives, and Indigenous political and social objectives.³⁵ These specific considerations are examined through law review articles, case law, newspaper articles, and local media highlights and guest speakers. For instance, in examining the Equator Principles, class discussions centre on international and domestic indigenous stakeholder rights.³⁶

³² Dwight Dorey & Joseph Magnet, *Legal Aspects of Aboriginal Business Development* (Toronto: LexisNexis Butterworths, 2005).

³³ Douglas Sanderson, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, but How Do You Build It in Canada?" (2011) 53:1 Can Bus LJ 92.

³⁴ See Vaughan Black, "Cultural Thin Skulls" (2009) 60 UNBLJ 186. See also Jerry Berryman, "Accommodating Ethnic and Cultural Factors in Damages for Personal Injury" (2007) 40 UBC L Rev 1.

³⁵ For more resources, see Tulo Centre of Indigenous Economics, which is about development on reserve land, online: Tulo Centre of Indigenous Economics <www.tulo.ca/textbook/>. See also Chief Reuben George's shareholder activism, Dan Fumano, "B.C. First Nations Take Kinder Morgan Pipeline Opposition from Coast to Coast", *The Vancouver Sun* (16 June 2016), online: The Vancouver Sun <vancouver.sun.com/news/local-news/b-c-first-nations-take-kinder-morgan-pipeline-opposition-from-coast-to-coast>. See also Tsleil-Waututh Nation, Media Release, "Tsleil-Waututh Chief Carries Message of Opposition to Kinder Morgan Expansion From Ottawa to New York City" (16 June 2016), online: Market Wired <www.marketwired.com/press-release/tsleil-waututh-chief-carries-message-opposition-kinder-morgan-expansion-from-ottawa-2135078.htm>. See also Sacred Trust Initiative, online: TWN Sacred Trust <twnsacredtrust.ca/>.

³⁶ I use Benjamin J Richardson's work as a starting point. Benjamin J Richardson, "Protecting Indigenous Peoples through Socially Responsible Investment" (2007) *Indigenous LJ* 6:1 205.

Business Associations

Carol Liao (University of Victoria)³⁷

Business Associations is an upper-year, mandatory course at the University of Victoria's law school that introduces students to the foundational legal principles of agency, partnerships, corporations, and other forms of association for carrying on business in Canada. The class size is approximately 50 students. I find it important at the outset of the course to convey to my students that Aboriginal legal issues are not counter to what the course is about, but reflective of where the future is headed. Learning the basics of business law enables one to be conversant with those who hold the majority of capital in our society. I emphasize that corporate law and social justice are not mutually exclusive concepts. I believe a serious disservice is committed to corporate reform efforts when we suggest to students that social justice is incompatible with corporate legal practice.

I have raised the importance of Indigenous rights in topics such as stakeholder interests, corporate social responsibility (CSR), and board diversity. Regarding stakeholder interests and CSR, throughout the course I discuss the growing imperative for directors to consider non-shareholder stakeholders in their corporate decision-making, first in accordance with their fiduciary duties to act in the "best interests of the corporation"³⁸ and under the oppression remedy,³⁹ and more recently in light of the Supreme Court of Canada's interpretation of directors' duties in *Peoples Department Store Inc (Trustee of) v. Wise*⁴⁰ and *BCE Inc v. 1976 Debentureholders*.⁴¹ I discuss the different challenges facing closely-held corporations in comparison to widely-held corporations, and ask students to consider the competing interests directors face in scenarios where Aboriginal rights are at risk (for example, energy companies with pipelines running through Aboriginal land), as well as other challenges where social and economic interests are at odds. I also incorporate the *United Nations Guiding Principles for Business and Human Rights*,⁴² the *United Nations Declaration on the Rights of Indigenous Peoples*,⁴³ and the recent case of *Choc v. Hudbay Minerals*,⁴⁴ which involved a suit by Guatemalan Indigenous plaintiffs against a Canadian mining company for human rights violations. I provide the students with a hypothetical scenario similar to *Choc* in which they represent a competing mining company. I ask if they would recommend that their client adopt a public policy commitment to respect human rights in accordance with s. 15(a) of the voluntary *UN Guiding Principles*. The class is split into small groups, with different sides outlining the risks in adopting and not adopting such a public policy commitment. Each side also provides recommendations on how to mitigate such risks. While it might be assumed that a company should automatically adopt such a policy, there are implications if there is not a

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³⁸ *Canada Business Corporations Act*, RSC 1985, c C-44, s 122.

³⁹ *Ibid*, s 241.

⁴⁰ 2004 SCC 68, 3 SCR 461.

⁴¹ 2008 SCC 69, [2008] 3 SCR 560.

⁴² *United Nations Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"*, OHCHR, 2011, UN Doc HR/PUB/11/04, (2011).

⁴³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 107th Plen Mtg, UN Doc A/61/295 (2007).

⁴⁴ 2013 ONSC 1414, [2013] OJ No 3375.

system in place to support it. The discussion has implications for the enforcement of Aboriginal rights and the complexities surrounding competing stakeholder interests.

With respect to board diversity, I address how, in 2014, most Canadian provincial securities commissions passed regulations requiring public companies to disclose their policies and approach to gender diversity on their boards of directors and in senior management. While arguments for including women on boards are well established, other kinds of diversity, particularly visible minorities and Aboriginal peoples, have not received the same attention. In 2015, visible minorities held 7.3% of FP500⁴⁵ board seats—Aboriginal peoples held 1.3%.⁴⁶ I discuss with my students how representation on boards may be particularly important in companies where certain stakeholders are highly relevant to corporate decision-making. For example, engaging with Indigenous peoples is essential for project development by resource companies, particularly in light of the Supreme Court of Canada’s decision in *Tsilhqot’in Nation v. British Columbia*,⁴⁷ and companies should be responding to this reality by having Indigenous representation on their boards.

The integration of Aboriginal legal issues into this mandatory business course is a work in progress. Among other things, I plan on inviting a guest speaker (as others have recommended) to discuss forms of business associations specific to, or used frequently by, Aboriginal communities, such as Indian bands. I have also invited students to suggest other ways to improve the curriculum to better respond to Call to Action 28. I found the discussions from students who approached me to be immensely helpful in gaining a better understanding of the issues affecting Indigenous communities today.

Business Associations & the Story of Professional Native Indian Artists, Inc. Gail Henderson (Queen’s University)⁴⁸

Representations matter. Part of my job as a law professor is to ensure that students see themselves represented in the course materials in as many different roles as possible. In the introductory Business Associations course,⁴⁹ the “characters” in the cases taught⁵⁰ continue to be majority male and white. Recently, I have been thinking about how to ensure that students who identify as First Nations, Inuit, and Métis see themselves represented in my course materials.

⁴⁵ FP 500 refers to the 500 largest Canadian companies by revenue.

⁴⁶ Canadian Board Diversity Council, “2015 Annual Report Card,” online: Canadian Board Diversity Council <boarddiversity.ca/sites/default/files/2015-Annual-Report-Card.pdf> at 9.

⁴⁷ 2014 SCC 44, [2014] 2 SCR 257. See also *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] FCJ No 705.

⁴⁸ BA (Hons), LLB, LLM, SJD. Henderson is Assistant Professor at Queen’s University Faculty of Law.

⁴⁹ The introductory class to forms of business organization, focusing on corporations, goes by different names across the country. At the University of Alberta, where I taught the class for four years, the class is called “Corporations”, although the syllabus always incorporates sole proprietorships and partnerships. At Queen’s University, the class is titled Business Associations.

⁵⁰ Mary Joe Frug, “Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook” (1985) 34 Am U L Rev 1065 at 1077.

This thinking was prompted in part by a visit to the Art Gallery of Alberta to see the exhibit “7: Professional Native Indian Artists Inc.”, a collection of works by Potawatomi, Ojibway, Dene, Cree, and Pueblo artists, sometimes referred to as either the Native or the Indian Group of Seven,⁵¹ who came together in the early 1970s. The group included Norval Morrisseau and Alex Janvier, names familiar to Canadian art gallery-goers. The exhibit was beautiful and exhilarating, but I fixated on the “Inc.” in Professional Native Indian Artists Inc. (“PNI AI”).

The artists were frustrated with curators treating contemporary art by Indigenous artists as “craft” or as relic, and excluding their work from galleries.⁵² The idea for PNI AI grew out of conversations among artists who sold their works through Odjig Indian Prints of Canada Limited in downtown Winnipeg, owned by artist Daphne Odjig. Indeed, PNI AI eventually became a corporation.⁵³ As member Joseph Sanchez describes, “We had no intention of creating a corporation, it just happened over a period of years of showing in Daphne’s house and gallery.”⁵⁴ The more senior artists—Odjig, Morrisseau, and Janvier—used the group to force galleries to exhibit works of the other members.⁵⁵ Exhibitions in Toronto, Ottawa, Vancouver, and a particularly important exhibition at the influential Dominion Gallery in Montreal, the latter with the aid of Indian Affairs,⁵⁶ led to more interest in Indian art as *art*.⁵⁷

The group was legally incorporated on April 1, 1975, with the help of law firm Martens and Dennehy, after Consumer and Corporate Affairs required revisions to their original incorporation documents submitted in 1974.⁵⁸ The name on the incorporation documents was Anisinabe Professional Native Indian Artists Incorporated. The objectives of the corporation included in the articles of incorporation were:

...to facilitate, aid, publicize, and promote Native Indian art and culture and create incentives for young artists;

...to provide for the holding of art displays, education lectures, exhibitions, public meetings, workshops, classes and conferences on Native Indian art and culture both nationally and internationally.

⁵¹ Michelle LaVallee, “7: Professional Native Indian Artists Inc” in Michelle LaVallee, ed, *7: Professional Native Indian Artists Inc* (MacKenzie Art Gallery, 2014) 45 at 63 [7].

⁵² Joseph Sanchez, “The Formation of Professional Native Artists Inc, The Indian Group of Seven” in Bonnie Devine, ed, *Witness* (Aboriginal Curatorial Collective and Witness, 2009) 20 at 21, online: Aboriginal Curatorial Collective and Witness <www.aboriginalcuratorialcollective.org/wordpress/wp-content/uploads/2013/01/ACC-witness.pdf>. (“We wanted acceptance as artists in our own right and spoke to the fact that Native arts were relegated to craft stores and tourist shops but not museum exhibitions.”).

⁵³ Thanks to Carolyn Jervis of the Art Gallery of Alberta in Edmonton for confirming this fact and for pointing me in the direction of the excellent exhibit catalogue.

⁵⁴ Sanchez, *supra* note 52 at 22.

⁵⁵ 7, *supra* note 51 at 52–53.

⁵⁶ Lee-Ann Martin, “Early Adventures in the Mainstream: Alex Janvier, Norval Morrisseau, and Daphne Odjig 1962-1975” in 7, *supra* note 51 at 216–17.

⁵⁷ Vivane Gray, “The New Group of Seven: A Reaction to the State of Indian Art in Canada in the Sixties and Seventies” in 7, *supra* note 51, 233 at 242.

⁵⁸ 7, *supra* note 51 at 58.

...to establish, construct, provide, endow, equip, operate, maintain and manage, all without pecuniary gain to any of its members, educational activities and facilities for the study of Native Indian art and culture.

...to establish bursaries, awards, scholarship funds and other forms of incentive programs to assist in the development of amateur Indian Artists.⁵⁹

PNIAI was, in the words of member Joseph Sanchez, “a western-named corporation with an Indigenous heart.”⁶⁰

Hopes for government funding for the group were unfulfilled; on one occasion, the Canada Council turned them down on the basis that the Council dealt only with individuals.⁶¹ The fact that its members lived in different cities also strained their ability to keep the group together. PNIAI was dissolved as a legal entity in 1979, for failing to file documents in the previous two years.⁶²

The story of PNIAI could serve several purposes in a Business Associations class. First, the formation of PNIAI can be viewed as an exercise of “rhetorical sovereignty”,⁶³ which allowed the artists to act together to challenge the racism facing Indigenous artists. Second, the story of PNIAI represents Indigenous people as agents in their own business venture. Odjig also represents an important example of a woman as a business actor.⁶⁴ Finally, it provides a concrete historical example of the type of social enterprise now formalized in the British Columbia *Business Corporations Act*⁶⁵ establishing “community contribution companies” (“C3”) as a new type of corporate entity. For students, PNIAI illustrates what a social enterprise is and to what ends it might be used. Students might be asked to explore whether the C3 is more compatible with Indigenous laws and traditions than traditional forms of business organization.⁶⁶

⁵⁹ *Ibid* at 59.

⁶⁰ Joseph Sanchez, “The Native Group of Seven aka Professional Native Indian Artists Inc” in 7, *supra* note 51, 187 at 189. On the other hand, Odjig found the corporate structure constraining: “We didn’t want a president, a secretary... We just wanted to meet together.”

⁶¹ 7, *supra* note 51 at 61.

⁶² *Ibid* at 62. There is no certificate of dissolution.

⁶³ Cathy Mattes, “‘Winnipeg, Where it All Began’ – Rhetorical and Visual Sovereignty and the Formation of the Professional Native Indian Artists Incorporated” in 7, *supra* note 51, 219 at 219–22 (defining “rhetorical sovereignty” as actions aimed at determining the public discourse about one’s people, which is interconnected with “visual sovereignty”, the “creative act of self-representation.”). See also 7, *supra* note 51 at 57 (“Self-determination and self-definition were at the heart of the PNIAI.”).

⁶⁴ Carmen Robertson, “Paper Trail: PNIAI Artists in Winnipeg Newspapers, 1966-1977” in 7, *supra* note 51, 225 at 230.

⁶⁵ SBC 2002, c 57, Part 2.2. See also Nova Scotia’s *Act Respecting Community Interest Companies*, SNS 2012, c 38.

⁶⁶ See e.g. Truth and Reconciliation Commission of Canada, *supra* note 1 at 18 (briefly discussing Indigenous laws regarding their relationship with nature).

III THEMES AND TENTATIVE CONCLUSIONS

In attempting to respond to Call to Action 28, many of us started with what might be considered basic concepts, but concepts that are not always covered in the traditional course materials, namely how corporate and commercial statutes interact with relevant provisions of the *Indian Act*. Specifically, faculty teaching commercial law courses dealing with secured debt, or corporate law courses dealing with corporate finance, might cover restrictions on taking security in property on reserve and how this affects individuals living on reserve as well as Aboriginal businesses and Aboriginal economic development. As some of the contributions above discuss, this seems only to scratch the surface and perhaps insufficiently challenges the status quo. These interventions and innovations are best viewed as a starting point, with a real awareness that more needs to be done.

Nevertheless, one of the important themes of the roundtable discussion was the need to incorporate this basic material into our courses to ensure that students are able to help their clients—whether they are First Nations, Indigenous business people, governments, corporations or nonprofit organizations—respond to the other Calls to Action. Graduating students who lack knowledge about these topics restricts the supply of lawyers who can competently advise clients in this area, and makes it more difficult, or at least more expensive, for Indigenous communities to engage in corporate and commercial ventures.

One of the important questions raised in the roundtable discussion was how to frame material on reconciliation and other issues in the context of the course as a whole; specifically, how to do this so that it is viewed by the students as essential, rather than peripheral. Not all students understand the importance or relevance of the TRC, and some may be skeptical and frustrated that coverage of Aboriginal people and the law is taking time away from “real” issues in a course. It is important to signal from the start of the course that Indigenous legal issues are not a separate silo from corporate and commercial issues.

One tactic was to emphasize the usefulness of the information, by reminding students that they may act for, or opposite, Aboriginal clients, and would need to understand the special laws that can apply to corporate and commercial dealings on reserve. Such a framing tactic appeals to learners’ instrumental motivations, even if they do not come to the class with an interest in Indigenous legal issues. Additionally, for those students who are interested in Aboriginal people and the law, it invites them to think more broadly about the practice areas in which they can pursue this interest.

A second framing tactic was to draw an explicit connection between the course content and the TRC report, for example, by explaining that the TRC has called on the entire legal profession to be part of the project of reconciliation, and that coverage of Aboriginal people and the law was a small part of that project. The creation of a mandatory first year course in Aboriginal people and the law may help to ensure that students coming into upper year corporate commercial courses already have an understanding of the TRC and its Calls to Action.

A difficulty professors face is to explain what reconciliation is, and how education on topics of Aboriginal law advances the project.⁶⁷ Lawyers like definitions, and law students

⁶⁷ The TRC “defines reconciliation as an ongoing process of establishing and maintaining respectful relationships.” Truth and Reconciliation Commission of Canada, *supra* note 1 at 16.

in particular are eager for conceptual clarity, but reconciliation is a term that defies precise delineation. Rather than attempt to create artificial certainty around what reconciliation means, faculty might instead invite students to engage with the inherent ambiguity of the project. The legal profession and the broader Canadian society have been called on to respond, and have been offered a number of discrete suggestions about what form responses should take, but much remains to be determined as we work individually, and together as communities, to implement the TRC's recommendations.

Art can be an effective tool for inviting students to engage with ambiguity, and to “explore their own worldviews, values, beliefs and attitudes.”⁶⁸ For example, Alex Janvier's painting “Blood Tears” can be used to make inroads into a discussion on reconciliation. Mr. Janvier painted “Blood Tears” while he was in his sixties, reflecting back on his experiences as a student at the Blue Quill Indian Residential School: it is both “a statement of [his] sense of loss, and a celebration of his resilience.”⁶⁹ On the back of the painting, Mr. Janvier lists the losses he experienced.⁷⁰ One of the roundtable participants described a student beginning a class presentation by reading part of this list to the class. It was an evocative opener, which reasserted the incredible need for healing at the level of the individual and the community.

Another theme emerging from the roundtable discussion and the contributions is that the TRC's Call to Action may be an invitation to think more broadly and creatively about the content of a course. For instance, professors teaching business associations may wish to provide detailed instruction on forms of organization other than the corporation, such as cooperatives and partnerships. This broadened approach may encourage law students to imagine new ways of doing business, which ultimately will benefit all future clients, including Indigenous ones.

A final theme that emerged repeatedly at the roundtable, and throughout the TRC-focused sessions at the CALT conference, was that many non-Aboriginal professors feel fear—or at least anxiety—at the prospect of providing greater coverage of Aboriginal people and the law in their courses. The fear seems to stem from a concern that professors might unknowingly make a serious misstep, say something unintentionally insensitive, or even racist, or respond in a way that reifies, rather than challenges colonial power dynamics.

Fear can be paralyzing, and there is a real risk that professors may allow their fear of making mistakes to translate into complacency with the status quo. As professors respond to the TRC's Calls to Action it is necessary to undertake the personal work of understanding colonialism, the history behind the residential school system, and the meaning of reconciliation with Indigenous communities. For many professors, developing an adequate response to the TRC will require them to educate themselves about new areas of law, and new legal traditions that may have very different epistemological and ontological bases than Anglo common law.

⁶⁸ Truth and Reconciliation Commission of Canada, *supra* note 1 at 280. See also Benjamin Berger, “Building Negative Capability—The Task of Legal Education” (Presentation delivered at the Canadian Association of Law Teachers Annual Conference, Winnipeg, 8 June 2014) [unpublished].

⁶⁹ Marlene Brant Castellano, Linda Archibald & Mike DeGangé, “From Truth to Reconciliation: Transforming the Legacy of Residential Schools” (2008) Aboriginal Healing Foundation, online: Aboriginal Healing Foundation <www.ahf.ca/downloads/from-truth-to-reconciliation-transforming-the-legacy-of-residential-schools.pdf>.

⁷⁰ See *ibid* at xi where the list is recreated.

This is a daunting challenge, and we have a lot of learning to do. Faculty may teach themselves by undertaking new research projects on the intersection of Indigenous law and corporate commercial topics. But reconciliation is about (re)building relationships, and at least some of this learning will only be possible if professors foster relationships.⁷¹ They can engage with Indigenous communities. They can reach out to people with expertise on, or experience with, corporate commercial law's impact on Aboriginal people. They also can consult, collaborate and share ideas with each other, as we have done here.

⁷¹ Truth and Reconciliation Commission of Canada, *supra* note 1.