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Indigenous Legal Traditions in Canada

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Indigenous Legal Traditions in Canada

John Borrows*

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INTRODUCTORY CONTEXT

Canada has a strong tradition of tolerance and respect for difference.¹ Individuals are free to practice their customs and

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1. These traditions have grown in the past thirty years to include Aboriginal peoples. See ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUITY, AND RESPECT FOR DIFFERENCE (Michael Asch ed., 1997); PATRICK MACKLEM, INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA (2001); The Right Honourable Chief Justice of Canada Beverly McLachlin, LaFontaine-Baldwin Symposium, 2003 Lecture: The Civilization of Difference (Mar. 7, 2003), available at http://www.operation-dialogue.com/lafontaine-baldwin/e/2003_speech_1.html.

traditions as long as they do not inappropriately infringe upon other's legal interests.² Groups can organize their affairs and associate with one another to improve their lives and those of the people around them.³ A vibrant constitutional framework supports this respect for individual and community belief, conscience, expression, assembly and association.⁴ Canada's federal structure facilitates laws, customs and traditions particular to its various provinces and regions.⁵

Canada's Charter of Rights and Freedoms guarantees individual rights to democratic participation, mobility, due process, and equality.⁶ This instrument enshrines French and English linguistic equality.⁷ Laws are to be "interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."⁸ Charter rights empower people to practice their cultures and 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."⁹

2. The guarantee of rights in Canada's Charter of Rights and Freedoms is subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, Constitution Act, 1982, pt. I, Canada Act, 1982, ch. 11, sched. B § 1 (U.K.).

3. See generally *Dunmore v. Ontario*, [2001] S.C.R. 1016; *Delisle v. Canada*, [1999] S.C.R. 989; *Canadian Egg Mktg. Agency v. Richardson*, [1998] S.C.R. 157; *Lavigne v. Ont. Pub. Serv. Employees Union*, [1991] S.C.R. 211; *Prof'l Inst. of the Pub. Serv. of Can. v. Nw. Territories*, [1990] S.C.R. 367; *In re Pub. Serv. Employee Relations Act*, [1987] S.C.R. 313; *Pub. Serv. Alliance of Can. v. Canada*, [1987] S.C.R. 424; *Saskatchewan v. Retail, Wholesale & Dep't Store Union*, [1987] S.C.R. 460.

4. Section 2 of the Charter guarantees that "[e]veryone 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." Canadian Charter of Rights and Freedoms, Constitution Act, 1982, pt. I, Canada Act, 1982, ch. 11, sched. B § 2 (U.K.).

5. *Id.* See generally IAN H. ANGUS, *A BORDER WITHIN: NATIONAL IDENTITY, CULTURAL PLURALITY, AND WILDERNESS* (1997); WILL KYMLICKA, *FINDING OUR WAY: RETHINKING ETHNOCULTURAL RELATIONS IN CANADA* (1998); *STRETCHING THE FEDERATION: THE ART OF THE STATE IN CANADA* (Robert Young ed., 1999); CHARLES TAYLOR, *RECONCILING THE SOLITUDES: ESSAYS ON CANADIAN FEDERALISM AND NATIONALISM* (Guy Laforest ed., 1993); STEPHEN G. TOMBLIN, *OTTAWA AND THE OUTER PROVINCES: THE CHALLENGE OF REGIONAL INTEGRATION IN CANADA* (1995); JEREMY WEBBER, *REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION* (1994).

6. See Canadian Charter of Rights and Freedoms, Constitution Act, 1982, pt. I, Canada Act, 1982, ch. 11, sched. B §§ 3–15 (U.K.).

7. *Id.* §§ 16–22.

8. *Id.* § 27.

9. *Id.* § 1. Leading cases interpreting section 1 of the Charter are: *Dunmore v. Ontario*,

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.¹⁰ The British North America Act of 1867 (the "BNA Act"),¹¹ knit a nation together along federal lines to protect these differences.¹² It enabled French and English speaking peoples to continue their unique political, religious, cultural, linguistic and legal traditions within provincial frameworks.¹³ Minority educational rights were constitutionally enshrined to ensure that groups could practice their traditions, even in provinces where the dominant culture was not their own.¹⁴ This was the constitutional bargain that brokered

[2001] S.C.R. 1016; Thomson Newspapers Co. v. Canada, [1998] S.C.R. 877; Libman v. Quebec, [1997] S.C.R. 569; Ross v. N.B. Sch. Dist., [1996] S.C.R. 825; RJR-MacDonald, Inc. v. Canada, [1995] S.C.R. 199; Irwin Toy Ltd. v. Quebec, [1989] S.C.R. 927; R v. Oakes, [1986] S.C.R. 103.

10. A.I. SILVER, *THE FRENCH-CANADIAN IDEA OF CONFEDERATION, 1864–1900* (1982).

11. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.).

12. Of course, there were also other factors that led to confederation. See GARTH STEVENSON, *UNFULFILLED UNION: CANADIAN FEDERALISM AND NATIONAL UNITY 20–33* (3d ed. 1989).

13. SILVER, *supra* note 10, at 33–50.

14. See Constitution Act, 1867, 30 & 31 Vict. ch. 3 § 93 (U.K.).

In and for 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 Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissident 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 due 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 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

Canada's foundation. The BNA Act, while an incomplete governance instrument, was nevertheless sufficient to unite disparate peoples. George Etienne Cartier, one of the instrument's 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 should 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.¹⁵

When considering what must be done to ensure Canada's continued strength, one cannot ignore these historically deep and constitutionally protected rights and traditions that foster its unity, difference and interdependence. Each strand of that fabric must remain strong to ensure the country's peace, order and good governance. Canadians strive to develop societal cohesion through common allegiance to this historical and legal framework. At the same time, differences in tradition must not be sacrificed through over-reaching attempts to enforce civic solidarity. The Canadian constitutional goal is to reconcile unity and diversity and recognize peoples' continued interdependence, even in the face of difference.¹⁶

under this Section.

Id.

15. PARLIAMENTARY DEBATES ON THE SUBJECT OF CONFEDERATION, 8TH PROVINCIAL PARLIAMENT OF CANADA 60 (1865).

16. Reference Re Secession of Quebec, [1998] S.C.R. 217, 244–45.

Some might say the solution to Canada's challenge of diversity is to instill and perhaps even enforce a greater sense of commonality within Canada's population. A variety of suggestions are given to address this concern, through, for example, education, the media, targeted spending, propaganda, the fostering of artistic and athletic excellence, and the creation of national institutions and symbols. For others, assimilation is often advanced as an answer.¹⁷ Of course, the question of who should assimilate who under such policies is not easily answered. 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 these problems, the "Melting Pot" idea may often appear to be an attractive metaphor in overcoming differences. This view of society exalts the idea that cultures can be blended into a singular system of belief, practice and approach to life. This view of cohesion can underestimate the inappropriate pressures it places on individual identities and national development.

While much attention and action need to be given to developing the bonds of belonging across Canada's vast cultural cartography, too strong a push towards assimilation can have the opposite effect. In fact, it could destroy the country. The recent history of the Quebec secessionist movement illustrates the dangers of forced assimilation.¹⁸ English dominance was appropriately overthrown because French-speaking people in the province did not want to lose their deepest traditions.¹⁹ However, some still clamor for complete

17. An early example of assimilation is found in LORD DURHAM'S REPORT (Gerald M. Craig ed., 1963), in which Lord Durham argued that French-Canadians should be assimilated into English Canadian culture. *Id.* at 34–35. Duncan Campbell Scott spoke to Parliament in 1920 and 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." ROBERT G. MOORE ET AL., *THE HISTORICAL DEVELOPMENT OF THE INDIAN ACT* 115 (2d ed. 1978). 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* (1995).

18. IS QUEBEC NATIONALISM JUST?: PERSPECTIVES FROM ANGLOPHONE CANADA (Joseph H. Carens ed., 1995); *THE REFERENDUM PAPERS: ESSAYS ON SECESSION AND NATIONAL UNITY* (David R. Cameron ed., 1999).

19. JOCELYN MACLURE, *QUEBEC IDENTITY: THE CHALLENGE OF PLURALISM* (2003); Louis Balthazar, *La Dynamique du Nationalisme Québécois*, in *L'ÉTAT DU QUÉBEC EN DEVENIR* 37–38 (Gérard Bergeron & Réjean Pelletier eds., 1980).

separation to more effectively resist assimilation.²⁰ People resist forced association and compulsion, particularly if it is contrary to their deepest identities. “If a person is compelled by the state or the will of another to a course 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.”²¹

Of course, not all associations are voluntary, like the family or certain requirements of citizenship; some arise from the “inescapable constraints of social life in modern society.”²² However, to the extent possible, people should be free to shape and appropriately choose their community’s practices and to follow the values that underlie those practices. 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, on the other hand, can inhibit an individual’s potential for self-fulfillment.²³ Democracy is enhanced when people can choose the rules and traditions under which they live. Mandatory assimilation is a recipe for resistance and continued conflict. Statutory assimilation without social, economic and political persuasion, reason and incentive should be rejected as contrary to Canada’s legal inheritance.

Today, there are many cultures and traditions within Canada that extend beyond those that gave rise to Confederation.²⁴ A pressing contemporary challenge is how to stitch them together without shredding society.²⁵ There are some in Canada who despair at the

20. See ROBERT YOUNG, *THE SECESSION OF QUEBEC AND THE FUTURE OF CANADA* (2d ed. 1998); ROBERT YOUNG, *THE STRUGGLE FOR QUEBEC: FROM REFERENDUM TO REFERENDUM?* (1999).

21. *R v. Big M. Drug Mart Ltd.*, [1985] S.C.R. 295, 336.

22. *Lavinge v. Ont. Pub. Serv. Employees Union*, [1991] S.C.R. 211.

23. *Id.*

24. In 1971, Canada adopted an official Multiculturalism Policy. RICHARD J.F. DAY, *MULTICULTURALISM AND THE HISTORY OF CANADIAN DIVERSITY* 189 (2000). In the decade between 1991 and 2001, Canada welcomed 2.2 million immigrants and refugees. 2001 Census, Canada’s Ethnocultural Portrait: The Changing Mosaic, <http://www12.statcan.ca/english/census01/products/analytic/companion/etoimm/canada.cfm> (last visited Jan. 10, 2006). In 2001, 5.4 million Canadians were born outside the country, 18.4 percent of the total population. *Id.* For a discussion of the development of diversity in Canada and a critique of its effectiveness, see DAY, *supra*.

25. CITIZENSHIP, DIVERSITY, AND PLURALISM: CANADIAN AND COMPARATIVE PERSPECTIVES (Alan C. Cairns et al. eds., 1999); CITIZENSHIP IN DIVERSE SOCIETIES (Will Kymlicka & Wayne Norman eds., 2000).

diversity of languages, cultures and traditions in our midst. Some believe Canadians are weakened as a nation because of their vast differences.²⁶ As noted, there have been times in Canada's history when it has come perilously close to dissolving its national bonds because of 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 to unity. Differences 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, as noted, such recognition is already a part of Canada's constitution. Section 27 of the Canadian Charter of Rights and Freedoms guarantees that individual rights will be "interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."²⁷ Part II, section 35(1) of the Constitution Act of 1981 protects the existing culture, practices and traditions of Aboriginal peoples throughout the land.²⁸ Rather than be threatened by difference, Canadians could take great comfort from the fact that respect for diversity is embedded in our central legal texts as a significant legal and political aspiration.

Many countries successfully exist with diverse legal traditions that respect different cultural and sub-national groupings.²⁹ Some of these countries are bi-juridical, and include both civil law and common law systems.³⁰ Others are multi-juridical, and include customary law regimes alongside the civil or common law.³¹ In fact, Canada itself is

26. *Id.*

27. Canadian Charter of Rights and Freedoms, Constitution Act, 1982, pt. I, Canada Act, 1982, ch. 11, sched. B § 27 (U.K.).

28. Rights of the Aboriginal Peoples of Canada, Constitution Act, 1982, pt. II, Canada Act, 1982, ch. 11, sched. B § 35(1) (U.K.).

29. See ESIN ÖRÜCÜ, *THE ENIGMA OF COMPARATIVE LAW: VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY* 136–43 (2004).

30. Scotland, France, South Africa, the United States (Louisiana), Egypt, etc. *See id.*

31. *See infra* note 235.

counted amongst these countries, and it includes common law, civil law and indigenous legal traditions. These legal customs are constitutionally recognized. Canada is a juridically pluralistic state, and draws on many sources of law to sustain order throughout the land. While civil and common law traditions are generally recognized nationwide, this is not always the case with indigenous legal traditions. Yet, indigenous legal traditions can have great force and impact in people's lives despite their lack of prominence in broader circles.³² Indigenous legal traditions are a reality within Canada and should be more effectively recognized as such.

I. LEGAL PLURALISM IN CANADA

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.³³

A legal tradition is an aspect of general culture, and can be distinguished from a national legal system if a state's national system does not explicitly recognize the force of its legal traditions.³⁴ Legal traditions are cultural phenomena that "provide categories into which the untidy business of life may be organized" and through which disputes may be resolved.³⁵ Sometimes, different traditions can operate within a single state or overlap between states.³⁶ This is legal pluralism, "the simultaneous existence—within a single legal order—of different rules of law applying to identical situations."³⁷

32. JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995).

33. JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 3–4 (2d ed. 2000).

34. M.B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975).

35. *Id.*

36. A.W.B. SIMPSON, *INVITATION TO LAW* 53–82 (1988). 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 co-terminus with nation state boundaries and can be divided into groups or families. *Id.*

37. André-Jean Arnaud, *Legal Pluralism and the Building of Europe*, <http://www.reds.msh>

Canada is a legal 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 just depend on its historic acceptance or how it is received by other traditions.³⁸ “[T]he strength of a tradition is not how closely it adheres to its original form but how well it is able to develop and remain relevant under changing circumstances.”³⁹ If recognized and given resources and room to grow, each legal tradition can be relevant in contemporary circumstances. A mark of an authentic and living tradition is that it points us beyond itself.⁴⁰ Each of Canada’s three major legal traditions is relevant in this respect, and continues to grow and remain relevant amidst changing circumstances.

The earliest practitioners of law in North America were its original indigenous inhabitants. These peoples are variously known as the “Aboriginal,”⁴¹ “Native,” or “First” peoples of the continent and include, among others, the ancient and contemporary nations of the Innu, Mi’kmaq, Maliseet, Cree, Montagnais, Anishinabek, Haudenosaunee, Dakota, Lakota, Nakota, Assinaboine, Saukteaux, Blackfoot, Secwepemec, Nlha’kpmx, Salish, Kwakwaka’wakw, Haida, Tsimshian, Gitksan, Tahltan, Gwich’in, Dene, Inuit, Metis, etc.⁴² Indigenous peoples’ traditions can be as historically different

-paris.fr/communication/textes/arnaud2.htm.

38. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

[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 the material universe, between the 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 the meaningful patterns of the past.

Id. at 9.

39. Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303, 331.

40. See also JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* 54 (1984).

41. “Aboriginal” in Canadian law includes Indian, Inuit and Metis peoples. Rights of the Aboriginal Peoples of Canada, Constitution Act, 1982, pt. II, Canada Act, 1982, ch. 11, sched. B § 35(2) (U.K.).

42. 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* (1992). For a description of the contemporary vitality of First Nations in Canada, see BOYCE RICHARDSON, *PEOPLE OF TERRA NULLIUS: BETRAYAL AND REBIRTH IN*

from one another as other nations and cultures in the world. For example, Canadian indigenous peoples speak over fifty different Aboriginal languages from twelve distinct language families, which have as wide a variation as do the language families of Europe and Asia.⁴³ These nations' linguistic, genealogical, political and legal descent can be traced back through millennia to different regions or territories in northern North America.⁴⁴ This explains the wide variety of laws among indigenous groups.

There is a debate, however, about what constitutes "law" and whether indigenous peoples in Canada practiced law prior to the arrival of Europeans. Some have said that indigenous peoples in North America were pre-legal.⁴⁵ Those who take this view believe that societies only have laws if proclaimed by some recognized power that is capable of enforcing such proclamation. Jurist John Austin expressed this opinion 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 as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the 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.⁴⁶

Thus, for legal positivists like Austin, centralized authority and explicit command are necessary for a legal system. Unfortunately,

ABORIGINAL CANADA (1993).

43. For an overview of the distinctiveness of First Nations in different regions of Canada, see *NATIVE PEOPLES: THE CANADIAN EXPERIENCE* (R. Bruce Morrison & C. Roderick Wilson eds., 3d ed. 2004).

44. For an excellent textual and pictorial representation of the pre-contact geographical spaces that First Nations peoples occupied in Canada, see *1 HISTORICAL ATLAS OF CANADA* (R. Cole Harris ed., 1987).

45. Editorial, *One Tier Justice*, *NAT'L POST*, Nov. 23, 2004, at A19.

46. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 31 (H.L.A. Hart ed., Noonday Press 1954) (1832).

when one examines the basis for this conclusion, one finds that it rests on inaccurate characterizations of indigenous societies. Behind Austin's formulation is the idea that Aboriginal peoples did not have law because they were "savage" and "living without subjection" because of their "ignorance" and "stupidity" in not submitting to political government.⁴⁷ Opinions that indigenous societies were lower on a so-called "scale of civilization" because of their non-European organization have not withstood scrutiny. Legal scholars have rejected these formulations as a "gross mischaracterization."⁴⁸ The Supreme Court of Canada has also condemned this approach:

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 culture, in effect subhuman species.⁴⁹

47. *Id.* at 184, 258.

48. Noted legal theorist Lon Fuller summarized the mischaracterizations of customary law in the following terms:

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 same track 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.

Lon L. Fuller, *The Law's Precarious Hold on Life (1968–1969)*, 3 GA. L. REV. 530, 537–38 (1969). For further critiques of legal positivism's view of customary law, see MAX GLUCKMAN, *POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY* (1965); E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* (1954); KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941); HENRY SUMNER MAINE, *ANCIENT LAW 7–8* (E.P. Dutton & Co. 1917) (1864); ANTONIA MILLS, *EAGLE DOWN IS OUR LAW: WITSUWIT'EN LAW, FEASTS AND LAND CLAIMS* (1994); RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (1975); Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1 (1969).

49. *Calder v. British Columbia*, [1973] S.C.R. 313, 346.

While courts and legislatures are an important source of law in Canada, a society does not need to have such institutions to possess law.

In fact, despite the doubts some might hold concerning the presence of law in indigenous societies, there has been a long history of recognition of indigenous legal traditions by those who encountered these societies.⁵⁰ Europeans' pronouncements that indigenous peoples had no government or law were contradicted by their practice of dealing with them through treaties and agreements.⁵¹ There was a long period of interaction between indigenous peoples prior to the arrival of Europeans and explorers from other continents.⁵² There were treaties, inter-marriages, re-settlements, war and extended periods of peace.⁵³ When Europeans and others came to North America, they encountered a complex socio-legal landscape. 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 of how the parties would relate to all parts of their world.⁵⁴ For example, the Haudenosaunee of the eastern Great Lakes maintained a sophisticated treaty tradition about how to live in peace that involved all of their relations: the plants, fish, animals, members of their nations, and members of other nations.⁵⁵ They also had legal traditions that governed a confederacy of relations between nations: the Mohawk, Oneida, Onandoga, Seneca and Cayuga.⁵⁶ This law, known as the Great Law of Peace, has served as an inspiration to other nations throughout history.⁵⁷ Like the Haudenosaunee, many

50. ROYAL COMM'N ON ABORIGINAL PEOPLES, LOOKING FORWARD, LOOKING BACK 119–30 (1996).

51. FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST 111 (1975).

52. ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 50, at 99–119.

53. *Id.*

54. *Id.*

55. *Id.* at 50–61.

56. *Id.*

57. WILLIAM N. FENTON, THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY (1998).

First Nations followed and developed laws through treaty and agreement that guided their actions in their respective lands.

When people from other continents arrived on the shores of North America, First Nations laws, protocols and procedures set the framework for the first treaties among Aboriginal peoples, and between Aboriginal peoples and the Dutch, French, British and Canadian Crowns.⁵⁸ An interesting indigenous-to-indigenous treaty occurred between the Haudenosaunee and the Anishinabek in 1701 near Sault St. Marie.⁵⁹ The agreement was orally transacted and is recorded on a wampum belt (a mnemonic device with shells forming pictures sewn onto strings of animal hide and bound together).⁶⁰ The 1701 belt has an image of a “bowl with one spoon.”⁶¹ It references the fact that both nations would share their hunting grounds in order to obtain food. The single wooden spoon in the bowl meant that no knives or sharp edges would be allowed in the land, for this would lead to bloodshed.⁶² This 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.⁶³ In the early 1700s, the French entered into treaties with the Anishinabek of the Great Lakes by using Anishinabek forms, wampum belts and ceremony.⁶⁴ 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.⁶⁵ In 1764, when the British were

58. ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800* (1997).

59. Victor Lytwyn, *A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region*, in *PAPERS OF THE 28TH ALGONQUIAN CONFERENCE* 210–27 (David H. Pentland ed., 1997).

60. *Id.*

61. *Id.*

62. Paul Williams, *Oral Tradition on Trial*, in *GIN DAS WINAN: DOCUMENTING ABORIGINAL HISTORY IN ONTARIO* 29–34 (Dale Standen & David McNab eds., 1996).

63. ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 50, at 119–30.

64. RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815* (1991).

65. For a history, see generally THOMAS ISSAC, *ABORIGINAL AND TREATY RIGHTS IN THE MARITIMES: THE MARSHALL DECISION AND BEYOND* (2001); WILLIAM C. WICKEN, *MI'KMAQ TREATIES ON TRIAL: HISTORY, LAND, AND DONALD MARSHALL JUNIOR* (2002).

able to assert an interest in North America after the Seven Years War, they used indigenous legal traditions to transact business and bind themselves to solemn commitments.⁶⁶ Since that time, there have been over 500 treaties in Canada, with many of them drawing on some form of indigenous legal tradition, even in later eras 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.⁶⁷ Since 1982, existing treaty rights have been recognized and affirmed by 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.

Treaties are not the only area in which indigenous traditions have influenced the development of law in Canada, continuing into the present day. From the 1500s onward, many European individuals submitted themselves to indigenous legal orders. For example, many traders and explorers adopted indigenous legal traditions and participated in their laws.⁶⁸ A perusal of the fur trade literature reveals that commercial transactions were often conducted in accordance with indigenous traditions.⁶⁹ The giving of gifts, the extension of credit, and the standards of trade were often based on indigenous legal concepts.⁷⁰ In the more personal sphere, many of the early marriage relationships between indigenous women and

66. John Borrows, *Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government*, in *ABORIGINAL AND TREATY RIGHTS IN CANADA* 155 (Michael Asch ed., 1997).

67. ROYAL COMM'N ON ABORIGINAL PEOPLES, PARTNERS IN CONFEDERATION: *ABORIGINAL PEOPLES, SELF-GOVERNMENT AND THE CONSTITUTION* 8, 20 (1993).

68. WHITE, *supra* note 64, at 94–114.

69. 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*, at 117, 117–42 (Jennifer S.H. Brown et al. eds., 1994).

70. VICTOR P. LYTWIN, *MUSKEKOWUCK ATHINUWICK: ORIGINAL PEOPLE OF THE GREAT SWAMPY LAND* (2002); ARTHUR J. RAY & DONALD B. FREEMAN, "GIVE US GOOD MEASURE": AN ECONOMIC ANALYSIS OF RELATIONS BETWEEN THE INDIANS AND THE HUDSON'S BAY COMPANY BEFORE 1763, at 231–60, 285 (1978); PAUL C. THISTLE, *INDIAN-EUROPEAN TRADE RELATIONS IN THE LOWER SASKATCHEWAN RIVER REGION TO 1840*, at 33–50 (1986).

European men were formed according to indigenous legal traditions.⁷¹ There were no priests or ministers in the Northwest to officiate at weddings until 1818, and this meant that governing laws were found in the various indigenous nations throughout the land.⁷²

For example, in the first year of Canada's confederation, the Quebec Superior Court affirmed the existence of Cree law on the Prairies and recognized it as part of the common law.⁷³ 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 degree⁷⁴

This legal doctrine is known as the doctrine of continuity.⁷⁵ While the original application of the common law in Canada was problematic, it did recognize the continuity of aboriginal customs, laws and traditions upon the Crown's assertion of sovereignty. In *R v. Mitchell*, Chief 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.

71. SYLVIA VAN KIRK, "MANY TENDER TIES": WOMEN IN FUR-TRADE SOCIETY IN WESTERN CANADA, 1670–1870 (1980).

72. Daniel Harmon's journal describes such a fur trade wedding in December of 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*) shews 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

SIXTEEN YEARS IN THE INDIAN COUNTRY: THE JOURNAL OF DANIEL WILLIAMS HARMON, 1800–1816, at 52–53 (W. Kaye Lamb ed., 1957).

73. *Connolly v. Woolrich*, [1867] 17 R.J.R.Q. 75 (Quebec Sup. Ct.), *aff'd*, *Johnstone v. Connelly*, [1869] 17 R.J.R.Q. 266 (Quebec Q.B.).

74. *Id.* at 79.

75. ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 67, at 19.

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. . . .”⁷⁶

Indigenous legal traditions continued to exist in Canada unless, as Chief Justice McLachlin wrote: “(1) they were incompatible with the Crown’s assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them.”⁷⁷ 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.⁷⁸ If reconciliation is the lens through which the courts interpret the parties’ relationships,⁷⁹ there are sound arguments that Aboriginal governance is compatible with the Crown’s assertion of sovereignty, that it was not surrendered by treaties, and that it was not extinguished by clear and plain government legislation.

One can also over-emphasize the positivistic nature of non-indigenous legal traditions.⁸⁰ The Supreme Court said that while Canada’s constitution is “primarily a written one . . . [b]ehind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.”⁸¹ The Court further noted that these unwritten principles are

76. R v. Mitchell, [2001] S.C.R. 911, 927.

77. *Id.*; see B. Slatery, *Understanding Aboriginal Rights*, 66 CAN. BAR REV. 727 (1987).

78. See *Calder v. Attorney Gen. of B.C.*, [1973] S.C.R. 313; *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 57 (Brennan, J.), 81–82 (Deane & Gaudron, JJ.), 182–83 (Toohey, J.).

79. See *R v. Van der Peet*, [1996] S.C.R. 507, 539.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

Id.

80. See Jean-François Gaudreault-DesBiens, *The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy and Identity*, 23 VT. L. REV. 793 (1999).

81. Reference re Secession of Quebec, [1998] S.C.R. 217, 247.

“not merely descriptive but are also invested with a powerful normative force, and are binding upon both courts and governments.”⁸² The Constitution’s unwritten postulates “form the very foundation of the Constitution of Canada.”⁸³ It is tempting to make broad, almost irreconcilable distinctions between Aboriginal legal traditions and western legal sources because of the different histories, social organization and values of the groups. This is why it is important to note that, much like indigenous legal traditions, Canada’s broader legal traditions also rest on an unwritten, customary base.

If these similarities are not appreciated, the differences between Aboriginal and non-Aboriginal legal systems can give rise to many misconceptions and stereotypes 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 *Delgamuukw v. British Columbia*.⁸⁴ Chief Justice Lamer observed:

In the Aboriginal tradition the purposes of repeating oral accounts from the past is broader than role of the written history in 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 and prestige. . . .⁸⁵

This description of the social role of Aboriginal oral histories is striking not because it is inaccurate—indeed, the Court was sensitive to the various roles these traditions can play—but because the Court seemed to overlook the broader social function of Canadian law generally. The “broad social role” of indigenous tradition, as the “expression of the values and mores” of culture is not very different from what occurs in the common law and civil law traditions.⁸⁶ Yet,

82. *Id.* at 249.

83. *Id.* at 250 (quoting *Re Man. Language Rights*, [1985] S.C.R. 721, 752).

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

85. *Id.* at 1068 (quoting REPORT OF THE ROYAL COMM’N ON ABORIGINAL PEOPLES (1996)).

86. *Id.* at 1068 (citing 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*, 30 ALTA. L. REV. 1276 (1992)).

by contrasting Aboriginal and non-Aboriginal traditions in a dichotomous manner, the Supreme Court did not give sufficient emphasis to the common or civil law's broad social function.

Stereotypes about indigenous law can be problematic because they neglect the civil and common law's own role 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 can be too easy to detach the civil and common law from their cultural contexts, especially when their cultural components seem almost invisible because they correspond with values a wide portion of society shares. A fair account of the similarities and differences between indigenous, civil and common law traditions would pay equal attention to the cultural aspects of each form of law. Canada's two most dominant legal traditions, the civil and common law, also have deep cultural roots.

A. *Civil Law Legal Traditions*

Canada's civil law legal tradition has its origin in Roman law and was originally codified in the *Corpus Juris Civilis* of Justinian.⁸⁷ It developed subsequently in Continental Europe and then spread around the world in codified and un-codified forms.⁸⁸ Civil law is a highly structured tradition based on broad declarations of general principles that provide guidance to its adherents.⁸⁹ It was first received in North America in the earliest days of New France when it became a royal province in 1663, more than a century before the French Revolution of 1789.⁹⁰ Canada's civil law originally derived from a decree by King Louis XIV that New France would follow the Custom of Paris, the body of laws that governed the region around Paris (Île de France) at the time.⁹¹ 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 did not necessarily share the

87. William Tetley, *Mixed Jurisdictions: Common Law and Civil Law (Codified and Uncodified) (Part I)*, 4 UNIF. L. REV. 591, 596 (1999).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

same customs, is a feature of principle-based laws.⁹² The laws of New France demonstrate this pattern of direction from the top, as Royal ordinances and edicts and decisions from the Conseil Souverain (Sovereign Council) proclaimed the laws by which people would live.⁹³ Fortunately, there was early recognition that law is not effective if it does not reflect some local values. In this recognition, it was implicitly acknowledged that the “top” of the social hierarchy has to interact with the “bottom” for law to be effective. Therefore, the Code went through several changes in 1667, 1678 and 1685 to reference the particular cultural circumstances of New France.⁹⁴

In 1763, the civil law was abolished as the legal system in New France after the conquest and the Treaty of Paris.⁹⁵ The British common law system was imposed on the people of New France, though the civil law continued to exist in practice.⁹⁶ It is interesting to note that even though the law was formally British, positivistic proclamations were insufficient to displace laws that had come to reflect more local values.⁹⁷ The culture of local law was not easily erased. As a result, the British reinstated the civil law system in the Québec Act of 1774 because they recognized that the best way to secure order and a degree of allegiance was to allow people to live closer to their own customs and values.⁹⁸ Since that date, the civil law has survived in Canada.

For example, the Constitutional Act of 1791 split the province of Québec into Upper and Lower Canada and did not extinguish the civil law.⁹⁹ While Upper Canada became a common law jurisdiction in that era, Lower Canada retained its civilian tradition.¹⁰⁰ Close to fifty years later, another change occurred through the Act of Union of

92. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 12 (2d ed. 1985).

93. MÉLANIE BRUNET, *OUT OF THE SHADOWS: THE CIVIL LAW TRADITION IN THE DEPARTMENT OF JUSTICE CANADA, 1868–2000*, at 5 (2000).

94. Tetley, *supra* note 87.

95. *Id.*

96. BRUNET, *supra* note 93, at 6.

97. *QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW* 10–11, 13 (John E.C. Brierley & Roderick A. Macdonald eds., 1993).

98. W.J. ECCLES, *FRANCE IN AMERICA* 234 (1st ed. 1972).

99. *QUEBEC CIVIL LAW*, *supra* note 97, at 14.

100. *Id.*

1840.¹⁰¹ This placed Lower and Upper Canada in a political union; it did not modify civil law rights, but it did create unique pressures on this system. This resulted in the development of a bilingual civil code for Canada East (still called Lower Canada in its title) in 1857, and was intended to reconcile the problems that had developed from the mixing of British common law and the Custom of Paris.¹⁰² Note that the civil law in Canada was not codified before this initiative. In 1866, the Civil Code of Lower Canada was enacted, which also drew inspiration from the 1804 Code Napoléon.¹⁰³ The 1866 Code had four books governing its structure: Persons, Property and its Different Modifications, Acquisition and Exercise of Rights of Property, and Commercial Law.¹⁰⁴

Confederation also allowed for the continuation of the civil law in Canada. Section 92(13) of the BNA Act gave the provinces exclusive power over “property and civil rights,”¹⁰⁵ continuing Quebec’s legal tradition under this head of power. In fact, the Civil Code of Lower Canada remained virtually unchanged from 1866 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 integrates some concepts from the common law.¹⁰⁶

The interpretive tradition of the civil law emphasizes the primacy of broad principles and embodies deeper societal commitments. Professor Rod MacDonald wrote: “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

101. *Id.* at 18.

102. *Id.* at 22.

103. *Id.* at 24.

104. *Id.* at 29.

105. Constitution Act, 1867, 30 & 31 Vict. ch. 3 § 92(13) (U.K.).

106. The ten books of the Code include: (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 of Canada).

established.”¹⁰⁷ Thus, the civil law is a powerful legal tradition in Canada because of its historic use and its relationship to the societal culture in which it is applicable.

B. Common Law Legal Traditions

At the same time that the civil law grew in Canada, common law tradition also came to enjoy broad operation. Its origins were not grounded in any text, but developed from a tradition “expressed in action.”¹⁰⁸ The common law began as customary law and was the product of a great diversity of cultures within 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.¹⁰⁹ Throughout the hills and hollows of England, there were courts of equity, market courts, manor courts, and university courts, along with county courts, borough courts, ecclesiastical courts and aristocratic courts, among others.¹¹⁰

The common law’s story is its expansion at the expense of these other legal jurisdictions, through the use of writs.¹¹¹ 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.”¹¹² The common law in medieval 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.¹¹³ Each writ gave rise to a specific manner of proceeding or form of action, and had its own

107. Roderick A. Macdonald, *Encoding Canadian Civil Law*, in DEP’T OF JUSTICE CAN., THE HARMONIZATION OF FEDERAL LEGISLATION WITH QUEBEC CIVIL LAW AND CANADIAN BIJURALISM 135, 159 (1997).

108. SIMPSON, *supra* note 36.

109. MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 39–43 (Legal Classics Library 1987) (1713); see H. Patrick Glenn, *The Common Law in Canada*, 74 CAN. BAR REV. 261, 265, 276 (1995). The cultural diversity in the development of the United Kingdom is nicely detailed in NORMAN DAVIES, THE ISLES: A HISTORY (1999).

110. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (2d ed. 1979).

111. See FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 1–130 (James F. Colby ed., 1915).

112. FREDERIC W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 11 (2nd prtg. 1948).

113. See MAITLAND & MONTAGUE, *supra* note 111, at 100–01.

particularized rules and procedures.¹¹⁴ These “forms of actions” were the procedural devices courts used to give expression to the theories of liability recognized by the common law.¹¹⁵ Through these writs, litigants elected their remedies in advance of trial, and 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.¹¹⁶ If litigants did not select the proper writ for their action, they could not succeed in their claim.¹¹⁷ This uniformity allowed for the more centralized control of the entire common law structure,¹¹⁸ and the sovereignty of the Crown expanded with the extension of the common law’s jurisdiction.¹¹⁹

The common law was exported to Canada when English governors arrived on its shores and asserted its application to their new home. The date for the common law’s reception varies across the country.¹²⁰ Newfoundland, Prince Edward Island, New Brunswick and Nova Scotia followed the common law before Confederation, after the Acadian settlement and expulsion in the Maritimes.¹²¹ Similarly, the colonies of Vancouver Island and British Columbia were also common law jurisdictions before union.¹²² Reception of the common law in what became Ontario is generally placed at 1763, while the prairies and the old North-west were deemed to receive the common law in 1870.¹²³ It was not until 1849 that decisions and developments in English law were no longer directly incorporated into Canadian common law.¹²⁴ Of course, many indigenous people wonder how these colonies became common law jurisdictions when indigenous legal traditions continued to apply.

114. See G.C. CHESHIRE ET AL., *THE LAW OF CONTRACT* 2 (11th ed. 1986).

115. BLACK’S LAW DICTIONARY 663 (7th ed. 1999).

116. *Id.*

117. See POTTER’S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 293–97 (A.K.R. Kiralfy ed., 4th ed. 1958).

118. See M.H. OGILVIE, *HISTORICAL INTRODUCTION TO LEGAL STUDIES* 70, 101, 106–07 (1982).

119. See S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 11–36 (2d ed. 1981).

120. PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 2-1 to 2-17 (1997).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

The common law tradition in contemporary Canada operates through *stare decisis* and a hierarchy of courts. *Stare decisis* is the principle that decisions in previous cases are applied to current cases which are materially similar, and in their decisions, judges are expected to provide reasons justifying their selection of applicable cases and principles.¹²⁵ As noted, the doctrine of precedent was not originally a part of the common law method, but arose in the seventeenth century because of a need to have standardized rules with the development of industrialization.¹²⁶ When following 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.¹²⁷

Another aspect of the common law that is now prevalent 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.¹²⁸ The Supreme Court of Canada is at the top of this hierarchy, with provincial Courts of Appeal below it, and trial courts below still.¹²⁹ Hierarchy also promotes uniformity and attempts to remove arbitrariness from Canada's legal system.¹³⁰ The common law's culture is one of incremental development on a case-by-case basis.

C. Indigenous Legal Traditions

Laws can arise whenever human interactions create expectations about proper conduct. Indigenous legal traditions developed in this fashion and were based on the customs and practices of their people.¹³¹ Customary laws are inductive and are discerned by examining specific routines and procedures relating to conduct within a community.¹³² As noted, the laws of England operated largely

125. DIMENSIONS OF LAW: CANADIAN AND INTERNATIONAL LAW IN THE 21ST CENTURY 53 (George Alexandrowicz et al. eds., 2004).

126. Glenn, *supra* note 109.

127. DIMENSIONS OF LAW, *supra* note 125, at 53.

128. *Id.*

129. *Id.*

130. *See supra* note 48.

131. DIMENSIONS OF LAW, *supra* note 125, at 53.

132. *See supra* note 48.

through custom until precedent and consolidation took place during the 1700s.¹³³ Even today, the common law method uses customs and traditions to fill gaps when interpreting written rules.¹³⁴ Indigenous legal traditions are best understood through the lens of customary law.

Indigenous peoples in what is now Canada developed various spiritual, political and social customs and conventions to guide their relationships.¹³⁵ These diverse customs and conventions became the foundation for many complex systems of law.¹³⁶ Contemporary Canadian law concerning indigenous peoples partially originates in, and is extracted from, these legal systems.¹³⁷ To ensure that important ideas are preserved, memory devices are an important part of these traditions.¹³⁸ Memory devices can include wampum belts, masks, totem poles, medicine bundles, culturally modified trees, birch bark scrolls, petroglyphs, button blankets, land forms, crests, and more.¹³⁹

133. Glenn, *supra* note 109, at 264.

134. Reference Re Secession of Quebec, [1998] S.C.R. 217.

135. A representative description of one culture's (Gitksan and Wet'suwet'en) societal conventions is found in GISDAY WA & DELGAM UUKW, *THE SPIRIT IN THE LAND* (1992).

136. "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 712 (2d ed. 1989). For additional comments on First Nations law, see INDIGENOUS LAW AND THE STATE (Bradford W. Morse & Gordon R. Woodman eds., 1987); Michael Coyle, *Traditional Indian Justice in Ontario: A Role for the Present?*, 24 OSGOODE HALL L.J. 605 (1986). For a contrary view, see *Delgamuukw v. British Columbia*, [1991] 79 D.L.R. 4th 185, 447 ("[W]hat 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."); Roger F. McDonnell, *Contextualizing the Investigation of Customary Law in Contemporary Native Communities*, 34 CAN. J. CRIMINOLOGY 299 (1992). For criticism of this view, see Michael Asch, *Errors in Delgamuukw: An Anthropological Perspective*, in *ABORIGINAL TITLE IN BRITISH COLUMBIA: DELGAMUUKW V. THE QUEEN* 221 (Frank Cassidy ed., 1992). For a fuller description of Wet'suwet'en law, see MILLS, *supra* note 48.

137. For cases involving the reception of First Nations law into Canadian law, see *Connolly v. Woolrich*, [1867] R.J.R.Q. 75 (Quebec Sup. Ct.), *aff'd*, *Johnstone v. Connelly*, [1869] R.J.R.Q. 266 (Quebec Q.B.); *R v. Nan-e-quis-a Ka*, [1889] Terr. L.R. 211 (N.W.T.S.C.); *R v. Bear's Shin Bone*, [1899] Terr. L.R. 173 (N.W.T.S.C.); *Re Noah Estate*, [1961] D.L.R. (2d) 185; *Re Kitchooalik & Tucktoo*, [1972] D.L.R. (3d) 483; *Michell v. Dennis*, [1984] W.W.R. 449 (B.C.S.C.); *Casimel v. Ins. Corp. of B.C.*, [1992] C.N.L.R. 84 (B.C.S.C.); *Vielle v. Vielle*, [1993] C.N.L.R. 165 (Alta. Q.B.).

138. PENNY PETRONE, *NATIVE LITERATURE IN CANADA: FROM ORAL TRADITION TO THE PRESENT* 9-35 (1990).

139. *Id.*

Indigenous traditions are often recorded in oral form. Oral history in numerous indigenous groups is conveyed through interwoven layers of culture that entwine to sustain national memories over the lifetime of many generations. The transmission of traditions in these societies is bound with the configuration of language, political structures, kinship, clan, economic systems, social relations, intellectual methodologies, morality, ideology and their physical world.¹⁴⁰ These factors assist people in knitting historic memories more tightly in their minds. There are many types of traditions that are a product of this process: memorized speech, historical gossip, personal reminiscences, formalized group accounts, representations of origins and genesis, genealogies, epics, tales, proverbs and sayings.¹⁴¹

Indigenous legal traditions also often rely upon elders or sanctioned wisdom keepers to identify and communicate law.¹⁴² In their aggregation, each of these cultural strands are wound together and reinforced by specific practices. These practices include such complex customs as 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 to help ensure that certain traditions are accredited within the community.¹⁴³ Oral tradition does not stand alone, but is given meaning through the context of the larger cultural experiences that surround it.

As noted, indigenous legal traditions sometimes find their articulation in ceremony.¹⁴⁴ Ceremonies often consist of formalized rituals that enable participants to directly participate in law.¹⁴⁵ Each group created its own distinctive ceremonies and formalities to renew, celebrate, transfer or abandon legal relationships.¹⁴⁶ As such, the ceremonies of the Potlatch on the west coast produced entirely

140. *Id.*

141. JAN VANSINA, ORAL TRADITION AS HISTORY 13–27 (1985).

142. JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW 16, 91 (2002).

143. *Id.* at 90.

144. *Id.*

145. *Id.* at 89–90.

146. *Id.*

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 Haudenosaunee, or in the lodges of the Mi'kmaq. Some ceremonies required special initiation in order to participate, thus creating a realm of sacred knowledge within some traditions.¹⁴⁷ Each group's ceremonies and stories varied according to its history, material circumstances, spiritual alignment and social structure.¹⁴⁸

Whatever the source and structure of indigenous legal tradition, the important point is 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.¹⁴⁹ Law is "a culture of argument"¹⁵⁰ that "provide[s] 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."¹⁵¹

Canada's civil and common law traditions are also embedded in a culture of argument. Each tradition contains a degree of ambiguity that requires judgment and application beyond its initial formulation. Judges and lawyers interpret the 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 largely familiar with the process of resolving ambiguities in civil and common law traditions through judicial decision-making and executive regulation-making. They may be much less familiar with how ambiguities are addressed in indigenous legal

147. *Id.* at 3–4.

148. *Id.*

149. See JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990).

150. *Id.* at xiii.

151. *Id.* at 80.

traditions. In trying to present a general picture of how these ambiguities are worked out, one is presented with a particular challenge; there are many indigenous legal traditions and each 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 that system's contours. It can be difficult to communicate how ambiguities should be overcome. Nevertheless, some idea of how indigenous peoples might engage in the process of interpretation within their traditions can be conveyed. The following story is indicative of the general methodology one must follow to interpret and apply indigenous laws.

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.¹⁵²

This 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. As this story indicates, even the smallest animals might have something to contribute to a decision or to the resolution of an issue. If we analogized this story to contemporary indigenous traditions, we would conclude that all powers of interpretation and judgment should not be vested in legislators or judges. Those in society with less formal power also have a role in deciding how customs and practices should apply to them. Decision-making in indigenous communities should not necessarily occur through those who are distant, professionalized and impersonal; indigenous dispute resolution has the potential to involve

152. 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, RESTRUCTURING THE RELATIONSHIP (1996).

a greater range of people in determining the consequences for actions. Dispute resolution following this model would enable indigenous people to take responsibility for their own actions, and simultaneously be accountable for them.¹⁵³

D. The Relationship of Canada's Legal Traditions

Indigenous legal traditions are an important source of legal guidance for Aboriginal peoples. For centuries, indigenous laws have assisted Aboriginal peoples in the resolution of their disputes.¹⁵⁴ Certain aspects of these traditions continue to guide indigenous communities in contemporary settings.¹⁵⁵ However, these laws have often been ignored or overruled by non-indigenous laws. Their influence has thus been eroded within indigenous communities.¹⁵⁶ Yet, they embody precepts and practices that connect Aboriginal and non-Aboriginal Canadians to land in a way that is not always possible under the current administration of the common or civil law.

For example, the common and civil law has often been applied in Canada to separate indigenous people from their lands and environments.¹⁵⁷ This has occurred through the dispossession of the country's original inhabitants, or through the doctrine of Crown title that underlies non-indigenous peoples' land rights in Canada.¹⁵⁸ On the other hand, indigenous peoples stories, ceremonies, teachings, customs and norms often flow from very specific ecological relationships, and are interwoven with the world around them.¹⁵⁹ For example, the west coast Potlatch systems are dependent on the vast richness that flows into their specific territories with the return of the

153. For more perspective on narrative and the law, see Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. CIN. L. REV. 95, 116–39 (1994); Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 182 (1985); Valerie Karno, *Bringing Fiction to Justice: Including Individual Narrative in Judicial Opinions*, 2 HASTINGS WOMEN'S L.J. 77, 79 (1990); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 385–86 (1989).

154. BORROWS, *supra* note 142.

155. *Id.* at 4.

156. *Id.* at 88.

157. *Id.*

158. *Id.*

159. *Id.* at 29–55.

salmon each year.¹⁶⁰ This geographic fact facilitated the accumulation of material resources that became an important part of the give-away ceremony and feast that accompanied the Potlatch.¹⁶¹ Relationships of family law, the law of obligations, and property law hinged upon these connections to land and resources.¹⁶² The symbols of the Potlatch system also reflect the specific locale, as cedar bent boxes, house posts and big houses provided the setting and gifts that permitted the memorialization of west coast indigenous laws.¹⁶³ Similar observations about the connectedness of indigenous laws to land could be made for many other indigenous groups in Canada¹⁶⁴ and in other countries.¹⁶⁵

The continued existence of indigenous legal traditions could be of great benefit to indigenous peoples and to 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 in creating greater recognition for indigenous legal traditions in the country.

160. DONALD LELAND, *ABORIGINAL SLAVERY ON THE NORTHWEST COAST OF NORTH AMERICA* 1–6 (1997).

161. *Id.* at 1–3.

162. *Id.* at 5–6.

163. *Id.*

164. HAROLD CARDINAL & WALTER HILDEBRANDT, *TREATY ELDERS OF SASKATCHEWAN: OUR DREAM IS THAT OUR PEOPLES WILL ONE DAY BE CLEARLY RECOGNIZED AS NATIONS* (2000); FENTON, *supra* note 57; 2 INTERVIEWING INUIT ELDERS: PERSPECTIVES ON TRADITIONAL LAW (J. Oosten et al. eds., 2000); BASIL JOHNSTON, *OJIBWAY CEREMONIES* (1982); MILLS, *supra* note 48; ROBIN RIDINGTON, *LITTLE BIT KNOW SOMETHING: STORIES IN A LANGUAGE OF ANTHROPOLOGY* (1990); *OUR TELLINGS: INTERIOR SALISH STORIES OF THE NLHA'KAPMX PEOPLE* (Darwin Hanna & Mamie Henry eds., 1996).

165. *See* JUDITH BINNEY, *REDEMPITIVE SONGS: A LIFE OF A NINETEENTH CENTURY MAORI LEADER TE KOATI ARIKIRANGI TE TURAKI* (1997); GLUCKMAN, *supra* note 48; HOEBEL, *supra* note 48; ROGER M. KEESING, *CUSTOM AND CONFRONTATION: THE KWAIO STRUGGLE FOR CULTURAL AUTONOMY* (1992); MICHAEL KWÁIOLOA & BEN BURT, *LIVING TRADITION: A CHANGING LIFE IN SOLOMON ISLANDS* (1997); LLEWELLYN & HOEBEL, *supra* note 48; ANNE SALMOND, *BETWEEN WORLDS: EARLY EXCHANGES BETWEEN MAORI AND EUROPEANS, 1773–1815* (1997); ANNE SALMOND, *TWO WORLDS: FIRST MEETINGS BETWEEN MAORI AND EUROPEANS, 1642–1772* (1991); *WESTERN APACHE RAIDING AND WARFARE* (Keith H. Basso ed., 1971).

II. ENTRENCHING MULTI-JURIDICALISM IN CANADA

Recently, the concept of bi-juridicalism has been frequently referenced in Canada. This phrase “refers to a state of facts: the co-existence of two contemporaneous legal systems in Canada.”¹⁶⁶ While the concept behind bi-juridicalism is fair, it is also problematic because it is under-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 to understanding relations between Canada’s legal traditions. This reminder should carry us beyond bi-juridicalism to search for more accurate and complete ways of describing the state of Canada’s legal inheritance.

There are numerous ways that Canada could recognize and develop indigenous legal traditions in its midst. For example, there could be a greater recognition of indigenous governments and dispute resolution bodies through the courts, parliament, legislatures, the executive, law societies and law schools.

A. Indigenous Governments

Indigenous communities could apply their legal traditions more explicitly in making decisions and resolving disputes, particularly in their management and regulatory systems. This would enable indigenous governments to become more fully accountable to their people and would allow their communities to become more self-sufficient. It could create a stronger tradition of positivistic indigenous law to rest beside more customary traditions. Indigenous governments could play a greater role in recognizing structures that facilitate access to their own legal values. This could occur through the development of indigenous Constitutions or through the application of their other culturally appropriate legal traditions. The federal government could extend or amend its policies to support and

166. Marie-Claude Gervais, *Harmonization and Dissonance: Language and Law in Canada and Europe*, in *BIJURALISM AND HARMONIZATION: GENESIS 10* (2001).

recognize indigenous governments in these matters, and pass governance recognition legislation.

The Draft Declaration on the Rights of Indigenous Peoples states: “Indigenous peoples have a right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁶⁷ While the Draft Declaration may not be finalized, and International laws do not generally define “peoples” who have a right of self-determination, self-determination nevertheless remains an important and widespread indigenous aspiration.

In exercising the right of self-determination, indigenous peoples in Canada could act to freely determine their political, economic, social and cultural development by determining legal issues within their own communities in accordance with their own values. If they did this, the first line of protection for indigenous culture would occur through 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 specific cultures that wish to protect their ideas, objects and expressions.

Indigenous peoples’ legal traditions would be more securely protected and would remain a living cultural force if they defined the parameters of such traditions within their cultural contexts.¹⁶⁸ Indigenous legal traditions are not frozen at some artificial moment in the past; they 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 careful not to equate change in indigenous

167. *Draft United Nations Declaration on the Rights of Indigenous Peoples*, reprinted in SHARON VENNE, *OUR ELDERS UNDERSTAND OUR RIGHTS* 205 app. 1 (1998).

168. For arguments that one can reconcile liberalism with cultural recognition, see JOSEPH H. CARENS, *CULTURE, CITIZENSHIP AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVEN HANDEDNESS* (2000); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* (2001); Alan Brudner, *The Liberal Duty to Recognize Cultures*, 8 *REV. CONST. STUD.* 129 (2003).

cultures with the extinction of indigenous cultures.¹⁶⁹ Something does not automatically become non-indigenous just because indigenous peoples adapt and adopt contemporary objects in their ideas and expressions.

Indigenous peoples should draw upon their and other cultures' best practices and procedures in the law-making powers. They should compare, contrast, accept and reject governmental and legal standards from many sources, including their own. Some might call this revisionist, and seek to undermine indigenous governance and law by the use of this label. Such a critique would be invidious. All law and governance is revisionist, as it must be continually re-interpreted and re-applied in each generation to remain relevant to changing conditions. Law would become unjust and irrelevant if it was not continually revised. Aboriginal governance and law is no different, and should not be held to higher standards. Stereotypes must be jettisoned that imply that Aboriginal peoples' ancient governmental or legal traditions were uniformly savage or, alternatively romantic, that they existed in a state of continual harmony and peace.

People must also reject ideas that hold 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.¹⁷⁰ The common law no longer sanctions trial by ordeal, trial by battle, sexual or racial discrimination and a hundred other human rights abuses.¹⁷¹ Likewise, indigenous legal traditions are the subject of continual revision to

169. 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*, 5 REV. CONST. STUD. 119 (2000); Catherine Bell & Michael Asch, *Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation*, in ABORIGINAL AND TREATY RIGHTS IN CANADA, *supra* note 1, at 38.

170. QUEBEC CIVIL LAW, *supra* note 97, at 208, 305–31, 371–74.

171. LOUISE BÉLANGER-HARDY & ALINE GRENON, ÉLÉMENTS DE COMMON LAW: ET APERÇU COMPARATIF DU DROIT CIVIL QUÉBÉCOIS 27, 57 (1997).

ensure compatibility with contemporary communities and consistency with human rights values.

Indigenous legal traditions could become even stronger if indigenous systems were the default whenever management, regulatory or dispute resolution issues arose. Indigenous peoples could define their claims and resolve them in the “context” of their own living culture.¹⁷² This would help to ensure that their 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 in maintaining their cultures. 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. One would quickly see they were neither savage nor saint-like, but human, with all the frailties, foibles, flaws and faults, strengths, talents, gifts and genius found in other communities.

Indigenous legal traditions could be recognized as existing Aboriginal and treaty rights under section 35(1) of the Constitution Act of 1982.¹⁷³ This result may flow from the very wording of the section itself: “The existing [A]boriginal and treaty rights of the [A]boriginal *peoples* of Canada are hereby recognized and affirmed.”¹⁷⁴ If peoples’ of Aboriginal groups rights are an element of section 35, concepts relating to self-determination should more thoroughly permeate this provision’s interpretation. Aboriginal groups should be able to claim organizational rights as *peoples*.

This is the point made by Professor Cathy Bell in a 1997 article about Métis rights.¹⁷⁵ She observed that section 35 came out of an international context where there was “[g]rowing activity at the United Nations aimed at ending colonial domination [which] resulted

172. 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*, 6 CAN. J.L. & JURIS. 249 (1993).

173. Rights of the Aboriginal Peoples of Canada, Constitution Act, 1982, pt. II, Canada Act, 1982, ch. 11, sched. B § 35(1) (U.K.).

174. *Id.* (emphasis added).

175. Catherine Bell, *Metis Constitutional Rights in Section 35(1)*, 36 ALTA. L. REV. 180, 189–92, 194–95 (1997).

in increased international pressure on nation states to recognize and protect the human rights of colonized peoples.”¹⁷⁶ If section 35 was placed in this broader context and recognized as a provision aimed at eradicating unconstitutional colonial domination, then principles of Aboriginal governance may be recognized as an important part of our Constitution’s purpose of “protect[ing] and reconcil[ing] . . . 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.”¹⁷⁷

Indigenous peoples exercised powers of governance in what is now Canada prior to Crown assertions of sovereignty.¹⁷⁸ In *Calder v. A.G.B.C.*,¹⁷⁹ Justice Judson wrote: “[T]he 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.”¹⁸⁰

Organization is essential to governance. People organize themselves through a set of understandings about what is appropriate or inappropriate in their day-to-day interactions. These understandings are given force through principle or custom and become the law through which actions are measured and sanctions or commendations made.¹⁸¹ The fact that Aboriginal peoples were “organized in societies” prior to the arrival of Europeans implies that Aboriginal legal traditions were an important element of their “pre-contact” societies.¹⁸² It demonstrates that their power of self-

176. *Id.* at 183.

177. *R v. Van der Peet*, [1996] S.C.R. 507, 548.

178. *See R v. Sioui*, [1990] S.C.R. 1025. 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.

Id. at 1053.

179. *Calder v. British Columbia*, [1973] S.C.R. 313.

180. *Id.* at 320 (emphasis added).

181. *Supra* note 48.

182. The reserved rights theory of aboriginal governance is also consistent with the proposition articulated in *R v. Van der Peet*, [1996] S.C.R. 507:

organization pre-existed the Crown's assertion of sovereignty and was in fact strong enough to hold rights to land. These governance and legal powers were not voluntarily surrendered by the Crown's act of assertion.¹⁸³ Indigenous peoples continued to exercise their powers of governance in many ways after the Crown's assertion of sovereignty.¹⁸⁴ As noted, these powers are evident in matters internal to their societies and in their external relationships with Canada through treaties, trade and conflict.¹⁸⁵

Indigenous peoples continue to live in organized societies in the present day. They are governed by ancient and contemporary customs, laws and traditions that give meaning and purpose to their lives,¹⁸⁶ though there has been extensive regulation of these powers

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 already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.

Id. at 538 (emphasis added).

183. However, it has been held that “discovery” diminished Indian rights to land. *See, e.g., Guerin v. R.*, [1984] S.C.R. 335, 378.

184. The Supreme Court of Canada accepted the idea that Aboriginal governance was multifaceted, even after the assertion of sovereignty, in *R v. Sioui*, [1990] S.C.R. 1025:

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.*

....

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.

Id. at 1053–55 (emphasis added).

185. John Borrows, *A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government*, 30 OSGOODE HALL L.J. 291 (1992). The Aboriginal peoples' ability to exercise their powers of governance through the post-confederation period was demonstrated every time a First Nations signed a treaty.

186. *See generally* John Borrows, *Stewardship and the First Nations Governance Act*, 29

through instruments such as the Indian Act.¹⁸⁷ 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 extinguished.”¹⁸⁸

In *R v. Van der Peet*,¹⁸⁹ the Supreme Court of Canada held that Aboriginal rights were those practices that were integral to Aboriginal peoples prior to the arrival of Europeans.¹⁹⁰ *R v. Pamajewon*¹⁹¹ held that governance powers would be tested on the same standard the Court developed in *R v. Van der Peet*.¹⁹² There are strong arguments that Aboriginal governance was integral to the organization of the distinctive cultures of Aboriginal peoples throughout Canada prior to the arrival of Europeans.¹⁹³ It remains so today. An indigenous society’s legal traditions are inseparable from its governance powers. Aboriginal governance is an independent legal right, not dependent for its existence on any grant of authority from the executive or legislative bodies in Canada.¹⁹⁴ It is a pre-existing right that vested in Aboriginal groups prior to the arrival of the common law in Canada.¹⁹⁵ 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, and so on.¹⁹⁶ Indigenous legal traditions enabled

QUEEN’S L.J. 103 (2003).

187. R.S.C., ch. I-5 (1985). 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, § 2(1); see also *Bigstone v. Big Eagle*, [1993] C.N.L.R. 25 (Fed. Ct.).

188. [1990] S.C.R. 1075, 1097. See Borrows, *A Geneology of Law*, *supra* note 185, for an application of this principle in a specific community context.

189. *R v. Van der Peet*, [1996] S.C.R. 507.

190. *Id.* at 509.

191. *R v. Pamajewon*, [1996] S.C.R. 821.

192. *Id.* at 822–23.

193. For the test used to prove Aboriginal rights, see *Van Der Peet*, [1996] S.C.R. at 511.

194. See *supra* note 137 and accompanying text.

195. *R v. Guerin*, [1984] S.C.R. 335, 378.

196. *Supra* note 48.

these peoples “when the settlers came [to be] organized in societies and occupying the land as their forefathers had done for centuries.”¹⁹⁷

The federal government has already recognized that Aboriginal peoples possess unextinguished inherent rights to govern themselves. A policy statement issued in 1995 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 based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to 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.¹⁹⁸

Note how these categories implicate indigenous legal traditions. Indigenous peoples’ ability to implement and develop laws, internal to their communities and integral to their cultures, could be considered within the scope of the federal policy. The federal policy should be broadened to recognize this fact. Aboriginal peoples’ rights to live by their laws are a matter integral to the unique cultures, identities, languages, institutions and relationship with land. Several observations:

- Indigenous culture is preserved 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.

197. *Calder v. British Columbia*, [1973] S.C.R. 313, 328; *see also Van Der Peet*, [1996] S.C.R. at 538 (“[W]hen 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.”).

198. INDIAN AND NORTHERN AFFAIRS CAN., FEDERAL POLICY GUIDE, ABORIGINAL SELF-GOVERNMENT: THE GOVERNMENT OF CANADA’S APPROACH TO IMPLEMENTATION OF THE INHERENT RIGHT AND THE NEGOTIATION OF ABORIGINAL SELF-GOVERNMENT (1995), available at http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html.

- Indigenous institutions are held together by indigenous custom and law.
- Indigenous peoples relationships with lands and resources stems from their legal traditions.

These observations should make it clear that indigenous governance rests on indigenous legal tradition. It is an existing Aboriginal right in Canada, recognized and affirmed by section 35(1) of the Constitution Act, 1982.¹⁹⁹ Aboriginal peoples have the right to implement their unique laws integral to their cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources. The 1995 *Inherent Rights Policy* should be amended or extended to recognize this fact. Aboriginal governments should strengthen their existing laws by acknowledging them as a source of their power, and should review and harmonize them with their legal traditions.

Furthermore, the federal government, with the participation and joint 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.²⁰⁰ If implemented, this Act would:

199. Rights of the Aboriginal Peoples of Canada, Constitution Act, 1982, pt. II, Canada Act, 1982, ch. 11, sched. B § 35(1) (U.K.).

200. RESTRUCTURING THE RELATIONSHIP, *supra* note 152, at 1042. The Royal Commission also recommended that 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;

(a) [E]nable 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 and to specify which additional areas of federal jurisdiction the Parliament of Canada is prepared to acknowledge as being core powers to be exercised by Aboriginal governments; and

(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.²⁰¹

(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;

Id. This 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, which have fewer resources and less support in the wider population than does the federal government. This could lead to the termination of First Nations, Metis and Inuit communities already recognized by the federal or provincial governments.

201. *Id.* 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 lands and resources and on agreements for interim relief with respect to lands subject to claims, to take effect before the negotiation of treaties.

Id.

B. Indigenous Courts and Dispute Resolution Bodies

Indigenous governments should recognize and/or recreate institutions to exercise dispute resolution powers over matters internal to their communities. Indigenous governments should affirm the powers of these institutions in a manner consistent with their legal traditions. Law must embrace a community's deeper normative values to be a just and effective force in facilitating peace and order.

In *Reference Re Secession of Quebec*, the Supreme Court of Canada considered the constitutionality of a unilateral declaration of sovereignty by Quebec.²⁰² In deciding the issue, the Court made some important observations about the principles upon which the Canadian legal order rests, which have application to indigenous legal traditions. The Court wrote that “[t]o 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.”²⁰³ Non-indigenous legal traditions do not sufficiently engage indigenous values and thus do not encourage indigenous participation. Indigenous adjudicative institutions using indigenous principles would correct this oversight. By and large, the current structures frustrate the participation of Indian people in Canada's constitutional structure. They falsely rest on public institutions (Indian Act and other non-indigenous bodies under federal creation and delegated and ministerial authority) that are largely inconsistent with the Constitution of the country because they constrain Aboriginal rights to exercise decision-making power under section 35.

Indigenous governance would enjoy greater accountability and legitimacy if their own institutions were able to resolve their disputes. The power of Aboriginal people to judge and hold their own members accountable for their actions is an Aboriginal right that was integral to First Nations communities prior to the arrival of Europeans. Further, this right has not been extinguished, and can be

202. *Reference Re Secession of Quebec*, [1998] S.C.R. 217, 217–18.

203. *Id.* at 256.

exercised in a contemporary form.²⁰⁴ What must be recognized is the power of Aboriginal peoples under section 35 of the Constitution Act to sit in judgment over their own citizens when issues of rights, responsibility and accountability are raised. They will be in the best position to articulate legal principles that will have the deepest meaning and legitimacy in their communities.

Such an approach would be consistent with indigenous legal values, as well as with more general principles of Canadian 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.”²⁰⁵ Protection and facilitation of the rule of law for Aboriginal peoples, as the *Secession of Quebec* 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.”²⁰⁶ Judging indigenous people against 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 coincide, bolstering the respect and effectiveness of regimes of accountability within communities.²⁰⁷ Failure to permit indigenous people to be governed and judged by principles that flow from their own normative prescriptions has not vouched-safe for indigenous peoples and “a stable, predicable and ordered society in which to conduct their affairs.”²⁰⁸

In the United States, independent tribal courts have been an important force in holding the leadership of Indian communities to the highest standards of accountability, in accordance with broader principles of stewardship. While the organization of tribal courts was initially suspect because of their heavy reliance on the Bureau of Indian

204. These criteria come from the Supreme Court’s test in *R v. Van der Peet*, [1996] S.C.R. 507.

205. *Secession of Quebec*, [1998] S.C.R. at 257.

206. *Id.* at 258 (quoting *Re Man. Language Rights Reference*, [1985] S.C.R. 721, 749).

207. “Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are embedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.” *Id.* at 256.

208. *Id.* at 257.

Affairs to administer justice,²⁰⁹ in the last twenty-five years they have grown to become independent bodies capable of addressing the most challenging issues courts can face.²¹⁰

One particularly strong example of this power comes from the decision *In Re Certified Question II: Navajo Nation v. MacDonald*, where 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.”²¹¹ 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 certain 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.²¹² In so finding, it did that which 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 this problem.²¹³ In particular, the Navajo justices drew on Navajo common law to give meaning to the fiduciary duty in the context of principles of normative order within their communities.²¹⁴ The court wrote of a story concerning two “Hero Twins” who slew monsters and overcame other troubles faced by the

209. See generally WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL* (1966); FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 61–98 (1995).

210. See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998).

211. *In Re Certified Question II: Navajo Nation v. MacDonald*, 16 Indian L. Rep. (Am. Indian Law Training Program, Inc.) 6086 (Navajo S. Ct. 1989), reprinted in DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 533 (4th ed. 1998).

212. *Id.* at 429.

213. See Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Tribal Courts*, 46 AM. J. COMP. L. 509 (1998).

214. Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989).

Navajo at the time of their creation.²¹⁵ The court held that this story embodied the “Navajo traditional concept of fiduciary trust of a leader (*naat’aanii*).”²¹⁶ 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. . . .²¹⁷

The court’s explanation of how the ancient story gave rise to fiduciary duties for a 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.

In relating this example, I do not intend to propose an exact replication of U.S. tribal courts in a Canadian context, or to suggest that bands or communities should reorganize themselves along western political lines when dealing with separation of powers issues (though I think there are important lessons to be drawn from that experience).²¹⁸ The problem indigenous peoples encounter in their current situations is the failure to address issues of normative order

215. GETCHES, *supra* note 211, at 430.

216. *Id.*

217. *Id.*

218. See WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (Stephen Cornell & Joseph P. Kalt eds., 1992).

within their communities through values that have persuasive meaning for them.

The recognition of indigenous dispute resolution bodies and courts does not mean that Aboriginal peoples would have a separate system of justice in Canada. The Supreme Court of Canada gave its approval for the recognition of difference as a mechanism to achieve equality in the case of *Law v. Canada*.²¹⁹ Justice Iacobucci observed:

[T]rue equality does not necessarily result from identical treatment. Formal distinctions in treatment will be necessary in some contexts in order to accommodate the differences between individuals and thus to produce equal treatment in a substantive sense . . . Correspondingly, a law which applies uniformly to all may still violate a claimant's equality rights.²²⁰

Just because a person is subject to differential treatment does not always mean that person is not receiving the equal benefit and protection of the law. As Justice Iacobucci observed, the notion of whether or not differential treatment is fair will always be a contextualized determination that depends on the right at issue, and the socio-economic status of that individual and of comparative groups. Applying these principles to the existence of indigenous legal traditions, one could also argue that differential treatment of indigenous and non-indigenous peoples do not necessarily raise concerns about inequality, fairness, or certainty.

In further considering indigenous dispute resolution and the argument that it departs from the standard of one law for all Canadians, one should take into account that Canada is a federal system. There are ten provinces, three territories and one central government that create and enforce a variety of different 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.²²¹ Some provinces are constitutionally obligated to fund religious schools,

219. [1999] S.C.R. 497.

220. *Id.* at 517.

221. Reference re Bill 30, An Act to Amend the Education Act (Ont.), [1987] S.C.R. 1148.

while others have no such constraint.²²² The fact that different, sometimes contradictory laws are passed by different legal regimes in Canada does not bring the legal system into disrepute. In fact, the respect it enjoys is heightened because the passage of different laws demonstrates a much-needed ability to respond to local circumstances. When one adds to this mix the idea that provincial governments each pass different regulations under identical federal laws when given the responsibility to administer such statutes, these variations are usually applauded because they allow legislators to be sensitive to purely local matters. Few would suggest that such provincial and regional variation is a departure from the principle of one law for all Canadians.²²³

Finally, one might even consider that aside from pre-existing indigenous laws, Canada has long had other laws operating on its soil that do not emanate from central or provincial governments. As Geoff Hall pointed out in his article, there are many different legal regimes operating within the country.²²⁴ For instance, there are extra-territorial applications of criminal law. Many countries have statutes that allow them to prosecute their citizens for crimes committed in another country.²²⁵ Canada has accepted this principle.²²⁶ Canada also recognizes the principle that tax obligations can be incurred to another country, even if one is working in Canada, depending upon the laws of one's country of citizenship.²²⁷ In addition, diplomats possess immunity from the operation of domestic law, and the idea that countries can enjoy sovereign immunity is not an unfamiliar concept.²²⁸ Similarly, admiralty law and military law each contemplate extra-territorial application for their effective operation.²²⁹

222. *Id.*

223. James [Sákéj] Youngblood, *Empowering Treaty Federalism*, 58 SASK. L. REV. 241 (1994).

224. Geoff R. Hall, *The Quest for Native Self-Government: The Challenge of Territorial Sovereignty*, 50 U. TORONTO L. REV. 39 (1992).

225. *Id.* at 45–48.

226. *See* Libman v. R., [1985] S.C.R. 179.

227. Hall, *supra* note 224, at 48–49.

228. *Id.* at 49–52.

229. *Id.* at 55–60.

The point of these examples is to show that sometimes the idea that Canadians live under one law is an overly simplistic view of how legal regimes interact within the country. Even the Criminal Code, a federal statute, is administered differently in each province.²³⁰ There is a great deal of variation between the provinces in their criminal law regimes, despite the common source of their laws.²³¹ The argument that there should be one law for all does not communicate the multiplicity of laws necessary for the functioning of any society. The law in Canada unites uniformity with diversity. While it is appropriate to uphold the idea that this country's laws (including indigenous laws) should be integrated, balanced and harmonized, it is inappropriate to hold the position that the law should be undifferentiated and that the exact same legal principles should apply to everyone in same manner. The existence of local, regional, provincial, common, civil, and indigenous legal traditions are better explained and protected by the realization that differential treatment might be the best mechanism for everyone living together under one law.²³²

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

We spent several years in a distracting debate over whether justice reform involves separate justice systems or reforming the mainstream justice 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 Peoples of control of 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 assumption of 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

230. *Id.* at 45–48.

231. *R v. Turpin*, [1989] S.C.R. 1296, 1297.

232. *See generally* MACKLEM, *supra* note 1.

and violent? These are not problems that Aboriginal communities dealt with traditionally and it will take some time before such 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 cases.²³³

C. Indigenous Law Recognition and Harmonization Acts

In order to recognize and affirm indigenous legal traditions, the Federal Parliament should pass legislation recognizing indigenous laws on their own terms and create mechanisms to harmonize these laws with Canada's other legal traditions. This legislation should be developed jointly with Aboriginal governments and organizations. This law should recognize the inherent rights of indigenous peoples to their legal traditions. It should also protect people and groups against discrimination in the operation of indigenous legal traditions. As such, the law should contain:

- A clause providing 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 stating 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;
- A clause stating that indigenous legal traditions must be consistent with the provisions of the International Declaration of Human Rights to be binding on any person or group;

233. Mary Ellen Turpel, *Reflections on Thinking About Criminal Justice Reform*, in CONTINUING POUNDMAKER AND RIEL'S QUEST 206, 215 (Richard Gosse et al. eds., 1994); see also MATTHIAS R.J. LEONARDY, FIRST NATIONS CRIMINAL JURISDICTION IN CANADA (1998); James Youngblood Henderson, *Implementing Treaty Order*, in CONTINUING POUNDMAKER AND RIEL'S QUEST, *supra*, at 52; Leonard Mandamin et al., *The Criminal Code and Aboriginal People*, U. B.C. L. REV. (SPECIAL ISSUE) 5 (1992); Bruce H. Wildsmith, *Treaty Responsibilities: A Co-relational Model*, U. B.C. L. REV. (SPECIAL ISSUE) 324 (1992).

- A clause noting that the Act would only come into force with the consent of an Aboriginal community and its government.

Though it was never implemented, Australia's Law Reform Commission proposed an Aboriginal Customary Law Recognition Act in its review of indigenous legal traditions in that country.²³⁴ However, many other countries have laws recognizing indigenous legal traditions, such as many Pacific Island states,²³⁵ South Africa,²³⁶

234. LAW REFORM COMM'N (AUSTL.), REPORT NO. 31, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS (1986).

235. 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 (N.Z.), section 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, section 100(3) (until July 27, 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.

The Laws of Kiribati Act 1989, section 4(2) states: "In addition to the Constitution, the Laws of Kiribati comprise— . . . (b) customary law" The Laws of Kiribati Act 1989, schedule 1, paragraph 2 also states: "[C]ustomary 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, article X, sections 1 and 2 state: "Nothing in Article II shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter [I]t shall be the responsibility of the Nitijela . . . to declare, by Act, the customary law in the Marshall Islands." The Constitution of Nauru 1968, section 81 states: "[T]he 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 1978, section 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, Article 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, section 76 and schedule 3, paragraph 3 enacts: "Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands." The Tokelau Amendment Act 1996 (N.Z.) preamble 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 (N.Z.) section 20 states: "[T]he 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, section 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, schedule 1, paragraph 2 states:

[C]ustomary 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 Vanuatu 1980, Article 47(1) 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.” In *Joli v. Joli*, the Vanuatu Court of Appeal found that there was no inconsistency between the English legislation and custom. Under a clause of the Vanuatu Constitution, the laws that 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 laws of general application of England and France, provided, however, that the foreign laws pay sufficient regard to Vanuatu custom. An argument was raised that the English notions of dividing property and adjusting proprietary interests were inconsistent with the custom requirements for succession to land. The court disagreed, thus upholding indigenous law. The Constitution of the Independent State of Papua New Guinea dictates: “(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 the 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*.

236. South African laws 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. S. AFR. CONST. 1996. Sections 211 and 212 read:

(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.

(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.

Id. §§ 211–12. Courts and legislatures have followed 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 by an African against another African within a headman’s area of jurisdiction through an authorized African headman using indigenous law and custom. 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

Peru, Bolivia, Columbia, and Ghana. These laws could be examined to determine appropriate mechanisms to secure indigenous legal traditions while simultaneously protecting human rights.

In addition to a Recognition Act, the Federal Parliament should pass legislation harmonizing indigenous legal traditions with other legal traditions in Canada. The Federal Law-Civil Law Harmonization Act, effective June 1, 2001, is the first in a series of Acts that will harmonize hundreds of federal statutes and regulations.²³⁷ This exercise is part of the Harmonization Program undertaken as a 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. This 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.²³⁸

Principles and structures similar to those found for the harmonization of civil and common laws could be created for indigenous legal traditions. These could be regarded as an equally authoritative and necessary part of Canadian law. An Associate or

court. The Recognition of Customary Marriages Act 120 of 1998 became effective on November 15, 2000. It recognizes marriages negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa.

237. R.S.C., ch. 4 (2001).

238. *Id.*

Assistant Deputy Minister could be responsible for its administration, with resources comparable to those available for dealing with harmonization of the civil law in Canada.

The harmonization process would have to deal with issues of protocol and the power imbalance that indigenous peoples will be concerned with in the identification and implementation of their legal traditions. Some of the issues that would have to be addressed by statute or regulations are:

- The role of Elders;
- Concerns about appropriation and culture property;
- The impact of colonialism on certain indigenous laws;
- The problem of gender stereotyping, discrimination or imbalance; and
- The potential harms certain traditional laws could cause for vulnerable individuals within indigenous communities.

It is important that indigenous legal traditions embrace contemporary human rights concerns. 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 communities without further extending the discriminatory practices and attitudes of earlier imperial policies. This is achieved best if indigenous peoples reformulate their traditions in a manner which respectfully integrates traditional and contemporary normative values and if the government secures protection and harmonization of these laws within the Canadian state.

One of the distinctive features of Canadian law is the ability to work across legal traditions. The fuller recognition of indigenous legal traditions in Canada could give Canadians a degree of expertise in working with and assisting other countries that have mixed legal systems (civil, common and indigenous). Such expertise would allow Canadians to play an even greater role on the world stage as experts in multi-juridicalism. Further, such explicit plurality would provide an even greater range of sources to answer pressing questions faced by Canadians. As Canadian courts draw on the wisdom of many legal traditions, and compare and contrast them, they are more likely

to make decisions that accord with the normative values of their increasingly diverse population.

D. Canadian and Indigenous Legal Institutional Development

The recognition, implementation and harmonization of indigenous legal traditions would involve other Canadian legal institutions. Provincial law societies would play a role in facilitating indigenous legal traditions. In the United States, the recognition of indigenous legal traditions has led to the development and existence of indigenous law societies. The Indigenous Bar Association (IBA) could be developed to take on a governance role in accreditation or coordination of lawyers or other practitioners who may participate in indigenous legal systems. The IBA could be an educational and disciplinary body, as its members would have expertise with most indigenous groups in Canada.

The further recognition and implementation of indigenous legal traditions would also create a greater role for indigenous legal education. The First Nations University of Canada and 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 as well. First Nations law schools or programs would facilitate the dissemination and acquisition of knowledge necessary to implement these traditions. There are numerous other societal initiatives that could be undertaken to support the dissemination and application of indigenous legal traditions throughout the country.

CONCLUSION

Canada's balanced, and somewhat decentralized, federal state is one of the country's great strengths. It facilitates the reconciliation of diversity with unity. It creates the potential for experimentation in the "social laboratory" that each constituent part of our federation encourages.²³⁹ More explicit recognition of indigenous legal

239. K.M. Lysyk, *Reshaping Canadian Federalism*, 13 U. B.C. L. REV. 1, 7 (1979).

traditions could lead to useful experimentation and innovation in solving many of Canada's pressing problems. Furthermore, affirmation of indigenous legal traditions would strengthen democracy in the country by placing decision-making authority much closer to the people within these communities.²⁴⁰ Aboriginal peoples would be better served in Canada's federation if they had the recognition and resources necessary to refine the law in accordance with their perspectives. This is important because central and provincial governments are more remote from Aboriginal peoples, both physically and culturally, and tend to be less responsive to the Aboriginal electorate than would their own governments exercising greater responsibility for their own affairs.²⁴¹ Greater recognition of indigenous legal traditions could provide some counter-weight 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 create difficulties in law and policy.²⁴² Laws dealing with indigenous peoples must take account of the totality of cultural practices and expressions that belong to them.²⁴³ Recognizing and affirming indigenous legal traditions would facilitate the rule of law within indigenous communities as they lived closer to their values and principles. It would enable the exercise of greater responsibility for their affairs, and allow them 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, such an approach would be consistent with their human rights as peoples while ensuring that other's rights were not abrogated. Creating a national framework to facilitate the implementation of indigenous legal traditions would help to ensure

Governments endowed "with both legislative jurisdiction and the wherewithal to exercise it [are] able to pioneer programmes which, if their worth is demonstrated, may commend themselves for adoption elsewhere in the country." *Id.*

240. *Id.* 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." *Id.*

241. See Borrow, *Stewardship and the First Nations Governance Act*, *supra* note 186.

242. HEATHER MCRAE ET AL., *INDIGENOUS LEGAL ISSUES: COMMENTARY AND MATERIALS* 380 (2003).

243. TERRI JANKE, *OUR CULTURE, OUR FUTURE: REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY* 77–78 (1998).

that non-indigenous rights and interests are also respected. It is easier to envision fairer and more effective laws when rights are determined on more even playing field, with greater indigenous influence and participation.

The proposals outlined in this paper are directed at creating laws and institutions that will find an appropriate balance between the interests of recognizing and respecting indigenous cultural, political, economic and social integrity and the interests of society as a whole.²⁴⁴ The paper advocates formal indigenous participation in dispute resolution because there are problems in treating questions about indigenous knowledge as a discrete, de-contextualized subject of inquiry to be used and judged by other normative systems, rather than treating it as an active system that contains its own values, norms, uses, standards, criteria and principles for the use of such knowledge.

To avoid this difficulty, indigenous intellectual methodologies that express indigenous legal concepts must be embedded in the very structure of indigenous dispute resolution.²⁴⁵ Aboriginal vantage points should form part of an appropriate balance from a rights perspective when judging issues of indigenous legal traditions. This paper has tentatively suggested ways in which indigenous norms could provide criteria for such judgment. As indigenous normative concepts are extended into dispute resolution regimes at the local, provincial and national level, a greater range of options will be available to tailor solutions that fit particular issues and disputes. This is consistent with the *sui generis* approach to judging indigenous rights outlined by the Supreme Court of Canada.²⁴⁶ It would also 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

244. The wider context of this issue is discussed in a non-indigenous context in G. BRUCE DOERN & MARKUS SHARAPUT, *CANADIAN INTELLECTUAL PROPERTY: THE POLITICS OF INNOVATING INSTITUTIONS AND INTERESTS* (2000).

245. See LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* (1999), for an excellent discussion of how indigenous peoples can reclaim their own research methodologies.

246. *R v. Van der Peet*, [1996] S.C.R. 507.

dissimilar 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 aboriginal rights will incorporate both legal perspectives.²⁴⁷

247. *Id.* at 547.