CONSTITUTIONAL SUPREMACY AND ABORIGINAL LEGAL TRADITIONS IN FEDERAL COURTS

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> *Anyone embarking on a discussion of Indian-white relations in Canada is faced from the outset with a virtually insoluble dilemma. Since every man is the product of the culture into which he is nurtured and educated, of necessity his thinking will follow certain well-defined lines. To change the direction of thinking is as difficult as changing the color of skin, and probably more painful.*
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> George F.G. Stanley, "As Long as the Sun Shines and Water Flows: An Historical Comment," in *As Long as the Sun Shines and Water Flows* [1]

> *There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.*
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> Canadian Judicial Council's *Commentaries on Judicial Conduct* (1991)[2]

The *Federal Courts Act*[3] and Canada *Evidence Act*[4] generate a particular consciousness for the judges of the Federal courts. They are used by the Federal courts

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1 A.L. Getty and Antoine Lussler, *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver, B.C.: University of British Columbia Press, 1983) at 1.

2 *R.D.S.* v. *Queen*, [1997] 3 S.C.R. 484 at para. 119 [*R.D.S.*].

3 *An Act respecting the Federal Court of Appeals and the Federal Court*, R.S., 1985, c. F-7.

4 *An Act respecting witnesses and evidence*, R.S.C. 1985, c. C-5.

and the legal profession to determine the burden of proof and demonstrate the truth of an assertion. It provides the familiar common law lens through which the judges look at events and generate facts against the background of constitutional and legal doctrines.

These acts of the Parliament of Canada, enacted under the authority of s. 101 of the *Constitution Act, 1867*,[5] establish a national court system which hears and decides legal disputes arising in the federal domain, including claims against the Crown in right of Canada, intergovernmental suits, civil suits in federally-regulated areas, and challenges to the decisions of federal tribunals. These statutes are particularly relevant to Indians and Lands reserved to the Indians, the jurisdiction over whom has been exclusively assigned to the federal Crown in s. 91(24) of *Constitution Act, 1867*,[6] as well as issues involving aboriginal and treaty rights of Indians (First Nations) and Inuit in s. 35 of the *Constitution Act, 1982*.[7] However, the *Federal Courts Act* is interestingly silent as to judicial review

5 Section 101 *Constitution Act, 1867* (U.K), 30 and 31 Vict., c. 3. ("The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.)

6 *Ibid*. Section 91(24) *Constitution Act, 1867*, *supra* note 5 ("It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—Indians, and Lands reserved for the Indians.")

7 Section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11, Schedule B in Part II [*Constitution Act, 1982*]. provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

over the constitutional rights of Indians or the federal *Indian Act*, but does include judicial review of the Specific Claims Tribunal.[8]

The emergence of litigation about aboriginal and treaty rights in Canadian courts has revealed that these rules and evidence acts are neither impartial nor comprehensive, nor is the judicial interpretation of them impartial or comprehensive. They are biased in favour of Eurocentric knowledge and against Aboriginal knowledge. These statutes have been artificially constructed to reflect the common and civil law traditions. They arise from Eurocentric knowledge and questionable assumptions about the truth, general and particular, and context and fact. They have not been developed with the intent of representing accurately the Aboriginal knowledge or legal traditions that create aboriginal and treaty rights. They are unrelated and external to the structure and presentation of Aboriginal legal traditions, languages, performance, and narratives inherent in aboriginal and treaty rights.

These insights learned from litigation affirm the conclusion of more than two decades of commissions, inquiries, reports, special initiatives, conferences, and books and court cases that the rule of the courts and the evidence act and the interpretative tools of the justice have failed to understand the Aboriginal worldview and need to be reformed.[9] In

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8 S. 28(1)(r), *Federal Courts Act*, *supra* note 3.

9 Canada, Indian and Northern Affairs, *Indians and the Law* (Ottawa: Canadian Corrections Association and the Department of Indian and Northern Affairs, 1967); Law Reform Commission of Canada, *Report No. 34, Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: The Law Reform Commission of Canada, 1991*)*; Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: The Commission, 1989); Ontario, *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee* (Ontario: The Committee, 1990*);* Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); Alberta, *Justice*

1994, at the federal and provincial justice ministers' conference, Canada's justice ministers collectively agreed that systemically the Canadian justice system has failed and is failing Aboriginal peoples. They agreed that reforms must make the general system "equitable in every sense" for Aboriginal peoples; that reforms must make the system "work" with Aboriginal communities; and must reflect the "values" of Aboriginal peoples. Also the justice ministers agreed that they must build "bridges" between the general system and Aboriginal practices, traditions, and approaches.[10] Finally, they pledged to work together with Aboriginal leaders on these priorities, and in future meetings to analyze the implications for Aboriginal people of all issues on the agenda.

In 1996, the Royal Commission on Aboriginal Peoples affirmed the failure of Canadian justice system in its report entitled *Bridging the Cultural Divide*. The report found that Eurocentric colonization has systematically undermined the traditional Aboriginal worldview and justice system and created racism as the fundamental lens for viewing Aboriginal peoples. This legal failure derives from the different views of Aboriginal and non-Aboriginal peoples in Canada on the content of justice and the means of achieving justice.

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on Trial: Report of the Task Force on the Criminal Justice System and Its Impacts on the Indian And Métis People of Alberta (Edmonton: the Task Force, 1991); Saskatchewan, *Report of the Saskatchewan Indian Justice Review Committee* (Saskatoon: The Committee,1992*);* British Columbia, *Report on the Cariboo-Chilcotin Aboriginal Justice Inquiry* (Victoria: The Inquiry 1993); Québec, *Justice for and by the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities, submitted to the Minister of Justice and the Minister of Public Security* (Québec: Advisory Committee on the Administration of Justice in Aboriginal Communities, 1995); Canada, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996).

10 "Final Statement of the Canadian Ministers of Justice" (Justice Ministers' Conference, Ottawa, March 24, 1994) [unpublished].

In *Gladue* v. *The Queen,*[11] the Lamer Court affirmed the Royal Commission's conclusions:

> Statements regarding the extent and severity of this problem are disturbingly common. In *Bridging the Cultural Divide*, supra […] at p.309, the Royal Commission on Aboriginal Peoples listed as its first "Major Findings and Conclusions" the following striking yet representative statement:
>
> > The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

Far from being a Canadian anomaly, these conclusions are consistent in each former colony that has used the common law tradition.[12] This systemic failure has many different faces.

One of the systemic failures is the existing common law rules of evidence in aboriginal and treaty rights litigation. The Supreme Court has found that the common law rules of evidence have to be adapted to take into account the *sui generis* nature of aboriginal and treaty rights. The judicial modification of these rules of evidence is relevant to the proof and meaning of aboriginal and treaty rights. In cases involving the determination of aboriginal and treaty rights, appellate intervention is warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating

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11 *Gladue* v. *The Queen,* [1999] 1 S.C.R. 688 at para. 62.

12 See Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623.

aboriginal or treaty claims when, first, applying the rules of evidence and, second, interpreting the evidence before it.[13]

This systemic failure of the common law system of courts and the rules of evidence has generated the present attempt to establish fair rules for Aboriginal Elders, faith keepers, and knowledge keepers to assist the Federal Court so that it can be consistent with constitutional supremacy and impartially and fairly comprehend Aboriginal knowledge and legal traditions that inform the existing aboriginal and treaty rights of Aboriginal peoples.

This exploratory essay will broadly look at the role of Elders in bringing an Aboriginal knowledge and legal traditions to the Federal Court in litigation involving aboriginal and treaty rights. It will look at this issue of the trans-systemic perspective of constitutional supremacy and through issues of impartially modifying the Eurocentric foundations of evidence law. Though the two issues are reducible to each other, they turn out to be connected with cognitive contextuality and imperialism: the power of the habitual settings of Eurocentric education and our action and experiences within the routinized institutions and preconceptions, and the basic methods and conceptions

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13 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*] at para. 80 and *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*] at para. 68 ("In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, *a court should approach the rules of evidence, and interpret the evidence that exists,* with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. *The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case*.")[Emphasis in original]

employed in the ordinary investigation of truth and justice —that we regularly take for granted, both consciously and unconsciously.

I. Constitutional Supremacy Guides Our Discussions on Elder's testimony

Canada has express constitutional guarantees recognizing and protecting the aboriginal and treaty rights of Aboriginal peoples. The Canadian courts have struggled in litigation with the nature and purpose of Aboriginal knowledge and legal traditions and have developed specific innovative, constitutional doctrines to apply to litigation of aboriginal and treaty rights. However, neither the federal nor territorial or provincial courts, nor their rules, have expressly reflected these doctrines by creating a cause of action under honour of the Crown or similar judicial doctrines of interpretation. The courts have not attempted to reconcile Aboriginal legal traditions with either the common law or civil law traditions though consultation or accommodations to generate trans-systemic rules or evidence acts. They have not attempted, with the consent and cooperation of holders of these distinct Aboriginal legal traditions, to develop specific rules of procedure or evidence, which would enable the fair and equal treatment of distinct legal traditions of Aboriginal peoples in the administration of justice in Canada.

Because of the lack of reconciling Aboriginal legal traditions in the rules of the courts, Aboriginal Elders' and knowledge keepers' testimony about Aboriginal legal traditions and their concept of the *sui genesis* knowledge, which is distinct from Eurocentric knowledges, have not been recognized, respected, or comprehended. This inactivity reveals another ongoing failure of constitutional supremacy as well as the rule

of law toward the rights of Aboriginal peoples. It demonstrates some judicial or legislative resistance to the patriated Constitution of Canada. It is the constitutional duty of the judges of Canadian courts to be independent and impartial to ensure that legislatures do not transgress the limits of their constitutional authority and engage in the inconsistent exercise of legislative power.[14]

In the patriation of the constitution to Canada from the Imperial crown in 1982, the Imperial acts established constitutional supremacy of the implementation of aboriginal and treaty rights by s. 52(1) of the *Constitution Act, 1982*.[15] The patriation of the Constitution from the imperial parliament, creating constitutional supremacy and modifying Parliamentary supremacy, was part of the decolonization process and a search for an equitable constitutional order. Patriation also affirmed the judicial doctrine of the rule of law.[16] Both constitutional supremacy and the rule of law implemented the explicit protection of existing aboriginal and treaty rights affirmed under s. 35(1) of the *Constitution Act, 1982*. The Supreme Court stated: "The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the

14 *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 744-47 [*Manitoba Reference*]; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [S*parrow*] at paras. 50, 54-66.

15 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Reference re Secession of Quebec*] at paras. 70-78.

16 The reference to "the rule of law" in the 1982 preamble of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], the Court has noted, reflects "an unwritten postulate which forms the very foundation of the Constitution of Canada", *Manitoba Reference, supra* note 14 at 748. Though an abstract notion, it "may give rise to substantive legal obligations" that governments are bound to obey as they are other constitutional provisions, *Reference re Secession of Quebec, ibid.* at paras. 70-78, 91, 96, and 145. See also *Inuit Tapirisat of Canada v. A.G. Canada*, [1980] 2 S.C.R. 735 at 752. Section 35(1) is not subject to the *Charter* by s. 25.

larger concern with minorities, reflects an important underlying constitutional value."[17] The aboriginal and treaty rights (as well as other rights) are protected from the personal rights of the *Charter* by the non-derogation clause in s. 25 of the *Charter*.[18] Neither the *Constitution Act* nor *Charter* provide for any legislative or judicial override of the constitutional rights of Aboriginal peoples. A constitutional convention and amendment is required to modify these rights of Aboriginal peoples.

Both constitutional supremacy and the rule of law created the constitutional obligations of the divided Crowns, their government, and their servants, officers and agents to abide by and obey the aboriginal and treaty rights and to implement them in Canadian law. In *Reference re Secession of Quebec*, the Supreme Court explained that:

> [t]he constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.[19]

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17 *Ibid.*

18 *Reference re Secession of Quebec, ibid.* at para. 82.

19 *Ibid.* at para. 72. Section 52 (1) of the *Constitution Act, 1982*, *supra* note 7.

As the Supreme Court noted constitutional supremacy has transformed the colonial theory of parliamentary supremacy. It provides safeguards for fundamental human rights and individual freedoms that might otherwise be susceptible to government legislation or interference.[20] It requires that constitutional law be uniformly respected and consistently applied in legislation, administration, and adjudication. It requires that governmental and judicial power be exercised consistently with constitutional law, regardless of the categories of persons and acts or powers or rights. It requires government or judicial action, which involves choices among conflicting interests and complex strategies, to stand above, or outside, the existing colonial legacies of social rank, class, and racial or gender discrimination. It requires justices and administrators to apply constitutional principles impersonally and impartially to governmental law, regulations, and policy.

Constitutional supremacy recognizes that Canadian society consists of a constellation of governments and laws balanced by aboriginal and treaty rights, as well as personal rights. It requires a system of *ad hoc* balancing of plural sources of power and rights, as well as numerous interests, by constitutional principles. The principles underlying constitutional supremacy create a constitutional convergence of its parts, with a judicial reluctance to completely sacrifice any one of the parts of the constitution to any other part. These principles created a constitutional order that is protected against unjustified legislative infringement.

20 *Ibid.* at para. 74.

Under constitutional supremacy, the Supreme Court has established that the individual elements of the constitution are linked to the others, and that the elements are not absolute, and they must be interpreted by reference to the structure of the Constitution as a whole.[21] These defining principles apply to both s. 35(1) of the *Constitution Act, 1982* and s. 101 of the *Constitution Act, 1867* that established the federal court system. They are to be interpreted as functioning in symbiosis.[22] No one principle or text trumps or excludes the operation of any other.[23] The basic rule of constitutional supremacy is "that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution".[24] The constitutional supremacy principle is an innovative and enduring

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21 *Ibid.* at para. 50. As to absence of absolute power for aboriginal rights, see *Delgamuukw*, *supra* note 13 at para. 160 ("The Aboriginal rights recognized and affirmed by s.35(1), including Aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. However, s.35(1) requires that those infringements satisfy the test of justification." Yet the federal legislation or provincial legislation that is inconsistent with aboriginal and treaty rights are effective or in force and cannot be have "compelling and substantial objectives", which are directed at the purposes underlying the recognition and affirmation of Aboriginal rights by s.35(1), *ibid.* at para. 161

22 *Ibid.* at para. 49. Symbiosis is not a familiar legal expression. It is meant a state of living together of interdependent parts, representing a cooperative, mutually beneficial relationship between the parts of the constitution.

23 *Ibid. Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 38 (one part of the Constitution cannot interfere with other parts); *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 337 ("It is a basic rule, not disputed in this case, that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution," McLachlin J. (as she then was); *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at 1207 [*Re Bill 30*] at 1196 ("The *Charter* cannot be applied so as to abrogate or derogate from rights or privileges guaranteed by or under the Constitution," Wilson J.) and 1206 ("The role of the *Charter* is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the *Constitution Act, 1982.* Action taken under the *Constitution Act, 1867* is of course subject to *Charter* review," Estey J.) and 1207 (The *Charter* "cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the *Constitution Act, 1867,*" Estey J.).

24 *New Brunswick Broadcasting Co.*, *ibid*. at 337, McLachlin J. (as she then was).

interpretative process, which the Supreme Court suggests, continues to breathe life into the Constitution of Canada.[25]

In the earliest case, the symbiotic approach was used in reviewing the provisions of pending *Canada Act 1982*, the English Court of Appeal held that under s. 35, no Parliament or provincial legislative assembly "should do anything to lessen the worth of these guarantees of the treaties," nor should these constitutional rights be "diminished or reduced"[26] except by the prescribed constitutional amendment process.[27]

In *Manitoba Language Rights*[28] and *Sparrow*, the Supreme Court established that the highest duty of the judiciary under s. 52(1) is to ensure that constitutional law prevails over the statutory or regulative law of Canada and each of the provinces. The judiciary's duty is to ensure that legislatures do not transgress the limits of their constitutional authority and engage in the inconsistent exercise of legislative power.[29] In the *Manitoba Language Rights* case, the Supreme Court stated that the words "of no force or effect" in

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25 *Reference re Secession of Quebec, supra* note 15 at paras. 49-54. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*] at para. 21, affirmed that the Aboriginal rights have to be interpreted in a purposive approach as explained in *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145 at 155, Dickson J. ("the Constitution must be interpreted in a manner which renders it 'capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers'").

26 *The Queen v. The Secretary of State*, [1981] 4 C.N.L.R. 86 at 99 (Eng. C.A.) [*Secretary of State*].

27 *Ibid.* at 99.

28 *Manitoba Reference, supra* note 14.

29 *Manitoba Reference, ibid.* at 744-47; S*parrow*, *supra* note 14 at paras. 50, 54-66.

s. 52(1) mean that a law inconsistent with the Constitution has no force or effect because it is invalid.[30] It established that:

> [t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.[31]

The courts cannot allow either federal or provincial legislation to exceed the limits of the established constitutional mandate; the consequence of such non-compliance continues to be invalidity, making the action of no force and effect.[32]

Under constitutional supremacy, *Sparrow* acknowledges that constitutional rights of First Nations are "unalterable by the normal legislative process, and unsuffering of laws inconsistent with it."[33] The Supreme Court held that the judiciary has a duty when asked "to ensure that the constitutional law prevails",[34] and a vital duty if the constitutional rights of the Aboriginal peoples of Canada are to be protected.

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30 *Manitoba Reference, ibid*. at 748-49 ("In the present case, declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law. The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in s. 23 of the *Manitoba Act, 1870* and s. 52 of the *Constitution Act, 1982*, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect.").

31 *Ibid.* at 745; *Sparrow*, *supra* note 14 at para. 56.

32 *Manitoba Reference, ibid*. at 740, 746, 748-49.

33 *Sparrow*, *supra* note 14 at para. 56, relying on *Manitoba Reference, ibid.* at 745.

34 *Sparrow*, *ibid.*

The Supreme Court has rejected the argument that aboriginal and treaty rights are subject *ab initio* to governmental power: it established that express governmental standards in legislation or regulations respecting aboriginal and treaty rights are required.[35] The Supreme Court rejected discretionary or covert governmental regulation of aboriginal and treaty rights. Governmental legislation and regulations that give direction to a minister must be consistent with these aboriginal and treaty rights and delegations. These governmental regulations must explain how public servants should exercise their discretionary authority in a manner that would respect the constitutionalized aboriginal and treaty rights.[36]

Section 52(1) protects existing aboriginal and treaty rights and limits inconsistent governmental powers. As part of reading together of aboriginal and treaty rights and other sections of the constitution,[37] any governmental legislation, regulation, and actions must be consistent with constitutional rights of Aboriginal peoples.[38] The Supreme Court has concluded that any "federal power" must be consistent with aboriginal and treaty rights as well as the Supreme Court's doctrine of interpretative principles, constitutional fiduciary duty, and honour of the Crown.[39] It has affirmed that executive and legislative

35 *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall*] at para. 54.

36 *Ibid.* at para. 64.

37 *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*] at paras. 47, 72, 83-85, Cory J., at paras. 1, 2, 12, Lamer C.J. and Sopinka J. dissenting; *Reference re Secession of Quebec, supra* note 15 at para. 3.

38 *Marshall*, *supra* note 35 at para. 64.

39 *Sparrow*, *supra* note 14 at para. 56 (The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation). McLachlin J. restated the position in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*] at paras. 231 (s. 35(1) "does not oust the federal power to legislate with respect to aboriginals, nor does it confer absolute rights.

power is constitutionally limited by fiduciary obligations[40] and the honour of the Crown.[41] It has provided that any exercise of governmental power must be consistent with constitutional rights of Aboriginal peoples.[42] The purpose of the fiduciary obligations and the principles of the honour of the Crown is constitutional displacement

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Federal power is to be reconciled with aboriginal rights by means of the doctrine of justification. The federal government can legislate to limit the exercise of aboriginal rights, but only to the extent that the limitation is justified and only in accordance with the high standard of honourable dealing which the Constitution and the law imposed on the government in its relations with aboriginals.").

40 *Sparrow*, *ibid.* at para. 59; *Guerin v. R.*, [1984] 2 S.C.R. 335 [*Guerin*] was read together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 [*Taylor and Williams*] to ground a general guiding principle for s. 35(1): "the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship"); *Delgamuukw*, *supra* note 13 at paras 162-64 (the fiduciary duty is a function of the "legal and factual context" of each appeal and variation in degree of scrutiny required by the fiduciary duty of the infringing measure or action related to the nature of the right).

41 *Sparrow*, *ibid.* at paras. 58 (relying on principles of *Taylor and Williams*, *ibid.* and *Guerin*, *ibid.* that the honour of the Crown is always involved in the special trust relationship created by history, treaties, and legislation and no appearance of 'sharp dealing' should be judicially sanctioned), 62 (the words "recognition and affirmation" incorporate the fiduciary relationship, constitutionally import some restraint on the exercise of sovereign power, and hold the Crown to a high standard of honourable dealing with respect to Treaty First Nations), 63-64 (Court rejected a characterization that would guarantee Aboriginal rights in their original form unrestricted by subsequent regulation, but found implicit in the constitutional scheme is the obligation of the legislature or regulation to satisfy the test of justification of any infringement upon or denial of Aboriginal rights in a way that upholds the honour of the Crown and must ensure recognition and affirmation of Aboriginal rights); *Delgamuukw*, *ibid.* at para. 169 (In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when economic aspect of Aboriginal title is infringed), and 203 (these legislative objectives are subject to accommodation of the Treaty First Nations' interests. This accommodation must always be in accordance with the honour and good faith of the Crown, entails notifying and consulting Treaty First Nations, fair compensation in terms of the constitutional rights and in keeping with the honour of the Crown, La Forest, J.); *Marshall*, *supra* note 35 at paras. 62-67; *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 42 [*Marshall 2* rehearing] at para. 45; in *R. v. Sundown*, [1999] 1 S.C.R. 393 at paras. 39-41.

42 Section 52 of the *Constitution Act, 1982*, *supra* note 7, *Sparrow*, *ibid.* at para. 45 (Musqueam submit that limits of federal regulatory power on Aboriginal rights are set by the word "inconsistent" in s. 52(1)), 56 (s. 52 declares the "supreme law" of the nation is unalterable by the normal legislative process and unsuffering of laws inconsistent with it), 61 (by the operation of s. 52 any law or regulation affecting Aboriginal rights will not be automatically of no force or effect, such laws must be judicially shown to be inconsistent and unjustified), and 79 (to the extent that the federal regulatory scheme fails to recognize Aboriginal rights, it is inconsistent with the constitution, and s. 52 mandates a finding that such regulations are of no force and effect), and 87 (if an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective). See also,*Van der Peet*, *supra* note 13 at para. 24.

of the indignities and humiliations of prior legislation and practices of colonization and racism, involving discrimination against First Nations and their legal traditions, with innovative, constitutionally-required honourable governance. This purpose includes a dialogical process of governance that requires respect, consultation, accommodation, justification, and accounting for their actions toward First Nations.[43] These constitutional doctrines bring a restoration of dignity to First Nations. The courts must scrutinize any lack of fairness and decency, or whiff of injustice, in governmental actions toward the constitutional rights of First Nations. These doctrines apply especially to the rules of the courts and evidence law.

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[43] For judicial displacement of colonial indignities, see Henderson, Benson, and Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000) at 247-329. That the Court requires the government to consult and explain its actions to Treaty First Nations is part of the constitutional fiduciary relationship between the federal Crown and Aboriginal people that was expounded originally as a federal fiduciary obligation in the leading case of *Guerin, supra* note 69 at 376, 383-5, 387, 389; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 [*Blueberry River*] (determining how statutory fiduciary principle applies in relation to the sale of mineral rights on reserve). The duty to consult sustains their inherent dignity as a constitutional category against the harmful effects of legislative powers, *Sparrow*, *supra* note 14 at paras. 53-55 and 62-65 (the Court stated the fiduciary obligation and the honour of the Crown required examining "… whether the Aboriginal group in question has been *consulted* with respect to the conservation measures being implemented," and noted that "… at the least…" the Aboriginal people would surely be expected to be "… informed regarding the determination of an appropriate scheme for the regulation of fisheries."); *R. v. Nikal*, [1996] 1 S.C.R. 1013 [*Nikal*] at para. 110 *(*where the Court suggested that the concept of reasonableness is integral to the justification test, in the "aspects of information and consultation", and "… the need for the dissemination of information and a request for consultations cannot simply be denied"); *Delgamuukw*, *supra* note 13 at para. 168 (the fiduciary relationship between the Crown and Treaty First Nations may be satisfied by the involvement of Treaty First Nations in decisions taken with respect to their lands. There is always a duty of consultation and good faith with the intention of substantially addressing the concerns of the Treaty First Nations, but the nature and scope of the duty will vary with the circumstances. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.); W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 173-95 (arguing that national life can accommodate multiple allegiances with attention paid to equality within and among groups); A. Margalit, *The Decent Society*, trans. N. Goldblum (Cambridge: Harvard University Press, 1996) at 173-76, and 180-86 (discussing the presence of subgroups within a polity with their own forms of life and the obligations of "a decent society" not to denigrate them, and to encompass groups with "competing and not merely incompatible forms of life").

The framers of the *Constitution Act, 1982* did not include a legislative override for aboriginal or treaty rights. Distinct from *Charter* rights, which may be overrode by operation of ss. 1 and 33, aboriginal and treaty rights of First Nations remain protected from majoritarian policies and expediencies of parliaments or legislative assemblies. Section 52(1) of the *Constitution Act, 1982* requires that the application of legitimate constitutional powers, either by federal or provincial legislation and regulations, must achieve convergence consistently with both imperial constitutional law[44] and Treaty rights.[45] The Supreme Court has held that constitutional supremacy requires judicial review.[46] The Supreme Court has held of s. 52(1) that "this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52".[47] Legislation that affects the exercise of rights of Aboriginal peoples may be valid, if it meets the consistency test, if it meets the honour of the Crown standard,[48] if the government can justify an interference, and if there is fair compensation the First Nations for the interference with the Treaty rights.[49]

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44 *Constitution Act, 1867*, s. 9, *supra* note 14.

45 *Marshall*, *supra* note 35 at para. 45; *Sundown*, *supra* note 41 at paras. 39-41.

46 *Ibid. Nikal*, *supra* note 43 (The mandatory conditions affixed to the 1986 licence under s. 4(1) of the British Columbia Fishery (General) Regulations infringe the appellant's Aboriginal rights and are not severable and the licence is therefore invalid by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*.) See also, *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 697; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at p 1195; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 at 518.

47 *Sparrow*, *supra* note 14 at para. 61 ("This does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52").

48 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [*Mikisew Nation*] at paras. 51, 54, and 57 (Treaty 8)

49 *Constitution Act, 1982*, s. 52(1), *supra* note 7.

II. Distinct Aboriginal legal traditions are integral parts of aboriginal and treaty rights and should be constitutionally respected by the Federal Courts rules and the Evidence Act.

At the dawn of the twenty-first century, the recovery of Indigenous knowledge and legal traditions involves a conscious and systematic effort to revalue that which has been denigrated by Crown laws and educational policy, and revive that which has been destroyed by Eurocentrism.[50] In *Sparrow*, the first case on interpreting s. 35(1), the Dickson Court emphasized the importance of the internal vision of aboriginal and treaty rights. He stated that when analyzing aboriginal rights under s. 35(1), "[i]t is [...] crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake."[51] In *Delgamuukw*, Justice Lamer, writing for the majority, clarified that these perspectives can be "gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of Aboriginal peoples."[52] The traditional law or legal traditions and oral histories are manifested by performance and orality; they are transmitted by creation stories, stories, songs, protocols, ceremonies, and

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50 Angla Wilson, "Introduction: Indigenous Knowledge Recovery is Indigenous Empowerment" 2004 28 (3 & 4) *American Indian Quarterly* at 359

51 *Sparrow, supra* note 14 at para. 69; for application in treaties see *Badger*, *supra* note 37.

52 *Delgamuukw*, *supra* note 13 at paras. 147-48 (The Court stated "As a result, if, at the time of sovereignty, an Aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for Aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use"). In *Van der Peet, supra* note 1 at para. 41 (Aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs, and traditions of Aboriginal peoples); and *ibid.* at para. 255, McLachlin J. (as she then was), dissenting on other issues. The reliance on the Aboriginal jurisprudence and perspective by the judiciary is consistent with s. 27 of the *Charter, supra* note 16, which provides: "This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

prayers.[53] Thus, these legal traditions of the Aboriginal peoples operate at a constitutional level as part of constitutional supremacy; they challenge every federal or provincial statute to be consistent with them. This generates a trans-systemic analysis of legal traditions that seek convergence with the constitution to forge a fair and more just legal system.

Also in *Delgamuukw* the Supreme Court found that the "traditional values of evidence law" were not necessarily conducive or appropriate to a culturally sensitive consideration of Aboriginal knowledge, legal traditions or oral histories. The Court urged that the law of evidence should be adapted to accommodate traditional law and oral evidence.[54] Until these rules are changed to be consistent with constitutional rights of Aboriginal peoples, judges should apply the existing rules of evidence broadly, flexibly, and commensurate with Aboriginal knowledge, legal traditions or oral histories on a case by case basis.[55]

[53] For a discussion see, J.Y. Henderson, *First Nations Jurisprudence and Aboriginal Rights* (Saskatoon, SK: Native Law Centre, 2007) ch. 4.

[54] *Delgamuukw*, *supra* note 13 at paras. 84-87; *R. v. Mitchell* [2002], 1 S.C.R. 911 [*Mitchell*] at paras. 29-34 (acknowledges that existing rules of evidence should not be abandoned, but warn against a Eurocentric approach to Aboriginal knowledge and traditions).

[55] *Delgamuukw*, *ibid*. at 84 (This appeal requires us to apply not only the first principle in *Van de Peet* but the second principle as well, and adapt the laws of evidence so that the aboriginal perspective on their practices, traditions and on their relationship with the land are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations are the only record of their past. Given that the aboriginal rights recognized and affirmed by s.35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights"); *Van der Peet*, *supra* note 13at para. 62.

In Eurocentric legal thought, a legal tradition is usually conceptualized as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught."[56] Law professor Robert Cover described the operations of Eurocentric[57] constitutional traditions:

> A legal tradition […] includes not only a *corpus juris*, but also a language and a *mythos*—narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from meaningful patterns of the past.[58]

European languages structure European approaches to law. For example, Eurocentric law is structured on the noun-verb-subject syntax of its languages. This is translated

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56 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2d ed.), (Stanford, CA: Stanford University Press, 1985) at 2.

57 Eurocentrism is the manifestation of ethnocentrism by Europeans. E. Kallen, *Ethnicity and Human Rights in Canada* (Toronto: Gage, 1982), described ethnocentrism as "the ubiquitous tendency to view all peoples and cultures of the world from the central vantage point of one's own particular ethnic group and, consequently, to evaluate and rank all outsiders in terms of one's own particular cultural standards and values." See N. Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity," (1990) 38 Buffalo L. Rev. 325 at 333 ("Ethnocentrism is what draws people together, making ethnic identities and cultural pluralism possible. Ethnocentrism is also what diminishes people by calling them outsiders, making discrimination and racism possible.") See also: J. O'Manique, "Universal and Inalienable Rights: A Search for Foundations", (1990) 12 Human Rts. Q. 465 at 485 ("...all forms of reductionism deny the human spirit and its future. But perhaps more insidious is the ethnocentrism that locks humanity and human development into a repressive mode").

58 R.M. Cover, "*Nomos* and Narrative" (1983) 97 Harv. L. Rev. 4 at 9. See also A.T. Kronman, "Precedent and Tradition" (1990) 99:4 Yale L. J. 1029 at 1066 ("we must respect the past because the world of culture that we inherit from it makes use of who we are. The past is not something that we, as already constituted human beings, choose for one reason or another to respect, it is such respect that establishes our humanity in the first place").

according to the language into persons-actions-things.[59] However, in the civil law tradition the proper order has been questioned over the centuries.[60] Language is a fundamental aspect of systems of knowing, a process of communication of knowledge, doctrine or technique. Each language has a system of oral "evidentials" to locate how knowledge is obtained.

Aboriginal civilization, confederacies, and societies developed their concepts of communal authority and legal traditions without any knowledge of European languages, *mythos*, or legal traditions. Aboriginal legal traditions existed prior to contact with European societies and laws and prior to the assertion and protection of sovereignty by the imperial British sovereign.[61] This fact, under the constitutional grundnorm of Aboriginal sovereignty,[62] makes Aboriginal legal traditions distinct from other legal traditions,[63] integral to their society or culture,[64] and thus *sui generis*. The grundnorm

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59 The trichotomy of the linguistic approach is grounded in reflection of the sacred and secular trinity of person-thing-action. As the *L'Interpre'tation des Institutes de Justinain,* ed. M. le duc Pasquier (Paris, 1847) [*Justinain Institutes*] at 1.2.12 articulates: "All of our laws is related either to persons or to things or actions." See also Gaius, *The Institutes of Gaius*, ed. Francis de Zulueta (Oxford: Clarendon Press, 1953) at 1.8. See, H. Goudy, *Trichotomy in Roman Law* (Oxford: Oxford University, 1910) and the tripartite scheme of the Napoleonic Code of France. In contrast, Aboriginal legal traditions begin with actions, with the cosmology of creation, rather than persons or things.

60 Some argued that the act of creation created things, person: Gregoire, *Syntagma iuris universi* (Cologne, 1623). Others argued that action is power and obligations are law, which derive from facts, both person and things, Gttfried Wilhem Leibniz, *Nova Methodsus discendae docenaeque iurisprudentiae* (Frankfurt, 1667).

61 *Van der Peet*, *supra* note 13 at paras. 56, 59-61.

62 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida Nation*] at para. 20.

63 *Van der Peet, supra* note 13 at para. 71. ("A tradition or custom that is distinct is one that is unique -- "different in kind or quality; unlike" (*Concise Oxford Dictionary*, *supra*). A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions*"*). It is difficult to distinguish distinct from the concept of *sui generis*.

affirmed that neither the British sovereign[65] nor imperial law[66] nor the common law of colonization[67] nor the constitution of Canada[68] created the distinct Aboriginal rights or

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64 *Van der Peet, ibid.* at para. 70. L'Heureux-Dubé J., dissenting *ibid.* at para. 206 ("it is my view that the nature and extent of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* must be defined by referring to the notion of 'integral part of a distinctive aboriginal culture', i.e., whether an aboriginal practice, tradition or custom has been sufficiently significant and fundamental to the culture and social organization of the particular group of aboriginal people for a substantial continuous period of time."); McLachlin, J. dissenting *ibid.* at paras. 254-59 (suggesting that concept of "integral" was indeterminate and overbroad to be workable as a category); *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686 [*Sappier-Gray*] at para. 45 accepted the dissenting justices arguments and emphasized the focus on the pre-contract nature of the Aboriginal communities, not their "practices" *per se* or their culture. Examining the pre-contract nature of the Aboriginal society or communities is "really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and potentially their trading habits").

65 *Delgamuukw*, *supra* note 13 at paras. 114 (Aboriginal title arises from the prior occupation of Canada by Aboriginal peoples *before* the assertion of British sovereignty); *Roberts* v. *Canada,* [1989] 1 S.C.R. 322 at 340 ("aboriginal title pre-dated colonization by the British and survived British claims to sovereignty"); *Guerin, supra* note 40 at 378.

66 *Delgamuukw*, *ibid.* at para. 114 (although Aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by Aboriginal peoples. The *sui generis* nature of Aboriginal title arises from the physical fact of occupation in British common law and the relationship between common law and pre-existing systems of Aboriginal law). For a development of and a description of imperial constitutional law, see M.K. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 Queen's L.J. 350; "Mohegan Indians *v.* Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," (1995) 33 Osgoode Hall L. J. 785 at 789-803; and "The 'Golden Thread' of Continuity: Aboriginal Customs at Common law and Under the Constitution Act, 1982" (1999) 44 McGill L. J. 711.

67 For common law of colonization see P.W. Hogg, *Constitutional Law in Canada*, 3rd ed. (Toronto: Carswell, 1992) [*Constitution Law*] at 21. *Van der Peet*, *supra* note 13 at paras. 125 (the content of Aboriginal title " is a *sui generis* interest that is distinct from "normal" proprietary interests"); *Delgamuukw*, *ibid.* at para. 112.

68 *Delgamuukw*, *ibid.* at paras. 114, 133-34 (Aboriginal title at common law is protected in its full form by s.35(1), however s.35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were "existing" in 1982), para. 136 (the constitutionalization of common law aboriginal rights by s.35(1) does not mean that those rights exhaust the content of s.35(1)) *Van der Peet*, *ibid.* at para. 28 (s.35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law"). In *R. v. Mitchell* [2002], 1 S.C.R. 911 [*Mitchell*] at para. 70*,* Binnie J.'s concurring opinion asserts an opposite position ("Counsel for the respondent [Mitchell] does not challenge the reality of Canadian sovereignty, but he seeks for the Mohawk people of the Iroquois Confederacy the maximum degree of legal autonomy to which he believes they are entitled because of their long history at Akwesasne and elsewhere in eastern North America. This asserted autonomy, to be sure, does not presently flow from the ancient Iroquois legal order that is said to have created it, but from the *Constitution Act, 1982*. Section 35(1), adopted by the elected representatives of Canadians, recognizes and affirms existing aboriginal and treaty rights. If the respondent's claimed aboriginal right is to prevail, it does so not because of its own inherent strength, but because the *Constitution Act, 1982* brings about that result"). Binnie has flipped the concept of pre-existing Aboriginal sovereignty to a theory of delegated authority from the

constituted the source of them. It has stressed that aboriginal and treaty rights are neither derived nor delegated from the British sovereign or law.[69] Aboriginal rights flow from the knowledge, customs and traditions of the Aboriginal peoples.[70] As Chief Justice McLachlin stated: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*".[71]

According to these Supreme Court decisions, it is important to understand that Aboriginal knowledge and its languages are distinct from European knowledge and languages. Aboriginal knowledge systems do not fragment the holistic unity into separate parts. They do not distinguish between philosophy and law. The Elders and teachers resist separating knowledge into these European categories as it undermines the interrelationship integral to Aboriginal knowledge. Aboriginal knowledge stresses the principle of totality or holistic thought and shares the importance of using diverse modes to unfold these teachings and describe its sovereignty and legal traditions. Aboriginal legal traditions and perspectives are stored in Aboriginal knowledge: in languages,

imperial Parliament of UK, which is inconsistent with the grundnorm of Aboriginal sovereign, but he avoids the issue that the Mohawks were sovereign in a trans-national confederation, long before the European sovereigns asserted jurisdiction over their territory. By treaties the Dutch, French, British monarchies, and the United States recognized their sovereignty.

69 McLachlin J. (as she then was), dissenting on other grounds, in *Van der Peet*, *supra* note 13 at para. 253 ("aboriginal rights under s.35(1) are not confined to rights formally recognized by treaty or the courts before 1982. As noted above, this Court has held that s. 35(1) 'is not just a codification of the case law on aboriginal rights that had accumulated by 1982"). L'Heureux-Dubé J. dissenting on other grounds in *Van der Peet*, *ibid.* at para. 112 (it has become accepted in Canadian law that aboriginal title, and aboriginal rights in general, derive from historic occupation and use of ancestral lands by the natives and do not depend on any treaty, executive order or legislative enactment).

70 *Badger, supra* note 37 at para. 76.

71 *Haida Nation*, *supra* note 62.

visions, and ceremonies. They comprise the distinct Aboriginal legal traditions, which the Elders, faith keepers, and knowledge keepers maintain. Aboriginal legal traditions are derived from relationships, experiences, and reflections with families and ecosystems. They are conceptually self-sustaining and dynamically self-generating aspects of the knowledge system; they have never required an absolute sovereign, the will of a political state, or affirmation or enactment by a foreign government to be legitimate.[72]

In general, Aboriginal knowledges have been described as "a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and their environment."[73] They form "a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity"[74] that "can only be fully learned or understood by means of the pedagogy traditionally employed by these peoples themselves, including apprenticeship, ceremonies and practices."[75] Aboriginal legal

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72 *Campbell v. British Columbia*, [2000] B.C.J. No. 1524 (S.C.) [*Campbell*] at para. 85 (Aboriginal laws did not emanate from a central print-oriented law-making authority similar to a legislative assembly, but took unwritten form).

73 *Final Report of the Royal Commission on Aboriginal Peoples*, vol. 1., Looking Forward, Looking Back (Ottawa: Minister of Supply and Services Canada, 1996) [*Final Report of RCAP*,] vol. 4 at 454.

74 Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, United Nations Economic and Social Council, *Preliminary Report of the Special Rapporteur, Protection of the Heritage of Indigenous Peoples,* UN ESC, UN Doc. E/CN.4/Sub.2/1994/31 (1994) at para. 8. For a more comprehensive analysis, see M. Battiste and J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich, 2000).

75 *Ibid.* These insights were codified in the *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples* (1995) that merged the concepts of Indigenous knowledge and heritage, see G.A. Res. 95-12808 (E), UN GAOR, 40th Sess., UN Doc. E/CN.4/Sub. 2/1995/3, (1995) at paras. 12-13 at 6. For examples of Indigenous knowledge as philosophy, see Willie Ermine, "Aboriginal Epistemology" in Marie Battiste and Jean Barman, *First Nations Education in Canada: The Circle Unfolds*. (Vancouver. BC: UBC Press, 1995) at 103; Manu alui Meyer, *Ho `Our Time of Becoming, Hawawiian Epistemology and Early Writings* (Honolulu, Hawawi: Ai Pohaku Press, 203); Betty Bastien, *Blackfoot Ways of Knowing: The*

traditions, both implicit and explicit, reflect a normative vision of Aboriginal sovereignty and how to live well with the land and with other peoples.[76] They reveal who Aboriginal peoples are, what they believe, what their experiences have been, and how they act. They reveal Aboriginal humanity's belief in responsible freedoms and order.

The Supreme Court's approach to Aboriginal sovereignty, traditions, and rights means looking at the manner in which the society lived[77] and its traditional way of life.[78] This is consistent with the interrelated view of knowledge in some Aboriginal languages.[79] This approach has recognized and affirmed the interrelatedness of parts of

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World View of the Siksikaitsitapi (Calgary, AB: University of Calgary Press, 2004); Richard E. Atleo, *Tsawalk: Nuu-chah-nulth Worldview* (Vancouver, BC: UBC Press, 2005).

76 McLachlin J. (as she then was), dissenting in *Van der Peet*, *supra* note 13 at para. 262 (described the majority's test for the definition of aboriginal rights as "reasoning from first principles" rather than following imperial British common law and its historical and judicial methodology to the *sui generis* orders).

77 *Sparrow*, *supra* note 14 at para. 68. ("The best description of 'Aboriginal title', as set out above, is a broad and general one derived from the fact the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries", Judson, J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at 328 and *Van der Peet*, *ibid.* at para. 30; *Delgamuukw*, *supra* note 13 at para. 126 and 145 ("Aboriginal title arises out of prior occupation of the land by Aboriginal peoples and out of the relationship between the common law and pre-existing systems of Aboriginal law"); *Sappier-Gray*, *supra* note 64 at para. 45 (culture is "really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and potentially their trading habits").

78 *Delgammuukw*, *ibid.* at para. 149 ("In considering whether occupation sufficient to ground title is established, 'one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed'") and La Forest, *ibid.* para. 194 ("the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc."); *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 [*Marshall-Bernard*] at para. 49; and *Sappier-Gray*, *ibid.* at para. 45.

79 By virtue of our humanity and the clarification of experiences, Aboriginal peoples generate an ideal of our place in nature in thought and the bond between the self and others. This bond and reflective experiences of consciousness and language, which remains the foremost object of Aboriginal knowledge, we give the name of way or life or meaning of life. The Anishinâbê speak often of their way of life as *bemodezewan*, which is a holistic philosophy, of spiritual, social, cultural, political, and legal existence that is viewed as inseparable. Nêhiyawak (Cree) use *wîtaskêwin*, (living together on the land).

Aboriginal knowledge and law.[80] It affirms that the constitutional framework contains a spectrum of aboriginal and treaty rights.[81]

A fundamental issue of trans-systemic or *sui generis* constitutional analysis requires non-Aboriginal scholars to be taught Aboriginal languages and knowledge. In general, the courts and most of its non-Aboriginal expert witness are unaware of the nature or scope of the distinct Aboriginal knowledge and legal traditions embedded in the languages and performances. Aboriginal lawyers and lawyers for Aboriginal peoples have sought to introduce facile linguistic categories of Aboriginal knowledge, but the judiciary have been cautious about using them.

The Supreme Court has firmly acknowledged that aboriginal rights are distinct from European law and societies.[82] It acknowledges that Aboriginal peoples have generated a distinct structure, medium, and content of Aboriginal sovereignty, knowledge and jurisprudences that underlie their constitutional rights.[83] Significantly, it has also affirmed that each substantive Aboriginal right would normally include the incidental right of the

80 *Delgamuukw*, *supra* note 13 at para. 148.

81 *Delgamuukw*, *ibid.* at para. 138.

82 *Delgamuukw*, *ibid.* at paras. 82 (although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*), para. 114 (Aboriginal title arises from the prior occupation of Canada by Aboriginal peoples *before* the assertion of British sovereignty); *Van der Peet*, *supra* note 13 at paras. 17, (the rights s. 35(1) recognizes and affirms are aboriginal), para. 20 (courts define aboriginal rights in a manner which recognizes that aboriginal rights are rights held by aboriginal people because they are aboriginal; courts must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights).

83 *Ibid.;* McLachlin J. (as she then was), dissenting in *Van der Peet*, *ibid.* at para. 230 stated that implicit in the *Sparrow* decision on s. 35(1) was the recognition of "a prior legal regime giving rise to aboriginal rights".

Aboriginal peoples to teach such a custom and tradition to ensure the continuity of Aboriginal customs and traditions.[84]

Since Aboriginal legal traditions are distinct from European legal traditions, the Supreme Court has cautioned the judiciary to be careful to avoid the application of traditional common law concepts to Aboriginal peoples.[85] It has also cautioned the judiciary that it should generally not be concerned with federal or provincial statutory provisions and regulations dealing with these constitutional topics.[86]

Canadian courts have often used a questionable analogy to European legal theory to discuss the distinct Aboriginal legal traditions. This approach contradicts its *sui generis* analysis and continues to fragment Aboriginal knowledge into Eurocentric categories, which creates methodological problems and should be used with caution. This analogy

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84 *R. v. Côté*, [1996] 3 S.C.R. 136 [*Côté*] at para. 27 (invoking the test set out in *Sparrow*, Baudouin J.A. for the Court of Appeal "had no difficulty in concluding that the aboriginal right to fish for subsistence included a right to teach traditional fishing techniques to a younger generation"), para. 31 ("I find that the appellants have indeed established the existence of an aboriginal right to fish for food within the Bras-Coupe-Desert Z.E.C. in accordance with the principles recently articulated by this Court in the *Van der Peet* trilogy. I also find that the appellants were exercising this right in accessing the Z.E.C. for the purpose of teaching younger band members traditional Algonquin fishing practices) and para. 56 ("The actions of the appellant Côté in this instance, of course, did not represent an act of fishing for food *per se*; rather, he was fishing to illustrate and teach younger aboriginal students the traditional Algonquin practices of fishing for food. But this fact should not change the nature of the appellant's claim. In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation").

85 *Sparrow*, *supra* note 14 at para. 68. For examples, see *Bernard, supra* note 75 the majority of the Supreme Court attempted to considered both the Aboriginal and European common law perspectives of Aboriginal title at paras. 45-70 compare to the dissenting opinion at paras. 126-141.

86 *Sparrow*, *ibid.* at para. 24 ("an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982"); *Delgamuukw*, *supra* note 13 at para. 192 ("in defining the nature of "Aboriginal title", one should generally not be concerned with statutory provisions and regulations dealing with reserve lands").

makes the incommensurability of the alterity and epistemology behind distinct Aboriginal knowledge systems and sovereignty appear to be comprehensible and reconcilable. It is a judicial attempt to master the knowledge and discursive disconnect. This attempts anticipates a legal tradition that the existing evidence law and pleadings prevent from being achieved.

Similar analogous approaches have not been successful in philosophy, anthropology, or linguistics. Aboriginal concepts have been distorted and severed from their holistic foundation. Non-Aboriginal scholars have studied Aboriginal worldviews, legal traditions, and languages from Eurocentric perspectives, and have generated facile understanding under labels such as an ideational order of reality,[87] cognitive orientations, or ethno-metaphysical and primitive laws.[88] This analogous approach has deluded the scholars into thinking they are masters of a methods or a legal tradition that is in fact still more than a mystery. They never realize analogy approach is an artificial crutch that would need to be cast off as soon as they could walk the talk.

However, only those who have been taught within the Aboriginal knowledge system itself and in its language can really comprehend the knowledge and how it operates as sovereignty and legal traditions. This is the role of Elders, sacred societies, bundle holders, faith keepers, and knowledge keepers. These roles are is distinct from the

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87 W.H. Goodenough, *Cooperation in Change* (New York: Russell Sage Foundation, 1963) at 7.

88 A.I. Hallowell, *Culture and Experience* (Philadelphia: University of Pennsylvania Press, 1955) and "Ojibwa Ontology, Behavior and World View" in S. Diamond, ed., *Primitive Views of the World* (New York: Columbia University Press, 1960), reissued as *Culture in History: Essays in Honour of Paul Radin* (New York: Columbia University Press, 1969) at 49.

Eurocentric legal traditions, its universities and college of law. Until 1982, these roles have been under attack by the federal Crown under its legislation and its policy on coercive assimilation.

The Aboriginal legal traditions have to be recognized and affirmed. There must be convergence in litigation. They also have to be reconciled by the parties in constitutional negotiations outside of the litigation.

III. Is the Canada Evidence Act consistent with Aboriginal and Treaty Rights?

Constitutional supremacy protects aboriginal and treaty rights protected under s. 35(1).[89] Legislation and regulations enacted under s. 101 of the *Constitution Act 1867,* including the federal rules and evidence act, have to be consistent with the aboriginal and treaty rights.[90] These rights of Aboriginal peoples of Canada cannot be extinguished by legislative power; such action would be *ultra vires*.[91]

In the spirit of *Manitoba Language Rights*, in *Delgamuukw* the Supreme Court has stated that the traditional values of evidence law in a provincial court were not conducive or appropriated to a culturally sensitive consideration of Aboriginal knowledge, legal traditions or oral history. It found the provincial evidence laws were not commensurate with the need to prove aboriginal and treaty rights, they were not equal to the task of proving aboriginal and treaty rights. In *Mitchell*, the Supreme Court has stressed that

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89 *Sparrow*, *ibid.* at para. 56.

90 See generally, *Marshall*, *supra* note 35 at paras. 62-66, 107.

91 *Delgamuukw*, *supra* note 13 at para. 173.

traditional rules of evidence are neither "cast in stone, nor are they enacted in a vacuum".[92] It affirms that the purpose of the existing rules of evidence should be to facilitate justice, not to stand in its way. In both cases, the Supreme Court stopped short of declaring that the evidence law was inconsistent with aboriginal and treaty rights.

To facilitate justice in each aboriginal and treaty right case, the Supreme Court has urged that existing evidence law be change to become consistent with constitutional rights of Aboriginal peoples. It urged that the law of evidence should be judicial adapted to accommodate traditional law and oral evidence.[93] Until these rules are changed to be consistent with constitutional rights of Aboriginal peoples, it stated that judges should apply the existing rules of evidence broadly, flexibly, and commensurate with Aboriginal knowledge, legal traditions or oral histories on a case by case basis.[94]

Parliament, provincial legislative assemblies, and the rule makers, however, have ignored to the Court's decisions with respect to changing the evidence code. These legislative bodies are been content to allow judges to adapt the rule of evidence in a case by case basis. This approach is arguably inconsistent with the Supreme Court holdings,

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92 *Mitchell*, *supra* note 68 at para. 30 relying on *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487).

93 *Delgamuukw*, *supra* note 13 at paras. 84-87; *Mitchell*, *ibid.* at paras. 29-34 (acknowledges that existing rules of evidence should not be abandoned, but warn against a Eurocentric approach to Aboriginal knowledge and traditions).

94 *Delgamuukw*, *ibid*. at para. 84 (This appeal requires us to apply not only the first principle in *Van de Peet* but the second principle as well, and adapt the laws of evidence so that the aboriginal perspective on their practices, traditions and on their relationship with the land are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations are the only record of their past. Given that the aboriginal rights recognized and affirmed by s.35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights"); *Van der Peet*, *supra* note 13 at para. 62.

which has rejected discretionary in regulation of aboriginal and treaty rights. It has stated that governmental legislation and regulations must explain how public servants should exercise their discretionary authority in a manner that would respect the constitutionalized aboriginal and treaty rights.[95] Explain how judges in the Federal Court should constitutionally and impartially exercise their discretion in adapting the rules of evidence to Aboriginal knowledges and legal traditions is part of our current initiative.

Several issues are involved in answering this question of consistency and force of certain sections of the existing rules of evidence (which I will not attempt). A few issues that I will address are the protected core of Indianness in s. 35(1), the concept of *sui generis* evidence, discrimination against Imperial proclamations and treaties, the avoidance of provisions in Imperial treaties for judicial review, the avoidance of the constitutional right of Elders to aid and assist the Court in bringing a Treaty Indian to justice or punishment, and the handling of sacred evidence. These issues affirm the constitutional authority of Indigenous knowledge and legal traditions in sec. 35 and the need for constitutional consistency in the federal rules and evidence acts.

A. Protected Core of Indianness

The evidence act does not recognize or affirm the distinctive core of Indianness that the Supreme Court has established as embedded in aboriginal and treaty rights. Inherent in the core of Indianness is Aboriginal knowledge, sovereignty, legal traditions and oral histories that are involved in an Elder's testimony. This involves ways of knowing,

95 *Ibid.* at para. 64.

transmission, and performance, and appropriate style of delivery. This constitutional core of Indianness exists in Aboriginal languages and oral traditions rather than in written form in libraries and thus raises many related issues of constitutional consistency.

In *Delgamuukw*, the Supreme Court relied on the core of Indianness in its constitutional analysis that read together s. 91(24) of the *Constitution Act, 1867*[96] with Aboriginal rights in s. 35(1) to prevent any provincial intrusion.[97] It stated:

> the Court has held that s.91(24) protects a "core" of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity. … That core, for reasons I will develop, encompasses Aboriginal rights, including the rights that are recognized and affirmed by s.35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s.91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of Aboriginal rights that are protected by s.35(1). Those rights include rights in relation to land; that part of the core derives from s.91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians".[98]

Under the doctrine of interjurisdictional immunity, s. 35(1) protects the core of Indianness from federal intrusion under s. 91(24) or s. 101 in conflicts with aboriginal and treaty rights.

Part of the constitutionalized core of Indianness is its distinctive *mythos*—Aboriginal creation stories and narratives in which the Aboriginal legal tradition or *corpus juris* is

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96 Section 91(24) *Constitution Act, 1867*, *supra* note 5. .

97 Section 35(1) of the *Constitution Act, 1982*, *supra* note 7.

98 *Delgamuukw*, *supra* note 13 at paras. 177-78.

located. These Creation stories and narratives reveal the Aboriginal legal tradition. It is also revealed in the narratives that surround the formation of the treaties with the Imperial crown. Many of these stories are part of the constitutional law of the Aboriginal nations and tribes. Yet, they were never transmitted with the purpose of informing other nations or tribes. This creates the need for *sui generis* translations and evidence of these distinct knowledges and legal traditions of the various Aboriginal nations and tribes that is distinct from the ordinary rules of evidence.

B. Concept of Sui Generis Evidence

The Supreme Court has linked the convergent doctrine to its *sui generis* analysis of existing aboriginal and treaty rights. As Chief Justice Lamer stated in *Delgamuukw*:

> [A]boriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure" [*Van der Peet* at para. 49]. Both the principles laid down in *Van der Peet* -- first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit -- must be understood against this background. [99]

The statements that the unique approach to *sui generis* rights and judicial accommodation must be done in a manner that does not strain the Canadian legal or constitutional structure is somewhat confusing. Aboriginal and treaty rights are part of the constitution

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[99] *Delgamuukw*, *ibid* at para. 82. In *Mitchell*, *supra* note 68 the Court stated at para, 32 "There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14)".

under s. 35(1), and under constitutional supremacy in s. 52(1), existing evidence law must be consistent with these rights in order to be valid. The Supreme Court has stated there is no principled basis for distinguishing s. 35 rights from other constitutional questions.[100] No persuasive basis exists for distinguishing the judicial power to determine s. 35 questions from the power to determine other constitutional questions.[101] Thus accommodations for *sui generis* rights of Aboriginal people cannot strain the constitutional or legal structure.

The *sui generis* approach to aboriginal and treaty rights forces courts and administrative tribunals to reason beyond common and civil legal traditions to Aboriginal legal traditions. They have to consider the distinct constitutionally protected Aboriginal legal traditions as supreme over common law and positive legislation and regulations and seek convergence with civil law traditions that are protected by constitutional acts. This approach has been developed from general principles of constitutional interpretation, *sui generis* principles relating to First Nations jurisprudence, and the purposes behind s. 35 itself.[102]

100 *Paul v. British Columbia (Forest Appeals Commission),* (2003), 2 S.C.R. 585 at para. 36-38.

101 *Ibid.* at para. 36.

102 *Sparrow*, *supra* note 14 at paras. 56-57. McLachlin J. (as she then was) summarized some of the *sui generis* approach in *Van der Peet*, *supra* note 13, dissenting on other points, at para. 232: ((1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of Aboriginal claims); (2) is liberal and generous toward Aboriginal interests; (3) considers the Aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is true to the position of the Crown throughout Canadian history as trustee or fiduciary for the first peoples of this country.)

C. Discrimination against Imperial Proclamations and Treaties

While s. 17 of the *Canada Evidence Act* provides for judicial notice to be taken of all acts of the Imperial Parliament that may form part of Canada and acts of federal, provincial, and territorial legislatures, it does not provide for similar judicial notice of Imperial treaties with First Nation that form part of Canada. Section 20 of the *Act* provides that Imperial proclamations, orders in council, treaties, orders, or other Imperial official records, Acts or documents have to be proved by documentary evidence.[103] This reflects a bias for Parliamentary supremacy rather than constitutional supremacy. This lack of judicial notice for Imperial treaties creates the need to use Elder's testimony to prove the existence of a treaty or treaty rights and to give testimony about the oral promises of the treaty in the negotiations, or evidence about First Nation purpose and interpretation of the English terms of the treaties.

The federal Crown has the exclusive authority to implement Imperial treaties under s. 132 of the *Constitution Act, 1867*, such as treaties with Indians and the United States. This section provides:

> The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.[104]

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[103] These imperial documents may be proved by (a) in the same manner as they may from time to time be provable in any court in England; (b) by the production of a copy of the Canada Gazette, or a volume of the Acts of Parliament purporting to contain a copy of the same or a notice thereof; or (c) by the production of a copy of them purporting to be published by the Queen's Printer.

[104] *Constitution Act, 1867*, s. 132, *supra* note 5.

This section must be read with s. 35 of *Constitution Act* 1982, and s. 91(24) and s. 101 of *Constitution Act 1867*. The powers necessary or proper for performing the obligations of imperial treaties with foreign countries to Canada have to be read together with the Treaty obligations in the Imperial *Foreign Jurisdiction Act* [105] and now in s. 35(1) of the *Constitution Act, 1982*. This constitutional authority is mandatory.[106] It is based on the promise principle of *pacta sunt servanda*, British rule of law, constitutional supremacy, constitutional fiduciary obligations, and the honour of the Crown. It gives Canada the broad power to perform its imperial Treaty obligations with the Aboriginal nations. These Treaty obligations had to be fulfilled through executive or legislative acts by s. 91(24), s. 132, or by using the residuary power "to make laws for peace order and good government of Canada" in section 91.[107] The wording of this power seems to override the jurisdictional questions about the division of powers between the federal government in s. 91 and provincial governments in s. 92.

The rules of evidence of the Federal Court should reflect the constitutional authority of these Imperial treaties with First Nations and those whose sections benefit them. They

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105 *An Act to remove Doubts as to the Exercise of Power and Jurisdiction by Her Majesty within divers Countries and Places out of Her Majesty's Dominions, and render the same more effectual*, 1843 (U.K.), 6 and 7 Vict., c. 94. The various acts were consolidated into Foreign Jurisdiction Act, 1890 and 1913.

106 *Ibid*. See *Employment of Aliens* (1922), 63 S.C.R. 293, aff'd *Att. Gen. B.C. v. Att. Gen. Canada,* [1924], A.C. 203 (s. 132 was basis of federal jurisdiction in implementing British treaty with Japan because subject matter affected the Empire and the Dominion despite being matter of civil rights and labour legislation assigned to the province); *Reference Re Water and Water Power* (1929), S.C.R. 200 (s. 132 delegated Canada full power to legislate to give effect to obligations imposed on Canada or a province by an imperial treaty); *In re the Regulation and Control of Aeronautics in Canada*, [1932], A.C. 54, reversing (1930), S.C.R. 663 (s. 132 and peace, order, and good government clause gives Canada power to legislate implementing Convention of Paris of 1919 on aerial navigation).

107 *Re Regulation and Control of Radio Communication in Canada*, [1932], A.C. 304 at 312 (P.C.). A similar residual power in the Chiefs and Headmen to maintain "peace and good order" is found in most of the Victorian treaties .

should provide for judicial notice of the treaties, and allow as a priority the testimony of the Elders or designated knowledge keepers of the Treaty tribes to give the legal meanings of the treaty provisions in Aboriginal legal traditions.

D. The avoidance of Imperial treaties that have explicit provision for judicial review of conflict among Indians and British

The federal rules have ignored judicial review in the Imperial treaties. Judicial supremacy and civil law were integral to treaty jurisdiction.[108] The *Wabanaki Compact*, 1725[109] continued the 1693 and 1713-1714 judicial review provisions. In trans-jurisdictional cases involving the Wabanaki and English disputes:

> If any Controversy or difference at any time hereafter happen to arise between any of the English and Indian for any reall or supposed wrong or injury done on either side no private Revenge shall be taken by the Indians for the same, but proper application shall be made to His Majesty's Government upon the place for Remedy thereof in a due course of Justice. We submitting ourselves to be ruled and governed by His Majesty's Laws and desiring to have the benefit of the same.[110]

The *Mikmaw Compact, 1752* incorporated and clarified the jurisdictional framework of the *Wabanaki Compact, 1725* and its ratification treaties with the Mi'kmaw chiefs in 1726 and 1749.[111] The Grand Chief and Delegates specifically limited the scope of

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108 J.Y. Henderson, "Constitutional Powers and Treaty Rights" (2000) 63 Sask. L. Rev. 719, 720-29.

109 *Wabanaki Compact, 1725*, art. 6 in letter, with enclosures, of Lieutenant-Governor Dummer of New England to Duke of Newcastle, *Calendar of State Papers* [*CSP*], vol. 35 (8 January 1726); UK PRO CO 5/898 at 173-74v; P. Cumming and N. Mickenberg, *Native Rights in Canada* (Toronto: General, 1972) at 293-309. Affirmed by treaties of 1726, 1749, 1752, and 1760-62. Similar provisions suspending indigenous law and providing British justice in colonial courts were common in other British treaties with the First Nations.

110 (15 December 1725) *Native Rights*, *ibid.* Appendix 3 at 301.

111 *Wabanaki Compact, 1725*, Accession Treaties of 1726, 1749 are incorporated in article 1.

English law and jurisdiction to controversies between English and Mi'kmaq to "His Majesty's Courts of Civil Judicature":[112]

> That all Disputes whatsoever that may happen to arise between the Indians now at Peace and others His Majesty's Subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefits, Advantages & Priviledges as any others of His Majesty's Subjects.

This clause did not give the courts jurisdiction over controversies between Mi'kmaq, as that remained in the Mi'kmaq jurisdiction. In *Simon,* the Supreme Court of Canada referred to this clause as a "dispute-resolution process".[113]

On June 25, 1761, the first Chief Justice of Nova Scotia, Jonathan Belcher, who was also the acting governor, explained the British understanding of the treaties and the interrelated jurisdictions to the assembled Mi'kmaw chiefs. He said that by signing the treaties, the chiefs were accepting and implementing "English protection and Liberty".[114] Belcher told the chiefs that the treaties placed them on the "Field of English Liberty", which he promised would be "free from the baneful weeds of Fraud and Subtlety."[115] This is an early expression of the doctrine of the honour of the Crown.

112 *Ibid.* Article 8. See generally B. Witkin, "26 August, 1726: A Case Study in New-New England Relations" (1993) 23.1 Acadiensis 5.

113 *R. v. Simon*, [1985] 2 S.C.R. 387 at 401, 24 D.L.R. (4th) 390.

114 United Kingdom [UK], Colonial Office [CO] 217/8 at 276, "Ceremonials at Concluding Peace with the several Districts of the general Mickmack Nation of Indians in His Majesty's Province of Nova Scotia, and a Copy of the Treaty" (25 June 1761); R.H. Whitehead, *The Old Man Told Us: Excerpts from Micmac History 1500-1950* (Halifax: Nimbus, 1991) at 157.

115 *Ibid.* at 156.

Chief Justice Belcher went on to explain the meaning of imperial protection under law enshrined in the treaties and the operation of the parallel legal systems:

> The Laws will be like a great Hedge about your Rights and Properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience.
>
> In behalf of us, now your Fellow Subjects, I must demand, that you Build a Wall to secure our Rights from being troden [*sic*] down by the feet of your people. That no provocation tempt the hand of Justice against you … your cause of War and Peace may be the Same as ours under one mighty Chief and King, under the same Laws and for the same Rights and Liberties.
>
> In this Faith I again greet you with this hand of Friendship, as a Sign of putting you in full possession of English protection and Liberty.[116]

The concept of the "Wall" acknowledges the difference between Mi'kmaw law and treaty rights and British law in the settlement and in judicial review of disputes between the Mi'kmaq and British.

In the ratification treaties of 1760 and 1761, the Malecite chiefs affirmed the existing treaty jurisdiction. They promised not to molest any of His Majesty's subjects or their dependents in their settlements or in carrying on "their Commerce or in any thing whatever within the Province".[117] They affirmed that

> if any insult, robbery or outrage shall happen to be committed by any of my tribe satisfaction and restitution shall be made to the person or persons injured. … That if any Quarrel or Misunderstanding shall happen between myself and the English or between them and any of my tribe, neither I, nor

116 *Ibid.* at 157. See also *Marshall*, *supra* note 35 at para. 47.

117 Treaty of Peace and Friendship concluded by [His Excellency Charles Lawrence] Esq. Govr. and Comr. in Chief in and over his Majesty's Province of Nova Scotia or Accadia with Paul Laurent chief of the LaHave tribe of Indians at Halifax in the Province of N.S. or Acadia (10 March 1760), PANS, N.S. Council Minutes at 137-40.

> they shall take any private satisfaction or Revenge, but we will apply for redress according to the Laws established in His said Majesty's Dominions.[118]

In 1763, the Penobscot, Passamaquoddy, and Machias Tribes renewed the 1725 compact at Boston on similar terms.[119]

These constitutional rights to judicial review for these Aboriginal nations and tribes are independent from the statutory rights to judicial review. The federal courts rules of judicial review should be made consistent with these specific rights to judicial review under the treaty. In addition, the treaty clauses reflect that Aboriginal knowledge and legal traditions should have the equal benefits to the rules of the court as well as evidence law as the lawmakers have accorded Eurocentric knowledge and legal traditions.

E. The avoidance of the constitutional right of Elders to aid and assist the Court in bringing a Treaty Indian to justice or punishment

The Federal Court rules and decisions have failed to link up Elders' testimony with the "aid and assist" clause in most of the Victorian treaties. In these treaties, the treaty chiefs agreed to maintain peace and good order in the lands ceded to the Imperial crown as well as to "aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the

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118 *Ibid.*

119 (22 August 1763) A conference held at Boston, Massachusetts with representatives of the Penobscot Tribe appearing for the "Passamaquodi [and] Machias" Indians., listed in Levi, et al., "We Should Walk in the Tract Mr. Dummer Made" a written Joint Assessment of Historical Materials Collected, Reviewed and Analysed by Treaty and Fisheries Policy Branch, Indian and Northern Affairs Canada, and the Mawiw District Council Relative to Dummer's Treaty of 1725 and all other related or relevant Maritime Treaties and Treaty Negotiations [unpublished document distributed at New Brunswick Chiefs' Forum on Treaty Issues, Saint John, New Brunswick, October 1st and 2nd 1992) at 17 .

laws in force in the country so ceded." In many treaty cases, where the Elders testify about such matter as their knowledge, the "natural" law of their tribe, and questions about a treaty Indian offending against it, or the law in force in the treaty territory, they are doing so under this specific constitutional rights and treaty responsibility. As noted by the Supreme Court prior, the evidence code does not recognize this constitutional treaty rights to aid and assist, and this absence has created many expression of disrespect for the Elders' testimony by both Crown and courts.

The treaty authority of Her Majesty's officers of Her Majesty to bring any Indian to justice and punishment was a shared treaty responsibility. In part, this constitutional responsibility is directed at judges who dispense justice and sentencing. The responsibility of the Elder's testimony is built on the foundation of sacred,[120] inviolate Treaty rights and the full compliance with the spirit and terms of the treaties. This shared responsibility of justice and punishment directly involves the honour of the Crown. The honour of the Crown is a borrowed idea of collective responsibility of those who act on behalf of the King; the "honour of the King" has its origins in the Crown prerogative and sovereign immunity in British law.[121] These Treaty rights and obligations have always

120 *Badger*, *supra* note 37 at paras. 41, 47; *R. v. Sioui*, [1990] 1 S.C.R. 1025 [*Sioui*] at 1063; *Simon*, *supra* note 113 at 401.

121 J.A. Chitty, *Treatise of the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (London: Joseph Butterworths and Son, 1820) [*Law of the Prerogatives of Crown*] at 394. Justice Story of the U.S. Supreme Court invoked the concept so as to limit government interference with existing contractual rights in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 at 597(1837). See D.M. Arnot, "The Honour of the Crown" (1996) 60 Sask.L. Rev. 339 ("Appealing to 'the honour of the Crown' was an appeal, not merely to the sovereign as a person, but to a traditional bedrock of principles of fundamental justice that lay beyond persons and beyond politics", at 340)

been considered legally binding on the Crown.[122] Under the constitutional mandate of recognizing and affirming Treaty rights in s. 35(1), the Supreme Court has judicially protected the context, purpose, intent, and mutual benefit of the First Nation treaties under the doctrine of the honour of the Crown.

To officers of the Crown, the honour of the Crown is the active and restorative part of the Federal Court's acknowledgement of Aboriginal knowledge and legal traditions. It affirms the loyal administration of constitutional obligations and commitments. It imposes the highest obligations and performance standards in law on any action in the name of the Crown that may affect constitutional rights of Aboriginal peoples.

The Supreme Court has stated that the honour of the Crown is a "core precept" that finds its application in concrete processes and practices.[123] Chief Justice McLachlin stated in *Haida Nation* that in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and from the processes of Treaty making and Treaty interpretation, "the Crown must act with honour and integrity."[124] These principles make the Treaty binding on Her Majesty's governments and establish that First Nations treaties are "sacred and inviolable".[125] They affirm the master principles of Treaty application, interpretation, and enforcement.

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122 *Taylor and Williams, supra* note 40; *Badger*, *supra* note 37 at paras. 41 and 47; *Sioui*, *supra* note 120 at 1044; *Simon*, *supra* note 113 at 401 and 410.

123 *Haida Nation, supra* note 62 at para. 16.

124 *Ibid*. at para. 19.

125 *Campbell v. Hall* (1774) Lofft 655, 1 Cowp. 204 (Eng. K.B.) [*Campbell*].

A divergence, violation or infringement of a Treaty right, obligation, or delegation is a breaking of the original and sacred compact and the consensual foundation of vested constitutional obligations upon which Canada is constructed. It is not only inconsistent with constitutional rights and violates the constitutional distribution of rights to Aboriginal peoples but also violates both imperial and constitutional promises, the honour of the Crown, and constitutional fiduciary obligations.

In approaching the specific terms of the Treaty, the Supreme Court has proclaimed that the honour of the Crown is always involved.[126] It declared that no appearance of delimiting the Treaty rights and obligations of the Crown should be sanctioned.[127] In *Mikisew Nation*, Justice Binnie speaking for a unanimous Supreme Court stated that when dealing with Treaty rights, either procedurally or substantively, the honour of the Crown is the leading and most important analysis.[128] It comes before the fiduciary obligation and the justified infringement analyses. The honour of the Crown infuses all the processes of treaty making and treaty interpretation.[129] Any reviewing court must first consider whether the process involved in the Treaty right, like the Elders assisting the courts in bring Indians to justice and punishment, whether procedural or substantively, is consistent with the honour of the Crown.[130] Then, the court can determine if the

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126 *Badger*, *supra* note 37; *Marshall*, supra note 35; *Taylor and Williams*, *supra* note 40 at 123; *R. v. George*, [1996] S.C.R. 267 at 279, Cartwright J. dissenting.

127 *Badger*, *ibid*.

128 *Mikisew Nation, supra* note 48 at paras. 51 and 57.

129 *Mikisew Nation*, *ibid*. at paras. 33 and 57, relying on *Haida Nation, supra* note 62 at paras. 19 and 35; *Marshall*, *supra* note 35 at para. 4; and *Badger*, *supra* note 37 at paras. 41, 47, 78, and 97.

130 *Mikisew Nation*, *ibid*. at paras. 33-34, 51-59.

legislation or regulation is consistent with the fiduciary obligations involved with a Treaty right or the Treaty rights itself. [131] If these constitutional protections are consistent with the Treaty rights, then it can consider the justification for the legislation infringing on a Treaty right. [132]

The shared meaning of the treaties is supposed to entitle treaty Indians to trust that the Crown will implement the Treaty rights and responsibilities, rather than unilaterally modify or infringe them. Little constitutional discretion exists for a judicial reconciliation of an existing Treaty relation or right to assist the court in the processes of justice and punishment of Indians, since they are the result of consensual reconciliation by the Treaty parties. To judicially reallocate a vested right from First Nations to legislative power would be to diminish the substance of the guaranteed constitutional right. This no court can do or justify.[133]

F. The Handling of Sacred Evidence

The existing evidence code is enacted based on the Eurocentric view society as artificial and man-made. It reflects a Eurocentric worldview, which is reduced to individual parts. This worldview or ideology reflects the idea that humans in society are the product of an evolutionary logic, or of deep-seated economic, organizational, or

131 *Mikisew Nation*, *ibid*. at paras. 51 and 59.

132 *Mikisew Nation*, *ibid*.

133 *Haida Nation*, *supra* note 62 at para. 20 ("Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982."; *Van der Peet*, *supra* note 13 McLachlin J. (concurring and dissenting opinion).

psychological constraints of interest accommodation or problem solving. These outcomes are shaped by objective facts about actual interests and possible accommodations, the sequence of practical and imaginative problems and conflicts that have emerged under these arrangements.

The rules of evidence of the Federal Court reflects this organization of social life as made and imagined rather than as in Aboriginal legal traditions as given in an eternal pattern by human nature or social harmony. These stark discontinuities among forms of legal traditions are central to the issue of capturing the sacred nature and intentions of Aboriginal legal traditions, which recognize different expressions of different ways of being human.

Part of the core of Indianness is its distinctive *mythos*—Aboriginal creation stories and narratives in which the Aboriginal legal traditions or *corpus juris* is located. These Creation stories and sacred narratives reveal the Aboriginal legal traditions.

Unique in an era of legal secularism, the Supreme Court has recognized and affirmed that Treaty rights are "sacred" rights derived from a consensual agreement with the British sovereign.[134] Because Treaty rights are sacred promises, the Supreme Court has held that the Crown's honour requires the judiciary to assume that the Crown intended to fulfill its promises.[135] The consensual nature of the rights, expressed in negotiations and

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134 *Sundown*, supra note 41; *Badger*, *supra* note 37 at para. 47; *Sioui*, *supra* note 120 at 1065; *Simon*, *supra* note 113 at 401.

135 *Badger*, *ibid*.; *Taku River Tlingit First Nation v. British Columbia* (*Project Assessment Director*), [2004] 3 S.C.R. 575 at para. 24 [*Taku River*].

the written treaties, are distinct from unwritten and unreconciled Aboriginal rights of some First Nations. In British common law protection, Aboriginal rights have never had a sanctity similar to Treaty rights.[136] The sanctity of Treaty rights in British and Canadian law is as extraordinary as it has been ignored.

The Supreme Court has affirmed treaties as sacred but has not addressed the inviolability principle. Imperial treaties with the First Nations are part of the United Kingdom legal regime, and were binding on the Sovereign, colonies, and subjects. They were acts of state establishing enforceable rights in the British courts. In 1774, Lord Mansfield in *Campbell v. Hall* judicially articulated the principle of the inviolability of treaties in Imperial law.[137] Imperial law had characterized the treaties' terms as inviolable in the Royal Instructions and Proclamations directed to First Nations. The Royal Instructions of 1761 affirmed that the existing treaties and compacts with the First Nations were sacred and inviolable.[138] The *Royal Proclamation of 1763*[139] affirmed that the treaties were binding on the Sovereign, colonies, and subjects.

136 In *Sparrow*, *supra* note 14 at paras. 32 and 37, where the Crown insists that the Aboriginal right to fish at common law was extinguished by regulations under the *Fishery Act*, and paras. 37-39 where the Court established that, if the Crown failed to establish that an Aboriginal right was not existing in 1982 such that it was not "recognized and affirmed" by s. 35(1), the Crown would have to show that the intention to extinguish the Aboriginal right was clear and plain. The Court, at para. 67, declared that s. 35(1) rendered inapplicable its previous decision in *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), which held there was nothing to prevent the *Fisheries Act* and the Regulations from regulating the alleged Aboriginal right to fish in a particular area.

137 *Campbell, supra* note 125; *Law of the Prerogatives of the Crown, supra* note 121 at 29.

138 *Native Rights, supra* note 109 at art. 4 at 285-86; Public Archives of Nova Scotia [PANS], Record Group [RG] 1,30: "WHEREAS the peace and security of our Colonies and plantations upon the Continent of North America does greatly depend upon the Amity and Alliances of the several Nations or Tribes of Indians bordering upon the said Colonies and upon a just and faithful Observance of those Treaties and Compacts which have been heretofore solemnly entered into with the said Indians by Our Royal

An example of an earlier concept of inviolable treaties, in 1760, Governor and Chief Justice Belcher promised British protection and liberty to the assembled Mi'kmaw chiefs and he requested that the treaties and instructions "be preserved and transmitted to you with charges to your Children, never to break the Seals or Terms of this Covenant."[140] The responding chiefs, as interpreted by the British scribe, promised that the Georgian treaties would be "kept inviolable on both Sides."[141]

Given the complexity and sensitivity of constitutional convergence, it is essential for governments in any legislative or policy context that affects Treaty rights to consult and work in cooperation with Treaty First Nations to establish policies, principles, and guidelines to protect, implement, and enforce Treaty rights. On the basis of the honour of the Crown and the fiduciary obligation declared by the Supreme Court, the Supreme Court has emphasized that consensual modification of Treaty rights by dialogical governance and negotiations is the best approach.[142]

Predecessors Kings and Queens of this Realm, … We therefor taking this matter into Our Royal Consideration, as also the fatal Effects which would attend a discontent amongst the Indians in the present situation of affairs, and being determined upon all occasions to support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into them".

139 *Royal Proclamation 1763*, 7 October 1763; Privy Council Register, Geo. III, vol. 3 at 102; PRO, c. 6613683; R.S.C. 1970, App. at 123-29. See K.M. Harvey, "The Royal Proclamation of 7 October 1763, Common Law and Native Rights to Lands Within the Territory Granted to the Hudson Bay Company" (1973-4) Sask. L. Rev. 131.

140 Public Archives of Nova Scotia [PANS] MS. Doc., vol. 37, No. 14.

141 PANS, *ibid.*

142 *Haida Nation*, *supra* note 62 at para. 20; *Delgamuukw, supra* note 13 at paras. 168 and 207; *Taku River*, *supra* note 135 at paras. 23-27.

IV. Is the Federal Evidence Act consistent with the concept of impartial rules and judicial decisions?

In considering the consistency of the rules of the Federal Court with the constitutional rights of Aboriginal peoples, we must also consider the usefulness and reliability of admission of, as well as the interpretation and weighing of, the evidence concerning aboriginal and treaty rights. Impartiality of the judges is involved in each of these processes. In a particular case involving aboriginal and treaty rights, a presiding judge has many tricky decisions to make. Since aboriginal and treaty rights have a distinct source in Aboriginal knowledge and legal traditions, this raises challenges to the Eurocentric nature of the rules, the enlargement of the mind or cognitive ambidexterity of the judge. She or he has to balance constitutional supremacy with the traditional value of the law of evidence. He or she has to determine how to broad and flexible adapt the law of evidence to conform to these alleged constitutional rights. And she or he has to weigh the admitted Aboriginal evidence. Often these processes also raises challenges regarding the translation of Aboriginal languages into English or French.

While there are no clear standards given to a judge with respect to the proper boundary in interpreting or weighing the evidence, in some cases, judges have relied on Eurocentric premises and resisted any broad or flexible adaptation or placing due weight on the aboriginal knowledge and legal traditions in determining the usefulness, reliability, or weight of evidence.[143]

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[143] *Benoit v. Canada,* [2003] 3 C.N.L.R. 20 (F.C.A) and *Newfoundland v. Drew*, (2003) NLSCTD 105Drew

A. Impartiality

Both the rules of evidence and the judicial process of weighing of evidence involve the highest standards of impartiality. In *R.D.S.* v. *Queen* [1997] Justice Cory states:

> A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.[144]

Independent of the terms of the treaties and s. 101 of the *Constitution Act, 1867*, ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* have expressly anchored in the constitution of Canada the right to trial by an impartial tribunal.[145] If the rules of evidence give rise to a reasonable apprehension of bias, this may render a trial unfair.

Under constitutional supremacy the rules of a court have to be impartial toward Aboriginal legal traditions and oral histories that informs aboriginal and treaty rights. The requirement of impartiality is a high standard for any adjudicator and should be apparent in formulating the *ad hoc* adaptation of the court rules, procedural or evidentiary. Under the rule of law, since adjudication is interpretation and weighing of evidence,[146] judges are held to this high standard. All adjudicators owe a duty of fairness to the parties who

144 *R.D.S., supra* note 2 at para. 91.

145 *Ibid.* at para. 93.

146 O.M. Fiss, "Objectivity and Interpretation" (1982) 14 Stan. L. Rev. 738.

must appear before them.[147] To fulfill this duty, both the rules of the court and the judges' adaptations must simultaneously be and appear to be unbiased.[148]

The Supreme Court views the requirement that justice should be seen to be done as meaning that the person alleging bias does not have to prove actual bias, only a reasonable apprehension of bias—a substantial, or real likelihood, or probability of bias. Fairness and impartiality must be both subjectively present and objectively displayed to an informed and reasonable observer. If the words or actions of a presiding judge give rise to a reasonable apprehension of bias, this will render the trial unfair.[149]

Reviewing courts have contrasted judicial impartiality with "bias". Judicial impartiality is "a state of mind or attitude of the tribunal in relation to the issue and the parties in a particular case."[150] True impartiality requires that the judge be free to entertain and act upon different points of view with an open mind.[151] The state of mind of a fair and impartial adjudicator is defined as disinterest in the outcome, meaning that she or he is open to persuasion by the evidence and submission.[152] Bias has an attitudinal and behavioural component.[153] A biased or partial adjudicator is one who is in some way

147 *R.D.S*, *supra* note 2 at para. 92.

148 *Ibid.*

149 *Ibid.*

150 *Ibid.*

151 *Ibid.* at para. 119.

152 *Ibid.* at para. 104, citing *Valente* v *The Queen*, [1985] 2 S.C.R. 673 at 685.

153 *R.D.S., ibid.* at para. 107.

predisposed to a particular result, or who is closed with regard to particular issue.[154] This state of mind has been considered a "leaning inclination, bent or predisposition toward one side or another or a particular result" or "preconceived biases" that affect the decision, or a closed judicial mind.[155]

Judges must then strive to ensure that no word or action during trial or in weighing of the evidence or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a judge decided a question based on stereotypical assumption or generalization or ideology. The Canadian Judicial Council, in *Commentaries on Judicial Conduct* (1991), has observed that the duty to be impartial:

> does not mean that a judge does not or cannot bring to the bench many existing sympathies, antipathies or attitudes. […] Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

While judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality.[156] In judicial inquiry into the factual, social, and psychological

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154 *Ibid. at* para. 105, citing *Liteky* v. *U.S.*, 114 S.Ct. 1147 at 1155 (U.S. 1994). L'Heureux-Dubé and McLachlin, JJ. endorsed Cory J.'s comments on judging in a multicultural society, the importance of perspective and social context in judicial decision-making, and the presumption of judicial integrity.

155 *R.D.S., ibid.* at para. 106.

156 *Ibid.* at para. 29. The Court followed United States Justice Cardozo's comments ("There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs [...]. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. [...] Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex

context within which aboriginal and treaty litigation arises, a conscious, contextual inquiry requires judicial impartiality.[157] Judges have to attempt to comprehend the Aboriginal knowledge and legal traditions as well as the shared intent of the both parties in a treaty. They have to learn to think like a First Nation person in different historical periods and in their oral traditions, which they can only learn from Elder testimony. They may gain an understanding of the historical context or background from expert witnesses,[158] or academic studies properly placed in evidence.[159]

In looking at the legal or historical content surrounding a constitutional right of Aboriginal peoples, impartial judges may take notice of actual racism or colonialism or Eurocentrism known to exist in a particular period of history.[160] Judges, acting as finders of fact and weighing of the evidence, must inquire into those forces, and be aware of the context in which the alleged events occurred.[161] This process of "enlargement of the mind" is consistent with, and an essential precondition of, judicial impartiality.[162] An

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of instincts and emotions and habits and convictions, which make the [person], whether [he or she] be litigant or judge.") *R.D.S., ibid.* at para. 34, citing Cardozo, *ibid.* at 12-13,167.

157 *Ibid.* at para. 42, citing Professor Jennifer Nedelsky, "Embodied Diversity and Challenges to Law" (1997) 42 McGill L.J. 91 at 107, who offers the following comment: "What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an 'enlargement of mind.' We do this by taking different perspectives into account. This is the path out of the blindness of our subjective conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective [...]. It is the capacity for 'enlargement of mind' that makes autonomous, impartial judgment possible."

158 *R.D.S., ibid.* at para. 44.

159 *Ibid.*

160 *Ibid.* at para. 47. See *Simon, supra* note 113 *and Sioui, supra* note 117 for the Court notice of colonialism n the law.

161 *Ibid.* at para. 41.

162 *Ibid.* at para. 45.

impartial judge cannot use his or her personal perspective in the decision-making process, as that would demonstrate that the judge was not approaching the case with an open mind fair to Aboriginal knowledge and legal traditions as well as to all parties.[163] Allegations of perceived judicial bias will succeed if the impugned conduct, taken in context, truly demonstrates that a judge has decided an issue based on ideology, prejudice or generalizations.[164] According to the Canadian Judicial Council, the Canadian judiciary cannot infer knowledge from his or her general view of Canadian society or the "prevalent attitude of the day," because such understandings are "personal or ideological".[165] Such ideological judicial reasoning is considered an error of law, and cause for a new trial.[166]

This concept of impartiality frames the problems that Aboriginal peoples face in Canadian courts, particularly respecting the totalizing ideology of Eurocentrism and British colonialism, and the strategies and manifestations of racism. Despite such explicit caveats on the "personal and ideological," Canadian judicial reasoning has never secured independence from its Eurocentric forms of reasoning and views of society to comprehend the Aboriginal legal or historical meanings. This requires thinking against one's consciousness, and it a difficult, painful and challenging process. To the extent that judicial reasoning remains part of the historically located inquiry of the common or civil

163 *Ibid.* at para. 49.

164 *Ibid.* at para. 141.

165 *Ibid.* at para. 10.

166 *Ibid.* at paras. 10, 25.

law traditions and Eurocentric discourses of knowledge, with its methods and prejudices, this artificial consciousness and reasoning requires cleansing for the sake of respecting the constitutional rights to Aboriginal people and for non-Aboriginal peoples committed to justice.

B. Eurocentrism is a pervasive ideological bias that judges have to overcome in every aboriginal and treaty case.

Eurocentrism is the manifestation of ethnocentrism by Europeans. Ethnocentrism has been described as "the ubiquitous tendency to view all peoples and cultures of the world from the central vantage point of one's own particular ethnic group and, consequently, to evaluate and rank all outsiders in terms of one's own particular cultural standards and values."[167] In Canadian education, including in faculties of law, Eurocentrism is a dominant intellectual and educational movement that postulates the superiority of Europeans over non-Europeans. The basic framework of Eurocentric diffusionism in its classical form depicts a world divided into two categories, one of which (Greater Europe, Inside) is historical, invents, and progresses; the other of which (non-Europe, Outside) is ahistorical, stagnant, and unchanging and receives progressive innovations by diffusion from Europe. From this base, diffusionism asserts that the difference between the two sectors is that some intellectual or spiritual factor, something characteristic of the "European mind," the "European spirit," "Western Man," and so forth, leads to creativity, imagination, invention, innovation, rationality, and a sense of

167 *Ethnicity and Human Rights*, *supra* note 57 ; "Universal and Inalienable Rights, *supra* note 57.

honor or ethics—in other words, "European values." The reason for non-Europe's non-progress is a lack of this intellectual or spiritual factor. This proposition asserts that non-European people are empty, or partly so, of "rationality," that is, of ideas and proper spiritual values. The classical division between "civilization" and "savagery" was sometimes treated as sharply distinct, with a definite boundary between the two areas (the European Center-Periphery Model of the World). Alternatively, this dualism is expressed as a clear and definite center of European society, but outside there is a gradual change in the degree of civilization or progressiveness or innovativeness. Other variants depict the world as divided into zones, each representing a level of modernity or civilization or development, or three great bands: "civilization," "barbarism," and "savagery."[168]

Eurocentric colonization has animated Canadian legal consciousness, uniting the historical events and superimposing various methods of legal analysis. The British and Canadian judiciary had affirmed the positive law distinction between "primitive" and "civilized" constructed within British and Eurocentric thinking.[169] That distinction—considered natural and normative—presumed that all Aboriginal peoples were progressing, or would progress, from initial savagery through an intermediate stage of barbarism, to reach the desired final state of European civilization.[170] The implicit

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168 A. Angie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40:1 Harv. Int'l L.J. 1–80.J.M. Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (New York: Guilford Press, 1993) at 8; S. Armin, *Eurocentrism*, trans. R. Moore (New York: Monthly Review Press, 1989).

169 *First Nation Jurisprudence, supra* note 53 at 8-16

170 See generally P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press, 1980). Modern research has emphatically rejected any scheme of universal legal evolution; no evidence exists of a straight line of development in the growth of law, *ibid*. at 104.

evolutionary process combined with the negative nuance of the term "primitive" was the primary tool of colonial British legal thought, especially legal conceptualism or positivism.[171] Colonial law sought to make understandable the hidden but predetermined legal content of an imposed political and economic order of the Hobbesian "artificial man-state" within the context of Aboriginal people as a lawless "state of nature".[172] Its overlapping methodological processes, embodying the deductive prejudice about language and interpretation, were transformed into analytical jurisprudence or positivism that saw law as commands rather than customs; formalism that inferred lower-order propositions from higher-order ones; conceptualism that explored the rules and doctrines that organized the categories of the rights system; to the present form of policy-oriented and principle-based style of purposive legal analysis. Contemporary judicial reasoning combines all these processes, often without adequate reflection.

To be impartial in aboriginal and treaty litigation, judges have to decolonize the deep prejudices of legal theory and practices of the courts. This also has to be applied to a "Rankean approach" to historical documents by the courts. This approach is named after Leopold von Ranke (1795 -1886) who pioneered techniques of empirical research and analysis of documentary sources and whose "ideas were often regarded as the beginning

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[171] British philosopher H.L.A. Hart in *The Concept of the Law*, (New York: Oxford University Press, 1961) at 126, defines positivism as "the vice known to legal theory as formalism or conceptualism" consisting in "an attitude to verbally formulate rules which both seek to disguise and to minimize the need for … choice, once the general rule has been laid down."

[172] "Universal and Inalienable Rights", *supra* note 57 Human Rts. Q. 465 at 485 states "...all forms of reductionism deny the human spirit and its future. But perhaps more insidious is the ethnocentrism that locks humanity and human development into a repressive mode").

of Eurocentric or 'modern' history".[173] His formal insistence on "objectivity" in analysing primary and secondary written sources — including written transcripts of oral history[174] — was until the mid twentieth century perceived as the dominant approach to writing academic history. Following this approach, once data from a written source was analyzed and presented as fact, it was then viewed as expressing an unbiased, objective scientific truth. However, the Eurocentric approach to both law and history has many biases favoring the written tradition over oral traditions.[175]

The Supreme Court has declared that courts "cannot recount with much pride the treatment accorded to the native people of this country."[176] It stated, "[i]t is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights."[177] It has rejected the past Crown's policy of deliberate avoidance or abeyance of the constitutional rights of Aboriginal peoples and related judicial misprisions that created the impoverished concept of its duty and rights. It has noted the past and present multitude of smaller grievances of Aboriginal people created

173 A Norton, "Ranke" in *The Hutchins Dictionary of Ideas*. (Oxford: Helicon Publishers, 1994) at 438.

174 W. Moss, "Oral History" *The Past Meets the Present*, ed. David Strickland & Rebecca Sharpless (New York: University Press of America, 1988) at10,

175 See J.Y. Henderson, *Treaty rights in the Constitution of Canada* (Scarbrough: Carswell, 2006) at 43-78.

176 *Sparrow*, *supra* note 14 at 1103 citing MacDonald J. in *Pasco v.Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35(B.C.S.C.), at 37.

177 *Ibid.* at 1105.

by the indifference of some government officials to Aboriginal people's concerns about their rights.[178]

In conflicts between the government and the marginalized and powerless Aboriginal peoples and their constitutional rights, judicial reasoning or interpretation undermines itself, like every imaginative practice, when it refuses to confront the Eurocentric assumptions and principles informing its colonial origins, government statutes, regulations, and policy. Only recently have constitutional reforms allowed a postcolonial order to emerge, permitting courts to decolonize the law to ensure that Aboriginal peoples effectively enjoy their constitutional rights. To enact a patriated jurisprudence, judicial reasoning must understand the nature of Eurocentric colonization, and free the rule of law from this unjust legacy of colonial societies made for the benefit of the Crown and its colonizers, and respect Aboriginal knowledge and legal traditions.

Approaching Eurocentric colonization or empire as an organic or natural evolution has impeded institutional and legal change by concealing the law's role as architect and sustainer of colonialism. The legacy of Eurocentric colonialism is that Canadian legal reasoning has often been inclined to put the best face on the ideology of colonization, treating it not as an artificial and accidental set of compromises, but as a rational framework to be perfected in the language of impersonal policy and principle. Appealing to general and neutral laws was not only propaganda or myth, but also the authority that legitimated and sustained colonial laws and institutions over Aboriginal

178 *Mikisew Cree First Nation, supra* note 48 at para. 1.

peoples. Fragmented modern thought hides the relationship between colonialism and law by representing law primarily as legislative, administrative, and judicial rules, procedures, and techniques in any given nation-state, as a technical device for getting things done. That the law is typically presented as not having a history or as having a limited view of the recent past obscures the connection between religious thought, secular theory, nationalism and modern law.

The legal complicity with colonialism is all too often unappreciated or strategically avoided in law schools and practices. As Albert Memmi explains:

> The laws establishing his exorbitant rights [as a colonialist] and obligation of the colonized are conceived by him. [...] A foreigner, having come to a land by the accidents of history, he has succeeded not merely in creating a place for himself but also in taking away that of the inhabitant, granting himself astounding privileges to the detriment of those rightfully entitled to them. And this not by virtue of local laws, which in a certain way legitimizes this inequality by tradition, but by upsetting the established rules and substituting his own. He thus appears doubly unjust. He is a privileged being and an illegitimately privileged one; that is, a usurper.[179]

For example, the idea of individualism arose as a manifestation of the colonizers' liberties in the colonial situation, and as a way of maintaining these liberties. What may be an emancipatory idea for the British colonizer required the oppression and domination of Aboriginal peoples. The relationships among individualism, personal rights regimes, and colonialism have not been sufficiently explored. In the context of the discipline of law, known for its commitment to unmask injustice and oppression, such neglect and avoidance of the jurispathic traditions of law in supporting colonialism are remarkable.

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179 A. Memmi, *The Colonizer and the Colonized*, trans. Howard Greenfield (New York: Orion Press, 1965) at 9.

To explore this neglected area is a necessary corrective to a prevailing amnesia in the legal profession and the common outlook that it has stood apart, or acted as neutral agent in the oppression of Aboriginal peoples.

In the legal process, colonial power was built not only on control over law, life, and property, but also on control over language and the means of communication. The function of the English and French languages in Canada as vehicles of colonial law requires that postcolonial law redefine itself by including Aboriginal laws and languages and creating *sui generis* legal categories and standards.

Because the colonial ideas were presented to courts and lawyers as "universal," moreover, contemporary legislatures, courts, and lawyers have had particular difficulty in understanding these implicit cognitive contexts and frameworks. The legal legacy of colonization's "universals" is partial perspectives that are not impartial. It is created legal imperialism and tyranny. The philosopher Iris Young provides definitions of prevailing domination and oppression that are especially applicable to the decolonization project. She defines "domination" as the various conditions that inhibit or prevent people from participating in political life, law- and decision-making; she defines "oppression" as the systemic processes in society that inhibit or prevent the dominated from communicating in contexts where others can listen, and prevent them from developing their human skills to resolve material deprivations.[180] According to Young's analysis, domination and

[180] I. Young, *Justice and the Politics of Difference* (Princeton, N.J.: Princeton University Press, 1990) at 33–38.

oppression are established by intolerance,[181] embedded in the unquestioned norms, habits, symbols, and everyday practices that inform law.[182] Intolerance advances from unconscious assumptions that underlie institutional rules and collective reactions; it is a consequence of following these givens or rules and accepting these reactions in everyday life.[183]

The need for dismantling colonial thought, its strategy of hierarchical differentiation, and its written legal traditions has been highlighted in recent case law on aboriginal and treaty rights,[184] as well as in the academic intersections of postmodernism, critical race theory, feminist criticism, and poststructuralist theory. These academic perspectives have attempted to end the legal fictions of colonial law, and limit the governmental or judicial ability to annex, determine, and verify partial truths as total truths.[185] Although contemporary jurists and lawyers continue to peel away the layers of colonial law and expose its biases and prejudices originating in the English or French languages and worldviews, the colonial legacy persists in the judicial consciousness. Specialized training is needed to overcome this implicit legacy.

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181 L. Noël, *Intolerance: A General Survey*, trans. A. Bennett (Montreal and Kingston: McGill-Queen's University Press, 1994) at 5. Noël states that, "[i]ntolerance is the theory; domination and oppression are the practices."

182 *The Concept of Law*, supra note 171 at 56.

183 Young, *supra* note 180 at 41.

184 For example J. Wilson dissent in *Horseman v. R*., [1990] arguing against the majority's ethnocentric biais toward oral history that is contrary to archival evidence. This dissent became the majority opinion in *Badger*, *supra* note 37 and *Marshall*, *supra* note 35.

185 M. Foucault, "The Political Function of the Intellectual" (1977) 17 Radical Philosophy 12; Foucault, "Afterword: The Subject and Power" in H.L. Dreyfus and P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: Chicago University Press, 1982).

The decolonization of Canadian law and the constitutional reconciliation of Aboriginal legal traditions with common and civil law traditions is best understood as a struggle to limit reliance on Eurocentric sources of law. Judges render decisions on the basis of evidence,[186] but most of this evidence is derived from Eurocentric traditions. The Supreme Court has urged that the existing rules of evidence should be changed, but until these changes have been made judges in each case must purposively and animately adapt the existing rules in a broad and flexible manner. The adaptation is necessary to be commensurate with the inherent difficulties posed by aboriginal and treaty rights based on Aboriginal knowledge and legal traditions to promote truth-finding and fairness.[187] The Court has said that three simple ideas underlie the diverse rules on the admissibility of evidence: (1) the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case; (2) the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it; (3) even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.[188] These ideas are centred on the discretion of the judge as trier of fact.

In aboriginal and treaty rights litigation determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or

186 *Mitchell*, *supra* note 68 at para. 29,

187 *Ibid*. at para. 29-30

188 *Ibid.* at para. 30

peripheral, is no easy task at a remove of hundreds of years.[189] The Supreme Court has held that in determining the usefulness and reliability of Aboriginal knowledge and oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions.[190] Aboriginal knowledge and oral histories reflect the distinctive perspectives and cultures of the Aboriginal peoples from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective.[191] Thus, the Supreme Court has cautioned against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.[192]

The issue of evidence and unbiased expert in aboriginal and treaty rights litigation reveals crucial systemic issues in procedural and evidence law. This is especially true for the negative evidence required to prove an aboriginal right, evidence of Aboriginal knowledge and legal traditions that existed before the introduction of Europeans and their knowledge system. This is negative evidence in relations the Eurocentric knowledge and legal traditions, since they were not present or had no knowledge about the existence of Aboriginal peoples of North America. All that Eurocentric knowledge or experts in

189 *Ibid*. at para. 32

190 *Ibid.* at para. 34

191 *Ibid.*

192 *Ibid.*

Eurocentric knowledge can ever know about pre-contract Aboriginal people is classic hearsay evidence, derived from Aboriginal peoples-—one way or another.

When confronted with aboriginal or treaty rights, the Crown and their experts have attempted to turn these rights and the contextual understanding of these rights into an issue of history, rather than law or even legal history. They have forced Aboriginal peoples to bring forward their understanding of the heritage and knowledge, then claim it is invalid because it does not conform to Eurocentric methods of history and evidence. Many courts have accepted this strategy as valid, their decision become more like historians tracing through British or French documents to prove or disprove present Aboriginal understanding. In the false security of documents of one party to the litigation, the judges reading evidence of aboriginal and treaty rights as empirical, eternal fact, rather than as a internal normative system of law that still affect living people. The historical approach hides the normative issue of constitutional law embedded in an aboriginal and treaty right.

In litigation the problem of asymmetrical access to knowledge exists. Aboriginal methodology knowledge, languages, and legal traditions have been avoided in the Eurocentric based universities. They still are. While the faculty may study Aboriginal peoples, they only do so from Eurocentric methodologies of the various disciplines. This creates a discrimination against Aboriginal methods of knowing and substantive knowledge. While the Supreme Court has held that Aboriginal Elders and knowledge keepers have the right to teach about aboriginal and treaty rights, no institution has been

funded to provide such a self-regulated College of Elders. In litigation this generates a inequities vis à-vis Elders and Aboriginal knowledge and legal traditions, since those concerned lack the institutional supports, such as in universities and law schools, as provided to Eurocentric scholarship, which are most concerned with the common and civil law traditions. In other words, the universities create endless number of expert witnesses for the Crown, but none for Aboriginal peoples.

A similar bias exists in the Federal Courts. While the *Federal Courts Act* gives judges discretion to admit evidence that would not otherwise be admissible if it is in accordance with the law in force in any province,[193] the judges do not appear to have the same discretion with Aboriginal legal traditions that inform the constitutional rights of Aboriginal peoples. Most provincial court systems are modelled on the British legal tradition, while that of Quebec is modelled on the civil law tradition. None are model under Aboriginal peoples' traditions.

C. Translations

Eurocentrism haunts all interpretation or translation of Aboriginal languages into English. In *Buffalo v. Canada*,[194] the Federal Court sat for three weeks on the Samson Cree Nation reserve in Hobbema, Alberta to hear the testimony of five Cree Elders, most in the Cree language. The Court and every party had a Cree-to-English interpreter, whose translations were recorded. In looking at the translation transcripts of each party, the

193 *Federal Court Act*, *supra* note 3 s. 53; 2002, c. 8, s. 51.

194 *Buffalo v. Canada,* (2005) FC 1622 (T.D.).

difficulty of translating the Elders' concept into English became apparent. Because of the diversity of interpretation by the four interpreters who were sworn in, a special committee of Cree linguists was impanelled to hear the tape of the Elders' testimony and retranslate it.

In general, however, the judge refused to "seek assistance from 'local experts' for a full contextual reading" of oral tradition testimony because the judge understood this to mean "independent fact-finding investigations".[195] The judge stated that oral history evidence of the Samson elders should be discounted because the story probably was not transmitted to them as they recalled it, and alternatively because it is implausible that the Crown representatives who negotiated Treaty 6 would have agreed to accept a surrender of the land only to a certain depth.[196] And he stated that the linguistic evidence of Professor Wolfart that the Cree leaders who signed Treaty 6 could not have understood the "cede, surrender and release" clause bears little weight because his evidence does not explain how he reached that conclusion.[197] The judge also reached the conclusion The "cede, release and surrender" clause in Treaty 6 was explained to the Cree leaders in 1876, and they understood that clause when they signed Treaty 6.[198]

However, the judge missed the central and obvious issue about translatability. If at the beginning of the twenty-first century that translation from Cree-to-English remains an

195 *Ibid.* para. 453.

196 *Ibid*. at para. 458 to 494.

197 *Ibid*. at para. 503.

198 *Ibid*. at para. 532.

intractable challenge, how incomprehensive was the translation of the English terms of the 1876 treaty into the Cree language at the time of the treaty negotiations. Is that any wonder that different translations of the treaty exist? Is it proper to use this the different translations against the First Nations and their Elders?

The Federal Court of Appeal held that that the trial judge's conclusions with respect to the oral history record were not binding in this case and has no normative value.[199]

V. Conclusion

Since judges of the Canadian courts are the protectors of the Constitution of Canada, the rules of the courts and the evidence law must be consistent with all the parts of the constitution. In terms of aboriginal and treaty rights, the judicial doctrine of broadly and flexibly adapting and interpreting the courts rules and evidence rules to adjust to the recognizing and affirming aboriginal rights on an *ad hoc* basis is not sustainable. The court rules and evidence law must be reconciled and made consistent with the realization of constitutional rights of Aboriginal peoples through the various processes of the honour of the Crown. This symposium is a start, much need to be done to create honourable and justice rules that reflect Aboriginal knowledge, languages, and legal traditions as well as Eurocentric knowledges, languages, and legal traditions.

199 *Samson Nation v. Canada* 2006 FCA 415, para. 50.