Indigenous Legal Traditions in Canada

By: John Borrows

Report for the Law Commission of Canada

January 2006

Professor John Borrows
Law Foundation Chair in Aboriginal Justice and Governance
Faculty of Law, University of Victoria

Executive Summary

Chapter One: A legal tradition reflects a set of deeply rooted attitudes about the nature and role of law in a society. It reflects ideas about the proper organization and operation of that society. It dictates the way in which law is, or should be, recognized, made, applied, studied, perfected and taught. Indigenous peoples in Canada have many legal traditions that guide their actions and mediate their relationships. These traditions are cultural phenomena typical of people organizing the untidy business of life into categories that help them resolve their disputes. When different legal traditions operate within a single state or overlap between states, the condition is called legal pluralism. Canada is a legally pluralistic state. Indigenous legal traditions stand beside civil law and common law; they also legally organize and structure society and establish systems that describe the actual or desired theory and practice of law.

Many Indigenous societies in Canada possess legal traditions. These traditions have indeterminate status in the eyes of many Canadian institutions. But they continue to function in Indigenous societies through people's actions, teachings, assumptions, premises and philosophies about the nature, operation and application of law. In Canada, Indigenous legal traditions are separate from but interact with common law and civil law to produce a variety of rights and obligations for Indigenous people. Like Canada's other legal traditions, Indigenous peoples' laws have many sources, regarded variously as divine, natural, positivistic, deliberative and customary. The perceived source of law affects the rules by which it can be developed, disclosed and applied. Indigenous peoples' ideas about the source of a law also affect the way in which they are recorded and conveyed. Some Indigenous laws are orally based; others combine the spoken and written word.

These legal traditions are not frozen in time. They have developed in response to the presence of other people in Indigenous territories. Indigenous law is a living system of social order and control, developed through comparing, contrasting, accepting and rejecting legal standards from many sources. Indigenous legal traditions do not lose their Aboriginal status if they adopt contemporary codes of conduct in order to address matters not encountered before European contact. Indigenous legal traditions are not solely matters of history: they are reinterpreted and reapplied in every generation to remain relevant in changing circumstances. Furthermore, within each tradition, interpretations often vary about the way law is and should be recognized, made, studied, taught, perfected and applied. Many perspectives within a legal tradition illustrate its vibrancy and vitality, just as in common law and civil law traditions. This diversity is healthy as long as mechanisms are present to resolve disagreements authoritatively at moments of heightened conflict.

Chapter Two: Among the Indigenous legal traditions examined in this paper are the Mi'kmaq, Hodinohso:ni, Anishinabek, Cree, Métis, Carrier, Nisga'a and Inuit. These examples show the variety of legal traditions among Indigenous peoples in Canada, and they introduce the internal complexities of each system. They show that Indigenous legal traditions can acknowledge or bestow legal personality on people and other living things not considered deserving of this recognition in other systems. This divergence is explained at least partially by the relationship between linguistic expression and ecological experience.

The Mi'kmaq example briefly introduces legal concepts related to Mi'kmaq political organization, metaphysical understandings, and international relationships. The differences between oral tradition as law and oral tradition as history are also briefly discussed in the context of Mi'kmaq legal traditions. The Hodinohso:ni example introduces the *Kaianerkowa* or Great Law of Peace and its associated narrative which teaches legal principles of peace, power and righteousness.

The Anishinabek example shows the role and importance of kin and clan (*dodem*) in regulating relationships. Legal principles of conservation, land use, and stewardship are illustrated, principles which could be applied today. The Cree example also discusses legal principles. These show how the Cree understand their over-arching obligations to the Creator, their families and other individuals. The discussion of the Métis demonstrates the written nature of certain Indigenous legal traditions, through the Law of Hunt to the organization of the Red River Provisional Government. More recently, Métis legal traditions have found positivist expression in bodies such as the Métis Settlement Appeal Tribunal. The Carrier example also shows the importance of social structure, ceremonial events and symbols as a way in to give force to legal traditions. The Nisga'a demonstrate how ancient legal traditions can be modified even to negotiate modern treaties with the Canadian state. Finally, Inuit legal traditions demonstrate their guiding legal principles that now find expression in the Nunavut territorial legislature which now applies their principles in its statutes and regulations.

Chapter Three: These examples of Indigenous legal traditions allow civil law and common law to be placed in a broader context. This demonstrates the historically fluid, socially constructed, and culturally contingent nature of legal traditions in Canada. Civil law and common law have force because people have chosen to accept their authority. The recognition of the role of choice and moral agency in the development of legal traditions is also significant for the continued growth of Indigenous law. The power to acknowledge them, and implement them more broadly, is within reach because there is nothing 'timeless' or 'natural' about recognizing only bi-juridicalism in Canada. Civil law developed in Canada through legal transplantation as a result of a decree by King Louis XIV and the *Civil Code* continues to regulate private law matters in Quebec today. Common law was also transplanted from Europe to Canada by choice. Common law was adopted differently across the country according to the particular histories of each colony and region. But it continues in force today. The development and

relationship of civil law and common law point the way to the extension of Indigenous legal traditions. Civil law has been dominated by common law for many centuries but it has enjoyed a resurgence in recent decades. This increased influence resulted from decisions within Quebec to produce a new *Civil Code*, and from decisions outside Quebec in the courts and Parliament. Common law is not quite as dominant as it once was and a healthy dialogue between these two traditions has now resulted. The survival and continued strength of civil law is enhanced by its greater recognition. Indigenous legal traditions could also be strengthened by more formal recognition by the courts and Parliament. It too could be part of a healthy dialogue about the nature and role of law in society. The undermining of Indigenous legal traditions must be halted; this undermines respect for the law in Indigenous communities and diminishes Canada as a nation. Connections can be and have been made between civil law, common law and Indigenous law traditions without destroying the country.

Chapter Four: The move from bi-juridicalism to multi-juridicalism is consistent with Canada's constitutional framework. The *Charter of Rights and Freedoms* and the *British North America Act, 1867* recognize French and English equality in social, cultural, religious, linguistic and juridical matters. Indigenous peoples should enjoy similar equalities. Canada's constitutional system exists to reconcile unity and diversity and recognize peoples' independence and interdependence. Any desire to eliminate this diversity through assimilation has damaged Canada's functioning as a democracy. If people are to be secure in their fundamental rights and freedoms, assimilation must be rejected. Forced association can inhibit an individual's potential for growth and self-fulfillment. A greater recognition of Canada's Indigenous treaty tradition is an important bulwark against assimilation. Like the *Charter* and the *BNA Act*, treaties exist in Canada's constitutional framework to reconcile unity and diversity.

Chapter Five: However consistent it may be with Canada's constitutional structure to formally acknowledge and encourage the growth of Indigenous legal traditions, the viability or desirability of this approach is sometimes questioned. Concerns may be raised about the *intelligibility, accessibility*, *equality, applicability, constitutionality* and *legitimacy* of Indigenous legal traditions. These concerns can be assuaged. *Intelligibility* requires that the consequences of a given action be foreseeable and sufficiently precise to govern conduct. Indigenous laws are intelligible to those familiar with their cultural context. Canadian and European law also shows that intelligibility allows for debate; it does not require the consequences of an action to be foreseeable with absolute certainty. The *accessibility* of Indigenous laws could benefit if they were more formally recognized and articulated. They could also become more accessible through legal education programs, though intellectual property issues sometimes arise. Indigenous legal traditions do not threaten *equality* in Canada, as the uniform application of law may sometimes do. At times, it is necessary to accommodate differences in order to produce true equality. Canada's federal system permits the differential application of law in order to protect differences between political cultures. Differential treatment under one overarching legal framework is the best mechanism to ensure that people live together in equality. The *applicability* of Indigenous legal traditions is more productively extended when Indigenous peoples are considered political groups, not racial categories. The *constitutionality* of Indigenous laws is consistent with Canada's framework, as Chapters Three, Four and Six describe. Questions of *legitimacy* involve psychology, emotion, economics and political science. These questions can be resolved by dealing with the psychological and emotional challenges to the acceptance of Indigenous legal traditions, and by exploring the economic benefits that could flow from this recognition.

Chapter Six: Indigenous legal traditions would be most likely to flourish if the law-making authorities of Indigenous governments were recognized, if Indigenous dispute resolution bodies

were acknowledged, if Federal law were harmonized with Indigenous law, and if legal institutions such as law societies, law schools and the judiciary were more responsive. There is a strong connection between Indigenous Government and Indigenous law. Developments in international law recognize the importance of Indigenous legal traditions for self-determination. Section 35(1) of the Constitution Act, 1982 can also facilitate the recognition and affirmation of Indigenous law as a part of the inherent right to self-government. But the problems currently underlying section 35(1)'s narrow and potentially self-destructive focus must be recognized. An Aboriginal Nations Recognition and Government Act could enhance Indigenous law-making jurisdiction. Indigenous governments would possess greater accountability and legitimacy if their own dispute resolution bodies were recognized as having authority to resolve their disputes. Tribal courts and other Indigenous conflict resolution bodies could well strengthen respect for law and order within Indigenous communities since they apply legal traditions that are closer to the peoples' normative orders. In addition, mechanisms could be created to harmonize Canada's other legal traditions with Indigenous laws. These mechanisms could even facilitate communication between the various legal traditions, thereby reducing unnecessary conflict or inconsistencies. Harmonization could also address questions about the relationship of pre-Confederation Indigenous law to federal statutes. It could create interpretive principles to ensure that Indigenous laws are read in a broad, liberal and generous manner. Finally, legal institutions could facilitate the recognition of Indigenous legal traditions as law societies and bar associations proclaim their support and develop mechanisms for the professional education and awareness of their members. Law Schools could support the recognition of Indigenous legal traditions by developing courses, degrees or certificates in Indigenous Law. The judiciary could appoint people to the bench who are familiar with Indigenous legal traditions, and could apply those traditions to the resolution of the disputes before them.

Table of Contents

I. Characteristics of Indigenous Legal Traditions

A. Indigenous Legal Traditions: "But are they Law?"

"A legal tradition…is 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."[1] A legal tradition is an aspect of general culture; it can be distinguished from a state's legal system if that national system does not explicitly recognize its force.[2] Legal traditions are cultural phenomena; they "provide categories into which the untidy business of life may be organized" and where disputes may be resolved.[3] Sometimes different traditions can operate within a single state or overlap between states.[4] This is known as legal pluralism: "the simultaneous existence within a single legal order of different rules applying to identical situations."[5]

Canada is a legally pluralistic state; civil, common and Indigenous legal traditions organize dispute resolution in different ways, though there are similarities between them. The vitality of each legal tradition does not solely depend on its historic acceptance or how it is received by other traditions.[6] "The strength of a tradition is not how closely it adheres to its original form but

---

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

2 M.B. Hooker, *Legal Pluralism* (Oxford: Clarendon Press, 1975).

3 *Ibid.*

4 A.W.B. Simpson, "Legal Systems and Legal Traditions" in *Invitation to Law* (London: Blackwell, 1988) chapter 3. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective. Systems of legal thought are not necessarily coterminous with nation state boundaries and can be divided into groups or families.

5 Andre-Jean Arnaud, "Legal Pluralism and the Building of Europe", http//www.reds.msh-paris.fr/communications/texts/arnaud2.htm.

6 See Robert Cover, "Nomos and Narrative" (1983) 97 *Harvard Law Review* 4 at 9:

how well it develops and remains relevant under changing circumstances."[7] If recognized, provided with resources and given jurisdictional space, each legal tradition can be applicable in a modern context. A mark of authentic and living tradition is that it points us beyond itself.[8] Each of Canada's three major legal traditions is relevant in this respect and continues to grow amidst changing circumstances.

The earliest practitioners of law in North America were its Indigenous inhabitants. These peoples are known as the "Aboriginal"[9] or "Native" peoples of the continent and include, among others, the ancient and contemporary nations of the Innu, Mi'kmaq, Maliseet, Cree, Anishinabek, Hodinohso:ni, Dakota, Lakota, Nakota, Assinaboine, Saulteaux, Blackfoot, Secwepemec, Nlha7kapmx, Salish, Nuu-Chah-Nulth, Kwakwaka'wakw, Haida, Carrier, Tsimshian, Nisga'a, Gitksan, Tahltan, Tlingit, Gwichin, Dene, Inuit, and Métis.[10] The traditions of these Indigenous peoples can be as historically different from one another as other nations and cultures in the world. For example, Canadian Indigenous peoples speak over 50 different Aboriginal languages from 12 distinct language families that have as wide a variation as those of Europe and Asia.[11] The linguistic, genealogical, political and legal descent of these nations

---

> A legal tradition…includes not only a *corpus juris*, but also a language and a mythos – narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and material universe, between constraints of reality and the demands of an ethic. These myths establish a repertoire of moves – a lexicon of normative action – that may be combined into meaningful patterns culled from meaningful patterns of the past.

7 See Katherine T. Bartlett, "Tradition, Change and the Idea of Progress in Feminist Legal Thought" (1995) *Wisconsin Law Review* 303 at 331.

8 See also Jaroslav Pelikan, *The Vindication of Tradition* (New Haven: Yale University Press, 1984) at 54.

9 "Aboriginal" in Canadian law includes Indian, Inuit and Métis people: see s. 35(2) of the *Constitution Act, 1982* (Canada), enacted as Schedule B to the *Canada Act*, 1982 (U.K.) 1982, c. 11.

10 A good historic overview of Aboriginal Peoples in northern North America is found in Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples From Earliest Times* (Toronto: McClelland & Stewart, 1992). For a description of the contemporary vitality of First Nations in Canada, see Boyce Richardson, *People of Terra Nullius: Betrayal and Rebirth in Aboriginal Canada* (Toronto: Douglas and McIntyre, 1993).

11 An overview of the distinctiveness of First Nations in different regions in Canada is found in R. Bruce Morrison and C. Roderik Wilson, eds., *Native Peoples: The Canadian Experience*, 2nd Ed. (Toronto: McClelland & Stewart, 1992).

can be traced back through millennia to different regions or territories in northern North America.[12] This explains the wide variety of laws found in Indigenous groups.

Indigenous peoples' laws hold modern relevance for them and for others. While the laws have ancient roots, they 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. Indigenous peoples possess law because conflict has always been present in their societies. Law provides the means to overcome or channel conflict through structured principles, practices and patterns of dispute resolution. Indigenous law will remain relevant as long as there is discord and dissension in the world and the desire to address the consequences. Disputes within Indigenous communities and with other societies could be reduced if their laws were more widely applied.

Despite their potential to answer pressing questions, Indigenous laws have an uncertain status in Canada's legal system. There is a debate about what constitutes 'law' and whether Indigenous peoples in Canada practiced law prior to European arrival. Some have said that Indigenous peoples in North America were pre-legal.[13] Those who take this view believe that societies have laws only if the laws are declared by some recognized power that is capable of enforcing such a proclamation. They may argue that Indigenous tradition is only customary, and therefore not clothed with legality. Jurist John Austin expressed this view of custom when he wrote:

> At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted by the courts of justice, and when judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the

---

12 For an excellent textual and pictorial representation of the pre-contact geographical spaces that First Nations peoples occupied in Canada, see Cole Harris and Geoffrey Matthews, eds., *Historical Atlas of Canada: From the Beginning to 1800* (Toronto: University of Toronto Press, 1987).

13 Editorial: One Tier Justice, *National Post*, November 23, 2004 at A19.

> courts and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.[14]

For legal positivists who side with Austin, centralized authority and explicit command are necessary for a legal system to exist. Unfortunately, this conclusion rests on inaccurate assumptions and stereotypes when applied to Indigenous societies. Not all Indigenous law is customary; it can also be positivistic, deliberative, or based on theories of divine or natural law. Furthermore, even if an Indigenous society practiced customary law, it is misleading to regard it as holding only moral force. Sometimes Indigenous customs are belittled because their societies have been inappropriately labelled as "savage".[15] Indigenous peoples have been described as "living without subjection" because of their "ignorance" and "stupidity" in not submitting to hierarchical political government.[16]

Opinions that Indigenous societies are lower on a so-called "scale of civilization" because of their non-European organization have not withstood scrutiny. Legal scholars have rejected these suggestions as a gross mischaracterization. Noted legal theorist Lon Fuller summarized the mischaracterizations of customary law as follows:

> If, in an effort to understand what customary law is and what lends moral force to it, we consult treatises on jurisprudence, we are apt to encounter some such explanation as the following…: Customary law expresses the force of habit that prevails so strongly in the early history of the race. One man treads across an area previously unexplored, following a pattern set by accident or some momentary purpose of his own, others then follow the path until a path is worn. [This] presents, I believe, a grotesque caricature of what customary law really means in the lives of those who govern themselves by it. [17]

---

14 John Austin, *The Province of Jurisprudence Determined*, 2nd Ed., Vol. I, W. Rumble ed., (Cambridge: Cambridge University Press, 1995) (first published, 1832) at 176. Thanks go to Professor Sakej Henderson, for bringing these references to my attention in *Indigenous Jurisprudence and Aboriginal Courts*, [unpublished].

15 *Ibid.*, Vol. I at 184 & Vol. II at 258.

16 *Ibid.*

17 Lon Fuller, "The Law's Precarious Hold on Life (1968-1969) 3 *Georgia. Law Review 530.* For further critiques of legal positivism's view of customary law see Henry Sumner Maine, *Ancient Law* (London: Dent., 1864) at 6; Lon Fuller, "Human Interaction and the Law" (1969) 14 *American Journal of Jurisprudence* 1; K. Llewellyn and E.A. Hoebel, "The Cheyene Way: Conflict and Case Law in *Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941); See E. Adamson Hoebel, *The Law of Primitive Man* (New York:

The Supreme Court of Canada has also condemned an approach that discounts Aboriginal customs. It commented: "The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or cultures, in effect subhuman species."[18] While courts and legislatures are important sources of law in Canada, it has long been accepted that a society does not need these institutions in order to possess law.

The Supreme Court of Canada has recognized that Aboriginal peoples possessed legal traditions and continue to possess them. In *R. v. Mitchell,* decided in 2001, it wrote that "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…"[19] In 2004, Chief Justice McLachlin of the Supreme Court of Canada wrote that: "Aboriginal peoples were here when Europeans came, and were never conquered."[20] There has been no wide-spread extinguishment of Indigenous legal traditions through military conquest, occupation, or legislative enactment. Though negatively affected by past Canadian actions, Aboriginal peoples continue to experience the operation of their legal traditions in such diverse fields as, *inter alia*, family life, land ownership, resource relationships, trade and commerce, and political

---

Atheneum, 1974); Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941); Max Gluckman, *Politics, Law and Ritual in Primitive Society* (Chicago: Aldine Publishing, 1965); Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman: University of Oklahoma Press, 1982); Antonio Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts and Land Claims* (Vancouver: UBC Press, 1994).

18 *Calder v. A.G.B.C.* [1973] S.C.R. 313 at 346-347.

19 *R. v. Mitchell* [2001] 1 S.C.R. 911 at para. 8.

20 *Haida Nation v. B.C. (Minister of Forests)* 2004 3 S.C.R. 511 at para. 25.

organization.[21] Indigenous legal traditions are inextricably intertwined with the present day Aboriginal customs, practices and traditions that are now recognized and affirmed in section 35(1) of the *Constitution Act, 1982*.[22]

This paper will show that there is a strong case for recognizing Indigenous legal traditions in Canada, and for providing Aboriginal peoples with the resources and political space to cultivate and refine Indigenous law according to their own aspirations and perspectives. This involves recognizing Indigenous laws, practices and customs, nurturing Aboriginal legal institutions, acknowledging the law-making authority of Indigenous governments, and removing obstacles to their proper functioning. Affirming Indigenous legal traditions would expand and improve the rule of law in the country, and benefit Aboriginal peoples and our society as a whole.

Many countries successfully exist with diverse legal traditions that respect different cultural and sub-national groupings. Some of these countries are bi-juridical and include both civil law and common law systems. Others are multi-juridical and include customary law regimes alongside civil or common law. Canada should be counted among these multi-juridical countries: it embraces common law, civil law and Indigenous legal traditions. Canada is a juridically pluralistic state, and draws on many sources of law to sustain order.[23] While civil and common law traditions are generally recognized across the country, this is not always the case with Indigenous legal traditions. Yet Indigenous legal traditions can have great force in people's lives

---

21 John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 *UBC Law Review* 285 at 300-307.

22 Constitution Act, 1982, Schedule B to the *Canada Act, 1982*, (U.K.) 1982 c. 11.

23 For a discussion of legal pluralism see Sally Engle Merry, "Legal Pluralism" (1988) 2 *Law and Society Review* 869.

despite their lack of prominence in broader circles.[24] Indigenous legal traditions are a reality in Canada and should be more effectively recognized.

B. Indigenous Legal Traditions: "What are their Sources and Scope?

Laws can arise whenever interpersonal interactions create expectations about proper conduct. Indigenous legal traditions develop in the same way; they can be based on supernatural declarations, naturalistic observations, positivistic proclamations, deliberative practices, or local and national customs. Some Indigenous laws are regarded as divine, given by the Creator in precise fashion for the world to follow. Others may be regarded as more naturalistic; some derive from the Creator, but others are timeless and independent of any external force. Natural law understandings that are not regarded as divinely formed are often discovered through observations of the physical and spiritual world. Though these observations and subsequent actions do not have the power to influence the law's requirements, people may then counsel with one another to describe the principles and practices of natural norms of order, and the remedies if they are violated.

Positivistic Indigenous legal traditions are often regarded as being of human origin, and not necessarily connected with any larger system of morality. These traditions can be changed by humans without any external consequences. Positivistic Indigenous laws can be formally proclaimed in feast halls, council houses, wampum readings and other similar settings. These functions can be carried out by a centralized authority, such as named chiefs, hereditary clan mothers, headmen, sachems and band leaders.

---

[24] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University

Many Indigenous laws are developed in a deliberative fashion, through councils, circles, and other informal meetings and gatherings. Some of the great democracies in early North America were based upon Indigenous legal precepts, as examples in the next chapter will demonstrate. Many Indigenous societies today continue to encourage very broad participation across their citizenry and are radically egalitarian. Some societies are so liberal in extending personal liberties to their members that every being has the legal right and practical opportunity to assist in the development of their laws. Other Indigenous democracies can severely restrict participation according to rules related to status, heredity, special accomplishment, or Canadian legal impediment.

Some Indigenous laws are customarily formed through established patterns of behaviour that can be objectively verified through observation within a certain cultural context. Customary laws are inductive; they are discerned by examining specific routines and procedures associated with conduct within a community. They achieve legal force when there is little dispute about how rights and obligations are regulated between community members.[25] Indigenous legal traditions often combine these different legal sources and create many layers of law within a single society: Divine, Natural, Positivistic, Deliberative and Customary.

As a result, different rules about their development, disclosure and application may exist. In terms of development, Indigenous peoples have some laws that cannot be changed by human agency, especially if their source is divine or naturalistic. Other laws may be quite capable of change through human intervention if they are positivistic, deliberative or customary. The distinction between divine natural law and positive, deliberative or customary law must be

---

Press, 1995).

[25] The laws of England largely operated through custom until precedent and consolidation took place through the 1700's. Patrick Glenn, "The Common Law in Canada" (1995) *Canadian Bar Review* 261. Even today, the

discerned in order to understand how to work with and within an Indigenous tradition. If a law is considered divine or natural, people from other traditions may find it difficult to abide by its precepts. For these people participation can be frustrating because of the faith or trust required to accept the law's sources.[26]

Similarly, rules related to the scope of disclosure must be understood in order to effectively understand Indigenous legal traditions. Just as cabinet discussions in a Parliamentary democracy may be privileged, some Indigenous legal procedures can be analogously limited. These limits exist because some Indigenous laws require special position, ceremonial recognition or hard work to receive them.[27] Others may have limited application or reception because of their hereditary nature. These limits may lead some to devalue Indigenous law as being secretive, non-transparent or undemocratic. However, before jumping to those conclusions, one must remember the pragmatic limits that also surround other Canadian legal traditions. The high degree of specialization necessary to understand, produce or practice Canadian law may be considered analogous to the special positions, ceremonies and hard work required by some Indigenous legal traditions. The substantial resources, societal position, or family connections required for Canadians to receive legal education, practice law, or become a judge may not be far removed from the hereditary privileges in some Indigenous societies.

---

common law method uses customs and traditions to fill gaps when interpreting written rules, *Reference re Secession of Québec*, [1998] 2 S.C.R. 217.

26 Indigenous peoples face similar challenges of faith and trust in the common law given that one of its sources in North America seems to necessitate the subordination of their governance, laws, and titles. For a theory of Canadian/Indigenous relationships that is based on the diminishment of Indigenous societies see Thomas Flanagan, *First Nations, Second Thoughts* (Montreal: McGill-Queen's Press, 2000).

27 Sometimes Indigenous laws find their articulation in ceremony. Ceremonies often consist of formalized rituals that enable its participants to directly participate in law. Each group created its own distinctive ceremonies and formalities to renew, celebrate, transfer or abandon their legal relationships. As such, the ceremonies of the Potlatch on the west coast produced entirely different legal relationships from those of the Sundance on the prairies, or the Midewiwin and False Face societies of central Canada. The stories told in the Big Houses of the Salish fundamentally differ from those told in the teepees of the Assinaboine, and these could be very different again from those spoken in the Longhouses of the Hodinohso:ni, or in the lodges of the Mi'kmaq. Some ceremonies required special initiation in order to participate, thus creating a realm of sacred knowledge with some traditions. Each group's ceremonies and stories varied according to its history, material circumstances, spiritual alignment and social structure.

Indigenous legal traditions are not alone in requiring special ceremonies, hard work and family connections.

Having noted the need to fairly and even-handedly judge questions of transparency within legal traditions, it is also important to observe that certain Indigenous laws were, and continue to be, decidedly undemocratic and far from transparent. In the past, some Indigenous societies practiced slavery, and placed limitations on personal rights and freedoms.[28] Like other countries, Indigenous peoples have forsaken slavery to the extent that the practice has little or no relevance for contemporary legal traditions. While the past existence of slavery demonstrates a high degree of social and legal organization, it no longer restricts Indigenous people from participating in the formulation and application of their laws. Unfortunately, the most likely source of restrictions on broader participation within Indigenous legal regimes today is Canadian law itself. The *Indian Act*, passed in 1876 to assimilate and manipulate Indigenous legal traditions, often restricts rules on participation.[29] It has also caused some First Nations to abandon specific legal traditions; others have subverted its precepts or incorporated them within their legal orders.[30] Additionally, Canadian governments have restricted the general franchise for many Aboriginal people, thus affecting the deliberative aspect of their legal traditions.[31]

---

28 Leland Donald, *Aboriginal Slavery in the Northwest Coast of North America* (Berkeley: University of California Press, 1997).

29 John Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in Ian Getty & Antoine Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1990) at 29.

30 *Indian Act*, R.S.C. c. I-5. See John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 *Osgoode Hall Law Journal* No. 2 at 291-354.

31 Indians could not vote for the first seventy five years of confederation, see for example, British Columbia *Qualification and Registration of Voters Amendment Act*, 1872, s. 13. Indians did not generally enjoy federal voting rights until 1960 when the federal franchise was finally extended to them without qualification. The provinces extended the franchise to Indians at different dates: British Columbia 1949, Manitoba 1952, Ontario 1954, Saskatchewan 1960, Prince Edward Island and New Brunswick 1963, Alberta 1965, Québec 1969. The Inuit were excluded from the federal franchise in 1934 but had the vote restored to them in 1950. Métis were always considered citizens able to vote in federal and provincial elections.

When Canadian interference is curbed, Indigenous laws can apply to entire societies, or operate at a local level, or be restricted to a particular person or question. Determining where and to whom Indigenous law should apply is not always easy. It requires more than a superficial exposure to the system. The search for understanding must also guard against stereotypes. Great differences exist within and among Indigenous peoples in what is now Canada. They developed differing spiritual, political and social customs and conventions to guide their relationships.[32] These diverse customs and conventions became the foundation for many complex systems of Indigenous law.[33]

C. Indigenous Legal Traditions: "How are they Recorded and Conveyed?"

Indigenous laws can be recorded and learned in many ways. Sometimes they are recorded orally. Memory devices play an important role in ensuring that important ideas are preserved. Memory aids can include wampum belts, masks, totem poles, medicine bundles, culturally modified trees, birch bark scrolls, petroglyphs, button blankets, land forms, and crests. In many Indigenous groups, oral tradition is conveyed through interwoven layers of culture that entwine to sustain national memories over many generations. The transmission of traditions in these

---

32 A representative description of one culture's (Gitksan and Wet'su'wet'en) societal conventions is found in Gisday Wa and Delgam Uukw, *The Spirit in the Land* (Gabriola Island, B.C.: Reflections Press, 1992).

33 "The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects," *Oxford English Dictionary*, 2nd Ed. (Oxford: Clarendon Press, 1989) at 712. Articles commenting of First Nations law include Bradford Morse and Gordon Woodman, eds., *Indigenous Law and the State* (Providence: Foris, 1988); Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 *Osgoode Hall Law Journal* 605. For a contrary view, see Roger F. McDonnell, "Contextualizing the Investigation of Customary Law in Contemporary Native Communities" (1992) 34 *Canadian Journal of Criminology* 299; *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) at 455:

> What the Gitksan and Wet'suwet'en witness[es] describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves.

For criticism of this view, see Michael Asch, "Errors in Delgamuukw: An Anthropological Perspective" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books, 1992) at 221. For a fuller description of Wet'suwet'en law, see Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts and Land Claims* (Vancouver: UBC Press, 1994).

societies is bound up with the configuration of language, political structures, kinship, clan, economic systems, social relations, intellectual methodologies, morality, ideology and the physical world. These factors assist people in knitting legal memories more tightly in their minds. Many types of traditions result from this process: memorized speech, historical gossip, personal reminiscences, formalized group accounts, representations of origins and genesis, genealogies, epics, tales, proverbs and sayings.[34] Indigenous legal traditions also often rely upon Elders or sanctioned wisdom-keepers to identify and communicate law. Each of these cultural strands are woven together and reinforced by specific practices. These practices may include complex customs like pre-hearing preparations, mnemonic devices, ceremonial repetition, the appointment of witnesses, dances, feasts, songs, poems, the use of testing, and the use and importance of place and geographic space. All help to ensure that certain traditions are accredited within the community. Oral tradition does not stand alone, but is given meaning through the larger cultural experiences that surround it.

At other times, Indigenous legal traditions may be intermixed with other traditional knowledge. They may be lodged in commentaries relating to stories, songs, ceremonies, feasts, dances, scrolls, totems, button blankets, wampum belts, etc. Clues to their historic existence and to the way in which they are applied may be found in missionaries' journals, government reports, settlers' correspondence, the research of anthropologists or other academics, newspaper articles, or fur trade records. These sources can be valuable, though extreme care must be used in drawing implications from them because of their partiality in understanding the culture being observed and the potential self-interest or bias of the observer.

---

[34] This list is taken from Jan Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985) at 13-27.

Sometimes Indigenous law is explicitly written; this can be done by Elders, Hereditary Chiefs, Clan Mothers, Tribal Councils, Band Councils, Public Governments, Tribal Court Judges, Indigenous lawyers and others. These writings interact with oral tradition to provide a more complete picture of Indigenous law. The present articulation of Indigenous legal traditions is to be found in functioning Indigenous governments or special societies where laws are codified for ease of access. These sources may also contain elements of self-interest and bias. But those who compose them likely possess the authority within their traditions to make these records and pronouncements. These versions of Indigenous law may be more reliable and respected than outside compilations because they are developed within a living cultural context.

II. Examples of Indigenous Law

Given the diversity of Indigenous laws and legal practice, it is perhaps most helpful to provide selected examples.[35] In this way, Indigenous law is shown in contemporary terms; idealized historical accounts are avoided. Care must always be taken not to over-simplify the self-contained nature of any legal tradition. Law, like culture, is not frozen; it is permeable and subject to cross-cutting influences.[36] To make laws, Indigenous peoples draw upon the best

---

35 Many Indigenous legal systems could be identified. However, it would be exceedingly difficult to outline Indigenous legal traditions within their own internal categories. At the same time, it would be inappropriate to force Indigenous law examples into common law and civil law boxes. This could mischaracterize Indigenous systems by organizing their legal relationships in terms of other legal cultures. The best way to provide examples seems to lie in sensitively providing descriptions that find resonance for Indigenous and non-Indigenous legal systems in Canada.

Civil law categories in the Québec Civil Code provide analogies: persons, the family, successions, property, obligations, prior claims, evidence, prescription, publication of rights, private international law. S.Q., 1991, c. 64.

Common law analogies can be taken from law school or law society divisions of subject matter: property law, tort law, contracts law, criminal law, constitutional law, legal process, administrative law, evidence, civil procedure, corporate and commercial law, family law, trusts, wills and estates, etc. The categorizations chosen in this paper borrow from broad comparisons and contrasts in civil law, common law and Indigenous legal systems. The Professional Legal Training Course of British Columbia breaks law down into the following categories: Civil Litigation, Estates, Family, Real Estate, Commercial, Company, Creditors Remedies, Criminal Procedure, Professional Responsibility and Law Office Management.

36 Clifford Gertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 167.

legal practices and procedures of their own culture, and of others. They compare, contrast, accept and reject legal standards from many sources, including their own. Indigenous law is a living system of social order and control. Some might call this revisionist, and thereby seek to undermine Indigenous governance and law. This criticism would be unfortunate and inaccurate. Law and governance is strongly revisionist, as it must be continually re-interpreted and re-applied in order to remain relevant in changing conditions. Law can become unjust and irrelevant if it is not continually reviewed and revised. Indigenous law is no different, and should not be held to higher standards.

Stereotypes must be jettisoned when they imply the ancient legal traditions of Aboriginal peoples were uniformly savage, or romantically existing in a state of continual harmony and peace. Nor is it helpful or true to suggest that Indigenous peoples lose their Aboriginality if they adopt contemporary codes of conduct. Indigenous legal traditions do not cease being Indigenous if they are called upon to deal with matters such as computer technology, stem-cell research, or insider trading in securities law. The authenticity of Indigenous law and governance is not measured by how closely they mirror the perceived past, but by how consistent they are with the current ideas of their communities.[37] This chapter provides examples of some Indigenous legal traditions. But it is important to remember that they exist within a culturally mixed milieu. In practice, they will draw upon insights and ideas from other Indigenous legal traditions, as well as from common law and civil law.

It should also be remembered that all legal traditions are subject to various interpretations. Disagreement is endemic in human affairs. Indigenous peoples are no different, and their

[37] The examples of Indigenous legal traditions in this paper do not permit sufficient detail to represent a comprehensive view of any one system. This is best left to those with the proper knowledge and authority. A legal commentary should never be confused with a legal judgment. Care must also be taken to ensure that the written word is not considered superior to oral and other forms of literacy. The living application of Indigenous legal traditions remains their best representation.

societies may well have different interpretations of law. In the following examples, disagreements may not be as clear as they should be. The need to briefly introduce and compare several legal traditions to show their variety may well simplify their internal complexity. At the same time, incongruity and differing interpretations are not signs that the community does not have law. To the contrary, multiple perspectives on a legal tradition are a sign that the tradition is vibrant and strong; it allows those with opposing viewpoints to maintain a relationship within the tradition. Canada's other legal traditions have wide disagreements within each and between both, but they are still accorded legitimacy and relevance. The dissenting opinions found in case law judgments and the opposing parties formed in legislatures and Parliament illustrate that complete accord is not needed in a functioning legal system.

The examples of Indigenous legal traditions in this paper are intended to develop an appreciation of how norms, practices, and interpretation coincide to provide authoritative direction. They show how Indigenous law channels behaviour by regulation, prevention and "cleaning up social mess".[38] They will also demonstrate how Indigenous law creates relationships between people by addressing the consequences of their actions.[39] The practices alone are not legally determinative; an element of intention is involved that invokes human agency in the ideological and interpretive dimensions of those practices.[40] The traditions that will be examined include the Mi'kmaq, Hodinohso:ni, Anishinabek, Cree, Métis, Carrier, Nisga'a, Inuit, and (for comparative purposes) the Navajo Nation of the south-western United States. The choices are not in themselves representative of the different categories of Indigenous law, but

---

38 Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) at 11.

39 Arthur Ripstein, "Justice and Responsibility" (2004) XVII *Canadian Journal of Law and Jurisprudence*, at 361-86.

40 Jeremy Webber, "Legal Pluralism and Human Agency" [unpublished manuscript].

they do convey a sense of the variety and complexity of Indigenous legal traditions in North America.

A. Mi'kmaq Legal Traditions

The Mi'kmaq people live in what is now Nova Scotia, eastern New Brunswick, Prince Edward Island, and southern Gaspé in Quebec. They are the People of the Dawn. The Mi'kmaq refer to themselves as *L'nu'k*, which means 'the people'. The title Mi'kmaq derives from their word *nikmak*, or 'my kin-friends'. Sakej Henderson describes Mi'kmaq legal traditions as ecological relationships that find jurisgenesis in their linguistic expression.[41] The Mi'kmaq language is verb-centered; it emphasizes states of being rather than fixed, noun-oriented categorizations of life. The language was formulated by experiencing and empirically identifying states of being within North Atlantic ecosystems.[42] Mi'kmaq legal thought builds upon their language and is shaped by these "ecological considerations mediated through their experiences, knowledge, spiritual understanding or interpretation and relationship to a local ecological order."[43]

For example, the Mi'kmaq confederacy, *Awitkatultik*, divides their territory into districts: *Sakamowati*. These districts acknowledge family rights to certain hunting grounds and fishing waters. Decisions within each district are based on what each group has learned from the beings within their territory: "The ecosystem in which they lived was their classroom; the life forms who shared the land were their teachers."[44] Building upon the earth's teachings in this manner, the Mi'kmaq people describe and apply legal responsibilities for their behavior. Leaders

---

41 James (Sakej) Youngblood Henderson, "First Nations'' Legal Inheritances in Canada: The Mikmaq Model" (1996), 23 *Manitoba Law Journal* 1.

42 James (Sakej) Youngblood Henderson, "*Ayukpachi*: Empowering Aboriginal Thought" in Marie Battiste ed. *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) at 256.

43 Kiera L. Ladner, "Governing Within an Ecological Context: Creating an AlterNative Understanding of Blackfoot Governance" (2003) 70 *Studies in Political Economy* 125 at 150.

of extended families (*saya*) and community spiritual leaders (*kaptins*) draw attention to these ecological relationships in order to guide and sustain order and continuity within their districts.[45] At the same time, everyone is given an opportunity to participate in this order (*wikamou*) during certain seasons.[46] The districts periodically gather to form a Grand Council, *Santé Mawíomi*, where they deliberate and facilitate consensus to better order their relationships.[47] Mi'kmaq unity in such relationships "resided in their cognitive realm: their language, culture and spirituality"[48], which once again is related to their ecological understanding of their territories.[49]

Mi'kmaq legal traditions also find expressions in their customary norms, "where flux was the universal norm and there was no noun-based system of positive law."[50] Sakej Henderson has written that "to codify this subtle order would be to change it. From a Mi'kmaq perspective, to freeze understandings into rules violated processes designed to balance the inherent flexibility of their worldview. No one person made or declared the customary rituals and solutions. 'Rules' were local solutions based on the experiences and consensual understandings." These customs covered most aspects of Mi'kmaq life, including individual freedoms, family responsibility,

---

44 Henderson, *Ayukpachi*, *supra* note 42 at 264.

45 Henderson, *First Nations' Legal Inheritances*, *supra* note 41 at 12.

46 *Ibid.*

47 *Ibid.* For further discussion of the *Santé Mawíomi* see *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back, Vol. 1* (Ottawa: Supply and Services, 1996) at chapter 4:

> The Mawíomi, which continues into the present time, recognizes one or more *kep'tinaq* (captains; singular: *kep'tin*) to show the people the good path, to help them with gifts of knowledge and goods, and to sit with the whole Mawíomi as the government of all the Mi'kmaq. From among themselves, the kep'tinaq recognize a *jisaqamow* (grand chief) and *jikeptin* (grand captain), both to guide them and one to speak for them. From others of good spirit they choose advisers and speakers, including the *putu's*, and the leader of the warriors, or *smaknis*.

48 *Ibid.*

49 See Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back, Vol. 1 (Ottawa: Supply and Services, 1996) at chapter 4:

> At the annual meeting, the *kep'tinaq* and *Mawíomi* saw that each family had sufficient planting grounds for the summer, fishing stations for spring and autumn and hunting range for winter. Once assigned and managed for seven generations, these properties were inviolable. If disputes arose, they were arbitrated by the *kep'tinaq* individually or in council.

50 Henderson, *First Nations' Legal Inheritances*, *supra* note 41 at at 14.

national organization and trans-national relations.[51] They also dealt with issues that would be considered criminal law matters under Canadian law,[52] making distinctions, for example, between murder, manslaughter, and accidental death.[53]

Many Mi'kmaq legal customs developed from their views of Creation and their explanations about their responsibilities in the world. These views and their implications were described in the following terms by the Royal Commission on Aboriginal Peoples:

> The Mi'kmaq were taught that the spark of life in living things has three parts: a form that decays and disappears after death; a *mntu* or spark that travels after death to the lands of the souls; and the guardian spark or spirits that aid people during their earth walk. While the form is different, all *mntu* and guardian spirits are alike but of different forces. No human being possessed all the forces, nor could human beings control the forces of the stars, sun or moon, wind, water, rocks, plants and animals. Yet they belong to these forces, which are a source of awe and to which entreaties for assistance are often addressed.
>
> Since all objects possess the sparks of life, every life form has to be given respect. Just as a human being has intelligence, so too does a plant, a river or an animal. Therefore, the people were taught that everything they see, touch or are aware of must be respected, and this respect requires a special consciousness that discourages carelessness about things. Thus, when people gather roots or leaves for medicines, they propitiate the soul of each plant by placing a small offering of tobacco at its base, believing that without the co-operation of the *mntu*, the mere form of the plant cannot work cures.
>
> Mi'kmaq were taught that all form decays, but the *mntu* continues. Just as autumn folds into winter and winter transforms into spring, what was dead returns to life. The tree does not die; it grows up again where it falls. When a plant or animal is killed, its *mntu* goes into the ground with its blood; later it comes back and reincarnates from the ground.

---

51 *Ibid.* at 10-27.

52 Christie Jefferson, *Conquest by Law* (Ottawa: Supply and Services, 1994) at http://ww2.psepc-sppcc.gc.ca/publications/abor_policing/Conquest_by_Law_e.asp.

53 See the following story at Wilson Wallis and Ruth Wallis, *The Micmac Indians of Eastern Canada* (Minneapolis: University of Minnesota Press, 1954) at 175.

> One night a man went to hunt moose, gave the moose call, and heard an answer. He was wearing, as a disguise, antlers of bark, in imitation of a moose. He called again, and this time was sure that the answer came from a moose. The other, who was in fact a man, saw the antlers in the bushes and shot at it. He heard a fall, and went over to look at his kill. He peeled off a piece of bark, lighted it, held it up as a torch, and saw a fallen man, shot through the heart. He carried the body home, and explained how the misadventure had happened. He was not punished.

See also Bernard Hoffman, The Historical Ethnography of the Micmac of the Sixteenth and Seventeenth Centuries (California: University of California, 1946) at 515.

Each person, too, whether male or female, elder or youth, has a unique gift or spark and a place in Mi'kmaq society. Each has a complementary role that enables communities to flourish in solidarity. Like every generation, each person must find his or her gifts, and each person also needs to have the cumulative knowledge and wisdom of previous generations to survive successfully in a changing environment. In this respect, oral accounts such as the creation story served not only to communicate a particular story, but also to give guidance to succeeding generations on the appropriate way to live — how to communicate with other life forms, how to hunt and fish and respect what is taken, and how to take medicines from the earth. Stories that feature visions and dreams help to communicate lessons learned from the past.[54]

---

[54] *Royal Commission*, Vol. 1, *supra* note 49. The Royal Commission, reproduced *A Mi'kmaq Creation Story* as follows:

> On the other side of the Path of the Spirits, in ancient times, *Kisúlk*, the Creator, made a decision. Kisúlk created the first born, *Niskam*, the Sun, to be brought across *Sk•tékmujeouti* (the Milky Way) to light the earth. Also sent across the sky was a bolt of lightning that created *Sitqamúk*, the earth, and from the same bolt *Kluskap* was also created out of the dry earth. Kluskap lay on Sitqamúk, pointing by head, feet and hands to the Four Directions. Kluskap became a powerful teacher, a *kinap* and a *puoin*, whose gifts and allies were great.
>
> In another bolt of lightning came the light of fire, and with it came the animals, the vegetation and the birds. These other life forms gradually gave Kluskap a human form. Kluskap rose from the earth and gave thanks to Kisúlk as he honoured the six directions: the sun, the earth, and then the east, south, west and north. The abilities within the human form made up the seventh direction.
>
> Kluskap asked Kisúlk how he should live, and Kisúlk in response sent Nukumi, Kluskap's grandmother, to guide him in life. Created from a rock that was transformed into the body of an old woman through the power of Niskam, the Sun, Nukumi was an elder whose knowledge and wisdom were enfolded in the Mi'kmaq language.
>
> Nukumi taught Kluskap to call upon *apistanéwj*, the marten, to speak to the guardian spirits for permission to consume other life forms to nourish human existence. Marten returned with their agreement, as well as with songs and rituals. Kluskap and his grandmother gave thanks to Kisúlk, to the Sun, to the Earth and to the Four Directions and then feasted. As they made their way to understand how they should live, Kluskap then met *Netawansum*, his nephew, whom Kisúlk had created in his human form from the rolling foam of the ocean that had swept upon the shores and clung to the sweetgrass. Netawansum had the understanding of the life and strength of the underwater realms and he brought gifts from this realm to Kluskap, including the ability to see far away. They again gave thanks and feasted on nuts from the trees.
>
> Finally they met *Níkanaptekewísqw*, Kluskap's mother, a woman whose power lay in her ability to tell about the cycles of life or the future. She was born from a leaf on a tree, descended from the power and strength of Niskam, the Sun, and made into human form to bring love, wisdom and the colours of the world. As part of the earth, she brought the strength and wisdom of the earth and an understanding of the means of maintaining harmony with the forces of nature.
>
> They lived together for a long time, but one day Kluskap told his mother and nephew that he and his grandmother Nukumi were leaving them to go north. Leaving instructions with his mother, Kluskap told of the Great Council Fire that would send seven sparks, which would fly out of the fire and land on the ground, each as a man. Another seven sparks would fly out the other way and out of these seven sparks would arise seven women. Together they would form seven groups, or families, and these seven families should disperse in seven directions and then divide again into seven different groups.
>
> Like the lightning bolts that created the earth and Kluskap, the sparks contained many gifts. The sparks gave life to human form; and in each human form was placed the prospect of continuity. Like Kluskap before them, when the people awoke naked and lost, they asked Kluskap how they should live. Kluskap taught them their lessons, and thus he is named "one who is speaking to you" or the Teacher-Creator.

The quotation shows that the relevance of Creation for Mi'kmaq legal freedoms and responsibilities is multi-faceted. The existence of *mntu* in every being extends legal personality beyond that present in other Canadian legal traditions. The need for respect, demonstrated by their awareness of the need for cooperation from the natural world, also has legal implications. The more centralized place of stories, dreams and visions in the legal tradition is certainly different from the interpretive world of common or civil law, but is nevertheless a part of the jurisprudential obligations felt by Mi'kmaq citizens.[55]

Mi'kmaq legal traditions are also expressed by regularized wampum readings, *Inapskuk*.[56] Wampum was traditionally made of clam shells that were drilled and threaded into strings or woven into belts.[57] Different colours have different symbolic meanings.[58] Wampum strings and belts are used as memory aids to validate the authority of persons carrying messages between communities and nations.[59] During wampum recitations, information about Mi'kmaq creation, migrations, and relationships with other nations is recounted and reproduced. The concept of peace, order and good government within Mi'kmaq society is facilitated by using these legal traditions to interpret the world around them. These 'readings', orally transmitted, are often accompanied by ceremonies. They also can include more recent 'stories' to ensure that their legal traditions remain relevant.

Source: This segment is based on a story taken from the ancient teachings of Mi'kmaq elders. The ancient creation story was compiled by Kep'tin Stephen Augustine of Big Cove, New Brunswick. See *Introductory Guide to Micmac Words and Phrases*, compiled by Evan Thomas Pritchard, annotations by Stephen Augustine, observations by Albert Ward (Rexton, N.B.: Resonance Communications, 1991). Another version is recounted by Reverend D. MacPherson in *Souvenir of the Micmac Tercentenary Celebration* (St. Anne de Restigouche: Frères Mineurs Capucins, 1910).

55 James (Sakej) Youngblood Henderson, "Mikmaw Tenure in Canada" (1995) 18 *Dalhousie Law Journal* 195 at 217-136.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

Mi'kmaq and other Indigenous legal traditions, such as wampum belts, have often been brought before Canadian courts as evidence of Mi'kmaq use and occupation of lands and resources. Unfortunately, this strategy can result in Mi'kmaq law being misunderstood, and doubt being cast on its authenticity. When Indigenous legal traditions are measured by historians or anthropologists, the wrong questions are often asked. Law is not simply a matter of history; it uses a normative framework to interpret past events and make contemporary assessments. Historians and anthropologists risk applying inappropriate criteria to Indigenous legal traditions when they read them solely as proof of past events.[60] It is as wrong to treat Mi'kmaq law simply as history as it would be to do the same with the decisions of Canadian courts. Mi'kmaq history is related to law because past events structure contemporary legal options; however, history is not law. Law is more explicitly normative and iterative; it develops through time in a value-laden context to take account of contemporary circumstances.

Judges who are asked to treat legal traditions as history should be clear about what is being asked of them. They should consider the distinctions between their discipline and that of historians and anthropologists. The historical method and legal analysis are significantly different. In law school, future judges are taught to measure law by its relationship to past cases and to broader policy issues. Lawyers do not evaluate law by measuring how closely it correlates with a historian's explanation of the past. Through time, legal accounts of prior events can diverge from historical accounts. The divergence is necessary to preserve the law's persuasiveness.

This divergence between law and history is also seen in Canadian jurisprudence. During the early decades of the last century, a dispute arose about whether 'persons' in section 24 of the

---

[60] John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39 *Osgoode Hall Law Journal*. 1.

British North America Act, 1867 included females.[61] This case, known as the 'Person's Case', developed the distinction between history and law. The historical approach to the issue was to give the word 'persons' the meaning it possessed when the *Act* was passed. This approach was rejected by the Judicial Committee of the Privy Council in favour of one that recognized law's normative aspects. The Court wrote that while it may be "legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn there from are extremely slight."[62] Judges and others would do well to recall that history is not law when they interpret Indigenous legal traditions. History might be useful to show what facts existed at the time legal traditions like those of the Mi'kmaq developed in the distant past. But major legal inferences should not be drawn from these facts, because law serves a different purpose.

Canadian jurisprudence has given reasons for the distinction between historical and legal methodologies when interpreting the past. For example, in the Person's Case the Privy Council wrote that it was "not right to apply rigidly to Canada of today the decisions or reasons thereof…to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development".[63] The law recognizes that communities and peoples undergo a continuous process of evolution.[64] Great care must be taken not to interpret one community's law by rigid adherence to the customs and traditions of another.[65] Lord Sankey of the Privy Council wrote that:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention.[66]

---

61 A. Prentice et. al, *Canadian Women: A History* (Toronto: HBJ-Holt Canada, 1988) at 207-208, 282-283.

62 *Edwards v. A.G. Canada* [1930] 1 DLR 98 (JCPC).

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

With this statement, the courts explicitly recognized that formative laws should not be treated as history when drawing inferences about past events. This same insight has significant implications for evaluating Mi'kmaq and other Indigenous legal traditions. Mi'kmaq legal traditions develop through usage and convention. Their present articulation should be judged accordingly, they should not be seen as inauthentic or false because present interpretations are not in accordance with 'facts' at the time they developed.

Just as in the Person's Case, historical interpretations will differ from legal interpretations. The same distinction applies when analyzing Mi'kmaq or other Indigenous legal traditions. Indigenous people are sometimes judged as being 'in error' when their legal traditions do not corroborate historical facts. No judge or court would appreciate being labelled as 'not credible' because their interpretations of the past are different from historians. Yet Indigenous legal officers have often faced similar damaging labels.

Some of the blame can be placed on lawyers who ask courts to evaluate these traditions by the wrong standards. The case of *R. v. Marshall* from Nova Scotia, testing Aboriginal and treaty rights to log for commercial purposes, is an illustration.[67] At trial, Chief Stephen Augustine, presented stories and read wampum related to Mi'kmaq law.[68] His testimony was judged as though he was presenting pure history as proof of past events.[69] When elements of his testimony did not accord with how the Court found Mi'kmaq law historically developed, Chief

---

67 The Supreme Court of Canada's decision in this case is styled *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 (CanLII).

68 *R. v. Marshall*, (2001), 191 N.S.R. (2d) 323; [2001] 2 C.N.L.R. 256 at para 57:

> Chief Augustine testified about stories passed down to him by his family. The most important of the stories were the Mi'kmaq creation story and the Getoasaloet story his grandmother told him when he was young. His grandmother said she had learned the creation story from his grandfather whom she had married while she was very young and his grandfather was very old. Chief Augustine said he had told the story at meetings of the Grand Council.

69 *Ibid.* at para. 58:

Augustine was found to be 'in error'.[70] This unfortunately diminished his credibility within the court and obscured the normative framework of the legal tradition he presented.

In particular, there was a dispute over whether one of the wampum belts he presented was from the 1600's or from a later date. Chief Augustine believed that it came from the 1600's, but an anthropologist was able to persuade the court that it was made much later. The focus on calendar dates rather than Mi'kmaq jurisprudential norms misconstrued Chief Augustine's knowledge as historical evidence rather than law. As previously noted, the judge was not entirely responsible for this error. The lawyers also bear some responsibility. More importantly however, the main criticism must lie with the framework of Canada's legal tests related to Indigenous legal traditions.

The inappropriateness of treating Mi'kmaq legal tradition as history rather than law is shown in the following portion of the provincial court's decision in *R. v. Marshall:*

> 59. It is worthy of note that Chief Augustine also testified about a wampum belt at the Vatican Archives. He and others had seen a photograph of the belt in a book. He and others had concluded that the belt was a representation of the linking of the Mi'kmaq Nation with Christianity when Membertou was baptized in the early 1600s. There is no doubt Chief Augustine firmly believed what he said about the belt. His good faith was demonstrated by the months of painstaking work he did to produce a replica of the belt. The replica itself is a beautiful work of art.
>
> 60. The crown witness Dr. von Gernet went to the Vatican Archives and studied the belt. He found conclusive evidence it had been made by aboriginals in Quebec as a gift for the Pope more than 200 years after Membertou's baptism. It had nothing to do with Nova Scotia or the Mi'kmaq.
>
> 61. When the defence received Dr. von Gernet's report, Mr. Wildsmith first purported to withdraw the portion of Chief Augustine's testimony dealing with the belt and then said the defence would no longer rely on the belt as part of its case. I said that amounted to an acknowledgement that Chief Augustine was wrong about the belt. I said I would consider that error in weighing Chief Augustine's other evidence.

> The defence offered those stories as evidence of ancient connections between the Mi'kmaq and their territory and of the ancient roots of the seven districts into which that territory is divided. …

[70] *Marshall*, *supra* note 68 at para. 56-65.

> 62. Dr. von Gernet testified at length about oral traditions. He said beliefs in themselves must always be respected, but when offered as proof of historical fact, they can't be accepted uncritically. They must be examined for accuracy. He said aboriginal memories are not biologically superior to those of non-aboriginals. He said there were ways of improving the accuracy of oral traditions, such as training and group validation. There was no evidence of those or other methods of improvement being used by Chief Augustine and the Mi'kmaq. He referred to the "feedback effect" by which ideas generated outside a culture are adopted by the culture. He pointed out that Mi'kmaq are literate and many have been for generations. He said after exposure to written materials it becomes increasingly difficult for the individual or the culture to distinguish between ancient traditions and those more recently arrived from the outside.
>
> 63. Chief Augustine knows a great deal about Mi'kmaq culture and history. He is a man of great dignity. …I found him thoroughly truthful, but I was not persuaded by him that the Grand Council or the seven districts were ancient Mi'kmaq traditions. The written record proves otherwise.
>
> 64. In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 and *Delgamuukw v. British Columbia*,[1997] 3 S.C.R. 1010, the Supreme Court of Canada said courts must put oral traditions on the same footing as documentary evidence in cases involving aboriginals. The court did not say oral tradition was better than documentary evidence or that the smallest amount of oral tradition was to be accepted over a mountain of documentary evidence.
>
> 65. In the present case we have evidence of oral tradition provided by a single witness. We don't know whether the traditions he relates were influenced by his own literacy or that of his forebears. We don't know whether there are other Mi'kmaq tradition bearers or other traditions about the same topics. On the other hand, we do have a mass of 18th-century documents, both French and British, containing no evidence of seven districts or a grand council. The massive written record is far more convincing than the minimal oral evidence.[71]

It is unfortunate that Chief Augustine's testimony was improperly presented as 'pure' history, and not law. It is simply not the case that the reconstructed belt "had nothing to do with Nova Scotia or the Mi'kmaq." The belt exists as a present-day legal text and is of great relevance for Nova Scotia and the Mi'kmaq even if it was made two hundred years after Chief Augustine believed. By treating the tradition as history, the judge drew different inferences than would be the case if the wampum were viewed as a legal text. The written record is used to crush Mi'kmaq normative judgments about their wampum, districts, and Grand Council. They are simply not to be believed as history, which collaterally casts doubt on their reliability as present-

---

[71] *Ibid.*

day legal traditions. Chief Augustine is labeled in a derogatory fashion as the "self-proclaimed interpreter of wampum belts."[72]

Another unfortunate aspect of the judgment, caused by casting Chief Augustine's testimony solely in an historic light, is that it seems to diminish traditions if they take account of and speak to other traditions. Law is not static in this way. Canadian judges, lawyers and legal academics would bristle at the suggestion that their legal opinions could not be influenced by their study of factors outside their home culture. Yet Chief Augustine's testimony seemed to have less weight because it was influenced by his "own literacy" and was subject to the so-called "feedback effect" of ideas generated outside his culture. Canadian legal framework appears to discount Indigenous traditions if they intermingle with those that arrived later. The danger is that this conclusion will be imported into the legal field to discount Indigenous traditions as law if they are influenced by other Canadian legal traditions. It would be a grave mistake to judge Indigenous

---

[72] The Nova Scotia Supreme Court restated the Provincial Court's decision as follows:

> [115] …There is also reference in Judge Curran's decision to the oral tradition and evidence of Stephen Augustine, a Hereditary Mi'kmaq Chief from New Brunswick and member of the Mi'kmaq Grand Council. The Learned Trial Judge acknowledged that Chief Augustine knows a great deal about Mi'kmaq culture and history. The Trial Judge did not appear to doubt the truthfulness of Chief Augustine. The evidence would appear to support a determination by the Trial Judge to the effect that while Chief Augustine was telling the truth as he knew it, much of Chief Augustine's evidence was not historically accurate and Judge Curran specifically ruled:
>
> I was not persuaded by him that Grand Council or seven districts were ancient Mi'kmaq traditions.
>
> I refer to other evidence which supported the Trial Judge's conclusion. Dr. Von Gernet referred to evidence Chief Augustine gave in relation to a wampum belt at the Vatican Archives. Chief Augustine suggested this was a representation of the linking of the Mi'kmaq nation with Christianity when Membertou was baptized in the early 1600's. Dr. Von Gernet went to the Vatican Archives and studied the belt, finding conclusive evidence that it had been made by Aboriginals in Québec as a gift for the Pope more than 200 years after Membertou's baptism. It was conceded by the Appellant's counsel at trial that the belt had nothing to do with Nova Scotia or the Mi'kmaq. Dr. Von Gernet cautioned about neo-traditionalism in relation to proof of historical events. He recognized that many traditions are very important to many modern native societies. That does not necessarily mean they are rooted in history.
>
> [116] Both *Van der Peet* and *Delgamuuk*w make it clear that oral evidence is important in terms of conveying Aboriginal perspective. That does not mean it must be accepted as being historically accurate if there is convincing evidence to the contrary. Oral tradition is not any better than documentary evidence and it is not to be blindly accepted over a mountain of documentary evidence. The risks associated will oral history or oral tradition become very apparent when as in the present case it became obvious that the wampum belt was not part of Mi'kmaq history. In spite of this lack of connection the self-proclaimed interpreter of wampum belts in this case testified as to his reading of the belt and what it meant to the Mi'kmaq people.

legal traditions as inauthentic or inaccurate if they are not historically 'pure'. Law is a deliberative cultural phenomenon that engages the past in the light of subsequent normative interpretations. Indigenous legal traditions should not be measured primarily as expressions of past historical events, but rather as normative frameworks for peace and order. If Chief Augustine had been considered to be interpreting Mi'kmaq legal tradition, rather than historical evidence, different inferences and a very different methodology would be in play. We would be more interested in why creation stories, wampum, councils and districts are important in contemporary Mi'kmaq interpretations of their relationships. If we examined Chief Augustine's testimony from this perspective, we might see that peace, order and continuity is achieved in Mi'kmaq law by highlighting their more recent interpretive opinion. Mi'kmaq legal order is maintained by its ongoing performative re-enactment and re-interpretation. Just as precedent is measured by the most recent cases, rather than by their first formulation, so Mi'kmaq legal tradition must be considered in its most recent light. It is freely accepted that law as a living, interpretive engagement between the past and the present is a necessary part of other legal traditions. The same acceptance should not be denied to Indigenous legal traditions.

Some common law illustrations might help to demonstrate the necessity of judging Indigenous law as distinct from history[73] Judges and legal commentators have sometimes made statements that are historically inaccurate but are, nonetheless, legally valid. For example, in the case of *Woolmington v. D.P.P.,* Lord Sankey, this time speaking for the English House of Lords, proclaimed that the accused is presumed innocent until proven guilty.[74] In arriving at this conclusion, he wrote: "Throughout the web of the English Criminal Law one golden thread is

---

(2002), 202 N.S.R. (2d) 42; [2002] 3 C.N.L.R. 176 at para 115.

73 Thanks go to Benjamin Berger and Hamar Foster for suggesting these possible analogies.

74 *Woolmington v. D.P.P* [1935] A.C. 462 (H.L.). For commentary see Benjamin Berger, "Trial by Metaphor: Rhetoric, Innovation and Juridical Text" (2002) 29 *Court Review* 30.

always to be seen, that is the duty of the prosecution to prove the prisoner's guilt."[75] In fact, Lord Sankey is historically inaccurate, even if his conclusion is legally correct. It has not *always* been the case that people were presumed innocent. Bruce Smith has concluded: "Many English criminal defendants in the late eighteenth and early nineteenth centuries did *not* benefit from a presumption of innocence but, rather, struggled against a statutory presumption of *guilt*."[76] One can imagine the indignities Lord Sankey might suffer if he were asked to give testimony about the historical presumption of innocence in English criminal law in court and his opinion was valued only for the proof of past treatment of prisoners. He would be in the same position as Chief Augustine, and might not fare too well under cross examination. Lord Sankey was not acting as a historian when he expressed his opinion about presumptions of innocence in England, he was drawing legal inferences to arrive at his conclusion.

Similarly, William Blackstone's historically inaccurate comments about juries show the need to distinguish between law and history. Prior to 1215, an individual accused of a criminal offence in England would have faced a Trial by Ordeal.[77] Even after 1215, and well into the 18th century, juries were far from the pristine institutions that Blackstone suggests. Judges exerted substantial control over jury decision-making.[78] Despite the historical fact that, in England, juries were not always present, or that their availability in criminal trials was limited until recently, Blackstone wrote that "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law".[79] Blackstone cannot be regarded as making an accurate historical

---

75 *Ibid.* at 481.

76 Bruce P. Smith, "The Presumption of Guilt and the English Law of Theft, 1750–1850" (2005) 23 *Law and History Review* 133. For a discussion of this principle in the United States see William S. Laufer, "The Rhetoric of Innocence" (1995) 70 *Washington University Law Review* 329.

77 Benjamin Berger, "Peine Forte et Dure: Compelled Jury Trials and Legal Rights in Canada" (2003) 48 *Criminal Law Quarterly* 207.

78 Benjamin Berger, "Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals" (2005) 10 *Canadian Criminal Law Review* 1.

79 William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1795 – 1769, Vol. III* (Chicago and London: University of Chicago Press, 1768) at 379.

claim.[80] He finds himself in the same company as Chief Augustine sharing his interpretation of Mi'kmaq legal traditions in the *Marshall* case. It is more helpful to consider both Blackstone and Augustine not as historical commentators, but as legal ones who are drawing inferences about the past for normative purposes.

This distinction between law and history is important as other Indigenous traditions are reviewed in this paper. For legal purposes, their relevance is determined by normative congruity between the tradition and the community. If these traditions are tested by historical methods alone, not only will readers miss their relevance for Indigenous peace and order, they will also find themselves mired in an inquiry that may not be capable of solution. Who is to say that the belt such as the one Chief Augustine replicated did not exist among the Mi'kmaq prior to a possible Papal re-gifting to Quebec Indians at a much later period? They may have existed, but we simply may never have found the originals. Chief Augustine's copy could have come from a later representation. More generally, approaching Indigenous legal traditions from an historical perspective will likely never likely produce agreement on the "facts" of Virgin-born Peacemakers, stone canoes, living rocks, talking plants, gossiping animals, transforming humans and supernatural beings from other worlds. Indigenous legal traditions must be understood in the context of their own interpretive rules, just as common law and civil law are understood in accordance with their own distinctive cultural traditions.

B. Hodinohso:ni Legal Traditions

Hodinohso:ni people, known more widely as the Iroquois Confederacy, historically lived in fortified villages in lands now called Southern Ontario, Southern Québec, New York and

---

[80] Hamar Foster, "Trial By Jury: the Thirteenth Century Crisis in Criminal Procedure" (1979) 13 *UBC Law Review* 280.

Wisconsin.[81] The Iroquois people of the lower Great Lakes and St. Lawrence Valley created a confederacy to consolidate peace between themselves and their neighbours. The confederacy was first made up of five nations: the Mohawk, Oneida, Onondaga, Cayuga, and Seneca. They were joined by the Tuscaroras in 1722 when they migrated from Carolina. The confederacy is still organized in this manner and resides in its historical territories.

Hodinohso:ni legal traditions are complex and sophisticated. Their Great Law of Peace, *Kaianerekowa*, bound the Iroquois nations together into a confederacy of considerable strength.[82] Its narrative and principles brought peace, power and righteousness to generations of Iroquois people, and continues to be important to Hodinohso:ni people today.[83] Its influence spread beyond its longhouses and had an impact on political discourse in the United States,[84] and on other Indigenous peoples.[85] The *Kaianerekowa* stands among the world's great legal codes as a testament to the power of human creativity and accomplishment. The Great Law of Peace is one of North America's most recognizable Indigenous constitutions.[86]

There are numerous written descriptions of the Great Law but its primary authority continues to reside in its spoken version.[87] The Great Law begins with the Peacemaker who was born into

---

81 See Lewis H. Morgan, *League of the Ho-He-No-Sau-Nee or Iroquois* (New York: Burt Franklin, 1901, Volume I).

82 Francis Jennings, *The Ambiguous Iroquois Empire* (New York: W.W. Norton and Company, 1990).

83 Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999).

84 Donald A. Grinde, Jr., and Bruce E. Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: American Indian Studies Centre 1991); Bruce E. Johanesen, *Forgotten Founders: How the American Indian Helped Shape Democracy* (Boston: Harvard Common Press, 1982).

85 John Borrows, "Wampum at Niagara: Canadian Legal History, Self-Government, and the Royal Proclamation" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1998).

86 William Fenton, *The Great Law and the Longhouse* (Norman: University of Oklahoma Press, 1998).

87 Jake Thomas, *Reading the Great Law of Peace* (Iroquoian Institution, 1992) (10 Video Tape Series).

the Wendat Nation of a virgin mother.[88] His early life is filled with trials until his grandmother is told in a dream that the Creator has a great work for him to perform. When he is old enough, the Peacemaker travels in a white stone canoe away from his people who reject his message. He lands in the Mohawk Nation where war, chaos, destruction and cannibalism abound and he delivers the Creator's message that war must cease. The Peacemaker is rejected by the Mohawks and taken in by Jikonsahseh, a strong woman who changes her life when she accepts his message. As a result of her willingness to hear the Peacemaker's words, Jikonsahseh becomes the Mother of Nations. The Peacemaker explains to her the principles of Peace, Power and Righteousness and the concept of the longhouse as a metaphor for the Great Law. In the National Confederacy that the Peacemaker proposes, women are given the role of Clan Mothers.

The Great Peace narration continues with the Peacemaker journeying onward; he meets Hayenwath (Hiawatha) after spying on him from the roof of his house from where he observes his cannibalism. Hiawatha spots the Peacemaker's reflection in the pot of soup he is about to eat and is transformed by the experience. The Peacemaker teaches him the evils of cannibalism and counsels him to eat deer meat. Deer antlers will become symbols of authority in the Confederacy.

With Hiawatha, the Peacemaker journeys back to the Mohawks where he once again proclaims his message. His powers are recognized when he emerges unscathed from a fall into a deep ravine from a tall tree that was chopped down from underneath him. The Mohawk chiefs accept his message of peace. He seeks out the Onondaga, but is prevented from meeting them by an evil trickster Tododaho. Hiawatha also faces trials with the Onondaga when Osinoh, a witch

[88] The structure of this overview follows the outline of the Great Law of Peace found at http://www.sixnations.org/Great_Law_of_Peace/.

transformed into an owl, murders his daughters. These challenges cause Hiawatha to battle with depression that he only partially overcomes with wampum strings.[89] He takes these strings to the Mohawks who receive him as an honoured chief. At this meeting, Hiawatha teaches the Mohawks proper protocols for creating peaceful relations, such as announcing the arrival of a peaceful visitor by building a signal fire at the village edge, and making wampum strings to be used to deliver messages. Next, the Peacemaker teaches Hiawatha even deeper principles about wampum as he removes his depression by using eight of Hiawatha's thirteen wampum strings. Since this frees Hiawatha's mind from pain, the Peacemaker determines that wampum will be used to carry the Creator's message.

At this point, the Peacemaker searches for Tododaho, a twisted, evil man, to receive his message with the Onondoga. The Peacemaker sends transformed animals and messages to bear his words, but each time he is rebuffed. While he is seeking Tododaho, he continues to proclaim his message with the result that the Cayuga, Oneida and Seneca join the Confederacy. The Peacemaker leads the four Confederacy members to Tododaho in an attempt to soothe his wrath. The Onondoga sing about the Confederacy, the *Kaianerekowa* and their ancestors. Tododaho finally accepts the message of peace when he receives a promise that his position in the Confederacy will be central and that Onondaga will be the capital of the League.

The Peacemaker and Hiawatha then create chieftainships to protect the peace. The chiefs are given instructions on how to live their lives and run their councils through roll calls and protocols. The Clan`s central role in the Confederacy's structure is described and future warnings are given. The chiefs are adorned with deer antlers as a sign of their authority. The path to

---

89 Wampum was made traditionally of clam shells, drilled and threaded into strings or woven into belts. Wampum of various colours carried different symbolic meanings. Wampum strings and belts eventually came to be used as aids to memory and to validate the authority of persons carrying messages between communities and nations.

communication is then cleared. Wing fans and poles are used to sweep dirt and keep unwanted beings away from the council fire. Laws are taught in greater depth through the development of metaphors. They deal with many things: the five fireplaces of the longhouse, wampum, the Tree of Peace, the circle of chiefs, the eagle, the white roots of peace, the burying of weapons under the tree, a feast of beaver tail, the binding of five arrows, and the council fire's smoke which pierces the sky. Each of these symbols communicates detailed aspects of the law. The Great Law continues with laws relating to adoption, emigration, individual rights and international relations. A Condolence Ceremony is outlined for use when a chief dies to help maintain the stability and mental health of the Confederacy's other chiefs. Once these principles are taught, the Peacemaker departs, leaving a promise of his return and a warning not to use his name except in special cases.

The Great Law is built on the consensus and agreement of the people. Future generations were considered a formal part of their deliberations. Unanimity was necessary for council decisions to be adopted.[90] Each of the nations of the Confederacy kept their independence and individuality within a centralized decision-making structure.[91] The council of fifty chiefs administered Confederacy business, repeatedly passing ideas across a fire to explore and analyze ideas before actions were taken. Any Iroquois nation of the Hodinohso:ni could request a meeting of the council by sending runners with wampum belts to indicate the time, place and agenda of the meeting.[92] The Onondoga nation, as the firekeepers of the council, could decide whether the issue would come before the Confederacy for full debate.

---

90 John Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: Native Law Centre, 1985) at 40.

91 Henry Lewis Morgan, *League of the Ho_De-No-Sau-Nee or Iroquois* (Rochester: Sage, 1851) at 77.

92 *Ibid.* at 109-110.

The Hodinohso:ni also had intricate diplomatic traditions in their relations with other nations.[93] One of the most prominent related to the *Gus Wen Tah*, or Two Row Wampum. The fundamental principles of the Two Row Wampum became the basis for the agreements made between the Hodinohso:ni and the Dutch in 1645, with the French in 1701, and with the English in 1763. The belt consisted of two rows of purple wampum beads on a white background. Three rows of white beads symbolizing peace, friendship, and respect separated the two purple rows. The two purple rows symbolized two paths or two vessels traveling down the same river. One row symbolized Hodinohso:ni people with their law and customs, while the other row symbolized Europeans laws and customs. As nations moved together side by side on the river of life, they were to avoid overlapping or interfering with one another. These legal precepts were embedded in subsequent agreements. Another symbol related to the *Gus Wen Tah* that communicates Hodinohso:ni independence is the Silver Covenant Chain. It is to be pure, strong and untarnished, and bind nations together without causing them to lose their individual characters or their independence. Those holding the Covenant chain were responsible for keeping their relationships bright and preventing them from breaking. Hodinohso:ni law seems to maintain an independence from other legal traditions that prevents its assimilation or integration.[94]

C. Anishinabek Legal Traditions

Anishinabek people are Algonkian-speaking and more recently English- speaking people living around the upper Great Lakes and on the prairies to the north-east of the Lakes.[95] Historically, the Anishinabek lived in communities as clans organized in a loose confederacy more recently

---

93 William Fenton, “Structure, Continuity and Change in the Process of Iroquois Treaty Making” in Francis Jennings, et. al, *The History and Culture of Iroquois Diplomacy* (Syracuse: Syracuse University Press, 1985).

94 However, see *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.) (upholding forcible eviction of traditional Hodinohso:ni government).

called the Council of the Three Fires.[96] They collectively refer to themselves as the Anishinabek, meaning "people" or "good people". Others have labelled them as the Odawa,[97] Potawatomi,[98] and Ojibway or Saulteaux.[99] Many still live in mixed "Three Fires" communities in their ancient homelands.[100]

The Anishinabek manage their resources through kinship allocations,[101] agreed upon through discussion and consensus.[102] In some locations, these allocations have been confirmed, overlain or displaced by band council-sanctioned certificates of possessions under the *Indian Act*. The Odawa, Potawatomi and Ojibway have well developed totemic or clan systems to allocate

---

95 See Helen Hornbeck Tanner*, Atlas of Great Lakes Indian History* (Norman: University of Oklahoma Press, 1982) at 58-59.

96 See Diamond Jenness, *The Indians of Canada* (Ottawa: Queen's Printer, 1967) at 277.

97 The Odawa are also known as Otaouan or Ottawa. I refer to these people as the Odawa because that is what they prefer to be called. Historically, the Odawa had four known subdivisions, the Sinago, Kiskakon, Sable and Nassauakueton (Christian A. Feest, "Ottawa" in Bruce G. Trigger, ed., *Handbook of North American Indians*, Vol. 15 (Washington: Smithsonian Institute, 1978) at 772. See also Vernon Kinetz, *The Indians of the Western Great Lakes* (Ann Arbor: University of Michigan Press, 1940) at 246.

98 For a history of the Potawatomi, see R. David Edmunds, *The Potawatomis, Keepers of the Fire* (Norman: University of Oklahoma Press, 1978).

99 Ojibway is the common title applied to these people in Canada, and Chippewa is the name most frequently employed in the United States. Throughout their history, the Ojibway have gone by different European descriptions in various regions of the Great Lakes. Contemporary western terminology still applies some divisions to the Ojibway. On the north shores of Lakes Ontario and Erie, the Ojibway are called Mississaugas, on the south shore of Lake Huron they are sometimes named Saugeens, while at the confluence of Lakes Huron and Superior around Sault Ste. Marie they are often known as the Saulteaux. Ojibway are further classified by their geographical location: the Southeast Chippewas of Michigan's lower peninsula and adjacent Ontario, the Chippewas of Lake Superior, the Southwest Chippewas of interior Minnesota, the Northern Chippewa of the Laurentian uplands above the Great Lakes, and the Plains Chippewa or Bungees. See Edmund Jefferson Danziger, Jr., *The Chippewa of Lake Superior* (Norman: University of Oklahoma Press, 1978).

100 People of the Three Fires are now found in other places in North America. Odawa people live in Kansas and Oklahoma because of the Removal Policies of the U.S. government in earlier periods. Potawatomi people also live in Oklahoma for the same reason, though there are still some communities in their traditional territories in Michigan and Wisconsin. Contemporary Ojibway communities can also be found surrounding Lakes Superior and Michigan, and on the north shores of Lakes Erie and Ontario.

101 "Each family of this tribe has a certain hunting region, to which the members of the family have a particular or exclusive right": B Rev. Frederick Baraga, *Chippewa Indians: As Recorded by Rev. Frederick Baraga in 1847* (New York: Studicia Slovenica, 1976) at 25.

102 "A Band Civil Chief had no coercive force. Control over affairs depended entirely upon personal prestige and the demands of the moment. …Civil Chiefs, usually men who inherited their position, also presided at band councils and represented their people at common and grand councils. All men and women past the age of puberty were included in open discussions of the band council…": Danziger, *supra* note 99 at 23.

resources among themselves. Each family is classified by a *dodem* (totem), designated by taking a symbol from nature, and descending in the male line.[103] Marriage is usually not permitted in the same *dodem*.[104] This system is the foundation of Anishinabek law and facilitates the allocation of resources amongst them,[105] though this has been influenced recently by the *Indian Act.* A person's *dodem* creates reciprocal obligations among fellow clan members, thereby establishing a horizontal relationship with different communities and creating allegiances that extend beyond the confines of the home village. For example, persons of one *dodem,* travelling throughout their "Three Fires" territory, can expect social and material obligations with clan members situated hundreds of miles away.

Totemic obligations help the Anishinabek allocate resources in hunting grounds, fishing grounds,[106] village sites,[107] and harvesting/gathering sites.[108] A conservation ethic is apparent in resource

---

103 Though sometimes totems were chosen rather than inherited if the circumstances were expedient for it: see Richard White, *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991) at 16-20.

104 William Warren, *History of the Ojibway Nation* (St Paul: Minnesota Historical Society, 1885; reprinted Minneapolis: Ross & Haines, 1970) at 42.

105 See C. Callender, *Social Organization of the Central Algonkian Indians* (Milwaukee: Milwaukee Public Museum, Pub. No. 7, 1962) in Leo Waisberg, *The Ottawa: Traders of the Upper Great Lakes, 1715-1800* (M.A. Thesis, McMaster University, 1977) [unpublished] at 128-131. For a more general description of the clan or totem system of organization, see Warren*, supra* at 41-53.

106 Another author has described First Nations' distribution of fishing rights in a way that harmonizes with the above communal methods of resource distribution, and corresponds to the traditional fishing practices used by the Odawa and Ojibway. While describing other groups which resembled the Anishinabek in social and cultural practices, this author has written:

> [I]n the case of extraordinarily plentiful fishing sites - especially major inland waterfalls during spawning runs - several major villages might gather at a single spot to share the wealth. All of them acknowledged a mutual right to use the site for that specific purpose, even though it might otherwise lie within a single village's territory. Property rights, in other words, shifted with ecological use.

William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (Toronto: McGraw, Hill, Ryerson, 1983) at 63. See also J.H. Coyne, *Galinee's Narrative 1670-71* Vol IV (Toronto: Ontario Historical Society, 1903) at 73 for a description of this phenomenon occurring among the Ottawa and Ojibway at Sault Ste. Marie.

107 The framework of allocation that was based on specific ecological uses was also reflected in the distribution of property between village sites:

> In order to use the sparse resources of the north woods efficiently, members of the Ottawa and Chippewa bands migrated seasonally to locations where they could find adequate resources. In time, these movements settled into well-established patterns, an annual round. The pattern varied from place to place, depending on the flora and fauna and the amount of farming practised by a

allocations under Anishinabek law.[109] Historically, this system of resource use combined common stewardship with exclusive rights:

> Among the Ottawas and Chippewas, the band - a group of extended families identified with a specific locale - was the centre of the allocation system...[The band] owned the common goods on which their members subsisted...they owned the right to harvest wild animals, fruits of the land and fish. The band apportioned this general right among its members by assigning to families and groups of families "territory" in which they harvested common goods. The right to take the scarcest and most crucial goods - animals for winter hunting - was assigned to small groups as an exclusive right to harvest game within a specified territory. Rights to more abundant goods, maple sugar and fish for example, were assigned to larger groups on a less exclusive basis...Family hunting territories grew out of scarcity as a way to increase efficiency and decrease competition for food.[110]

These allocation measures helped to reduce conflict and to ensure there was a relatively equal supply of food for all members of the community. The practices were facilitated by conservation procedures which left hunting areas "fallow" from year to year. Some areas were hunted only every third year, while other areas were hunted every second year.[111] Other conservation practices

---

> band or a group, but its basic rhythms remained. From late spring through early fall, the Ottawas and the Chippewas lived in relatively large groups on the shores of the Great Lakes, where fish provided plenty to eat. ...In the fall these large gatherings separated into smaller kin-linked groups...migrating to family hunting grounds usually located about fifty miles inland along the banks of a river. ...The same families appeared to have used the same winter camps year after year and had developed a sense of ownership.
>
> Robert Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery* (Lexington: University Press of Kentucky, 1990) at 481-483.

108 H.P Biggar, ed, *The Works of Samuel De Champlain*, Vol 3 (Toronto: University of Toronto Press, 1936) at 210 and 319.

109 One has to be careful about assuming that observations about Aboriginal resource-use by post-contact writers are valid for pre-contact Aboriginal society. There is a debate in the anthropological literature that states that the allocations to be described in the next few pages developed as a result of the fur trade, and were not practiced before contact. See T.G. Brasser, “Group Identification Along a Moving Frontier”, *Verhandlungen des XXXVIII Internationalen Amerikanischenkongresses* (Munich: BndII, 1971) at 261. While there is no doubt that contact had a significant impact on Aboriginal customs, the effect event was usually to intensify pre-existing uses, before changing them over a longer period of time. See Bruce G. Trigger, *Natives and Newcomers: Canada’s Heroic Age Reconsidered* (Kingston-Montreal: McGill-Queen’s Press, 1985) at 214-228. As an Anishnabe person, I have been taught that the types of resource allocations I will describe existed long before contact.

110 Robert Doherty, *Disputed Waters: Native Americans and the Great Lakes Fishery* (Lexington: University Press of Kentucky, 1990) at 15-16.

111 Baron De Lahontan & Reuben Thwaites, eds., *New Voyages to North America*, Vol. 1 (Chicago: McClurg, 1905) at 210 & 319.

involved leaving a certain number of animals in a region to repopulate the land.[112] These historical precedents have current relevance for the Anishinabek.

The Anishinabek people have a number of legal principles that guide their relationship with other living beings in a conservationist mode. Rocks (land) are animate or living in verb-oriented Algonkians languages such as Anishnabemowin. Their active nature means rocks have an agency of their own which must be respected when Anishinabek people use them. It would be inappropriate to use rocks without their permission because the action would oppress their liberty.[113] Using rocks without their consent would be akin to using other people against their will. Their enslavement could lead to great calamities for the earth and its people. Therefore, to ensure that rocks and land are used appropriately, particular ceremonies, or legal permissions, are needed.

The pipe ceremony is a particularly important certification-like process preceding the appropriate use of land. When the sacred pipe is smoked under the guidance of proper leaders, the earth's legal personality is acknowledged. As the smoke ascends to the Creator, prayers of thanksgiving are also said for the rocks, plants, animals and other humans as the smoke rises. The pipe itself represents earth's different orders: "the earth, whose elemental substance was rock, made up the pipe; the plant, tobacco was the sacrificial victim; the animal, symbolized by feathers and fur, was appended to the sacred pipe of rock; man was the celebrant."[114]

Under Anishinabek legal traditions, rocks (earth) could not be owned or allocated if this ownership implied control of the earth without its consent. The use of the pipe was a token of

---

[112] Doherty, *supra* note 110 at 11-12.

[113] A similar principle applies to animals: Ojinee. They are not to be disrespected or taken without their permission.

peace between people and the land, and between peoples settling on the land. The earth was best used by celebrating its contributions and consulting with its Creator. When treaties were signed, Anishinabek people often included non-Indigenous people. Anishinabek Elder Basil Johnston has observed that rocks are the elemental substance of life and must be continually acknowledged for their role in sustaining other orders of life.[115] While plants, animals and humans all come to an end, the earth lives on. It is contrary to interpretations of Anishinabek law to claim to own the earth, which is called a mother because of her role in bringing forth life. As Dr. Johnston has written:

> No man can own his mother. This principle extends even into the future. The unborn are entitled to the largess of the earth, no less than the living. During his life a man is but a trustee of his portion of the land and must pass on to his children what he inherited from his mother. At death, the dying leave behind the mantle that they occupied, taking nothing with them but a memory and a place for others still to come.[116]

Thus, for many Anishinabek, “ownership” was differently construed when compared with other Canadian legal traditions. When explaining limitations concerning Anishinabek land use, the analogy of a trustee is somewhat helpful in the understanding of Anishinabek law. A trust in common law is a right held by one person (the trustee) for the benefit of another person (the beneficiary). Under Anishinabek law, land is held by the present generation for future generations. Land does not belong to a person or people in the sense that they have absolute discretion and control; land is provisionally held for present sustenance and for the sustenance of those yet unborn.

However, the analogies to trust law can create confusion in understanding Anishinabek legal traditions if carried too far. Under Anishinabek law, while the earth is somewhat dependent on

---

114 Basil Johnston, *Ojibway Heritage* (Toronto: McClelland & Stewart, 1976) at 24-25.

115 *Ibid.* at 25.

116 *Ibid.*

other orders of life for its health and vitality, plants, animals, and humans are much more reliant on the earth. In this sense, the earth could be considered the trustee for the beneficiaries (plants, animals and humans). This analogy may be a stretch for a common law perspective because of the legal personality the earth possesses under Anishinabek law. But whatever the common law principle, Anishinabek legal traditions recognize interdependence between rocks and humans because of their mutual agency.

The concept of reciprocal obligations between rocks and humans is an important part of Anishinabek law. People are the beneficiaries of the earth's care, and under Anishinabek law, this creates duties for the beneficiaries as well as for the earth (as the so-called trustee).[117] Humans and others have rights relative to the earth in their jurisprudence, they also have duties. Duties or obligations are central to relationships under Anishinabek Law. This is demonstrated in formalized patterns of speech. For example, when Anishinabek people historically met, they would first ask one another: "*Weanaesh k'dodem*?" (What is your totem?).[118] Once clan and family were determined, people would be asked: "*Ahniish aen-anookeeyin*" (What do you do for a living?). Both of these questions are related to a person's responsibility within the community. A person's *dodem* indicates more than their lineage: obligations are attached to their clan affiliations. Like a *dodem*, a person's *anookeewin* also connotes ideas of duty and right (*daebinaewiziwin*). Anishinabek peoples have obligations (*daebizitawaugaewin*) to their families and community: to support them, to help them prosper, and exercise their rights to live and work.[119] In an Anishinabek legal context, rights and responsibilities are intertwined.[120] Some

---

117 *Ibid.*

118 *Ibid.* at 59.

119 Basil Johnston (correspondence).

120 Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 *Osgoode Hall Law Journal* at 605–33.

common law theorists recognize the same point in their system. [121] W.N. Hohfeld observed: "[A] duty is the invariable correlative of that legal relation which is most properly called a right or claim."[122] "A duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated."[123] This is the case within Anishinabek law. Wherever a potential right exists a correlative obligation can usually be found, based on mankind's relationship with the other orders of the world.

The Anishinabek have strong legal traditions that convey their duties relative to the world. These are stewardship-like concepts (*bimeekumaugaewin*) and apply to their use of land, plants, and others. Principles of acknowledgement, accomplishment, accountability and approbation, are embedded in the Anishinabek creation epic and associated stories. Ojibway legal traditions concerning *bimeekumaugaewin* speak of how the world was created, and how beings came to live on the earth.[124] They tell of how they depended on the earth, plants and animals for their

---

121 Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 *Review of Constitutional Studies*, 1-26; Joseph Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) *Wisconsin Law Review* 975.

122 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, ed., Walter Wheeler Cook (New Haven and London: Yale University Press, 1919) at 35-64.

123 *Lake Shore & M. S. R. v. Kurtz* (1894) 10 Ind. App., 60; 37 N.E., 303, 304, cited in Singer *supra* note 121.

124 An excellent rendition of the Anishinabek creation story is found at "Creation Story", online: http://www.ancestraltrails.org/ojibwe.html.

> "When the Earth was new it had a family. The moon, or Grandmother and the sun, called Grandfather. The Creator of all of this said that the Earth was a woman - Mother Earth - because all living things came from her. Water (the oceans, lakes, rivers and streams) are her life blood nourishing and purifying her. Mother Earth was given four directions - East, South, West and North, each with physical and spiritual powers.
>
> When Mother Earth was new Creator filled her with beauty. He sent singers in the form of birds who also carry the seeds of life to all Directions. There were swimmers in the water. He placed plants, trees, insects, crawlers and four-leggeds on the land. And everyone lived in harmony with everyone else.
>
> Creator, or Kitchi-Manitoo as Ojibwe people call him, then blew into four parts of Mother Earth using the sacred Megis Shell. From the union of these four sacred elements and his breath, two-leggeds or man was born. Thus, man was the last form of life to be put on Earth. From this original man came the Anishinabe - or The People.
>
> There came a time when the harmonious way of life did not continue. Men and women disrespected each other, families quarreled and soon villages began arguing back and forth. This saddened Kitchi-Manitoo greatly, but he waited. Finally, when it seemed there was no hope left, Creator decided to purify Mother Earth through the use of water. The water came, flooding the

sustenance and survival once they arrived.[125] The Ojibway's acknowledgement

---

> Earth, catching all of creation off guard. All but a few of each living thing survived. How could life begin again?
>
> Nanabush, or the spirit of the original people, found himself floating on a log in the water covering Mother Earth. As he floated, some of the other animals still alive would come and rest on the log. All would take turns and through this sharing they saved themselves and each other. After floating for a long time and not seeing land, Nanabush finally said, "I'm going to swim to the bottom of this water and grab a handful of Earth. With this and help from Creator, I believe we can create a new land. He dived and was gone a long time. Finally he surfaced but was so out of breath he could not speak. Then he said, "It's too deep. I can't swim fast enough to reach the bottom."
>
> Everyone on the log was silent. Finally a loon, who was swimming alongside the log, spoke, "I can dive a long ways for my food. I will dive to the bottom and bring some of Earth up in my beak." Loon dived and was gone a long time. Just when the others thought she'd drowned she surfaced very weak and out of breath. "I couldn't make it. There doesn't seem to be a bottom."
>
> The grebe then came forward and offered to try. Grebe was gone a long time too and just when everyone was about to give up hope, they saw him float to the top. He was unconscious but alive. When he awoke he said, "I am very sorry my brothers and sisters, I too couldn't reach the bottom."
>
> Many more animals offered themselves to do the job, important to the survival of all. Mink tried but couldn't make it; otter tried and failed. Even Turtle tried but didn't make it. Just when all seemed hopeless, a soft voice spoke up. "I'll try," it said. When everyone turned to look, Muskrat stepped forward. "I'll try," he said again. Some of the others laughed at him, but Nanabush said, "Hold it, it is not our place to judge another. That belongs to Creator and if little Muskrat wants to try I think we should let him."
>
> With that, Muskrat dived down and disappeared. Nanabush and the others were sure Muskrat had given up his life trying to reach the bottom. Muskrat made it to the bottom. He grabbed some Earth in his paw and with his last bit of strength pushed toward the surface. One of the animals on the log saw Muskrat as he floated to the top and they pulled him onto the log. Nanabush looked him over and said, "It seems our brother went without air for too long. He's dead." A song of mourning and praise began and floated over the water. Then Nanabush said, "Look! Muskrat has something in his paw." Carefully they opened it and there in Muskrat's paw was a piece of Earth. Everyone cheered. Muskrat had given up his life so that the others could begin again.
>
> Nanabush took the piece of Earth from Muskrat's paw just as Turtle came swimming up. "Use my back to bear the weight of this piece of Earth. With Creator's help we can make a new Earth," she said. When the Earth was placed on Turtle's back the winds began to blow from each of the Four Directions. The tiny piece of Earth began to grow. Larger and larger it grew until it formed an island. And still Turtle bore the weight on her back. Nanabush began to sing and all the animals began to dance in a circle. Finally the winds ceased and water was calm and a huge island sat right in the middle of the great water.

See also Basil Johnston*, Ojibway Heritage* (Toronto: McClelland & Stewart, 1996) at 11-17. I draw heavily on the work of Basil Johnston in the following sources because his research is well respected in many Ojibway communities, and he grew up and resides on my reserve. For another prominent version of Anishinabek creation see, Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (Hayward: Indian Country Communications, 1988).

[125] "Out of nothing Kitchi-manitoo made rock, water, fire, and wind. Into each he breathed the breath of life. On each he bestowed with his breath a different essence and nature. Each substance had its own power which became its soul-spirit. From these four substances Kitche Manitou created the physical world of sun, stars, moon and earth. Then Kitche Manitou made the plant beings. These were four kinds: flowers, grasses, trees and vegetables. To each he gave a spirit of life, growth, healing and beauty. Each he placed where it would be most beneficial, and lend to earth the greatest beauty and harmony and order. After plants, Kitche Manitou created animal beings conferring on each special powers and natures. There were two-leggeds, four-leggeds, wingeds and swimmers. Last of all he made man. Though last in order of creation, least in the order of dependence, and weakest in bodily powers, man had the greatest gift - the power to dream. Kitche Manitou then made The Great Laws of Nature for the well being and harmony of all things and all creatures. The Great Laws governed the place and movement of sun, moon, earth and stars; governed the powers of wind, water, fire and rock; governed the rhythm and continuity of life, birth, growth and decay. All things lived and worked by these laws." Basil Johnston, *Ibid.* at 13-14.

(*gaamiinigooyang*) of a Creator and an appreciation of their reliance on their relationship to the world are the first principle of *bimeekumaugaewin* within Ojibway society.[126] As these traditions progress, the second principle of *bimeekumaugaewin* emerges: how to accomplish (*gikinoo'amaadiwin*) the Creator's vision in setting life in motion.[127] The stories convey the manner in which plants, animals and humans should relate to and respect one another.[128] They contain important teachings about the preparation necessary for living a good life. They talk of principles that must be followed so that all the orders of creation can live together in peace and friendship. The tradition goes on to explore the third principle of *bimeekumaugaewin*: accountability (*gwayakochigewin*). As with the pipe, ceremonies are often performed in conjunction with these stories to communicate to the Creator, and to acknowledge before others

---

126 For Anishinabek to speak of accountability detached from notions of to whom duties are owed (acknowledgement), how they should be exercised (accomplishment), and the consequences that flow from such exercise (approbation) is to speak of a hollow, almost meaningless concept. Accountability is given context by its relationship to larger principles of stewardship. It draws its significance from the fact that the Creator, the earth, plants, animals and other beings are those to whom responsibility flows. Accountability is thus given meaning by the knowledge one has about how to prepare to exercise and implement this responsibility. Stewardship is only effective when people recognize that specific consequences flow from how duties are acknowledged and accomplished. Part of the *acknowledgement* necessary for Anishinabek peoples in exercising contemporary stewardship is to admit that people who originally came from other parts of the world now form a part of our network of associations. Just as Anishinabek once acknowledged a stewardship towards the Creator, earth, plants, animals and other beings in a time prior to their arrival, they must now acknowledge that non-Indigenous peoples form a part of their current web of life. In this light, there are four important considerations that should form a part of discussions about stewardship and accountability.

127 For a discussion of these stories describing people's stewardship responsibilities and associated ceremonies, see, generally, Basil Johnston, *Ojibway Ceremonies* (Toronto: McClelland & Stewart, 1980). Anciently, Aboriginal people would learn how to *accomplish* their stewardships through instruction and practice. Learning would be assisted by participation in ceremonies that taught people how best to *acknowledge* "all their relations". This period of preparation was vital to understanding the laws and customs upon which stewardship was based. When a student had solid background knowledge of what their responsibilities required, they would receive a specific responsibility in the community. They would learn the specific duties required to *accomplish* each particular job they undertook in accordance with the values learned earlier. They would be expected to live according to their preparation to put those teachings into practice. Through such preparations, First Nations peoples learned that stewardship was *accomplished* by following principles such as loyalty, bravery, courage, generosity, and love towards other beings that were part of their world. Currently, much of the government's response to securing accountability within First Nations is focused on taking legislative action to codify technical rules of behavior. There is no talk of preparation in accordance with ancient ceremonies and teachings. There is no discussion *acknowledging* the source of First Nations stewardship, nor the means by which this stewardship should be *accomplished*. Missing are words and stories that incorporate Aboriginal principles about faithfulness, valour, kindness, resolve, affection, and steadfastness towards the Creator.

128 *Ibid.* at 21-58, 119-133.

how one's duties and responsibilities have been performed.[129] Dancing, feasting and singing sometimes accompany these rituals to ratify legal relationships. Finally, the traditions talk about the consequences of living in accordance with, or contrary to, these principles.[130] Stories about Mandamin,[131] Gowkopshee,[132] Animoosh,[133] Pauguk,[134] Pitchee,[135] Nanabush,[136] and a hundred other characters communicate the notion that every being will face the consequences of their actions.[137] The idea of approbation received for proper performance of duty, or disapprobation (*tubuhumahgawin*) flowing from failure to fulfill a responsibility, complete the Ojibway circle of *bimeekumaugaewin*. They are the enforcement mechanisms of Anishinabek law.

An interesting Anishinabek story teaches the principle of *bimeekumaugaewin* in the context of approbation. As the Ojibway creation epic spoken of earlier comes to an end, a character named Odaemin is introduced into the narrative.[138] After sky woman returned to her own realm, the world was plagued by disease, and Odaemin was among the many who died from this affliction. As he left this world, he traveled four days along the path of souls to the land of the dead. He reached a great gorge that separated the two spheres, pleaded for his people, and was shown the way to bridge the gap between the world of the living and the dead. With great

---

129 *Ibid.* at 80-93, 134-148.

130 *Ibid.* at 94-118.

131 Verna Petronella Johnston, *Tales of Nokomis* (Toronto: Stoddart, 1975) at 25.

132 Edward Higgins, *Nookomis O Dibajamonwin, Grandmother Tell Me A Story* (Cobalt: Highway Book Shop, 1986) at 7-10.

133 Basil Johnston, "Animoosh w'gauh izhitchigaet" *Star Man and Other Tales* (Toronto: Royal Ontario Museum, 1997) at 44-51.

134 Basil Johnston, *The Manitous: The Spiritual World of the Ojibway* (Toronto: Key Porter, 1995) at 195-220.

135 Johnston, *supra* note 124 at 61.

136 See, generally, George Laidlaw, "Ojibway Myths and Tales" *Twenty-Seventh Annual Archeological Report 86* (Ontario: Ministry of Education, 1915).

137 Emerson Coatsworth and David Coatsworth, told by Sam Snake, Chief Elijah Yellowhead, Alder York, David Simcoe, and Annie King, *Adventures of Nanabush: Ojibway Indian Stories* (Toronto: Doubleday Canada Limited, 1979).

sacrifice, he placed a fallen tree across the chasm that divided the two worlds. His deed is said to be of benefit to all Anishinabek peoples because it allows them to proceed on further journeys once they leave this life.

In recognition and appreciation of his selfless acts, Odaemin was restored to life. He was then given a further responsibility to teach people what they must do to live a good life and to find safe passage to the next world. He was also told that a great teacher would come to provide further information that would build on his message. Odaemin is honoured for his acts by identifying his life with that of the wild strawberry. These small red berries are in the shape of a heart and are found in abundance in rocky places surrounding the Great Lakes. They are called Odaemin (heart berry) as a symbol of *approbation* for his accomplishments.[139] Every time a person sees this fruit, the name is intended to help them remember Odaemin's acts and to remind them of their own preparation for their future journey to the land of the dead. Anishinabek people often encode legal principles on the land by identifying some living thing with a particular right or responsibility. In this way, they teach important principles of approbation that could have application for *bimeekumaugaewin* today. Like Odaemin, if a person lives by principles that respect and facilitate their stewardship, such as loyalty, patience and bravery, they should receive the approbation of their community. In Anishinabek law, legal remedies are not usually punitive. However, examples can be found where drastic action had to be taken against individuals to preserve community safety.

A case from the French River in Ontario where a man was put to death using Anishinabek law illustrates this approach. The individual was known as Mayamaking; the case was recorded by William Jarvis, Superintendent of Indian Affairs in 1838. The circumstances unfolded as follows:

---

138 Johnston, *supra* note 124 at 17.

139 For further information about the symbolism and role of Odaemin, see Benton-Banai, *supra* note 124 at 57.

> He came among us at the very beginning of last winter, having in most severe weather walked six days, without either kindling a fire, or eating any food.
>
> During the most part of this winter he was quiet enough, but as the sugar season approached got noisy and restless. He went off to a lodge, and there remained ten days, frequently eating a whole deer at two meals. After that he went to another [lodge] WHEN a great change was visible in his person. His form seemed to have dilated and his face was the color of death.. At this lodge he first exhibited the most decided professions of madness; and we all considered that he had become a Windigo (giant). He did not sleep but kept on walking round the lodge saying "I shall have a fine feast. Soon this (caused) plenty of fears in this lodge, among both the old and growing. He then tore open the veins at his wrist with his teeth, and drank his blood. The next night was the same, he went out from the lodge and without an axe broke off many saplings about 9 inches in circumference. [He] never slept but worked all that night, and in the morning brought in the poles he had broken off, and at two TRIPS filled a large sugar camp. He continued to drink his blood. The Indians then all became alarmed and we all started off to join our friends. The snow was deep and soft and we sank deeply into it with our snow shoes, but he without shoes or stockings barely left the indent of his toes on the surface. He was stark naked, tearing all his clothes given to him off as fast as they were put on. He still continued drinking blood and refused all food eating nothing but ice and snow. We then formed a council to determine how to act as we feared he would eat our children.
>
> It was unanimously agreed that he must die. His most intimate friend undertook to shoot him not wishing any other hand to do it.
>
> After his death we burned the body, and all was consumed but the chest which we examined and found to contain an immense lump of ice which completely filled the cavity.
>
> The LAD, who carried into effect the determination of the council, has given himself to the father of him who is no more: to hunt for him, plant and fill all the duties of a son. We also have all made the old man presents and he is now perfectly satisfied.
>
> This deed was not done under the influence of whiskey. There was none there, it was the deliberate act of this tribe in council.[140]

This real life historical case is an interesting example of Anishinabek law. The community dealt with the issue in accordance with their own legal traditions. The community had no other resources for their protection but themselves, their extended family and friends. They used their law to deal with a pressing issue. The onset of their problems with the man was slow and gradual and developed over most of the winter. They tried to help him. His health and mental state seem to have worsened as time went by to the point that he began uttering threats. The

---

[140] Jarvis Papers, Metro Toronto Reference Library. Collection # S-125, Volume B57. Jarvis was superintendent of Indian Affairs in the 1840's.

group did not take action right away but seemed to wait for two or three weeks, despite the threat to the community and the harm the man was causing himself. When it became clear that he was not getting any better and that his threats were becoming a matter of life and death, they went to council together rather than take action on their own. This is an important Anishinabek legal principle. Their method of making judgments was collective, not individualized. They relied upon one another's viewpoints. They clearly felt that the method of deciding was very important because they traveled through heavy snow to meet together.

When the group finally deliberated, the legal principles that led to the man's death are noteworthy. The matter was not about retribution or anger, but rather defense and compassion (another legal principle related to intent): the man's closest friend was charged with the duty of carrying out the task. The action also has restorative aspects. The father received gifts from the community, and the man who killed the son stepped into his role, also performing restitution. Even the man who lost his son seemed to be satisfied with the council's decision. This example shows how Anishinabek law can be very different from non-Indigenous law. Imagine what our legal systems would be like if judges or lawyers had to take the place of those they have prosecuted or sent to jail.

It is important to focus on the process and principles that guided the actions, rather than on the specific outcome. Some might read this case as an example of ad hoc, 'uncivilized' practices. But a vast literature shows this pattern of dealing over long periods of time, and in different geographic regions where the Anishinabek (also called Ojibway or Chippewa) lived. Furthermore, psychological illness (of which the man was probably suffering) would now be handled very differently. The Anishinabek, like other peoples around the world, have developed a more refined understanding of mental disorders. They would *not* kill the man. However, the

underlying principles in this account remain, even if the process would not lead to the same result today. People could still:

1. Wait, observe and collect information
2. Council with their friends when it is apparent something is wrong
3. Help the person who is threatening or causing imminent harm
4. If the person does not respond to help and becomes an imminent threat to individuals or the community, remove them so that they do not harm others (though, to re-emphasize, that would not now involve capital punishment)
5. Help those who rely on that person by restoring what might be taken from them by the treatment
6. Have both the collective and individual participate in the restoration.

These legal principles provide the important elements of the case, and they show what can be learned from looking at the past. Anishinabek people will likely find familiarity with many of these approaches in their contemporary lives. As the Supreme Court of Canada wrote in the *Rodriguez* case, when it comes to determining principles of fundamental justice:

> The way to resolve these problems is not to avoid historical analysis, but to make sure that one is looking not just at the existence of the practice itself…but the rationale behind that practice and the principles that underlie it.[141]

For Anishinabek people, *windigos* come in different forms today. There are other harmful forms of cannibalistic consumption that destroy lands and people. The principles that underlie the practice in the Mayakiming case are important for dealing with these problems.

D. Cree Legal Traditions

The Cree are a widespread people of the boreal forest and prairie. Their homeland stretches from James Bay to the Rocky Mountains; its diverse ecologies influence their laws.[142] The Cree

---

141 *Rodriguez v. B.C. (A.G.)*, [1993] 3 SCR 519 at 54.

142 Fikret Berkes, Sacred Ecology: Traditional Ecological Knowledge and Resource Managements (Philadelphia, PA: Taylor & Francis, 1999).

are anthropologically divided into two groups known as the Plains Cree and Woodland or Swampy Cree. Like the Anishinabek and the Mi'kmaq, the Cree are Algonkian-speaking and now English-speaking peoples. The Cree language encodes many of their legal principles and is a key to understanding their legal perspectives.[143] They have law keepers: *Onisinweuk*. Cree law contains many fundamental principles expressed by the words: *wahkohtowin, miyo-wicehtowin, pastahowin, ohcinewin, kwayaskitotamowin.*[144] While these terms are not exclusive as expressions of Cree law, nor placed in ordered priority, understanding them provides a glimpse into Cree traditions.

Wahkohtowin is viewed as the over-arching law governing all relations.[145] This law is said to flow from the Creator who placed all life on earth. Humans are a part of this order and are organized into families. Since humans exist within the overarching natural law, they are counseled to observe other living things for guidance in practicing this law. A body of stories describes what people have learned from observing the natural world; the stories are used to facilitate order in Cree law.[146] The sun, moon, winds, clouds, rocks, fish, insects, and animals all provide illustrations of *wahkohtowin,* which the Cree interpret into law.

Wahkohtowin has implications for individuals, families, governments and nations. For example, in the family law context, *wahkohtowin* is said to require different levels of conduct: parents are

---

143 Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

144 These words have the following meaning:

- Wahkohtowin – laws governing all relations.
- Miyo-wicehtowin – having or possessing just relations as in the way Cree will conduct their lives individually or collectively.
- Pastahowin – a transgression of spiritual or natural law, sin, use of bad medicine or evil doings all of which will be responded to by the Creator.
- Ohcinewin – part of the concept of pastahowin, to suffer in retribution for an action against creation.
- Kwayaskitotamowin – doing things in a right way, treating creation in a good way, a just or legal dealing.

145 Kathleen O'Reilly-Scanlon, Kristine Crowe, Angelina Weenie "Pathways to Understanding: Wahkohtowin as a research methodology", (2004) 39 *McGill Journal of Education* 1 at 29.

to nurture and care for their child with loyalty and fidelity; brothers and sisters are to live close but separately in an atmosphere of non-interference; cousins and other relatives are to be treated respectfully in a non-coercive manner.[147] Within larger governmental relationships, unrelated people are to apply *wahkohtowin* in accordance with the ideas found in *miyo-wicehtowin, pastahowin, ohcinewin*, and *kwayaskitotamowin.*

Miyo-wicehtowin is said to have originated in the laws and relationships that the Cree Nation has with their Creator.[148] "It asks, directs, admonishes or requires Cree peoples as individuals and as a nation to conduct themselves in a manner such that they create positive good relations in all relationships."[149] "The root of *wicehtowin* is *wiceht* which means to come alongside or to support."[150] Like most human societies that have struggled to live by their highest values, the Cree have not always managed to sustain the harmony they desired. There have been periods of conflict. Nevertheless, *miyo-wicehtowin* is an important legal principle because it speaks to maintaining peace between people of different places and perspectives. The maintenance of mutual good relationships, through positive support and assistance (*miyo-wicehtowin*), is often represented by the circle in Cree law.[151] Circles are considered sacred and represent the bringing together of people.[152] They are meant to remind people of Mother Earth and their journey through life: from the earth, to infant, to child, through adulthood to old age and back to

---

146 Elder Dolly Neapetung, in Cardinal and Hildebrandt, *supra* note 143 at 6.

147 *Ibid.* at 34.

148 Cardinal and Hildebrandt, *supra* note 143, at 14.

149 *Ibid.*

150 Shalene Jobin, *Guiding Philosophy and Governance Model of Bent Arrow Traditional Healing Society* (M.A.I.G. thesis, University of Victoria, 2005) [unpublished] at http://66.102.7.104/search?q=cache:pjbvzcj2LwMJ:web.uvic.ca/igov/research/pdfs/Bent%2520Arrow%2520Governance-Final.pdf+miyo-wicehtowin&hl=en.

151 Cardinal and Hildebrandt, *supra* note 143, at 14-15.

152 *Ibid.*

the earth. Cree legal traditions can be conducted in circles, such as talking circles, healing circles, and reconciliation circles.

Consequences for failing to abide by Cree law are described as *pastahowin* and *ohcinewin*.[153] *Pastahowin* is used to describe something that goes against natural law. If such an offence occurs, negative consequences will follow, making the concept of *ohcinewin* relevant. *Pastahowin* and *ohcinewin* can apply to any circumstance where the law is not followed, either through action or omission. Cree law has many retributive aspects, such as "*meskotsehowin* (redress), *kakweskasowehk* (reproval), *apehowin* (revenge), *naskwawin* (reprisal), *pasastehokowisowin* (retributive justice), *naskwastamasowin apo apehowin* (vengeance), *pasihiwewin* (vindication), *atameyimew* (blame), *sihkiskakewin* (obligation), *masinahikepayowin (*indebtedness), and *tipahikewin* (the act of recompensing)." [154]

Examples of *pastahowin* and *ohcinewin* can be found in Cree-animal relationships. Animals are regarded as persons in their own right; the relationship between the Cree and animal-persons is governed by the same legal considerations that govern human relationships.[155] For the Cree, "animals are spoken of as possessing its own *itatisiwin* 'nature': it is *itatisiwak* that caribou migrate, that beavers build lodges, and so forth. In the shaking lodge and in dreams, animals share human *itatisiwin*: They come to be like humans."[156] If animals are not treated

---

153 Robert Brighton, *Grateful Prey: Rock Cree Human-Animal Relations* (Berkeley: University of California Press, 1993) at 104: "*pastahow* (verb) 'someone brings retribution on himself'."

154 Chief Wayne Roan and Earle Waugh, *Nature's Laws* (Heritage Community Foundation, 2004) at http://www.abheritage.ca/natureslaws/spiritual/index9.html.

155 Paul Driben, Donald J. Auger, Anthony N. Doob, and Raymond P. Auger, "No Killing Ground: Aboriginal Law Governing the Killing of Wildlife Among the Cree and Ojibwa of Northern Ontario" (1997) 1 *Ayaangwaamizin* at 101.

156 Brighton, *supra* note 153, at 197.

appropriately, *pastahowin* and *ohcinewin* can result, something bad will happen. Many stories interpret the law relating to animals in these terms.[157]

A contemporary application of Cree linguistic concepts in Canadian law is found in Saskatchewan's Provincial Court. The Cree court creates an important space for Cree legal traditions to find expression. In 2001, Cree-speaking Judge Gerald Morin was appointed to the bench and called to preside over a Cree Court in northern Saskatchewan. A majority of the people who appear before the court are Cree. All proceedings of the court are conducted in the Cree language and translators are provided to non-Cree speakers. Canadian law continues to apply in every respect; people receive due process, rights, and substantive freedoms in conformity with the *Canadian Charter of Rights and Freedoms*. At the same time, while Canadian law forms the basis of the Court's jurisdiction, its focus can be different from conventional Provincial Court proceedings. When proceedings are conducted in Cree, the dynamics of the legal process are different. Linguistic relationships are possible that are not easily comprehended in English. Concepts like *wahkohtowin*, *pastahowin* and *ohcinewin* come naturally to life when Cree people participate in their own language. Restorative concepts seem to play a great role in the Cree court because of their cultural orientation. But while the Cree court is an important initiative, it does *not* represent anything close to a fully functioning Cree legal system. The initiative could be extended throughout Cree territory, and amongst other willing Indigenous language groups. But it only faintly affirms Cree legal traditions. The substance and procedures of Canadian law continue to contain many cultural incongruities that

---

[157] See Rupert Ross has observed:

> Storytelling as a means of law-giving seems to be based on the same understanding – that law can be known to everyone through reciting the consequences of acts alone, not through communicating judgmental labels for either the act or, worse still, the actor.

Rupert Ross, *Return to the Teachings: Exploring Aboriginal Justice* (Toronto: Viking/Penguin, 1996) at 171.

are considered incompatible with Cree legal traditions. More work lies ahead to appropriately recognize and affirm this system on its own terms.

E. Métis Legal Traditions

The Métis peoples in Canada have unique origins. Their cultures grew out of the interaction between First Nation and European contact in northern North America. Métis people formed communities throughout Canada, including present-day Labrador, Atlantic Canada, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and the North. Children of First Nations and European parents developed a distinctive language, artistic expressions, political identities and legal traditions.

For example, in 1840, the Métis of the prairies developed buffalo hunting laws to organize their economic and social activities. The buffalo hunt involved hundreds of men, women, and children, together with their Red River carts, horses and tools for processing and preserving the meat and hides.[158] The complex activity was ordered through laws that identified appropriate behavior during a potentially difficult and dangerous pursuit. The Captain of the Hunt could impose penalties if these laws were broken. A codified portion of these laws contained the following provisions:

a. No buffalo to be run on the Sabbath-Day.

b. No party to fork off, lag behind, or go before, without permission.

---

158 "Among the historical Métis people, entire families participated in buffalo hunting expeditions. As there were large numbers of participants to organize, some of the activities within family units were supplemented by a quasi-military organization in the camp as a whole. Alexander Ross, in an 1856 account, described the discipline enforced during a buffalo hunt involving 1,210 Red River carts and 1,630 men, women, boys and girls. The movement of the camp was under the direction of 10 captains, among whom a senior was named. Under the captains were 10 soldiers and 10 guides, the latter taking turns bearing the flag used to signal directions to move or to stop the entourage. While the flag was up, the guide was chief of the expedition and in command of everyone. The moment the flag was lowered, the captains and soldiers were on duty." See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3* (Ottawa: Supply and Services, 1996).

c. No person or party to run buffalo before the general order.

d. Every captain with his men, in turn, to patrol the camp, and keep guard.

e. For the first trespass against these laws, the offender to have his saddle and bridle cut up.

f. For the second offence, the coat to be taken off the offender's back, and be cut up.

g. For the third offence, the offender to be flogged.

h. Any person convicted of theft, even to the value of a sinew, to be brought to the middle of the camp, and the crier to call out his or her name three times, adding the word "Thief", at each time.[159]

The Law of the Hunt as expressed in these principles was important in asserting Métis control over one of their main socio-economic activities. But it is also important to note that this set of laws was not a complete Code for the hunt. There were in addition significant customary law principles involving the respectful killing and use of an animal. Métis law also extended to trade, family obligations, political organization and land use.[160]

Métis legal traditions were evident in Canada's first encounters with the Métis people after Confederation. Their existence and organization in the West prior to Confederation was pivotal to the economic development and expansion of the East. Without the order they created, the fur trade would have floundered, and political and economic development on the St. Lawrence River and eastern Great Lakes would have been severely delayed or restricted. The Métis

---

159 Alexander Ross, *The Red River Settlement: Its Rise, Progress, and Present State* (Minneapolis: Ross and Haines, 1957) at 249–50.

160 See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3* (Ottawa: Supply and Services, 1996): Métis families similarly divided responsibilities between men and women as they ranged on extended hunting expeditions from permanent settlements, such as Red River. A woman from a Montana Métis settlement, who lived a mobile lifestyle with a group that migrated from Manitoba to Montana following the buffalo, recalled camp life in the early part of the twentieth century:

> Our men did all the hunting, and we women did all the tanning of the buffalo hides, jerky meat making, pemmican and moccasins. For other supplies, we generally had some trader with us…who always had a supply of tea, sugar, tobacco and so on.

Obituary of Clemence Gourneau Berger, *Democrat-News*, Lewistown, Montana, 31 December 1943, quoted in Verne Dusenberry, "Waiting for a Day that Never Comes: The Dispossessed Métis of Montana", in *The New Peoples: Being and Becoming Métis in North America*, ed. Jacqueline Peterson and Jennifer S.H. Brown (Winnipeg: University of Manitoba Press, 1985) at 125.

Nation was also crucial to ushering western and northern Canada into Confederation and to increasing the wealth of the nation by opening up the prairies to agriculture and settlement. These developments could not have occurred without their intercession and legal presence.[161]

Métis legal traditions were most prominent when the Dominion Parliament attempted to unilaterally survey the old North-West Territories around the Red River in 1869.[162] The Métis did not want to become a part of the Dominion without participation and consent, so they blocked surveyors from doing their work. This prevented Canada's expansion into the region and compelled the government of Sir John A. Macdonald to negotiate with them. The Red River Métis even developed their legal traditions to form a Provisional Government that was given authority to negotiate the terms of union with Ottawa and bring the area into Confederation. Representatives of this government traveled to Ottawa as delegates of the Métis people to negotiate conditions for entry. They brought with them a locally developed Bill of Rights that expressed their demands. The negotiations were challenging, but an agreement was reached and its terms were embodied in the *Manitoba Act* of 1870.[163] The democratic legitimacy of this process was sealed through the Métis Provisional Government's acceptance of the agreement even before the Dominion and Imperial Parliament's statutory endorsement that made it part of the constitutional law of Canada.[164] The people of the Métis Nation regard the *Manitoba Act* as a treaty that recognizes and affirms their nation-to-nation relationship with Canada, even though

---

161 George F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellion* (Toronto: University of Toronto Press, 1960).

162 The Dominion's unilateral attempt to add the old north-west to Canada were legislated in the *Rupert's Land Act, 1868,* 1868, (U.K.) c. 105. For historical context see Maggie Siggins, *Riel: A Life of Revolution* (Toronto: Harper Collins, 1994).

163 *Manitoba Act*, 1870 (U.K.) 32 & 33 Vict. c. 3. The Act provided for the creation of the province of Manitoba, French language rights, protection for settled and common lands, distribution of 1.4 millions acres of land to Métis children, and amnesty for those who participated in the provisional government.

164 The Imperial Parliament passed the *Constitution Act, 1871*, 1871, (U.K.), c. 28 to give effect to the provisions embodied in the *Manitoba Act*.

they argue that its provisions concerning land and resources have not been fulfilled.[165] Métis law was important to the development of the country in this region.

Métis laws continued in the period following the Provisional Government. In 1873, their laws relating to the buffalo hunt are of particular note. After being pushed from the Red River settlement (when the *Manitoba Act* was violated), a group of Métis established a democratically elected government in St. Laurent, near Batoche. Gabriel Dumont and eight councillors passed rules, patterned after their ancient buffalo hunt laws, in the following areas:

> [T]he duties of the council, regulating contracts (e.g. agreements made on Sunday were null and void) and authorizing the raising of money by taxing households. They also passed laws related to penalties for crimes such as horse stealing, dishonouring girls and lighting fires on the prairie in midsummer. On January 27, 1875 the council passed laws regulating the buffalo hunt: old laws which specifically forbade anyone from proceeding ahead of the designated departure date for the hunt were enacted, and new laws prohibiting anyone from leaving behind unused buffalo carcasses were also passed.[166]

The Métis Laws at St. Laurent contained the following provisions:

> **Article I.** On the First Mondays of the Month, the president and members of his council shall be obliged to assemble in a house indicated before hand by the president, in order to judge the cases that may be submitted to their arbitration.
>
> **Article II.** Any Counsellor who, unless by reason of illness, or impossibility shall not be present at the indicated place shall pay a fine of five Louis.
>
> **Article III.** The president who by his own fault shall not meet his Counsellors in the indicated place shall pay a fine of five Louis.
>
> **Article IV.** Any captain refusing to execute the orders that he shall receive in the name of the Council shall pay a fine of three Louis**.**
>
> **Article V.** Any soldier, who shall refuse to execute the orders of his captain shall pay a fine of one Louis and a half.
>
> **Article VI.** Any person who shall insult the Council or a member of the Council in the public exercise of his functions shall pay a fine of three Louis.
>
> **Article VII.** Any person who shall be guilty of contempt of any measure of the Council or of one passed in a general Assembly, shall pay a fine of one Louis.

---

165 See *R. v. Dumont*, (1988) 52 D.L.R. (4th) 25 (Man.C.A.); rev'd (1990) 67 D.L.R. (4h) 159 (S.C.C.).

166 Joanne Pelletier, *Gabriel Dumont* (Curriculum Unit: Gabriel Dumont Institute of Native Studies and Applied Research, 1985).

Article VIII. Any person wishing to plead shall inform the President beforehand and shall deposit with him, as security, the sum of five shillings.

Article IX. In every case the plaintiff shall deposit two Louis, five shillings with the President to remunerate him and the members of the Council for their loss of time, but at the termination of the case, the person losing shall pay all the costs and the plaintiff if he gains shall receive back the money deposited.

Article X. Any person shall call the Assembly together, shall pay five shillings to the president and to each member, should he come to a compromise with the other side and abandon the prosecution of the case.

Article XI. Every witness in a case shall receive two and a half shillings a day.

Article XII. Any case once brought before the Council, can no longer be judged by any arbitrators outside the Council.

Article XIII. Any person judged by the Council, shall be allowed ten days to make arrangements with the person with whom the quarrel is; at the expiration of that term the Council shall cause its order to be forcibly executed.

Article XIV. Any person, who only has three animals, shall not be compelled to give up any one of them in payment of his debts: This clause does not apply to unmarried men, who shall be compelled to pay even to the last animal.

Article XV. Any person who shall be known to have taken another person's horse without permission, shall pay a fine of two shillings.

Article XVI. Any contract made without witnesses shall be null and void and its executive cannot be sought for in the Council.

Article XVII. Any bargain made on a Sunday even before witnesses, cannot be prosecuted in Court.

Article XVIII. Any bargain any contract any sale shall be valid, written in French, English or Indian characters even if made without witness, if the plaintiff testified on oath to the correctness of his account or contract.

Article XIX. Any affair decided by the Council of St. Laurent shall never be appealed by any of the parties before any another tribunal when the government of Canada shall have placed its regular magistrates in the country, and all persons pleading do it with the knowledge that they promise never to appeal against the decision given by the Council and no one is permitted to enjoy the privileges of this community, except on the express condition of submitting to this law.

Article XX. Any money contribution shall not exceed one Louis and every public tax levied by the Council shall be obligatory for the inhabitants St. Laurent, and those who shall refuse to submit to the levy shall be liable to pay a fine, the amount of which shall be determined by the Council.

Article XXI. Any young man, who, under pretext of marriage, shall dishonour a young girl and afterwards refuses to marry her, shall be liable to pay a fine of fifteen Louis: This law applies equally to the case of married men dishonouring girls.

> **Article XXII.** Any person who shall defame the character of another person shall attack his honour, his virtue or his probity shall be liable to a fine in proportion to the quality and rank of the person attacked or to the degree of injury caused.
>
> **Article XXIII.** Any person who shall set fire to the prairie from the 1st August and causes damage shall pay a fine of four Louis.
>
> **Article XXIV.** On Sundays and obligatory festivals the river ferrys shall be free for people riding or driving to church, but any person who shall crop without going to church, shall pay as on ordinary days.
>
> **Article XXV.** All the horses shall be free, but he whose horse causes injury or annoyance shall be warned and should he not hobble his horse he shall pay a fine of 5 shillings a day from the time he was warned to look after his horse.
>
> **Article XXVI.** If any dogs kill a little foal, the owner of the dogs shall be held responsible for the damage done.
>
> **Article XXVII.** Any servant who shall leave his employer before the expiration of the term agreed upon, shall forfeit all right to his wages: in the same way, any employer dismissing his servant without proper cause shall pay him his wages in full.
>
> **Article XXVIII.** On Sunday no servant shall be obliged to perform any but duties absolutely necessary, however, on urgent occasion, the master can order the servant to look after his horses on Sundays only after the great mass: he shall never prevent him from going to church, at least in the morning.

Métis legal traditions are a strong and important part of Canada's legal inheritance. Their laws have survived in customary form, and still have relevance today.[167]

Métis legal traditions also survive in Canada as positive law. In Alberta, Métis people operate a quasi-judicial system to deal with disputes about membership, land dealings, surface rights, and any other matter to which the parties agree. This body, called the Métis Settlement Appeal Tribunal, was set up in 1990 under provincial legislation.[168] The Tribunal's jurisdiction covers eight Métis settlements on 1.25 million acres of land in northern Alberta. It has developed an extensive body of jurisprudence as a living legal tradition.[169] Alberta Métis also see their legal traditions reflected through Settlement Governance involving issues such as membership,

---

167 Fred Shore and Lawrence Barkwell eds., *Past Reflects the Present: The Métis Elders' Conference* (Winnipeg: Manitoba Métis Federarion, 1997).

168 *Métis Settlements Act*, R.S.A., 2000, c. M-14.

hunting, fishing, trapping, timber, and other matters relating to land. The Métis Settlements General Council may enact laws (General Council policies) that are binding on the General Council and every settlement. These laws (General Council Policies) are equal in status to other provincial laws. It also has an administrative body which includes Strategic Training Initiatives (education and training), and Programs and Services Development. Métis in other parts of the country have also enacted their laws in a contemporary context.

F. Carrier Legal Traditions

The Carrier people live in north-central British Columbia in twenty-two bands, speaking six Athapascan (Dene) dialects.[170] Their law is organized around a House Group with a Head Chief ("Diniizee" or "Dzakiizee"), subsidiary wing Chiefs, and House members. A group of Houses constitutes a Clan, within which there is generally no single Head Chief.[171] Membership in a House and a Clan is generally determined through matrilineal descent.[172] Carrier legal traditions contain principles of societal organization.[173] These laws are central to the proper distribution of decision-making power.[174]

---

169 See Cathy Bell, *Contemporary Métis Justice* (Saskatoon: Native Law Centre, 1999).

170 Carrier clans are bear, caribou, grouse, frog, small frog, fireweed, wolf and beaver. Linguistic dialects are: Babine, Cheslatta, Nakazd'li, Saik'uz, Lheidli-T'enneh and Wit'suwit'en. See Diamond Jenness, "The Carrier Indians of the Bulkley River: Their Social and Religious Life" *Bulletin #133, Bureau of American Ethnology, Anthropological Papers No. 25* (Washington, D.C, 1943) at 469-586.

171 Factum of the Appellants, "The Wet'suwet'en Heriditary Chiefs, in the Supreme Court of Canada", No. 23799, Native Law Centre of Canada at http://www.usask.ca/nativelaw/factums/W.html at para. 31. The House in historic times was literally a plank-walled House, where the Chief would provide leadership to people living under one roof. The House controlled its own territories for food social, ceremonial and commercial purposes, trade and ceremonial purposes, Ken Rabet, *The Past into the Present, Cultural Heritage Resource Review of the Bulkley Timber Supply Area* (2000), at 32, at http://66.102.7.104/search?q=cache:5lq7hnWu2dkJ:www.for.gov.bc.ca/dss/cultural/CHRREVIEW.pdf+Babine+kungax&hl=en#22.

172 *Ibid.*

173 The Carrier name (*Porteur*) comes from an historic law which required widows to carry their deceased husband's ashes from their winter to their summer village, so that a ceremonial rite could be performed to acknowledge and fulfill important legal obligations.

174 Margaret Tobey, "Carrier" in *Handbook of North American Indians: Volume 6, Subarctic*., June Helm, ed. (Washington: Smithsonian Institution, 1981) at 413-442.

An integral part of Carrier legal heritage is their *kungax*, or "own spirit power".[175] *Kungax* tell of the land's creation, the people`s earliest history, territorial boundaries, major battles, and the origins of their house crests, titles, names, and significant past events. *Kungax* are often performative, using song and dance to communicate major themes and specific principles. *Kungax* are first taught to children when they are quite young. As they mature, they are expected to deepen their memory and understanding of the *kungax* until they can recite them accurately.[176] While every attempt is made to ensure that those with proper authority perform the *kungax* in official gatherings, parallel or divergent accounts often circulate.[177]

Kungax teach specific principles for regulating behaviour as well as outlining remedies for breaches of social order. Several fundamental principles intended to govern individual conduct have been identified within Carrier law. These are respect, responsibility, obligation, compassion, balance, wisdom, caring, sharing and love.[178] It has been said: "Each of these principles is expected to be followed concurrently and with equal weight. No one principle is understood to have greater significance than any other principle."[179]

An example of a principle found within the *kungax* concerns animals and the obligation to treat them with respect. If fish, birds or animals are not well treated they will leave Carrier territories, and could even exact retribution. To mark respect for fish, the Carrier enact a ceremony each year to honour the salmon's return. Honour continues throughout the salmon's cyclical visits

---

175 Antonia Mills, Eagle Down is Our Law: Witsuwit'en Feasts and Land Claims (Vancouver: UBC Press, 1994) at 122.

176 *Ibid.* at 74.

177 *Ibid.* at 75.

178 Warner Adam, Travis Holyk and Parry Shawana, *Whu Neeh Nee (Guiders of Our People): Carrier Sekani First Nations Family Law Alternative Dispute Resolution* (2003) http://www.sfu.ca/cfrj/fulltext/adam.pdf.

179 *Ibid.*

with rules governing its allocation, catch, use, preparation and disposal.[180] These regulations are present because the Carrier believe that “the salmon’s spirit moves out of its body when you hit it with a stick.”[181] They believe that this “is why the body wiggles – the spirit is leaving.”[182] *Kungax* reinforce the rules governing the proper treatment of salmon by providing commentaries about consequences for mistreatment. Anthropologist Diamond Jenness heard stories that taught this principle. He wrote:

> "Many years ago the Natives gathered in *Shin* [summer] to set their weirs in the river. They caught and dried large numbers of fish, while the children played happily around the camp. Then a boy named Mek made a girdle of some fish heads and began to dance with them. An old man scolded him saying, 'Don’t do that. Sa [The Sun] will see you and by and by you will be hungry!' A year passed, and the people gathered again at the same spot, but this time they caught no fish at all. The men left the women to attend the net and went away to hunt, but the game too had vanished. Before long they were starving and the first to die was Mek. No sooner was he dead than the river seemed to teem with fish and the people had no difficulty in catching all they needed"[183]

This *kungax* not only provides precedent to guide future behavior, it also creates strong feelings that motivate and encourage listeners to properly meet their obligations to the salmon. Feelings are an important part of the law; reason is not separated from emotion in making decisions and taking action. Reason and emotion operate together to motivate proper conduct. Carrier woman Helen Nikal illustrates this connection in commenting about the *kungax* and the salmon: “I start to feel strange, I *feel* the salmon all go down the river, leave.”[184]

The *kungax* also teach proper rules of respect, love and obligation towards others. If people are not well treated, they can transform into animals and leave their partners. To stress the importance of taking proper care of one’s spouse and animals, Diamond Jenness recounted the following ancient story about the origin of the beaver.

---

180 Mills, *supra* note 175 at 157-158.

181 *Ibid.*

182 *Ibid.*

183 Diamond Jenness, “Myths of the Carrier Indians of British Columbia.” (1934) 47 *American Folklore.*

> A newly married couple left their village to hunt in the mountains near a small stream. The woman grew lonely when her husband was absent and to pass the time made a small dam across the stream. Her husband found that it made the water too deep for him to wade across and so broke it with his foot. The next day she made another dam, and he broke that also. This happened again and again until she became very angry. One evening when her husband returned from his hunting he found a very large dam spanning the stream and a beaver house in the middle of the water. His wife was kneeling on the edge of the pond with her breechcloth between her legs. As soon as she saw her husband coming, she leaped into the water and entered the beaver house. She eluded all his attempts to capture her. Then a large beaver leaped out of the water and sat on top of its house. It was his wife, whose trailing breechcloth had become a tail. She called, "I have changed into a beaver. Now go back home, for I cannot live with you anymore."[185]

Jenness concludes his account by noting: “That is why the beaver’s belly and intestines resemble those of a human being.”[186] This case illustrates the consequences of ill treatment of animals and one’s spouse. It demonstrates the fluid relationship between people and animals, and shows the importance of remembering these connections.

With the *kungax* providing a principled context, Carrier people regulate their society through the *bah’lats* or Potlatch laws. The *bah’lats* laws are the legal basis for succession and inheritance, territorial laws and resource management, family law (including marriage, divorce and mourning), dispute settlement, village governance, special rules of conduct for women, and principles of justice taught to children.[187] The *bah’lats* is administered through head-clan and sub-clan chiefs who determine questions of Carrier law.[188] Hereditary chiefs receive their authority from matrilineal clan assignments in the *bah’lats*, if they live in way that merits the honour. Wealth, service, generosity, wisdom, respect, family and community support all qualify people for the authority. Without living in accordance with these principles, a person cannot

---

184 Mills, *supra* note 175 at 157.

185 Diamond Jenness “Myths of the Carrier Indians of British Columbia.” (1934) 47 *American Folklore.*

186 Adam, *supra* note 178.

187 Jo-Anne Fiske and Betty Patrick, Cis Dideen Kat, *When the Plumes Rise: The Way of the Lake Babine Nation* (Vancouver: UBC Press, 2000).

188 Warner Adam, Travis Holyk and Parry Shawana, *Whu Neeh Nee (Guiders of Our People): Carrier Sekani First Nations Family Law Alternative Dispute Resolution* (2003) http://www.sfu.ca/cfrj/fulltext/adam.pdf.

expect to be effective in interpreting and adjudicating disputes.[189] If they have the respect of the people, head chiefs from each clan are responsible for determining breaches of Carrier law and, in consultation with wing chiefs, they adjudicate an appropriate remedy.[190] Once an infraction has been identified, remedies are administered by a clan member known as a "whip man" from the father clan (the clan of one's father responsible for the rearing and care of that individual).[191] In describing the chiefs' authority and responsibility, anthropologist Antonia Mills has written the following about the Witsuwit'en, one of the Carrier groups:

> The head chiefs have the authority to decide how the law should be applied in individual disputes, both in the feasts, out in the territories, and in the villages. Some disputes involve other peoples, and some are internal to the Witsuwit'en. In dealing with the latter the chiefs call upon their deep acquaintance, kinship, and understanding of the people; conversely the respect the Witsuwit'en have for their chiefs makes them effective mediators in internal disputes.
>
> The Witsuwit'en chiefs are in a position to effectively intervene the sensitive areas of marital relations and territorial disputes because they have a thorough knowledge of the nature of the participants. This gives them a distinct advantage over outside adjudicators…[192]

The Chiefs exercise dispute resolution powers within their authority and can enforce breaches of their society's laws in formal and informal ways. Their judicial role facilitates peace and order whenever conflict needs to be resolved.

Formal business within the *bah'lats* takes place in the feast hall. The Witsuwit'en, say: "the feast has forged their law".[193] The *bah'lats* is also sometimes referred to as the Feast, and is guided by a major legal tenet, *dinii biits wa aden*, or the way the Feast works.[194] People must be properly seated in their House groups before the Feast begins. There are requirements for the

---

189 Fiske, *supra* note 187 at 57.

190 *Ibid.* at 3.

191 *Ibid.*

192 Mills, *supra* note 175 at 138.

193 *Ibid.* at 38.

proper welcome and acknowledgement of guests, as well as for the order and content of speeches. The giving of gifts within the *bah'lats* is also guided by detailed rules. Practices and principles must be followed when a hereditary chief's name is being assigned, when law is solidified, when shaming occurs, and when a birth, marriage or adoption is announced.[195] Precise legal procedures are followed within the Feast.

Mechanisms within the *bah'lats* certify the binding nature of the business conducted. The Feast structure has built-in procedures to seal and validate rights and obligations. Two important practices ratify the Feast's legal procedures and results: the distribution of eagle down and the proper calling of witnesses.

Actions and decisions within the *bah'lats* can be endorsed through the scattering of eagle down. When eagle down is distributed to Feast participants after all the decisions have been made and agreed to, "the peace is binding and retaliation is stopped".[196] Eagle down has great power for the Carrier people because of the bird's pre-eminence amongst other animals. Distributing it symbolizes the peace and forbearance that should be maintained between those present, and shown towards all creation, including humans and animals, birds and fish.[197] Antonia Mills has described this relationship as follows:

> The chiefs are responsible for seeing that relations between all these beings are in balance. The power of the chiefs rests on their recognition of, and participation in, the spirit world, where one meets and marries the animals. Contact with the spirit powers is acted out in the feasts through the use of crests and songs.[198]

---

194 W. Naziel, *Wet'suwet'en Traditional Use Study Report* (Office of Wet'suwet'en Hereditary Chiefs: Moricetown, B.C, 1997) [unpublished].

195 *Ibid.*

196 *Ibid.*

197 *Ibid.*

198 *Ibid.*

Carrier law is attentive to all the relationships of living beings on the land, in the air, and under the water. The sanctioning of decisions, plans, and transactions is an integral component of Carrier law and has been called *Chus*, the law of the eagle feather plumes.[199]

The appointment of witnesses is another important mechanism in the *bah'lats* for endorsing and confirming legal transactions. Clan members act as witnesses and memorize the transactions agreed between the parties.[200] These witnesses are important because they may be called upon at a future feast to verify past actions. The recording of the *bah'lats* proceedings ensures that the witnesses are specifically prepared to testify in the event of a potential conflict over what has transpired. In this respect, the Carrier's legal structure is similar to other north-west coast nations, such as the Gitxsan, Tsimshian, Haida, Kwakwaka'wakw, Coast Salish and Nisga'a.

G. Nisga'a Legal Traditions

The Nisga'a Nation of north-western British Columbia provides an important example of how Indigenous legal tradition can extend to a contemporary context. The Nisga'a people divide themselves into four clans or *pdeek*: *Gisk'ahaast* (Killer Whale), *Laxgibuu* (Wolf), *Ganada* (Raven) *and Laxsgiik* (Eagle). *Pdeek* members may not marry within their clan, even if they are not Nisga'a. Times are changing, but if a couple broke this law in the past, they were *k'aats* or shunned by the community. Nisga'a people also historically organized themselves into *wilps* or house groups. Each *wilp* had its own chiefs, territories, rights, history, stories, songs, dances, and traditions. These possessions are handed down through matrilineal succession.

---

199 *Ibid.*

200 Fiske, *supra* note 187, at 57.

Wilps are matrilineal and matrilocal. The highest ranking woman in a *wilp* is called the *sigidimnak*'; she makes the final decisions on names and inheritance. On her death, her position would be assumed by her oldest sister or daughter. The highest ranking man in a *wilp* is called the *sim'oogit*. When he dies, his entitlements are usually passed on to his eldest living brother or the oldest son of his eldest sister. *Wilp* chiefs are responsible for passing *adaawks* and associated prerogatives from one generation to the next. This is usually done through a series of feasts to make public these prerogatives and have them validated by other chiefs.[201]

Each *wilp* has an *adaawk* that describes how their ancient territories were acquired; they can take the listener back to the beginning of time. The *adaawk* will also describe the *wilp's* ancient migrations, territorial defence, and "major events in the life of the house, such as natural disasters, epidemics, war, the arrival of new peoples, the establishment of trade alliances, and major shifts in power."[202] The *adaawk* records property rights such as fishing sites, hunting territories, and gathering grounds. It also details rights and responsibilities in family law. For example, *adaawks* convey information about how their ancestors were given animals to be used as crests by each *wilp* and to show them how to live, eat and prepare food.[203] They also relate details about how these entitlements and obligations should be passed on to the next generation.

The Nisga'a people are assisted in remembering their *adaawks* by referring to their *ayuukhl*. The *ayuukhl* is an ancient legal code that has guided Nisga'a social, economic and political relationships from "time of memory".[204] Centuries before Canada proclaimed itself a nation

---

201 Neil Sterritt, Susan Marsden, Robert Galois, Peter Grant, and Richard Overstall, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998) at 12.

202 *Ibid.*

203 A. Rose, ed., *Nisga'a: People of the Nass River* (Vancouver: Douglas & McIntyre, 1993) at 22.

204 *Ibid.* at 15.

"founded upon the principles that recognize the supremacy of God and the rule of law, the people of the Nass River were living according to *Ayuukhl Nisga'a*, an ancient code of laws that will stand comparison to any modern constitution or declaration of statehood and nationality".[205] The *ayuukhl*, in conjunction with the *adaawk*, historically governed land ownership, education, succession, citizenship, and the institutions of the chieftain and matriarch. The laws also governed marriage, divorce, war, peace, trading relationships, and restitution,[206] though these have been modified in some degree by a recent treaty. For example, on matters of succession, property is passed on when a *wilp* Chief dies and his next older brother or his oldest sister's son assumes the role of custodian for all the property of the House.[207] "This process occurs through a sophisticated ceremony known as a Settlement Feast. Like a deed in a land registry office, the Settlement Feast is a formal registration of title and ownership."[208] Some *ayuukhl* are related to the Nisga'a narrative of their origins, such as having being placed in *Ginsk'eexkw* by *K'amligihahlhaahl* who is regarded as the Supreme God.[209] Other *ayuukhl* are founded upon *K'amligihahlhaahl* teachings to *Txeemsim*, the trickster, who identified central legal tenets for

---

205 T. Molloy, *The World is our Witness* (Calgary: Fifth House, 2000) at 121.

206 For a summary of *Ayuukhl Nisga'a* by Nisga'a elder Bert McKay in A. Rose, ed. *Nisga'a: People of the Nass River* (Vancouver: Douglas & McIntyre, 1993) at 125-9.

207 *Ibid.* Elder Bert McKay has said:

> [T]he Settlement of the Estate…happens when a person dies. And it's the only time a name of a chieftain can be transferred to a person Ayuukhl Nisga'a dictates that to be a chieftain, you have to be reared for it. You have to be disciplined and you have to have the approval of your people before you can take that rank. And today, that's still in place. Under the chieftainship too is our property rights. Again, this was in place before the advent of our western counterparts. There were very strict laws regarding property rights so that there was no need for our people to be going beyond their boundaries to take someone else's property because it was never allowed under our laws. I'm a Raven and my father was a Wolf chieftain. According to our law, I was privileged because I was his son, or any of my brothers and sisters were allowed, to harvest from his resource areas as long as he was alive. And the minute he died that privilege was given back; I had no claim on his property then. I'm married to a Killer Whale princess and they have resource areas so when we married I was told that because of the children that we were going to have, they will be Killer Whales so I was privileged to feed them from that resource area. As long as my wife lives that will happen. And it's reciprocal. My people would say the same to my wife, but the minute I die that property goes back to us. Our laws, perhaps, are edicts, really much more refined because they are constant. They are still observed today.

208 *Ibid.*

209 *Ibid.*

Nisga'a peace and order.[210] His deeds and misdeeds illustrate consequences that can flow from certain behaviors.

Some *ayuukhl* seem to come from the direct experience and observation of the people. There are many cases of people being rewarded or punished because of the respect or disrespect they showed in following the *ayuukhl.* For example, Chief Joe Gosnell has spoken about an *ayuukhl* that warns against disrespect for animals. In this *ayuukhl,* young boys were playing with salmon and setting tiny pitch lamps in their backs to watch the lights swim away upriver. Chief Gosnell reported that: "For this crime, the animals took their vengeance upon the valley, causing the eruption of a dormant volcano known as *Wilksi Baxhl Mihl*. More than 2,000 of our people were entombed in the lava that flowed from the volcano, and the lava beds remain the dominant feature of much of the Nass Valley to this day."[211] This account demonstrates that Nisga'a legal principles can also be embedded in the very landscape of their nation.

A reading of Nisga'a law makes it apparent that sanctions and restitution are an important part of their legal regime. Nisga'a Elder Bert McKay has described the shaming and cleansing nature of Nisga'a law:

> And the last of our laws were, I guess you would call them, penalties**.** One is called restitution, or *Ksiiskw*. It's a very, very difficult and important law. When a life is lost over carelessness or over greed the law states very plainly, that before the sun sets if the offending family does not settle the issue with the grieved family, then those people have a right to take double the lives that they lost. So the only way that was resolved was by restitution payment. And then the other part, where certain of the ten laws were broken, not restitution but to make amends, to make a complete break from the shame that you imposed on your family, and that was called public cleansing.[212]

---

210 *Ibid.* at 15.

211 Chief Joe Gosnell, *Nisga'a Treaty Sends Signal of Hope & Reconciliation Around the World* at http://www.kermode.net/nisgaa/no_frames/gosnell3.html.

212 *Ibid.* at 129.

Nisga’a legal traditions therefore cover many significant aspects of human behavior. The Nisga’a *ayuukhl* and *adaawks* are an important part of their legal traditions because they connect them to their territories, families and past. They teach them how to live in relationship with the earth around them.

Recently the Nisga’a nation has modified its legal traditions to a degree by entering into a treaty with the Canadian and British Columbian governments. After initiating the *Calder* case before the Supreme Court and having the justiciability of their legal position in Canadian law recognized, the Nisga'a entered into a two-decade long negotiation that culminated in a comprehensive treaty in 1999. The agreement is an ambitious one, providing for collective Nisga’a ownership of approximately 2,000 square kilometres of land in the Nass Valley watershed of northwestern British Columbia. The treaty covers issues as diverse as land titles, minerals, water, forests, fisheries, wildlife, governance, the administration of justice, fiscal relations (including taxation), cultural property, and dispute resolution. Many of these provisions provide significant benefits for Nisga’a people that are far greater than anything contemplated under the current *Indian Act*. Of particular importance is the agreement's reference to the *Ayuukhl* as a source of Nisga'a law, and the creation of Nisga'a courts to interpret its meaning under the new treaty. This institution will help Nisga'a stories to rise to the surface and perforate the cover of the Canadian legal fictions that previously denied them rights in their traditional territories.

Nisga’a legal traditions such as the *ayuukhl* will now operate in a contemporary Canadian context through the Nisga’a Lisims Government because of the *Nisga’a Final Agreement Act*. [213] They will be adapted and find expression in Nisga’a parliamentary procedure. They will be

[213] R.S.C. 2000, c. 7; S.B.C. 1999 c. 2. Within Nisga’a Lisims Government there is a legislative house knows as Wilp Si’ayuukhl Nisga’a and the Nisga’a Lisims.

evident in statutory laws governing marriage, divorce, commerce, resource use, education, dispute resolution, wills and estates, citizenship, governance, and land. They will be the background 'common law' principles in Nisga'a courts. In its preamble, the Nisga'a Final Agreement recognizes the continued importance of Nisga'a legal traditions:

> WHEREAS the Parties acknowledge the ongoing importance to the Nisga'a Nation of the Simgigat and Sigidimhaanak (hereditary chiefs and matriarchs) continuing to tell their Adaawak (oral histories) relating to their Ango'oskw (family hunting, fishing, and gathering territories) in accordance with the Ayuuk (Nisga'a traditional laws and practices).[214]

The "Ayuukhl Nisga'a" and "Ayuukl" is defined within the Final Agreement to mean "the traditional laws and practices of the Nisga'a Nation."[215] Through the agreement, Nisga'a legal traditions continue to exist today. Their authority and use is evidence of the potential for tolerance and respect of Indigenous legal traditions in contemporary Canada, though the process has not been without critique and challenge.[216]

---

214 Nisga'a Final Agreement, http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html.

215 *Ibid.*

216 Neil Sterritt, Susan Marsden, Robert Galois, Peter Grant, and Richard Overstall, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998). Sterritt et al argue that the Nisga'a have breached indigenous law in making such a large claim over territory that they should know well is not theirs. This indigenous law arises from recalling the oral traditions that document land ownership (*adaawk*), marking household ownership of land on totem poles, and validating the land tenure at potlatch feasts (*yukw*). This is the same 'law' that was recognized by the Supreme Court in *Delgamuukw* as being valid and absorbed into Canadian common law. The book is an upfront challenge to the Nisga'a claim, with comprehensive evidence from oral traditions about land ownership (*adaawk*) forming the core of the argument. The *adaawk* are backed up by a detailed review of the written and cartographic record for land ownership and tribal boundaries on the Nass River. Thus, this becomes an extremely important text in suggesting precisely how oral traditions might be presented to say something concrete about aboriginal title and rights in the post-Delgamuukw era in Canada. Sterritt *et al* (1998) claim that in Gitksan/Nisga'a law, the existence of an *adaawk* proves ownership to the specific lands named in the story. Toponomy is critical in telling *adaawk* to connect mythological elements of stories to specific, owned areas on the ground which can be recognized today. Potlatch feasts (*yukw*) are held to formalize the recognition of these ownership rights and to allow them to be contested. In the book, the authors present the *adaawk* as forming unambiguous statements of ownership of land. Legendary episodes in the stories are correlated with geological history to suggest a relative chronology for the time when the events were supposed to have occurred. From this they build a picture of the ancestors of the present-day clans, households and villages having settled the unoccupied territories in post-glacial times. The initial settlement was followed by three periods of movements and wars which resulted in the present-day structure of land ownership. New territories could be claimed in one of two ways. First, lands that were seen as abandoned during the migration were thrown open for new ownership. Otherwise, lands could be ceded to another tribe as retribution for lost wars or as compensation for services provided within a clan. Such a cession of land must be formally recognized in a special land-cession ceremony (*xsiisxw*) given at a potlatch. The transfer of land could not occur without a widely recognized *xsiisxw*. Lands that were owned by a house required permission to use (in principle), and were actively defended from trespass from both unwelcome neighbours and unwelcome Europeans. Marriage alliances brought access to land, but not title.

Since the Nisga'a Final Agreement came into effect, the *Wilp Si'ayuukhl Nisga'a* has enacted over 30 Acts and other pieces of legislation.[217] Some of these acts are: *Nisga'a Effective Day Procedures Act, Nisga'a Lisims Government Act, Nisga'a Interpretation Act, Nisga'a Citizenship Act, Nisga'a Elections Act, Nisga'a Financial Administration Act, Nisga'a Capital Finance Commission Act, Nisga'a Administrative Decisions Review Act, Nisga'a Personnel Administration Act, Nisga'a Land Act, Nisga'a Land Designation Act, Nisga'a Village Entitlement Act, Nisga'a Nation Entitlement Act, Nisga'a Land Title Act, Nisga'a Fisheries and Wildlife Act, Nisga'a Forest Act, Nisga'a Programs and Services Delivery Act,* and the *Nisga'a Offence Act*. The Nisga'a Constitution describes how law-making power is to be exercised by the *Wilp Si'ayuukhl Nisga'a* and has rules describing the process for enacting laws.[218] Furthermore a Nisga'a Executive[219] has the power to make regulations under laws enacted by the *Wilp Si'ayuukhl Nisga'a* and Village Governments also have jurisdiction in their areas of law-making authority.[220]

Under the *Nisga'a Final Agreement*, Nisga'a Government has no exclusive jurisdiction.[221] It is always concurrent with federal or provincial jurisdiction; this made it necessary to provide for rules that determine which law prevails in the event of inconsistency or conflict. "Generally, Nisga'a laws prevail in relation to matters that are internal to the Nisga'a Nation, integral to their distinct culture, essential to the operation of their government or the exercise of their other treaty

---

217 During Wilp Si'ayuukhl Nisga'a meetings, all members are able to make statements, participate in question periods, introduce petitions, raise urgent matters, and debate Nisga'a bills introduced. Legislation is enacted by Wilp Si'ayuukhl' Nisga'a when there is: Introduction of the Bill; Consideration of the Bill; Final Vote of the Bill; and Signing of the Bill by the President.

218 The Nisga'a Government is composed of: Nisga'a Lisims Government; Nisga'a Village Governments in the Nisga'a Villages of New Aiyansh, Gitwinksihlkw, Laxgalts'ap,and Gingolx; and Representatives elected by the Nisga'a Urban Locals of Vancouver, Terrace and Prince Rupert/Port Edward.

219 The Nisga'a Lisims Government Executive consists of all the Officers, the Chief Councilor of each Nisga'a Village Government, and one representative from each Nisga'a Urban Local.

220 See the Nisga'a Lisims Government website at http://www.nisgaalisims.ca/legislation.html.

221 Edmond Wright, "Self-Government: The Nisga'a Experience" in *Speaking Truth to Power III* (Vancouver: BC Treaty Commission, 2002).

rights.[222] In some cases, Nisga'a laws must comply with provincial standards in order to be valid. If those standards are met or exceeded, then Nisga'a laws prevail. In other cases, Canada, British Columbia, and the Nisga'a Nation agreed that, while Nisga'a Government should have the authority to make laws, if there is a conflict, federal or provincial laws should prevail.[223] Finally, there are many subject matters over which Nisga'a Government has no jurisdiction."[224]

Under the *Nisga'a Final Agreement,* Edmond Wright has argued that Nisga'a laws prevail in the following matters: administration, management, and operation of Nisga'a Government; creation, continuation, amalgamation, dissolution, naming or renaming of Nisga'a villages on Nisga'a lands, and Nisga'a urban locals; Nisga'a citizenship; preservation, promotion and development of Nisga'a language and culture; use, management, possession, and disposition of Nisga'a lands owned by the Nisga'a Nation; a Nisga'a village or a Nisga'a corporation and similar matters relating to the property interests of the Nisga'a nation; Nisga'a villages and Nisga'a corporations; Nisga'a lands use, management, planning, zoning, development, and similar matters related to the regulation and administration of Nisga'a lands, (including establishment of a land title or land registry system), and designation of Nisga'a lands; use, possession,

---

222 Matters that are internal to the Nisga'a people are membership in the Nisga'a nation, Nisga'a government institutions, marriages, social services, health services, child and family services, child custody, adoption and education; management of Nisga'a lands, including the development and management of a Nisga'a land title system, control over access to Nisga'a lands and highways and the use, management, planning, zoning and development of Nisga'a lands; management of resources on Nisga'a lands, including forest, fisheries, wildlife and resources on Nisga'a lands.

223 The following are subject matters listed in Nisga'a Government Chapter where federal or provincial laws prevail: Use, possession and management of assets located off of Nisga'a Lands, of the Nisga'a Nation, Nisga'a Villages or Nisga'a Corporations; Public order, peace and safety on Nisga'a Lands; Regulation of traffic and transportation on Nisga'a Roads; Solemnization of marriages; Provision of social services by Nisga'a Government to Nisga'a citizens; Health services on Nisga'a Lands; Prohibition of, and the terms and conditions for, the sale, exchange, possession or consumption of intoxicants on Nisga'a Lands; Emergency preparedness; Sale, in accordance with the Final Agreement, of fish or aquatic plants harvested under the Final Agreement or the Harvest Agreement; Sale of wildlife or migratory birds harvested under the Final Agreement; Environmental assessment of projects on Nisga'a Lands; Environmental protection on Nisga'a Lands; Own source revenue administration.

224 *Ibid.*

management and similar matters relating to the property interests of the Nisga'a nation; Nisga'a villages and Nisga'a corporations and their assets, other than real property on Nisga'a lands; organization and structure for the delivery of health services on Nisga'a lands; authorization or licensing of aboriginal healers on Nisga'a lands, including measures in respect of competence, ethics and quality of practice that are reasonably required to protect the public; child and family services on Nisga'a lands, if Nisga'a laws include standards comparable to provincial standards intended to ensure the safety and well-being of children and families; adoption of Nisga'a children, if Nisga'a laws expressly provide that the best interests of the child is the paramount consideration and that British Columbia and Canada are provided with records of all adoptions occurring under Nisga'a laws; pre-school to grade 12 education on Nisga'a lands of Nisga'a children, if Nisga'a laws include provisions for curriculum, examination and other standards that permit transfers between school systems, and for appropriate certification of teachers; post-secondary education within Nisga'a lands, if Nisga'a laws include standards comparable to provincial standards in respect of matters such as institutional structure and accountability, admission, and curriculum standards; devolution of cultural property (ceremonial regalia and similar property associated with a Nisga'a clan and other personal property having cultural significance to the Nisga'a Nation) of a Nisga'a citizen who dies intestate.[225]

---

[225] *Ibid.* Other areas where Nisga'a law prevails are: Timber resources and non-timber forest resources on Nisga'a Lands, if Nisga'a laws meet or exceed provincial standards (subject to transitional provisions); Nisga'a Nation's rights and obligations in respect of fish and aquatic plants under the Final Agreement, if Nisga'a laws are consistent with this Agreement and the harvest Agreement and are not inconsistent with Nisga'a annual fishing plans approved by the Minister; Nisga'a Nation's rights and obligations in respect of wildlife and migratory birds under the Final Agreement, if Nisga'a laws are consistent with this Agreement and are not inconsistent with the annual management plans approved by the Minister; establishment of a Nisga'a Police Board and Nisga'a Police Service, if Nisga'a laws include provisions in substantial conformity or compatible with provincial standards set out in the Final Agreement, and with the approval of the Lieutenant Governor in Council; establishment of a Nisga'a Court, if Nisga'a laws include laws to ensure fairness, independence and accountability, and with the approval of the Lieutenant governor in Council; direct taxation of Nisga'a citizens on Nisga'a Lands to raise revenue for Nisga'a Nation or Nisga'a Village purposes; implementation of taxation agreements with Canada or British Columbia.

H. Inuit Legal Traditions

The Inuit are a circumpolar people who live in the Arctic, in parts of Alaska, Greenland, Siberia, and Canada. In Canada, they occupy the western and central part of the Arctic, the Keewatin region of the barren lands, Baffin Island, the High Arctic, the coastal areas of Hudson's Bay, and parts of northern Quebec and Labrador. Like the Nisga'a, the Inuit are implementing their legal traditions in a contemporary context as a result of their land claims agreement and powers of public governance in Canada's newest territory, Nunavut.

Among the most important legal terms in Inuit law are *maligait, piqujait* and *tirigusuusiit.*[226] *Maligait* refers to things that have to be followed.[227] It is a relational term focusing on the result of a request (the obligation to obey).[228] *Piqujait* deals with things that have to be done. The obligation that is the focus of *piqujait* is the wish of an authorized person about something that is to be done. *Tirigusuusiit* refers to things that have to be avoided. If a person transgresses *tirigusuusiit,* they will face consequences from their actions.

These legal traditions are of ancient origin but have potential application to present circumstances. Inuit Elder Aupilaarjuk stated: "Today, the problem is to retain from the old traditions what is valuable to the present. When I think about this, I wonder how we can solve the problem. I would like to look at the Inuit *maligait* that we had in the past and compare them with the laws we have today, so we could develop better laws for the future."[229] When Aupilaarjuk was asked which *tirigusuusiit* could be applied today he said:

---

226 Mariano Aupilaarjuk, Marie Tulimaaq, Emile Imaruittuq, Lucassie Nutaraaluk, Akisu Joamie, *Interviewing Inuit Elders, Volume 2: Perspectives on Traditional Law*, Jarich Oosten, Frédéric Laugrand and Wim Rasing eds., (Iqaluit: Nunavut Arctic College, 1999).

227 *Malik* means "to follow a person, an animal, an idea, an object." *Ibid*. at 2.

228 *Ibid.* at 2.

229 *Ibid.* at 13.

> I think some of them could be brought back because they are not dangerous. We *tirigusuk* when we refrain from doing something. *Qallunaat* (non-Inuit) also have *tirigusuusiit* such as not working on Sundays. This is a modern day *tirigusungniq.* Following *tirigusungniq* is not bad, it is good because it is part of our tradition. …I think it is important we take back some of the *tirigusuusiit.* They will not cause people to become bad. Just because they are a part of Inuit *ukpirusuusiit,* some people think they are no good and come from Satan. We are wrong to think like that. What we are following today is wrong and people are killing themselves. Inuit weren't like that before. We have to look at where we came from and where we are today. Back then we truly believed in *tirigusuusiit.* You need to think about this when you are preparing for your future.

Tirigusuusiit could be used as an Inuit legal device to highlight inappropriate actions. While not all ancient *tirigusuusiit* would be followed in a contemporary setting, they could be compared and contrasted with other Canadian legal traditions to create a better future, as Aupilaarjuk suggested. For example, *tirigusuusiit* requires that campsites be kept clean out of respect for the land and the animals. Joan Atuat of Qairnirmiut noted: "We used to have to keep our garbage area in one small place away from children and tents. My grandmother was very strict about people throwing garbage in the lakes. She would not have anything to do with dirty fish…She was so strict about cleanliness that she didn't even want small pieces lying around the tent."[230] This *tirigusuusiit* sounds like a wise law in environmental and land use planning. There are *tirigusuusiit* related to visiting other peoples land, clothing, and hunting and other life activities.[231]

Inuit Qaujimajatuqangit is a particularly important concept in Inuit law that contains guidance for the future. *Inuit Qaujimajatuqangit "*includes unwritten traditional knowledge, family and political structures, learning, social development schemes, and even the understanding of local weather

---

230 John Bennett and Susan Rowley, eds., *Uqalurait: An Oral History of Nunavut* (Montreal: McGill-Queen's Press, 2004) at 110.

231 *Ibid.* at 131, 310, 391, 402

patterns".[232] It has also been described as a living technology for rationalizing thought and action, organizing tasks, resources, family, and society into a coherent whole.[233]

Today, the Nunavut Territorial Government is one of the most important institutions implementing Inuit legal traditions in Canada. The government has taken great guidance from *Inuit Qaujimajatuqangit* to structure its legislative and administrative agenda and actions. For example, the *Nunavut Integrity Act* integrates *Inuit Qaujimajatuqangit* into its process and substance for dealing with conflicts of interest.[234] This was recognized by members of the Nunavut legislature when it was introduced.[235] At the opening of the 2004 session, there were constant references to Inuit legal traditions in the legislature.[236] Inuit legal procedures are also evident in the functioning of the executive. There are no political parties at the territorial level; the Cabinet operates on the basis of consensus politics.[237] Concepts applied under *Inuit Qaujimajatuqangit* include: *Pijitsirniq* (serving), *Aajiiqatigiinniq* (decision-making), *Pilimmatsaniq* (passing knowledge and skills through observation, doing and practice); *Piliriqatigiinniq* (working together for a common cause); *Avatittinnik Kamattiarnik* (environmental stewardship); *Qanuqtuurniq* (creatively resourceful problem-solving); *Tunnganarniq* (openness, acceptance and inclusivity); *Ippigusuttiarniq* (caring for others); *Angiqatigiinniq* (proceeding forward with clear understanding); *Ikajuqatigiinniq* (assistance and cooperation without barriers); *Qaujimautittiarniq* (information sharing); *Uppiriqattautiniq* (fair treatment); *Tukisiumaqatigiinniq*

---

232 Law Commission of Canada, Final Report: Transforming Relationships Through Participatory Justice (Ottawa, 2003) at chapter 2.

233 Jaypetee Arnakak, "Commentary: What is Inuit Qaujimajatuqangit?" *Nunatsiaq News*, August 25, 2000.

234 Nu. 2001, c.7.

235 Legislative Assembly of Nunavut, Fifth Session, *Hansard*, May 24, 2001 at http://www.assembly.nu.ca/old/english/hansard/final5/010524.html. See, generally, the work of the Integrity Commissioner of Nunavut at http://www.integritycom.nu.ca/English/index.html.

236 For example, the opening session of 2004 on Tuesday November 16, 2004 restated government commitments to: *Inuuqatigiitsiarniq*, healthy communities; *Pijarniniqsaq qattujjiqatigiitsiarnirlu*, simplicity and unity; *Nangminiq makitajunnarniq*, self reliance; and *illipallianginnaqniq*, continuous learning.

237 Under the consensus system, ministers are chosen by the legislative assembly, not by the premier. The premier, however, is in charge of assigning departmental jobs.

(conscious understanding of others as the basis of mutual relationships); *Ilainnasiunnginniq* (sensitivity to difference); *Ilajjuttigiinniq* (encouragement of others); *Aaqqiumatitsiniq* (keeping order in place); *Iqqaqtuijjiqattariaqannginniq* (restraint on personal judgment); *Piviqaqtittiniq* (opportunity for participation and contribution); *Silatuniq* (wisdom to know how to apply your knowledge); and *Ajuqsatittinginniq piviqarialinnik* (support for growth, development and success).[238] The Nunavut government has taken many opportunities to apply these and other Inuit legal traditions in their statutes, regulations and government procedures.[239]

III. Learning from Bi-Juridicalism

At this point, a brief review of civil and common law is appropriate. Recently, the concept of Canadian bi-juridicalism has been frequently mentioned. This "refers to a state of facts: the co-existence of two contemporaneous legal systems in Canada."[240] While the concept behind bi-juridicalism is fair as far as it goes, it is also problematic because it is not sufficiently inclusive. As has already been noted, numerous Indigenous legal traditions continue to function in Canada in a systemically important way. 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.

A more thorough understanding of the development of common and civil law demonstrates the historically fluid, socially constructed, and culturally contingent nature of legal traditions in

---

238 Research and Statistics Division, Review of the Nunavut Community Justice Program: Final Report (Department of Justice, 2004) at http://canada.justice.gc.ca/en/ps/rs/rep/2005/rr05-7/p0.html, appendix I, with assistance from Scott Clark Consulting Inc.

239 See generally, Nunatsiaq News archive at http://www.nunatsiaq.com/archives/archives.html.

240 Marie-Claude Gervais, "Harmonization and Dissonance: Language and Law in Canada and Europe" in Department of Justice, *Bijuralism and Harmonization: Genesis* (Ottawa: Minister of Justice and Attorney General of Canada, 2001) at 10.

Canada. It also provides an important reminder not to stereotype or exaggerate the positivistic nature of non-Indigenous legal traditions.[241] Without this broader context, the traditions may be regarded as 'natural' and 'timeless'. This tends to lead to the conclusion that Indigenous traditions have no place in contemporary society. 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. Understanding the conditional development of civil and common law over time, as the systems waxed and waned depending on socio-cultural factors, increases awareness of the need for choice and moral agency in the adoption and adaptation of legal traditions in Canada's history. This recognition is important to the further development of Indigenous legal traditions, as similar powers of choice and agency are now appropriate and available.

It is tempting to make broad, almost irreconcilable distinctions between Indigenous legal traditions and western legal sources because of their different histories, social organization, and values. This is why it is important to note that, like Indigenous legal traditions, Canada's broader legal traditions also rest upon unwritten cultural assumptions. The Supreme Court has ruled that, while Canada's Constitution is primarily a written one, there is, behind the written word, "an historical lineage stretching back through the ages, which aids in the consideration of underlying constitutional principles. These unwritten principles inform and sustain the constitutional text: they are the vital un-stated assumptions upon which the text is based."[242] The Court further noted that these unwritten principles are "not merely descriptive but are also invested with a powerful normative force, and are binding upon both courts and governments."[243] Indigenous legal traditions are

---

241 J.F. Gaudreault-Desbiens, "The Québec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy and Identity" (1999) 23 *Vermont Law Review* 793.

242 *Reference re Secession of Québec*, [1998] 2 S.C.R. 217.

243 *Ibid.* at para. 54.

among Canada's unwritten normative principles and, with common and civil law can be said to "form the very foundation of the Constitution of Canada."[244]

If the similarities are not appreciated, the differences between Aboriginal and non-Aboriginal legal systems can give rise to misconceptions and stereotypical ideas about Aboriginal traditions. The Supreme Court of Canada may have fallen into this trap when it reflected on the similarities and differences between Aboriginal and non-Aboriginal traditions. In *R. v. Delgamuuukw,* Chief Justice Lamer observed: "In the Aboriginal tradition the purposes of repeating oral accounts from the past is broader than the written history of western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority or prestige"[245] This description of the social role of Aboriginal oral histories is striking not because it is inaccurate—the Court is in fact sensitive to the various roles these traditions can play—but because the Court seems to overlook the broader social function of Canadian law. The "broad social role" of Indigenous tradition, as the "expression of the values and mores" of culture, is not very different from common and civil law traditions.[246] Yet by contrasting Aboriginal and non-Aboriginal traditions as a dichotomy, the Supreme Court did not give sufficient emphasis to the broad social function of common or civil law.

These stereotypical ideas about Indigenous law can be problematic because they neglect the role of civil and common law as a cultural medium that educates, communicates, and socializes. They make Indigenous principles and traditions appear overly subjective and "non-legal" because of their "broad social role". It is too easy to detach the civil and common law from their cultural contexts.

---

244 *Ibid.*

245 *Delgamuukw* v. *British Columbia* at 1068 (S.C.C.), quoting from *Report of the Royal Commission on Aboriginal People, Volume 1, Looking Forward, Looking Back* (Ottawa: Minister of Supply and Services Canada, 1996).

This is especially the case when their cultural components seem almost invisible precisely because they correspond with the values of a wide portion of society. A fair assessment of the similarities and differences between Indigenous, civil and common law traditions would pay equal attention to the cultural aspects of each. Canada's two most dominant legal traditions, civil and common law also have deep cultural roots. They are not removed from society, nor do they exist apart from it. The development of the civil and common law flows from, and is embedded in, the cultures of specific groups of Canadians.

A. Civil Law Legal Traditions

Civil law tradition has its origin in Roman law and was originally codified in the Corpus Juris Civilis of Justinian.[247] It developed subsequently in continental Europe and then spread around the world in codified and un-codified forms. Civil law is a highly structured tradition; it is based on broad declarations of general principles that provide guidance to its adherents. It was first received in North America when New France became a royal province in 1663, more than a century before the French Revolution of 1789. Canada's civil law originally derived from a decree by King Louis XIV that New France would follow the Custom of Paris; this was the body of laws that governed the Île de France (the region around Paris) at the time. The centralized transplant of customs from one part of the world and their application to people in another part of the world, (even if they do not necessarily share the same customs), is a feature of principle-based laws. The laws of New France demonstrate this pattern; they are directed from the top, with Royal ordinances, and edicts and decisions from the Conseil Souverain (Sovereign

---

246 Quoted from *Delgamuukw* v. *British Columbia* at 1068, paraphrasing Clay McLeod, "The Oral Histories of Canada's Northern Peoples, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30 *Alberta Law Review* 1276.

247 William Tetley, "Mixed Jurisdictions: Common Law and Civil Law (Codified and Uncodified)" (1999) 4 *Uniform Law Review* 591.

Council) proclaiming the laws by which people would live.[248] Fortunately, there was some early recognition that law is not effective if it does not reflect local values. It was implicitly acknowledged that the "top" of the social hierarchy has to interact with the 'bottom" for law to be effective. The Code therefore went through several changes in 1667, 1678 and 1685 and helped to accommodate the particular cultural circumstances of New France.

In 1763, after the conquest and the Treaty of Paris, a choice was made to abolish civil law in New France. The British common law system was imposed on the people of New France. In practice, though, civil law continued to exist and it is interesting to note that positivistic proclamations of formal British law were not sufficient to displace laws that had come to reflect more local values. The culture of local law among the French settlers was not easily erased. As a result, the British reinstated the civil law system (for property and civil rights) in the *Québec Act, 1774.* They recognized that the best way to secure order and a degree of allegiance was to have people live closer to their own customs and values. Since that date, civil law has survived in Canada.[249]

For example, the *Constitutional Act, 1791* split the province of Québec into Upper and Lower Canada and did not extinguish civil law.[250] While Upper Canada became a common law jurisdiction, Lower Canada retained its civil law tradition. Close to fifty years later, another change occurred as a result of the *Act of Union of 1840.* This placed Lower and Upper Canada in a political union. It did not modify civil law rights, though it did create unique pressures on the system. This resulted in the development of a bilingual civil code for Canada East (still called

---

248 Melanie Brunet, *Out of the Shadows: The Civil Law Tradition at the Department of Justice* (Canada: Supply and Services, 2000) at 5.

249 John Brierly and Roderick Macdonald, eds., *Québec Civil Law: An Introduction to Québec Private Law* (Toronto: Emond Montgomery, 1993).

250 W.J. Ecccles, *France in America* (Toronto: University of Toronto Press, 1972) at 234.

Lower Canada) in 1857, intended to reconcile the problems that had developed from mixing British Common law and the Custom of Paris. Civil law in Canada had not been codified before this initiative. In 1866, the *Civil Code of Lower Canada* was enacted, which also drew inspiration from the 1804 Code Napoléon. The 1866 Code had four books: Persons, Property and its Different Modifications, Acquisition and Exercise of Rights of Property, and Commercial Law.

Confederation also allowed for the continuation of civil law in Canada in private law matters. This explicit choice was made by Canada's founders and supported by the Imperial Parliament. Section 92(13), gave the provinces exclusive power over 'property and civil rights'. This continued Quebec's legal tradition under this head of power, although the federal government retained jurisdiction over criminal law. From 1866, the *Civil Code of Lower Canada* remained virtually unchanged until 1955. In the late 1980s, it became apparent that a major revision of the Code was required. As a result, a new *Civil Code of Québec* came into force on February 1, 1994. The new Code contains ten books and includes some concepts from common law.[251]

The interpretive tradition of civil law emphasizes the primacy of broad principles and embodies deeper societal commitments. Professor Rod Macdonald has written: "A civil code may be described as a social or civil constitution – a text documenting the compact between people by which fundamental terms of civil society are established".[252] Civil law remains a powerful legal tradition in Canada because of its historical use and its relationship to the society and culture in which it is applicable.

---

[251] 1. Persons (e.g.: basic individual rights, residence rules, privacy), 2. The Family (e.g.: marriage, parentage, adoption), 3. Successions (e.g.: wills, inheritance, estates), 4. Property (e.g.: possession, land boundaries, right-of-way), 5. Obligations (e.g.: contract law, civil liability (tort law), sales, leasing), 6. Hypothecs (i.e.: mortgages and the sale of land), 7. Evidence (e.g.: burden of proof, rules of evidence), 8. Prescription (i.e.: statutes of limitations), 9. Publication of Rights (e.g.: registration of property), 10. Private International Law (governs the resolution of legal issues involving persons outside Canada)

[252] Rod MacDonald, 'Encoding Canadian Civil Law' in *Canada, The Harmonization of Legislation with Québec Civil Law and Canadian Bijuralism* (Ottawa: Supply and Services, 1997) 136 at 159; see also J. Carbonnier, "Le Code Civil" in P. Nora ed., *Les Lieux de Memoire*, Vol.2 (Paris: Gallimard, 1986).

B. Common Law Legal Traditions

At the same time that civil law grew in Canada, common law tradition also began to be widely used. Nature or deity did not design Canada as a common law country, but those who settled the land outside Quebec brought a cultural preference for this legal tradition. The origins of common law are not grounded in any text; the system developed from a tradition "expressed in action".[253] Much like some Indigenous legal traditions, common law began as customary law. In fact, customary law is still important in the development of common law reasoning. English common law was the product of a great diversity of cultures in medieval England. It grew out of a society where a bewildering diversity of courts, from a broad array of cultures, enforced a wide variety of law.[254] Throughout England, there were courts of all kinds: courts of equity, market courts, manor courts, university courts, county courts, borough courts, ecclesiastical courts and aristocratic courts. [255] Common law was born when the use of writs expanded at the expense of these other legal jurisdictions. [256] The great English historian F.W. Maitland observed that writs were "the means whereby justice became centralized, whereby the king's court drew away business from other courts."[257] Common law in mediaeval England was a formulary system, developed around a complex of writs that a litigant could obtain from the Chancery to initiate litigation in the Royal Courts.[258] Each writ gave rise to a specific manner of proceeding or "form

---

253 Simpson, *supra* note 4.

254 See Patrick Glenn, "The Common Law in Canada" (1995) 74 *Canadian Bar Review* at 265, 276; Matthew Hale, *The History of the Common Law of England,* Charles M. Gray, ed. (Chicago: University of Chicago Press, 1971) at 39-43. The cultural diversity in the development of the United Kingdom is nicely detailed in Norman Davies, *The Isles: A History* (New York: Oxford University Press, 1999).

255 See John H. Baker, *An Introduction to English Legal History*, 2nd. Ed. (London: Butterworths, 1979).

256 See Frederic W. Maitland & Francis C. Montague, *A Sketch of English Legal History* (London: G.P. Putnam and Sons, 1915) at 1-130.

257 See Frederic W. Maitland, *The Forms of Action at Common Law* (Cambridge: Cambridge University Press, 1948) at 11.

258 Maitland, *supra* note 256 at 100-101.

of action" each with its own rules and procedures.[259] These "forms of action" were the procedural devices used by courts to give expression to the theories of liability recognized by the common law.[260] Through these writs, litigants chose their remedies in advance of trial. They could not subsequently amend their pleadings to conform to the proof needed for the case or to meet the court's choice of another theory of liability.[261] If litigants did not select the proper writ for their action, they could not succeed in their claim.[262] This uniformity allowed for the more centralized control of the entire common law structure,[263] and the sovereignty of the Crown expanded as the jurisdiction of common law became more widespread. [264]

Common law was exported to Canada when English governors arrived on its shores and asserted its application to their new home. They made a choice. The date for the common law's reception varies across the country.[265] Before Confederation, Newfoundland, Prince Edward Island, New Brunswick, and Nova Scotia all followed common law after the Acadian settlement and expulsion in the Maritimes. Similarly, the colonies of Vancouver Island and British Columbia were common law jurisdictions before union. Establishment of common law in what became Ontario is generally placed at 1763, while the prairies and the old North West were deemed to have received common law in 1870. It was not until 1949 that decisions and developments in English law ceased to be directly incorporated into Canadian common law. Of course, many

---

259 See M.P. Furmston, ed., *Cheshire, Fifoot and Furmston's Law of Contract*, 11th Ed.,(London: Butterworths, 1986) at 2.

260 Henry Campbell Black, *Blacks Law Dictionary*, 5th Ed. (St. Paul, Minn.: West Publishing, 1979) at 587.

261 *Ibid.*

262 See Albert K.R. Kiralfy, ed., *Potter's Historical Introduction to English Law and its Institutions* (London: Street and Maxwell, 1962) at 293-297.

263 See Margaret H. Ogilvie, *Historical Introduction to Legal Studies* (Carswell: Toronto, 1982) at 70, 101, 106-107.

264 See Stroud F.C. Milsom, *Historical Foundations of the Common Law*, 2nd. Ed. (Toronto: Butterworths, 1981) at 11-36.

265 Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997) at 1-17.

Indigenous people wonder how these colonies became common law jurisdictions when Indigenous legal traditions continued to apply in all of them.

The common law tradition in contemporary Canada operates through *stare decisis* and a hierarchy of courts. *Stare decisis* is the principle by which decisions in previous cases are applied to current cases that are materially similar. In their decisions, judges are expected to provide reasons justifying their selection of applicable cases and principles. As previously noted, the doctrine of precedent was not originally a part of the common law method; this came with the development of industrialization in the 17th century and the need to have standardized rules.[266] With precedent, previous cases provide guidance and act as constraints on judges. It provides a measure of uniformity to the law and attempts to avoid arbitrariness in decision-making. Another aspect of common law that is now accepted, but was not originally a part of its operation, is the hierarchy of courts. Lower court decisions can be appealed to higher courts, and the decisions of the higher or superior courts are binding on inferior tribunals. The Supreme Court of Canada is at the top of this hierarchy; below it are provincial Courts of Appeal, followed by trial courts. Hierarchy also promotes uniformity and attempts to remove arbitrariness. The culture of common law is of incremental development on a case-by-case basis.

This brief examination of civil and common law illustrates the importance of history and culture in the development of legal traditions. Without such understanding some people may not recognize that the development of civil and common law traditions is based on specific historical and cultural circumstances. Choice and moral agency both played a role in the adoption and adaptation of these traditions. Choice and agency will be as important to the adoption and

---

[266] Glen, *supra* note 25.

continued adaptation of Indigenous legal traditions. Since legal traditions are subject to human intervention, they can change, grow, and develop.

C. The Relationship of Canada's Legal Traditions

It is important to understand the relationship between Canada's legal traditions in order to appreciate their effect on one another. None are fully autonomous; they mutually influence each other for better or worse. For most of the country's history, common law has been a dominant force in Canada; at times, this has made it difficult for civil and Indigenous legal traditions to develop and grow. However, in the past three decades, civil law has increasingly emerged from the shadow of common law, and now enjoys greater prominence. The growth of Indigenous legal traditions may follow the same course if appropriate measures are taken.

i. Interactions between Civil Law and Common Law: Lessons for Indigenous Law?

Legal traditions within Canada interact with one another, and this may hold lessons for Indigenous laws' growth. The civil law has been inordinately influenced by the common law and still maintained its authority; perhaps the same conclusion will apply to Indigenous traditions influenced by the other legal traditions. Indigenous traditions may still maintain their power despite being heavily overshadowed by other legal traditions in the courts, parliament and provincial legislatures.

For many years, courts, Parliament, and legislatures outside Quebec paid very little attention to civil law. Even within Quebec there was a long period of concern about the 'creeping' of

common law principles into the judicial interpretation of the Civil Code.[267] During these years, civil law did not enjoy the same weight as common law in the Supreme Court of Canada. It seemed in danger of being assimilated.[268] The Privy Council and Supreme Court did not appear to understand that the Civil Code was a founding document of Quebec's legal system; as a result, they treated it like an ordinary statute.[269] This lack of reciprocity between the two systems caused many to worry about the continued vitality of civil law tradition.[270]Scholars even went so far as to wonder whether the civil law would be undermined and assimilated through the influence of common law interpretive principles.[271] The tide seems to have turned in the last few years.[272] The influence of civil law began to grow after 1949 when the Supreme Court of Canada replaced the Privy Council as the country's final appellate body. Since 1975, the growth in the influence of civil law on common law has been most noticeable. Both the Supreme Court of Canada and the Parliament of Canada have taken steps to re-balance the relationship between the two systems.

---

267 See, generally, France Allard, "The Supreme Court of Canada and its Impact on the Expression of Bijuralism", in Justice Canada, *The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism* (Ottawa: Department of Justice, 2001). See also J.M. Brisson and A. Morel, "Droit fédéral et droit civil : complémentarité, dissociation", *The Harmonization of Federal Legislation with Québec Civil Law and Canadian Bijuralism* (Ottawa: Department of Justice, 1997) 213 at 231.

268 D. Howes, "From Polyjurality to Monojurality: The Transformation of Québec Law, 1875-1929" (1987) 32 *McGill Law Journal* 523.

269 Québec Railway, Light, Heat and Power Co. v. Vandry [1920] A.C. 662; Town of Montreal West v. Hough. [1931] S.C.R. 113.

270 Lloyd Brown-John and Howard Pawley, *When Legal Systems Meet: Bijuralism in the Canadian Federal System* (Barcelona: Institut de Ciencies Politiques I Socials, 2004) at 12 http://www.diba.es/icps/working_papers/docs/wp234.pdf.

271 *Ibid.* citing P.B. Mignault, "Les Rapport entre le droit et la common law au Canada spécialement dans la province de Québec" (1932) 11 *Revue de Droit* 201; P Azard, "La Cour Suprême du Canada et l'application de droit civil de la Province de Québec" (1965) 43 *Canadian Bar Review* 553; J.L. Baudoiin, "Le Code Civil du Québec: Crise de croissance ou crise de vieillesse " (1966) 44 *Canadian Bar Review* 391; S. Normand, "Un thème dominant de la pensée juridique traditionelle au Québec: La Sauveguarde de l'integrité de droit civil" (1987) 32 *McGill Law Journal* 559.

272 *Béliveau St-Jacques* v. *Fédération des employées et employés de services publics Inc.*, [1996] 2 S.C.R. 345; *Québec (Public Curator)* v. *Syndicat national des employés de l'Hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *Godbout* v. *City of Longueuil*, [1997] 3 S.C.R. 844; *Aubry* v. *Éditions Vice-Versa*, [1998] 1 S.C.R. 591.

While common law has historically had the more dominant influence, civil law has at times affected common law.[273] Taking care not to over-emphasize the impact,[274] we can nevertheless point to several examples in which the Supreme Court has referred to civil law in common law decisions. A paper written for the Department of Justice notes some examples:[275]

> [There] was the case in *Rivtow Marine Ltd.* v. *Washington Iron Works*, in which the Court cited *Ross* v. *Dunstall* on manufacturer's liability. It is interesting to note that, in *Ross* v. *Dunstall*, the Supreme Court interpreted article 1053 of the *Civil Code of Lower Canada* ensuring that its interpretation was not inconsistent with a rule established by English precedent. In *Sorochan* v. *Sorochan*, it cited *Cie Immobilière Viger Ltée* v. *Lauréat Giguère Inc.*, but only for comparison as the basis of unjust enrichment can also find basis in common law. In another case, that of *Arndt* v. *Smith*, McLachlin J. cited *Laferrière* v. *Lawson* in support of her reasons on the balance of probabilities test in evaluating causation. Despite the varying levels of influence of civil law in these examples, they nevertheless illustrate an increased receptivity to comparative analysis of Canadian common law with Quebec civil law.
>
> In family law, and more particularly with regard to child custody, the Court has seen fit to consider common law decisions in its civil law judgments, and vice versa, while recognizing the conceptual differences of the concepts in both traditions. The dialogue established between the two traditions in this field with regard to questions involving children, may be explained by a common thread running between them relating to the basis for every decision concerning children: the concept of the best interest of the child. This shared principle encourages common solutions, even if the reasons expressed based on the concepts specific to each tradition differ. L'Heureux-Dubé J.'s comparison in *Gordon* v. *Goertz* which is based on the distinctions established on the concept of custody in *C. (G.)* v. *V.-F. (T)*, is a good example of this trend, as is the analysis in *W. (V.)* v. *S. (D.).*
>
> Furthermore, when the issue before the Court concerns universal values, there is a more pronounced tendency to mention the rules and solutions of either tradition. This finds expression in the decisions, for example in matters pertaining to human rights and freedoms, including questions related to the protection of the fetus and the rights of the mother. The use of *Montreal Tramways Co.* v. *Léveillé* or *Tremblay* v. *Daigle* in *Dobson (Litigation Guardian of)* v. *Dobson* and *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.* reflect this bridging of the gap between the two traditions. Each of these judgments, regardless of the question to be decided, turned on the same fundamental characterisation: the legal personality of the fetus before birth.[276]

---

273 Patrick Glenn, "The Common Law in Canada" (1995) 74 *Canadian Bar Review* 261; C.D. Gonthier, "L'influence d'une cour suprême nationale sur la tradition civiliste québécoise" in *Journées Maximilien-Caron 1990*, *Enjeux et valeurs d'un code civil moderne* (Montreal: Thémis 1991) 3 at 8.

274 Patrick Glenn, "Le droit comparé et la Cour suprême du Canada" in E. Caparros et al., eds., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 197.

275 See Department of Justice, "The Supreme Court of Canada and its Impact on the Expression of Bijuralism" at http://canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule3_ptitre.html.

276 *Ibid.*

The dialogue between these two legal traditions has proved positive. Greater reciprocity has facilitated access to a richer body of laws with which to answer legal questions.

Despite the recent successes in harmonizing civil law and common law traditions, some civil law trained lawyers worried about the system's integrity, especially during the dark years of assimilation. They feared that civil law had become or would become tainted through its interaction with common law. Those who took this view felt that the best way to preserve the authenticity of civil law was to look inward. They tried to purify its doctrines by removing common law influences.

This approach fails to recognize that the integrity of a legal system is not solely dependent on its relative isolation, internal logic, or doctrinal purity. Integrity also depends upon the system's recognition, from within and by others. Recognition secures a jurisdictional space for its operation that encourages the respect of the public and facilitates access to resources. When legal systems do not have to continually defend and justify their existence or worth, they are less vulnerable to arguments that challenge their authenticity. When they gain recognition, they are much freer to interact with other systems without fear of assimilation.

The survival of civil law was greatly assisted by its broader recognition. To gain this recognition, civil law jurists did not have to concede the autonomy of the system's single source and intellectual approach to dispute resolution. Once the courts and Parliament acknowledged the authority and scope of civil law, it became easier for its influence to grow. Because it has been more firmly recognized by Canada's dominant legal institutions, civil law has been revitalized.

Indigenous legal traditions could benefit from this process. They could grow stronger through greater recognition by the Courts and Parliament. The civil law experience should not be lost on

those who seek to extend Indigenous legal traditions. Indigenous legal practitioners might consider the civil law experience and identify potential dangers that could develop from an exclusively inward-looking approach to tradition. Excessive introspection did not serve civil law well; nor will it be beneficial to Indigenous legal traditions. Greater discussion is needed within Indigenous communities about the potential problems of trying to purify Indigenous traditions by the removal of the so-called contamination from common law and civil law traditions. Those wishing to live solely by their traditions could usefully ponder whether disproportionately negative effects flow from attempts to completely isolate themselves from surrounding relationships. Many Indigenous peoples have close ties with surrounding Canadian life: through inter-marriage (50% of Aboriginal people marry non-Aboriginal people), through commercial relationships, and through other important private or societal relationships. Indigenous peoples may not have to concede the autonomy of the sources and approach of Indigenous legal tradition to secure its survival. There are strong arguments that Indigenous traditions could be strengthened by their interaction with the principles and approaches that are found in Canada's other legal traditions.

Of course, the civil law experience may not provide the best guide. Indigenous traditions are different. Indigenous peoples are a much smaller proportion of the population than those living under civil law in the province of Quebec. These smaller numbers might give less political weight to the recognition of Indigenous legal traditions nationally. Furthermore, the Quebec government (which protects property and civil rights through civil law), has specific protections in the Canadian Constitution, whereas Indigenous governance may not have the same status. It may be broadly protected under section 35(1) of the *Constitution Act, 1982*; but so far this recognition has been less than optimal. Additionally, the fact that civil law and common law both stem from European cultures may make their 'harmonization' easier than is the case with Indigenous legal traditions. (But this must not be used as a convenient excuse to not explore

recognition[277]). Furthermore, the surrounding trans-national and international legal systems seem to favour common and civil law modes of organization. This congruence should be a further caution against too strong an application of civil law history in Canada to Indigenous legal traditions. Finally, civil law is limited to matters of private law, whereas Indigenous legal traditions deal also with aspects of public law. While there are similarities, the differences between civil law and Indigenous law must be acknowledged, and form part of any strategy designed to preserve and develop Indigenous legal traditions. .

ii. Interactions: Recognizing Connections Across Legal Traditions

Indigenous legal traditions are an important source of legal guidance for Aboriginal peoples. They could interact with other legal traditions in autonomous and interdependent ways. As noted in Chapter Two, Indigenous laws have assisted Aboriginal peoples in the resolution of their disputes for centuries. Unfortunately, these laws have often been overlooked by non-Indigenous laws; their influence has been eroded within Indigenous communities, in some cases severely.

This erosion must be halted. It has at least two negative effects. First, undermining Indigenous law weakens normative order within Indigenous communities: subverting the underlying values reflected in Indigenous legal traditions generates more confusion and disrespect for 'the law' in the broad sense. This result is a challenge for peace, order and development because it creates uncertainty. Some may think that legal certainty is best achieved by having only one legal tradition, such as common law[278] . But this is not necessarily the case. Whenever common

---

277 Especially where the differences in culture between European law and Indigenous law are cast in terms that subordinate Indigenous traditions on disguised grounds that they are less civilized.

278 It would probably also be dangerous to only have indigenous law apply within a community, because many community members would expect elements from common law or civil law to also guide answers to their disputes.

law or a legislative rule ignores or overturns an Indigenous law without Indigenous participation, Indigenous people conclude that the rules governing their lives are arbitrary and unjust. Arbitrariness and injustice are contrary to the rule of law in Canada.[279] Indigenous legal traditions must gain recognition so that they can influence that rule of law.

Second, the undermining of Indigenous legal traditions diminishes Canada as a nation. The culture of law is weakened in the country as a whole if Indigenous peoples' legal traditions are excluded from its matrix. Not only do we lose great wisdom about how to organize relationships and reduce disputes, we also fail to attend to the underlying justice of Canada's creation and development. The recognition of Indigenous legal traditions could connect Aboriginal and non-Aboriginal Canadians to land in ways not possible under the current administration of common or civil law. When common or civil law is applied to remove Indigenous people from their lands and environments, the highest principles of Canada's legal system are not served. At the time of confederation or union, there was no military *conquest* of Aboriginal peoples that extinguished their jurisdictional rights over their own affairs.[280] At the time of confederation or union, there was no *discovery* by the Crown that would justify the extinguishing of most, if not all, Aboriginal jurisdiction. Aboriginal peoples had already discovered most of the land in Canada and exercised jurisdiction over it prior to the arrival of Europeans. If any legal consequences flowed from so-called 'discovery', these consequences should vest in favor of Aboriginal peoples, not

---

279 *Reference re Secession of Québec*, *supra* note 242, and *Manitoba Language Rights Reference*, at [1985] 1 S.C.R. 721.

280 With respect to its traditional interpretation, the doctrine of conquest allowed using force or waging war only if a nation's security or rights were threatened. Under traditional international law, a country was no more justified in exploiting another through force than was a private individual. Conquest gave the victorious nation the full right to colonize the vanquished nation and change its legal regime. These rights usually were described in the peace treaty that ended the war. The doctrine of conquest only operates, however, if the conquered territory was actually annexed and possessed by the conqueror. In terms of Indigenous lands in B.C. these criteria were not met, as no state of war was declared. See *Status of Eastern Greenland Case* (1933) 3 W.C.R. 148 at 171:

> "[The doctrine of conquest] only operates as a cause of lack of sovereignty when there is a war between two states, and by reason of the defect of one of them sovereignty over territory passes from the loser to the victorious state".

the Crown.[281]At the time of confederation or union, the Crown had not *effectively occupied* Aboriginal lands to the extent that it could claim complete jurisdiction over Aboriginal peoples and thereby negate their jurisdiction over the majority of issues of concern to them.[282] At the time of confederation or union, the Crown had not exercised *adverse possession* over Aboriginal lands that resulted in complete jurisdictional powers over them.[283]

The recognition of Indigenous legal traditions gives Canadian law a way out of the impasse identified above. If we assume that Indigenous peoples have legal traditions that embody rights to allocate, alienate or share land within their communities and with others, then Canada can claim land and jurisdiction through consent when land or power is transferred in accordance with these traditions.

Treaties are one way to recognize Indigenous peoples' right to make decisions in accordance with their laws to share or give land to others. *Indigenous peoples are not the only beneficiaries under the treaties. Non-Indigenous peoples also have treaty rights.* Both groups are recipients of the promises made in the negotiation process. The mutuality of the treaties is often overlooked because Indigenous peoples are those most often striving to assert their rights. Yet

---

281 The doctrine of discovery only gives rights over land if the land is *terra nullius* (literally meaning barren and deserted). The lands that made up British Columbia at the time of confederation were not barren and deserted. The High Court of Australia has characterized the doctrine of discovery, tied to *terra nullius*, as "unjust and discriminatory", see *Mabo v. Queensland* [No 2] (1992) 175 CLR 1 at 42. The doctrine of discovery was rejected in *Island of Palmas* (1928) 2 R.I.A.A. 829.

282 According to the *Island of Palmas* case, a claim based on occupation was incomplete until accompanied by "effective occupation of the region claimed to be discovered". The term "effective occupation" incorporates the notion or "uninterrupted or permanent possession". Based on this rule, the only ones capable of successfully advocating a claim of discovery and occupation of British Columbia at the time of Confederation were the Aboriginal peoples themselves. The *Western Sahara* case (1975) I.C.J. 12 precludes a region from being termed uninhabited if nomadic or resident tribes with a degree of social and political organization are present in the area.

283 Adverse possession requires that an area be openly occupied over a period of time and the original owner acquiesces to that presence. It requires a de facto exercise of sovereignty which is peaceful and unchallenged. This has not occurred in British Columbia. Crown jurisdiction has been challenged from the outset; the Crown's claim to exclusive jurisdiction has not been peaceful and Aboriginal peoples in British Columbia have not acquiesced to full Crown jurisdiction in the province.

there are a number of potential inheritors of treaty rights other than Indigenous nations, bands and individuals. The British and Canadian Crown certainly received many benefits from the treaties. Their citizens were able to peacefully settle and develop most parts of the country by consent. In those parts of the country where there are no treaties (such as British Columbia and parts of the north), Indigenous consent is now being negotiated. Non-Indigenous Canadians trace many of their rights in this country to the consent that was granted to the Crown by Indigenous peoples in the treaty process.

Treaties also rely upon Indigenous law. As the Supreme Court of the United States recognized in the *Winans* case: "treaty rights are a grant of rights *from* the Indians, not *to* the Indians".[284] Two important implications flow from this view. The first is that Indigenous peoples have rights and jurisdictions under their laws until those rights are expressly altered in treaty negotiations. This is known as the ‘reserved rights’ notion of treaties. The ‘reserved rights’ doctrine has also been expressed in Canadian law in connection with Aboriginal title.[285] The doctrine implies that anything not agreed to or expressed in the treaty remains vested in Indigenous populations, and cannot be claimed by the non-Indigenous governments as a general right that flows from the treaty negotiations. The ‘reserved rights’ doctrine highlights the inherent nature of Aboriginal rights. It builds upon the fact that when the Europeans arrived in North America, the Indians were already here, living in organized societies and occupying their lands as they had done for centuries.[286] This is why people are trying to sign treaties in British Columbia and other parts of Canada today.

---

284 *United States v. Winans*, 198 US 371 (USSC).

285 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

286 *R. v. Van der Peet*, [1996] 2 S.C.R. 607.

The second important implication that flows from the 'reserved rights' view of treaties is that non-Indigenous peoples received rights in Canada from a grant to the Crown by the Indians. In this view, Indigenous legal traditions have the power to bind their peoples and others to share land in Canada. This means that, with regard to those areas of the country where treaties have been signed, people live there in part because of the permission granted to the Crown by the Indians. Non-Indigenous peoples settled those parts of the country because Indigenous peoples granted this right to them through treaties.

Yet the notion that non-Indigenous peoples might trace certain rights to land or governance through the treaties is, for many, still an emergent concept. Because people have not been exposed to Indigenous understandings of law or the treaties, they are only now beginning to consider them in this light. Other nations do not have these same protocols, conventions, history, or traditions of cooperation and communication in dealings among diverse populations. As a result, nations struggle to create better regimes without the advantage of shared ideological roots of intercultural understanding and association. While some jurisdictions try to start *tabula rasa* and revolutionize how people will relate to one another in society,[287] most simply do not have wide enough support from across the political spectrum to undertake so radical a change. They are left with the arduous task of reforming their systems without ideologies or institutions that have a shared resonance for the members of disparate groups.

Canada is different. Canada was largely created through multi-juridical meetings that mediated differences throughout most of the land. Treaties between Indigenous peoples and the Crown promoted peace and order across cultures and were the basis of the country's formation. This was an early, successful example of multi-juridicalism. Canadians are fortunate to have historic

---

[287] *Truth vs. Justice,* (New Haven: Yale University Press, 1998).

agreements that provide mutually recognized conventions for the resolution of disputes between peoples that draw on different legal traditions. New policies or norms to solve our challenges need not be invented. Treaties and other such recognitions of Indigenous traditions already provide a common starting point of poly-juridical connectivity. Much of the world is not founded on such high principles.

The recognition of Indigenous legal traditions and their application within Indigenous communities could also provide stronger connections to land for Indigenous peoples. Their stories, ceremonies, teachings, customs and norms often flow from very specific ecological relationships, and are interwoven with the world around them. For example, the west coast Potlatch systems depend on the vast wealth that flows into their territory with the return of the salmon each year. This abundance made possible the accumulation of material resources that became an important part of the give-away ceremony and feast that accompanied the Potlatch. Relationships of family law, the law of obligations, and property law hinged upon these connections to land and resources. The symbols of the Potlatch system also reflected a specific location, as cedar bent boxes, house posts and big houses provided the setting and gifts that permitted the memorialization of west coast Indigenous laws. Similar observations about the connectedness of Indigenous laws to land could be made elsewhere in Canada,[288] and for peoples in other countries.[289]

---

[288] Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Feasts and Land Claims* (Vancouver: UBC Press, 1994); Robin Riddington, *Little Bit Know Something* (Vancouver: Douglas & McIntyre, 1990); Darwin Hanna and Mavis Henry, *Our Tellings: Interior Salish Stories and the Nlha7kapmx People* (Vancouver: UBC Press, 1996); Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000); Basil Johnston, *Ojibway Ceremonies* (Toronto: McClelland & Stewart, 1982); William Fenton, *The Great Law and the Longhouse* (Oklahoma. City: University of Oklahoma Press, 1998); J. Oosten, F. Laugrand, W. Rasing, eds., *Interviewing Inuit Elders. Vol. 2: Perspectives on Traditional Law*. (Iqaluit: Nunavut Arctic College, 2000).

[289] See E. Adamson Hoebel, *The Law of Primitive Man* (New York: Atheneum, 1974); Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941); Max Gluckman, *Politics, Law and Ritual in Primitive Society* (Chicago: Aldine Publishing, 1965); Anne Salmond*, Between Worlds: Early Exchanges Between Maori and Europeans 1773-1815* (Honolulu: University of Hawaii Press, 1997); Anne Salmond, *Two Worlds: First Meetings Between*

Whatever the source and structure of Indigenous legal tradition, it is important to note that they rely less on centralized proclamation and enforcement than Canada's other legal traditions. Indigenous legal traditions, like all legal traditions, require a translation process. [290] Law is "a culture of argument" that "provides a place and a set of institutions and methods where this conversational process can go on, as well as a second conversation by which the first is criticized and judged".[291]

Canada's other legal traditions are also embedded in a culture of argument. Each contains a degree of ambiguity that requires judgment beyond its initial formulation. Judges and lawyers interpret civil and common law through case law judgments. Parliament and legislatures promulgate administrative regulations to further implement and clarify statutory grants of power. Indigenous traditions also require further explication beyond bare practice and presentation in order to understand and apply their meaning.

Canadians are by and large familiar with the process of dealing with ambiguities in civil and common law traditions through judicial decision-making and executive regulation-making. They are much less familiar with the ways in which ambiguities are addressed in Indigenous legal traditions. This presents a challenge. Each of the many Indigenous legal traditions might possess a different method of interpretation. The best way to understand how to overcome ambiguity within an Indigenous tradition is to become familiar with the system. In part, this is the aim of this paper. While it can be difficult to communicate how all ambiguities should be overcome, some idea of how

---

Maori and Europeans 1642-1772 (Toronto: Viking, 1991); Judith Binney, *Redemptive Songs: A Life of a Nineteenth Century Maori Leader (*Honolulu: University of Hawaii Press, 1997); Michael Kwaioloa and Ben Burt, *Living Tradition: A Changing Life in the Solomon Islands* (London: British Museum Press, 1997); Roger Keesing, *Custom and Confrontation: The Kwaio Struggle for Cultural Autonomy* (Chicago: University of Chicago Press, 1992); *Keith Basso, Western Apache Raiding and Warfare* (Tuscon: University of Arizona Press, 1971).

290 See James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1990).

291 *Ibid.* at xiii and 80.

Indigenous peoples might engage in the process can be conveyed. More people need to be involved in the formation of Canadian law.

The following story points out general principles that can be followed to interpret and apply Indigenous laws, and to generate greater participation among those who have felt left out.

> **IN THE TIME BEFORE** *there were human beings on Earth, the Creator called a great meeting of the Animal People.*
>
> *During that period of the world's history, the Animal People lived harmoniously with one another and could speak to the Creator with one mind. They were very curious about the reason for the gathering. When they had all assembled together, the Creator spoke.*
>
> *"I am sending a strange new creature to live among you," he told the Animal People. "He is to be called Man and he is to be your brother.*
>
> *"But unlike you he will have no fur on his body, will walk on two legs and will not be able to speak with you. Because of this he will need your help in order to survive and become who I am creating him to be. You will need to be more than brothers and sisters, you will need to be his teachers.*
>
> *"Man will not be like you. He will not come into the world like you. He will not be born knowing and understanding who and what he is. He will have to search for that. And it is in the search that he will find himself.*
>
> *"He will also have a tremendous gift that you do not have. He will have the ability to dream. With this ability he will be able to invent great things and because of this he will move further and further away from you and will need your help even more when this happens.*
>
> *"But to help him I am going to send him out into the world with one very special gift. I am going to give him the gift of the knowledge of Truth and Justice. But like his identity it must be a search, because if he finds this knowledge too easily he will take it for granted. So I am going to hide it and I need your help to find a good hiding-place. That is why I have called you here."*
>
> *A great murmur ran through the crowd of Animal People. They were excited at the prospect of welcoming a new creature into the world and they were honoured by the Creator's request for their help. This was truly an important day.*
>
> *One by one the Animal People came forward with suggestions of where the Creator should hide the gift of knowledge of Truth and Justice.*
>
> *"Give it to me, my Creator," said the Buffalo, "and I will carry it on my hump to the very centre of the plains and bury it there."*
>
> *"A good idea, my brother," the Creator said, "but it is destined that Man should cover most of the world and he would find it there too easily and take it for granted."*

> *"Then give it to me," said the Salmon, "and I will carry it in my mouth to the deepest part of the ocean and I will hide it there."*
>
> *"Another excellent idea," said the Creator, "but it is destined that with his power to dream, Man will invent a device that will carry him there and he would find it too easily and take it for granted."*
>
> *"Then I will take it," said the Eagle, "and carry it in my talons and fly to the very face of the Moon and hide it there."*
>
> *"No, my brother," said the Creator, "even there he would find it too easily because Man will one day travel there as well."*
>
> *Animal after animal came forward with marvellous suggestions on where to hide this precious gift, and one by one the Creator turned down their ideas. Finally, just when discouragement was about to invade their circle, a tiny voice spoke from the back of the gathering. The Animal People were all surprised to find that the voice belonged to the Mole.*
>
> *The Mole was a small creature who spent his life tunnelling through the earth and because of this had lost most of the use of his eyes. Yet because he was always in touch with Mother Earth, the Mole had developed true spiritual insight.*
>
> *The Animal People listened respectfully when Mole began to speak.*
>
> *"I know where to hide it, my Creator," he said. "I know where to hide the gift of the knowledge of Truth and Justice."*
>
> *"Where then, my brother?" asked the Creator. "Where should I hide this gift?"*
>
> *"Put it inside them," said the Mole. "Put it inside them because then only the wisest and purest of heart will have the courage to look there."*
>
> *And that is where the Creator placed the gift of the knowledge of Truth and Justice.*[292]

The story teaches the importance of participation in the interpretation of Indigenous legal traditions. The power of interpretation and judgment is not vested solely in 'greater' beings, such as the Creator or powerful animals. Even the smallest animals have something to contribute to a decision or the resolution of an issue. If we apply the story to Indigenous traditions, we can conclude that all powers of interpretation and judgement should not be vested in legislators or judges. Common law and civil law should not be the only reference points in Canada's legal lexicon. Those with less formal power in society should also have a role in deciding how law should be interpreted and

---

[292] Based on a story by Phil Lane, Jr., Four Worlds Development, University of Lethbridge, Lethbridge, Alberta, as retold by Richard Wagamese, *in Royal Commission on Aboriginal Peoples, Vol. 2, Restructuring the Relationship* (Ottawa: Supply and Services, 1996) at chapter 3.

should apply to them. Decision-making in Indigenous communities should not necessarily be done by those who are distant, professionalized and impersonal; Indigenous dispute resolution has the potential to involve a greater range of people in determining the consequences for actions. In this model, dispute resolution would enable Indigenous people to take responsibility for their own actions, and simultaneously be accountable for them.[293]

The continued existence of Indigenous legal traditions could be of great benefit to Indigenous peoples and the wider public if they were given space to grow and develop. Canada has distinguished itself as a country that effectively operates with a bi-juridical tradition. There is much that can be learned and analogized from this experience. Recognizing and affirming Canada's legal structures within a framework of multi-juridical diversity is one more step in this learning.

IV. Recognizing a Multi-Juridical Legal Culture

The operation of multiple legal systems is a Canadian tradition, though one not yet fully embraced by all its institutions. Despite many challenges, Canada has strong aspirations to tolerance and respect for difference.[294] The law aims to allow individuals the freedom to practice their customs and traditions as long as they do not inappropriately infringe on the legal interests

---

293 Nancy L. Cook, "Outside the Tradition: Literature as Legal Scholarship" (1994) 63 *University of Cincinnati Law Review* 95 at 116-139; Robert M. Cover, "The Folktales of Justice: Tales of Jurisdiction" (1985) 14 *Capital University Law Review* 179 at 182; Valerie Karno, "Bringing Fiction to Justice: Including Individual Narrative in Judicial Opinions" (1990) 2 *Hastings Women's Law Journal* 77 at 79; Thomas Ross, "The Richmond Narratives, (1989) 68 *Texas Law Review* 381 at 385-386.

294 These traditions have grown to include Aboriginal peoples in the past thirty years, see Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); The Right Honourable Chief Justice of Canada Beverly McLachlin, *The Civilization of Difference: LaFontaine-Baldwin Symposium*, 2003 Lecture at http://www.operation-dialogue.com/lafontaine-baldwin/e/2003_speech_1.html.

of others.[295] Our legal system endeavors to facilitate group organization and association to improve the lives of the participants and those around them.[296] A vibrant constitutional framework supports this respect for individual and community belief, conscience, expression, assembly and association.[297] The federal structure is designed to facilitate laws, customs and traditions particular to its various provinces and regions.[298] The Charter of Rights and Freedoms guarantees individual rights to democratic participation, mobility, due process, and equality.[299] This instrument enshrines French and English linguistic equality.[300] Laws are to be interpreted in a manner consistent with the preservation and enhancement of Canadians' multicultural heritage.[301] Charter rights are designed to empower people to practice their cultures and

---

295 The guarantee of rights in Canada's *Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, is subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

296 Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016; Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989; Canadian Egg Marketing Agency v. Richardson [1998] 3 S.C.R. 157; Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211; Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367; Reference Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313; Public Service Alliance of Canada v. The Queen, [1987] 1 S.C.R. 424; Government of Saskatchewan v. Retail, Wholesale and Department Store Union, [1987] 1 S.C.R. 460.

297 Section 2 of the *Charter* guarantees that:

> "Everyone has the following fundamental freedoms:
>
> *a*) freedom of conscience and religion;
>
> *b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> *c*) freedom of peaceful assembly; and
>
> *d*) freedom of association."

298 Ian Angus, A *Border Within: National Identity, Cultural Plurality, and Wilderness* (Montreal: McGill-Queen's University Press, 1997); Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations In Canada*, (Toronto: Oxford University Press, 1998); Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill-Queen's University Press, 1993); Stephen Tomblin, *Ottawa and the Outer Provinces: The Challenge of Regional Integration in Canada* (Toronto: James Lorimer, 1995); Jeremy Webber, *Re-imagining Canada: Language, Culture, Community and the Canadian Constitution* (Kingston: McGill-Queen's University Press, 1994); Robert Young, ed., *Stretching the Federation: The Art of the State in Canada* (Kingston: Institute of Intergovernmental Affairs, 1999).

299 See sections 3-15 of the *Canadian Charter of Rights and Freedoms*.

300 *Ibid.*, sections 16-22.

301 *Ibid.*, section 27.

traditions, and to pursue their goals and aspirations subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[302]

Canada's founders rejected the idea of forced cultural coercion, at least as it related to the most critical challenges they encountered: French and English, juridical, cultural, religious, and linguistic differences.[303] Though this framework was not extended to Indigenous peoples, it is not too late to do so. The *British North America Act 1867* was designed to bring people together along federal lines to protect their differences.[304] It enabled French and English speakers to continue their unique political, religious, cultural, linguistic and legal traditions within provincial frameworks.[305] Minority educational rights were constitutionally enshrined in section 93 to ensure that groups could practice their traditions, even in provinces where the dominant culture was not their own.[306] This was the constitutional bargain that made the foundation of the country

---

302 *Ibid.*, section 1. Leading cases interpreting section 1 of the *Charter* are: *R. v. Oakes* [1986] 1 S.C.R. 103; *Thompson Newspapers v. Canada (Attorney General)* [1998] 1 S.C.R. 877; *Dunmore*, *supra*, note 297; *Irwin Toy v. Québec (Attorney General)* [1989] 1 S.C.R. 927; *Libman v. Québec (Attorney General)* [1997] 3 S.C.R. 569; *R.J.R. v. Canada (Attorney General)* [1995] 3 S.C.R. 199; *Ross v. New Brunswick School District*, 1 S.C.R. 825.

303 Arthur Silver*, The French-Canadian Idea of Confederation, 1864-1900* (Toronto: University of Toronto Press, 1982).

304 Of course, there were also other factors that led to confederation, see Garth Stevenson, *Unfulfilled Union*, 3rd Ed., (Toronto: Gage Publishing, 1989) at 20-33.

305 Silver, *supra*, note 303 at 33-50.

306 See section 93 of the *Constitution Act, 1867* (*British North American Act, 1867*) 30 & 31 Victoria, c. 3: "…each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
>
> (2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Québec:
>
> (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
>
> (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far as the

possible. The BNA Act (now the *Constitution Act, 1867*), while an incomplete governance instrument, was nevertheless sufficient to unite disparate peoples. George Etienne Cartier, one of its architects, observed:

> It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. The idea of unity of races [is] utopian -- it [is] impossible. Distinctions of this kind always exist. Dissimilarity, in fact, appear[s] to be the order of the physical world and of the moral world, as well as in the political world. But with regard to the objection based on this fact, to the effect that a great nation [can]not be formed because Lower Canada [is] in great part French and Catholic, and Upper Canada [is] British and Protestant, and the Lower Provinces [are] mixed, it [is] futile and worthless in the extreme. . . . In our own Federation we have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success [will] increase the prosperity and glory of the new Confederacy. . . . [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.[307]

In the deliberations about what must be done to ensure Canada's continued strength, these historically deep, constitutionally protected rights and traditions that foster its unity, difference, and interdependence cannot be ignored. These principles have application for Indigenous peoples. Canada's legal traditions must remain strong to ensure peace, order and good government. Canadians strive to develop societal cohesion through common allegiance to this historical and legal framework. At the same time, differences in traditions must not be sacrificed to over-reaching attempts to enforce civic solidarity. The country's constitutional goal is to reconcile unity and diversity, to recognize continued interdependence even in the face of difference.[308] Canada's democracy is fundamentally connected to substantive goals. This includes the promotion of self-government through the accommodation of cultural and group

---

> Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section."

307 *Parliamentary Debates on the Subject of Confederation, 8th Provincial Parliament of Canada* (Québec: Hunter, Rose & Co., Parliamentary Printers: 1865) at 60.

308 *Reference re Secession of Québec*, *supra* note 242.

identities.[309] These benefits that underlie Canada's constitutional order should be more widely available to Indigenous peoples.

Yet this message has detractors. Some say that the solution to Canada's challenge of diversity is to enforce a greater commonality. A variety of suggestions are given to address this approach; education, the media, targeted spending, propaganda, artistic and athletic excellence, and the creation of national institutions and symbols. Others concerned about difference often see the answer in assimilation.[310] Of course, the question of who should assimilate whom is not easily answered. The normal assumption is that minorities should be assimilated. Yet it is hard to justify why one group should be entitled to dominate and absorb others. It is also difficult to secure agreement from groups facing assimilation.

Given the problems in overcoming differences, the melting pot metaphor may often appear to be an attractive one. This promotes the idea that cultures can be blended into a singular system of belief, practice and approach to life. But it underestimates the inappropriate pressures this places on individual identities and national development. This has particularly been the case with Aboriginal peoples.[311] Despite Canada's constitutional embrace of European (French/English) cultural difference, respect for cultural difference has not always been

---

309 *Ibid.* at para. 64.

310 An early example of assimilation is found in G. Craig, ed., *Lord Durham's Report, 1839* (Toronto: McLelland and Stewart, 1963), where Lord Durham argues that French Canadian should be assimilated into English Canadian culture. Duncan Campbell Scott spoke to Parliament in 1920 and stated that "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question", J. Leslie and R. Maguire, ed., *The Historical Development of the Indian Act*, second edition (Ottawa: Treaties and Historical Research Centre, Indian Affairs and Northern Development, 1978), p. 115. For greater context on the policy of assimilation of Aboriginal peoples see Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (Vancouver: UBC Press, 1995).

311 John Tobias, "Protection, Civilization and Assimilation: An Outline History of Canada's Indian Policy," in James Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) at 127.

extended to Aboriginal peoples. Early legislation encouraged and endorsed their assimilation.[312] Duncan Campbell Scott, former Deputy Superintendent General of Indian Affairs, illustrated this approach in an address to Parliament in 1920. He stated: "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question".[313]

But Aboriginal assimilation has been an astonishing failure. A wealth of empirical and anecdotal evidence makes it clear that assimilation is THE most hated and resisted policy for Indigenous peoples. Nothing will turn them from the Canadian state with greater force than policies designed to assimilate them. The policy has no credibility in contemporary debates. Assimilation must be rejected if Canada is to enjoy a healthy, vibrant democracy based on the rule of law.

Too strong a push towards assimilation could destroy the country. The recent history of the Quebec secessionist movement illustrates the dangers.[314] English dominance was appropriately overthrown because French-speaking people in the province did not want to lose their deepest traditions.[315] Some still clamor for complete separation in order to more effectively resist assimilation.[316] People resist forced association and compulsion, especially if it is contrary to their deepest identities. “If a person is compelled by the State or the will of another to a course

---

312 For a detailed overview of these policies see “Displacement and Assimilation”, in *The Royal Commission on Aboriginal Peoples, Looking Forward Looking Back, Volume One* (Ottawa: Supply and Services, 1996) at Chapter 6.

313 J. Leslie and R. Maguire, eds., *The Historical Development of the Indian Act*, second edition (Ottawa: Treaties and Historical Research Centre, Indian Affairs and Northern Development, 1978), p. 115.

314 David Cameron, *The Referendum Papers: Essays on Secession and National Unity* (Toronto: University of Toronto Press, 1999); Joseph, Carens, ed. *Is Québec Nationalism Just? Perspectives from Anglophone Canada* (Montreal: McGill-Queen’s University Press, 1995).

315 Jocelyn MacLure, *Québec Identity: The Challenge of Pluralism* (Montreal : McGill-Queen’s Press 2003); Louis Balthazar, “La Dynamique du Nationalisme Québecois,” in Gérard Bergeron and Réjean Pelletier, eds., *L’État du Québec en Devenir*, (Montréal, Boreal Express, 1980) at 37-38.

316 Robert Young, *The Secession of Québec and the Future of Canada*. 2nd Ed. (Montreal: McGill-Queen’s University Press, 1998); Robert Young; *The Struggle for Québec: From Referendum to Referendum* (Kingston: McGill-Queen’s University Press, 1999).

of action or inaction, which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free."[317] Of course, not all associations are voluntary, like the family or certain requirements of citizenship; they arise from the "inescapable constraints of social life in modern society".[318] But, to the extent possible, people should be free to choose and shape their community's practices and follow their underlying values.

As long as citizens are secure in their fundamental rights and freedoms, they should be entitled to live by their choices, customs and traditions. Forced association inhibits the potential for self-fulfillment.[319] Democracy is enhanced when people can choose the rules and traditions under which they live. "Democracy requires a continuous process of discussion".[320] Mandatory assimilation is a recipe for resistance and continued conflict. Statutory assimilation without social, economic and political reasons and incentives should be rejected as contrary to Canada's legal inheritance. The protection of minority rights is an independent principle underlying our constitutional order.[321] As the Supreme Court of Canada observed: "Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation".[322]

Today, Canada is home to many more cultures and traditions than those that gave rise to Confederation.[323] A pressing contemporary challenge is how to stitch them together without

---

317 *R. v. Big M. Drug Mart Ltd.*, (1985), 1 SCR 295 at 336.

318 LaForest in *Lavigne supra* note 296 at 321.

319 *Ibid.*

320 *Reference re Secession of Québec*, *supra* note 242 at para. 68.

321 *Ibid.* at para. 80.

322 *Ibid.* at para. 81.

323 In 1971, Canada adopted an official Multiculturalism Policy. In the decade between 1991 and 2001, Canada welcomed 2.2 million immigrants and refugees. In 2001, 5.4 million people were born outside the country, or 18.4 percent of the total population. For a discussion of the development of diversity in Canada and a critique of its effectiveness see Richard Day, *Multiculturalism and the History of Canadian Diversity* (Toronto: University of Toronto Press, 2000).

shredding society.[324] Some despair at the diversity of languages, cultures and traditions in our midst.[325] But Aboriginal peoples are in a special position in Canada's constitutional framework: they are not just another culture or minority group. Section 35(1) in Part II of the *Constitution Act, 1982* protects the existing culture, practices and traditions of Aboriginal peoples. Section 35(1) safeguards Indigenous peoples as one of the country's founding political and legal groups. The fact that respect for Indigenous diversity is embedded in Canada's central legal texts as a legal and political aspiration gives great comfort.

To summarize this paper's conclusions thus far, it has been established that Indigenous peoples have a long experience with their own legal orders. Assumptions that Indigenous peoples had no government and law are countered by their practices of establishing treaties and agreements.[326] Prior to the arrival of Europeans and explorers from other continents, a long period of interaction between Indigenous peoples developed a vibrant legal pluralism. Treaties, inter-marriages, contracts of trade and commerce, and mutual recognition contributed to extended periods of peace. When Europeans and others came to North America, they found themselves in this complex socio-legal landscape. Contemporary Canadian law concerning Indigenous peoples partially originates in, and is extracted from, these legal systems.[327]

---

[324] Alan Cairns, ed. *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* , (Montreal: McGill-Queen's University Press, 1999); Will Kmylicka and Wayne Norman, eds. *Citizenship in Diverse Societies* (Toronto: Oxford University Press, 2000).

[325] Some believe that Canadians are weakened as a nation because of their vast differences. As noted, there have been times in Canada's history when it has come perilously close to dissolving its national bonds because of these differences. If Canadians want to enjoy a stable future, this fear must be acknowledged and addressed. There is no doubt that Canada's cultural complexity can be a daunting challenge for unity. Difference can threaten the country's national integrity and identity. Nevertheless, a plurality of traditions need not weaken, threaten or overwhelm Canada's historic and constitutional framework. Its history has shown that diversity can be reconciled with unity. Canada is best preserved and strengthened by extending this framework. The deal brokered at Confederation must include more than French and English political, cultural, religious or legal traditions. Fortunately, such recognition is already a part of Canada's constitution. Section 27 of the Canadian *Charter of Rights and Freedoms* guarantees individual rights will be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[326] Francis Jennings, *The Invasion of America: Indians, Colonization and the Cant of Conquest* (New York: W.W. Norton, 1976) at 111.

[327] For cases involving the reception of First Nations law into Canadian law, see *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Québec Superior Court), affirmed as *Johnstone* v. *Connelly* (1869), 17 R.J.R.Q. 266

The complexity and scale of the interaction is demonstrated in early treaty and marriage relationships. The first treaties in North America involved Indigenous laws. These treaties existed prior to European arrival, and recorded solemn agreements about how the parties would relate to all parts of their world. As noted in chapter two, the Hodinohso:ni of the eastern Great Lakes maintained a sophisticated treaty tradition about how to live in peace with all their relations, whether they were plants, fish, animals, or members of their nations, and of other nations. They also had legal traditions that governed a confederacy of nations: the Mohawk, Oneida, Onandoga, Seneca and Cayuga. This law, known as the Great Law of Peace, has served as an inspiration to other nations throughout history.[328] Like the Hodinohso:ni, many First Nations followed and developed laws through treaty and agreement that guided their actions.

When people from other continents arrived on the shores of North America, Indigenous laws, protocols and procedures set the framework for the first treaties between Aboriginal peoples, and between Aboriginal peoples and the Dutch, French, British and Canadian Crowns.[329] An interesting Indigenous-to-Indigenous treaty occurred between the Hodinohso:ni and the Anishinabek in 1701 near Sault St. Marie.[330] The agreement was orally transacted and is recorded on a wampum belt (a memory device with shells forming pictures sewn onto strings of animal hide and bound together). The 1701 belt has an image of a “bowl with one spoon”. This

---

(Québec Queen’s Bench); *R. v. Nan-e-quis-a Ka* (1899), 1 Territories Law Reports 211 (N.W.T.S.C.); *R. v. Bear’s Shin Bone* (1899), 3 C.C.C. 329 (N.W.T.S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.); *Re Deborah* (1972), 28 D.L.R. (3rd) 483 (N.W.T.C.A.); *Michell v. Dennis*, [1984] 2 C.N.L.R. 91 (B.C.S.C.); *Casimel v. I.C.B.C.*, [1992] 1 C.N.L.R. 84 (B.C.S.C.); *Vielle v. Vielle*, [1993] 1 C.N.L.R. 165 (Alta. Q.B.).

328 William Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Civilization of the American Indian Series) (Norman: University of Oklahoma Press, 1998).

329 Robert Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford, 1997).

330 Victor Lytwyn, “A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region”, *Papers of the 28th Algonquian Conference* , ed., David H. Pentland, (Winnipeg: University of Manitoba, 1997) at 210-227.

acknowledges that both nations would share their hunting grounds in order to obtain food. The single wooden spoon in the bowl meant that no knives would be allowed in the land, for this would lead to bloodshed.[331] The agreement is still remembered by the two nations today.

In the early days of contact, agreements between Indigenous peoples and others often followed Aboriginal legal customs and traditions. In the early 1700's, the French entered into treaties with the Anishinabek of the Great Lakes by using Anishinabek forms, wampum belts and ceremonies.[332] From 1685 until 1779, the peace and friendship treaties between the Mi'kmaq, Maliseet, Passamaquody and the British Crown used similar principles grounded in Indigenous protocols, procedures and practices.[333] In 1764, when the British were able to assert an interest in North America after the Seven Years War, they used Indigenous legal traditions to transact their business and bind themselves to solemn commitments.[334] Since that time, there have been over 500 treaties in Canada, many of them drawing on some form of Indigenous legal tradition. This even continued to occur later when Aboriginal peoples enjoyed less political influence. First Nations laws, legal perspectives and other Indigenous frameworks have been present throughout the entire span of the treaty-making process in Canada. Since 1982, existing treaty rights have been recognized and affirmed in the Constitution, thus enjoying the highest possible status in Canada's legal order. The continuation of treaty rights and obligations entrenches the continued existence of Indigenous legal traditions in Canada.

---

331 Paul Williams, "Oral Traditions on Trial" in S. Dale Standen and David McNab, eds.,*Gin **Das Winan** Documenting Aboriginal History in Ontario,* Occasional Papers of The Champlain Society, Number 2, (Toronto: The Champlain Society, 1996) at 29-34.

332 Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (New York: Cambridge University Press, 1991).

333 For a history, see generally William Wicken, *Mi'kmaq Treaties on Trial* (Toronto: University of Toronto Press, 2002); Thomas Issac, *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (Saskatoon: Purich Publishing, 2001).

334 Borrows, *supra* note 85.

Yet treaties are not the only area where Indigenous traditions influenced the development of law in Canada and continue to the present day. From the 1500's, many European individuals submitted themselves to Indigenous legal orders. For example, many traders and explorers adopted Indigenous legal traditions and participated in their laws.[335] Literature from the fur trade reveals that commercial transactions were often conducted in accordance with Indigenous traditions.[336] The giving of gifts, the extension of credit, and the standards of trade were often based on Indigenous legal concepts.[337] Traditionally, Aboriginal peoples did not transfer goods by conducting their relations with other people in a static way.[338] Relationships were continually renewed and reaffirmed through ceremonial customs.[339] The idea that the principles of the terms of trade could be "frozen" through a contract and written on paper was an alien concept.[340] The traders recognized this and conducted their affairs accordingly.[341] In more personal relationships, many early marriages between Indigenous women and European men were solemnized according to Indigenous legal traditions.[342] There were no priests or ministers in the Northwest

---

335 Richard White, *supra* note 332.

336 Lynda Gullason, "'No Less Than 7 Different Nations': Ethnicity and Culture Contact at Fort George-Buckingham House," In, *The Fur Trade Revisited: Selected Papers of The Sixth North American Fur Trade Conference, Mackinac Island, Michigan, 1991*, eds by Jennifer S.H. Brown, W.J. Eccles, and Donald P. Heldman (East Lansing/Mackinac Island: Michigan State University Press, 1994) at 117-42.

337 Arthur J. Ray and Donald B. Freeman, *"Give Us Good Measure:" An Economic Analysis of Relations between the Indians and the Hudson's Bay Company Before 1763* (Toronto: University of Toronto Press, 1978) at 231-260, 285; Paul Thistle, *Indian-European Trade Relations in the Lower Saskatchewan River Region to 1840* (Winnipeg: University of Manitoba Press, 1986) at 33-50; Victor P. Lytwyn, *Muskekowuck Athinuwick: Original People of the Great Swampy Land* (Winnipeg: University of Manitoba Press, 2002).

338 Bruce M. White, "A Skilled Game of Exchange: Ojibway Fur Trade Protocol" (1987) *Minnesota History* 229.

339 For a description of the rigorous formalities involved in Ojibway diplomatic relationships, see Peter Jones (Kahkewaquonaby), History of the Ojibway Indians with Special Reference to their Conversion to Christianity (London: A.V. Bennett, 1861) at 105-107 & 111-128 and F. W. Major, *Manitoulin: The Isle of the Ottawas* (Gore Bay: Recorder Press, 1974) at 11-15. For an example of the formalities of treaty making in Hodinohso:ni culture, see Francis Jennings *et al*, eds., *The History and Culture of Iroquois Diplomacy* (Syracuse, NY: Syracuse University Press, 1985) at 18-21.

340 Wilbur R. Jacobs, *Wilderness Politics and Indian Gifts: The Northern Colonial Frontier, 1748-1763* (Lincoln: University of Nebraska Press, 1966).

341 Arthur Ray, J.R. Miller and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's Press, 2000).

342 Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670-1870* (Winnipeg: Watson & Dwyer, 1980).

to officiate at weddings until 1818; this meant that the governing laws were found only in the various Indigenous nations.[343]

In the first year of confederation, the Quebec Superior Court affirmed the existence of Cree law on the Prairies and recognized it as part of common law. In arriving at this position Justice Monk wrote:

> Will it be contended that the territorial rights, political organization such as it was, or the laws and usages of Indian tribes were abrogated - that they ceased to exist when these two European nations began to trade with [A]boriginal occupants? In my opinion it is beyond controversy that they did not - that so far from being abolished, they were left in full force, and were not even modified in the slightest degree….[344]

The legal doctrine applied by Justice Monk is known as the 'doctrine of continuity'. While the original application of common law in Canada is problematic, it did recognize the continuity of aboriginal customs, laws and traditions when the Crown asserted sovereignty. In *R. v. Mitchell*, Justice McLachlin wrote for a majority of the Court:

> 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, and were absorbed into the common law as rights... [345]

Indigenous legal traditions continue to exist in Canada unless, as Chief Justice McLachlin wrote in *Mitchell:* "(1) they were incompatible with the Crown's assertion of sovereignty, (2) they were

---

343 Daniel Harmon's journal describes such a fur trade wedding in December 1801:

> Payet one of my Interpreters, has taken one of the Natives Daughters for a Wife, and to her Parents he gave in Rum & dry Goods &c. to the value of two hundred Dollars, and all the ceremonies attending such circumstances are that when it becomes time to retire, the Husband or rather Bridegroom (for as yet they are not joined by any bonds) shows his Bride where his Bed is, and then they, of course both go to rest together, and so they continue to do as long as they can agree among themselves, but when either is displeased with their choice, he or she will seek another Partner...which is law here...

Daniel Williams Harmon, *Sixteen Years in the Indian Country : The Journal of Daniel Williams Harmon, 1800-1816* ed.,W. Kaye Lamb (Toronto: Macmillan, 1957).

344 *Connolly* v. *Woolrich, supra* note 327 at 79.

345 *R. v. Mitchell*, *supra* note 19 at para. 8.

surrendered voluntarily via the treaty process, or (3) the government extinguished them."[346] Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continue as part of the law of Canada today.[347] There are sound arguments that Indigenous legal traditions are compatible with the Crown's assertion of sovereignty, were not surrendered by treaties, and were not extinguished by clear and plain government legislation, if reconciliation is the lens through which the courts interpret the parties' relationships. Indigenous legal traditions certainly fit into Canada's Constitutional framework without threatening peace, order and good government.

V. Challenges and Opportunities in Recognizing Indigenous Legal Traditions

Having developed a broader context for the recognition of Indigenous legal traditions, it is critically important to highlight the challenges and opportunities this recognition may face. While every attempt has been made to accurately convey the current relationship between Canadian legal traditions and their potential for future development, these positions are likely to be contested for different reasons: social, political, economic, psychological, ideological, spiritual, etc. Some may argue from a legal standpoint, questioning the accuracy of the portrayal of Indigenous legal traditions and their viability as modern authoritative rules. This questioning would be perfectly appropriate. Law is never singular and is always open to interpretation. As Professor Jeremy Webber has written:

> [I]t is always misleading…to talk about 'the law' in a particular context as though the law's content were pre-determined and singular, at least until the mechanisms operative in that context have adjudicated the disagreement… . The

346 See B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Canadian Bar Review 727.

347 See *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (per Brennan J.), pp. 81-82 (per Deane and Gaudron JJ.), and pp. 182-83 (per Toohey J.).

> hermeneutic character of normative argument means that law always has a measure of openness…. Any attempt to describe the law of a particular context should reflect this openness. It should not state the law as though it were singular. Instead it should aim to capture a legal culture, portraying the range of contending arguments on the one hand, and practices, interests, patterns of historical experience and individuals identifications on the other; the extant mechanisms for resolving social disagreement, and from an assessment of all these factors, the relative success of various normative assertions.[348]

If this paper is criticized as having presented law as too singular and not sufficiently open to alternative interpretations, it is hoped that potential critics will judge their response by the same criteria. This paper has highlighted contending arguments and contested practices, interests, historic experience and individual identities in Canada's legal traditions. It has also identified mechanisms for resolving disagreements about the desirability of recognizing Indigenous legal orders in Canada. It is even more necessary to fully explore arguments that are critical of Indigenous legal traditions. Canadian law's relationship to Indigenous legal traditions is not fixed; its future shape will be influenced by criticism about its reality or desirability.

It is simply not possible to definitively declare what "the law" *is* or *should be* in the relationship between Canada's legal traditions.[349] One must be open to the view that Indigenous legal traditions did not, do not, or should not exist in Canada. So far, this paper has concluded that these traditions did exist prior to the arrival of the common law and civil law in Canada, and that they continue to exist today. This chapter will examine this notion in greater detail, and consider

---

348 Jeremy Webber, "Legal Pluralism and Human Agency" [unpublished manuscript].

349 All legal arguments co-mingle descriptive and prescriptive elements. Even judges, who may be regarded as the most authoritative legal commentators in the Canadian legal context, have descriptive and prescriptive aspects to their judgments. Sometimes these dual functions are explicit, as when readers can distinguish between the ratio of an arguments and obiter dicta. At most other times the distinction between what the law *is* and what it *should be* are hidden and implicit within their judgments. This is because of the cultural deference they are given: expectations about the result and force of their decisions often masquerade as reality. Yet, despite all the ink spilled about judicial impartiality and lack of bias, the fact remains that claims about what the law *is* and *should be* are always contestable. Judges and all who support Canada's legal system hope that people regard their opinions as creating a perfect coincidence between *is* and *ought*. However, there is always the potential for dissent: on the bench, in Parliament, with the parties to the dispute, or more generally within the public's response to their opinions.

further obstacles to their recognition. The obstacles are intelligibility, accessibility, equality, applicability, constitutionality and legitimacy.

A. Intelligibility

Laws are regarded as intelligible if those who must abide by their precepts "can foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[350] On this basis, some people might question the legal intelligibility of Indigenous law. They may argue that Indigenous legal traditions are not precise enough to affect someone's conduct. They may contend that it is not possible to foresee the consequences of inappropriate behavior. Indigenous peoples and others who are supportive of their legal traditions should take this concern seriously. Some Indigenous laws are framed as stories, songs, practices and customs; as such, they may be criticized as being unintelligible as a prescription of conduct. They could be construed as too open-ended to function as legal standards. It is reasonable to ask whether Indigenous citizens would have trouble understanding their own laws.

There are several approaches to answering this question. First, as has been observed, law is a cultural phenomenon. As a result, what may be unintelligible to those untrained or inexperienced in Indigenous culture, may be quite intelligible to those familiar with it. A Eurocentric approach to legal interpretation must not be allowed to undermine Indigenous legal traditions. A leading historiographer of oral tradition, Jan Vansina, has observed that "all messages are a part of a culture".[351] In his seminal work, Vansina wrote that messages "are expressed in the language of a culture and conceived, as well as understood, in the substantive

---

350 *Sunday Times v. United Kingdom* (1979), 2 EHRR 271.

351 Jan Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985) at 124.

terms of a culture".[352] He therefore concluded that since culture shapes all messages, we must take culture into account when interpreting these messages. This is a challenging proposition. Since what constitutes a fact is largely contingent on the language and culture from which the information arises,[353] the person who decides what a "fact" is inevitably defines it from the matrix of relationships they share with others.[354]

There are enormous risks for misunderstanding and misinterpretation when Indigenous laws are judged by those unfamiliar with the culture.[355] The potential for misunderstanding is compounded if each culture has somewhat different perceptions of space, time, historical truth, and causality.[356] The cultural specificity of what constitutes a fact may make it difficult for people from different cultures to accept the same information as a fact in their respective cultures.[357] Since variations between groups encode "facts" with different meanings,[358] to be properly understood, they must be viewed through the lens of the culture that recorded them.

---

352 Julie Cruikshank, "Oral Tradition and Oral History: Reviewing Some Issues" (1994) 75 *Canadian Historical Review* 410.

353 Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe trans.) 3rd Ed., Philosophical Investigations (New York: Macmillan Publishing Co., 1958) 154, 155. He wrote that meaning and understanding of a fact is "knowing how to go on". If you do not have an understanding of "how to go on" in a culture that is different from your own, you do not know the facts of that culture.

354 Martin Heidegger, *Being and Time*, trans John Macquarrie and Edward Robinson (New York: Harper & Row, 1962) at 157.

355 Richard Rorty, "On Ethnocentrism: A Reply to Clifford Geertz" (1986) 25 *Michigan Quarterly Review* 115; Abdullahi Ahmed An-Na'im, "Problems of Universal Cultural Legitimacy for Human Rights" in A. An-Na'im and Francis Deng, eds, *Human Rights in Africa* (Washington: Brookings Institute, 1990).

356 For example, in spatial terms, early Christians visualized the Garden of Eden as being in Mesopotamia and thus attempted to explain all human migration as somehow stemming from this point. On the other hand, many Ojibway people trace their origin to Michilimackinac Island in the Great Lakes and reference their migrations from this place. Temporally speaking, Christianity, Islam and Judiasm have tended to view time as being linear, progressing, and "marching on". Other cultures such as the Maya, Ainu or Cree have thought of time as being cyclical and repetitive. Causality or change can also differ between groups. See Vansina, *supra*, note 351 at 125-133.

357 Vansina has written "Historical truth is also a notion that is culture specific". *Ibid* at 129.

358 Charles Taylor, "Understanding and Ethnocentricity" in *Philosophy and the Human Science, Col. 2, Philosophical Papers* (Cambridge: Cambridge University Press, 1985) at 119, 121. Vansina states that since "culture can be defined by what is common in the minds of a given group of people;…people in a community

Those who evaluate the meaning, relevance and weight of Aboriginal legal traditions must therefore appreciate the potential cultural differences in the implicit meanings behind the explicit messages if they are going to draw appropriate inferences and conclusions.[359] They should attempt to grasp the unspoken symbolic aspects in order to evaluate their truth and value. Mastering both these facets of interpretation is a tremendously difficult and complex task. Even with the best of intentions, many simply may not be equipped to perform this role without further training. Each culture has its own shared imagery that conveys both meaning and emotion, as found in metaphors, stock phrases, stereotypes and other clichés.[360] It is important to understand the particular imagery of a culture contained in these forms to appreciate "the context of meaning" behind a legal standard.[361] Without this deeper knowledge, it may be difficult to understand and acknowledge the meanings that Aboriginal people give to their laws.[362] This evaluation will be especially fraught with danger if the interpreter does not recognize the cultural foundation of knowledge, and acknowledge his or her own bias.[363]

---

share many ideas, values and images…which are collective to them and differ from others", Vansina, *supra* note 351 at 124.

359 A leading enthnohistorian wrote:

> Historical records can be interpreted only when the cultural values of both the observer and the observed are understood by the historian. In the study of modern Western history, the experience of everyday life may suffice to supply such knowledge. Yet this implicit approach does not provide an adequate basis for understanding the behavior of people in earlier times or in cultures radically different from our own.

Bruce Trigger, *Natives and Newcomers: Canada's Heroic Age Reconsidered* (Montreal: McGill-Queen's Press, 1985) at 168.

360 Vansina, *supra* note 351, at 124.

361 *Ibid.* at 137.

362 Louise Mandell, "Native Culture on Trial," in Sheilah Martin and Kathleen Mahoney eds*., Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 358; Joan Ryan and Bernard Ominayak, "The Cultural Effects of Judicial Bias" *Ibid.* at 346; Robin Ridington, "Cultures in Conflict: The Problem of Discourse in W.H." New, Ed., *Native Writers and Canadian Writing* (Vancouver: UBC Press, 1990) 273.

363 Anthropologist Robin Ridington observed these problems in the factual underpinnings of the trial judge's decision in *Delgamuukw*, see Robin Ridington, "Fieldwork in Courtroom 53: A Witness to Delgamuukw" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books, 1992) at 211-212. For further commentary on the historical and cultural assumptions of Chief Justice McEachern's decision in *Delgamuukw,* see: Joel Fortune, Construing Delgamuukw: Legal Arguments, Historical Argumentation, and the Philosophy of History (1993) 51 *U.T. Fac. Law Review* 80; Michael Asch and Catherine Bell, Definition and Interpretation of Fact in Canadian Aboriginal Title Legislation: An Analysis of Delgamuukw (1994) 10 *Queen's Law Journal* 503; Robin Fisher, "Judging History: Reflections on the Reasons for Judgment on *Delgamuukw v. B.C*." (1992) 95 *B.C. Studies* 43; Geoff

Second, Indigenous peoples might also approach the issue of intelligibility by questioning the detail necessary for a formulation to be 'prescribed by law'.[364] Western courts have allowed governments great leeway in interpreting this phrase. In the European Court of Human Rights case of *Sunday Times v. United Kingdom*[365] the phrase 'prescribed by law' was interpreted flexibly under the European Convention on Human Rights to allow for a degree of vagueness. The Court wrote:

> In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law.' First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unreasonable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

The phrase 'prescribed by law' does not require that an action's consequences be foreseeable with absolute certainty. This would lead to excessively rigid laws unable to keep pace with changing circumstances. Legal interpretation is a question of 'practice' where potentially vague laws can be made intelligible by their application in a particular factual context.

In interpreting the phrase in the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada took a similar approach to the *Sunday Times* case when it held that law cannot be

---

Sherrott, "The Court's Treatment of the Evidence in *Delgamuukw v. B.C.* (1992)" 56 *Saskatchewan Law Review* 441.

364 Indigenous peoples might also argue that the phrase 'prescribed by law' (to circumscribe individual action) does not apply under their legal traditions. The phrase 'prescribed by law' is primarily used in rights instruments and Indigenous peoples may feel they are not bound by the Charter, much like American Indians are not bound by the Bill of Rights.

365 (1979), 2 EHRR 271.

characterized too rigidly. The Court noted ‘prescribed by law’ could set too high a standard for governments if interpreted too strictly. In *Irwin Toy v. Quebec (A.G.)* the Court observed:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard… The task of interpreting how that standard applies in a specific instance might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies.[366]

This shows that the Supreme Court of Canada has interpreted the ‘prescribed by law’ broadly. In matters ‘prescribed by law’, ‘discretion’ and ‘balance’ are allowed.[367] The Supreme Court has held that a law is only ‘impermissibly vague” if it does “not provide a sufficient basis for legal debate.”[368] If broader Canadian law can describe ‘debatable’ legal standards as intelligible, Indigenous legal traditions should surely be given the same courtesy. Care must be taken to ensure that Indigenous legal traditions are not held to a higher standard of intelligibility than non-Indigenous law. Indigenous peoples may well be able to argue that their laws meet the standards of intelligibility as outlined by the courts, even if they are not immediately ‘cognizable’ to a judge trained in the common law or civil law systems, or if there is room for debate about their meanings.

B. Accessibility

Intelligibility is closely related to the issue of accessibility. If a significant number of people, Indigenous and non-Indigenous, have a difficult time understanding Indigenous laws, steps should be taken to make them more accessible. Indigenous peoples would benefit if their laws had greater accessibility. They would have a better chance of grasping what was expected of

366 *Irwin Toy v. Quebec (A.G.)* [1989] 1 SCR 927 at 44.

367 *Ibid.*

368 *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 at 24.

them.[369] This is probably also the wish of many non-Indigenous people as regards Canada's other legal traditions, the civil law and common law. If Indigenous peoples were to make their laws more accessible for their own people, non-Indigenous peoples who want to recognize them more widely would also benefit. They would be less fearful about Indigenous legal traditions, and more willing to consider Canada as a multi-juridical society. As mentioned earlier, non-Indigenous recognition would also benefit Indigenous people.

Increasing the accessibility of Indigenous legal traditions could take many forms, some of which are described in the next chapter. Indigenous laws could be codified, and made available in written form. Written distribution would get information into more homes and institutions. At the same time, the strengths of the oral nature of the traditions would be maintained; steps must be taken to ensure flexibility is not lost. Safeguards can be put in place to ensure wide communication without undue rigidity. Quebec's Civil Code has maintained this openness and flexibility. Indigenous Codes could contain preambles that retain local interpretative authority. In some respects, Canada itself has maintained this flexibility in the preamble to its *Constitution Act, 1867*, where the constitution is to be 'similar in principle to the United Kingdom'. The rooting of the written text of Canada's Constitution in unwritten constitutional principles has allowed Canadian courts to avoid the rigidities of textual constraints on numerous occasions.[370]

Indigenous peoples might also decide to make their laws more accessible by creating broader learning opportunities. Legal education can take many forms: videos, media, workshops, apprenticeships, classroom learning, written text-books, published judgments, public

---

369 Many Indigenous peoples have only a limited knowledge of only some of their traditions, while others may have lost that knowledge completely. Colonial processes and individual choice have been hard on Indigenous culture at certain levels. Therefore, while some members may find Indigenous traditions 'intelligible' there may be a need to more broadly communicate them in different ways, with different cultural styles, if they are going to avoid being too vague for those expected to abide by them.

370 Recent examples being the *Québec Secession* case, *supra* note 242, the *Manitoba Language Reference*, *supra* note 279, and the *Provincial Court Judge's Reference*, [1997] 3 SCR 3.

performances, etc. Indigenous legal education can also be developed in a law school context and thereby increase its exposure to interested students and practitioners. This could deepen the practical and academic understanding. Indigenous legal education in law school context will be explored in greater detail in the final chapter.

Indigenous laws also become more accessible when the government recognizes their law-making powers through treaties. Nunavut and Nisga'a are two recent examples. As noted in chapter two, in 1999, a new territory was created in Canada's north that makes Inuit law more intelligible and accessible to both Inuit and non-Inuit people. Called Nunavut, meaning "our land", the area covers almost one-third of Canada. It was established through the negotiation, vision, and hard work of Inuit leaders who wanted to determine their own place in the north. It is governed by and for the Inuit people who make up the majority in the region. In addition to the governance of the entire territory, the Inuit were also able to secure exclusive title to wide expanses of land, exclusive harvesting rights on lands and waters throughout the Arctic, control, and participation on land use boards throughout the region, royalty payments for non-Inuit resource use, preferential employment status for government jobs in the territory, and an exceptionally strong place in Canada's federal structure. This enables them to exercise law-making authority over many matters and express those laws in positivistic ways. There are many heads of power about which Inuit people proclaim their views. These laws are published in official reports, gazettes and papers. The media covers law-making activities and there is widespread debate in Inuit and non-Inuit circles about the nature of these laws.

Another step in making Inuit law more intelligible and accessible is a legal education program in conjunction with the University of Victoria in British Columbia. This program assists the residents of Nunavut to articulate their ancient laws and present-day values in contemporary terms. The law school is called Akitsiraq, and it strives to be attentive to legal pluralism in the

north by integrating traditional Inuit knowledge with the requirements of the territory's constitutional and legislative provisions. Students receive all their classes in Iqaluit, the capital of Nunavut, and at the end of four years receive a law degree from the University of Victoria. Inuit stories are a vital part of this education as are Elders and community leaders. Students interact with southern legal academics to ensure that Inuit law fits the needs of the residents of the new territory. The students are able to learn Inuit law throughout most of their studies. The Akitsiraq initiative is an example of the type of activity that might occur elsewhere to facilitate the development of legal processes and reasoning appropriate to Inuit norms and needs. Law is most successful when it expresses the normative order of the people who it serves.

Another initiative that demonstrates the developing accessibility of Indigenous peoples law in Canada comes from the Nisga'a people of north-western British Columbia. As noted in chapter two, the Nisga'a historically governed their society by reference to the *ayuukhl*, an ancient legal code that has guided their social, economic and political relationships from "time of memory". The stories, ceremonies, and feasts central to the *ayuukhl* are at the heart of efforts to revitalize their legal traditions. The Nisga'a never entered into treaties with Canada; they consistently asserted an exclusive right to relate to the lands and resources throughout their traditional territories by reference to the *ayuukhl*. All of this increases the likelihood that Nisga'a people will know about and be able to learn more about their laws, which answers concerns about accessibility and intelligibility.

As both the Nisga'a and Nunavut example illustrate, Indigenous peoples' law could become more accessible if it was conveyed in modern forms. Indigenous peoples' cultural circumstances are always in flux. Indigenous law will not be accessible if this is not acknowledged. Understanding what Indigenous laws were like five hundred years ago is necessary, but not sufficient to make these laws applicable today. Changes in traditional means of communication

may be needed to increase legal understanding, and are acceptable as long as these changes are consistent with the tradition's broader principles. Changing cultural circumstances might lead some Indigenous groups to embed common law or civil law principles in their traditions. If this is the self-determining response of the group, it could appropriately recognize the reality of their normative values in modern terms. Indigenous peoples have experienced other people's values for centuries, and they can be adapted to the extent the community desires them. Infusing Indigenous legal traditions with innovations from other systems does not necessarily negate the authenticity or autonomy of Indigenous traditions, as was seen in Chapter Two. In fact, the careful development of Indigenous traditions consistent with ancient values, but relevant in today's circumstances, increases their intelligibility and accessibility.

A discussion about accessibility would be incomplete without identifying potential dangers. Indigenous peoples have many reasons to distrust the sharing of their ideas more widely. In the past, these activities caused misunderstandings in non-Indigenous communities. Misunderstandings arise when recipients do not put the full meaning of what is revealed into context, or when stereotypical assumptions determine the listener's interpretation. Responses of this kind can place Indigenous people in a consistently defensive role. An inordinate amount of time can be spent clarifying or justifying their legal position. Dealing with outdated stereotypes and educating others about the wider context of Indigenous law is frankly demeaning and exhausting for many Indigenous peoples, and can lead to a loss of trust. The matter of trust between Indigenous and non-Indigenous people may need significantly more attention before Aboriginal people are willing to share their ideas in a more public, accessible way.

The matter of trust also relates to another barrier to the accessibility of Indigenous legal traditions. In the past, Indigenous culture has been wrongly appropriated and stolen. Some Indigenous peoples will be very hesitant to share their legal knowledge, because of the potential

for its inappropriate use. For most of Canada's history, Indigenous culture was considered inferior. Indigenous knowledge was considered degraded, static, decaying, and dying a slow but inexorable death. Great effort was expended in trying simultaneously to eradicate and catalogue Indigenous cultural expression, objects and ideas. Cultural interference took the form of the suppression of Indigenous institutions of government,[371] the denial of land,[372] the forced taking of children,[373] the criminalization of economic pursuits,[374] and the negation of rights of religious freedom,[375] association,[376] due process[377] and equality.[378] Encouraged by government officials and religious leaders, feasts and dances were outlawed and made subject to criminal prosecution. Ceremonial masks, totem poles, bent boxes, wampum belts, clothing, baskets and other objects were confiscated and placed in private collections and public institutions. As anthropologists stood by and took notes, bones, tissue and other human remains were taken and studied in hospitals, universities and museums, making the careers of archeologists, medical practitioners and academics. Aboriginal songs, stories, and performances were

---

371 *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.) (upholding forcable eviction of traditional Hodinohso:ni government).

372 For example, Joseph Trutch, in denying Aboriginal title in B.C. observed:

> The title of the Indians in the fee of the public lands, or any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied.

British Columbia, Papers Connected with the Indian Land Question, 1850-1875 (Victoria: Government Printer, 1875) at appendix, 11.

373 John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986* (Winnipeg: University of Manitoba Press, 1999).

374 Aborignal people are constantly charged with criminal offences for hunting and fishing in traditional economic pursuits. Some high profile cases are *R. v. Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.); *Simon v. The Queen* (1985) 24 D.L.R. (4th) 390 (S.C.C.); *R. v. Horseman* (1990) 1 S.C.R. 901 (S.C.C.); *R. v. Cote* (1996) 138 D.L.R. (4th) 185 (S.C.C.); *R. v. Badger* (1996) 133 D.L.R. (4th) 324 (S.C.C.); *R. v. Marshall* [1999] 2 S.C.R. (S.C.C.).

375 *Thomas v. Norris* [1992] 2 C.N.L.R. 139 (B.C.S.C.) (Aboriginal spirit dancing not protected by Charter); *Jack and Charlie v. The Queen* (1985) 21 D.L.R. (4th) 641 (S.C.C.) (taking fresh deer meat for Aboriginal death ceremony not protected).

376 Many bands were kept apart or relocated to prevent their association because of a government fear they would organize to resist impingements of their rights.

377 A Crown fiduciary duty has recently been articulated in an attempt to cure violations of Aboriginal rights stemming from differences in the way Aboriginal people hold and access their rights. Significant cases in this regard are *Guerin v. The Queen* (1984) 13 D.L.R. (4th) 321 (S.C.C.); *Kruger v. The Queen*, (1985) 17 D.L.R. (4th) 591 (F.C.A.); *Blueberry River Indian Band v. Canada* (1995) 130 D.L.R. (4th) 193 (S.C.C.). For a fuller discussion see Len Rotman, *Parallel Paths* (Toronto: University of Toronto Press, 1996).

appropriated. Non-aboriginal musicians, literary guilds, and Hollywood were the beneficiaries. These practices still create challenges today.

It has been observed that Indigenous "cultural appropriation is not just historical, it is happening today."[379] Those with ears to hear quickly realize that issues of cultural appropriation are near-weekly news events. The impact at the community level is significant and presents an equally significant obstacle to expanding the accessibility of Indigenous legal traditions. People will not want to share if they believe that any exchange will only lead to appropriation, criticism and extinguishment.

Finally, there is one last challenge to note. In some Indigenous communities, knowledge forms part of a tradition that should be considered intellectual property. When this is the case, knowledge cannot be shared without following elaborate protocols that may purposely limit accessibility. For example, for many First Nations of the west coast only people who have earned the right to receive hereditary names are permitted to speak about and use certain knowledge. If others were to attempt to spread these traditions in a way in which they were not entitled, they would be breaking their deepest laws. Accessibility cannot be encouraged in a way that undermines the very law you are trying to spread in order to increase its respect. In making Indigenous tradition more accessible, close attention must be paid to the specific cultural contexts in which it operates, and craft solutions which best address those contexts.

---

378 *Canada (A.G.) v. Lavell* [1974] S.C.R. 1349 (invidious distinctions in Indian Act on basis of sex upheld).

379 Barry Steven Mandelker, "Indigenous People and Cultural Property Appropriation: Intellectual Property Problems and Solutions" (2000) 16 *Canadian Intellectual Property Review* 367.

C. Equality

Another challenge to the recognition of Indigenous legal traditions is the concern about equality. Some might view the recognition of Indigenous legal traditions as creating special treatment for Aboriginal people within the justice system. It should rather be said that the recognition and implementation of Indigenous legal traditions would create separate but equal systems. This paper has consistently argued that the recognition of Indigenous legal traditions does not mean a completely separate system of justice for Aboriginal people in Canada. The recognition of Indigenous legal traditions alongside common law and civil law traditions would be part of *the* justice system. There is plenty of room for these traditions to interact within *one* framework. It is not segregation to more tightly associate Indigenous legal traditions with Canada's other traditions. Inter-connection does not imply absolute convergence and fusion between the traditions. Indigenous legal traditions should no more be subject to forced assimilation than the common law to the civil law. Each can operate in conjunction with the other, and be harmonized to some degree. There would be fierce opposition if it were proposed to assimilate civil law within common law. Canadians do not generally label the status of civil law in the country as special treatment, segregation, or the creation of separate but unequal laws. We should not label Indigenous legal traditions any differently.

The meaning of equality in the Canadian context should be fully appreciated. The Supreme Court of Canada has acknowledged that the recognition of difference can be a mechanism to achieve equality. For example, in the case of *Law v. Canada (Minister of Employment and Immigration),* Justice Iacobucci observed that "true equality does not necessarily result from identical treatment".[380] He went on to note that formal distinctions in treatment will be sometimes be necessary to accommodate differences between individuals and thus produce

[380] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.

equal treatment in a substantive sense. “Correspondingly, a law which applies uniformly to all may still violate a claimant's equality rights.”[381] Differential treatment does not always signal a denial of the equal benefit and protection of the law. Judgments about the fairness of differential treatment will always be contextualized; it will depend on the right at issue, the person’s socio-economic status, and that of comparative groups. Applying these principles to Indigenous legal traditions, it can be argued that the fact of their difference does not necessarily raise concerns about equality, fairness, certainty, and so on.

International legal principles also support an approach to equality that can accommodate appropriate differential treatment. As early as 1934, the Permanent Court of Justice tackled the issue of discrimination in its opinion concerning the *Minority Schools in Albania*.[382] It held that a “subtle form of persecution comes from measures which denies any members of a minority the capacity to be different from the majority, namely they are forced, to their disadvantage, to be the same as the majority”. Later, the *South West Africa Case*[383] further refined the meaning of discrimination. In Judge Tanaka’s famous dissenting judgment in that case,[384] he held that:

> To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently.
>
> To treat unequal matters differently according to their inequality is not only permitted but also required.
>
> The principle of equality does not mean absolute equality but recognizes relative equality: namely differential treatment proportionate to concrete individual circumstances. Differential treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice, as in the treatment of minorities, different treatment of the sexes, regarding public conveniences, etc. In these cases, the differentiation is aimed at the protection of those concerned and is not detrimental and therefore not against their will.

---

381 *Ibid.* at 25.

382 *Minority Schools in Albania* (1934), P.C.I.J. (Ser. A/B) at 17.

383 *South West Africa Case*, [1966] I.C.J. Rep. at 248.

384 Heather McRae, Garth Nettheim, Laura Beacroft, Luke McNamara, *Indigenous Legal Issues: Commentary and Materials, 3rd ed.* (Sydney: Thomson Lawbook Co., 2003) at 443-444.

This position, that the principle of non-discrimination requires *both* the equal treatment of equals *and* the consideration of difference in assessing the need for differential treatment, is also accepted in the *International Convention for the Elimination of Racial Discrimination*.[385]

It must also be remembered that Canada is a federal system. There are ten provinces, three territories and one central government that create and enforce a variety of legal rules throughout the country. Some of these laws even contradict one another. For example, some provinces permit state funded denominational schools, while others prohibit them. Some provinces are obligated to fund religious schools through constitutional obligation, while others have no such constraint. The fact that Canada has different, sometimes contradictory laws passed by different legal regimes does not bring the legal system into disrepute. In fact, its respect is heightened because the passage of different laws demonstrates a much-needed ability to respond to local circumstances. At times, provincial governments each pass different regulations under identical federal law (when given the responsibility to administer such statutes). This diversity is usually applauded because it allows legislators to be sensitive to matters of a purely local nature. Few would suggest that provincial and regional variation is a departure from the principle of one law for all Canadians.[386]

Finally, pre-existing Indigenous laws aside, Canada has considerable experience in accommodating laws that do not emanate from central or provincial governments. As Geoff Hall pointed out in a *University of Toronto Faculty of Law Review* article, many different legal

---

385 For commentary, see Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* (Canberra: AGPS, 1995) 63-64, “Equality does not mean equal treatment. Recognition of the distinct cultural identity of minority groups is consistent with the notion of equality. Further, the mere use of race as a classifying criterion does not render a distinction discriminatory, but rather it lies in the invidious purpose or effects of that distinction.”

386 For an application of this concept in an Indigenous context see James (Sakej) Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 *Saskatchewan. Law Review* 241.

regimes operate within the country.[387] An example is the extra-territorial application of criminal law. Many countries have statutes that allow them to prosecute their citizens for crimes committed in another country.[388] Canada has accepted this principle.[389] Canada also recognizes the principle that tax obligations can be incurred to another country, even if one is working in Canada.[390] Another example is diplomats who have immunity from the operation of domestic law operation. The idea that countries can enjoy sovereign immunity is also a familiar concept. Similarly, naval and military law both operate extra-territorially.[391] These examples all show that the idea that Canadians live under one law is an overly simplistic view of how legal regimes interact.

Even the Criminal Code, a federal statute, is administered differently in each province. Provinces vary greatly in the application of criminal law, despite its common source.[392] The law in Canada unites uniformity with diversity. It is appropriate to feel that the country's laws (including Indigenous legal traditions) should be inter-connected, balanced and harmonized, it is inappropriate to regard the law as undifferentiated and that exactly the same legal principles should apply to everyone in the same way[393]

In this context, Judge Mary Ellen Turpel-Lafond's advice of a few years ago seems particularly appropriate:

---

387 Geoff R. Hall, “The Quest for Native Self-Government: The Challenge of Territorial Sovereignty” (1992) 50 (1) *University of Toronto Faculty of Law Review* 39*.*

388 *Ibid.* at 45-48

389 *Libman v. R*., [1985] 2 S.C.R. 179.

390 Hall, *supra* note 387, at 48-49.

391 *Ibid.* at 55-60.

392 *R. v. Turpin*, [1989] 1 S.C.R. 1296.

393 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

> We spent several years in a distracting debate over whether justice reform involves separate justice systems or reforming the mainstream system. This is a false dichotomy and fruitless distinction because it is not an either/or choice. The impetus for change can be better described as getting away from the colonialism and domination... Resisting colonialism means a reclaiming by Aboriginal people of control over the resolution of disputes and jurisdiction over justice, but it is not as simple or as quick as that sounds. Moving in this direction will involve many linkages…and perhaps phased jurisdiction. For example, is there a community with the capacity to take on cases of individuals who have been charged with first-degree murder and are considered criminally insane and violent? These are not problems that Aboriginal people dealt with traditionally and it will take some time before offenders can be streamed into an Aboriginal system (if ever). Communities may not want to or may not be ready to take on these kinds of issues.[394]

D. Applicability

Judge Turpel-Lafond's observation leads to the idea of applicability: When, how and to whom should Indigenous law apply? First, as Professor Turpel points out, Indigenous groups will not always exercise every aspect of their decision-making powers. The Nisga'a, for example, have refrained from exercising their authority to run a tribal court. They have other priorities related to capacity and other socio-economic issues that have caused them to forego this institution for a time. Other Indigenous groups may well take the same approach. They could periodically leave jurisdictional powers vacant without relinquishing their authority over them. This has occurred in the United States where American Indian tribes have greater control and authority over their legal systems. Despite their jurisdictional entitlement, many tribes choose not to operate tribal courts; others willingly cede certain matters to federal or state courts so that they can pursue other priorities.

---

394 Mary Ellen Turpel, "Reflections on Thinking About Criminal Justice Reform" in R. Gosse, J. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994). See also James (Sakej) Youngblood Henderson, "Implementing Treaty Order" in R. Gosse, J. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994); Matthias Leonardy, *First Nations Criminal Jurisdiction in Canada* (Saskatoon: Native Law Centre, 1998); Bruce Wildsmith, "Treaty Responsibilities: A Co-relational Model" (1992) *UBC Law Review: Special Edition*, *Aboriginal Justice*; Leonard Mandamin, Dennis Callihoo, Albert Angus, Marion Buller, "The Criminal Code and Aboriginal People" (1992) *UBC Law Review: Special Edition, Aboriginal Justice*.

Second, the issue of how Indigenous laws would operate must be dealt with. In large part, this is the subject of the final chapter which, to summarize, argues that Indigenous legal traditions could be applicable through Indigenous governance institutions and instruments, Indigenous dispute resolution bodies, Federal recognition and harmonization, and Canadian and Indigenous legal institutional development.

But perhaps the most controversial issue of applicability deals with the question of to whom Indigenous laws would apply. Many worry that the application of Indigenous laws will be racially based, encouraging racialization and racism in Canada. Others worry that the application could be too narrowly focused and not cover all people living in Indigenous communities. These concerns require further examination.

There are many disturbing examples throughout the world of law being applied solely on racial lines. This practice is usually discriminatory and subordinates groups or individuals within society. Applying Indigenous legal traditions on the basis of race should be avoided. Indigenous laws should flow from the political character of these societies; they should not apply because of ancestry. Aboriginal peoples belong to distinct political bodies that have an existence that is broader than their familial and ancestral ties. As the Royal Commission on Aboriginal Peoples wrote:

> Aboriginal peoples are not racial groups; they are organic political and cultural entities. Although contemporary Aboriginal peoples stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestries. As organic political entities, they have the capacity to evolve over time and change in their internal composition.[395]
>
> … One of the greatest barriers standing in the way of creating new and legitimate institutions of self-government is the notion that Aboriginal people constitute a "disadvantaged racial minority" ... .Only when Aboriginal peoples are viewed, not as "races" within the boundaries of a legitimate state, but as distinct political

[395] Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services, 1996), Chapter 3.

> communities with recognizable claims for collective rights, will there be a first and meaningful step towards responding to Aboriginal peoples' challenge to achieve self-government. [396]

Indigenous peoples should apply their legal traditions as political bodies rather than racial groups. They have rules for adopting others into their communities or granting them citizenship. Their traditions could be modernized and made applicable to people from all parts of the world. Clauses in the recent Dogrib and Innu treaties recognize their authority to make their own citizenship decisions. Other groups could take the same approach. Indigenous governments should set criteria under their own laws to determine how a people from other communities become citizens. This would help to overcome most problems of applicability of Indigenous legal traditions within these communities.

A range of options exists to address broader applicability issues. First, Indigenous laws could be territorial: if a person is on Indigenous land, Indigenous laws apply. Second, Indigenous law could be personal, and follow an Indigenous person wherever he or she goes. Indigenous laws could similarly acknowledge that other Canadians carry personal law with them onto Indigenous lands and exempt them from their Indigenous laws. These are currently the most pressing issues before the United States Supreme Court. Cases like *Oliphant, Duro, National Farmers, Montana, Hicks* and others are among the most difficult with which the Courts are dealing. US jurisprudence has been too focused on blood quantum and racial categories. These preoccupations should be avoided in applying Indigenous laws in the Canadian context. Laws should be applied because of the political association and membership of its citizens.

---

396 Paul L.A.H. Chartrand, "Aboriginal Self-Government: The Two Sides of Legitimacy" in Susan D. Phillips, ed., *How Ottawa Spends: A More Democratic Canada. . . ?* 1993-1994, (Ottawa: Carleton University Press, 1993), pp. 234, 236, as cited in Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services, 1996), Chapter 3.

E. Constitutionality

A fifth challenge relates to the legality and constitutionality of Indigenous legal traditions. This paper maintains that recognition would be consistent with our constitutional framework. It can be argued that Indigenous legal traditions are protected as aboriginal or treaty rights, and thus must be recognized and affirmed. This will be explored in greater detail in the next chapter, and has been a constant theme of this paper.

F. Legitimacy

There are psychological, emotional, economic and political objections to recognizing Indigenous legal traditions that must be addressed at this point. Some of these perceptions flow from stereotypical assumptions or uninformed opinions. A very small number may even flow from racist ideas about Indigenous populations and the legitimacy and worth of their laws. Racist ideas should be rejected, including the racist notions Indigenous peoples themselves may hold about others and their laws. Most concerns about Indigenous legal traditions are not racially motivated but rather relate to more mundane, but nevertheless real, fears of the unknown.

Even the idea that Indigenous people are capable of administering their own affairs needs to be dealt with. There is a five hundred year history that has portrayed Indigenous peoples as lower on the scale of social organization, and thus less capable of managing conflict. These messages run deep in popular culture and may be difficult to resist unless explicitly addressed. These feelings will be particularly poignant when miscarriages of justice occur in Indigenous systems, as they certainly will. No society is immune from error, miscalculation, vice, corruption and distortion. Even though grave injustices periodically arise within Canada’s other legal systems, similar injustices may be regarded more severely in an Indigenous context. It is difficult

to prevent Indigenous peoples being held to a higher standard when they seek to administer their own affairs.

Another concern about the fairness of recognizing Indigenous legal traditions may arise even if every explanation for their recognition makes intellectual sense. Resentment might be a partial motivation. People might think Indigenous peoples are getting something they are not, leading to irritation or bitterness. This paper has attempted to show that the recognition of Indigenous legal traditions will extend benefits to Indigenous peoples which others already enjoy. But not everyone will see the issue in this light, and will resist any expansion of the rule of law for Indigenous peoples in the way proposed in this paper. Greed, worry, fear, anxiety, envy, paternalist affection, protective concern or devoted love of country may all lead people to reject Indigenous legal traditions. Any strategy to recognize the traditions must address these emotional reactions.

The economic cost of recognizing Indigenous systems may be considered too great. The potential for duplication of legal services may be viewed as wasteful and inefficient. The cost of legal personnel may seem extravagant in relation to other pressing priorities.

It does cost money to support a legal system. But it is also expensive to ignore the development of greater respect for the rule of law in Indigenous communities. Indigenous legal systems, operating at a formal level and setting clear rules for community conduct, can result in economic gain.

Economic and social development goes hand in hand in Indigenous communities.[397] Legal development is an important component of social development and is economically relevant. Social problems negatively affect individual human capital and collective social capital, the resource generated in group relationships.[398] The development of social capital breeds trust, goodwill, and mutual obligations that are necessary for a group to develop and act effectively.[399] When Indigenous peoples find themselves in socially negative situations, barriers to economic success are created.[400] The development of Indigenous legal traditions can help them overcome socially negative circumstances and reduce barriers to economic development.

Indigenous communities would benefit greatly from the creation of more stable political environments that recognition of their legal traditions would bring. In some Indigenous communities, there are too many examples of interference with social and economic development: demands that certain individuals be hired, obstructing necessary financial or administrative decisions, or attempts to influence the distribution of grants or loans. These activities demoralize, cause social disruption, lead to business failure and undermine economic initiative. Indigenous communities are then left with unpredictable, arbitrary social environments that discourage investment and commitment.

This is one reason why the formalized recognition of Indigenous rules and procedures are so important. They can combat factionalism and undue socio-economic interference. They could regulate permit procedures and prevent every small grievance from turning into a major political

---

397 Thanks to Sarah Morales for her assistance in developing the insights in these next three paragraphs.

398 See Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Toronto: Simon and Schuster, 2000).

399 S. Callahan, “The Capital that Counts” (1996) 123:20 *Commonwealth* 7 at 7.

400 J. Coleman, “Social Capital in the Creation of Human Capital” (1988) 94 *American Journal of Sociology* at 98.

confrontation.[401] Indigenous conflict resolution could remove pressure at key junctures before it boils over. Environmental laws would govern land use, wildlife and resource extraction.[402] For greater economic benefits, Indigenous laws should be implemented through processes that clearly and explicitly define the rights and responsibilities of all affected parties.[403] If people can clearly see avenues for decision and appeal, their confidence in their social and political institutions will increase. Questions that need to be addressed to assist in this objective include:

- When can the Indigenous governmental authority organization overrule other departments?
- When are there requirement for public notice or public hearings?
- What right of appeal do applicants have, and to whom?

Given the diversity of Indigenous societies, no one legal model could be applied across the country. Each community will have to develop its own institutions and policies. Communities that do not come to terms with these issues invite conflict and instability that will inhibit socio-economic development.[404]

Professional legal standards and fair, effective dispute resolution procedures will allow communities to weather political storms.[405] They can insulate Indigenous leaders from petty factionalism.[406] A community enhances its political stability and increases its ability to effectively

---

401 Stephen Cornell & Joseph P. Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations" in *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* at 19.

402 *Ibid.*

403 Many Indigenous governments have inadequate controls over finances and weak management systems. Development will be discouraged if the paperwork on a new business permit is lost, if Band Council records are cleared out each time a new council is elected, if the building contractor's bill goes unpaid until funds can be shuffled around departments, or if each firing of an employee turns into a political crisis. See John Borrows, "Stewardship, Accountability and Indian Act Governance" (2003) 29 *Queen's Law Journal* 103.

404 Cornell *supra* note 401 at 19.

405 *Ibid.* Good financial accountability and record systems prevent abuses, improve performance monitoring, increase accountability and enhance a community's ability to make informed, knowledgeable decisions regarding community assets and opportunities.

406 *Ibid.*

manage its own affairs when conflict resolution depends less on who sits on Council or Board and more on a formalized, fair and dependable dispute resolution process. All societies must prevent abuse of public authority, including Indigenous peoples. Steps need to be taken to ensure that those who exercise public power do not use their office to enrich themselves.[407] Indigenous societies will be crippled if those seeking an inappropriate accumulation power are not stopped. There are strong arguments that as Indigenous peoples become more responsible for their communities, they will create greater certainty and opportunity for growth and investment. This insight is helpful in dealing with questions about the economic costs of recognizing Indigenous legal traditions.

In political science terms, there may be concerns about legitimacy because long experience has shown that people will abuse their authority if they not properly accountable. Indigenous people are no exception. Effective checks and balances can constrain abuse through mutual oversight and countervailing power. In most contexts, this means that one level or branch of government can curtail the other unless they cooperatively work together to cultivate their mutual interests. The idea is that these systems will curb inappropriate use of power because of the veto-like power one branch or level of government has over the other. It is legitimate to theory of checks and balances one should ask whether the existence of Indigenous legal systems would help or hinder effective and appropriate checks and balances.

One approach to this question would be to encourage Indigenous peoples to design their own system of checks and balances. They could generate culturally appropriate constraints for those communities exercising dispute settlement authority. For example, they could create something akin to a legislative override if decisions of their justice system required review. Canada has

---

[407] The use of power for personal gain can occur through direct taking of funds or authority or through the biasing of laws, rules and regulations so as to favour particular interests. This phenomenon is socially and

taken this route through section 33 in the *Canadian Charter of Rights and Freedoms*.[408] Centuries earlier, the Hodinohso:ni trod a similar path with their system of override in their Great Law of Peace.[409] It has been said that the Iroquois system of checks and balances were an inspiration to those who framed the U.S. Constitution, with its system of mutual oversight and review.[410]

Indigenous peoples could also choose to separate their branches of government. They could allow their Councils, Chiefs and Dispute Resolution Bodies to act in tension with each another. They could require joint action by different bodies before certain decisions were taken. Councils could be constrained from acting unless their decisions received approval from their Chiefs. Chiefs could be required to obtain the legislative support of Councils before they acted. Dispute Resolution Bodies could be constrained by both Chiefs and Councils; substantive and procedural limits could be placed on their powers.

The point is that Indigenous peoples could facilitate checks and balances through innovation and experimentation when setting up their own legal systems. They could do this in a manner that most appropriately matches their cultural norms. The facilitation of Indigenous legal systems could introduce much needed reform, at least in Canada under the *Indian Act*. This *Act* created a structure that placed too much power in the hands of the Band Council - a single government body. A vibrant legal system could dissipate the potential for abuse that exists in

---

economically destructive.

408 Section 33 (1) of the *Canadian Charter of Rights and Freedoms* reads: Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*.

409 Francis Jennings, *The Ambiguous Iroquois Empire* (New York: W.W. Norton and Company, 1990).

410 Donald A. Grinde, Jr., and Bruce E. Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: American Indian Studies Centre 1991).

the *Indian Act* system. It could do this by spreading decision-making authority more evenly through communities.

Indigenous peoples could also facilitate checks and balances in their dispute resolution processes by setting up a review system that takes advantage of larger cultural groupings. For example, individual bands might choose to begin dispute resolution initiatives at the local level, and then use a wider Panel, Elders Council or Court to consider appeals. This would balance local authority. This is, in fact, the route the Métis Settlements followed when they created the Métis Settlements Appeal Tribunal outlined in Chapter Two. It is also the course the Navajo have chosen in their justice system, as discussed in the next chapter. These examples demonstrate that Indigenous peoples can take appropriate steps to ensure that their dispute resolution bodies do not abuse their authority.

To carry legitimacy issue further, checks and balances could also operate between the three legal systems. For example, if Indigenous peoples are going to be constrained by provincial or federal governments in their systems, it could also be argued that provincial or federal decision-making structures should be constrained by Indigenous systems. The circle of checks and balances would then be complete. Intercultural dispute resolution could give Indigenous peoples appropriate checks and balances over the exercise of federal and provincial authority. This power should extend to constrain Cabinet, Legislative or Court decisions that adversely effect Indigenous peoples. It would be interesting to see Canadian structures restrained by Indigenous legal concepts. If Indigenous peoples possessed real reciprocal authority, they may be less concerned that the Canadian government could check their authority inappropriately. Indigenous peoples must have the ability to limit federal or provincial authority for intercultural dispute resolution. Concepts in the guise of intercultural engagement that do not challenge the

domination, fabrication and sometimes racism of the other systems will be regarded by suspicion.

G. Summary

This chapter has argued that the concerns that may be raised in objection to the recognition of Indigenous legal traditions must be seriously considered and addressed. While some of these issues can be answered by reference to historic experience or academic commentary, others are less likely to be rationally resolved. There is an essential emotional and psychological component to human relationships. This component is always engaged when Indigenous legal issues are considered. Decisions tend to be made in a way that includes psychological considerations. These must be dealt with if Indigenous legal traditions are to enjoy greater development.

VI. Entrenching Multi-Juridicalism in Canada

Indigenous legal traditions could more positively permeate people's lives if their power was acknowledged. Many Indigenous peoples have been demoralized because of their experiences with the state. The tide could be turned if they exercised a greater level of control over their affairs. There are numerous ways Canada could recognize and develop Indigenous legal traditions.[411] There could be a greater recognition of Indigenous governments and dispute

[411] Former Minister of Justice, Irwin Cotler said:

> "Today, Canadians across the country will celebrate the cultural richness and historical contributions that Aboriginal peoples - First Nation, Métis, and Inuit - have brought to Canadian society. I am personally proud to take part in this celebration, and to join with the Prime Minister and my cabinet colleagues to express our appreciation for the guidance and inspiration that Aboriginal peoples and groups provide to Canadians as we go about our daily lives.
>
> When I was asked by the Prime Minister to take on the role of Minister of Justice and Attorney General of Canada, his expectation of me and my colleagues was clear: we must each do everything possible within our portfolios to ensure that the quality of life for Aboriginal peoples in

resolution bodies through the courts, parliament, legislatures, the executive, law societies and law schools.

Governments formulate, authorize and administer laws. If they function properly, they are a focal point for communication about the nature of the society over which they preside. If governments are imposed and do not reflect the society's choice, social chaos and disorder result. With few exceptions, Indigenous peoples in Canada live under governmental structures that are not of their own choosing. As a result, they do not enjoy the degree of peace and order to which they are entitled because their legal traditions do not effectively reflect and communicate their normative standards. This must change. Indigenous governments can become a catalyst for constructive change if they build upon Indigenous peoples' aspirations.

Effective Indigenous governments would apply their legal traditions more explicitly in making decisions and resolving disputes, particularly in their management and regulatory systems. A more visible and transparent legal structure would make Indigenous governments more accountable to their people and would help their communities to become more self-sufficient.

Canada improves. This is a legacy issue: reaching this goal will require personal and professional commitments at all levels. It will also require a principled approach, that we anchor our policies in fundamental principles. The seven "R" principles that I am committed to following are:

- Recognition - of the historical place of Aboriginal peoples in our society,
- Respect - for the distinct constitutional status of Aboriginal peoples,
- Redress - for historical wrongs, as exemplified by the recently concluded historical agreement on the residential school tragedy,
- Responsiveness - with regard to our duty to consult Aboriginal groups,
- Representation - to combat the over-representation of Aboriginal people in the criminal justice system as offenders and victims, while addressing the under-representation of Aboriginal people in the justice system,
- Reconciliation - as the underlying dynamic of process and outcome,
- Renewal - a healthier, healing relationship as the product of the previous six Rs.

These principles already underpin our work at the Department of Justice where Aboriginal peoples are concerned. But there is still much more to be done.

Today, as we continue toward our goal, it is my hope that a continued spirit of collaboration combined with this principled approach will lead to this renewed relationship where all Aboriginal peoples enjoy healthy, vibrant communities, while participating fully in Canadian society."

Indigenous governments could play a greater role in recognizing structures that facilitate access to their own legal values. This could occur through the articulation of Indigenous constitutions, codes, rules, regulations and policies. Indigenous governments could identify and apply other culturally appropriate legal traditions to communicate the contours of their legal order.

A society's choice of government allows the members of that society to determine how they might best fulfill their aspirations and facilitate their moral agency. This is a people's self-determination. Governments should be accountable to those whom they most directly affect to ensure that their laws are fair and just. Peace and order are best cultivated where governmental structures promote freedom of association, conscience, and the belief in people's participation in their society. If choices are impeded by a body over which people have little or no control, they are in a state of subjugation. Liberty and freedom require the protection of inalienable rights to life and land, as well as access to civil, political, economic, social and cultural rights. An integral element of self-determination involves the choice of legal traditions that a society will follow. Self-determination requires the recognition that Indigenous governments are law-making bodies in accordance with the cultural contours required by their legal traditions.

A. Indigenous Governments: The International Context

International legal instruments contain proposals that recognize the connection between Indigenous governance and law. The *Draft Declaration on the Rights of Indigenous Peoples* is clear about this relationship. The *Draft Declaration* is part of a 13-year-long intensive effort by members of the Working Group on Indigenous Populations of the Sub-Commission on the Promotion and Protection of Human Rights. The *Draft Declaration*'s goal is to promote human rights for Indigenous peoples. It contains nine sections and numerous articles that deal with matters such as equality, self-determination, freedom from threats of genocide or ethnocide,

health, and the maintenance of distinct identities, history, religion and cultural heritage. While the *Draft Declaration* may not be finalized, and International laws do not generally define "peoples" who have a right of self-determination, this right nevertheless remains an important and widespread Indigenous goal. Governance and law are connected within the *Declaration*. It proclaims that "Indigenous peoples have a right to self-determination."[412] It states that: "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[413]

Provisions within the *Draft Declaration* highlight Indigenous legal traditions for recognition and development in order to facilitate their self-determining status.[414] Article 9 of the *Declaration* asserts that "Indigenous peoples have the right to belong to indigenous communities or nations *according to their own traditions and customs*." Article 19 provides that "Indigenous peoples have the right…to maintain and develop *their own decision making institutions*." Article 33 recognizes that Indigenous peoples have the "right to *maintain a justice system in accordance with their legal traditions.*" These principles could be considered and adopted in a Canadian context so that Indigenous peoples could develop their governments' law making powers.

Other international instruments dealing with Indigenous peoples recognize the connection between their governance and legal traditions. For example, in 1989, the International Labour Organization (ILO) adopted Convention 169 which has provisions respecting Indigenous legal traditions. While the ILO primarily promotes and protects employee rights, it has been a long-

---

412 See Erica I.A. Diaz, "Equality of Indigenous Peoples Under the Auspices of the United Nations: Draft Declaration on the Rights of Indigenous Peoples" (1995) 7 *St. Thomas Law Review* 493; James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 151-182; Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Princeton: Theytus Books, 1998) 107-171.

413 E/CN.4/1995/2/1994/56 (1994), reprinted in 31 I.L.M. 541 (1995).

time ally of Indigenous peoples. In the mid 1950s, the ILO Convention Number 107 became the first international instrument to explicitly deal with indigenous peoples. While the recognition of Indigenous rights was a positive step for an international organization, its assimilative premise did not coincide with Indigenous peoples' preferences. As a result, the ILO revised Convention 107 by drafting ILO 169 which was adopted in 1989. Norway was the first country to ratify this convention, making its obligations applicable throughout the country.[415] Canada has not yet ratified the convention. Nevertheless, its underlying philosophy is consistent with the premises listed in this paper. The preamble states the Convention's goal: to recognize "the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions."

Articles 8 and 9 of ILO Convention 169 are the provisions that are most applicable to the recognition and implementation of Indigenous legal traditions. Article 8.1 states that in "applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws". Article 8.2 of the Convention contemplates a procedure for ensuring that Indigenous legal traditions are compatible with fundamental international and domestic human rights. It states that Indigenous peoples "shall have the right to retain their own customs and institutions where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights." It also declares that: "Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle." Article 9.1 reinforces the issues of compatibility of Indigenous legal traditions with human rights standards and respect for Indigenous legal practices. It reads: "To the extent compatible with the national legal system and internationally recognized human

---

414 Wilton Littlechild, *Recognition of International Laws: An International Basis*, A presentation to the Joint Conference of the Canadian Bar Association and the Indigenous Bar Association, Ottawa, March 4-5, 2005 [unpublished].

rights, the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected." ILO Convention 169 is important because it identifies the important relationship between governance and Indigenous law.

The Organization of American States (OAS) is another international body that has promoted the recognition of Indigenous legal traditions as part of Indigenous and National governance. The OAS is a regional international organization of 34 member states, including Canada and the United States. The human rights component of the OAS is the Inter-American Commission on Human Rights (ICHR), whose primary mandate is to promote respect for and defense of human rights in the hemisphere. The OAS Proposed Declaration on the Rights of Indigenous Peoples is the first International Instrument to specifically have articles entitled Indigenous Law. These articles were approved by the ICHR on February 26, 1997 at its 1333rd Session, 95th regular session.

Article 16 of the OAS Declaration acknowledges Indigenous law to be part of the State's legal systems and of Indigenous peoples' internal governance and dispute resolution systems. The Draft contains the following declarations:

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

---

415 By virtue of the Storting's adoption of the *Human Rights Act* (1999) this ILO Convention 169 has been incorporated into Norwegian Law, and it takes precedence over Norwegian Law.

Article 17 of the Declaration deals more fully with the issue of national incorporation of Indigenous legal and organizational systems within the state's systems. It suggests that the State change its structures and practices to include Indigenous legal traditions. It reads:

> 1. The states shall facilitate the inclusion in their organizational structures, the institutions and traditional practices of Indigenous Peoples, and in consultation and with consent of the peoples concerned.
>
> 2. State institutions relevant to and serving Indigenous Peoples shall be designed in consultation and with the participation of the peoples concerned so as to reinforce and promote the identity, cultures, traditions, organization and values of those peoples.

In exercising the right of self-determination, Indigenous peoples could act in accordance with these international instruments to freely determine their civil, political, economic, social and cultural development. Legal issues would be determined within their own communities in accordance with their own values. If Indigenous peoples followed this path, Indigenous law would become the first line of protection for Indigenous culture in all their relationships. The protection would result from the operation and recognition of Indigenous peoples' own laws, legal systems, policies and protocols. This could be done in tribal courts, potlatches, feasts, councils, administrative agencies, or any other forum a group chooses to protect its culture. These institutions should flow from the cultures themselves.

Indigenous legal traditions would be more securely protected and would remain living cultural forces if their own governments defined the parameters of their cultural practices.[416] Indigenous legal traditions should not be frozen at some artificial moment in the past; they should continually develop to meet the needs of each generation. No culture is free from so-called external 'contaminating' pressures. Indigenous cultures are no exception, though one should be

---

[416] For arguments that one can reconcile liberalism with cultural recognition see Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995); Joseph Caren, *Culture, Citizenship and Community: A Contextual Exploration of Justice as Even-Handedness* (Oxford: Oxford University Press, 2000); Ayelet Shachar, *Multicultural Jurisdictions* (Cambridge: Cambridge University Press, 2001); Alan Brudner, "The Liberal Duty to Recognize Cultures" (2003) 8 *Review of Constitutional Studies* 129.

careful not to equate change in Indigenous cultures with their extinction.[417] Objects, ideas and expressions do not automatically become non-Indigenous just because Indigenous peoples adapt and adopt contemporary ones.

Indigenous governments draw upon their best practices and procedures in their law-making powers, and upon those of other cultures. They compare, contrast, accept and reject governmental and legal standards from many sources, including their own. Some might call this revisionist, and might use the label to undermine Indigenous governance and law. This criticism would be unfounded. All law and governance is revisionist, it must be continually re-interpreted and re-applied to remain relevant to changing conditions. Law would become unjust and irrelevant if it was not continually revised. Indigenous governance and law is no different, and should not be held to higher standards. Stereotypes implying that Aboriginal peoples ancient governmental or legal traditions were either uniformly savage, or romantically existing in a state of continual harmony and peace must be rejected. So should the idea that Indigenous peoples lose their Aboriginality if they adopt contemporary codes of conduct.

The authenticity of Indigenous law and governance is not measured by how closely they mirror the perceived past, but by how consistent they are with the current ideas of their communities. All legal traditions possess past practices that are no longer acceptable in light of contemporary values. The Quebec *Civil Code* recently abandoned inequality between spouses, and added privacy rights, personality rights and (trust-like) patrimony of affection powers. The common law no longer sanctions trial by ordeal, trial by battle, sexual or racial discrimination, and a host of

---

417 For a critical discussion of how the Canadian judiciary has mischaracterized concepts of culture see Michael Asch, "The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*" (2000) 5 *Review of Constitutional Studies* 119; Michael Asch, "Errors in *Delgamuukw*: An Anthropological Perspective" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books, 1992) at 221; Cathy Bell and Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) at 38.

other human rights abuses. Likewise, Indigenous legal traditions should be the subject of continual revision in order to ensure compatibility with contemporary communities and consistency with human rights values.

Indigenous legal traditions could become even stronger if Indigenous governance systems were the default structure whenever management, regulatory or dispute resolution issues arose. Indigenous governments could best define their claims and resolve them in the context of their own living culture.[418] This would help to ensure that Indigenous legal traditions were not considered a relic of some long-lost, distant past, protected in a glass cage and treated as the heritage of mankind. It would free Indigenous peoples from some of the stereotypes and domination they have encountered. Placing the resolution of disputes in Indigenous hands would help ensure that Indigenous culture remains an evolving, dynamic power that sustains the community's ongoing existence. They would quickly be seen to be neither savage nor saint-like. They would be seen to be just as human those of other communities, with all the same frailties, foibles, flaws and faults, strengths, talents, gifts and genius.

B. Indigenous Governments: The Domestic Context

Indigenous legal traditions could be recognized as existing Aboriginal and treaty rights under section 35(1) of the *Constitution Act, 1982*. The section's wording states: "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed". The section is clear about who holds the rights: *peoples*. Indigenous groups should be able to claim organizational rights as *peoples*. This point is made by Professor Cathy Bell in

---

418 For an argument recounting the importance of Indigenous peoples making their claims 'in context' see Rosemary Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6 *Canadian Journal of Law and Jurisprudence* 249.

a 1997 article about Métis rights.[419] She observed that section 35 came out of an international context where there was: "Growing activity at the United Nations aimed at ending colonial domination [which] resulted in increased international pressure on nation states to recognize and protect the human rights of colonized peoples".[420] If section 35 was placed in this broader context and recognized as a provision aimed at eradicating unconstitutional colonial domination, then principles of Indigenous governance could be recognized as an important part of our Constitution's purpose. This stated purpose is "the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions".[421] This reconciliation could involve the implementation of provisions similar to those in the UN and OAS Draft Declarations which recognize the connection between Indigenous governance and Indigenous legal traditions.

The Royal Commission on Aboriginal Peoples acknowledged that section 35(1) recognized and affirmed a right to self-government. This also has implications for Indigenous law because governments exercise law-making authority. The Commission regarded the Aboriginal right to self-government as one of the three orders of government in Canada. In fact, the Commission asserted that Aboriginal people already possess an inherent sphere of jurisdiction under section 35(1) related to matters internal to their peoples (which could include legal orders). The Commission wrote:

> In 1982, the inherent right of Aboriginal self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty-protected right. As a result, it is now entrenched in the Canadian constitution. Aboriginal peoples exercising this right constitute one of three distinct orders of government in Canada: Aboriginal, federal and provincial. The

---

419 Cathy Bell, "Métis Constitutional Rights in Section 35(1)", (1997) 36 *Alberta Law Review* 180, 189-192, 194-195.

420 *Ibid.*

421 *Van der Peet*, *supra* note 286 at para. 44.

> sphere of inherent Aboriginal jurisdiction under section 35(1) comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories.[422]

The Royal Commission's observation could be acted upon by Aboriginal peoples and others. Aboriginal self-government could be considered an inherent right. This recognition would imply that Indigenous legal traditions could be more explicitly proclaimed and practiced.

The Commission was able to find that Indigenous peoples already possessed governance powers in Canada because it was never extinguished. Indigenous peoples exercised governmental and law-making power prior to assertions of sovereignty by the Crown.[423] In *Calder v. A.G.B.C* Justice Judson wrote:

> …the fact is that when the settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had done for centuries. This is what Indian title means [my emphasis].[424]

Organization is essential to governance. Indigenous peoples organized themselves through a set of understandings about what was appropriate and/or inappropriate in their day-to-day interactions. These understandings were given force through principles and customs which measured appropriate sanctions or commendations. The fact that Indigenous peoples were "organized in societies" prior to the arrival of Europeans implies that their legal traditions were an important element of their 'pre-contact' societies.[425] It demonstrates that their power of self-

---

422 Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services, 1996), Chapter 3.

423 *R. v. Sioui* [1990] 1 S.C.R. 1025. Chief Justice Lamer observed:

> "The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations".

424 *Calder v. A.G.B.C, supra* note 18 at page 328.

425 The reserved rights theory of aboriginal governance is also consistent with the proposition articulated in *R. v. Van der Peet* at para. 30:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were

organization pre-existed the Crown's assertion of sovereignty and was in fact strong enough to hold rights to land. These powers of governance and law-making were not voluntarily surrendered by the Crown's act of assertion.[426]

Indigenous peoples continued to exercise their powers of governance after the Crown's assertion of sovereignty in many ways.[427] These powers are evident in matters internal to their societies and in their external relationships with Canada, through treaties, trade and conflict.[428] Indigenous peoples continue to live in organized societies to the present day. They are governed by ancient and contemporary customs, laws and traditions that give meaning and purpose to their lives[429] despite the extensive regulation of these powers through instruments such as the *Indian Act*.[430] Fortunately, as the Supreme Court noted in *R. v. Sparrow*, "that the right is controlled in great detail by the regulations does not mean that the right is thereby

---

> already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries [1996] 2 S.C.R. 507.

426 However, it has been that 'discovery' diminished Indian rights to land, *Guerin v. R.* [1984] 2 S.C.R. 325.

427 The Supreme Court of Canada accepted the idea in *Sioui*, *supra* note 423, that Aboriginal governance was multifaceted, even after the assertion of sovereignty:

> As the Chief Justice of the United States Supreme Court said in 1832 in *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832), at pp. 548-49, about British policy towards the Indians in the mid-eighteenth century:
>
> Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: *she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged*. [Emphasis added. (by Justice Lamer)] …
>
> This "generous" policy which the British chose to adopt also found expression in other areas. The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.

428 John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1990) 30 *Osgoode Hall Law Review* 291. The ability of Aboriginal peoples to exercise their powers of governance through the post-Confederation period was demonstrated every time a First Nations signed a treaty. Implied within the Aboriginal treaty-making power is that they had government authority which could by the group.

429 Borrows, *supra* note 403.

430 R.S.C. 1985, c. I-5. For example, First Nations exercise pre-existing governance powers through the Indian custom council system under the *Indian Act.* For a definition of band custom, see the *Indian Act*, section 2(i), "council of the band". See *Bigstone v. Eagle* (1992), [1993] 1 CNLR 25 (F.T.D).

extinguished".[431] The regulation of Indigenous law-making power does not extinguish their jurisdiction.

In *R. v. Van der Peet,* the Supreme Court of Canada held that Aboriginal rights were those practices that were integral to Aboriginal peoples prior to the arrival of Europeans.[432] *R. v. Pamajewon* held that governance powers would be tested on the same standard as the Court developed in *R. v. Van der Peet.*[433] There are strong arguments that Indigenous law and governance were integral to the organization of the distinctive cultures of Aboriginal peoples throughout Canada prior to the arrival of Europeans.[434] It remains so today. An Indigenous society's legal traditions are inseparable from its governance powers. Aboriginal governance is an independent legal right, and does not depend for its existence on any grant of authority from the executive or legislative bodies in Canada.[435] It is a pre-existing right vested in Indigenous groups prior to the arrival of the common law in Canada.[436] Indigenous governance enables these peoples to use their legal traditions to pass on important names, divide territories, host feasts, raise memorials, engage in trade, sign treaties, participate in conflict resolution, exercise rights, keep the peace, facilitate development, build alliances, hold property, resist encroachments, etc. Indigenous legal traditions enabled these peoples to be here "when the

---

431 [1990] 1 S.C.R. 1075 at 1097. See "A Genealogy of Law", *supra* note 428, for an application of this principle in a specific community context.

432 *Van der Peet*, *supra* note 286.

433 *Ibid.*

434 For the test to follow to prove Aboriginal rights *see R. v. Van der Peet* (1996) 2 SCR 507.

435 For cases involving the reception of First Nations law into Canadian law, see *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Québec Superior Court), affirmed as *Johnstone* v. *Connelly* (1869), 17 R.J.R.Q. 266 (Québec Queen's Bench); *R. v. Nan-e-quis-a Ka* (1899), 1 Territories Law Reports 211 (N.W.T.S.C.); *R. v. Bear's Shin Bone* (1899), 3 C.C.C. 329 (N.W.T.S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.); *Re Deborah* (1972), 28 D.L.R. (3rd) 483 (N.W.T.C.A.); *Michell v. Dennis*, [1984] 2 C.N.L.R. 91 (B.C.S.C.); *Casimel v. I.C.B.C.*, [1992] 1 C.N.L.R. 84 (B.C.S.C.); *Vielle v. Vielle*, [1993] 1 C.N.L.R. 165 (Alta. Q.B.).

436 *R. v. Guerin*, [1984] 2 S.C.R. 335 at 378 (S.C.C.).

settlers came,…organized in societies and occupying the land as their forefathers had done for centuries".[437]

The Royal Commission on Aboriginal Peoples emphasized that a major source of Indigenous governance was Indigenous law:

> The laws of Canada spring from a great variety of sources, both written and unwritten, statutory and customary. …Given the multiple sources of law and rights in Canada, it is no surprise that Canadian courts have recognized the existence of a special body of 'Aboriginal rights'. *These are not based on written instruments such as statutes, but on unwritten sources such as long-standing custom and practice.* In the *Sparrow* case, for example, the Supreme Court of Canada recognized the Aboriginal fishing rights of the Musqueam people on the basis of evidence "that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day."[133] The court went on to hold that government regulations governing the Aboriginal fishing right were incapable of delineating the content and scope of the right.[134]
>
> *Aboriginal rights include* rights to land, rights to hunt and fish, special linguistic, cultural and religious rights, and *rights held under customary systems of Aboriginal law.* [438] [my emphasis]

Aboriginal peoples hold rights under their legal systems. A particularly important right for the health and vitality of their legal order is their inherent governmental power. Canada's multi-juridical status implies the existence of a multi-jurisdictional political order. Section 35(1) can facilitate the connection, growth and development between Indigenous governance and Indigenous legal traditions. The recognition of Indigenous governance within Canada's Constitution is important because it can help heal the troubled relationship that Indigenous peoples have had with the country.[439]

---

437 *Calder v. AGBC* [1973] S.C.R. 313 at 328. See also *R. v. Van der Peet supra* note 286 at 538. When Europeans arrived Aboriginal peoples were "already here [in British Columbia], living in communities on the land, and participating in distinctive cultures, as they had done for centuries".

438 Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services, 1996) and Chapter 3.

439 For most of Canada's history there has been very little recognition or protection of Aboriginal peoples fundamental human rights and personal freedoms. See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103:

> For many years the rights of Indians to their aboriginal lands were virtually ignored.

i. A Caution About Section 35(1): Remembering Sections 91 & 92

Despite section 35(1)'s excellent potential to build stronger Indigenous legal orders, its provisions must not bear all the weight of reform. Aboriginal rights can only go so far in building a harmonious Nation State. Broader socio-political forces related to Indigenous peoples' place in Canada's federal structures must also be mobilized.[440] Reform should not be exclusively channeled through the language and categories of section 35(1) to implement Indigenous law.[441] Section 35(1) is necessary, but not sufficient, to accomplish legal reform. Other opportunities for reform might be missed, particularly in regard to federalism, if too much reliance is placed on section 35.

Section 35 has not been sufficiently directed towards the larger project of nation building.[442] To put it bluntly, sections 25 and 35 have become focused on a few specific practices that the courts have decided were integral to Aboriginal peoples prior to Europeans arrival in North America and that have not already been extinguished. Furthermore, from an Aboriginal perspective, the provisions in section 35 are increasingly used to justify government infringements of Aboriginal rights.[443] Section 35 should not be permitted to sidetrack us from the more fundamental work to be done to harmonize Indigenous peoples' relationships with their neighbours. Some Canadians are uncomfortable, or at least unsure, about whether they want to have in their midst Aboriginal Nations that possess their own territories, speak their own languages and administer their own laws. This is a federalism question. Section 35 can blind us

---

440 Even then, broader engagement does not always generate broad support. The referendum following the Charlottetown Accord is partial evidence for this. On the other hand the referendum concerning treaties in British Columbia does not seem to hurt support for signing treaties in BC.

441 Similarly, Section 25 is not powerful enough to shield Aboriginal collectivities from the assimilative pressures of the majority, and section 37 was insufficient to bring about a political settlement between national Aboriginal organizations and first ministers.

442 Section 37 might have been, but the use of Aboriginal/First Ministers conferences has been expanded.

to what needs to be accomplished. Canada needs to reinvigorate and reinterpret its federalism provisions in order for Indigenous legal traditions to receive fuller support.

Section 35(1) as currently interpreted does not replicate jurisdictional powers for Aboriginal peoples as found in section 91 or 92 of the *Constitution Act, 1867*. Aboriginal peoples do not have an Attorney General to protect their rights. There has been too little constitutional discussion of democracy, self-determination and the rule of Indigenous law as they relate to Aboriginal peoples in Canada. In the 1998 *Quebec Secession Reference* case, the Supreme Court wrote that the federal system was only partially complete "according to the precise terms of the *Constitution Act 1867*"[444] because the "federal government retained sweeping powers that threatened to undermine the autonomy of the provinces".[445] As a result, the courts have had to "control the limits" of the federal and provincial government's "respective sovereignties" since "the written provisions of the Constitution do not provide the entire picture"[446] of the Canadian federal structure. In this vein, the courts historically helped to facilitate provincial "democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective", having regard to the diversity of the component parts of Confederation.[447] The court's historic approach has resulted in the sharing of political power in Canada between two orders of government: the provinces and the central government. Provincial power has been significantly strengthened under this interpretation.

---

443 Furthermore, section 35, in Part II of the *Constitution Act 1982*, is so influenced by the *Charter of Rights and Freedoms* in Part I of the same Act, that the jurisdictional concerns of Aboriginal peoples are lost. Section 1 lives within section 35, though in a somewhat modified form; it limits aboriginal rights.

444 *Ibid.* at para. 55.

445 *Ibid.*

446 *Ibid.*

447 *Ibid.* at 58.

These principles could be applied to Indigenous issues. It should be possible to strengthen Aboriginal peoples' jurisdiction if we regarded the federal system as only partially complete in relation to Aboriginal peoples.[448] In the context of the court's interpretation of provincial rights to Aboriginal rights, it could similarly be argued that the "federal government retained sweeping powers" relative to Aboriginal peoples "which threatened to undermine the autonomy" of Aboriginal groups. Furthermore, since the "written provisions of the Constitution does not provide the entire picture" relative to Aboriginal peoples, the courts could also "control the limits of the respective sovereignties" by distributing appropriate powers to the Aboriginal governments. If provincial powers can be strengthened by drawing on federalism's unwritten principles to fill in the "gaps in the express terms of the constitutional text",[449] the same can be done for Aboriginal peoples.

Section 35 should not shoulder the entire burden of reconciling Aboriginal peoples with the Crown. Section 35 is a lever or tool for further extending the development of Indigenous legal traditions. It could include federalism within its provisions, but if not, federalism will have to be a greater part of our discussions.

ii. Recognizing Indigenous Governance: What can the Federal Government Do?

The federal government has already recognized that Aboriginal peoples possess unextinguished inherent rights to govern themselves. A policy statement was issued in 1995 that stated: "The Government of Canada recognizes the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*. Recognition of the inherent right is

---

448 See Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 *McGill Law Journal* 309.

449 *Reference re Secession of Québec*, *supra* note 242, at para. 53.

based on the view that the Indigenous peoples of Canada have the right to govern themselves in matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources."[450] Note how these categories implicate Indigenous legal traditions.

The ability of Indigenous peoples to implement and develop laws, internal to their communities and integral to their cultures, could be considered to be within the scope of the federal policy. The policy should be broadened to recognize this fact. Aboriginal peoples' rights to live by their laws are integral to their unique cultures, identities, languages, institutions and relationships with the land.

Observations like the following make it clear that Indigenous governance rests on Indigenous legal tradition.

- Indigenous culture is preserved by and adapts through legal tradition.
- Indigenous identity is developed and passed on through Indigenous law.
- Indigenous languages embody Indigenous juridical approaches in their very structure and organization.
- Indigenous institutions are held together by Indigenous custom and law.
- Indigenous peoples' relationships with lands and resources stems from their legal traditions.

Indigenous legal tradition is an existing Aboriginal right in Canada, recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. Aboriginal peoples have the right to implement their unique laws that reflect their cultures, identities, traditions, languages and institutions, and recognize their special relationship with their land and their resources. The 1995 Inherent Rights Policy should be amended or extended to recognize this. At the same time, Aboriginal

---

[450] The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html.

governments should act to strengthen their laws by acknowledging them as a source of their power, and should review their existing laws to harmonize them with their legal traditions.

Furthermore, the federal government, with the participation and development of Indigenous governments, could modify and implement the recommendations of the Royal Commission on Aboriginal Peoples which proposed an *Aboriginal Nations Recognition and Government Act.*[451] The federal government could extend or amend its policies to support and recognize Indigenous governments in these matters, and pass Governance Recognition Legislation.

---

451 Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services, 1996) and Chapter 3. The Royal Commission also recommended the *Recognition Act*:

(a) establish the process whereby the government of Canada can recognize the accession of an Aboriginal group or groups to nation status and its assumption of authority as an Aboriginal government to exercise its inherent self-governing jurisdiction;

(b) establish criteria for the re-recognition of Aboriginal nations, including

(i) evidence among the communities concerned of common ties of language, history, culture and of willingness to associate, coupled with sufficient size to support the exercise of a broad, self-governing mandate;

(ii) evidence of a fair and open process for obtaining the agreement of its citizens and member communities to embark on a nation recognition process;

(iii) completion of a citizenship code that is consistent with international norms of human rights and with the *Canadian Charter of Rights and Freedoms;*

(iv) evidence that an impartial appeal process had been established by the nation to hear disputes about individuals' eligibility for citizenship;

(v) evidence that a fundamental law or constitution has been drawn up through wide consultation with its citizens; and

(vi) evidence that all citizens of the nation were permitted, through a fair means of expressing their opinion, to ratify the proposed constitution;

(c) authorize the creation of recognition panels under the aegis of the proposed Aboriginal Lands and Treaties Tribunal to advise the government of Canada on whether a group meets recognition criteria;

(see, Royal Commission on Aboriginal Peoples, *Renewal: A Twenty-Year Commitment*, Vol. 5 (Ottawa: Supply and Services, 1996), Appendix A, Summary of Recommendations.)

This current paper does not support the above recommendations in the form suggested by the Royal Commission because they could be used to remove recognition from Indigenous governments currently enjoying power within Canada. The burden of proof is on Aboriginal governments, and they have fewer resources and less support in the wider population than the federal government, which could lead to the termination of First Nations, Métis and Inuit communities already recognized by the federal or provincial governments.

If implemented, this *Act* could:

(a) enable the federal government to vacate its legislative authority under section 91(24) of the *Constitution Act, 1867* with respect to core powers deemed needed by Aboriginal nations. It could specify which additional areas of federal jurisdiction the Parliament of Canada is prepared to acknowledge as core powers to be exercised by Aboriginal governments. It could also

(b) provide enhanced financial resources to enable recognized Aboriginal nations to exercise expanded governing powers for an increased population base in the period between recognition and the conclusion or reaffirmation of comprehensive treaties.[452]

Legislation recognizing Aboriginal governance could also contain provisions relating to Indigenous legal traditions. These provisions should be implemented under the following principles:

(a) A community must freely consent and elect to take advantage of its provisions at their exclusive option, which should not be imposed or mandatory.

(b) The legislation should be proposed and drafted on a nation-to-nation basis after wide-ranging consultation with Indian Bands, Métis organizations and Nunavut villages.

(c) The legislation should also have the consent of the five major Aboriginal organizations.

(d) The legislation should be rights-based; it should not undermine historical treaties, or abrogate or derogate from other section 35 rights.

(e) The legislation should not impose more bureaucratic control over Indigenous people, and should reflect the concerns of Indigenous women.

(f) The legislation should also reject a one-size-fits-all approach and thereby allow for the great diversity within Indigenous nations to find expression.

In summary, Recognition legislation will not work if it is regarded as the federal government's attempt to offload responsibility and to increase the costs of governance for Indigenous

---

[452] Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services, 1996) and Chapter 3. The Royal Commission also recommended the creation of a Canada-wide framework agreement to guide the development of subsequent treaties and self-government agreements between recognized Aboriginal nations and the federal and provincial governments. The Commission wrote:

> The framework discussions should have three primary purposes: to achieve agreement on the areas of Aboriginal self-governing jurisdiction; to provide a policy framework for fiscal arrangements to support the exercise of such jurisdiction; and to establish principles to govern negotiations on

communities without an adequate quid pro quo. Legislation will most likely work if Indigenous peoples regard the Bill as their own. The Bill must not be seen to create or give permission for their governance powers, but merely to provide a way for the federal and provincial governments to formally acknowledge already inherent Indigenous legal and governmental powers.

C. Indigenous Courts and Dispute Resolution Bodies

Indigenous governments should recognize and/or recreate institutions that exercise dispute resolution powers over matters that are both internal to their communities and crucial to their relationship with other people. Indigenous governments should affirm the power of these institutions consistent with their legal traditions. Indigenous law must embrace a community's deeper normative values as a fair and effective force in facilitating peace and order. In the *Quebec Secession Reference* the Supreme Court of Canada noted this when considering the constitutionality of a unilateral declaration of sovereignty by Quebec.[453] The Court made some important observations about the principles upon which the Canadian legal order rests. The observations apply equally to Indigenous legal traditions. The Court wrote that, "to be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of and accountability to the people, through public institutions created under the Constitution."[454]

Indigenous dispute resolution is necessary because Canada's other legal traditions do not sufficiently engage Indigenous values and thus do not appropriately encourage Indigenous

---

lands and resources and on agreements for interim relief with respect to lands subject to claims, to take effect before the negotiation of treaties.

453 *Reference re Secession of Québec*, *supra* note 242.

454 *Ibid.* at para. 67.

participation. This oversight would be corrected by Indigenous adjudicative institutions established to apply Indigenous principles. Current constitutional structures too often frustrate the participation of Indian people since those structures falsely rest on public institutions (like the *Indian Act*) that are constitutionally questionable.

The Supreme Court of Canada has been concerned that their decisions should not generate "chaos and anarchy".[455] They have said the law will not tolerate a legal vacuum,[456] nor would it tolerate any part of Canada being without a valid and effectual legal system.[457] But, when their laws are not recognized, Indigenous peoples do exist in a legal vacuum. This does create chaos and makes the legal system ineffectual.[458] There is a mounting crisis in the rule of law in Aboriginal communities. The crisis is not because Aboriginal peoples lack legal rules; it is a crisis of legitimacy about the laws that apply within Indigenous communities. If Aboriginal peoples could start to see themselves and their normative values reflected in how they conduct their day-to-day affairs, some of the legal challenges within Indigenous communities would diminish.

Indigenous governance would enjoy greater accountability and legitimacy if their own dispute resolution bodies were able to resolve their disputes. The power to hold their own members accountable for their actions is an Aboriginal right that was integral to First Nations communities

---

455 *Manitoba Language Reference*, *supra* note 279, at 749.

456 *Ibid.*, at 753.

457 *Ibid.*, at 758

458 *Ibid.*, at 768. In the *Manitoba Language Reference* this rule was applied as follows:

> All rights, obligations and any other effects which have arisen under the Acts of the Manitoba legislature which are purportedly repealed, spent, or would currently be in force were it not for their constitutional defect, and which are not saved by the de facto doctrine, or doctrines such as res judicata and mistake of law, are deemed temporarily to have been, and to continue to be, enforceable and beyond challenge from the date of their creation to the expiry of the minimum period of time necessary for translation, re-enactment, printing and publishing these laws. At the termination of the minimum period these rights obligations and other effects will cease to have

prior to the arrival of Europeans. That right has not been extinguished and can be exercised in a contemporary form.[459] Under section 35 of the *Constitution Act* 1982, Aboriginal people have the right to sit in judgment of their own citizens on issues of rights, responsibility and accountability. They are in the best position to articulate legal principles that will have the deepest meaning and legitimacy in their communities.

This approach would be consistent with Indigenous legal values as well as with more general principles of Constitutional Law. Ultimately, accountability within Indigenous communities must flow from "principles of constitutionalism and the rule of law [that] lie at the root of our system of government", as the Supreme Court advised.[460] Protection and facilitation of the rule of law for Aboriginal peoples, as the *Quebec Secession* case suggests: "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order".[461] Judging Indigenous people by norms that flow from within their legal traditions is essential to the facilitation of normative order. It would create a regime where legality and legitimacy would coincide and that would bolster the respect and effectiveness of regimes of accountability.[462] The failure to permit Indigenous people to be governed and judged by principles that flow from their own normative prescriptions has not provided them with "a stable, predicable and ordered society in which to conduct their affairs".[463]

---

force and effect, unless the Acts under which they arose have been translated, re-enacted, printed and published in both languages. …

459 These criteria come from the Supreme Court's test in *R. v. Van der Peet* [1996] 2 S.C.R. 507.

460 *Reference re Secession of Québec*, *supra* note 242, at para. 70.

461 *Ibid.*, quoting from the *Manitoba Language Rights Reference*, at [1985] 1 S.C.R. 721 at p. 749.

462 "Our law's claim to legitimacy also rests on an appeal to moral values, many of which are embedded in our constitutional structures. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values", *Ibid.* at para. 67.

463 *Ibid.*

In the United States, independent Tribal Courts have played an important role in holding Indian leadership to the highest standards of accountability. While tribal courts were initially suspect because of their heavy reliance on the Bureau of Indian Affairs for the administration of justice,[464] they have grown in the last 25 years to become independent bodies capable of addressing the most challenging issues.[465] One particularly strong example of this power is the decision in *Re Certified Question II: Navajo Nation v. MacDonald.* In *MacDonald,* the Navajo court was asked to consider, among other things, whether their tribal chairman had breached any fiduciary duties by receiving "bribes and kickbacks from contractors doing business with the Navajo Nation".[466] This case was significant for the Navajo courts because it asked them to solve their nation's most pressing problem without resorting to external legal institutions. It squarely raised the issue of accountability in a context similar to those sometimes raised about Indigenous leaders in Canada. As such, it is instructive to note the approach and result of the Navajo courts in this case.

In *MacDonald*, the Navajo Court drew upon 'western' principles of law to articulate the fiduciary duty that a tribal executive officer owes to the members of the tribe. With this, it did what any other court would have done. It examined general principles of law and applied them to the facts of the case to arrive at an appropriate solution. However, in finding that the chairman owed and violated fiduciary duties to the nation, the court referred to other legal norms that only it would be qualified to draw upon in facing down this problem.[467] In particular, the Navajo justices drew on Navajo common law to explain the fiduciary duty in the context of the principles of their own normative

---

464 William Hagan*, Indian Police and Judges* (New Haven: Yale University Press, 1966); Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995) 61-98.

465 Nell Jessup Newton, "Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts" (1998) 22 *American Indian Law Review* 285.

466 In "Re Certified Question II: Navajo Nation v. MacDonald" (1989), 16 *Indian Law Reporter* 6086 (Navajo Supreme Court); edited version appears in David Getches, Charles Wilkinson and Robert Williams Jr., *Federal Indian Law*, 4th Ed. (Minneapolis: West Publishing, 1998).

467 Robert Cooter, "Indian Common Law: The Role of Custom in American Tribal Courts" (1998) 46 *American Journal of Comparative Law* 509.

order.[468] The Court wrote of a story concerning two "Hero Twins" who slew monsters and overcame other troubles faced by the Navajo at the time of their creation. The court held that this story embodied the "Navajo traditional concept of fiduciary trust of a leader (*naat'aanii*)". In applying the principles embedded in this story, the court wrote:

> After the epic battles were fought by the Hero Twins, the Navajo people set on the path of becoming a strong nation. It became necessary to elect *naat'aaniis* by consensus of the people. A *naat'aanii* was not a powerful politician nor was he a mighty chief. A *naat'aanii* was chosen based on his ability to help the people survive and whatever authority he had was based upon that ability and the trust placed in him by the people. If *naat'aanii* lost the trust of his people, the people simply ceased to follow him or even listen to his words….The Navajo Tribal Council can place a Chairman or Vice Chairman on administrative leave if they have reasonable grounds to believe that the official seriously breached his fiduciary trust to the Navajo people…. [469]

The court's explanation of how an ancient story about Hero Twins gave rise to fiduciary duties for a modern tribal chairman illustrates the relevance of First Nations law to contemporary Indigenous jurisprudence. It enabled the Navajo to solve a pressing constitutional crisis in their nation concerning the accountability of its elected leaders, by fitting general principles of stewardship to the specific realities of their community.

While this paper is focused on Indigenous legal traditions in Canada, the Navajo case is included to demonstrate what can happen if these traditions are given jurisdictional space by a nation state. Tribes in the United States have had greater experience in articulating and sharing their legal traditions with the wider world. There are lessons to be learned in understanding their approach to legal traditions. This is not because their traditions will necessarily be the same as Indigenous traditions in Canada, but because they have shown that is possible to have a contemporary jurisprudence that draws on ancient values.

---

468 Tom Tso, "The Process of Decision Making in Tribal Courts" (1989) 31 *Arizona Law Review* 225.

469 *Ibid.*

The development of Indigenous courts can lead to broader articulation of Indigenous laws, thereby increasing their intelligibility and accessibility. A sample of their legal rules shows the positive interaction between historic values and contemporary needs.[470] For example, the Navajo Nation Bar Association summarized important legal traditions in contracts, government, procedure, family law, property and children's issues. Their principles show that Navajo law is not anachronistic but a living legal force. The Navajo Bar Association summarized some these principles as follows:

> CONTRACTS
>
> *Oral agreement* – A valid oral agreement, commitment, and/or contract is sacred and once made, is binding. *Tome v. Navajo Nation* No. WR-CV-153-83, slip op. at 21 (W.R. Dist. Ct. 1984).
>
> *Execution* – A person must follow through with an agreement made with another person *Ben v. Burbank*, No. SC-CV-23-95 (Nav. Sup. Ct. 1996).
>
> GOVERNMENT
>
> *Democracy & Power Abuse* – A *naat'aanii* is chosen based upon his ability to help the people survive and whatever authority he has is based upon that ability and the trust placed in him by the people. If he lost the trust of his people, the people simply ceased to follow him or even listen to his words. *In re Certified Questions II (Navajo Nation v. Macdonald),* A-CR-13-89, slip op. at 24-25 (Nav. Sup. Ct. 1989). See also *Downey v. Bigman*, No SC-CV-07-95, slip op. at 3-4 (Nav. Sup. Ct. 1995).
>
> *Coercion* – Navajo common law rejects coercion. *Navajo Nation v. Macdonald*, A-CR-10-90, slip op. at 27-28 (Nav. Sup. Ct. 1992). See also *Downey v. Bigman*, No SC-CV-07-95, slip op. at 3-4 (Nav. Sup. Ct. 1995).
>
> PROCEDURE/DUE PROCESS
>
> *Peacemaking* – Controversies and arguments should be resolved by "talking things out". *Navajo Nation v. Crockett,* No. SC-CV-14-94, slip op. at 10 (Nav. Sup. Ct. 1996); See also *Rough Rock Community School v. Navajo Nation*, No. SC-CV-06-94, slip op. at 12(Nav. Sup. Ct. 1995).
>
> *K'eh* – includes equality and respect and leads to consensual solution. *Downey v. Bigman… Rough Rock Community School v. Navajo Nation*, No SC-CV-06-94 (Nav. Sup. Ct. 1998). K'eh contemplates one's unique, reciprocal relationships to the community and the universe. It promotes respect, solidarity, compassion, and cooperation so that people may live in *hozho*, or harmony. *K'eh* stresses duties and obligations of individual relatives to their community. *Atcitty v. Dist. Ct. for the Judicial Dist. Of Window Rock*, No. SC-CV-25-96, slip op. at 7-8 (Nav. Sup.

[470] Excerpt from Navajo Nation Bar Association website, http://www.navajolaw.org/commonlaw_01.html.

Ct. 1996). See also *Ben v. Burbank*, No. SC-CV-23-95, slip op. at 5-6 (Nav. Sup. Ct. 1996).

Naalyeeh – owed to family, clan or person. *In re Claim of Joe*, No A-CV-39-92. slip op at 7-8 (Nav. Sup. Ct. 1993). One who inflicts harm must pay the victim to restore harmony. *Farley v. Kerr McGee*, No. SR-CV-103-95, slip op at 7 (S.R. Dist. Ct. 1996). See also Nez v. Peabody Western Coal Co., inc. No. SC-CV-28-97, slip op. at 10, (Nav. Sup. Ct. 1999). It should be enough "so there are no hard feelings."… If a person is hurt, he or she looks to clan relations for help. The tortfeasor and his or her relatives are expected to set things right in accordance with the hurt…. *Nalyeeh* depends on restitution, reparation, restoring harmony or replacing the loss or paying back. The manner and amount of payback are not so crucial. *Benalli v. First Nat'l Ins. Co. of America*, No. SC-CV-45-96, slip op. at 16-17 (Nav. Sup. Ct. 1998). See also *Navajo Nation v. Blake*, No. SC-CR-04-95, slip op. at 4-5 (Nav. Sup. Ct. 1996).

Punishment as last resort – Punishment were actions of last resort. *Navajo Nation v. Platero*, No. A-CR-04-91, slip op. at 7, (Nav. Sup. Ct. 1991).

DOMESTIC

Traditional Wedding – basket ceremony requirements 9 N.N.C. 3(D) (1993).

Rejection of common law marriage – Unmarried couples who live together act immorally because they are said to "steal each other". *In re Validation of marriage of Francisco,* No. A-CV-15-88, slip op. at 4, (Nav. Sup. Ct. 1989).

Traditional Wedding & Divorce - Husband moves in with wife at time of marriage. At divorce, husband returns to mother's unit. (Various methods to divide property discussed) *Apache v. Republic National Life Insurance*, 3 Nav. 4. 250 (1982). See also *Naize v. Naize* No. SC-CV-16-96, slip op. at 7-8 (Nav. Sup. Ct.1997)

Traditional divorce – Yoodeeyah doctrine *Begay v. Chief*, KY-FC-348-00 (2002); Traditional divorce outlawed. *In the Matter of Documenting the Marriage: Ellen M. Slim and Tom Slim*, 3 Nav. R. 218 (1982)

Navajo plural marriages – outlawed with exceptions. 9 N.N.C. 2 (1993). See also *Austin v. Smith*, KY-FC-178-02 (Kay. Dist. Ct. 2002).

Custody – Children are of the mother's clan or extended family*. Goldtooth v. Goldtooth*, 3 Nav. R. 223 (W.R. Dist. Ct. 1982).

In-laws – Hadaane has certain duties*. Means v. Dist. Court of the Chinle Judicial Dist.*, SC-CV-61-98 slip op. at 17-18 (Nav. Sup. Ct. 1999)

Respectful speech – People speak with caution and respect because speech is sacred. *Hosteen v. Tapaha* No. SR-CV-77-92, slip. op. at 9 (S.R. Dist. Ct. 1997).

PROPERTY / PROBATE

Communal ownership – Families hold land (grazing rights) in communal ownership. *Begay v. Keedah*, No. A-CV-09-91, slip op. at 9 (Nav. Sup. Ct. 1991). See also *In re estate of Benally*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987). Private ownership is unknown to *Navajos. Hood v. Bordy*, No A-CV-07-90, slip op. at 11-12 (Nav. Sup. Ct. 1991).

> *Property ownership* – Property belongs to wife and her children. *In re Trust of Benally*. 1 Nav. R. 12 (1969); See also *Lenta v. Notah*, 3 Nav. R. 72 (1982).
>
> *Property distribution* – "Productive property" (sheep, land, land permits) are held for benefit of the individual and the camp, and upon death, such property is held for the benefit of those living in the camp. "Non-productive property" (jewelry, tools, equipment, non-subsistence livestock) is held to belong to the individual. *In re estate of Boyd Apachee*, 4 Nav R. 178 (1983)
>
> *Oral wills* – must be in presence of family, *In re estate of Lee, in the matter of estate of Chisney Benally* 1 Nav R. 219 (1978).
>
> *Discussing Death* – Death is not a proper and lively item to discuss. In *re Estate of Tsosie*, 4 Nav. R. 198, 200 (W.R. Dist Ct. 1983).
>
> CHILDREN'S CASES
>
> *Parent's obligation* – A child's interest are paramount. A parent must provide for the child's needs until the child can support him/herself. *Burbank v. Clarke,* No SC-CV-36-97, slip op. at 4 (Nav. Sup. Ct. 199).
>
> *Father's obligation* – A father of a child owes that child support. *Touchin v. Touchin*, No. CP-CV-237-87, slip op. at 5 (C.P. Dist. Ct. 1988). A man who fails to pay support is said to have "stolen the child". *Tom v. Tom*, 4 Nav. R. 12 (Nav. Ct. App. 1983).
>
> *Emancipation* – A child is emancipated when self-supporting, independent, and free of parent control. T'aabiak'inaaldzil doctrine. *Burbank v. Clarke*, No SC-CV-36-97, slip op. at 4 (Nav. Sup. Ct. 199).
>
> *Adoption* – Family members, aunts, grandparents obligated. *In re interest of JJS* 4 Nav. R. 192 (W.R. Dist. Ct. 1993).

These examples of Navajo law do not mean that this paper is proposing an exact replication of US tribal courts in a Canadian context. Nor should bands or communities feel compelled to reorganize themselves along western political lines in resolving disputes (though important lessons can be drawn from that experience[471]).

At the same time, the recognition of Indigenous institutions of dispute resolution may even have a place in broader Canadian legal development and reform. Indigenous peoples are not prevented from serving as Legislators, parliamentarians, government ministers or judges just because aspects of their legal participation are particular to their Indigenous citizenship.

---

471 Stephen Cornell & Joseph Kalt, eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (Los Angeles: American Indian Studies Center, 1992).

Participation in larger political communities does not have to suffer because Indigenous peoples belong to groups of which others are not a part. (But, as mentioned earlier, Indigenous people might productively consider developing citizenship laws to admit others fully into their communities). People from Quebec are not prevented from participating in Canada because their dispute resolution procedures are based on the Civil Code. Navajo people in the United States can run for high political office in that country even though the tribe has its own justice system. Participating as an Indigenous person in Indigenous traditions (with a political identity, legal entitlements and normative responsibilities) should not preclude other formal identities, entitlements and responsibilities. Specifically, Indigenous peoples should not have to relinquish their participation in wider national and international communities just because they have separate dispute resolution systems.

Similarly, the existence of Indigenous dispute resolution bodies should not preclude the acceptance and application of Indigenous legal principles in broader matters. Indigenous law can influence the development of the common law and civil law and be an important source of guidance for other peoples.

> First Nations legal traditions are strong and dynamic and can be interpreted flexibly to deal with the real issues in contemporary Canadian law concerning Aboriginal communities. Tradition dies without such transmission and reception. Laying claim to a tradition requires work and imagination, and a certain degree of change, as particular individuals interpret it, integrate it into their own experiences, and make it their own. In fact, tradition is altered by the very fact of trying to understand it. It is time that this effort to learn and communicate tradition be facilitated, both within First Nations and between First Nations and Canadian courts. There is persuasive precedent in Canadian law recognizing the pre-existent aspect of Aboriginal rights and their associated laws. Furthermore, the courts have created an opportunity to receive these laws into Canadian law by analogy and through *sui generis* principles. Since First Nations possess the powerful ability to articulate their laws, it is time that these principles began to influence the development of law in Canada. When First Nations laws are received with more fully in Canadian law, both systems of laws will be strengthened concurrently.[472]

D. Indigenous Law Recognition and Harmonization Acts

As the first section of this chapter argued, the federal parliament could accept and affirm Indigenous legal traditions by passing legislation that recognizes Indigenous governments on their own terms. After recognition legislation is enacted, mechanisms could be created to harmonize Canada's other legal traditions with Indigenous laws. These harmonization mechanisms would facilitate communication between Canada's other legal traditions and reduce conflict or inconsistencies between them. It could address questions about the relationship of pre-Confederation Indigenous law to federal statutes and create interpretive principles to ensure Indigenous laws are read in a wide, liberal and generous manner.

Harmonization legislation already exists to deal with the interface between the civil law and the common law. The *Federal Law-Civil Law Harmonization Act* came into force on June 1st, 2001, as chapter 4 of the Statutes of Canada. This *Act* is the first in a series intended to harmonize hundreds of federal statutes and regulations. This exercise was the result of the coming into force of the *Civil Code of Québec* in 1994, which substantially changed the concepts, institutions and terminology of civil law. The *Act* was necessary because since Confederation the federal government has passed laws to regulate private law matters such as marriage and divorce, bankruptcy and insolvency, copyright and patents that, but for the division of powers in the *Constitution Act, 1867* probably would be within the jurisdiction of provincial governments. It ensures that existing federal law provisions are brought into line with existing civil law provisions.[473] The *Act* recognizes the common law and civil law as equally authoritative sources of law for property and civil rights. It also contains provisions allowing statutes to be interpreted

---

472 John Borrows*, Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

473 See Jay Sinha, Luc Gagné, Law and Government Division, Legislative History of Bill S-22, 20 September 2000 at http://www.parl.gc.ca/common/bills_ls.asp?Parl=36&Ses=2&ls=s22.

in a manner that applies the legal tradition closest to the source of the conflict. In this regard Sections 8.1 and 8.2 of the *Act* states:

> **8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> **8.2** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

Similar principles and structures could be created for Indigenous legal traditions.[474] Harmonization legislation could be developed jointly with Aboriginal governments and organizations, possibly under the name the *Federal Law-Indigenous Law Harmonization Act*. This legislation should recognize the inherent rights of Indigenous peoples to property law and civil rights within their legal traditions. The *Federal Law-Indigenous Law Harmonization Act* could also borrow principles from the preamble of the *Federal Law-Civil Law Harmonization Act* and apply them to the Indigenous context.

For example, as in the *Federal Law-Civil Law Harmonization Act,* Indigenous laws could be statutorily recognized as an equally authoritative and a necessary part of law in Canada. Harmonization would also help remedy the fact that the Parliament of Canada has not always adequately included Indigenous legal systems and their languages when articulating private law standards. A *Federal Law-Indigenous Law Harmonization Act* could adapt the preamble of the *Federal Law-Civil Law Harmonization Act* and proclaim that:

> all Canadians are entitled to access to federal laws in keeping with their legal tradition;

---

474 Lloyd Brown-John and Howard Pawley, *When Legal Systems Meet: Bijuralism in the Canadian Federal System* (Barcelona: Institut de Ciencies Politiques I Socials, 2004 at 17). http://www.diba.es/icps/working_papers/docs/wp234.pdf.

> Indigenous laws reflect the unique character of Indigenous societies;
>
> the harmonious interaction of federal and Indigenous legislation is essential; and
>
> the full development of our major legal traditions gives Canadians a window on the world and facilitates exchanges with the vast majority of other countries.[475]

These principles would send a strong signal about the importance of Indigenous legal traditions throughout the country[476] To ensure that they are properly administered, an Associate or Assistant Deputy Minister could be given responsibility for their application and development, and provided with resources comparable to those needed to harmonize the civil law.

A *Federal Law-Indigenous Law Harmonization Act* could also ensure that Indigenous laws and other Canadian legal traditions are consistent with international human rights standards. This could protect people and groups against discrimination. The law could contain:

- a clause that the *Indigenous Law Recognition Act* would not abrogate or derogate from any Aboriginal or treaty right under section 35(1) of the *Constitution Act, 1982*,
- a clause that Indigenous legal traditions must treat men and women equally, and that any Indigenous legal traditions inconsistent with section 35(4) are of no force and effect,

---

475 *Ibid.*

476 *Ibid.* The Preamble to the *Federal Law-Civil Law Harmonization Act* reads:

> WHEREAS all Canadians are entitled to access to federal legislation in keeping with the common law and civil law traditions;
>
> WHEREAS the civil law tradition of the Province of Québec, which finds its principal expression in the *Civil Code of Québec*, reflects the unique character of Québec society;
>
> WHEREAS the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;
>
> WHEREAS the full development of our two major legal traditions gives Canadians enhanced opportunities worldwide and facilitates exchanges with the vast majority of other countries;
>
> WHEREAS the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;
>
> WHEREAS the objective of the Government of Canada is to facilitate access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions;
>
> AND WHEREAS the Government of Canada has established a harmonization program of federal legislation with the civil law of the Province of Québec to ensure that each language version takes into account the common law and civil law traditions.

- a clause that Indigenous legal traditions must be consistent with the provisions of the *Universal Declaration of Human Rights,* to be binding on any person or group,
- a clause noting that the Act would only come into force with the consent of an Aboriginal community and its government.

Australia's Law Reform Commission proposed recognizing *Aboriginal Customary Law Recognition Act* in its review of Indigenous legal traditions in that country. Though it was never implemented,[477] it contained similar provisions for protecting human rights. Other countries have laws recognizing Indigenous legal traditions, including many Pacific Island states,[478] South

---

477 The Law Reform Commission (Australia), *The Recognition of Aboriginal Customary Laws – Vol.s 1 & 2, Report No 31* (Canberra: Australian Government Publishing Service, 1986).

478 Other countries have created Recognition Acts for pre-existing systems of law. Some of the best examples of legislative recognition of Indigenous legal traditions are found among the Pacific Island states. For example, the *Cook Islands Act* 1915 (NZ), s. 422 states: "Every title to and interest in customary land shall be determined according to the ancient custom and usage of the natives of the Cook Islands." The *Constitution of Fiji* 1990, s. 100(3) (until 27 July 1998) states: "Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji: Provided that this subsection shall not apply in respect of any custom, tradition, usage or values that is, and to the extent that it is, inconsistent with a provision of this constitution or a statute, or repugnant to the general principles of humanity." Under the authority of the preamble to the *Constitution of Kiribati* 1979, the *Laws of Kiribati Act* 1989, s. 4(2) states: "In addition to the Constitution, the Laws of Kiribati comprise - …(b) customary law …". The *Laws of Kiribati Act* 1989, sch 1, para. 2 also states: " …customary law shall be recognised and enforced by , and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest." The *Constitution of Marshall Islands* 1978, art X, ss1 and 2 states: "Nothing in Article II shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter…" "…it shall be the responsibility of the Nitijela...to declare, by Act, the customary law in the Marshall Islands" The *Constitution of Nauru* 1968, s. 81 states: Custom and Adopted Laws Act 1971, s. 3: "the institutions, customs and usages of the Nauruans … shall be accorded recognition by every court, and have full force and effect of law" to regulate the matters specified in the Act. The *Niue Act* 1966, as amended by the *Niue Amendment Act* 1968 (No2), s. 23 states: "Every title to and estate or interest in Niuean land shall be determined according to Niuean custom and any Ordinance or other enactment affecting Niuean custom." The *Constitution of Samoa* 1962, Art III(1) declares: "Law… includes … any custom or usage which has acquired the force of law in Samoa … under the provisions of any Act or under a judgment of a court of competent jurisdiction." The *Constitution of Solomon Islands* 1978, s. 76 and sch 3, para. 3 enacts: "Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands". The *Tokelau Amendment Act* 1996(NZ), Preamble, para 4 reads: "Traditional authority in Tokelau is vested in its villages, and the needs of Tokelau at a local level are generally met through the administration of customary practices by elders." The *Tokelau Amendment Act* 1967 (NZ), s. 20 states: "the beneficial ownership of Tokelauan land shall be determined in accordance with the customs and usages of the Tokelauan inhabitants of Tokelau". The preamble of the *Constitution of Tuvalu* 1986 and the *Laws of Tuvalu Act* 1987, s 4(2) dictate that: "In addition to the Constitution, the Laws of Tuvalu comprise - …(b) customary law…". In addition the *Laws of Tuvalu Act* 1987, sch 1, para 2 states: "…customary law shall be recognised and enforced by , and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest." In the *Constitution of Vanuatu* 1980, Art 47(1) it states: " … If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom." The Vanuatu Court of Appeal in *Joli v Joli*, (Court of Appeal decision 7 November 2003) found there was no inconsistency between the English legislation and custom. In Vanuatu under a clause in the Constitution, stated that laws which applied at the day of Independence continue to apply unless the Parliament of Vanuatu has passed legislation on the subject matter. Those pre-independence laws include the laws of general application of England and France provided, however, that

Africa,[479] Peru, Bolivia, Columbia, and Ghana. An examination of these laws could provide appropriate mechanisms to secure Indigenous legal traditions while simultaneously protecting human rights.

---

the foreign laws pay sufficient regard to Vanuatu custom. An argument was raised that the English notions of dividing property and adjusting proprietary interests was inconsistent with the custom requirements for succession to land, and the court disagreed, thus upholding Indigenous law. The *Constitution of the Independent State of Papua New Guinea* dictates that the: (1) An Act of Parliament shall, (2) Until such time as an Act of Parliament provides otherwise - (a) the underlying law of Papua New Guinea shall be as prescribed … . In 2000, Papua New Guinea passed an *Underlying Law Act* which proclaims: "The customary law shall apply unless: (*a*) it is inconsistent with a written law; or (*b*) its application and enforcement would be contrary to the National Goals and Directive Principles and the Basic Social Obligations established by the *Constitution*; or (*c*) its application and enforcement would be contrary to the basic rights guaranteed by *Division III.3 (Basic Rights)* of the *Constitution*."

[479] South Africa has laws which recognize Indigenous legal traditions. The *Constitution of the Republic of South Africa* affirms the continued applicability of traditional leadership and law and upholds the courts and legislatures authority to recognize and apply that law. Sections 121 and 122 of the *Constitution of the Republic of South Africa*, Act 108 of 1996 reads:

> 211 (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.
>
> 212 (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law national or provincial legislation may provide for the establishment of houses of traditional leaders; and national legislation may establish a council of traditional leaders.

Courts and legislatures have followed through with this recognition. Community Courts and Courts for Chiefs and Headmen have jurisdiction to hear certain matters on the level of magistrates' courts. They deal with customary disputes through an authorised African headman using indigenous law and custom, by an African against another African within a headman's area of jurisdiction. These courts are commonly known as chief's courts. A person with a claim has the right to choose whether to bring a claim in the chief's court or in a magistrate's court. The *Recognition of Customary Marriages Act,* 1998 (Act No. 120 of 1998) came into operation on 15 November 2000.,recognizes marriage negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa. See also Jill Zimmerman, "The Constitution of Customary Law in South Africa: Method and Discourse," (2001) 17 *Harvard BlackLetter Law Journal* 197; Hon. Yvonne Mokgoro, "The Customary Law Question in the South African Constitution," (1997) 41 St. Louis *University Law Journal* 1279; Chuma Himonga, "Transforming Customary Law of Marriage in South Africa and the Challenges to its Implementation with Specific Reference to Matrimonial Property" (2004) 32 *International Journal of Legal Information* 260; Lona N. Laymon, "Valid-Where-Consummated: The Intersection of Customary Law Marriages and Formal Adjudication" (2001) 10 *South California Interdisciplinary Law Journal* 353; Andrew P. Kult, "Intestate Succession in South Africa: The "Westernization" of Customary Law Practices Within a Modern Constitutional Framework" (2001) 11 *Indiana International and Comparative Law Revie*w 697 (thanks for Joanne St. Lewis for these citations).

The harmonization process would also have to deal with protocol issues. They would also have to address the power imbalance that Indigenous peoples encounter relative to the common law and civil law. Some of the issues that would have to be addressed include:

- The role of Elders,
- Concerns about appropriation and culture property,
- The impact of colonialism on Indigenous laws,
- The problem of gender stereotyping, discrimination or imbalance in Canadian and Indigenous laws
- The potential harm traditional laws and Canadian laws could cause for the vulnerable within Indigenous communities.

It is important that each of Canada's legal traditions embrace contemporary human rights concerns, including those with a colonial origin that have negatively impacted Indigenous peoples. It is also important that human rights concerns do not become an excuse to further colonize Indigenous societies. Human rights can be protected within Indigenous and other Canadian communities without further extending the discriminatory practices and attitudes of earlier imperial policies. This is best done by Indigenous peoples and Canadians reformulating their traditions in a manner which both respectfully integrates traditional and contemporary normative values, and protects and harmonizes these laws within the Canadian state.

One of the distinctive features of Canadian law is the ability to work across legal traditions. More fully recognizing Indigenous legal traditions in Canada could give Canadians significant expertise in working with and assisting other countries that have mixed legal systems (civil, common and Indigenous). This expertise in multi-juridicalism would allow Canadians to play an even greater role on the world stage. Furthermore, this explicit plurality would provide an even greater source of answers to pressing questions faced by Canadians. As Canadians compare and contrast the wisdom of many legal traditions, their courts are more likely to make decisions that reflect the normative values of their increasingly diverse population.

E. Canadian and Indigenous Legal Institutional Development

The Royal Commission on Aboriginal Peoples observed that there should be greater participation of Aboriginal peoples at all levels of the Canadian state. Aboriginal peoples should take a greater role in building both their own and Canada's larger institutions. The Commission wrote:

> It is well known that the Aboriginal peoples in whose ancient homelands Canada was created have not had an opportunity to participate in creating Canada's federal union; they seek now a just accommodation within it. The goal is the realization for everyone in Canada of the principles upon which the constitution and the treaties both rest, that is, a genuinely participatory and democratic society made up of peoples who have chosen freely to confederate. Canada's image of itself and its image in the eyes of others will be enhanced by changes that properly acknowledge the indigenous North American foundations upon which this country has been built. Aboriginal peoples generally do not see themselves, their cultures, or their values reflected in Canada's public institutions. They are now considering the nature and scope of their own public institutions to provide the security for their individual and collective identities that Canada has failed to furnish.
>
> This Commission concludes that a fundamental prerequisite of government policy making in relation to Aboriginal peoples is the participation of Aboriginal peoples themselves. Without their participation there can be no legitimacy and no justice. Strong arguments are made, and will continue to be made, by Aboriginal peoples to challenge the legitimacy of Canada's exercise of power over them. Aboriginal people are rapidly gaining greater political consciousness and asserting their rights not only to better living conditions but to greater autonomy.[480]

The participation of Indigenous Peoples in Canada would grow if their values, perspectives and legal traditions were a more prominent part of the Canadian constitutional fabric. Broader participation would enable Indigenous peoples to see themselves, their cultures and their values reflected in Canada's institutions. It would give Aboriginal peoples greater confidence in their interactions with others if they knew they did not have to give up their deepest beliefs and assimilate when they worked with others. Indigenous peoples do not want to be assimilated. Assimilation has been a dismal failure in Canada. It has contributed to the gross violation of Aboriginal peoples' human rights. The recognition and development of Indigenous legal

---

480 "Looking Forward, Looking Back", Vol. I, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1996).

traditions across the Canadian landscape would provide a bulwark against assimilation. Aboriginal peoples could use their own legal norms to guide their interactions as they venture from their reserves and settlements to re-occupy their traditional territories in harmony with others.

i. Law Societies and Associations

The recognition, implementation and harmonization of Indigenous legal traditions would involve other Canadian legal institutions. Provincial law societies could play a role: they could develop tests and codes of conduct relating to the practice of law involving Indigenous legal traditions. In the United States, the recognition of Indigenous legal traditions has led to the development of Indigenous law societies. For example, the Bar of the Navajo Nation tests its candidates on Torts, Contracts, Domestic Relations (9 Navajo Nation Code), Criminal Law, Federal Indian Law, Indian Child Welfare Act, Navajo Nation Children's Code (9 N.N.C. § 1001, et seq.), District Court Rules of Civil and Criminal Procedure, Business Associations, Including Corporations and Partnerships, Model Rules of Professional Conduct, Navajo Nation Jurisdiction, Navajo Uniform Commercial Code (5A N.N.C.), Navajo Nation Government (2 N.N.C.), Navajo Rules of Evidence, Indian Civil Rights Act, Navajo Property Law-Personal/Real Property, Navajo Employment and Business Preference Laws, Navajo Nation Bill of Rights, Decedents' Estates (8 N.N.C.) and Rules of Probate Procedure, Treaty of 1868, Administrative Law, Navajo Rules of Civil and Criminal Appellate Procedure, Navajo Sovereign Immunity Act (1 N.N.C. § 551 et seq.), Navajo Peacemaking. The Navajo Nation Bar Examination includes a written test emphasizing Navajo Common Law, the Navajo Nation Code and Navajo Nation Supreme Court decisions, including the skills required to practice in the Courts of the Navajo Nation. The purpose of the Navajo Nation Bar is:

(a) To promote and encourage the highest quality and professionalism in the practice of law in the Navajo Nation and in the judicial system thereof;

(b) To recommend to the Navajo Nation Supreme Court candidates for admission to practice of law before the Navajo Courts, so as to insure the competence of such practitioners and their scrupulous adherence to the ethical standards of the Navajo Courts and the Navajo Nation Bar Association, Inc.;

(c) To encourage and assist in the establishment of comprehensive training programs for persons desiring to practice in the Navajo Courts and to insure the maintenance of high standards for such training;

(d) To advise on and assist in the recruitment and selection of the most able practitioners to serve as judges in the Navajo Courts;

(e) To advise the Courts on rule changes and other measures which would improve the administration of justice in the Navajo Court system;

(f) To recommend to the Navajo Courts legislation which would enhance and improve the Navajo Court system and the ability of the Navajo Nation effectively and fairly to govern those within its jurisdiction.[481]

The Indigenous Bar Association (IBA) could evolve to take on a similar governance role in the accreditation or coordination of lawyers or other practitioners who may be called on to participate in Indigenous legal systems. The IBA could be an education and disciplinary body, as its members have expertise from most Indigenous groups in Canada. This role fits with the objectives of the Indigenous Bar Association:

1. To recognize and respect the spiritual basis of our Indigenous laws, customs and traditions.

2. To promote the advancement of legal and social justice for Indigenous peoples in Canada.

3. To promote the reform of policies and laws affecting Indigenous peoples in Canada.

4. To foster public awareness within the legal community, the Indigenous community and the general public in respect of legal and social issues of concern to Indigenous peoples in Canada.

5. In pursuance of the foregoing objects, to provide a forum and network amongst Indigenous lawyers: to provide for their continuing education in respect of developments in Indigenous law; to exchange information and experiences with respect to the application of Indigenous law; and to discuss Indigenous legal issues.

6. To do all such other things as are incidental or conducive to the attainment of the above objects.[482]

---

[481] Navajo Nation Bar Association, http://www.navajolaw.org/aboutus_01.html.

The Canadian Bar Association could also play a supportive role in the recognition of Indigenous legal traditions. They could develop and run Continuing Legal Education Programs on aspects of practice and policy pertaining to Indigenous legal traditions. The CBA could produce written materials for its membership explaining the implications of the recognition of Indigenous traditions in the practice of law. Codes of Professional Conduct could be drafted to ensure that any special issues of ethical practices in dealing with Indigenous issues are considered. The CBA's Standing Committee on Equity could consider Indigenous legal traditions as part of its mandate as expressed in *Touchstones for Change: Equality, Diversity and Accountability*, a document approved by the CBA Council in 1994 and 1995. The Committee promotes awareness in the legal profession of equity issues in relation to Indigenous legal traditions; it provides the means to eliminate discrimination about these traditions, develops resources to assist the legal profession to achieve equity through the recognition of Indigenous legal traditions, and monitors, on a national basis, the status of equity in Indigenous issues within the legal profession.

ii. Indigenous Legal Education

Wider recognition and implementation of Indigenous legal traditions would also create a greater role for Indigenous legal education. The First Nations University of Canada or other Indigenous educational institutions could work with Indigenous leaders to develop programs specific to Indigenous groups and their laws. The First Nations Governance Centre could provide valuable information and education. The creation of Indigenous law schools or specialized Indigenous Law Programs or courses would facilitate the dissemination and acquisition of the necessary knowledge. An Indigenous law school or Indigenous Law program within an existing Canadian

---

[482] See the Indigenous Bar Association Objectives on their website at http://www.indigenousbar.ca/home/objectives.html.

law school could do much to teach and test its students on Indigenous legal traditions. The example of McGill Law School could be emulated in an Indigenous context, with Indigenous legal traditions integrated with the common law and civil law through the entire curriculum.[483]

If Indigenous legal traditions received this academic focus, they would be more widely understood and practiced. A number of Indigenous academics already have the knowledge of their own legal traditions and possess post-graduate legal training in the common law or civil law. Other non-Indigenous academics with similar qualifications could also administer and teach these programs. Elders and others could play a role, to ensure that the programs not only operate consistently with the traditions being taught but also that they are relevant in a contemporary context.

The Faculty of Law at the University of Victoria (UVic) is considering a Program of study that could lead to an Indigenous Law degree.[484] This is one example of the initiatives that could be

---

483 McGill describes their program as follows:

> In 1999, the Faculty adopted a creative and challenging new approach to legal education that will prepare McGill graduates for careers that increasingly require knowledge of more than one legal system. From the very first year, students will be introduced to civil law and common law concepts and encouraged to compare and critically evaluate the two traditions. This dramatic and unique curriculum, which explores the common law and the civil law in an integrated fashion, is entirely different from the "three-plus-one" programmes offered by other faculties. In such programs, students learn one legal system in three years, then receive additional exposure to the other tradition in a one-year add-on. McGill's trans-systemic method fosters not only outstanding analytical ability, but also critical reflection and openness to diverse approaches to legal problems.

484 The University of Victoria Faculty of Law is a national leader in its relationships with Aboriginal peoples and organizations. This is reflected in the strong representation of Aboriginal people on its faculty and student body. The creation of a Chair in Aboriginal Justice and Governance and the successful delivery of the four-year Akitsiraq Law School program for Inuit students in Nunavut are two recent examples of the Faculty's expertise with and commitment to Aboriginal initiatives.

The Faculty of Law of the University of Victoria is committed to the following goals:

1. Broadening perspectives on Aboriginal/non-Aboriginal relationships
2. Increasing knowledge and understanding of the Aboriginal issues in Canada,
3. Facilitating reconciliation and producing stronger partnerships and principles that result in more effective solutions to legal issues involving Indigenous peoples
4. Promoting justice for Aboriginal peoples and greater social and economic stability for all

encouraged, though many other options are possible. Education in Indigenous law falls along a spectrum, from the instruction and leadership of Indigenous law experts in Indigenous communities, to law school programs of different kinds. UVic's proposal would be in the middle of this spectrum, by offering rigorous bachelor's level training in Indigenous law equivalent to a LL.B.

A Bachelor of Indigenous Law (B.I.L.) could be integrated with the Bachelor of Law (LL.B.) at any Canadian law school. Combining Indigenous laws and the common law or civil law could ensure that students understood distinctive approaches to dispute resolution. The comparative nature of the program could sharpen analytical reasoning and enhance practical skills in research, writing and practice. Students could obtain both an Indigenous law (B.I.L.) and common law (LL.B.) degree after completing the appropriate number of academic units. Concepts from the common law (or civil law) and Indigenous legal systems could be creatively conveyed through an integrated pedagogy designed to nurture critical analysis and practice. The B.I.L./LL.B. Program could qualify students for the Bar Admission Course in all provinces.

To ensure that resources were appropriately focused and shared, twenty-four students could move through the Program as a single cohort over a four year period. They could be taught by professors from the host Law School, visiting academics from other law schools with special knowledge and expertise, Elders, and traditional law keepers. Only one cohort of the Program would be in existence at any given time to better use faculty resources. The cooperation and support of the Canadian Council of Law Deans and individual law schools would be vital to the program's success. Cohorts in the program could move from school to school if there was a demand in different parts of the country. As expertise in Indigenous law grows, thereby causing

---

5. Encouraging legal research and teaching skills that assist Aboriginal and all Canadian communities in setting new directions and generating new opportunities relative to

less of a drain on Indigenous and other faculty members, other innovations and designs could be considered. To ensure Indigenous law remains intelligible and accessible, admission to the program would be open to both Aboriginal and non-aboriginal students.

In the program's ***first year,*** the course offerings and workload could be similar to those found in any law schools, with one important difference. Each required first year course would convey information in the context of an Indigenous legal tradition. Each course would alternately compare, contrast, critique and construct understanding of the materials from the perspectives of both common (or civil) law and Indigenous law. For example, Constitutional law could include Anishinabek law, Criminal law could include Salish legal traditions, Inuit laws of obligation could be dealt with in Tort law, Métis law could deal with Contracts Law, and so on. Throughout the first year, students would therefore be exposed to many of the same cases and statutory materials as other first year students in a conventional curriculum.[485] At the same time, students enrolled in the program would receive the additional benefit of learning about Indigenous laws and legal traditions throughout their studies. Courses could include:

Aboriginal legal issues.

485 Legal research and writing would be nested in the Constitutional Law Traditions course, and students would complete four legal research and writing assignments using materials from the Constitutional curriculum. It could be described as follows: *Law 1007 Legal Research and Writing:* This course will be taken within the Constitutional Law Traditions course, and students will complete four legal research and writing assignments using materials from the Constitutional curriculum. This course acquaints the first year student with the variety of materials in the Law Library and provides knowledge of basic legal research techniques. The use of various research tools, including computers, is considered. Through a variety of written assignments, students become familiar with accepted principles pertaining to proper citation in legal writing and develop a degree of proficiency in legal writing and research.

1. Constitutional Law Traditions (Anishinabek legal context),[486]
2. Criminal Law and Justice Traditions (Salish legal context),[487]
3. Comparative Indigenous Legal Traditions (multi-juridical Indigenous context),[488]
4. The Legal Process,[489]

---

[486] *Law 1000 Constitutional Law Traditions*: Anishinabek law will form the Indigenous legal context of this course. Approximately 1/3 of the course will convey this tradition. Canada has a complex constitutional history, drawing upon written and unwritten laws and conventions. This course provides an introductory overview of constitutional relations in the Canadian political and legal system. The course is organized into three parts. The first part generally examines the manner in which Indigenous Nations historically formed relationships with other Nations, and the ways in which they form relations with other Indigenous Nations in the contemporary context. The second part of the course examines the nature of relations between Aboriginal, federal and provincial levels of government. More specifically, the course looks at historical development, political judicial regulation of these relationships, as well as political reformulation of fundamental constitutional structures. Federalism is an element of this inquiry. The third part of the course focuses on the role Aboriginal rights and the Canadian Charter of Rights and Freedoms plays in the constitutional order. (Full year course)

[487] *Law 1001 Criminal Law and Justice Traditions:* Salish law will form the Indigenous legal context of this course. This course is an introduction to Canadian criminal law and Salish justice, both substantive and procedural, and focuses on the following topics:

- Principles of Salish Justice.
- The social, political and constitutional context in which the Canadian criminal justice system operates.
- Significant aspects of Salish powers as they relates to the Canadian state in the Douglas treaties.
- Important elements of police and prosecutorial powers in the pretrial process and during trial.
- The effect of the Constitution Act, 1982 and the Canadian Charter of Rights and Freedoms upon both criminal procedure and substantive criminal law.
- Substantive criminal law, including the theory and doctrine behind the concepts of restorative justice, mens rea, actus reus and justifications and excuses. (Full year course)

[488] *Law 1002 Comparative Indigenous Legal Traditions*: The Indigenous peoples of Canada include, among others, the ancient and contemporary nations of the Innu, Mi'kmaq, Maliseet, Cree, Innu, Anishinabek, Haudenosaunee, Dakota, Lakota, Nakota, Dakota, Assinaboine, Saulteaux, Blackfoot, Secwepemec, Nlha7kapmx, Salish, Kwakwaka'wakw, Nu-chah-nulth, Haida, Tsimshian, Gitksan, Wet'suwet'en, Tahltan, Gwichin, Dene, Inuit, Métis, etc. It is also estimated that there are over 800 million Indigenous people living throughout the world. Indigenous law and legal traditions are diverse. This course will expose students to the leading national and international academics and practitioners of Indigenous law. It considers the development, interpretation and theories of Indigenous law from many perspectives. Guest lecturers will present their work and ideas to examine the frameworks in which a wide range of legal problems can be analyzed and prescriptions evaluated. This course is taught in the fall term only, with a final exam in December.

[489] *Law 1003 The Legal Process*: This course provides a general perspective on the processes of decision-making throughout Canada legal systems, by examining its major institutions and the function of substantive and procedural law within them. It provides first year students with a transactional overview of their new discipline, and a background for courses in the second and third year program. It also introduces students to the institutional structure of the Canadian legal system and, at the same time, provides an analysis of the role of law in society. The course has a variety of components, namely historical, institutional, cultural, procedural and philosophical. The role of law in society, the function of the legal profession, the development of the legal system, the reception of English law in Canada, the contemporary legal system in British Columbia, the structure of the courts, problems of fact finding and evidence, stare decisis, sources of law, the legislative process, administrative tribunals, an introduction to jurisprudential concepts, future trends

5. Voluntary Obligations/Contracts (Métis legal context),[490]
6. Involuntary and Hybrid Obligations/Torts (Inuit legal context),[491]
7. Property Law Traditions (Gitksan legal context)[492]

The first year curriculum could also appropriately acknowledge and teach the legal traditions of communities close to where the law school is located. For example, if a Bachelor of Indigenous Law was offered at UVic, Salish law would be taught in recognition of the fact that the university is located on Salish traditional territory. Aspects of Salish law would be taught through activities such as a traditional welcome to territory, a Salish cultural awareness camp, and a Legal Process exercise in the second term of first year involving Salish legal traditions.

---

with respect to the role of law in society including law reform, legal services, the legal profession, and access to the law are all considered.

490 *Law 1004 Voluntary Obligations/Contracts:* Métis law will form the Indigenous legal context of this course. (Full year course)**.** The Law of Contracts is usually broadly classified either as part of the Law of Obligations or as part of the system of private law (which encompasses contracts, property and torts). In general, the system of private law deals with the areas of law that concern primarily private interests and involve private disputes. The Law of Obligation deals with duties that a person owes to another person. The Law of Contracts deals with self-imposed duties, that is, binding agreements voluntarily concluded between parties. This course will interrogate why, how and under what circumstances the common law and Métis law gave force to obligations voluntarily undertaken. This course will further examine the general principles of contract law in Canada as developed by the courts and the principles contained in the statutes regulating specific areas of contract law. Attention is given to the following issues: contract formation, interpretation, capacity to contract, excuse for performance and remedies for breach.

491 *Law 1005 Involuntary and Hybrid Obligations/Torts***:** Inuit law will form the Indigenous legal context of this course. (Full year course)**.** The law of Torts, or civil wrongs, deals with disputes between individuals that arise when the acts or omissions of one person cause injury or property loss. Inuit law also had substantive rules and procedures directed to loss or injury caused by acts or omissions of legal duties. The most important area in torts is negligence, which embraces unintentionally caused injury to the person, damage to property, and harm to economic interests. Other major areas of Tort Law are nuisance (unreasonable interference with the enjoyment of land), and intentional injuries whether to the person, property, or personal dignity and reputation. Analysis of Tort Law involves consideration of social values, deterrence, loss distribution and economic efficiency, as well as corporate and governmental responsibility.

492 *Law 1006 Property Law Traditions*: Gitksan and Wet'suwet'en Law will form the Indigenous context of this course. Property law explores how law regulates relationships among persons in which they acquire, use, and transfer resources. The course will introduce students to well-established doctrine as well as emerging fields of property law. The foundational topics the course addresses include the nature of property, the concept of possession, aboriginal title, shared ownership and the doctrine of estates and conditional transfers. The course also cultivates an understanding of the intimate relation between law and social context and encourages students to approach their study of property law with critical sensibilities. (Full year course).

In the ***second year*** of the Program students could be required to take three courses in Salish legal traditions, (if Uvic was the host school, once again in recognition of the fact that the Faculty of Law is in Salish territory).[493] Courses could include:

1. Salish Legal Traditions,[494]
2. Salish Language and Law,[495]
3. Salish Legal Writing and Advanced Legal Research[496]

If the University of Toronto or Osgoode Hall Law School offered the program, it would include Anishinabek and Hodinohso:ni law. At Dalhousie, Mi'kmaq law could be taught. The program could be adapted for each school depending on the desires of the Indigenous nations with which they have a relationship. At Uvic, Salish Elders and law keepers from around the Strait of Georgia could teach courses in conjunction with teachers from Canadian law faculties.

---

493 Salish Nations and people are divided into coastal and interior groups. Coastal Salish people are found throughout southern Vancouver Island, Vancouver, the Fraser Valley, the Gulf Islands and Puget Sound. Interior Salish people are traditionally from the Upper Fraser River and Pemberton Valley regions.

494 *Law 2000 Salish Legal Traditions*: This seminar will explore the pre-colonial foundations of Salish legal traditions in the Pacific North-west of North America. As the indigenous inhabitants of this region, the Salish developed legal systems grounded in the social, ecological and spiritual realities of their environment. The core principles of these legal systems will be conceptualized by considering notions of identity (individual/collective), governance (autonomy/authority), entitlement (rights/responsibilities), and territoriality (geographical/spiritual) from both perspectives. To avoid privileging written texts (case law, legislation, alphabetic renderings of treaties), attention will be given to Salish oral tradition and its associated non-alphabetic semiotic systems such as carvings, clothing, petroglyphs, and other inscribed representations of material culture.

495 *Law 2001 Salish Language and Law*: Language is a key to understanding legal relationships and obligations. This course will provide an introduction to the linguistic structures of the Salish family of languages, one of the major language families in British Columbia. The course will include discussion of oral and written literature and topics related to Salish obligations and law. Language revitalization as an element of legal development among Salish language communities will be discussed. The course provides theoretical as well as practical and hands-on experience in developing understandings about the importance of Indigenous language to understanding Indigenous laws.

496 *Law 2002 Salish Legal Writing and Advanced Legal Research*: It is no exaggeration to observe that Indigenous writing is a well-established part of the Canadian landscape. This fact has significance for Indigenous law. The First Peoples of Canada have always had a *verbal* tradition: speeches, myths, legends, stories, songs, and poetry have been fashioned and transmitted from generation to generation since time immemorial. These expressions have always been a part of Indigenous life and continue to animate their interpretive understanding of the world. Of course, historically indigenous legal traditions were *oral* and, as such, contrasted sharply with the *written* cultures of the common law and civil law. Today, Indigenous written expression stands alongside oral traditions as important ways to convey meaning. This course will involve students in a study of Salish writing and expression. It builds on the research and writing skills learned in first year law. Students explore a wide range of Salish and Canadian research sources, both legal and non-legal, including computer assisted legal research. Students analyze various types of legal writing, Salish and non-Indigenous. The importance of context, organization and audience in legal writing is stressed. Parts, sections or clauses of written documents are analyzed, evaluated, criticized, edited and rewritten to improve and develop student analytical and writing skills.

Second year students would also be required to enroll in three courses from the conventional LL.B. curriculum. This would recognize the importance of these areas for subsequent practice, especially in the Bar Admission Course upon graduation. The three courses are as follows:

1. The Administrative Law Process,[497]
2. Business Associations,[498]
3. Family Law[499]

As with first year courses, these would cover conventional LL.B. subject matter, but they would be enhanced to include common law and Indigenous legal perspectives.

In the ***third year*** of the Program, students could be required to take three courses towards their Indigenous Law Degree. Once again, using UVic as an example, two of these courses could recognize two other major Indigenous legal traditions on Vancouver Island. The remaining special course would recognize and develop the importance of oral traditions within Indigenous law. The courses could be:

---

497 *Law 301 The Administrative Law Process*: This course investigates the nature and function of the administrative process with particular reference to the development of tribunals and agencies with a wide variety of disparate functions and interactions with private life. Similarly, the course investigates the way in which tribunals and courts interact, with specific reference to the judicial arsenal available for the control of administrative behaviour. Indigenous tribunals and tribunals that frequently deal with Indigenous issues and people will be one aspect of this course.

498 *Law 315 Business Associations*: This course analyzes and discusses the various legal forms for carrying on trade. The course recognizes that the corporation is of immense commercial and legal significance as an organizational form and will hence stress legislation and materials respecting the modern company. Students will, however, be exposed to sole proprietorship, partnership and related agency principles. In addition, business development will also be examined in an Indigenous legal context. Across Canada, Indigenous communities and businesses hold tremendous potential to advance prosperity and wellbeing. This potential remains largely untapped as a result of substantive and administrative impediments to Aboriginal economic and business development. The course will address practical and meaningful strategies to dismantle these systemic barriers to bring significant benefits to Aboriginal people and communities, to the financial and business sectors, and to the economy and society of Canada as a whole.

499 *Law 322 Family Law*: This course considers the institution of the family, both in its social and legal contexts. Specific reference is made to the law relating to adoption, reproduction, violence in intimate relationships, marriage, divorce, custody, matrimonial property and support. Particular attention is paid to the manner in which family law both shapes and is shaped by social practices and ideologies. Furthermore, Indigenous legal traditions regarding family formation and dissolution will be examined. Finally, special family law rules in Canadian law relevant to Indigenous people will be addressed, including: Section 19 of the Federal Child Support Guidelines used to 'gross up' the income of aboriginal persons whose income is free of tax and who are ordered to pay child support; Section 89 of the *Indian Act* affecting the enforcement of child and spousal support orders; considerations of a child's aboriginal heritage in determining custody, etc.

1. Nu-chah-nulth Legal Traditions,[500]
2. Kwakwaka'wakw Legal Traditions,[501]
3. Indigenous Moot: Indigenous Oral Advocacy Dispute Resolution[502]

Elders and law keepers could teach the courses from the Nu-chah-nulth and Kwakwaka'wakw nations in conjunction with UVic and other law faculty.

Third year students would also be required to take three courses from the LL.B. curriculum in recognition of the importance of these areas for subsequent practice, should a student decide to enroll in a Bar Admission Course upon graduation. The three courses would be:

1. Civil Procedure,[503]
2. Evidence,[504]
3. Secured Transactions[505]

---

500 *Law 3000 Nu-chah-nulth Legal Traditions*: The Nuu-chah-nulth people are indigenous peoples on the Pacific North-west on the West Coast of Vancouver Island. The Nuu-chah-nulth, and other Pacific Northwest cultures were famous for their potlatch ceremonies, in which the host would generous gifts on guests. The potlatch contained many rules to order society and respect relationships. The Nu-Chah-Nulth also had principles related to traditional ecosystem management, called "Ha Huulhi". The potlatch, ha huulhi and other Nu-Chah-Nulth legal principles and practices will be the focus of this course.

501 *Law 3001 Kwakwaka'wakw Legal Traditions:* The Kwakwaka'wakw have many laws relative to relationships to land, animals, plants, family, business partners and other nations. One law, the potlatch, takes the form of a ceremonial feast traditionally reinforced through the exchange of gifts and other ceremonies. This course will examine potlatching and other laws within the Kwakwakawakw. It will also consider the Potlatch's relationship to Canadian law. Potlatching was made illegal in Canada in the late nineteenth century largely at the urging of missionaries and government agents. Prosecutions and underground practices were a feature of Kwakwaka'wakw in this period. Today people continue to hold potlatches and they are once again an important part of community life. The legal implications of this fact will be explored.

502 *Law 3002 Indigenous Moot: Indigenous Oral Advocacy Dispute Resolution*

503 *Law 307 Civil Procedure*: This course is founded on an inquiry into the functions of a modern procedural system. Specific reference is made to the development of a process, which considers the extent to which the specific system under study, aids in the achievement of just, speedy and economic resolutions of justiciable conflicts on their merits. Students are introduced to the basic structure of a civil action and major items for consideration throughout the development of civil litigation. As a result, such matters as the expenses of litigation, jurisdiction, initial process, pleadings, amendment, joinder, discovery, disposition without trial and alternatives to adjudication are discussed.

504 *Law 309 Evidence*: This course examines the objective structure and content of the law governing proof of facts in both civil and criminal trials, as well as before administrative tribunals. Rules of evidence respecting burdens of proof and presumptions, competence and compellability of witnesses, corroboration, hearsay, character, opinion evidence and a variety of other topics are critically examined in the light of the objectives of the legal process. The course will also focus on the rules of evidence relevant to Indigenous peoples presenting their knowledge in court.

505 *Law 316 Secured Transactions*: This introductory course is about the law relating to commercial lending. When a business borrows money, lenders usually require some form of personal property as security for the

These courses too would integrate conventional common law and Indigenous legal perspectives.

Students would take the remainder of their courses from the law school's conventional LL.B. curriculum throughout their upper years. But they would have the option, if they so desired, of taking courses relevant to Indigenous law already within the LL.B. curriculum. At UVic, these courses would include:

1. Indigenous Lands, Rights and Governance,[506]
2. Historical Foundations of Aboriginal Title and Government,[507]
3. Comparative Indigenous Rights: The US Experience,[508]

---

loan. Although this area of the law arises from the common law, most Canadian provinces and territories have enacted comprehensive legislative schemes that govern commercial lending. In British Columbia, the Personal Property Security Act (BCPPSA) governs areas such as the different kinds of security interests, creation, registration, priorities, and rights and remedies on default. Most of the class time will be spent on the BCPPSA. At the end of the course, there will be a very brief introduction to the law of negotiable instruments via the provisions of the Bills of Exchange Act that relate to commercial lending. At the end of the course, students should have a basic understanding of security devices provided for in the BCPPSA and an ability to apply the provisions of the BCPPSA to simple fact-situation based problems. More particularly, students should understand the common vehicles of commercial lending, the creation of commercial security interests, the priority structure for competing security interests, the basic rules relating to the realization of these securities and some of the theory underlying their creation and use. Although the focus of this course is on commercial lending, students will gain some understanding of consumer transactions as set out in the BCPPSA and the Bills of Exchange Act in contrast to the commercial lending environment. Implications for Indigenous peoples will be considered throughout the course.

506 *Law 340 Indigenous Lands, Rights and Governance*: This is a course in modern Canadian native law (or "Aboriginal law") - the laws which relate to the special status and capacities of Aboriginal peoples and to their distinctive institutions - as part of the Canadian legal system. The emphasis is on current problems in the field of law as it is found and practiced today. The course covers such topics as: the core of federal jurisdiction under s. 91(24); the extent to which provincial laws may extend to Indian reserves and Indian people; Aboriginal rights over Crown lands; the relationship between bands and neighbouring municipalities; exemptions and other similar issues of importance to Aboriginal people and non-Aboriginal people alike.

507 *Law 341 Historical Foundations of Aboriginal Title and Government*: This course introduces students to Aboriginal title and self-government in their historical context. The focus is on common law, constitutional and statutory law in relation to Aboriginal title and rights, but reference is also made to the treaty process, reserve lands, and hunting and fishing. Although the course deals with all parts of Canada, the emphasis is on British Columbia

508 *Law 343 Comparative Indigenous Rights: The US Experience*: The law relating to Indigenous Peoples challenges many fundamental assumptions about legality and the rule of law. For example, in a leading case dealing with Indigenous Rights, Chief Justice John Marshall observed, "it is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could...give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors". Yet, despite this problem with "the doctrine of discovery", the entrenchment of this principle is the foundational statement in the common law of Aboriginal rights. This course will examine how the acceptance of "discovery" has impacted upon Indigenous Peoples in the United States to simultaneously preserve and dispossess them of their rights. It will survey U.S. law governing the relationship between the United States, the States and Indian Nations, and will focus on the constitutional, statutory and jurisprudential rules which make up the field of Federal

4. Aboriginal Politics and Self-Government,[509]

5. First Nations and Economic Development,[510]

6. Self-Determination of Peoples,[511]

7. Colonial Legal History,[512]

8. Indigenous Women and the Law,[513]

Indian law. Topics to be addressed include: the history of federal-tribal relations; the origin and scope of federal power over Indian affairs; the source and scope of tribal powers recognized under federal law; the limits of state authority in Indian country (including taxation); Indian law claims; and contemporary Indian policy. The course will be comparative, but the readings will be almost exclusively drawn from the U.S. jurisprudence.

509 *Law 343 Aboriginal Politics and Self-Government*: The course is an introduction to the study of Indigenous Politics. The specific focus is on the history and contemporary politics of First Nations in Canada and British Columbia. However, this is situated in the broader context of the global situation of Indigenous Peoples, the historical contexts of European imperial expansion and colonization over the last 500 years, the diverse struggles and relationships that have developed among settler societies and Indigenous Peoples, with special reference to treaty relationships and nation-to-nation relationships, the various attempts to transform these unequal relationships today, the struggles of Indigenous Peoples to gain recognition in International Law, and the development of Indigenous peoples global networks. The course studies the very different perspectives on these struggles and relationships in theory and practice.

510 *Law 343 First Nations and Economic Development*: First Nations and Economic Development examines the issues in both law and policy as they relate to the burgeoning field of indigenous development in Canada. The topic is both timely and necessary as the state of indigenous law in Canada raises serious issues with respect to the law's capacity to accommodate aboriginal self-determination and more generally, recognize the constitutional status of aboriginal peoples within the development paradigm. Examining this paradigm will include analysis of taxation, employment law, business organizations and theory, and finance. Beyond the legal construct itself, the social and economic consequences of particular business practices pose additional challenges to the cause of cultural preservation and a sense of community well being. For example, we will examine whether or not particular business forums provide greater cultural integrity and whether there exists a relationship to the overall success of the project in question. These complex issues will form the basis of class lectures and discussions. As well, the use of case studies will further demonstrate the inherent and emerging tensions that intersect with indigenous development.

511 *Law 343 F10 Self-Determination of Peoples*: In this course students will read and discuss work by contemporary authors that bears on the historical development, current content, and normative justification of collective self-determination, more commonly known as the self-determination of peoples. Although the course includes a brief survey of the international legal and institutional context, the primary emphasis is on the conceptual underpinnings of the right to self-determination of peoples and on its plausibility and status as a norm in international ethics and international law. In particular, the readings will focus on: the relationship between self-determination and respect for human rights; and on the extent to which the right has internal as well as external dimensions (the extent to which the right generates duties for states vis a vis their own population and not just vis a vis the populations of other states).

512 *Law 362 Colonial Legal History*: This course uses a website for both teaching and communications linking students at UVic, UBC and Australian National University. It offers the study of legal history as a means of understanding the relationships between law, state, society and culture in Canada in comparison and contrast with Australia. These two modern liberal democratic states which previously comprised clusters of British settler colonies, established at different times, for different purposes during the late 18th and through the 19th century provide a rich setting for examining the growth of colonial legal culture, tensions between imperial governance and settler demand and the competing pressures for centralization and pluralism in law and the administration of justice. The colonies of Upper Canada, Vancouver Island / British Columbia, New South Wales and South Australia are the subjects of the most detailed study.

513 *Law 368 Indigenous Women and the Law*: This seminar examines the unique place of Indigenous women within the constructs of Canadian law and society. The seminar takes an interdisciplinary approach. Topics canvassed are marital property, colonialism, government, membership, human rights, criminal justice, sexuality, employment and children. The first objective of the seminar is to introduce the growing body of

The ***fourth year*** of the program could be offered in at least two ways. One possibility is for students to spend their last year of study learning Indigenous legal traditions within Indigenous communities. Students could rotate in succession through three learning terms of four-months each over a 12-month period. Each of the three terms would be devoted to a single Indigenous legal tradition in order that it could be learned in greater depth. Another possibility is to extend the entire law school experience to allow for more course work. If this were the case, the intensive immersion in Indigenous legal traditions could occur in the three summers between each of the four years. This would provide a full year of legal instruction in immersion within single Indigenous legal traditions while still allowing for four years of classroom work. This model would permit greater flexibility in the first year curriculum; it would allow a conventional first year course (or two) to be pushed into the second year to accommodate the trans-systemic immersion into different legal traditions.

Immersion is important: a program would fail to adequately teach Indigenous law if it did not provide learning opportunities outside of law schools. While there is great value in formal classroom instruction, Indigenous law must also be learned in an applied and practical context. Indigenous laws are often the product of specific relationships to land, plants, animals, water, people, etc. To fully appreciate Indigenous law, students need to be immersed with the people whose law they want to more fully understand. This immersion must also be intensive, and focused on one tradition at a time in order to expose students to each tradition's depth and complexity. Students' education in Indigenous law is incomplete if they do not delve deeper into legal traditions of their choice for either three summer terms or one final year.

---

scholarship by and about Indigenous women. Secondly, by the end of the course, participants will be able to formulate a critical analysis of the political, economic and social challenges faced by contemporary Indigenous women. This is not a course about developing solutions to the political, economic and social challenges facing Indigenous women and their families in contemporary Canadian and Indigenous societies.

The intensive immersion experiences could have the themes for each term. Term One could focus on working with community Elders and Law Keepers.[514] Term Two could focus on learning Indigenous legal traditions within a political/community context.[515] Term Three could place students in an Indigenous Court or Dispute Resolution Body, or with a lawyer working with Indigenous laws.[516] For evaluation purposes during these immersion terms, students would be expected to write a reflective daily journal and pass an oral exam. At the end of each placement, the student would return to the school for a week to present their knowledge before core faculty and other students. As a requirement of the Indigenous Law degree, students would also produce a major paper in each term of the 12-month period related to the Indigenous legal tradition in which they were immersed. Elders who practice Indigenous legal knowledge would not be able to pay for students to work with them. It would therefore be appropriate for law schools to raise a small fund to enable students to provide gifts and offerings. Indigenous laws may require an exchange of material goods to qualify as an apprenticeship opportunity.

This proposed program of study for a combined B.I.L. and LL.B. could certainly be modified to meet the academic requirements of the law school and the needs and protocols of the Indigenous communities with which they work. This course of study could also be offered with

---

514 *Law 4000 Working with Elders and/or Law Keepers in a Community Context*: Students will work with an Elder, group of Elders or law keepers to understand the transmission and meaning of oral traditions in Indigenous law. They will serve in a traditional capacity in learning the norms, principle, values and application of the tradition under study. Students might live in a remote or rural setting, on the land or in a crowded urban setting where Elders or law keepers are practicing their legal traditions.

515 *Law 4001 Working with an Indigenous Political Community*: Students will work with a political community to increase their understanding of the opportunities and challenges First Nations, Métis communities and Inuit governments face in applying their laws in contemporary circumstances. Depending on the Indigenous Nation a student is working with, examples of placement might include: Nisga'a Liisms Government, Haudensaunee Confederary, Miqmaq Grand Council, Inuit Circumpolar Conference, Indian band council, etc.

516 *Law 4002 Working with an Indigenous Court or Dispute Resolution Body*: Students will work in a tribal court or Indigenous dispute resolution body to better understand the application of Indigenous law to individuals within a community. Students learn the distinctiveness and diversity of a particular Indigenous judicial culture, to appreciate nuances of language and historical practices. Depending on the Indigenous Nation a student is working with, examples of placements might include: The Cree Court in Saskatchewan, The Tsuu Tina and Peacemaker Court in Alberta, Aboriginal Legal Services of Toronto, The Tohono O'odham Court in Arizona, The Navajo Court in Arizona, The Colville Tribal Court, etc.

selected components if a law school or community is unable to support the program in full. For example, one first year course could be taught in any law school - comparing, contrasting, critiquing and constructing Indigenous and other Canadian legal traditions. Alternatively, the intensive immersion component could be built into a law school's curriculum. Other schools might want to introduce students to nearby Indigenous traditions through Indigenous legal language classes, cultural awareness camps or Indigenous legal processes exercises. Whatever methods are chosen, the point is that it is presently possible to teach Indigenous legal traditions with law school accreditation. All that is needed are willing Indigenous communities and academic institutions.

iii. Judicial Appointments

Numerous other societal initiatives could be undertaken to support the dissemination and application of Indigenous legal traditions. Parliament, provincial and territorial legislatures, Cabinet ministries, the Governor General's Office, and the courts could all integrate Indigenous legal traditions into their operations. In particular, and as an example of what could happen in other institutions, more Aboriginal judges should be appointed. This would help to ensure that Indigenous traditions would develop by being understood and appropriately applied on a case-by-case basis. The appointment of Aboriginal judges could spread to all levels of the court system, including the Supreme Court of Canada. It has been said that "just as the recognition of the civil law of Québec makes it necessary that there be representation of Québec judges specifically on the Supreme Court, so too the recognition of Aboriginal laws and customs as living law in Canada makes Aboriginal representation necessary if the legitimate claim of the

Supreme Court to be the final arbiter in cases concerning Aboriginal peoples is to be maintained."[517]

The Royal Commission on Aboriginal Peoples recommended that, "…the Supreme Court of Canada should include at least one Aboriginal member"[518]. Resolutions of support for this appointment have also been made by the Canadian Bar Association, the Indigenous Bar Association, the Canadian Association of Law Teachers, and the National Secretariat Against Hate and Racism in Canada. In their position paper produced for the IBA, Albert Peeling and Professor James Hopkins argued that "the appointment of Aboriginal persons to the Supreme Court is philosophically consistent with Canadian Legal Pluralism…"[519] Appointing people with knowledge of Indigenous legal traditions to the courts in Canada is an issue of merit. A person with this knowledge would be more qualified to sit in judgment over cases involving Indigenous legal issues than a person not possessing this information.

The *Supreme Court Act*[520] governs the Supreme Court appointment process. Section 5 of the *Act* states:

> *Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.*[521]

Section 6 states that at least three of the Supreme Court justices must come from Quebec. Convention requires that an additional three be selected from Ontario, two from Western provinces, and one from Atlantic Canada. Indigenous legal traditions in Canada require that

---

517 Albert Peeling and James Hopkins, "Aboriginal Judicial Appointments to the Supreme Court of Canada", Unpublished Paper prepared for the Indigenous Bar Association, April 2004.

518 Royal Commission on Aboriginal Peoples, *Renewal: A Twenty-Year Commitment*, Vol. 5, (Ottawa: Supply and Services, 1996) chapter 5

519 *Ibid.*

520 *Supreme Court Act,* R.S.C. 1985, c. S-26.

521 *Ibid.,* section 5.

these conventions be revised to appoint a jurist knowledgeable in these bodies of law.[522] Such an appointment would also be consistent with section 35(1) of the *Constitution Act 1982* and would recognize the unique constitutional status of Aboriginal peoples in Canada. The appointment of an Indigenous judge with Indigenous legal training would also facilitate the reconciliation framework that section 35(1) is designed to achieve. Appointing members of the Court with Indigenous law experience would increase its competence in strictly legal terms, and develop its specific capacity to deal with Aboriginal issues.

It is also critical that Indigenous judges work at other levels within the judicial system. Canada has excellent examples of Indigenous judges working with Indigenous legal traditions. As noted in Chapter Two, the Cree Court in Saskatchewan, presided over by The Honourable Judge Gerald Morin of the Provincial Court of Saskatchewan, is an important first step in reflecting Indigenous law in that province. The court's work in the Cree language compels the parties to frame their rights and obligations differently. Distinctive insights are generated when a problem is presented in a different language. Since the judge, legal aid lawyer, prosecutor, clerk, probation officer and native court worker all speak Cree in this Court they can be more creative than non-Cree speakers within a Provincial Court framework. The small but important step in appointing an Indigenous judge to decide cases allows the Court to dispense justice in a manner that is not always possible for those trained solely in the common law.

Alberta also provides interesting innovations that result from the appointment of an Indigenous judge with a knowledge of Aboriginal communities and their laws. The Honourable Judge L.S. Mandamin of the Alberta Provincial Court presides over the Tsuu T'ina First Nations Peacemaker Court on the Tsuu T'ina Nation on the outskirts of southwest Calgary. The court

---

522 Provincial unanimity is required for a constitutional amendment in accordance with s.41 for changes to the composition of the Supreme Court of Canada. Without an amendment stating the Supreme Court must have

began in October 2000; it is integrated with the Provincial Court, and also with the community and its traditions of justice. Judge Mandamin is a highly qualified Anishinabek member of the Bar fully vested with the necessary authority for his role on the Bench. He also possesses legal knowledge which enables him to bridge the cultural divide between Euro-Canadian and First Nations legal traditions. In addition, two Peacemakers who are elders also sit as community witnesses to the proceedings and can provide Indigenous legal knowledge to the Court. The Peacemaker coordinator calls on Peacemakers from the community who have its trust and respect. The Peacemaking function could become more prominent within Canadian Courts if Indigenous judges were appointed in greater numbers. They would use their knowledge of Indigenous legal traditions to chip away at problems within communities in which they serve.

The most important reason for appointing people to the bench who have knowledge of Indigenous legal traditions is that they bring new ideas to their task. A change of ideas when exercising judgment will bring broader reform than almost any other initiative. It is simply not enough to have Indigenous issues, individuals, and institutions become an integral part of the law. Until Indigenous *ideas* (ideologies) are part of the intellectual exchange, Canadians are just rearranging deck chairs on the Titanic as they deal with the ongoing problems of Indigenous peoples and the law. Nothing in the law changes if “reform” simply means adding a few more issues, individuals and institutional variations to the mix. Profound legal change requires that questions be examined from perspectives that at least partially emerge from sources outside western legal discourses, and are motivated by considerations from Indigenous normative orders. Standards for judgment must not only flow from the common law, but also from Indigenous legal values. Precedent should not be confined to dusty old law books; it should also be open to the authority of Indigenous teachings and law-ways.

---

at least one Aboriginal member change could occur by constitutional convention.

The criteria for measuring what is just, fair and equitable should not solely be drawn from non-Indigenous sources. Indigenous codes of conduct need to be part of the law's formal and informal expressions. Indigenous traditions should guide how Indigenous people and other Canadians answer the problems collectively encountered. Indigenous laws are necessary to meet challenges that lie in Canada's future. These traditions should be simultaneously compared, contrasted, combined with and distinguished from critical and constructive norms in the civil law and common law traditions. Judges with Indigenous legal training could perform this role. Progress in Indigenous law will be limited until the ideas by which people order and govern themselves include norms developed from these perspectives. This is why the appointment of Indigenous people to the courts is critically important. Their ideas could facilitate a unique exchange with Canada's other legal tradition. The exploration of new ideas may lead to answers not immediately apparent under conventional ways of thinking.

Conclusion

Canada's balanced, somewhat decentralized, federal state is one of the country's great strengths. It makes it possible to reconcile diversity with unity. It creates the potential for experimentation in the 'social laboratory' that each constituent part of our federation encourages.[523] The more explicit recognition of Indigenous legal traditions could lead to useful experimentation and innovation in solving many of Canada's pressing problems. Furthermore, the affirmation of Indigenous legal traditions would strengthen Canadian democracy by placing decision-making authority much closer to the people within these communities.[524] Aboriginal

---

523 K.M. Lysyk Q.C., "Reshaping Canadian Federalism" (1979) 13 *UBC Law Review* 1 at 7, governments are endowed "with both legislative jurisdiction and the wherewithal to exercise it is able to pioneer programs which, if their worth is demonstrated, may commend themselves for adoption elsewhere in the country".

524 Professor Lysyk wrote, at *Ibid.* at 8-9: "Another reason for guarding against undue centralization has to do with the desirability, in general, of keeping democratic decision-making as close as possible to the citizenry".

peoples would be better served in the federation if they had the recognition and resources to refine law in accordance with their perspectives. This is important because central and provincial governments are more remote from Aboriginal peoples, physically and culturally. They also tend to be less responsive to the Aboriginal electorate than Aboriginal governments would be if they could exercise greater responsibility for their own affairs.[525] A greater recognition of Indigenous legal traditions could provide some counterweight to the bi-culturalism and bi-elitism that sometimes infects Canada's polity.

The recognition of Indigenous legal traditions in the Canadian state is bound to be contested and to create difficulties in law and policy. [526] The law dealing with Indigenous peoples must take account of the totality of cultural practices and expressions that belong to them.[527] Recognizing and affirming Indigenous legal traditions would develop the rule of law within Indigenous communities by allowing them to live closer to their values and principles. It would allow them to exercise greater responsibility for their affairs, and to hold their governments and one another accountable for decisions made within their communities. If properly implemented and harmonized with Canada's other legal traditions, this approach would be consistent with their human rights as peoples while ensuring that others' rights were not abrogated. Creating a national framework to facilitate the implementation of Indigenous legal traditions would help to ensure that non-Indigenous rights and interests are also respected. Laws are fairer and more effective when rights are determined on more even playing field, with greater Indigenous influence and participation.

---

525 Borrows, *supra* note 403.

526 Heather McRae, Garth Nettheim, Laura Beacroft, Luke McNamara, *Indigenous Legal Issues: Commentary and Materials* (Sydney: Thomson Lawbook Co., 2003) at 380.

527 Terry Janke, *Our Culture/Our Future: Report on Australian Cultural and Intellectual Property Rights* (Surrey Hills, NSW: Michael Frankel and Co., 1998) at 77-78.

The proposals outlined in this paper are directed at creating laws and institutions that will find an appropriate balance between interests that recognize and respect Indigenous cultural, political, economic and social integrity and those of society as a whole.[528] The paper advocates formal Indigenous participation in the resolution of disputes. This is because it is problematic to treat questions about Indigenous knowledge as a discrete, de-contextualized subject of inquiry to be used and judged by other normative systems. It should rather be treated as an active system that contains its own values, norms, uses, standards, criteria and principles.

To avoid this difficulty, intellectual methodologies that express Indigenous legal concepts must be embedded in the very structure of Indigenous dispute resolution.[529] Aboriginal vantage points should form part of an appropriate balance of rights when judging issues of Indigenous legal traditions. This brief paper has suggested ways in which Indigenous norms could provide criteria for judgment of this kind. As Indigenous normative concepts are extended into dispute resolution regimes at local, provincial and national levels, a greater range of options will be available to tailor solutions to particular issues and disputes. This would be consistent with the *sui generis* approach to judging Indigenous rights outlined by the Supreme Court of Canada. It would meet the task outlined in *R. v. Van der Peet*: "The challenge of defining [A]boriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly different legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined…a morally and politically defensible conception of rights will incorporate both legal perspectives".[530]

---

528 This wider context of this issue is discussed in a non-Indigenous context in G. Bruce Doern and Markus Sharaput, *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests* (Toronto: University of Toronto Press, 2000).

529 See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Dunedin: University of Otaga Press, 1999) for an excellent discussion of how Indigenous peoples can reclaim their own research methodologies.

530 *Van der Peet*, *supra* note 286 at para. 41.