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# *With or Without You: First Nations Law (in Canada)*

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John Borrows\*

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Much of the history of Canadian law on Aboriginal rights can be viewed as a contest between the principles of First Nations, English, American, and international legal regimes. As a result, First Nations law has often been overlooked by Canadian courts because of its perceived incompatibility with and inferiority to the Common law. The author criticizes this approach to the development of Aboriginal rights jurisprudence as dismissive of the continuing presence of Aboriginal law. He urges Canadian courts to make explicit use of First Nations law in the resolution of Aboriginal rights disputes.

Part I reviews Canadian caselaw to demonstrate that courts have already implicitly recognized the legitimacy of First Nations law in the settlement of disputes over Aboriginal issues. The Supreme Court of Canada, for example, has acknowledged the continuing existence of First Nations principles despite the strong influence of European-based law. In Part II, the author attempts to demonstrate the validity and flexibility of First Nations law (particularly with regard to environmental law) to illustrate how it can be articulated in a manner that can be recognized by non-Aboriginals and by the courts as law.

Finally, the author concludes that the driving force behind the further development of Aboriginal rights jurisprudence in Canadian law is in the hands of First Nations and non-Aboriginals alike. He contends that the answer lies partly in better education and partly in further and more explicit use of First Nations law by lawyers and courts, both in Canada and abroad. In this way, Aboriginal law in Canada will be recognized for what it is: a dynamic, relevant, and integral part of Canadian law.

L'histoire du droit canadien des questions autochtones peut, en grande partie, être envisagée comme un conflit entre les principes des systèmes juridiques anglais, américain, international et des Premières nations. Par conséquent, les tribunaux canadiens ont souvent négligé de prendre en compte le droit des Premières nations, le jugeant incompatible avec la *common law* et estimant qu'il lui était inférieur. L'auteur critique cette approche au développement jurisprudentiel des droits autochtones car elle rejette la présence constante du droit autochtone. Il recommande fortement aux tribunaux canadiens de résoudre les conflits portant sur les droits autochtones en faisant un usage explicite du droit des Premières nations.

Dans la première partie de l'article, l'auteur fait un compte rendu de la jurisprudence canadienne pour démontrer la reconnaissance implicite de la légitimité du droit des Premières nations dans la résolution des questions autochtones. La Cour suprême du Canada, par exemple, a reconnu l'existence constante de principes autochtones, malgré l'influence importante du droit d'origine européenne.

Dans la deuxième partie, l'auteur tente de démontrer la validité et la flexibilité du droit des Premières nations (notamment en ce qui a trait au droit de l'environnement) pour illustrer comment il peut être exprimé afin d'être reconnu par les non-autochtones et les tribunaux.

L'auteur conclut que le développement jurisprudentiel des droits autochtones au Canada dépend autant des Premières nations que des non-autochtones. Il soutient que la question ne pourra se résoudre que si l'on améliore l'éducation à ce sujet et que si les avocats et les juges font un usage continu et explicite du droit des Premières nations. Ainsi seront reconnues les qualités réelles du droit autochtone au Canada : un droit dynamique, pertinent et faisant partie intégrante du droit canadien.

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*Synopsis*

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[*Neesh-wa-swi'ish-ko-day-kawn arose and*] said:

*"In the time of the Seventh Fire an Osh-ki-bi-ma-di-zeeg' (New People) will emerge. They will retrace their steps to find what was left by the trail. ...*

...

*"The task of the new people will not be easy.*

*"If the new people remain strong in their quest, the Waterdrum of the Midewiwin Lodge will again sound its voice. There will be a ... rekindling of old flames. The Sacred Fire will again be lit.*

*"It is at this time that the Light-skinned Race will be given a choice between two roads. If they choose the right road, then the Seventh Fire will light the Eighth and Final Fire — an eternal Fire of peace ... If the Light-skinned Race makes the wrong choice of roads ..."*<sup>1</sup>

E. Benton-Banai

## Introduction

There are over one million people of First Nations ancestry in what is now called Canada. These people are variously known as the "Indigenous", "Aboriginal" or "Native" peoples of North America<sup>2</sup> and include, among others, the ancient and contemporary Nations of the Metis, MicMac, Cree, Anishinabe, Haudenosaunee, Dakota, Shuswap, Salish, Haida, Dene and Innu.<sup>3</sup> Their descent can be traced back through

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<sup>1</sup> Quoted in E. Benton-Banai, *The Mishomis Book* (Hayward, Wisc.: Indian Country Communications, 1988) at 91-93.

<sup>2</sup> See A. McMillan, *Native Peoples and Cultures of Canada* (Toronto: Douglas & McIntyre, 1988) at 1. For more detailed statistical information about First Nations, see: M.A. Reddy, *Statistical Record of Native North Americans* (Washington, D.C.: Gale Research, 1993); R. Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (Norman, Okla.: University of Oklahoma Press, 1987).

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

<sup>3</sup> For the most part, Aboriginal peoples are as historically different from one another as are other races and cultures. For example, Canadian Indigenous peoples speak over 50 different Aboriginal languages, from one of 12 distinct language families. These language families have as wide a variation as do those of Europe and Asia. A summary overview of the distinctiveness of First Nations in different Canadian regions is found in R.B. Morrison & C.R. Wilson, eds., *Native Peoples: The Canadian Experience*, 2d ed. (Toronto: McClelland & Stewart, 1992).

millennia and to different regions or territories in northern North America.<sup>4</sup> In these geographic spaces, First Nations peoples developed spiritual, political and social customs and conventions to guide their relationships<sup>5</sup> and these became the foundation for many complex systems of law.<sup>6</sup> Contemporary Canadian law concerning Aboriginal peoples partially originates in, and is extracted from, these legal systems.<sup>7</sup>

Canadian law concerning First Nations also finds its source in British and U.S. Common law and, to a lesser extent, in international law.<sup>8</sup> These sources are similarly grounded in complex spiritual, political and social customs and conventions, namely those of European nations.<sup>9</sup> In Canadian jurisprudence, unique and distinctive Euro-

<sup>4</sup> For an excellent textual and pictorial representation of the pre-contact geographic spaces that First Nations peoples occupied in Canada, see R.C. Harris, ed., *Historical Atlas of Canada I: From the Beginning to 1800* (Toronto: University of Toronto Press, 1987).

<sup>5</sup> A representative description of one culture's (Gitksan and Wet'suwet'en) societal conventions is found in G. Wa & D. Uukw, *The Spirit in the Land* (Gabriola Island, B.C.: Reflections Press, 1992).

<sup>6</sup> Each First Nation has its own unique ceremonies and formalities to renew, celebrate, transfer or abandon its legal relationships. The ceremonies of the Potlatch on the west coast could create entirely different legal relationships from the Sundance of the prairies, or the Midiewin and/or False Face society of central Canada. Furthermore, each Aboriginal Nation has its own particular stories which categorize its legal relationships to the different orders of Creation, and each group's stories differ according to its own history, material needs, spiritual alignment or social structure. Clearly, then, different Aboriginal Nations had, and continue to have, their own unique cultural approaches to their rights.

Comments on First Nations law include: B. Morse & G. Woodman, eds., *Indigenous Law and the State* (Providence: Foris, 1988); M. Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 *Osgoode Hall L.J.* 605. For a contrary view, see: R.F. McDonnell, "Contextualizing the Investigation of Customary Law in Contemporary Native Communities" (1992) 34 *Can. J. Crim.* 299; *Delgamuukw v. British Columbia (A.G.)* (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.) [hereinafter *Delgamuukw* (B.C.S.C.) cited to D.L.R.]: "What the Gitksan and Wet'suwet'en witness[es] describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves" (*ibid.* at 447). For criticism of this view, see M. Asch, "Errors in *Delgamuukw*: An Anthropological Perspective" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C. & Montreal: Oolichan Books, 1992) 221. For a fuller description of Wet'suwet'en law, see A. Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts and Land Claims* (Vancouver: University of British Columbia Press, 1994).

<sup>7</sup> For cases that find First Nations law being received into Canadian law, see: *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Sup. Ct.) [hereinafter *Connolly* cited to R.J.R.Q.], *aff'd (sub. nom. Johnstone v. Connolly)* (1869), 1 C.N.L.C. 151, 17 R.J.R.Q. 266 (Q.B.); *R. v. Nan-e-quis-a Ka* (1889), 1 Terr. L. R. 211 (C.A.); *R. v. Bear's Shin Bone* (1899), 3 C.C.C. 329 (N.W.T.S.C.); *Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686 (N.W.T.Terr.C.); *Re Kitchoalik*, [1972] 5 W.W.R. 203, 28 D.L.R. (3d) 483 (N.W.T.C.A.) [hereinafter *Tucktoo*]; *Michell v. Dennis*, [1984] 2 C.N.L.R. 91, 51 B.C.L.R. 27 (S.C.); *Casimel v. Insurance Co. of British Columbia* (1991), [1992] 1 C.N.L.R. 84, 58 B.C.L.R. (2d) 316 (S.C.); *Vielle v. Vielle*, [1993] 1 C.N.L.R. 165 (Alta. Q.B.).

<sup>8</sup> For a useful discussion of how courts apply these different European sources of law in First Nations jurisprudence, see S. Grammond, "Aboriginal Treaties and Canadian Law" (1994) 20 *Queen's L.J.* 57.

<sup>9</sup> The creation of legal meaning — *jurisgenesis* — always takes place through an essentially cultural medium (see R.M. Cover, "Foreword: Nomos and Narrative" (1983) 97 *Harv. L. Rev.* 11). An informative collection of essays which explores the "cultural creation of legal meaning" has been edited by R. Post, ed., *Law and the Order of Culture* (Los Angeles: U.C.L.A. Press, 1991).

pean customs have sometimes been applied to First Nations as if there were no differences between the cultures.<sup>10</sup> More disturbingly, Canadian law has often been applied on the assumption that First Nations cultures were inferior to European laws and culture.<sup>11</sup> Although these approaches have often obscured First Nations legal systems,<sup>12</sup> many Aboriginal customs and conventions were, in fact, incorporated into Canadian law.

Much of the history of Canadian law concerning Aboriginal peoples can be seen as a contest between ideas rooted in First Nations, English, U.S. and international legal regimes.<sup>13</sup> The intersection of these various legal genealogies is sometimes portrayed as a conflict, in which one source of law is incompatible with, or should gain pre-eminence over, the others.<sup>14</sup> In such instances, the Aboriginal source of law is generally not applied because of its perceived incompatibility with,<sup>15</sup> or supposed inferiority within, the legal hierarchy.<sup>16</sup>

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<sup>10</sup> There are many examples in Canadian caselaw of how First Nations cultures and associated rights are often undifferentiated from the culture and rights of the general Canadian populations (see e.g.: *R. v. Jack*, [1985] 2 S.C.R. 332 at 344, 21 D.L.R. (4th) 641, where the Court inappropriately expected that the Coast Salish people could use frozen deer meat for their sacred religious ceremonies; *Pawis v. R.* (1979), [1980] 2 F.C. 18, 102 D.L.R. (3d) 602 (T.D.) [hereinafter cited to F.C.], where the Court erroneously treated promises to preserve Ojibway culture, and associated treaty rights, as "tantamount to a contract" between private individuals (see *ibid.* at 25).

<sup>11</sup> See e.g. *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 313, 50 C.C.C. 389 (N.S.Co.Ct.) where Patterson J. held that the MicMac were "uncivilized" peoples and, thus, incapable of exercising sovereignty. For an excellent discussion of how Common law and international legal doctrines have treated First Nations as inferior and permitted their dispossession, see R.A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1989).

<sup>12</sup> The arbitrary treatment of First Nations cultures as selectively similar to and different from non-Native people has often obscured Aboriginal legal sources in the formulation of Canadian law. Professor Patrick Macklem has written of this tendency to employ selective notions of similarity and difference in law concerning First Nations cultures:

Native difference is denied where its acceptance would result in the questioning of basic premises concerning the nature of property, contract, sovereignty or constitutional right. Native difference is acknowledged where its denial would achieve a similar result (P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 at 392 [hereinafter "First Nations Self-Government"]).

<sup>13</sup> See J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. [forthcoming].

<sup>14</sup> The contested origins of legal principles in Aboriginal rights jurisprudence are described in: K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); B. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1990).

<sup>15</sup> Recent caselaw from British Columbia has held that in the case of conflict between Aboriginal laws and Canadian laws, the latter will prevail (see *Delgamuukw* (B.C.S.C.), *supra* note 6 at 453, accepted in *R. v. Williams* (1994), [1995] 2 C.N.L.R. 229 at 231-33 (B.C.C.A.)).

<sup>16</sup> Two of the most important cases in Canadian jurisprudence concerning First Nations issues have stated that Crown law and interests were paramount (see *St. Catherines Milling and Lumber Co. v. R.* (1888), 14 A.C. 46 at 55, 4 Cart. B.N.A. 107 (P.C.) [hereinafter *St. Catherines*]; *R. v. Sparrow*, [1990]

It is unnecessary, however, for courts to approach the interpretation of Aboriginal laws in this manner. The Supreme Court of Canada has defined Aboriginal rights in such a way that these various sources can often be harmonized and need not obstruct each other. As Professor Brian Slattery has pointed out, Canadian law applying to First Nations is an autonomous body of law, not fully bound to any one of the above legal systems. It “bridges the gulf” between First Nations and European legal systems by embracing each without forming a part of any.<sup>17</sup> While it is true that legal doctrines from Britain, the United States and the international community (or, for that matter, First Nations) have influenced the development of Canadian law, the body of caselaw dealing with Aboriginal issues is, in the end, “indigenous” to Canada.<sup>18</sup> Thus, while Canadian law dealing with First Nations may be inspired by legal notions from various Aboriginal and non-Aboriginal cultures,<sup>19</sup> it is also an amalgam of many different legal orders.<sup>20</sup> It is, therefore, incumbent upon Canadian judges to draw upon First Nations legal sources more often and more explicitly in order to assist them in deciding Aboriginal issues.

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1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.]. For example, despite intimations to the contrary the Court in *Sparrow* found: “[T]here was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown” (*ibid.* at 1103). For an excellent critique of these conclusions, see M. Asch & P. Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991) 29 *Alta. L. Rev.* 498.

<sup>17</sup> B. Slattery, “Understanding Aboriginal Rights” (1987) 66 *Can. Bar Rev.* 727 at 733.

<sup>18</sup> J. Woodward, *Native Law* (Toronto: Carswell, 1990), has noted the uniquely domestic origins of Native law:

Canadian courts increasingly are called upon to interpret and enforce the rights and powers of native peoples in Canada. The unique nature of these rights and powers requires an understanding of their origins as well as expertise in treading the labyrinthine paths of the Indian Act. These origins are truly indigenous, unlike other Canadian legal principles (Woodward, *ibid.* at “Preface”).

See also *Native Communications Society of British Columbia v. Canada* (M.N.R.), [1986] 3 F.C. 471, [1986] 4 C.N.L.R. 79 (C.A.). For a supporting argument, see B. Slattery, “The Independence of Canada” (1983) *Supreme Court L.R.* 369.

<sup>19</sup> See *Delgamuukw v. British Columbia* (A.G.) (1993), 104 D.L.R. (4th) 470, 30 B.C.A.C. 1, var’g *Delgamuukw* (B.C.S.C.), *supra* note 6 [hereinafter *Delgamuukw* (B.C.C.A.) cited to D.L.R.], where Wallace J.A. states:

One must not be asked to drop all Western legal thought at the door in identifying aboriginal rights and characterizing their content and implications. They are unique. That does not mean that useful comparison and analogy is impossible. After all, these rights receive their recognition and protection through the common law (*Delgamuukw* (B.C.C.A.), *ibid.* at 572).

<sup>20</sup> For example, the Supreme Court of Canada recognized that pre-existing Aboriginal rights form a part of the “laws of Canada” in *Roberts v. Canada* (A.G.), [1989] 1 S.C.R. 322, [1989] 2 C.N.L.R. 146 [hereinafter *Roberts* cited to S.C.R.]. In this case, Madam Justice Wilson held: “[T]he question for us, therefore, is whether the law of aboriginal title is federal common law. ... I believe that it is. ... [T]his Court recognized aboriginal title as a legal right derived from the Indians’ historic occupation and possession of their tribal lands ... and [which] pre-dated colonization” (*ibid.* at 340).

This paper describes how Canadian jurisprudence on Aboriginal issues compels the courts to analogize and apply principles from First Nations law. It also reveals the content of contemporary First Nations law and explores how this law can be more fully received into the Canadian legal framework. Part I of this article reviews Canadian caselaw to demonstrate that in formulating legal principles on Aboriginal rights, the courts have recognized First Nations law to be a legitimate legal source. This is done by adopting a standpoint<sup>21</sup> that takes into account the survival and persistence of First Nations legal principles despite the constraints of Canadian law.<sup>22</sup> First Nations rights, after all, have not been extinguished, even under the most oppressive weight of western legal control.<sup>23</sup> Part II of this paper demonstrates that there are sources of First Nations law that are similar to European-based law. For example, First Nations environmental law, as it exists in Aboriginal communities, can be articulated so as to apply to disputes before Canadian courts. Part III demonstrates that there are mechanisms currently in place that allow for the communication, interpretation, reception and application of First Nations law.

## I. Taking the Court ... Seriously: Sources of Law in Canadian Aboriginal Rights Jurisprudence

The fact that Aboriginal and non-Aboriginal sources form a part of Canadian law as applied to First Nations was recognized from the outset.<sup>24</sup> Aboriginal rights have

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<sup>21</sup> The significance of perspective in examining First Nations rights is developed more fully in J. Borrows, "Constitutional Law From a First Nation Perspective: Self-government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 [hereinafter "First Nation Perspective"].

<sup>22</sup> Chief Blaine Favel of the Federated Saskatchewan Indian Nations wrote about the continued existence of dispute resolution in First Nations:

The intention of our grandfathers was not to relinquish power over internal dispute-resolution. This power is tied to the wellbeing of future generations. It is inconceivable that the power to pass on cultural values and enforcement mechanisms for proper behaviour was ever relinquished with consent (B. Favel, "First Nations Perspectives of the Split in Jurisdiction" in R. Gosse, J.Y. Henderson, & R. Carter, eds., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich, 1994) 136 at 138).

See also J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291.

<sup>23</sup> See Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communications Group, 1993). First Nations rights continued to exist despite intrusive interference on the part of the government. This was confirmed in *Sparrow*, *supra* note 16: "That the right is controlled in great detail ... does not mean that the right is thereby extinguished" (*ibid.* at 1097).

<sup>24</sup> In the first year of Canada's confederation as a Dominion, the Quebec Superior Court noted:

[W]ill 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 aboriginal occupants? In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives (*Connolly*, *supra* note 7 at 79).

been called, among other things, pre-existing,<sup>25</sup> customary,<sup>26</sup> *sui generis*,<sup>27</sup> unextinguished<sup>28</sup> and beneficial.<sup>29</sup> These designations illustrate that Canadian law dealing with Aboriginal peoples draws upon First Nations law in giving meaning to the content of Aboriginal rights.<sup>30</sup> In these instances, the Canadian law's use of First Nations legal sources is due to the unextinguished continuity of those pre-existing legal relationships. Since the Common law did not alter First Nations law, Aboriginal customs and conventions give meaning and content to First Nations legal rights.

Nevertheless, a parallel line of cases has also discounted the idea that First Nations legal sources have much place in Canadian law concerning Aboriginal peoples.<sup>31</sup> Under

<sup>25</sup> See *Guerin v. R.*, [1984] 2 S.C.R. 335 at 378-79, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.].

<sup>26</sup> See: *Re Indian Custom Adoptions; Re Beaulieu's Petition* (1969), 67 W.W.R. 669 (N.W.T.Terr.Ct.); *Tucktoo*, *supra* note 7; *Re Wah-Shee* (1975), 21 R.F.L. 156 (N.W.T.S.C.). Custom is an exception to the general principle that the Common law is homogeneous and universal; it gives rise to rights that prevail over those that flow from the Common law generally (see: *Hammerton v. Honey* (1876), 24 W.R. 603; *Lockwood v. Wood*, [1844] 6 Q.B. 50 at 64, [1843-60] All E.R. Rep. 415; *New Windsor Co. v. Mellor*, [1975] 1 Ch. 380 at 387, 3 All E.R. 44 (C.A.); *Champneys v. Buchan* (1857), 4 Drew. 41, 62 E.R. 41).

<sup>27</sup> See *Delgamuukw* (B.C.C.A.), *supra* note 19, where Lambert J.A. states: "[I]t is not only aboriginal title to land that is *sui generis*, all aboriginal rights are *sui generis*" (*ibid.* at 644).

<sup>28</sup> See: *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 401, 34 D.L.R. (3d) 145, Hall J. (dissenting) [hereinafter *Calder* cited to S.C.R.], quoting *Calder v. British Columbia (A.G.)* (1970), 13 D.L.R. (3d) 64 at 95 (B.C.C.A.); *Delgamuukw* (B.C.C.A.), *ibid.* at 520-39, quoting *United States v. Santa Fe Pacific Railway*, 314 U.S. 339 at 354, 86 L. Ed. 260 (1941)). The Supreme Court of Canada has also declared that "existing means unextinguished", and that the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time" (*Sparrow*, *supra* note 16 at 1093).

<sup>29</sup> See: *Canada (A.G.) v. Giroux* (1916), 53 S.C.R. 172, 30 D.L.R. 123; *Western Industrial Contractors Ltd. v. Sarcee Developments Ltd.* (1979), 15 A.R. 309, 98 D.L.R. (3d) 424 (C.A.); *Miller v. R.* (1949), [1950] S.C.R. 168, [1950] 1 D.L.R. 513.

<sup>30</sup> The Australian High Court has also recognized that the Common law draws on Aboriginal legal sources:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs (*Mabo v. Queensland* (1992), 107 A.L.R. 1 at 42, 175 C.L.R. 1 (H.C.) [hereinafter *Mabo* cited to A.L.R.]).

For discussion on this case, see: M.A. Stephenson & S. Ratnapala, eds., *Mabo: A Judicial Revolution* (St. Lucia, Queensland: University of Queensland Press, 1993); R.H. Barlett, *The Mabo Decision: Commentary and Text* (Toronto: Butterworths, 1993). The *Mabo* decision was subsequently confirmed through legislation (see *Native Title Act 1993* (Aus.), 1993, No. 110).

<sup>31</sup> See: J.H. Smith, ed., "The Mohegan Indians v. Connecticut" in *Appeals to the Privy Council from the American Plantations* (New York: Octagon Books, 1965) 442; *Sheldon v. Ramsay* (1852), 9 U.C.Q.B. 105 at 133-34; *British Columbia (A.G.) v. Canada (A.G.)*, [1906] A.C. 552 at 554-55 (P.C.), applied in *Delgamuukw* (B.C.S.C.), *supra* note 6; *Sero v. Gault* (1921), 50 O.L.R. 27 at 31-33, 64 D.L.R. 327 (H.C.); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 75 S. Ct. 313 (1955); *Isaac v. Davey* (1974), 5 O.R. (2d) 610 at 620, 51 D.L.R. (3d) 170 (C.A.), *aff'd* [1977] 2 S.C.R. 897, 77



these formulations, Aboriginal rights have been labelled as personal, usufructuary and "dependent on the goodwill of the Sovereign".<sup>32</sup> In these instances, Canadian law has been more attentive to non-Aboriginal legal sources that considered First Nations legal rights as emanating only from the Sovereign.<sup>33</sup> As a result, the protection of Aboriginal customs and conventions have often been interpreted as being dependent on some positive executive or legislative affirmation.

Historically, Canadian courts overly relied on non-Aboriginal sources and on the resulting characterization of Aboriginal rights, at the expense of First Nations legal sources. This resulted in very little protection for Indigenous peoples.<sup>34</sup> Aboriginal land rights were obstructed,<sup>35</sup> treaty rights repressed<sup>36</sup> and sovereign rights constricted;<sup>37</sup> this judicial discourse narrowed First Nations social, economic and political power.<sup>38</sup>

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D.L.R. (3d) 481; *Milirrpum v. Nabalco Pty. Ltd.* (1971), [1972-1973] A.L.R. 65, 17 F.L.R. 141 (N.T.S.C.); *Delgamuukw* (B.C.C.A.), *supra* note 19 at 577.

During the period of Canadian law's disregard of Aboriginal rights, First Nations laws continued because of the strength, principles and practices of Aboriginal communities (see *e.g.*: D. Cole & I. Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990); K. Pettipas, *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994)). In this period, First Nations were able to preserve their laws and rights in spite of the Common law.

<sup>32</sup> Specifically, the Court held:

[T]he tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. ... [T]here has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title (*St. Catherine's*, *supra* note 16 at 54-55).

See also: *Smith v. R.*, [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237; *Quebec (A.G.) v. Canada (A.G.)*, [1921] 1 A.C. 401 at 410-11, 56 D.L.R. 373 (P.C.).

<sup>33</sup> See *St. Catherine's*, *ibid.*

<sup>34</sup> See: P. Kulchyski, *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994); P. Mallea, *Aboriginal Law: Apartheid in Canada?* (Brandon, Man.: Bearpaw, 1994); T. Berger, *A Long and Terrible Shadow: White Values and Native Rights in the Americas* (Toronto: Douglas & McIntyre, 1991).

<sup>35</sup> See: Royal Commission on Aboriginal Peoples, *The High Arctic Relocation*, vols. 1, 2 (Ottawa: Canada Communications Group, 1994); G.S. Lester, "Aboriginal Land Rights: Some Remarks Upon the Ontario Lands Case (1885-1888)" (1988) 13 Queen's L.J. 132; P. Chartrand, "Aboriginal Rights: The Dispossession of the Metis" (1991) 29 Osgoode Hall L.J. 457; K. McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginal?" (1990) Monash U. L. Rev. 91.

<sup>36</sup> See: J. Borrows, "Negotiating Treaties and Land Claims: The Impact of Diversity within First Nations Property Interests" (1992) 12 Windsor Y.B. Access Just. 179; S. Harring, "The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law" (1992) 56 Sask. L. Rev. 297.

<sup>37</sup> See G. Erasinus & J. Sanders, "Canadian History: An Aboriginal Perspective" in D. Engelstad & J. Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord, Ont.: Anansi Press, 1992) 3. See generally: F. Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.

First Nations legal sources and their derivative rights need not be obscured. First Nations and non-Native legal principles can be consistent<sup>39</sup> and co-exist without conflict.<sup>40</sup> It is true that the caselaw does not often reveal instances of compatibility. However, this is largely because judicial decisions deal with disputes where the parties cast their arguments in adversarial language to convince the court that their right prevails. This oppositional paradigm conceals the broader context in which Aboriginal and non-Aboriginal laws generally co-exist. Perhaps unconsciously, the Supreme Court of Canada reconciled this “appearance of conflict”<sup>41</sup> by simultaneously referring to Aboriginal rights as pre-existing and personal and usufructuary. The Court noted in *Guerin*:

It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it [as] a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law.<sup>42</sup>

The Court found that different descriptions of Aboriginal rights were apparently inconsistent because the courts used inappropriate terminology and incorrect legal categories to describe those rights. Dickson C.J.C. observed that compatibility between the Crown’s interests and Native law and title would be more obvious if the judiciary did not use the conventional terminology and categories of Canadian law to describe Abo-

& Montreal: Oolichan Books, 1991); B. Richardson, ed., *DrumBeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989).

<sup>38</sup> For articles that have assessed the effect of judicial interpretation on different aspects of First Nations rights, see: M. Asch & C. Bell, “Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*” (1993-94) 19 *Queen’s L.J.* 503; “First Nations Self-Government”, *supra* note 12; B. Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) 36 *McGill L.J.* 308; M.-E. Turpel, “Home/Land” (1991) 10 *Can. J. Fam. L.* 17; L.H. Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991); R. Riddington, “Cultures in Conflict: The Problem of Discourse” in W.H. New, ed., *Native Writers and Canadian Writing* (Vancouver: University of British Columbia Press, 1990) 273; J. Ryan & B. Ominayak, “The Cultural Effects of Judicial Bias” in K. Mahoney & S. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1989) 346; L. Mandell, “Native Culture on Trail” in Mahoney & Martin, eds., *ibid.*, 358.

<sup>39</sup> In *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487 [hereinafter *Paul* cited to S.C.R.], the Court held that “it would be inconsistent to hold that possession through the Crown could be claimed in order to divest the Indians of an interest which the Crown holds for their benefit” (*ibid.* at 673 [emphasis added]).

<sup>40</sup> Even an interest in land as great as fee simple may be compatible with Aboriginal laws and title:

A fee simple grant of land does not necessarily exclude aboriginal use. Uncultivated, unfenced, vacant land held in fee simple does not necessarily preclude the exercise of hunting rights ... Two or more interests in land less than fee simple can co-exist (*Delgamuukw* (B.C.C.A.), *supra* note 19 at 532 [references omitted]).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Guerin*, *supra* note 25 at 382.

original rights. As such, the Court held that, in general, Aboriginal and non-Aboriginal legal sources were consistent with each other and could operate together.

Of course, finding consistency between Aboriginal and non-Aboriginal interests in general does not address the real issue of which of the two laws should prevail if they are found incompatible. While this paper focuses on the often neglected instances where Crown and Aboriginal legal sources are compatible, it is also important to note that the Supreme Court has held that, in the event of conflict (barring exceptional circumstances),<sup>43</sup> existing First Nations sources should receive "top priority".<sup>44</sup> Furthermore, if Aboriginal and non-Aboriginal interests are inconsistent, this suggests ambiguity in the interpretation of each right. Ambiguity or uncertainty in a matter concerning Aboriginal rights requires that they be "construed in a purposive way"<sup>45</sup> and be given "generous, liberal"<sup>46</sup> and "remedial interpretation",<sup>47</sup> and that "doubtful expressions [be] resolved in favour of the Indians".<sup>48</sup> Under such tests, therefore, First Nations laws should receive substantial protection from conflicting non-Aboriginal laws.<sup>49</sup> In fact, the Court in *Guerin*, despite recognizing consistency between First Nations and Crown interests, did not close its eyes to possible conflict in some instances. In the event of such a conflict, the Court ruled that the Crown's interest should yield to the Indians.<sup>50</sup> However, as the Court was suggesting, First Nations and non-Aboriginal legal sources are generally compatible when inappropriate terminology and categories of law are removed.

Since the pre-existing rights of First Nations can often function alongside western legal principles, the task for the courts is to find more appropriate terminology to describe Aboriginal rights. Ultimately, this requires recognizing a category in Canadian

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<sup>43</sup> The Court recently justified interference with Aboriginal rights on the premise that:

There is no explicit language in [s. 35(1) of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" ... are not absolute (*Sparrow, supra* note 16 at 1109).

<sup>44</sup> *Sparrow, ibid.* at 1116.

<sup>45</sup> *Ibid.* at 1106.

<sup>46</sup> *Ibid.*

<sup>47</sup> *R. v. Sparrow* (1986), 36 D.L.R. (4th) 246 at 268, 98 B.C.L.R. (2d) 300 (B.C.C.A.), aff'd in *Sparrow, ibid.*

<sup>48</sup> *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at 36, 144 D.L.R. (3d) 193, cited in *Sparrow, ibid.* at 1107.

<sup>49</sup> But see *R. v. Howard*, [1994] 2 S.C.R. 299, 115 D.L.R. (4th) 312, for a potential retreat from principles of liberal interpretation in First Nations jurisprudence. For a critique of this, see J. Bakan *et al.*, "Developments in Constitutional Law: The 1993-1994 Term" (1995) 6 Supreme Court L.R. 67 at 83-89.

<sup>50</sup> Dickson J. considered the possibility of conflict and wrote that in such circumstances: "The Crown ... should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed" (*Guerin, supra* note 25 at 388). Wilson J. stated the point more strongly: "The Bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree" (*ibid.* at 349).

law that would receive First Nations law. The judiciary has taken steps in this regard by noting that First Nations law protects "*sui generis* interests".<sup>51</sup> In defining Aboriginal rights as unique, the judiciary has acknowledged that it cannot use conventional Common law doctrines alone.<sup>52</sup> Other factors, such as Aboriginal conceptions of the right at stake,<sup>53</sup> should also be considered in the formulation of First Nations rights.

By referring to First Nations rights as *sui generis*, the Court describes them as "deriv[ing] from the Indian's historic occupation and possession of their tribal lands".<sup>54</sup> This interpretation accounts for the fact that "when the settlers came, the Indians were there, *organized* in societies and occupying the land as their forefathers had done for centuries".<sup>55</sup> Under these formulations, the manner through which First Nations organized themselves, "with a legal as well as just claim to retain possession of [their territory], and to use it according to their own discretion",<sup>56</sup> "remained unaffected" by conflicting British claims.<sup>57</sup> This pre-existing organization of First Nations communities is integral to their occupation and possession of land. Since First Nations organization and occupation of land is dependent on the existence of First Nations law, this law is, by extension, the foundation for other Aboriginal rights. The fact that the *sui generis* interest in land has valid roots in Aboriginal law means that this law necessarily forms a part of the contemporary meaning of Aboriginal rights. These rights are not defined by general categories of the Common law and are "not inferior to or lesser than any

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<sup>51</sup> For example, the Court in *Guerin* found:

[T]he *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown (*Guerin, ibid.* at 382).

The phrase *sui generis* seems to have first been used in this context in a student Note published in July 1984, commenting on a U.S. case. The Note was published a few months before the *Guerin* decision was released (see K.T. Ellwanger, "Money Damages for the Breach of the Federal-Indian Trust Relationship After Mitchell II" (1984) 59 Wash. L. Rev. 675 at 687). See also R. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask. L. Rev. 301 at 317.

<sup>52</sup> For example, as Judson J. observed: "[I]t does not help one in the solution of this problem" to characterize Aboriginal title as a personal and usufructuary right" (*Calder, supra* note 28 at 328).

<sup>53</sup> See *Sparrow, supra* note 16 at 1112. Taking the perspective of Aboriginal peoples themselves allows for the incorporation of Aboriginal perspectives and principles as part of the law's formulation. The inclusion of Aboriginal legal principles is possible because, as mentioned, the *sui generis* concept overarches and embraces both First Nations and Common law legal systems. This is an important clarification of Canadian law dealing with Aboriginal peoples. Sensitivity to the Aboriginal perspective suggests that domestic law may be of increasing value for First Nations people in clarifying their rights, because it can take account of legal concepts that are not derived from general European categories of law. Legal interpretation under this test stems from a perspective that is more consistent with the First Nations' understanding of the right at stake.

<sup>54</sup> *Guerin, supra* note 25 at 376.

<sup>55</sup> *Calder, supra* note 28 at 328 [emphasis added].

<sup>56</sup> *Johnson v. McIntosh*, 21 U.S. 542 at 570, 5 L. Ed. 681 (1823), Marshall C.J. [hereinafter *McIntosh* cited to U.S.], quoted in *Guerin, supra* note 25 at 378.

<sup>57</sup> *McIntosh, ibid.*, cited in *Guerin, ibid.*

other class or category" of law.<sup>58</sup> They are "independent legal interests", inherent orders of legislation — not delegated nor a result of colonial proclamations.<sup>59</sup> Because Aboriginal legal systems of occupancy were uninterrupted and unaltered by the reception of the Common law,<sup>60</sup> there has been a continuity of First Nations legal relationships "in the lands they traditionally occupied prior to European colonization [which] both pre-dated and survived the [non-Native] claims to sovereignty".<sup>61</sup> Thus, the *sui generis* description of Aboriginal rights expresses this continuity.

Although the term "*sui generis*" only recently appeared in Canadian jurisprudence, this does not mean that the doctrine has only recently come into existence.<sup>62</sup> Courts have always noted that First Nations have their own systems of law,<sup>63</sup> and that great care must be exercised when translating this law into the Common law.<sup>64</sup> Yet courts have only recently begun to give meaning to the *sui generis* definition of Aboriginal rights in a manner that befits the ancient origins of those rights.<sup>65</sup>

For example, in *Simon*, the Supreme Court of Canada investigated, among other things, whether a treaty between the Crown and the MicMac Nation was validly created by competent parties, and whether it had been subsequently terminated. During argument, both parties relied on rules of international law respecting treaty interpretation. Dickson C.J.C. held that international law was not determinative in First Nations treaty interpretation, though these principles "may be helpful" by way of analogy.<sup>66</sup> He

<sup>58</sup> *Delgamuukw* (B.C.C.A.), *supra* note 19 at 649, Lambert J.A. (dissenting). See also the cases consolidated under *Western Australia v. Commonwealth* (1995), 128 A.L.R. 1, 69 A.L.J.R. 309 (H.C.).

<sup>59</sup> *Guerin*, *supra* note 25 at 336.

<sup>60</sup> See *Campbell v. Hall* (1774), 1 Cowp. 204 at 208-209, 98 E.R. 1045.

<sup>61</sup> *Guerin*, *supra* note 25 at 336.

<sup>62</sup> See: J. Borrows & L. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" [unpublished]; *McIntosh*, *supra* note 56; *Re Southern Rhodesia*, [1919] A.C. 211, 88 L.J.P.C. 1; *Amodu Tijani v. Secretary (Southern Nigeria)*, [1921] 2 A.C. 399, 90 L.J.P.C. 236 [hereinafter *Amodu Tijani* cited to A.C.]; *Connolly*, *supra* note 7.

<sup>63</sup> See *McIntosh*, where the United States Supreme Court held:

If an individual might extinguish the Indian title, for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages ... still it is a part of their territory, and is held under them, by a title dependent on their laws (*McIntosh*, *ibid.* at 590-91 [emphasis added]).

<sup>64</sup> In *Amodu Tijani*, the Privy Council stated:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely (*Amodu Tijani*, *supra* note 62 at 402-403).

<sup>65</sup> Among the most notable Supreme Court cases dealing with the *sui generis* doctrine are: *R. v. Simon*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390 [hereinafter *Simon* cited to S.C.R.]; *R. v. Sioui*, [1990] 1 S.C.R. 1025, 24 D.L.R. (4th) 427 [hereinafter *Sioui* cited to S.C.R.]; *Paul*, *supra* note 39; *Sparrow*, *supra* note 16.

<sup>66</sup> *Simon*, *ibid.* at 404.

thus lent support to the proposition advanced earlier that the rights of Aboriginal peoples should not be defined by the exclusive reliance on non-Aboriginal sources. He also held that First Nations treaties were unique agreements neither created by nor terminated according to international law.<sup>67</sup> Instead, they were *sui generis* agreements, complete with their own set of interpretive guidelines and principles. In so holding, Dickson C.J.C. opened the door for a further infusion of Aboriginal law in matters of treaty interpretation.

More specifically, First Nations laws are an essential source of appropriate analogies. Drawing analogies from First Nations law as well as from general law more firmly establishes a truly autonomous body of law which “bridges the gulf” between First Nations and European legal systems and embraces each system without forming a part of either.<sup>68</sup> As a result, Canadian laws on Aboriginal issues become truly unique.

Creating law that accounts for both parties’ legal interests makes sense in the context of Aboriginal- and treaty-rights litigation since these disputes necessarily involve the interaction of legal interests of both Aboriginal and non-Aboriginal societies. The use of First Nations law in these instances operates as an important check on inappropriate analogies being drawn from other legal sources. This can help ensure that the Crown and First Nations perceive their interaction as fair. The restraint that First Nations law can provide to counteract the powerful influence of non-Aboriginal laws, in the development of *sui generis* principles, can help to ensure the resulting law is as free of bias as possible. Dickson C.J.C.’s observation that *sui generis* doctrines have their own interpretive guidelines and procedures and can receive analogies from other areas of law, is a serious indication that the Court will consider First Nations law as forming a legitimate part of the Canadian law on Aboriginal rights.

*Simon* also provided some guidance as to how courts may evaluate the appropriateness of drawing specific analogies from First Nations laws in given cases. Dickson C.J.C. inferred that such analogies would be appropriate with regard to practices that were “reasonably incidental” to the exercise of the right in question. Practices embraced by Aboriginal or treaty rights must include First Nations laws because these laws give content and meaning to First Nations customs and conventions. Thus, the Court in *Simon* provided a valuable insight into the scope of what would be protected under pre-existing Aboriginal rights; it ruled that “those activities reasonably inciden-

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<sup>67</sup> Chief Justice Dickson was explicit on this point:

While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law (*Simon, ibid.* at 404).

See also *Sioui*, *supra* note 65 at 1071-73 where the Court held that Huron use of a provincial park for religious rites and ceremonies was *compatible* with the government’s use and occupancy of the land as a park. *Sioui*, like *Simon*, involved an Indian treaty that implicated the method of interpreting treaties signed between the Crown and First Nations.

<sup>68</sup> See “Understanding Aboriginal Rights”, *supra* note 17.

tal" to the exercise of the protected right must also be "implicit" in that right.<sup>69</sup> Taking the facts in *Simon* as an example, if an Aboriginal person has a right to hunt, he or she also has an associated right to travel with a gun to the place where that right can be exercised. More broadly, if a First Nation has a particular right, it also has those associated liberties necessary to make effective the activity protected by that right. Certainly, the Aboriginal right to hunt is made effective by associated First Nations laws and customs.<sup>70</sup> Under the principles set forth in *Simon*, therefore, the existence and protection of First Nations laws are implied in the exercise of other specific Aboriginal rights.

The finding that Aboriginal rights include implied protections reasonably incidental to the exercise of those activities was extended by the British Columbia Court of Appeal in *Saanichton Marina Ltd. v. Tsawout Indian Band*.<sup>71</sup> In that case the issue was whether a right granted by treaty "to carry on our fisheries as formerly"<sup>72</sup> was broader than indicated by the words in the document. The Court accepted the Tsawout Indian Band's argument that the right to fish included the protection of the place where the Band exercised that right. Since a proposed marina would disrupt the Band's treaty-protected fishery, they received a permanent injunction to prohibit further development on the marina. The Court concluded that the dredging and construction of the bay would destroy an important crab fishery and restrict access to crabbing areas around the marina basin.<sup>73</sup> Applying the doctrine of incidental rights protection enunciated in *Simon*, the Court was able to hold that the preservation of the crab beds was "reasonably incidental" to the Band's exercise of the right "to carry on [their] fisheries as formerly".<sup>74</sup> The Court's reasoning in *Saanichton* not only protects the practice ("fact") by which a specific right is exercised, but also extends the reasoning in *Simon*

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<sup>69</sup> *Simon*, *supra* note 65 at 403.

<sup>70</sup> For an example of how Aboriginal hunting rights are only made effective by First Nations law, see H. Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Toronto: Douglas & McIntyre, 1988) c. 5.

<sup>71</sup> (1989), 57 D.L.R. (4th) 161, 36 B.C.L.R. (2d) 79 [hereinafter *Saanichton* cited to D.L.R.]. For an informative commentary on this case, see H. Foster, "The Saanichton Bay Marine Case: Imperial Law, Colonial History, and Competing Theories of Aboriginal Title" (1989) 23 U.B.C. L. Rev. 629.

<sup>72</sup> The complete relevant clause in the treaty stated: "[I]t is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly" (quoted in *Saanichton*, *ibid.* at 163). The treaty was agreed to by Governor James Douglas and representatives of the Saanich tribe on February 11, 1852.

<sup>73</sup> See *Saanichton*, *ibid.* at 173.

<sup>74</sup> The Court stated:

[C]onstruction of the marina will derogate from the right of the Indians to carry on their fisheries as formerly in the area of Saanichton Bay which is protected by the treaty. To begin with it will limit and impede their right of access to an important area of the bay. Further, they will not be able to carry on the stationary crab fishery as formerly ... This development, while of only a small area of the bay, will have a harmful impact on the right of fishery granted to the Indians by the treaty (*Saanichton*, *ibid.* at 173).

Therefore, the right to fish guaranteed in the treaty contained an implied right to protect the fish habitat. Since the continued existence of the crab beds was reasonably incidental to the exercise of the right to fish, it could be protected by the Court.

to embrace the "site" where the right is exercised. Thus, Aboriginal and treaty rights contain particular elements that are fact and site specific.<sup>75</sup>

Discovering essential implicit rights within more explicitly defined rights also makes it clear that fact and site specific Aboriginal rights are rooted in an overarching jurisprudential infrastructure,<sup>76</sup> a higher order of implied principles that gives these rights legal force. This higher order of rights gives meaning to particular interests and

<sup>75</sup> The British Columbia Court of Appeal recently expressed a similar idea of the centrality of First Nations law (see *Delgamuukw* (B.C.C.A.), *supra* note 19). The Court implied into conventional Aboriginal rights what is necessarily incidental to the very existence of Aboriginal communities as organized societies, by deciding that Aboriginal rights are those rights that are integral to the existence of Aboriginal society. This idea was recently quoted with approval by the Ontario Court of Appeal (see *R. v. Pamajewon* (1994), 21 O.R. (3d) 385, [1995] 2 C.N.L.R. 188 [hereinafter *Pamajewon* cited to O.R.]:

*"The essential nature of an aboriginal right stems from occupation and use. The right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty. ... Aboriginal rights are fact and site specific. They are rights which are integral to the distinctive culture of aboriginal society. The nature and content of the right, and the area within which the right was exercised are questions of fact.*

*"The precise bundle of rights that a particular aboriginal community can assert may depend upon a number of factors including the nature, kind and purpose of the use or occupancy of the land by the aboriginal community in question, and the extent to which such use or occupancy was exclusive or non-exclusive. ...*

...

*"Thus, native title does not have a single, generic form encompassing all activities. Its content is determined by traditional aboriginal enjoyment."*

I agree with MacFarlane J.A.'s observations concerning the essential nature of aboriginal title and rights, as set out above (*Pamajewon*, *ibid.* at 398, quoting *Delgamuukw* (B.C.C.A.), *supra* note 19 at 496-97).

For a critique of the British Columbia Court of Appeal's reasons, see A. Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995) 53 U.T. Fac. L. Rev. 1.

<sup>76</sup> That Aboriginal rights may be considered on a global basis may appear to contradict Dickson J.'s suggestion that

*[c]laims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis (*R. v. Kruger* (1977), [1978] 1 S.C.R. 104 at 109, 75 D.L.R. (3d) 434).*

However, Dickson J.'s comment is only partially consistent with the approach taken in this paper. On the one hand, he identifies the necessary reference to the particular pre-existing site and facts in order to resolve Aboriginal-title issues. On the other, however, Dickson J. ruled that one could not decide on a global basis because he failed to realize that, by the very appeal to "history, legend, politics and moral obligations", he created a global reference point to determine the resolution of Aboriginal rights disputes — the fact and site specific First Nations laws that constructed their use.



provides a principled basis for inquiry into various fact and site specific rights. First-order implied Aboriginal rights and principles are the laws of First Nations.<sup>77</sup> Moreover, since First Nations laws continue to give meaning and content to all Aboriginal rights<sup>78</sup> and form a part of the laws of Canada,<sup>79</sup> reference to these laws in Canadian law is a foundational and unifying principle in Aboriginal rights jurisprudence.<sup>80</sup> As these First Nations laws have "always constituted an integral part of their distinctive culture ... for reasons connected to their cultural and physical survival"<sup>81</sup>, they constitute a principled reference point in the interpretive framework of Aboriginal rights, a foundation upon which other Aboriginal rights lie.<sup>82</sup> First Nations laws are integral to the exercise of all Aboriginal rights; they must be part of the courts' interpretation of those rights.<sup>83</sup>

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<sup>77</sup> See *Mabo*, *supra* note 30:

As their Lordships also indicated, a similar approach had been adopted by the Privy Council with respect to the claims of Canadian Indians to their traditional homelands or hunting grounds. The content of the traditional native title recognised by the common law must, in the event of dispute between those entitled to it, be determined by reference to the pre-existing native law or custom (*Mabo*, *ibid.* at 65, Deane and Gavaron J.J. [references omitted]).

<sup>78</sup> The High Court of Australia has recognized that the laws of Indigenous peoples are implicit in other rights that are protected by the Common law:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. ...

...

[R]ights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants ... (*Mabo*, *ibid.* at 43-44, Brennan J.).

See Lambert J.A. (dissenting) in *Delgamuukw* (B.C.C.A.), *supra* note 19 at 636-40.

<sup>79</sup> See *Roberts*, *supra* note 20.

<sup>80</sup> As noted above, it is only through the operation of pre-existing First Nations laws that Aboriginal people occupied and possessed land, exercised rights to hunt and fish, or entered into treaties and relationships with the Crown. These laws continued upon contact with non-Native people, and the fruits of these laws have been recognized by Canadian courts as, among other things, Aboriginal title, customary marriage and hunting and fishing rights (see *supra* notes 24-65 and accompanying text).

<sup>81</sup> *Sparrow*, *supra* note 16 at 1099.

<sup>82</sup> That is not to say that courts will be able to reference a unified First Nations law which will apply in the same way, across different First Nations. Obviously, First Nations will have their own specific laws that are factually particular to their territories.

<sup>83</sup> The recognition of the authenticity of Aboriginal laws, and their compatibility with Canadian law, has been assisted by the enactment of section 35(1) of the *Constitution Act, 1982*, *supra* note 43: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Section 35(1) has prompted courts to renounce the old jurisprudential rules of the game in favour of providing a just resolution of Native claims. The leading case in this regard is *Sparrow*, *supra* note 16, where the Court held that Aboriginal rights are "held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of tradi-

When considering the existence of an Aboriginal right in its fact and site specific context, therefore, it is necessary to realize that these particular rights are manifestations of an overarching phenomenon. The pervasive and unifying architecture that supports the existence and operation of particular Aboriginal rights is First Nations law. By inquiring into First Nations laws that give meaning to these rights, courts can approach Aboriginal rights cases on a more principled and global basis, while retaining a fact and site specific context. When these First Nations laws are discovered, courts can then explicitly incorporate them into Canadian law by analogy, thus further developing the *sui generis* body of Aboriginal law.

## II. First Nations Law: Traditions, the Trickster and Transformations

*"I would ask you to remember only this one thing," said Badger. "The stories people tell have a way of taking care of them. If stories come to you, care for them. And learn to give them away where they are needed. Sometimes a person needs a story more than food to stay alive. That is why we put these stories in each other's memory. This is how people care for themselves."*<sup>84</sup>

B.H. Lopez

How does a court discover First Nations law in order to receive it into Canadian law? First Nations law originates in the political, economic, spiritual and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders.<sup>85</sup> These principles are enunciated in the rich stories, ceremonies and traditions of the First Nations.<sup>86</sup> Such stories articulate the law in First Nations communities, since they represent the accumulated wisdom and experience of First Nations conflict resolution.<sup>87</sup> Some of these narratives pre-date the Common law, have enjoyed

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tional Common law concepts of property as they develop their understanding of ... the '*sui generis*' nature of aboriginal rights" (*ibid.* at 1112). Thus, under the *Constitution Act, 1982*, courts will protect rights "in keeping" with First Nations cultural practices. These protected practices certainly include laws.

<sup>84</sup> B.H. Lopez, *Crow and Weasel* (San Francisco: North Point Press, 1990) at 48.

<sup>85</sup> See: E.A. Hoebel, *The Law of Primitive Man* (New York: Atheneum, 1974); K.N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, Okla.: University of Oklahoma Press, 1941); M. Gluckman, *Politics, Law and Ritual in Tribal Society* (Chicago: Aldine, 1965).

<sup>86</sup> For a sampling of these stories, see: G. Blondin, *When the World Was New: Stories of the Sahtu Dene* (Yellowknife, N.W.T.: Outcrop, 1990); P. Knudston & D. Suzuki, *Wisdom of the Elders* (Toronto: Stoddart, 1993); S. Wall & H. Arden, *Wisdom Keepers: Meetings with Native American Spiritual Elders* (Hillsboro, Ore.: Beyond Words, 1990).

<sup>87</sup> See Chief Justice T. Tso, "The Process of Decision Making in Tribal Courts" (1989) 31 *Ariz. L. Rev.* 225: "Our common law is comprised of customs and long-used ways of doing things" (*ibid.* at 230).

their effectiveness for millennia and have yet to be overruled or distinguished out of existence.<sup>88</sup>

The traditions and stories of First Nations are both similar to and different from caselaw precedent.<sup>89</sup> They are analogous to legal precedent because they attempt to provide reasons for, and reinforce consensus about, broad principles and justify or criticize certain deviations from generally accepted standards.<sup>90</sup> Common law cases and Aboriginal stories are also similar because both record the fact patterns of past disputes and their related solutions.<sup>91</sup> Furthermore, First Nations stories are interpreted by knowledgeable keepers of wisdom and presented in a manner that fits a particular dilemma.<sup>92</sup> The stories are regarded as authoritative by their listeners, and there are natural, moral and cultural sanctions for the violation of their instructions.<sup>93</sup> The interpretation of these stories encourages a basic personal and institutional adherence to underlying values and principles.<sup>94</sup> Each of these factors permits First Nations to look upon the

<sup>88</sup> See: Brody, *supra* note 70 at c. 3, 5; G. Copway or Kah-ge-gah-bowh, *The Traditional History and Characteristic Sketches of the Ojibway Nation*, (Toronto: Coles, 1972) at 95-97; B. Johnston, "One Generation from Extinction" in D.D. Moses & T. Goldie, eds., *An Anthology of Canadian Literature in English* (Toronto: Oxford University Press, 1992) 97; T. Porter, "Traditions of the Constitution of the Six Nations" in L. Little Bear, M. Boldt & J. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) 14.

<sup>89</sup> See: N.L. Cook, "Outside the Tradition: Literature as Legal Scholarship" (1994) 63 U. Cin. L. Rev. 95 at 116-39; R.M. Cover, "The Folktales of Justice: Tales of Jurisdiction" (1985) 14 Cap. U. L. Rev. 179 at 182; T. Ross, "The Richmond Narratives" (1989) 68 Tex. L. Rev. 381 at 385-86.

<sup>90</sup> One scholar has commented on the similarity between the Common law and the oral traditions: Settled doctrines, principles and rules of the common law are settled, because for complex reasons, they happen to be inatters upon which agreement exists, not, I suspect, because they satisfy tests. The tests are attempts to explain the consensus not the reason for it. ... What is involved is basically an oral tradition, still only imperfectly reduced to published writing (B. Simpson, "The Common Law and Legal Theory" in W. Twining, ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) 8 at 22).

<sup>91</sup> One theory of the Common law is that law comes into being through declaration and established immemorial usage (see: M. Hale, *The History of the Common Law of England*, 5th ed. (Chicago: University of Chicago Press, 1974) at 12, 39-43; W. Blackstone, *Commentaries on the Laws Of England*, vol. 1, ed. by S.G. Tucker (New York: W.E. Dean, 1845) at [\*68] - [\*70]).

<sup>92</sup> For a discussion of how stories and customs develop into law, see: C.K. Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press, 1964); A. Watson, "An Approach to Customary Law" (1984) U. Ill. L. Rev. 561; Gluckman, *supra* note 85; H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition: The Folklaw* (Cambridge, Mass.: Harvard University Press, 1983) at 52-84.

<sup>93</sup> For a theoretical examination of how law in "primitive" societies fulfils these functions, see: W.N. Hohfeld, *Fundamental Legal Conceptions, as Applied in Judicial Reasoning*, ed. by W.W. Cook (New Haven: Yale University Press, 1964); M. Radin, "A Restatement of Hohfeld" (1938) 51 Harv. L. Rev. 1145; W. Seagle, *The Quest for Law* (New York: Knopf, 1941).

<sup>94</sup> For a discussion of the importance of the integrity of principles in legal systems, see generally: R. Dworkin, *Law's Empire* (London: Fontana, 1986) at 176-84, 219-24; R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

stories as a body of knowledge that fulfils the same functions as Common law precedent.<sup>95</sup>

First Nations stories, however, can also be distinguished from Common law precedents in both form and content because of the way they are recorded and applied.<sup>96</sup> First Nations use an oral tradition to chronicle important information, which is stored and shared through a literacy that treasures memory and the spoken word.<sup>97</sup> As such, the application of these memories and words is quite different from the application of Common law precedent. Non-ceremonial stories can change from one telling to another,<sup>98</sup> but such changes do not mean that the story's truth is lost; rather, modification recognizes that context is always changing, requiring a constant reinterpretation of many of the account's elements.<sup>99</sup> First Nations stories take this form because there is an attempt to convey contextual meaning relevant to the times and the needs of the listeners.<sup>100</sup> While the timeless components of the story survive as the important background for the central story, its ancient principles are mingled with the contemporary setting and with the specific needs of the listeners.<sup>101</sup> This allows for a constant re-creation of First Nations systems of laws.<sup>102</sup>

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<sup>95</sup> An instructive comment on how stories can have a prescriptive application in questions about precedent in legal reasoning is found in K. Yoshino, "What's Past is Prologue: Precedent in Law and Literature" (1994) 104 Yale L.J. 471. See also P. Macklem, "Of Texts and Democratic Narratives" (1991) 41 U.T.L.J. 114: "Legal stories are not unlike stories we use to give meaning to our lives, histories, and relations with others ... some of these stories become the reality against which new narratives are engendered" (*ibid.* at 114).

<sup>96</sup> See generally: E.P. Thompson, *Whigs and Hunters* (London: Allen Press, 1975); E.P. Thompson, *Customs in Common* (London: Merlin Press, 1991).

<sup>97</sup> See W. Bright, *American Indian Linguistics and Literature* (New York: Mouton, 1984).

<sup>98</sup> I do acknowledge, however, that even Common law cases change from telling to telling because of the different facts and issues that a judge might decide to highlight.

<sup>99</sup> See P. Petrone, *Native Literature in Canada: From Oral Tradition to the Present* (Toronto: Oxford University Press, 1990): "Oral traditions have not been static. Their strength lies in their ability to survive through the power of tribal memory and to renew themselves by incorporating new elements" (*ibid.* at 17).

<sup>100</sup> See F.M.P. Robinson, "Introduction" in *Visitors Who Never Left*, trans. Chief K.B. Harris, ed. (Vancouver: University of British Columbia Press, 1974): "When contact with the white man is established, a new set of problems arises and requires a logical cultural explanation to restore the world to order. Hence old myths are altered and new ones are generated to explain the process of cultural change" (*ibid.* at xv).

<sup>101</sup> See G. Valencia-Weber, "Tribal Courts: Custom and Innovative Law" (1994) 24 N.M. L. Rev. 227:

In the tribal society, past and present are inseparable as the continuation of a story anchored in values enduring in contemporary life. ...

In the creation of American Indian common law, in the longstanding and emerging tribal courts, custom serves in conjunction with appropriate principles from federal and state law (Valencia-Weber, *ibid.* at 229).

<sup>102</sup> See E.J. Dickson-Gilmore, "Finding the Ways of the Ancestors: Customary Change and Invention of Tradition in the Development of Separate Legal Systems" (1992) 34 Can. J. Crim. 479.

Like the form, the content of First Nations stories can also be very different from the Common law. This is a result of different histories, social organization and values. Each First Nation has a richly developed cultural ethic, distinct from western values, that often places different emphases on different issues.<sup>103</sup> Perhaps the best way to illustrate the similarities and differences between Common law and First Nations cases is by providing an example using the case method.<sup>104</sup> I will do this by recounting a story from my people, the Anishinabe,<sup>105</sup> in a manner intended to demonstrate the ancient and contemporary stability and flexibility of First Nations law. The story was told to me by my relative John Nadjiwon of Neyaashiiniing. What follows is the retelling of the story in a way that combines ancient principles with the contemporary requirements of our people.<sup>106</sup>

#### A. *Nanabush v. Deer, Wolf et al.: A Case Comment on First Nations Law*

In the distant mists of time, the Anishinabe Nation rendered its judgment in the case of *Nanabush v. Deer, Wolf et al.*<sup>107</sup> The decision signifies an important principle in the development of Anishinabe environmental law. After weighing strong competing factors, the Elders of the Nation proclaimed an important social/legal position which they held with respect to natural resource use.<sup>108</sup> Natural resource use of First Nations is defined by the Elders with reference to its use by third parties. Environmental law in the Anishinabe First Nation has always stressed the significance of intersecting rela-

<sup>103</sup> See: M. Dockstator, *Towards An Understanding of First Nations Self-Government* (D.Jur.Thesis, Osgoode Hall Law School, 1994) [unpublished]; J. Dumont, "Justice and Aboriginal People" in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Roundtable on Aboriginal Issues* (Ottawa: Canada Communications Group, 1993) 42 [hereinafter *National Roundtable on Aboriginal Issues*]; C. Brant, "Native Ethics and Rules of Behaviour" (1990) 35 Can. J. Psychiatry 534; Benton-Benai, *supra* note 1.

<sup>104</sup> A critique of the "supposed" endeavour to establish an objective theory of law by using the case method can be found in: K. Llewellyn, "Some Realism about Legal Realism — Responding to Dean Pound" (1931) 44 Harv. L. Rev. 1222 at 1222-23; F. Colien, "Transcendental Knowledge and the Functional Approach" (1935) 35 Colum. L. Rev. 809.

<sup>105</sup> The Anishinabe have also been called Ojibway or Chippewa. Our Nation surrounds the Great Lakes. My home, within our Nation, has been called the Cape Croker Indian Reserve by Indian and Northern Affairs Canada. It is located on the Bruce Peninsula on the western shores of Georgian Bay in Southern Ontario.

<sup>106</sup> See: K.T. Bartlett, "Tradition, Change, and the Idea of Progress in Feminist Legal Thought" (1995) 2 Wis. L. Rev. 303: "[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" (*ibid.* at 331); J. Pelikan, *The Vindication of Tradition* (New Haven: Yale University Press, 1984): "It is, then, a mark of an authentic and living tradition that it points us beyond itself" (*ibid.* at 54).

<sup>107</sup> (Time Immemorial), 0002 Ojibway Cases (1st) 3 (Anishinabe S.C.) in A.K. Helbig, ed., "Nenebojo [Nanabush] and the Deer" in *Nanabozhoo giver of life* (Brighton, Mich.: Green Oak Press, 1987) 118 [hereinafter *Nanabush*].

<sup>108</sup> For a discussion of the problems of defining resources as "natural", because it requires some human agency to define it as such, see W. Cronon, *Changes in the Land: Indians, Colonists and the Ecology of New England* (New York: Hill & Wang, 1983) at 165.

tionships in the natural and human world. This case provided the Elders with an opportunity to illustrate this principle.

This comment will examine the *Nanabush* decision to demonstrate its implications with regard to the use of resources situated in our territories that are subject to competing third party claims.

## 1. The Facts

Nanabush<sup>109</sup> was journeying through the forest when he saw a deer coming toward him to get a drink. Nanabush stopped the deer and asked: "What's the matter with your eyes? They look so very red. They certainly must be quite sore. I have some medicine here for sore eyes." The deer answered that its eyes were not sore, and that they were naturally red. Nanabush interjected: "I never saw them like they are today. My eyes were like that for some time, but I cured them with this." Nanabush showed the deer some berries he had in his hand, and he finally persuaded the deer to take some of them. He took a handful of the berries and rubbed them in the deer's eyes. It was so painful that the deer dropped to the ground. As the deer went down, Nanabush beat it with a club and killed it. He then dressed and roasted the deer, leaving only the head for his grandmother.

When Nanabush sat down to eat, he saw a tree nearby, and every time the wind blew, one of its branches would screech. Nanabush did not like this and said to the branch: "Don't you bother me just when I want to eat, for I am very hungry." Yet every time he was about to take a bite, the branch began to screech. So Nanabush got up and climbed into the tree to cut off the screeching branch. Just as he broke off the branch, however, his wrist got caught between two other branches, and he was forced to hang in the tree for some time.

As he was hanging there, unable to free himself, he saw a pack of wolves running along the river. They were just about to run by when Nanabush shouted: "Run right on, do not look in this direction." When they heard this, the wolves said: "Nanabush must have something there, for he would not tell us to run ahead if he didn't." So they all went to Nanabush and found and ate the deer that had been roasted. When they were finished, Nanabush said: "Now go right ahead, don't look up in that tree there." So the wolves looked up and saw the deer's head hanging in the branches. They pulled it down and ate all the meat that was on it. As the wolves were leaving, Nanabush managed to release his wrist and come down from the tree. He could not find the slightest piece of deer meat. He turned the deer's head around but could find nothing.

Then Nanabush thought of the deer brains. He transformed himself into a very small snake and burrowed his way into the head. He ate all the deer brains, but when he tried to get out, he found he was unable to do so. So he transformed himself into Nanabush again. But now he had a deer head on his head. He then ran to the river,

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<sup>109</sup> Nanabush is the Trickster figure in the Anishinabe world.

where he came upon some people who mistook him for a deer and chased him. As he ran away, he tripped and fell. The deer head struck a stone and broke open, and Nanabush was free again.

## 2. The Issue<sup>110</sup>

Do Nanabush's actions violate the balance required by law in the relationship between humans and animals?

The Anishinabe attributed some of their society's problems to the imbalance of the hunting relationship between humans and animals.<sup>111</sup> In this case, Nanabush violated these principles because he failed to respect the dignity and body of the deer. The court arrived at this conclusion by accepting the earlier case of *Crow, Owl, Deer et al. v. Anishinabe*.<sup>112</sup>

In *Crow*, the deer, moose and caribou left the land of the Anishinabe and were captured by the crows. The crows confined them, and when the Anishinabe discovered this they went to battle against the birds. There was a long and bitter battle in which neither side prevailed. During the battle, the deer looked on with seeming indifference as to the outcome. Eventually a truce was called, and the Anishinabe met with the crow and the deer in council. The Anishinabe asked: "Why are you so apathetic about our efforts to rescue you from your imprisonment? We have suffered great affliction and hazarded death to save you — all on your behalf. It seems as though you could not care less." The Chief Deer replied: "You are mistaken if you have imagined that we are here against our wishes. We have chosen to stay with the crows. We are not sad but very happy. The crows have treated us better than you ever did when we shared the same country with you."

The Anishinabe were astonished and asked the deer how the Nation had offended them. The deer spoke sadly: "You have wasted our flesh; you have despoiled our haunts; you have desecrated our bones; you have dishonoured us and yourselves. Without you we can live — but without us you cannot live. We can live with or without you." The Anishinabe then asked how they should make amends; they said their negligence was not motivated by ill will. The Anishinabe asked: "How shall we restore what we have taken and what you have lost?" The Chief Deer answered, "Honour and

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<sup>110</sup> The reader might be excused for wondering what this story has to do with "Law". However, just as the Common law is only understood through a grid of intersecting judgements, likewise one cannot understand First Nations law unless there is an appreciation of how each story correlates with others. Therefore, a full understanding of First Nations law requires more familiarity with the myriad stories of a particular culture, and the surrounding interpretations given to them by their people. What I am merely trying to give in this short piece is a glimpse into how the combination of First Nations stories creates law.

<sup>111</sup> See C. Veseey & J.F. Fisher, "The Ojibwa Creation Myth: An Analysis of its Structure and Content" (1984) 20 *Temenos* 66 at 90.

<sup>112</sup> (Time Immemorial), 0001 Ojibway Cases (1st) 1 (Anishinabe S.C.) in B. Johnston, *Ojibway Heritage* (Toronto: McClelland & Stewart, 1976) at 56 [hereinafter *Crow*].

respect our lives and our beings, in life and in death. Do not waste our flesh. Preserve fields and forests for our homes. Cease doing what offends our spirits. To show commitment to these things and as a remembrance of the anguish you have brought upon us, always leave the tobacco leaf from where you take us. Gifts are important to build our relationships once again." The Anishinabe promised to follow the words of the Chief Deer, and the crows released the captured deer.

### 3. Resolution of the Issue

The *Crow* case applies to the *Nanabush* case, because it is clear that Nanabush broke the law by disregarding the promise of respect. Through disrespectful trickery and foolish ruse, Nanabush violated the oath of honour and respect pledged by the Anishinabe Nation. In particular, Nanabush's method of killing the deer, his failure to leave gifts, the way in which his actions caused the deer to be despoiled by the wolves and the breaking of the deer's skull all point to the creation of an imbalance between humans and animals and constitute a violation of Anishinabe environmental law. This was the finding of the majority in the *Nanabush* case. The minority judgment in *Nanabush* placed a greater emphasis on the deer's conduct than on the treaty between the Anishinabe and the deer. The majority judgment convincingly responded to that opinion and rejected the assertion that the deer must bear responsibility for its own death.<sup>113</sup> The majority's reasoning is preferential because its focus on the duty to respect the deer is the interpretation that best implements, and is the most consistent with, the commitment that the Anishinabe made to the deer. The minority's focus solely on the deer's actions does not preserve the spirit and intent of the treaty between the Anishinabe and the deer, and if this opinion were followed subsequently, it could create a serious problem for both the deer and the Anishinabe.

If resources are not honoured and respected and gifts not made to strengthen relationships, these resources will eventually disappear from our lands. When these resources are gone our people will no longer be able to sustain themselves; as the case states, while the deer have an existence without us, we have no existence without them. The majority decision in *Nanabush* is, therefore, important for Anishinabe people in resolving their disputes regarding the environment, land, habitat protection and hunting rights: as such, the *Nanabush* case is an important decision in Anishinabe environmental law.<sup>114</sup>

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<sup>113</sup> The minority found support for its position in *Rest of the Forest v. Birch Tree* (Time Immemorial), 0002 Ojibway Cases 2 (Anishinabe S.C.) in D.M. Reid, ed., "Nanabozho [Nanabush] and the Birches" in *Tales of Nanabozho [Nanabush]* (Toronto: Oxford University Press, 1963) 47. In this case, the birch tree was whipped by the pine tree needles for its vanity in boasting about its preeminent strength and beauty. The pine tree was not held liable for the dark lateral marks placed on the pure white bark of the birch tree. The birch was found contributorily negligent by creating an imbalance in the forest by asserting its worth over the others.

<sup>114</sup> Other First Nations also have laws, expressed as stories, that guide their interpretation of environmental justice:

American Indian peoples possess their own unique visions of environmental justice which are capable of inaugurating this decolonization process. The values animating



### B. *Giving and Receiving Gifts: The Role of First Nations Law*

This case presents many of the earlier developed similarities and differences between First Nations law and the Common law. It is true that the stories have been translated and stylized to make them appear more similar to the Common law form.<sup>115</sup> The changes made are quite consistent with a genre of First Nations story-telling, however, that allows the narrator to become the Trickster, transforming the content of the story into a new, previously unaccepted form. The Trickster is alive in First Nations intellectual expression.<sup>116</sup>

Regardless of the form of First Nations stories, however, they function together to guide people in the resolution of disputes. First Nations frequently access their historic experiences and cultural epics in order to formulate and apply their own law. The values underlying the stories are often advanced by respected individuals and elders and are expected to be of precedential value in conducting First Nations through contemporary challenges.<sup>117</sup>

It is important that Canadian judges have suitable access to these legal institutions and texts. When this law is more widely proclaimed, these stories or laws can be available by analogy in *sui generis* categories of Canadian law concerning Aboriginal peoples. They can be treated in a manner similar to how law is received from sources, including contract law, property law and international law, in other Aboriginal cases. That is, First Nations laws can be received by analogy into the Common law to bridge the gap between Aboriginal and non-Aboriginal laws. They can be used in a culturally appropriate way to answer many of the contemporary challenges Canadian courts en-

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these American Indian visions are typically reinforced throughout tribal culture by myths and narratives which seek to invoke our imaginative capacities to see the social, physical and spiritual worlds we inhabit as connected and interdependent. Through such stories and their interrelated themes of harmony and humility, we are taught a system of values which induces a profound attitude of respect for the forces which give life to the complex world of which we are but a small part (R.A. Williams, Jr., "Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World" (1994) 96 W. Va. L. Rev. 1133 at 1135).

<sup>115</sup> It can be argued, however, that all justice requires a translation process (see J.B. White, *Justice as Translation* (Chicago: University of Chicago Press, 1990)). Translation in law is necessary for White because law is culture — "a culture of argument" (*ibid.* at xiii) which "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" (*ibid.* at 80). Therefore, the Nanabush story is translated into the language of legal culture to create a recognizable conversation with Canadian law and to criticize Canadian law for its reluctance to engage in legal conversations with First Nations cultures.

<sup>116</sup> For a discussion of how the Trickster can play a role in First Nations jurisprudence, see "First Nation Perspective", *supra* note 21 at 7.

<sup>117</sup> For a brief but interesting example of how a story can guide law, see Chief G. Potts, "Growing Together From the Earth" in Engelstad & Bird, eds., *supra* note 37, 199.

counter. The incorporation of such a broad base of legal principles would make the law truly Canadian and, as a result, more equitable and fair.<sup>118</sup>

Despite the existence of First Nations law, some people may contend that European-derived law cannot discern, apply or accommodate Aboriginal legal principles.<sup>119</sup> Such an argument ignores the fact that the Common law has already discerned and received pre-existing First Nations laws.<sup>120</sup> Notwithstanding evidence to the contrary, however, it still may be suggested that while First Nations law may work to resolve issues within First Nations, it is of little assistance in resolving inter-cultural disputes between First Nations and non-Aboriginal people. As an initial response, I would not be so quick to dismiss the potential of First Nations law to resolve cross-cultural issues.<sup>121</sup> First Nations legal principles have the respect of many non-Aboriginal people and have a long history in the mediation of inter-cultural disputes.<sup>122</sup> In 1987, the publication of the report of the World Commission on Environment and Development,<sup>123</sup> or The Brundtland Commission, commented on the importance of First Nations legal institutions to other societies:

[So-called indigenous or tribal peoples] are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. ...

...

These groups' own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.<sup>124</sup>

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<sup>118</sup> The notion that law can be retranslated and contingently detached from its colonial context assists decision-makers in recognizing the inherent pluralism that exists in Canadian law. A recognition of the pluralism of Canadian law also enables First Nations to employ its legal forms and symbols as simultaneous acts of accommodation and resistance (see S.E. Merry, "Resistance and the Cultural Power of Law" (1995) 29 L. & Soc'y Rev. 11).

<sup>119</sup> An interesting examination of the law's ability to transform itself through its own methods is found in W. Pue, "Evolution by Legal Means" in H.P. Glenn, ed., *Contemporary Law 1994 Droit contemporain* (Montréal: Yvon Blais, 1994) 1.

<sup>120</sup> See *supra* notes 24-65 and accompanying text.

<sup>121</sup> For a detailed article that explores the use of First Nations law to resolve these disputes, see M. Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) (Special Edition) U.B.C. L. Rev. 147.

<sup>122</sup> For example, early treaties were often negotiated and ratified according to First Nations form and content (see F. Jennings *et al.*, eds., *The History and Culture of Iroquois Diplomacy* (Syracuse, N.Y.: Syracuse University Press, 1985)) and have been remarkably successful in maintaining peace and friendship over long periods of time (see R.S. Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774-1815* (Toronto: Dundurn Press, 1993)).

<sup>123</sup> See World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

<sup>124</sup> *Ibid.* at 114-16.

This report makes the point that First Nations laws and institutions have a great deal to contribute to solutions to the common problems faced by both Aboriginal and non-Aboriginal people. Therefore, when considering whether First Nations should use the Common law to deal with issues that lie partially outside their communities, it is important to note that many people are themselves looking to First Nations institutions to answer these questions.<sup>125</sup> As such, First Nations law has an important place even in a broad inter-cultural context.<sup>126</sup>

As contemporary notions of First Nations dispute resolution find increasing acceptance in many western institutions,<sup>127</sup> their recognition foreshadows a wider use in inter-cultural disputes.<sup>128</sup> The future may see the continued development of First Nations law to answer questions that plague western society today.<sup>129</sup> For example, in many Canadian jurisdictions, traditional Aboriginal practices regarding justice are modified to interact with courtroom procedures.<sup>130</sup> The operation of First Nations law in conjunction with the criminal law demonstrates the role First Nations institutions can play in inter-cultural disputes. Aboriginal practices are often employed at the pre-trial stage,<sup>131</sup> and sometimes they function at the end of the conventional criminal justice process.<sup>132</sup> Sen-

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<sup>125</sup> See: A.L. Booth & H.M. Jacobs, "Ties That Bind: Native American Beliefs as a Foundation for Environmental Consciousness" (1990) 12 *Env. Ethics* 27; J. Ragsdale, "Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values" (1986) 10 *Harv. Envtl. L. Rev.* 417.

<sup>126</sup> Others have also written about how cross-cultural dialogue can increase inter-cultural consensus (see A.A. An-Na'im, ed., "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment" in *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 19 at 27).

<sup>127</sup> See T. Alcoze, "Our Common Future: Native Land Use and Sustainable Development" in *The Guelph Seminars on Sustainable Development* (Guelph: University of Guelph, 1990), reproduced in E.L. Hughes, ed., *Environmental Law and Policy* (Toronto: Emond Montgomery, 1993) 568.

<sup>128</sup> See H. Lilles, "A Plea for More Human Values in Our Justice System" (1992) 17 *Queen's L.J.* 328: "The system can benefit from involving the community more, and, in this practice, the dominant society has much to learn from aboriginal people" (*ibid.* at 349).

<sup>129</sup> For an example of First Nations law being applied to environmental problems, see R. Kapashesit & M. Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 *McGill L.J.* 925.

<sup>130</sup> A similar situation is occurring in Australia where courts have shown a willingness to adjust their rules to accommodate the needs of Aboriginal applicants (see *Milpururru v. Indofurn Pty. Ltd.* (1994), 130 *A.L.R.* 659, 30 *I.P.R.* 209 (F.C.)). For comment, see K. Puri, "Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action" (1995) 9 *I.P.J.* 293.

<sup>131</sup> See: D. Auger, "Crime and Control in Three Nish-nawbe-Aski Nation Communities" (1992) 34 *Can. J. Crim.* 317; S. Stevens, "Northwest Territories Community Justice of the Peace Program" in *National Roundtable on Aboriginal Issues*, *supra* note 103, 385; Muskrat Dam First Nation, *Anishinaabe Justice in Muskrat Dam — A Study of Past and Present Practices* (Waterloo, Ont.: Fund for Dispute Resolution, 1994).

<sup>132</sup> See: M. Jackson, "Locking Up Natives in Canada" (1989) 23 *U.B.C. L. Rev.* 205; L. Mandamin *et al.*, "The Criminal Code and Aboriginal People" (1992) (Special Edition) *U.B.C. L. Rev.* 5 at 21-27; R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1989] 3

tencing circles provide an interesting illustration of the cross-cultural interaction of First Nations institutions and texts with Canadian law.<sup>133</sup>

Sentencing circles draw upon both customary conflict resolution processes used by Aboriginal peoples and Canadian criminal law. Traditionally, the circle consists of people interested in participating in the resolution of a dispute. These people are usually the offender, his or her family and friends, the victim and other individuals with information, interests or skills that can be of use in restoring harmony among the people involved and also within the community. These people gather in a circle, both to symbolize a connection to the order of the non-human world and to confirm the equality of all the participants. Once in a circle, conversation flows in one direction, one person speaking at a time. People speak in this manner to imitate the movements of the sun, earth and moon and to ensure that everyone has the opportunity to contribute without being interrupted. People speak about what can be done to help the offender, the victim and the community at large.

The principles used in the sentencing circle are heavily influenced by traditional First Nations law and world-view. At the same time, however, the topics of conversation within the circle are those of contemporary western society. This mingling of forms indicates that there is indeed room for Aboriginal law in the resolution of intercultural disputes.<sup>134</sup> In fact, Milliken J. of the Saskatchewan Queen's Bench has implied that the circle may even serve to guide the resolution of disputes unrelated to Aboriginal peoples:

I decided that the holding of a sentencing circle should not depend upon whether the offender was an aboriginal living in an aboriginal community ...

My reasoning for deciding not to put these types of limitations on the holding of a sentencing circle is based on my conclusion that the persons who are normally present in a sentencing circle; the accused, his family, the victim, the police and professional advisers are the same parties who are usually involved in a presentence report.

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C.N.L.R. 1; S. Moyer & L. Axon, *An Implimentation Evaluation of the Native Community Council Project of the Aboriginal Legal Services of Toronto* (Toronto: Ministry of the Attorney General, 1993); T. Lajeunesse, "Hollow Water First Nation's Community Holistic Circle Healing Project" in Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: a report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communications Group, 1996) 159 [hereinafter *Bridging the Cultural Divide*].

<sup>133</sup> Leading cases dealing with sentencing circles are: *R. v. Moses* (1992), 71 C.C.C. (3d) 347, [1992] 3 C.N.L.R. 116 (Y. Terr. Ct.); *R. v. Webb*, [1993] 1 C.N.L.R. 148 (Y. Terr. Ct.); *R. v. Cheekineew* (1993), 80 C.C.C. (3d) 143, 108 Sask. R. 114 (Q.B.); *R. v. Morin* (1993), 114 Sask. R. 2, [1994] 1 C.N.L.R. 150 (Q.B.) [hereinafter *Morin* cited to Sask. R.], rev'd (1995), 101 C.C.C. (3d) 124, 134 Sask. R. 120 (C.A.) [hereinafter *Morin* (C.A.) cited to C.C.C.].

<sup>134</sup> For a discussion of how traditional principles of First Nations are preserved in their interaction with contemporary western legal concepts, see J. Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics" (1994) 43 U.N.B.L.J. 19.

I am not aware of any restrictions imposed upon a judge when he or she decides to request a presentence report, so why should there be restrictions on judges about ordering a sentencing circle?<sup>135</sup>

A significant implication of Milliken J.'s reasoning is that First Nations legal institutions may have a role not only in inter-cultural disputes, but also in answering disputes wholly outside of Aboriginal involvement.<sup>136</sup> It is apparent that this reasoning creates an even stronger justification for the use of First Nations law where there is conflict between Aboriginal and non-Aboriginal peoples. First Nations law, therefore, clearly has a role to play where some aspect of cross-cultural conflict exists.

### Conclusion: At the Beginning

*Tradition ... cannot be inherited, and if you want it you must obtain it by great labour.*<sup>137</sup>

T.S. Eliot

The question of how to implement the reception of First Nations law more fully in Canadian law is just now beginning to unfold. Respect for and acceptance of First Nations law will not be easy to accomplish,<sup>138</sup> even though there is legal precedent that would allow it<sup>139</sup> as well as strong and clear evidence of currently existing First Nations law.<sup>140</sup> The contemporary dynamics of political, economic and social power place the Common law in a superordinate position relative to First Nations law.<sup>141</sup> Lawyers and judges trained in conventional legal reasoning are bound to encounter difficulties in interpreting First Nations law,<sup>142</sup> because they are accustomed to looking to reported cases to assist them in defining and applying the law. It will be a great challenge to pre-

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<sup>135</sup> *Morin*, *supra* note 133 at 5. Although the Court of Appeal overturned the lower court's decision, it stated that "sanctions other than imprisonment" could be available for "all" offenders (*Morin* (C.A.), *supra* note 133 at 139).

<sup>136</sup> There will, no doubt, be resistance to applying Aboriginal legal principles outside of disputes involving Aboriginal peoples (see *R. v. Willcocks* (1995), 22 O.R. (3d) 552 (Gen. Div.), where a Jamaican-Canadian in Toronto's black community was denied access to an alternative justice program similar to Aboriginal initiatives).

<sup>137</sup> T.S. Eliot, "Tradition and the Individual Talent" in *Selected Essays* (London: Faber, 1964) 3 at 4.

<sup>138</sup> See J. Carillo, "Surface and Depth: Some Methodological Problems with Bringing Native American-Centred Histories to Light" (1993) 20 N.Y.U. Rev. L. & Soc. Change 405.

<sup>139</sup> See text accompanying notes 54-61, above.

<sup>140</sup> See text accompanying notes 107-14, above.

<sup>141</sup> See M. Hooker, *Legal Pluralism* (Oxford: Clarendon Press, 1975).

<sup>142</sup> For a critical analysis of the difficulty one judge experienced in trying to understand law from another culture, see R. Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw*" in F. Cassidy, ed., *supra* note 6, 206; Pinder, *supra* note 38; J. Cruickshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition As Evidence in *Delgamuukw v. BC*" (1992) 95 B.C. Studies 25.

sent First Nations law to decision-makers who may be unfamiliar with non-European cultures.<sup>143</sup> Changing the cultural power of conventional "western" law will also be difficult.<sup>144</sup> Legal principles derived from communities outside the dominant culture of a society often encounter daunting obstacles before they are accepted.<sup>145</sup>

Bias and prejudice will also be hard to overcome<sup>146</sup> because, despite recent caselaw, some people believe that First Nations laws are inferior.<sup>147</sup> This problem has already been encountered in the United States<sup>148</sup> and is exemplified in the following account of the Chief Justice of the Navajo Court speaking to a six-state conference of judges in the south-west United States on the meaning of "Indian traditional law" or "Indian Common law". The Navajo people have a complex system of law which is currently administered by Navajo judges on their reservation. After Chief Justice Yazzie spoke:

Jim Zion, our court solicitor, dashed outside for a cigarette. He overheard two Wyoming judges talking about what I had to say. The first judge said, "What did you think of Chief Yazzie's presentation on Navajo common law?" The second laughed and said, "He didn't mention staking people to anthills".<sup>149</sup>

Attitudes that falsely caricature First Nations will inevitably persist for many years. Prejudice rooted in racial and cultural bias will continue to suppress the legitimacy and

<sup>143</sup> See A. Soifer, "Objects in the Mirror are Closer Than They Appear" (1994) 28 Ga. L. Rev. 533 at 552.

<sup>144</sup> See R. Delgado, "Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence" (1995) 68 S. Cal. L. Rev. 545:

At first, society welcomed the new storytellers. We thought they were cute and endearing, like children. ... But then we noticed that ... they were making points about us, about the ways in which we think and live. And some of their points were not particularly flattering. ... Now we started to temper our praise, to find fault with storytelling. Reservations appeared. Writers called for criteria to evaluate, to get a handle on this new legal genre (Delgado, *ibid.* at 569-70 [footnotes omitted]).

...

Cultural power always reasserts itself. You make gains, then when you least expect it, there's the backlash. And those who participate in the reaction don't see themselves as counterrevolutionaries at all. Rather, they're just trying to set things right (*ibid.* at 572 [footnotes omitted]).

<sup>145</sup> See A. Sarat & R. Berkowitz, "Disorderly Differences: Recognition, Accommodation, and American Law" (1994) 6 Yale J. L. & Human. 285 at 296.

<sup>146</sup> See R.A. Williams, Jr., "Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System" (1995) 2 Rev. Const. Studies 146 at 174.

<sup>147</sup> For an explanation of how western legal principles rhetorically invert the laws of subcultures within a state, see P. Fitzpatrick, *The Mythology of Modern Law* (New York: Routledge, 1992) at 80-81.

<sup>148</sup> See J. Carillo, "Identity as Idiom: Mashpee Reconsidered" (1995) 28 Ind. L. Rev. 517 at 526-31.

<sup>149</sup> R. Yazzie, "Healing as justice: the American Experience" [Spring 1995] *Justice as Healing* 7. This newsletter is edited by Sakej Henderson and is produced by the Native Law Centre in Saskatoon.

acceptance of First Nations law.<sup>150</sup> Unique characteristics of First Nations law will make the reception of that law into Canadian Common law more complex.<sup>151</sup> As a result, it may take longer for these laws to enjoy the same respect as other categories of Common law.

Yet there are mechanisms currently in place that would allow for the communication, proof, interpretation, reception and application of First Nations law.<sup>152</sup> Ethnography,<sup>153</sup> recorded precedent,<sup>154</sup> learned treatises,<sup>155</sup> judicial notice,<sup>156</sup> expert testimony<sup>157</sup> and

<sup>150</sup> For example, I anticipate that some will accuse me of romanticizing First Nations law or idealizing practices within First Nations legal institutions. I am the first to admit that not all Anishinabe people follow the environmental law outlined in *Nanabush* or in their other laws. Some people have forgotten or disregard these laws, and our communities have accordingly suffered. This has often occurred through colonialism, but sometimes it has occurred through dissent. There is a degree of deviation, however, in any society's observance of their laws, but that does not mean those laws are non-existent (see R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) at 24-25). It merely demonstrates that the formation and observance of all law is fluid and contingent on a variety of social, political and economic factors. For a description of the conditional nature of law in general subject areas, see D. Kairys, ed., *The Politics of Law: A Progressive Critique*, rev. ed. (New York: Pantheon Books, 1990).

<sup>151</sup> For an exceptional discussion of how arguments of equality and difference can work to dispossess First Nations of rights, and how normative notions of distributive justice can be applied to successfully mediate First Nations difference, see P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stan. L. Rev.* 1311.

<sup>152</sup> An example of how Indigenous law can be applied along with other laws is revealed in a statement of judges from the international community who investigated the claims of Native Hawaiian people:

"The Tribunal considers that it is applying the law as fully and as honestly as it knows how. It refuses, however, to define law in a formalistic or colonialist manner. It is guided by [concepts of law drawn from Indigenous, international and domestic laws].

...

"Law is a great river that draws on these five sources as tributary rivers, and the Tribunal will apply law in this spirit. We have found indigenous Hawaiian understanding of law to be an indispensable and powerful background for this verdict, and we believe that law experience and wisdom of indigenous peoples generally is helping ... nations to develop a more useful and equitable sense of law" (Ka Ho'okolokolonui Kanaka Maoli, People's International Tribunal, Hawaii (1993), *Interim Report: Kanaka Maoli Nation, Plaintiff v. United States of America, Defendant* (12-21 August 1993, Type-script), quoted in Merry, *supra* note 118 at 22).

<sup>153</sup> See Hoebel, *supra* note 85 at 30-45, where he writes about methods and techniques of reliable ethnography to discern Aboriginal law. See generally E. Hedican, *Applied Anthropology in Canada: Understanding Aboriginal Issues* (Toronto: University of Toronto Press, 1995).

<sup>154</sup> For an examination of how courts use recorded precedent to discover First Nations law in the Navajo Nation, see: D. Lowery, "Developing a Tribal Common Law Jurisprudence: The Navajo Experience" (1993) 18 *Am. Indian L. Rev.* 379 at 394; P. Bluehouse & J. Zion, "Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony" (1993) 10 *Mediation Q.* 329; J. Wallingford, "The Role of Tradition in the Navajo Judiciary: Re-emergence and Revival" (1994) *Okla. City U. L. Rev.* 141; C. Zuni, "The Southwest Intertribal Court of Appeals" (1994) 24 *N.M. L. Rev.* 304.

<sup>155</sup> The treatises, of course, would have to be specific to the Nation at trial.

skilled advocates can all assist judges in this venture. Properly trained lawyers of all cultures would conceivably be able to learn and articulate First Nations law, given appropriate access to, and support from, the community they represent. Included among this cadre of talented lawyers are legally trained members of First Nations.<sup>158</sup> Many of these people are bi-cultural and/or bilingual and have learned law from both their elders and from Canadian legal and academic institutions.<sup>159</sup> Many of them can interpret “western” Common law case precedent, but they also know how to find resolutions to the same questions within First Nations customary or Common law. They have access to an alternative source of knowledge and their contributions can help courts resolve troublesome issues.<sup>160</sup> They can bridge the gulf between First Nations and European legal systems. Therefore, while there may be many avenues to knowledge in the search for First Nations law, these people can be a significant source to which the courts can refer and be guided in the answers to their questions.<sup>161</sup>

Of course, not every First Nations person trained in Canadian law schools or other institutions will be capable of providing courts with the necessary guidance.<sup>162</sup> Many

<sup>156</sup> The Supreme Court of Canada ruled that judicial notice of historical facts concerning First Nations could be introduced even if they were not part of the record at lower courts:

The intervener was relying on documents that were not part of the record in the lower courts ... I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge (*Sioui*, *supra* note 65 at 1050).

See also: *R. v. White* (1964), 50 D.L.R. (2d) 613 at 629, 52 W.W.R. 193 (B.C.C.A.); *Monarch Steamship Ltd. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196 at 234, 1 All E.R. 1 (P.C.); *Read v. Bishops of Lincoln*, [1892] A.C. 644 at 652-54, [1891-94] All E.R. Rep. 227 (P.C.).

<sup>157</sup> The Navajo Nation Court in the United States has developed useful and culturally sensitive rules to qualify expert witnesses in First Nations law.

<sup>158</sup> These are people who can “reconcile [their] paper knowledge with the vast knowledge that is held by [their] Elders — ‘the keepers of the tribal encyclopedia’” (R. Yazzie, “Life Comes From It: Navajo Justice Concepts” (1994) 24 N.M. L. Rev. 175 at 190).

<sup>159</sup> For example, there are over 300 First Nations people with law degrees in Canada today who have varying amounts of expertise in cross-cultural knowledge and interpretation.

<sup>160</sup> See F. Pommersheim, *Braid of Feathers* (Berkeley and Los Angeles: University of California Press, 1995) at c. 4.

<sup>161</sup> A major study of Aboriginal peoples and the law observed:

The prominent position accorded to elders is a striking feature of Aboriginal societies. They have been largely responsible for retaining much of the knowledge of Aboriginal cultural traditions. ... The role of elders within Aboriginal communities sometimes varied, but generally consisted of helping the people, individually and collectively, to gain knowledge of the history, traditions, customs, values and beliefs of the tribe. ... It is apparent that Aboriginal elders will continue to play a very important role in the future of Aboriginal societies (A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg: Queen’s Printer, 1991) at 19-20).

<sup>162</sup> Alternatively, some First Nations lawyers will regard their talents best used in other places and may not even want to work in this field (see P.S. Deloria & R. Laurence, “What’s an Indian? A Con-



First Nations people trained as lawyers are relatively young and have, understandably, been so busy learning Canadian law that they have not had time to invest in the study of their traditional laws.<sup>163</sup> It is as great, if not greater, an investment of time to acquire knowledge of First Nations law as it is to learn and apply Canadian law.<sup>164</sup> Individuals wanting to learn First Nations law currently must go on a personal quest for understanding and knowledge, and it is not always easy to acquire this information by oneself.<sup>165</sup> Discussions have only recently begun to establish a formal and institutional way for First Nations law to be communicated to First Nations and non-Aboriginal lawyers, law students and others.<sup>166</sup> The creation of a First Nations Traditional Law School or Program would go a long way to articulating and diffusing knowledge of First Nations law. Until such programs receive support from universities, law societies, courts and First Nations, we will have to rely upon the individual effort and sacrifice of those who endeavor to become educated in both legal systems. These people are waiting to be called upon, but much more could be done to facilitate their efforts.

The institutional apparatus of Canadian law, and the community whose legal interests are represented, must recognize those who can traverse the divide between First

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versation About Law School Admissions, Indian Tribal Sovereignty and Affirmative Action" (1991) 44 Ark. L. Rev. 1107).

<sup>163</sup> First Nations people should not only learn Canadian law, they must also learn their own laws:

The reproduction of traditions and cultural forms is an achievement which can be legally enabled, but by no means *granted*. Reproduction here requires the conscious appropriation and application of traditions by those native members who have become convinced of these traditions' intrinsic value. The members must first come to see that the inherited traditions are worth the existential effort of continuation (J. Habermas, "Multiculturalism and the Liberal State" (1995) 47 Stan. L. Rev. 849 at 850).

<sup>164</sup> For an insightful article on the burdens of learning and applying both First Nations and non-Native law, see F. Pommersheim, "Liberation, Dreams and Hard Work: An Essay on Tribal Court Jurisprudence" (1992) Wis. L. Rev. 411 at 450-55.

<sup>165</sup> The acquisition of knowledge regarding much of First Nations law is not a magical ritual that is acquired through mystical processes. While there may be aspects of First Nations law that partake of the "magical", the law can be discerned on other bases as well (see M. Suchman, "Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Pre-literate Societies" (1989) 89 Colum. L. Rev. 1264).

Though it is true that some sources of First Nations law, such as the sacred and the ceremonial, would be inappropriate to bring before the courts, much of the information about First Nations law is acquired in the same way other legal education is acquired — years of study and hard work. The fact that First Nations law can be learned in a manner that is familiar to most people in Canadian society means that the interpretation of this law for the benefit of Canadian courts is not the exclusive domain of Aboriginal people. It is conceivable that a non-Aboriginal person who received the training, confidence and certification of a First Nations community may be the bridge by which First Nations law is communicated to Canadian courts in searching for *sui generis* analogies.

<sup>166</sup> The Saskatchewan Federated Indian College has recently approached the University of Saskatchewan and the College of Law to determine the feasibility of having "traditional" First Nations Cree law taught in a degree program. Harold Cardinal, Sakej Henderson, Georges Sioui, Patricia Monture-Okanee, Maria Campbell and I were all present at a meeting with representatives of the University to agree to further pursue the formal institutionalized communication of First Nations law by First Nations elders and other knowledgeable people.

Nations and non-Aboriginal legal sources in any specific dispute; and these people must be given the opportunity to speak to the law in that instance. They could speak as would any other lawyer in addressing the relevant law.<sup>167</sup> If we are to take the Court seriously in its pledge to treat Canadian law concerning Aboriginal peoples as *sui generis*, then these people and those of all cultures must be permitted and encouraged to express First Nations law for application by the court. If Aboriginal people are going to take seriously the challenge to change Canadian jurisprudence and transform legal principles to accommodate their understanding of law and justice, then they must give thoughtful consideration and effort to articulate their own laws.<sup>168</sup> Efforts to define and apply these laws will assist First Nations to fulfil important philosophical and social responsibilities in the communities of Nations and peoples.<sup>169</sup>

None of the statements in this article — regarding First Nations laws providing analogies for Canadian law and First Nations being able to articulate their laws in a “western” format — should be taken to mean that Aboriginal people will only work to implement their laws through Canadian law.<sup>170</sup> It is precisely because First Nations have

<sup>167</sup> A lawyer addressing First Nations law would attempt to transform the client’s problem into an acceptable legal form:

A lawyer’s primary task is translating human stories into legal stories and retranslating legal story endings into solutions ...

...

[T]he lawyer can only give legal advice if he can transform the client’s unique situation into a recognizable legal story that has an established plot and ending. ... [I]t is only the lawyer’s ability to see how unique, idiosyncratic human situations can be recharacterized to fit a much smaller set of acceptable legal narratives that enables him to give legal advice, make legal arguments, and otherwise function as a lawyer (A. Gray Anderson, “Lawyering in the Classroom: An Address to First Year Students” (1986) 10 *Nova L.J.* 271 at 274-76).

<sup>168</sup> See Merry, *supra* note 117:

[T]his is a movement which not only uses law as a mode of resistance but also challenges the legitimacy of nation-state law as the sole or even primary source of law ... [T]his movement attempts to redefine some aspects of law while accepting its symbolic power, seizing the concept of justice and deploying it as separate from state law (Merry, *ibid.* at 22-23).

<sup>169</sup> G. Morris acknowledges that many First Nations peoples regard it as their

“responsibility to tell the world that justice cannot be employed without also including the indigenous vision of what justice means ... We believe that as indigenous peoples we come from societies that had our own laws, that had our own understanding of the land and the sky and the ocean. And now it’s time for the West to integrate those principles into their law” (quoted in U. Hasager *et al.*, eds., *Ka Ho’okolokolonui Kanaka Maoli: The People’s International Tribunal, Hawai’i MANA’O* (Honolulu: Honolulu Publishing, 1993) at 9).

<sup>170</sup> As *Nanabush* suggests, if First Nations laws are not honoured and respected, they may eventually no longer be practiced on Canadian lands. Just as the deer left the Anishinabe and practiced their ways with the protection of the crow, First Nations may decide to practice their laws through the protection of others. When First Nations laws are no longer available to Canadian law, Canadians will not enjoy the substantial benefits that these laws can contribute to society. Thus, in applying the

their own systems of laws that courts can borrow from them to analogize to Canadian laws.<sup>171</sup> In fact, the chances of Canadian law accepting First Nations legal principles would be substantially weakened if the First Nations did not continue to practice their own laws within their own systems.<sup>172</sup> There is even greater room for First Nations legal systems to be operative; Aboriginal systems of law can and do operate with or without the reception of their principles in Canadian courtrooms.

First Nations legal traditions are strong, dynamic and can be interpreted flexibly to deal with the real issues in contemporary Canadian law concerning Aboriginal communities.<sup>173</sup> It is time that this effort to learn and communicate traditions be facilitated, both within First Nations and between First Nations and Canadian courts. There is persuasive precedent in Canadian law recognizing the pre-existing aspect of First Nations

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holding of the *Nanabush* case to the question of the acceptance of First Nations law in Canada, it is clear that while First Nations law can exist independently without being received into Canadian law, Canadian law cannot be truly independent until it more fully receives non-colonial sources of law. Depending on the acceptance of the principles presented in this article, as First Nations our laws will, in the end, be exercised with or without Canada.

<sup>171</sup> It is, then, up to First Nations communities and those people who have a bridging knowledge of both Aboriginal and Canadian law, to decide if and how they will utilize these principles within First Nations. The fact that First Nations legal interpreters can facilitate the reception of First Nations laws into Canadian law, should not be taken to mean that these people will be qualified to practice First Nations law within the communities. There are other considerations within First Nations cultures that may work against the use of "lawyers" advocating and interpreting the law within (see F. Pommerstein, "The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Bar as an Interpretive Community" (1988) 18 N.M. L. Rev. 49 at 68). This debate has not yet begun in Canada; however, the use of people to interpret First Nations law does not necessarily damage the internal workings of Aboriginal legal systems when they are not consciously trying to invoke a principle for reception into Canadian law.

<sup>172</sup> The abandonment of traditional laws can lead to loss of Aboriginal rights more generally:

The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (*Mabo*, *supra* note 30 at 43).

<sup>173</sup> Tradition itself is very flexible:

[T]o constitute a tradition, a past belief or practice must be transmitted by some individuals, in one time and place, and received by others. Without transmission and reception, a tradition dies. Its transmitted quality means that a tradition is not a static thing in time, but rather something that necessarily changes as the particular individuals who receive the tradition interpret it, integrate it into their own experiences, and make it their own. As it is interpreted, tradition necessarily changes; in fact, tradition is altered by the very fact of trying to understand it. Laying claim to a tradition requires work and imagination, which again means change (Bartlett, *supra* note 106 at 330).

rights and associated laws. Furthermore, the courts have created an opportunity to receive these laws into Canadian law by analogy and through *sui generis* principles. Since First Nations possess the powerful ability to articulate their laws, it is time that these principles began to influence the further development of law in Canada. When First Nations laws are received with greater force in Canadian law, both systems of law will be strengthened concurrently.<sup>174</sup> As both an Anishinabe and a Canadian citizen, it is my hope that Canada will not disregard the promise of respect that Canadian law holds for First Nations. While disrespectful trickery and foolish ruse on either side can violate the legal promise of mutual honour and respect,<sup>175</sup> the acceptance and application of the principles developed in this paper can strengthen both First Nations and Canadian legal institutions.<sup>176</sup> Canadian legal institutions will soon determine if First Nations law will continue, with or without them.

*[Neesh-wa-swi'ish-ko-day-kawn arose and] said:*

*"In the time of the Seventh Fire an Osh-ki-bi-ma-di-zeeg' (New People) will emerge. They will retrace their steps to find what was left by the trail. ...*

...

*"The task of the new people will not be easy.*

*"If the new people remain strong in their quest, the Waterdrum of the Midewiwin Lodge will again sound its voice. There will be a ... rekindling of old flames. The Sacred Fire will again be lit.*

*"It is at this time that the Light-skinned Race will be given a choice between two roads. If they choose the right road, then the Seventh Fire will light the Eighth and Final Fire — an eternal Fire of peace ... If the Light-skinned Race makes the wrong choice of roads, then the destruction which they brought with them in coming to*

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<sup>174</sup> Since state and First Nations law interact in the everyday life of Aboriginal peoples, it is important that each system be responsive to the values of the other (see generally M.T. Sierra, "Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Siera de Puebla" (1995) 29 L. & Soc'y Rev. 227).

<sup>175</sup> In the past, as in *Nanabush*, the methods used in attempting to destroy First Nations law, the failure to receive this law as one would a gift, the way in which actions have caused First Nations law to be despoiled by the courts and the near-breaking of their legal institutions all point to an imbalance in the relationships of First Nations to Canada and constitute a violation of our joint-society's legal environment.

<sup>176</sup> See: R.A. MacDonald, "Recognizing and Legitimizing Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada" in *National Roundtable on Aboriginal Issues*, *supra* note 103, 232; *Bridging the Cultural Divide*, *supra* note 132.

*this country will come back to them and cause much suffering ...*

...

*“[W]e might be able to deliver our society from the road to destruction. Could we make the two roads that today represent two clashing world views come together to form [a] mighty nation? ...”*

*“Are we the New People of the Seventh Fire?”<sup>177</sup>*

E. Benton-Banai

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<sup>177</sup> Quoted in Benton-Banai, *supra* note 1 at 91-93.