

AUSTRALIAN INDIGENOUS LAW REVIEW

2010 • Volume 14, Number 2



INDIGENOUS LAW CENTRE

A PUBLICATION OF THE
INDIGENOUS LAW CENTRE
UNIVERSITY OF NEW SOUTH WALES
www.ilc.unsw.edu.au



AUSTRALIAN INDIGENOUS LAW REVIEW

2010 • Volume 14, Number 2

EDITORS

Daniel Threlfall
Daniel Wells
Megan Davis

STUDENT EDITOR

Tristan Harley

Thalia Anthony BA LLB PhD (Sydney)
Toni Bauman BA (Macquarie)
Sean Brennan BA LLB LLM (ANU)
Ngiare Brown BMed (Newcastle) MPHTM (James Cook) FRACGP (Aust Coll GP)
Claire Charters BA LLB (Hons) (Otago) LLM (NYU)
Donna Craig BA LLM (Osgoode Hall)
Kyllie Cripps BA (Hons) (South Aust) PhD (Monash)
Chris Cunneen BA DipEd (UNSW) PhD (Sydney)
Megan Davis BA LLB (UQ) GDLP LLM (ANU)
Dalee Sambo Dorough MALD (Tufts) PhD (British Columbia)
Brendan Edgeworth LLB (Hons) MA (Sheffield)
Tim Goodwin BA LLB (Hons) (ANU)
Brenda Gunn BA (Manitoba) JD (Toronto) LLM (Arizona)
Jackie Hartley BA (Hons) LLB (UNSW) LLM (Arizona)
Samantha Joseph BA LLB (UNSW)
Peter Jull BA (Toronto)
Patricia Lane BA LLB (Hons) LLM (Sydney)
Terri Libesman BA LLB (Macquarie)
Erin Mackay BA LLB (UNSW) GDLP (ANU)
Hannah McGlade LLB LLM (Murdoch)
Garth Nettheim LLB (Sydney) AM (Tufts)
Keryn Ruska LLB (Melbourne) GDLP (ANU)
Sonia Smallacombe BA DipEd (Monash) BA (Hons) MA (Melbourne)
Prue Vines BA MA (Sydney) DipEd (Syd Teach Coll) LLB (UNSW)

STUDENT EDITORIAL PANEL

Michael Brull, Dave Buxton-Forman, Megan Caristo, Mel Cheng,
Paul Fine, Katie Gilchrist, Zoe Hankin, Tristan Harley,
Amanda Kazacos, Ange McDonald, Xavier O'Halloran,
Kaylie Salvatori and Claire Stimpson.



Editorial communications should be addressed to:

The Editor
Australian Indigenous Law Review
Indigenous Law Centre
Faculty of Law
University of New South Wales
Sydney NSW 2052 Australia
phone 61 2 9385 1496
fax 61 2 9385 1266
email ailr@unsw.edu.au

phone 61 2 9385 2252
fax 61 2 9385 1266
email ilbsubscriptions@unsw.edu.au
web www.ilc.unsw.edu.au

This issue may be cited as (2010) 14(2) AILR
ISSN 1835-0186
Print Post Approved Number 255003/05849

To register a subscription to:

Australian Indigenous Law Review
for 1 volume (two issues):
@ AUD\$220 (Australian subscribers)
@ AUD\$240 (International subscribers)
please visit: **www.ilc.unsw.edu.au/ailr**
for details and a subscription form, or contact:
Subscriptions Manager
Indigenous Law Centre
Faculty of Law
University of New South Wales
Sydney NSW 2052 Australia

© Indigenous Law Centre, University of New South Wales

This publication is copyright. Other than for purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publishers.

Graphic Design / DTP:

John Hewitt

INDIGENOUS LAW BULLETIN

Since 1981 the Indigenous Law Bulletin has led the way with accessible, accurate and timely information about Australia's Indigenous peoples and the law. We write for legal practitioners, advocates, policy makers, researchers and students. We cover legislation and government policy, case law, parliamentary proceedings, international developments, local activism and the work of Indigenous communities and organisations.

We report on crime, family law, native title, custody issues, legal services, international and comparative law, land and water rights, intellectual property and copyright law.

CONTACT DETAILS

*Indigenous Law Bulletin, Faculty of Law, UNSW, Sydney 2052, Australia
phone 61 2 9385 2256 fax 61 2 9385 1266 email editor ilb@unsw.edu.au
email subscriptions ilbsubscriptions@unsw.edu.au
web www.ilb.unsw.edu.au*

SUBSCRIPTION RATES

*(all GST inclusive),
one year / six issues*

individual	\$ 49.50
organisation	\$ 66.00
student	\$ 20.00
unwaged individual	\$ 33.00
community and non-government	\$ 49.50
international (one year)	\$ 85.50



ADVISORY COUNCIL

Professor S James Anaya
*United Nations Special Rapporteur on the situation of human rights
and fundamental freedoms of Indigenous people;
College of Law, University of Arizona*

Professor Michael Dodson
Chairperson, Australian Institute of Aboriginal & Torres Strait Islander Studies

Justice ETJ Durie
High Court of New Zealand

Judge Caren Fox
Maori Land Court

Professor Kent McNeil
Faculty of Law, Osgoode Hall Law School

Professor Doug Sanders
Faculty of Law, University of British Columbia (Retired)

Professor Brian Slattery
Faculty of Law, Osgoode Hall Law School



EDITORIAL NOTE

The *Australian Indigenous Law Review* ('AILR') is a publication unique for its currency, expert commentary and international perspectives. It draws together legal developments from all areas affecting Indigenous peoples in Australia and around the world.

The AILR publishes detailed, peer-reviewed commentary from leading Australian and international experts. It also includes recent and relevant case law, publishing the most prominent cases alongside those which would otherwise go unreported.

Included in the last volume of each edition is a cumulative index.

The AILR is designed to complement the Indigenous Law Centre's long-established publication, the *Indigenous Law Bulletin*.

Previous editions of the AILR are available online at <<http://www.austlii.edu.au/au/journals/AILR/>> and <<http://www.informit.com.au/>>.

ACKNOWLEDGMENTS

The AILR is prepared at the Indigenous Law Centre at the University of New South Wales, Sydney, Australia, whose in-kind support makes the AILR possible. The AILR also gratefully acknowledges the support of the Commonwealth Attorney-General's Department in the development of this publication.

The editors wish to express their gratitude to the following people, who generously and expertly prepared headnotes for this edition: Michael Brull for *Mullett on behalf of the Gunai/Kurnai People v Victoria* [2010] FCA 1144, Dave Buxton-Forman for *R v Morgan* [2010] VSCA 15; Megan Caristo for *R v Woods* [2010] NTSC 69, Mel Cheng for *Huddleston v Aboriginal Land Commissioner* [2010] FCAFC 66, Paul Fine for *Moselthanyane v Attorney General of Botswana* (MAHLB-000393-09) [2010] BWHC and *Maya Leaders Alliance v Attorney General of Belize* (Supreme Court of Belize, 28 June 2010), Katie Gilchrist for *Beckman v Little Salmon/Carmacks First Nation* [2010] SCC 53 and *Yellowknives Dene First Nation v Canada* (Attorney General) [2010] FC 1139', Zoe Hankin for *R v Wanganeen* [2010] SASC 237 and *Case of Handölsdalen Sami Village and Others v Sweden* [2010] ECHR 418, Amanda Kazacos for *Kennedy v NSW Minister for Planning* [2010] NSWLEC 240, Ange McDonald for *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* [2010] SCC 43, Xavier O'Halloran for *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland* (No 2) [2010] FCA 643, Kaylie Salvatori for *White and Others v State of South Australia* [2010] SASC 95 and Claire Stimpson for *Bullen v State of Western Australia* [2010] FCA 900 and *Roe v Kimberley Land Council* [2010] FCA 809.

The editors thank the Editorial Panel for their support and assistance. Thanks are also extended to the referees who anonymously – and very generously – reviewed the submissions for this edition. The editors would also like to thank Janette Murdoch, Dylan Lino, April Long, Peta MacGillivray, Kyllie Cripps, Simone King and all of the Centre staff and volunteers as well as designer John Hewitt, for their contributions to the creation and production of this edition of the AILR.

Artist's Note

In 2006, Helen McCarthy Tyalmuty had her first solo exhibition in Melbourne. Further solo and group exhibitions, in Sydney and Perth, quickly followed. In August 2007, Helen was honoured to receive the People's Choice Award at the 24th Telstra National Aboriginal & Torres Strait Islander Art Awards for her painting Tyemeny Liman's Wutinggi (Grandpa Harry's Canoe). Helen was also a finalist at the 2008 Telstra Awards. Helen now devotes herself to painting full time. Helen now devotes herself to painting full time in her community at Bulgul, on the coast between Daly River and Darwin, and with her family in Darwin.

The artist explains the cover artwork entitled *Wangi – the start of the wet*: 'This work was painted in Alice Springs and it was one of a series I did exploring a completely new artistic direction for me. Until this series, all my works had explored traditional topics from a bush point of view. In this series, I looked at traditional subjects from both a bush and a city perspective, and as a result, some of the iconography I have used clearly shows urban landscapes. I guess it recognises my heritage which is part Indigenous and part non-Indigenous. The painting itself talks about the start of the wet. Across the lighter part of the painting, we see the wind that has swung around from the desert and now comes from the north bringing the monsoons with it. It is at this time that the bush turns green and the edible plants start to spring up. But not only is the bush green, so is Darwin, my other home.'

Further information about the artist and her work can be found at: <<http://www.aboriginalartworld.com.au/index.asp>> and <<http://www.kateowengallery.com/>>



CONTENTS

Volume 14, Number 2

Commentary

- The 'Intervention' Legislation – 'Just' Terms or 'Reasonable' Injustice? – *Wurridjal v Commonwealth of Australia* **2**
Dr Shelley Bielefeld
- Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada **24**
James (Sa'ke'j) Youngblood Henderson
- Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water? **49**
James D. K. Morris and Jacinta Ruru
- Comparative Analysis of Canadian Law, Aboriginal Law and Civil Law Traditions **63**
Yvonne Boyer
- Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations **83**
Chiara Lawry
- Scrutinising ILUAs in the Context of Agreement Making as a Panacea for Poverty and Welfare Dependency in Indigenous Communities **100**
Dr Deirdre Howard-Wagner

Court and Tribunal Decisions

Australia

- R v Morgan* [2010] VSCA 15 **116**
- White v South Australia* [2010] SASC 95 **117**
- Huddleston v Aboriginal Land Commissioner* [2010] FCAFC 66 **119**
- Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim group v Queensland (No 2)* [2010] FCA 643 **120**
- R v Wanganeen* [2010] SASC 237 **122**
- Roe v Kimberley Land Council* [2010] FCA 809 **124**

<i>Kitching v Queensland Commissioner of Police</i> [2010] QSC 303	126
<i>Bullen v Western Australia</i> [2010] FCA 900	128
<i>Mullett on behalf of the Gunai/Kurnai People v Victoria</i> [2010] FCA 1144	130
<i>Kennedy v NSW Minister for Planning</i> [2010] NSWLEC 240	132
<i>R v Woods</i> [2010] NTSC 69	134
Canada	
<i>Rio Tinto Alcan Inc v Carrier Sekani Tribal Council</i> [2010] SCC 43	136
<i>Yellowknives Dene First Nation v Canada (Attorney General)</i> [2010] FC 1139	138
<i>Beckman v Little Salmon/Carmacks First Nation</i> [2010] SCC 53	140
Botswana	
<i>Moselthanyane v Attorney General of the Republic of Botswana</i> [2010] BWHC	143
South Africa	
<i>Tongoane v National Minister for Agriculture and Land Affairs</i> [2010] ZACC 10	145
Belize	
<i>Maya Leaders Alliance v Belize</i> (Supreme Court of Belize, 28 June 2010)	147
Sweden	
<i>Case of Handölsdalen Sami Village v Sweden</i> [2010] ECHR 418	149
Cumulative Index: AILR 14 [1] & [2]	



CONSTITUTIONAL VISION AND JUDICIAL COMMITMENT: ABORIGINAL AND TREATY RIGHTS IN CANADA

James (Sa'ke') Youngblood Henderson*

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*.

Chief Justice McLachlin, Supreme Court of Canada¹

I Long Struggle, Difficult Transformation

After a long and difficult struggle to implement treaty rights and recognise Aboriginal rights in both the political forum and the courts in Canada and the United Kingdom, the United Kingdom's Parliament repatriated Aboriginal and treaty rights. In the *Canada Act 1982*, the imperial Crown in Parliament transferred these rights from imperial law to the constitutional law of Canada, vesting them in the Aboriginal peoples of Canada.² Section 35 of the *Constitution Act 1982*, which is part of the *Canada Act 1982*, elegantly summarises the catalytic transformation of an old truth:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.³

Section 25 of the *Canadian Charter of Rights and Freedoms* affirmed that existing Aboriginal and treaty rights (as well as other rights and freedoms that pertain to them) would not be construed as being abrogated or derogated by the *Charter's* rights and freedoms.⁴ These sections reflect the imperative need to constitutionally accommodate, recognise, and implement Aboriginal and treaty rights. They also require reconciliation with other constitutional powers.

These constitutional clauses were not a new statement of rights; they merely affirmed pre-existing Aboriginal sovereignty with the asserted British sovereign rights and the more than 300 imperial treaties that established the original constitutional order and now a new postcolonial

constitutional order of Canada. The affirmation of these rights reflects the constitutional commitment to shape a new order guaranteeing the effective enjoyment of the constitutional rights of Aboriginal peoples, both collectively and individually.

The leaders of the constitutional movement to have Aboriginal and treaty rights affirmed were the First Nations Elders and the first generation of First Nations peoples educated in the Eurocentric systems in Canada.⁵ This trans-generational alliance used Aboriginal world views and legal traditions as well as Eurocentric strategies and persuasion, a vision of Aboriginal modernity, to accomplish the seemingly impossible by affirming Aboriginal and treaty rights over the objections of the Canadian provinces.

The patriated Constitution that directs Canadian life locates the shared and layered sovereignty of Canada in the First Nations and the imperial Crown. Differing levels of internal and external self-determination exist in the constitution of Canada for different people in a shared territory. The various peoples of Canada comprise the differential political sovereign, which generates the institutional form of life and society. As part of the supreme law of Canada,⁶ which is embodied in fragmented imperial treaties and acts, s 35 of the *Constitution Act 1982* specifically directs and mandates recognition and affirmation of existing Aboriginal and treaty rights at every level of Canadian society, creating new contexts for the honourable interpretation of governmental responsibility and treaty rights in Canada.⁷ However, gaps exist between constitutional vision and commitment, and between commitment and implementation.

Most of the politicians and Canadians were (are) taken aback by the constitutional reform and vision, the differentiated

coordinates of political sovereignty, and its necessary legal and institutional transformations. Superimposing an innovative vision of constitutionalism on Canadian consciousness derived from British colonialism is difficult and complicated, especially since it conflicts with existing knowledge structures, including cognitive themes, scripts, schemas, categories, and stereotypes, that ensured all sovereignty and power came from the imperial Crown.⁸ This cognitive dissonance is especially valid, when some of the involved parties have never shared in the new constitutional vision of Canada. The anxious public and resistant politicians and bureaucracies were lost in the implausible constitutional reforms, which they seemed to consider merely as prestigious rhetorical envelopes or devices rather than transformational law. They faced a myriad of challenges in the rights based regime that displaced a colonial system based on a theory of race or its supposed characteristics that condemned Aboriginal peoples to a derivative, marginal, and subjugated existence. Perhaps the greatest challenge governments and the public faced in the constitutional regime was transforming their knowledge and consciousness to conform to the emerging postcolonial order. This bewilderment and resistance has been and is reflected in the Canadian legal profession, literature, litigation, and institutions.

Faced with this federal and provincial resistance to implementing Aboriginal peoples' rights, provincial governments attempted to litigate against the exercise of Aboriginal and treaty rights and the Canadian courts became an asymmetrical centre of the transformation in consciousness, knowledge, politics, and law. Faced with the constitutional reforms, the Supreme Court of Canada ('Court') found it was no longer able to be the rational and technical apologist of colonial federalism and legislation; it was no longer confined to its 'proper function', having no legal authority to invalidate statutes on the ground that they were contrary to fundamental moral or legal principles. When the Court, the highest court of appeal, began to explore ways of ensuring the practical conditions for the effective enjoyment of constitutional rights of Aboriginal peoples, it discovered these rights changed the existing legal and institutional structure of Canada. The Court had to reinvent its procedures as it confronted the constitutional reform that stressed liberation from oppression, justice rather than injustice.⁹

The Court found that the lower courts were inadequate to the task of directing the constitutional transformation.

Most of the trial courts and courts of appeal failed in their initial attempts, leaving the Court to articulate the correct principles and insights. At first, the Court chose conceptions and strategies that implied keeping present institutional arrangements by requiring justification for any legislative infringements of Aboriginal and treaty rights, while controlling their consequences by judicial review of legislation. Its later conceptions and strategies, however, flipped the concept of sovereignty, implied change of the institutions and structured arrangements with Aboriginal peoples. The Court asserted institutional change by requiring constitutional convergence with constitutional powers of the federal and provincial governments with Aboriginal and treaty rights and constitutional reconciliation of these powers and rights. This emerging symbiosis analysis sought to harmonise the different sources of constitutional power and rights as well as to protect and implement the rights more effectively against state powers.

In almost fifty cases since 1982, the Court has begun to generate a truly Canadian legal system based on constitutionalism and legal and epistemic plurality, attempting to create fair processes for just, honourable government, and trans-systemic convergences and reconciliations of the common law traditions with the Aboriginal legal traditions. The Court's trans-systemic approach to constitutional law developed innovative principles of adjudication that creates a unique reorientation of Canadian constitutional jurisprudence. Most politicians and the public have been flabbergasted by the Court's unfamiliar trans-systemic constitutional symbiosis that empowered Aboriginal and treaty rights.¹⁰ They were still operating on an unreflective colonial paradigm and remained an intolerant and perplexed society.

The Court has determined that the wording of s 35(1) of the *Constitution Act 1982* – the recognition and affirmation of existing Aboriginal and treaty rights – provides a trans-systemic constitutional framework through which the fact that First Nations lived on the land in distinctive societies with their own sovereignty, legal orders, practices, traditions and cultures was brought within the protection of the constitutional law of Canada.¹¹ The Court has held that the phrase 'recognised and affirmed' in s 35(1) establishes constitutional supremacy over parliamentary supremacy, recognises the ultimate principle of Aboriginal sovereignty upon which asserted British authority was constructed, generates a *sui generis* approach to Aboriginal and treaty

rights to displace positivism and the common law, and establishes honourable government over good government.

The Court articulated that constitutionalising Aboriginal and treaty rights has displaced and transformed the colonial and racial understandings of Aboriginal peoples' rights in relation to other constitutional powers and rights. Section 35 affords constitutional protection to existing Aboriginal peoples' rights against provincial and federal legislative power as a 'restraint on the exercise of sovereign power'¹² and requires that a strict justification test be met.¹³ It did not constitutionalise existing federal or provincial regulatory laws,¹⁴ but its convergence principle forced federal and provincial law to be consistent with Aboriginal peoples' rights.¹⁵

Moreover, the Court held that *Charter* rights of individuals could not override Aboriginal and treaty rights or ameliorative or remedial law, policy or programs of the Crown designed to pro-actively combat discrimination and aimed at helping Aboriginal peoples improve their situation and process to self-sufficiency.¹⁶ Legislation that distinguishes between Aboriginal and non-Aboriginal people in order to protect interests associated with Aboriginal sovereignty, territory, culture or way of life, or the treaty process or implementation deserves to be shielded from *Charter* scrutiny to promote substantive equality.¹⁷

In their efforts to comprehend the deep structure of Aboriginal and treaty rights, its Aboriginal knowledge and legal traditions, the Canadian courts, including the Court, have been burdened by the lack of a method to comprehend the constitutional rights of Aboriginal peoples. The way in which the common law and civil law jurists approached the issue of method and evidence in these cases has been largely determined by the severely limited fund of basic schemes of explanation available in Eurocentrism, an entrenched prejudice in knowledge.¹⁸ In fact, one might say that all these methods are variations on two types: logical analysis and causal explanation. The logical and the causal methods serve as the starting points for two ways of dealing with the problem of rational method, explanation, and justification. Each method attempts to provide an interpretation of what it means to account for something both in the sense of telling what it is like (which is description) and in the sense of establishing why it had to follow from something else (which is explanation in the strict sense).

This article will explore and analyse the trans-systemic symbiosis of the Court's constitutional framework that is required in the constitutional reconciliation of Aboriginal and treaty rights with the older parts of the constitution. It will address how the Court, in its cautious case-by-case approach, has generated innovative methods and principles to displace colonialism and racism in the law according to its constitutional mandate. It will articulate how the Court has affirmed that constitutional supremacy displaces Parliamentary supremacy; its judicial recognition of the constitutional grundnorm of Aboriginal sovereignty; its development of a *sui generis* approach to Aboriginal and treaty rights that displaces the familiar common law and legal positivism approach to constitutional power and rights; its validation of the distinct knowledge systems and legal tradition of the Aboriginal peoples that informs its *sui generis* approach to Aboriginal peoples' constitutional rights; its generation of the innovative concepts of the honour of the Crown and honourable governance to guide the relationship between constitutional powers and Aboriginal and treaty rights; and its development of the trans-systemic symbiosis approach in constitutional convergence and reconciliation of the legal traditions of the Aboriginal people with the common and civil law traditions.

The Court developed these approaches as a transformative method to protect Aboriginal peoples, their distinct knowledge systems, legal traditions, and way of life. The subject is crucial, and its importance is daunting. These principles also inform institutional change and peoplehood (and citizenship) in Canada. They embody both conceptual and practical arrangements. Still, the Court has not resolved many central issues in its complicated and fragmentary approach to explaining Aboriginal and treaty rights to power holders in Canada.

II Constitutional Supremacy Displaces Parliamentary Supremacy

Section 52(1) of the *Constitution Act, 1982* expresses constitutional supremacy:

The 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.¹⁹

Section 52(1) creates a different, if not distinct, theory of the constitution of Canada as compared to the constitution of the United Kingdom, which is based on the supremacy of Parliament and its legislation and has no overriding constitutional supremacy clause. In the *Quebec Secession Reference*, a unanimous Court established an analytical framework for constitutional supremacy.²⁰ It implicitly includes unwritten imperial common law principles, norms, and rules that created the framework for Aboriginal rights and imperial treaties with First Nations.²¹

The convergence doctrine is a complicated nexus of constitutional supremacy.²² Under the principle of constitutional supremacy and the rule of law, the Court has established that the individual elements of the constitution are linked to the others, and must be interpreted by reference to the structure of the constitution as a whole.²³ The defining principles function in constitutional 'symbiosis'.²⁴ No one principle or text trumps or excludes the operation of any other.²⁵ The basic rule of constitutional supremacy is 'that one part of the constitution cannot be abrogated or diminished by another part of the Constitution'.²⁶ For example, the application of *Charter* rights cannot abrogate or derogate from rights or privileges guaranteed by, or under, the *Constitution Act 1867*.²⁷ The Court has stated that no automatic repeal by ordinary legislation or judicial interpretation of any provision of the constitution of Canada is possible.²⁸ However, action taken by legislatures or people is, of course, subject to judicial review.²⁹ The convergent (or symbiotic doctrine) of constitutional supremacy principle is an innovative and enduring interpretative process, which, the Court suggests, breathes life into the constitution of Canada.³⁰

In *Manitoba Language Rights* and *Sparrow*, the Court established that the highest duty of the judiciary under s 52 is to ensure that the constitutional law prevails over the 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.³¹ In the *Manitoba Language Rights* case, the Court stated that the words 'of no force or effect' in s 52 mean that a law inconsistent with the constitution has no force or effect because it is invalid.³² 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.³³

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.³⁴ In effect, this is a constitutional veto of legislation, regulation, and policy.

This constitutional supremacy test applies to Aboriginal and treaty rights protected under s 35(1).³⁵ Under constitutional supremacy, the Court in *Sparrow* has acknowledged that constitutional rights of First Nations are part of the supreme law of the nation and unalterable by the normal legislative process, and unsuffering of laws inconsistent with it.³⁶ The Court held that the judiciary has a duty when asked 'to ensure that the constitutional law prevails',³⁷ and a vital duty if the constitutional rights of the Aboriginal peoples of Canada are to be protected.

Legislation and regulations have to be consistent with the Aboriginal peoples' rights.³⁸ These rights cannot be extinguished by governmental power; such action would be *ultra vires*.³⁹ The 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.⁴⁰ The Court rejected discretionary or covert governmental regulation of Aboriginal or treaty rights. Governmental legislation and regulations must give explicit direction to a minister that is consistent with Aboriginal peoples' rights. These governmental regulations must explain how public servants should exercise their discretionary authority in a manner that would respect these constitutionalised rights.⁴¹

The centrepiece of constitutional convergence and reconciliation of constitutional supremacy is the Court's articulation of a new version of Canadian 'sovereignty' – '[t]he Constitution is the expression of the sovereignty of the people of Canada'.⁴² Different peoples generate the institutional form of life and society. They are where human

interests meet ideals, and the human spirit struggles with structure. Constitutionalism is not a separate thing; it is an expression of all society and culture. The will of the peoples creates constitutionalism, which informs and broadens the conversation about the institutional present and the institutional futures of society:

Constitutionalism facilitates – indeed, makes possible – a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it.⁴³

Also, the Court has stated: ‘the law ... creates the framework within which the “sovereign will” is to be ascertained and implemented.’⁴⁴ This is a simple conclusion of postcolonial sovereignty and constitutional legitimacy. This principle is consistent with the language and insights of sovereignty by Aboriginal peoples.⁴⁵ Constitutionalism seeks not only to humanize Canadian institutions but also to change them based on peoplehood not citizenship. The colonial legal regime and its advocates have to transform to constitutionalism; its understanding of constitutional law and its practice of legal symbiosis has to change from the bottom up and from the inside out. The public, politicians, and scholars have to comprehend that they can no longer imagine that constitutional law, institutions, and legal theories are inherited, ready-made European systems.

This conceptualisation of the relationship of political sovereignty to constitutional supremacy displaces the imperial Crown’s and United Kingdom’s concept of an unwritten constitutional law that posits parliamentary sovereignty over the peoples of Canada. It replaces the colonial framework and narrative developed during the era of parliamentary supremacy.⁴⁶

The distinctive principle of parliamentary sovereignty or supremacy was entirely the construction of Oxford men;⁴⁷ the principle derives from writings of Coke, and Blackstone, and was widely popularized in the imperial age by Dicey.⁴⁸ Dicey’s conceptualisation of the principle stated:

The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament [defined as the Queen, the House of Lords, and the House of Commons, acting together] ... has, under the English Constitution, the right to make or unmake any law whatever; and, further,

that no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament.⁴⁹

Dicey did not cite a clear judicial decision of binding authority for his absolutist view of parliamentary power, nor did he point to any reference to it in any statute or constitutional instrument.⁵⁰ This principle is not laid down in any parliamentary legislation.

The North American colonialists assumed this principle applied to the development of local government. They based their governments on British parliamentary traditions as affirmed in imperial acts, rather than the antecedent imperial treaty delegations from Aboriginal nations. They founded their assumption and beliefs on an unwritten British constitutional tradition, which they viewed as close to perfect, and they sought to reproduce it into the governance of their communities.⁵¹ They assumed all their laws emanated from the Crown, and could be traced, ultimately, to the will of that Sovereign in Parliament at Westminster, rather than their own local legislatures. In their path from imperial rule to self-rule, the colonialists never critically inquired about the validity of these principles; instead they sought to adopt them to local government.⁵² Thus, the validity and authority of their use of power and law could ultimately and comfortably be traced back to the Sovereign’s prerogative, to the decisions of the Sovereign’s judges, and to the Sovereign in Parliament at ‘home’. It provided a simple, ready means of tracing the lineage of their law. This assumption, however, was only part of the constitutional lineage.

The colonialists’ beguiling and enduring identification of the fundamental source of law as parliamentary sovereignty concealed the constitutional lineage of Aboriginal sovereignty and the imperial treaties that delegated the imperial Crown its authority. In the colonial narrative of Canada, as created by legislation and judicial decisions, Aboriginal sovereignty and treaty orders have been masked by parliamentary supremacy and the delegation of that supremacy to responsible government and good government for the British and French colonialists.⁵³ The colonial assumption became that the sovereignty of Parliament was ‘received’ or carried over into Canadian constitutional order after the enactment by the imperial Parliament of the *Constitution (British North America) Act, 1867*.⁵⁴ However, this construction had certain legal anomalies created by colonisation theory – that the new Canadian Parliament and its distinct provincial federation was still legally subordinate to the imperial Parliament and

that Canadian courts were subject to review, on appeal, by an imperial tribunal, the Judicial Committee of the Privy Council, sitting in London. In the late 19th century, the Judicial Committee of the Privy Council held that when the imperial Parliament granted power to colonial legislatures to make laws for the 'peace, welfare, and good government' of their colonies, this granted them power of the same nature, as plenary and absolute, as its own power.⁵⁵

These colonial assumptions and judicial interpretations had not been challenged in Canadian ideology, legislation, and precedents prior to the *Canada Act 1982*. The colonialists – neither their academics, nor legal profession – never suggested that their assertion of Crown sovereignty was an 'ugly fiction'.⁵⁶ They never suggested the Crown or UK Parliament lacked unlimited legislative competences.⁵⁷ No subject or colonialist would have suggested that the principle of parliamentary sovereignty was a 'huge, ugly, Victorian monument that has dominated the legal and constitutional landscape and exerted a hypnotic effect on the legal perception'.⁵⁸ No British-trained lawyers were ever told that they had been 'brain-washed ... in [their] professional infancy by the dogma of legislative sovereignty'.⁵⁹ Yet, this is part of the truth of colonised legal consciousness. The colonial legal consciousness has been characterised by Justice Michael Kirby of the High Court of Australia as the times of 'fairytales', of the Aladdin's cave of the common law, of the declaratory theory of law, and the 'Victorian monuments' of legal positivism.⁶⁰

The entrenchment of Aboriginal and treaty rights and personal rights and freedoms in the *Charter* as part of constitutional supremacy in the *Canada Act 1982* revealed the limitation of the principle of parliamentary supremacy. The sovereignty of the Crown, that is, parliamentary supremacy, as the colonial legal *grundnorm*⁶¹ still prevails in the courts,⁶² but when confronted with Aboriginal peoples' rights these principles are not persuasive. The Court is displacing many of the pragmatic abeyances, biases, and prejudices of the colonial legal era⁶³ with Aboriginal and treaty rights and the interpretative doctrine of constitutional convergence and reconciliation discussed above.⁶⁴ These doctrines of constitutional supremacy have modified the inherited principle of parliamentary supremacy over Aboriginal and treaty rights.

The Court has recognised that Aboriginal and treaty rights in the constitution required a new, complex, and comprehensive

theory of constitutional supremacy. Interstitially and incrementally, the Court has structured innovative doctrines out of many constitutional principles, while paying due regard to constitutional stability and practicality. In trying to work out answers to these questions today, it has faced fictions and inconsistent claims about the basis of sovereignty and rights in postcolonial Canada. Based on these innovative case-by-case interpretations of constitutional law, the Court discovered that Aboriginal knowledge and philosophy operated to affirm and protect Aboriginal sovereignty in the constitutional framework of Canada. This evolving and living constitutional law is challenging governments and Aboriginal peoples to develop more effective approaches for addressing Aboriginal and treaty rights and to create trans-systemic convergence and reconciliation.

III Recognising the Constitutional Grundnorm of Aboriginal Sovereignty

As part of constitutional supremacy, the Court has established a new patriated constitutional *grundnorm* of Aboriginal sovereignty.⁶⁵ The Court reaffirmed Aboriginal sovereignty as a new fundamental basis for the legitimacy of constitutional law and legislation in Canada and its converging role in shared governance in the 'eternal future'. The Court recognised that Aboriginal and treaty rights presuppose Aboriginal sovereignty, which is a *grundnorm* that is the foundation not only for the constitutional rights of Aboriginal peoples, but also other constitutional powers and rights. It has not worked out the conclusion or implications of this insight in an existing case, but this is its task in future litigation or constitutional reconciliation.

In *Van der Peet*, the Court began to explain how the diverse Aboriginal confederacies, nations, tribes, peoples, societies, cultures, communities, and families exist in imperial constitutional law, and why they were recognised and affirmed as holding Aboriginal rights in s 35(1) of the *Constitution Act 1982*:

because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.⁶⁶

This simple fact is more than historical description; it is a fact or premise that creates the ultimate constitutional principle or *grundnorm* or deep structure in the patriated constitutional law of Canada. It displaces the previous factual concept of Crown sovereignty in British constitutional law, which has always been a political fact in Great Britain's unwritten constitution. As mentioned above, no purely constitutional or legal authority can be constituted for the concept in Britain, much less in North America.⁶⁷ Yet, the colonialists have never represented this British premise as the ultimate constitutional principle in North America.

Nonetheless, the deeper and invisible, impalpable but powerful, constitutional *grundnorm* in North America has always been Aboriginal sovereignty. The pre-existing sovereignty of the First Nations was manifest in imperial treaties and affirmed in the constitutionalisation of Aboriginal peoples' rights.

The arrival of Europeans and the assertions of European sovereignty over Aboriginal territories generated new questions about sovereignty, jurisdiction, and ownership of land and resources. The British Crown's response was to enter into imperial treaties with the Aboriginal sovereigns. While the *grundnorm* was the foundation of the imperial treaties and prerogative acts, it was not disclosed in the ensuing imperial parliamentary acts that established delegated responsible government among the non-Aboriginal settlers in British North America. This situation was reflective of the division of prerogative jurisdiction of the Crown and its treaties from Parliament's competencies.

Aboriginal sovereignty re-emerged in the patriation of Canada from residual imperial authority in the recognition and affirmation of Aboriginal rights and existing treaty rights. It provides a trans-systemic constitutional norm⁶⁸ and rule of recognition⁶⁹ that protects Aboriginal legal traditions, heritage, and imperial treaties, the beginning of a chain of normative validity of *sui generis* analysis. This foundational norm revises Crown sovereignty of the colonial era. The *grundnorm* of Aboriginal sovereignty mandates a reorientation of the constitutional framework of Canada.

Aboriginal sovereignty is the foundation for existing Aboriginal and treaty rights in the constitution.⁷⁰ As Chief Justice McLachlin noted: '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 These sovereignty treaties permitted the Crown certain responsibilities in Aboriginal territory, including British settlement, and provided for British law to control the conduct of the settlers. These treaty delegations created the source for the Crown delegation of self-rule to the colonialists and led to the establishment of provinces and the federal government.

The source of the *grundnorm* is derived from pre-existing Aboriginal knowledge and legal traditions. Aboriginal sovereignty is derived from and interrelated with Aboriginal knowledge and legal traditions about what makes them a certain kind of people.⁷² It existed when European adventurers arrived. Its existence is recognised and affirmed by the British Sovereign in the imperial treaties, which establish vested treaty federalism and rights as distinct from provincial federalism.⁷³

Aboriginal sovereignty has always operated by its own force derived from the knowledge and languages of Aboriginal peoples. In Aboriginal thought, sovereignty is not about absolute power, but the subtle art of generating and sustaining relationships. It is a distinct vision about the way humans lived together and behaved in a kinship and an ecosystem, a distinct tradition of philosophies and humanities. It is a distinct philosophy of justice and legal traditions based on spiritual and ecological understandings and linguistic conventions that are interconnected. It operates as an implicit, inherent, dramatic, epistemic, unwritten, and living concept.

In constitutional law and its relationship to federal and provincial legislation and policy, Aboriginal sovereignty generates the judicial mandate to protect Aboriginal peoples' rights, heritage, traditions, culture, and traditional and transformed ways of life.⁷⁴ It separates Aboriginal peoples from all other peoples in Canada who migrated to Canada.⁷⁵ It generates a distinct theory of equality of law in constitutional supremacy.⁷⁶ These constitutional obligations contain many principles and manifestations, some implicit, others explicit,⁷⁷ such as pre-existing systems of Aboriginal knowledge and law,⁷⁸ and its distinctive sovereignties, nations, societies or legal orders, and Aboriginal title or land tenures.⁷⁹ These judicial interpretative principles rely upon and animate the latent Aboriginal peoples' knowledge and traditions,⁸⁰ which provide the content to Aboriginal sovereignty, title, and rights as well as the substantive, evidentiary, and procedural processes of Aboriginal and

treaty rights.⁸¹ They clarified the underlying jurisprudential framework of Aboriginal peoples' rights.⁸²

The *grundnorm* of Aboriginal sovereignty and its implicit principles in s 35 animate a resourceful constitutional analysis that searches for underlying principles of jurisprudence, which is an exceptional and extraordinary transformation in Canadian scholarship and law. It provides the Canadian scholarly and legal profession with a foundation for developing a *sui generis* constitutional analysis or method, perhaps based on Aboriginal languages, through which the imported jurisprudences can be reconciled with Aboriginal jurisprudence.

Many related constitutional purposes, methods of constitutional analysis, and legal consequences flow from Aboriginal sovereignty. The Court has identified several constitutional purposes that include: determining the historical rights of Aboriginal peoples and giving Aboriginal rights constitutional force to protect them against legislative powers,⁸³ precluding the unilateral extinguishment of Aboriginal peoples' rights;⁸⁴ sanctioning challenges to social and economic policy objectives embodied in legislation to the extent that Aboriginal rights are affected;⁸⁵ assisting in reconciling the rights and interests that arise from their distinctive societies with the sovereignty of the Crown;⁸⁶ providing Aboriginal peoples with a solid constitutional base for fair recognition of Aboriginal rights and negotiations and settlement of Aboriginal claims,⁸⁷ and a commitment to recognise, value, protect, and enhance their distinctive cultures.⁸⁸

Properly understood, Aboriginal sovereignty is the source of all law in Canada. Aboriginal sovereignty flips the colonial concept of all power being derived from the imperial Crown or imperial Parliament. This *grundnorm* creates a distinct way of looking at the patriated constitution of Canada and the division of powers; however, this concept is still little understood by most courts, politicians, academics, and Canadians. Much dialogue and discussion in constitutional reconciliation processes will be required to actualise the new *grundnorm*.

IV Sui Generis Approach Replaces the Common Law and Legal Positivism Approach

In searching for how to characterise the constitutional framework of Aboriginal peoples' rights and its background

of Aboriginal sovereignty, the Court chose to characterise these rights as *sui generis*.⁸⁹ It properly rejected using the existing categories of legal theory and judicial reasoning embedded in the common law or legal positivism for these extraordinary constitutional rights. Yet, the judiciary struggles to generate a trans-systemic method to displace the Eurocentric monopoly and baggage of colonial attitudes and sympathies embedded in familiar judicial methods, evidence, and reasoning.

The Court borrowed its concept of *sui generis* from the language of empire to discuss distinct legal traditions and rights. The expression was originally created by European scholastic philosophy to indicate an idea, an entity, or a reality that cannot be included in a wider concept, and that is structurally outside all legally defined categories, a species that heads its own genus. The concept derived and borrowed from the Latin language: *su* (of its own) connected with *generis*, genitive of *genus* (kind), meaning self generating; being the only example of its kind; of a kind of one's own; without equal. It is translated into English as constituting a class of its own; whatever is absolutely unique or distinctive about something. In other words — a distinct knowledge system from Eurocentrism.

The Court's use of *sui generis* analysis is based on the realization that the extraordinary sources of Aboriginal legal traditions and jurisprudence were beyond their legal training and experience. The legal concept of *sui generis* was used to signify a legal tradition that the Court could not acknowledge as its own. In *Sparrow*, the Court defined the *sui generis* nature of Aboriginal rights by focusing on specific activities, rather than methods, but *Van der Peet* rephrased the focus as 'an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right'.⁹⁰ Their epiphanic opinions reveal they were uncomfortable with and incapable of articulating the *sui generis* interpretative paradigm outside the existing legal traditions and knowledges of the Canadian legal system. They realised, however, that the imperial and Canadian jurisprudence was neither a legitimate nor an adequate framework for explaining Aboriginal or treaty rights. This realisation generates the need to protect and enhance distinct Aboriginal knowledge systems and distinctive cultures.

The Court's use of *sui generis* illustrates a distinct constitutional method for Aboriginal and treaty rights. It attempts to describe and explain an Aboriginal method of

symbiosis, one that is not derived from and is distinct from British, French, or European jurisprudence.

In *Van der Peet*, the Court began the work of articulating and understanding what constitute distinct Aboriginal legal traditions.⁹¹ In *Van der Peet*, the Court rejected the application of the European enlightenment or colonial ideology as informing Aboriginal rights:

*Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal.*⁹²

This constitutional exclusion makes most, if not all, Eurocentric enlightenment philosophies and methods of very limited utility in recognising, defining or describing Aboriginal legal traditions, sovereignty, and rights. The excluded philosophical precepts of the liberal enlightenment relied on the priority of reason over religious or hereditary authority to establish individual freedom and social progress, using logical and causal entailment in social theory and law, calling the concept 'rationalism' or legal positivism or related forms of rationalising legal analysis.⁹³ Logic and causality as rationalising legal analysis fail as sufficient methods for Aboriginal rights because they are products of the European enlightenment and because they are distinct from Aboriginal knowledge systems, languages, and traditions.

To put this complex task of constitutional definition of Aboriginal rights more precisely, the Court acknowledged that it has to develop new methods of *sui generis* analysis of Aboriginal rights. It has to discover and apply certain forms of relationship derived from Aboriginal knowledge systems, which follow distinct methods. It can apply Eurocentric logic or causality in the short term, but the results may well be biased by the imposition of Eurocentric methods on Aboriginal knowledge. Under the Court's conception of Aboriginal rights in the constitution, no justifications exist for granting primacy to Eurocentric methods over Aboriginal methods in Aboriginal rights and some treaty rights because they are distinct. Neither the continued reliance on logical entailment nor causal explanation has been reconciled with Aboriginal verb-centred languages and consciousness that represents a holistic approach to life that acknowledges the

interrelatedness of all the elements of a situation.⁹⁴ Moreover, these Eurocentric methods ignore the importance Aboriginal consciousness attributes to relationships and to one another's acts or interests against the background of the relationship. This consciousness is what gives Aboriginal conduct and thought its distinctly legal, social, and human meaning. To disregard this Aboriginal meaning is to neglect an integral part of the experience for which an account is to be given and the internal perspective of Aboriginal rights.

Recognising this paradox, the Court declared that rights associated with Aboriginal sovereignty and jurisprudences are equal to (but distinct from) the rights of the liberal enlightenment and the *Charter*.⁹⁵ The task of the judiciary is recognising or defining these distinct Aboriginal rights by certain Aboriginal methods:

which recognises that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures *both* the aboriginal and the rights in aboriginal rights.⁹⁶

The Dickson Court emphasised the importance of the internal vision of Aboriginal rights. It stated that when analysing Aboriginal rights under s 35(1), 'it is ... crucial ... to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.'⁹⁷ In *Delgamuukw*, the Court has acknowledged 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'.⁹⁸ They operate at every step of the constitutional analysis.

The Court's characterisation of what Aboriginal rights are not is fully developed, but struggle with the sources of Aboriginal rights is in a rudimentary state. This is inevitable, since the Court is engaged in a revisionary analysis of great difficulty and profundity. The justices are searching for a vantage point that they are developing. The Court has been struggling with defining Aboriginal rights in a Eurocentric tradition, but has not attempted to articulate the internal Indigenous method or procedure embedded in the distinct Aboriginal legal traditions.⁹⁹ It has not clarified the relations between purpose

and being in performance-based Aboriginal legal traditions, the link between those traditions that describe and those that ordain, or its approach to factual irregularities and customs, or the nature of Aboriginal reasoning about necessity, sequence, time, causation, and objectivity, as expressed in their languages.¹⁰⁰

Because of the *sui generis* nature of Aboriginal and treaty rights, the Court has demanded a unique approach to the existing procedural and evidentiary law of the various courts, which accords due weight to the perspective of Aboriginal peoples.¹⁰¹ The Court found that the traditional rules of evidence law, which are the consciousness of the court, were not necessarily conducive or appropriate to a culturally sensitive consideration of Aboriginal knowledge, legal traditions, or histories. In adjudicating Aboriginal and treaty cases, the Court has held that trial courts must adapt the law of evidence to accommodate Aboriginal law and oral histories and approach the rules of evidence in light of the evidentiary difficulties inherent in these claims and they must interpret that evidence presented in the same spirit.¹⁰² Until the law of evidence is made consistent with Aboriginal peoples' rights, judges should apply the existing rules in a broad and flexible manner commensurate with Aboriginal knowledge and legal traditions until the *sui generis* Aboriginal traditions and methods are placed on an equal footing with other types of historical evidence.¹⁰³

The initial way the Court has sought to accomplish this substantive task is through a constitutionally purposive approach that identifies the activities or interests that Aboriginal and treaty rights were intended to protect.¹⁰⁴ The purposive approach, based on a principle-based and policy-oriented style of legal reasoning, will ensure that the recognition and affirmation of Aboriginal and treaty rights are constitutional rights.¹⁰⁵ The Court's interpretative meanings of Aboriginal peoples' rights requires that courts acknowledge their unique knowledge system, languages, consciousness, and ways of life that are protected by both general principles of constitutional interpretation and distinct principles specifically relating to Aboriginal and treaty rights.¹⁰⁶ These rights should not be viewed as static and only relevant to current circumstances; they are dynamic and transforming.¹⁰⁷

The distinct system of Aboriginal peoples' rights and responsibilities, even though it might not be of a type or form that the common or civil law has recognised, was recognised

under the British imperial constitutional law,¹⁰⁸ within the common law,¹⁰⁹ and in the constitutional supremacy.¹¹⁰ In *Sundown*, the Court stated that 'Aboriginal and treaty rights cannot be defined in a manner which would accord with common law concepts of title to land or the right to use another's land'.¹¹¹ However, the Court has also noted that 'a court must take into account the perspective of the Aboriginal people claiming the right ... while at the same time taking into account the perspective of the common law' such that '[t]rue reconciliation will, equally, place weight on each'.¹¹² This generates an innovative yet complex trans-systemic analysis in constitutional law between the two legal systems.

V Distinct Legal Traditions

The Court has discussed the distinct 'traditional laws',¹¹³ 'traditional customs',¹¹⁴ and 'practices' of First Nations as the foreground of Aboriginal knowledge systems and sovereignty.¹¹⁵ It has noted that these legal traditions are based on oral traditions¹¹⁶ and histories¹¹⁷ that illuminate Aboriginal sovereignty and law.¹¹⁸ The Court has stated that Aboriginal legal traditions are those things passed down, and arising, from the pre-existing legal teaching, heritages, and customs of Aboriginal peoples.¹¹⁹ But to Aboriginal peoples and their system of knowledge, understanding of traditions is distinct from the Court's thin and static meanings of pastness or replicating past practices based on Eurocentrism. In the European enlightenment, for example, a distinction between tradition and reason was developed to revolt against the inequalities of European aristocratic society. Based on this distinction the Eurocentric concept of rationalised legal analysis and rights were developed.

Aboriginal concepts of tradition are a method of learning and contemplation. This involves bringing oral processes or ceremonies that integrate new insights, attitudes, and practices through dynamic ways of life and learning that adapt to changing environments and situations. It involves a distinct version of thinking about time, which is distinct from the Eurocentric linear extension of the past to the present and a discernible future. Aboriginal traditions are not comprehensive, they are always becoming. They are open, ongoing, renewing processes of lifelong learning. They were never static forms of social order, as the disruptive concept of 'the trickster' in Aboriginal traditions and literature reveals.¹²⁰

These Aboriginal legal traditions contain many perspectives concerning Aboriginal knowledge and sovereignty. They do not present a singular vision of a good mind or a balanced relationship, but many.¹²¹ For example, Aboriginal knowledge and sovereignty has always been based on relationships and the subtle arts of sustaining peaceful relationships. As such, when determining Aboriginal sovereignty, jurisprudences, and perspectives, trans-systemic and *sui generis* analyses are critical since one culture cannot be judged by the norms of another and each must be seen in its own terms.¹²² Governments, bureaucracies, academics, scholars, and the legal profession, who have refused to step outside the Eurocentric traditions and comprehend Aboriginal traditions, have not often understood this insight that Aboriginal traditions are distinct from Eurocentric traditions. Many courts and scholars have ignored the distinct traditions and have tried to place or integrate Aboriginal traditions within the Eurocentric tradition.

Aboriginal legal perspectives are transmitted in Aboriginal knowledges, languages, visions, and ceremonies. They comprise methods distinct from Eurocentrism. In Eurocentric legal thought, a legal tradition is usually conceptualised 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 organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.'¹²³ Law professor Robert Cover described the operations of Eurocentric¹²⁴ 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.¹²⁵

These legal traditions are shaped by the structure of European languages. For example, Eurocentric civil law is structured by the trichotomy of the linguistic approach reflected in the sacred and secular trinity of person-thing-action, while the common law is structured by the trichotomy of the English language reflected in the noun-verb-subject of its language. This is translated according to the language into person-

action-thing.¹²⁶ However, in the civil law tradition the proper order has been questioned over the centuries. Language is a fundamental aspect of systems of knowing, a process of communication of knowledge, doctrine, or technique.

Modern Eurocentric law was reconstructed on the legacy of concepts, methods, theories, and tacit assumptions handed down by the leading social theorists of the late nineteenth and the early twentieth century. These social theorists of the imperial age—Tocqueville, Marx, Durkheim, Weber—rejected the established intellectual traditions in Eurocentrism, derived from the ancients and scholastic philosophy of the academics (or Schoolmen), especially Plato, Aristotle, and the translated Greek and Arabic treatises, generating a new identifiable 'modern' movement in Eurocentrism. In many ways, the Canadian legal system is based on a belief or convention of being untraditional, which is characterised by an ongoing denial of its historical roots or its past. A legal system may reject tradition, but cannot escape from it.¹²⁷

The Court's decisions emphasise the importance of understanding how distinct Aboriginal knowledges and languages are from European knowledge and languages. Aboriginal knowledge systems are holistic; they do not fragment the holistic unity into separate parts. They do not distinguish between philosophy, human science, and law. The Elders and teachers resist separating Aboriginal knowledge into these European schemata or categories as such disconnection 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 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.¹²⁸

Aboriginal civilisation, confederacies, and societies developed their concepts of communal authority and legal traditions without any knowledge of European languages, *mythos*, society, or legal traditions. Aboriginal legal traditions existed prior to contact between Aboriginal and European societies and prior to the assertion and protection of sovereignty by the imperial British Sovereign.¹²⁹ The Court recognised that

this isolation makes Aboriginal legal traditions distinct from other legal traditions,¹³⁰ and integral to their pre-existing Aboriginal Sovereignty and pre-existing way of life.¹³¹ The Court affirmed that neither the British sovereign,¹³² nor imperial law,¹³³ nor the common law of colonisation¹³⁴ nor the constitution of Canada¹³⁵ created distinct Aboriginal rights or constituted the source of them. It has stressed that Aboriginal rights are neither derived nor delegated from the British sovereign or law.¹³⁶ Aboriginal rights flow from the customs and traditions of the Aboriginal peoples.¹³⁷

In *Van der Peet*, the Court emphasised the constitutionalisation of Aboriginal legal traditions and rights as distinct from their recognition by the common law.¹³⁸ Because they are distinct sources of constitutional power, Parliament cannot extinguish these traditions or rights by legislation.¹³⁹ The task of the courts is to protect the Aboriginality of activities and interests and to police the legislative processes that may interfere with these constitutional guarantees.

Since Aboriginal legal traditions are distinct from Eurocentric traditions,¹⁴⁰ Aboriginal knowledge, sovereignty, and legal traditions are best studied in the structure and context of Aboriginal languages and consciousness. Most of these languages are being-or-action centred, which in the English language is called verb-centred.¹⁴¹ Aboriginal vocabularies, stories, methods of communication, and styles of performance and discourse all encode values and frame understanding. Elders and designated persons who speak Aboriginal languages are primary sources for and authorities on *sui generis* Aboriginal jurisdictions.¹⁴² The integrated methods of knowing cover all aspects of stored heritage as revealed through Aboriginal languages, memories, stories and ceremonies, and as learned and expressed through the oral and symbolic traditions and teachings of Aboriginal peoples.

Aboriginal legal traditions generate a sovereignty and legal order that is simultaneously heard, seen, felt, and savoured through holistic ceremonies and communal performances.¹⁴³ It can be described as comparable (or analogous in legal expression) to the 'synesthetic' tradition of early Greek and Hebrew societies.¹⁴⁴ Through dynamic symbiosis, Aboriginal traditions exist not as a thing or noun or rule but rather as the overlapping and interpenetrating processes or activities that represent teachings, customs, and agreements. Aboriginal peoples understand law as a force that lives through the ecology and personal conduct, rather than as something that

has to be written or produced by specialised thought and reasoning. It is more a matter of processes than a matter of Eurocentric logic, causality, or structural theory.

Aboriginal legal traditions, both implicit and explicit, reflect to a Eurocentric 'reasoning from first principles',¹⁴⁵ however these principles are derived from the ecology or nature about how to live well with the land and with other peoples.¹⁴⁶ 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 Court's approach to Aboriginal sovereignty, traditions and rights means looking at the manner in which the society lived¹⁴⁷ and the value and purpose of its traditional way of life.¹⁴⁸ This is consistent with the interrelated view of Aboriginal knowledge in some languages.¹⁴⁹ It is related to the concept of the right to life in international human rights and the *Charter*.¹⁵⁰

In general, Aboriginal knowledges have been described in Eurocentric thought 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.'¹⁵¹ They form 'a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity'¹⁵² that 'can only be fully learned or understood by means of the pedagogy traditionally employed by these peoples themselves, including apprenticeship, ceremonies and practices.'¹⁵³

The Court has recognised and affirmed the interrelatedness of parts of Aboriginal knowledge and law.¹⁵⁴ It affirms that the constitutional framework contains a spectrum of Aboriginal rights.¹⁵⁵ The courts are generally unaware of the distinct nature or scope of the Aboriginal languages and uncertain about the 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 Court has and is using 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.¹⁵⁶ This analogy 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 gap and discursive disconnect presented by distinct legal traditions. It anticipates a trans-systemic legal tradition that the common law evidence and pleading codes have not formulated and often prevent.

Similar approaches by analogy have not been successful in Eurocentric 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 understandings under the labels of an ideational order of reality,¹⁵⁷ cognitive orientations, or ethno-metaphysical and primitive laws.¹⁵⁸ This analogical approach has deluded scholars into thinking they are masters of a method or a legal tradition that is in fact still little more than a mystery. They never realised the approach by analogy is inconsistent with distinct traditions and at best an artificial crutch that needed 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, in its language, through lifelong learning, can really comprehend the deep structures of its legal traditions and how it operates as sovereignty and legal traditions. A fundamental issue of trans-systemic constitutional analysis or *sui generis* analysis requires non-Aboriginal scholars and courts to be taught Aboriginal languages and how to translate or comprehend Aboriginal traditions.

Many courts have initiated this process of comprehending the distinct Aboriginal traditions on their own internal orientations. The process is not incommensurable; it is challenging. Chief Justice McLachlin of the Court cautions the courts that it is wrong to apply a Eurocentric perspective on an issue of Aboriginal title or rights: 'The search for aboriginal title ... takes us back to the beginnings of the notion of title. ... It would be wrong to look for indicia of aboriginal title in deeds or Euro-centric assertions of ownership. Rather, we must look for the equivalent in the aboriginal culture at issue.'¹⁵⁹ In determining the usefulness and reliability of oral traditions or history of Aboriginal peoples as evidence of Aboriginal title, the Court has held that judges must

resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories of the Aboriginal peoples reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted by the judges simply because they do not conform to the expectations of the Eurocentric traditions or perspective.¹⁶⁰

Similarly, Justice Vickers in the *Tsilhqot'in Nation* case, stated:

Courts that have favoured written modes of transmission over oral accounts have been criticized for taking an ethnocentric view of the evidence. Certainly the early decisions in this area did little to foster Aboriginal litigants' trust in the court's ability to view the evidence from an Aboriginal perspective. In order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonisation.¹⁶¹

He states in his judgment that the richness of Tsilhqot'in language, the story of their long history on this continent, the wisdom of their oral traditions, and the strength and depth of their characters are a significant contribution to Canadian society. He notes that Tsilhqot'in people have survived despite centuries of colonization and the central question is whether Canadians can meet the challenges of decolonisation.¹⁶²

VI Honourable Governance

The central doctrine of constitutional supremacy that protects Aboriginal and treaty rights is the honour of the Crown. The Court has found that it is vital for the Crown and its governments to comprehend and protect the constitutional rights of Aboriginal peoples through a systemic and pragmatic mechanism of making the Crown and governments act honourably toward these rights. This concept of the honour of the Crown generates a unique constitutional standard of honourable governance toward Aboriginal peoples.¹⁶³ It generates the constitutional mechanism including consistency of policy and legislation,¹⁶⁴ fiduciary duties,¹⁶⁵ meaningful consultation, accommodation, and negotiation,¹⁶⁶ and compensation for justified infringements and losses. Professor Brian Slattery has characterised the duty to consult with Aboriginal peoples as a 'generative constitutional order',¹⁶⁷ which I conceptualise as constitutional dialogical governance.¹⁶⁸ Both concepts reach similar conclusions. They acknowledge the constitutional

capacity, legitimacy and rights of Aboriginal peoples against governmental powers. It is a part of the deepening of our understanding of democracy of peoples and the innovative modalities of shared sovereignty. The importance of the processes of change and learning of dialogical governance or the generative constitutional order will be horizontal and cross-sectoral. These changes in constitutional governance will have to be integrated into every government program and service delivery as well as corporate agenda.

The honour of the Crown has been judicially described as a core precept that finds its application in concrete practices.¹⁶⁹ It applies to discretionary powers and contexts as well as statutory interpretations. The Court has declared that the Crown may not simply adopt an 'unstructured discretionary administrative regime' which risks infringing Aboriginal or treaty rights in a substantial number of applications in the absence of some explicit guidance.¹⁷⁰ Consultation must take place 'when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.'¹⁷¹ 'In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances'¹⁷² with a view to substantially addressing First Nations' concerns as they are raised through a meaningful process of consultation.¹⁷³ The Court has developed a variable or sliding approach to the intensity of each specific review required by the honour of the Crown. The graver the impact of the decision upon the First Nation affected by it, the more substantial the inquiry, the deeper the consultation, and justification required.¹⁷⁴ In effect, the calibrated but hard edged standard of review operates like a resilient mechanism: the more the exercise of public power presses on the constitutional rights of Aboriginal peoples, the more the honour of the Crown resistance to that exercise increases, requiring consultation, accommodations, cogent reasons, and justification for the exercise of governmental power. The honour of the Crown affirms new patterns and processes of relationships between the First Nations and the symbolism and operation of the government. The doctrine is predicated on the idea that First Nations have constitutional rights and that any governmental action is constitutionally required to recognise these rights and to respect them. It operates with a strong presumption in favour of constitutional rights of Aboriginal peoples.

The Court has determined that the Crown must do research on any project that may potentially interfere with the

constitutional rights of Aboriginal peoples and must negotiate with them to sustain a respectful collaboration. The new context of good faith negotiations, including consultation and accommodation, is conceptualised as a consensual process where the rights of Aboriginal people converge with constitutional power and the rights of Canadian society. This convergence is not based on a trumping of constitutional rights by constitutional power, but on the developing of consensual strategies to effectively recognise, determine and implement these rights in a generous way in Canadian society. Constitutional supremacy makes possible, facilitates, and enhances constitutional democracy by creating an orderly framework within which people may make valid political decisions.¹⁷⁵

The Court has established the Crown's duty of honourable dealings as part of 'managing change' and 'managing' the relationship between the Crown and constitutional rights of Aboriginal peoples.¹⁷⁶ It has rejected the Crown's argument that this duty would 'undermine the balance of federalism'.¹⁷⁷ According to the revitalised doctrine of the honour of the Crown¹⁷⁸ underlying the obligations of the federal and provincial governments toward recognising and affirming the Aboriginal and treaty rights of Aboriginal peoples, the Crown is required to negotiate with Aboriginal peoples to recognise, identify, and protect their rights, either potential or vested, in a contemporary and developing form.

The Court has established the need of legislatures and the bureaucracy to maintain the honour of the Crown with respect to both procedural and substantive rights, which establish dialogical relationships and governance. The management of the constitutional relationship takes place in the shadow of a long history of grievances and misunderstanding. The Court has rejected the historic policies of the Crown of deliberate avoidance or abeyance of the constitutional rights of Aboriginal peoples and related 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 by the indifference of some government officials to Aboriginal people's concerns about their rights.¹⁷⁹

In implementing the honour of the Crown as a fundamental concept and its corollary of honourable governance, the courts have described the doctrine as always at stake in its dealings with Indian people;¹⁸⁰ it arises with the Crown's assertion of sovereignty over Aboriginal lands;¹⁸¹ it generates the

obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation;¹⁸² it continues when ownership of the underlying title is vested in the Crown,¹⁸³ it requires the Crown to act with honour and integrity¹⁸⁴ and to avoid even the appearance of 'sharp dealing';¹⁸⁵ and it is involved in the resolution of claims.¹⁸⁶

Also, the honour of the Crown is involved in the process of treaty making.¹⁸⁷ It infuses every treaty;¹⁸⁸ assumes that the Crown intends to fulfill its promises and obligations;¹⁸⁹ governs treaty interpretation;¹⁹⁰ requires courts and administrators to interpret the treaties in a manner that maintains the honour of the crown;¹⁹¹ governs treaty application;¹⁹² infuses the performance of every treaty obligation;¹⁹³ governs statutory provisions that have an impact upon treaty or Aboriginal rights; and must be approached in a manner that maintains the integrity of the Crown.¹⁹⁴

The Court has rejected the concept that the government does not have to consult with First Nations on any proposed policy or action that would affect Aboriginal and treaty rights. It has rejected the proposition that the constitutional rights of First Nations are dependent on the good will of the Crown¹⁹⁵ or on non-legal political obligations,¹⁹⁶ good practices,¹⁹⁷ or common law duties only.¹⁹⁸ The Court has called these legal assertions the 'impoverished view' of Crown duties. It states that the honour of the Crown demands good faith consultation when government contemplates or establishes legislation or policy that might impact on an asserted Aboriginal or treaty right, regardless of whether or not it has been judicially noticed.¹⁹⁹

In the absence of Crown policy, such as treaty implementation, the principles announced by the Court and affirmed by the *First Nations-Federal Crown Political Accord* (2005) will govern any constitutional issue.²⁰⁰ The Court has stated that constitutional law operates to avoid any perceived legal vacuum.²⁰¹ The Court has declared that any federal law, policy, or process that fails or failed to implement or perform every clear treaty obligation would be a breach of constitutional supremacy.²⁰² Similarly, if the Crown unilaterally acts in bad faith—that is if it has not considered the policy process consequence or does not attempt to minimise adverse impacts on a First Nation that results in them having no meaningful right, losing the opportunity to earn a livelihood, or existing in poverty—could be viewed as a breach of the honour of the Crown.²⁰³

VII Trans-systemia

Section 35(1) of the *Constitution Act 1982* has been viewed by the Court as providing the constitutional framework by which an honourable reconciliation between distinctive pre-existing Aboriginal societies and the Crown would occur.²⁰⁴ Chief Justice Lamer of the Court emphasised that fair and just reconciliation will take into account both Aboriginal and common law perspectives and place equal weight on each.²⁰⁵ Understandably, the Court is uneducated about Aboriginal knowledge and its languages, traditions, and performance methods. While the Court has firmly acknowledged that Aboriginal peoples have generated a distinct structure, medium and content of Aboriginal sovereignty, knowledge, and jurisprudences from Eurocentrism that underlie their constitutional rights,²⁰⁶ out of necessity in each case it has had to develop its decisions based on Eurocentric methods and fragile and tentative understanding of Aboriginal knowledge and legal traditions. This has been a challenging and complex vantage point of an emerging trans-systemic approach in constitutional law, beyond the familiar Eurocentrism and the common and civil law traditions.

In its adjudicative decisions, the Court has affirmed the divide among the distinct legal traditions and the necessity of constructing a bridge between the distinct traditions to generate an 'intersocietal'²⁰⁷ legal system and constructs diverse ways of reconciling, sustaining, and synthesising these traditions.

In Aboriginal and treaty rights controversies, then, the first operation of the Court in establishing the constitutional framework has been to be critical about, tactical in reinterpretation, and independent from British or European legal traditions and their institutions, while the second operation is generating a trans-systemic symbiosis,²⁰⁸ which is a promising practice model of reconciling Eurocentric systems of knowledge with Aboriginal systems of knowledge. With the help of this judicial transformation, Canadians can rethink the established institutions and can breathe new meaning and new life into them.

Trans-systemic legal symbiosis is an innovative constitutional method. The simplest way to define the method is to say that it represents a way to think clearly and connectedly about the many legal traditions that inform and shape Canadian law and justice. It is based on the ability to recognise and affirm that in Canada, law is made up of many legal

traditions, which has been one of the chief lessons taught by the Court in postcolonial constitutional law over the past few decades. Trans-systemic symbiosis is designed to promote a more profound and coherent understanding of fundamental epistemologies that mould the jurisprudential consciousness and legal principles of Canadian law rather than simply teaching the logic of a single system of law. It is an attempt to understand the deep and implicit structure of humanity, ecology, and civilisations; an attempt to appreciate knowledge over information.

Through its honourable convergence of knowledge systems, trans-systemic legal symbiosis by the Court has acknowledged and affirmed Aboriginal sovereignty, knowledge, and its version of humanity and legal traditions. Trans-systemic legal symbiosis is an indispensable antidote to ethnocentric bias in Canadian legal reasoning and courts' decisions. It enables Aboriginal peoples to become secure with their densely shared traditions, heritages and culture while restraining popular settler majorities and their legislative and policy power under law. It relieves distinct ways of living and cultural diversity of some of its terrors, both past and present.

In constructing this intersocietal or trans-systemic approach by constitutional reconciliation, the Court has recognised and affirmed that Aboriginal sovereignty and jurisprudence has its own genesis and unique philosophical precepts.²⁰⁹ It has affirmed that Aboriginal legal traditions represent a distinct knowledge and legal system with its internal *sui generis* method of analysis. Aboriginal legal traditions are based on distinct narratives and categories integral to Aboriginal languages that give normative force to interpretation and analysis of its legal performances. It presents a unique set of interpretive and consensual methods of problem solving. It has a unique set of rhetorical operations and decisional conventions, engrained through performance and dialogue.

The Court has recognised that Aboriginal legal traditions or jurisprudences do not depend for their existence on consistency or coherence with certain political principles or processes that create Canadian statutory law and bureaucratic administration. The Court has noted that neither imperial law nor common law has required adherence of Aboriginal rights to the doctrinal categories, rules, rights and distinctions based on British and French jurisprudence.²¹⁰ In constitutional theory, the *sui generis* constitutional framework of Aboriginal peoples' sovereignty and jurisprudence is

distinct from Canadian, British, and civil jurisprudence. These judicial interpretations recognise and supplement the constitutional authority of these concepts, but they do not create them.

The Court is still developing a mode of explanation that will show how the elements of the constitution 'fit together' or converge. To resolve these inconsistent concepts of Crown power and duty and Aboriginal and treaty rights, the Court generated a theory of constitutional reconciliation between distinctive pre-existing sovereignty and rights of Aboriginal societies and the federated Crowns in Canada.²¹¹ The constitutional purpose of reconciling the place of Aboriginal peoples within the Canadian state²¹² is an evolving and living part of constitutional law — its purposes are to assist in reconciling the rights and interests that arise from their distinctive societies with the sovereignty of the Crown²¹³ and to enhance Aboriginal peoples' survival as distinctive communities.²¹⁴ As the Court has noted, constitutional reconciliation is a necessary political process that is guided by the constitutional law.²¹⁵ 'This process of reconciliation,' Chief Justice McLachin stated for the Court,

flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.²¹⁶

Constitutional reconciliation is not extinguishment or modification or trumping of Aboriginal and treaty rights;²¹⁷ it is a convergence or learning to read them together with other constitutional powers and make other intergovernmental agreements, legislation and policy consistent with them. The process of reconciliation is not motivated by an assimilative desire to make Aboriginal legal traditions more like common law traditions, but rather to gain a better comprehension of the ways to converge and reconcile them.

Still, the Court has not been able to identify a way to move beyond the Eurocentric method of rationalising analysis in explaining Aboriginal peoples' rights or in its discussion of constitutional reconciliation. It understands the value of articulating a *sui generis* method, but its case-by-case approach has not fashioned a coherent *sui generis* method based on Aboriginal knowledge, language and traditions that displaces what the logical and the causal modes of explanation have in common (despite their important

divergence): the concern with sequence and the search for relationships of necessity. It is still searching for a persuasive model, or models, of constitutional analysis and reconciliation that respects Aboriginal traditions in a dynamic, coherent, and legitimate manner.

The Court is aware that it cannot construct the *sui generis* approach to Aboriginal rights or a trans-systemic symbiosis without Aboriginal peoples transmitting their knowledges or traditions. It has affirmed the value of lawyers pleading evidence and law school teaching the judiciary ways to comprehend Aboriginal knowledge systems and legal traditions, stating that each substantive Aboriginal right would normally include the incidental right of the Aboriginal peoples to teach such customs and traditions to ensure the continuity of Aboriginal customs and traditions.²¹⁸ This learning process of Aboriginal legal traditions by the courts should create new tools and methods to aid in the transformation and a credible account of structural change of law, institutional arrangements, and associated beliefs that shape the practical and conversational routines of peoples. Both the new *sui generis* analysis and the trans-systemic symbiosis has to acknowledge the transformative possibilities of the constitutional reforms, giving Canadians the power to decolonise the past and make a new future, freeing Canada from fictions about the present. Learning Aboriginal legal tradition de-scribes Canadian law, remembers and restores Aboriginal sovereignty and law, and revises Canadian sovereignty and law.

This shift in judicial consciousness is complex, but manageable. It requires the judges to move beyond Eurocentrism, colonial precedents, statutory interpretation, and deference to Parliament. Canadian society needs to move beyond treating Eurocentric colonialism as the cumulative residue of 'civilisational' realism, which disconnects principles of justice from institutional design (or façade) and fetishism. This approach leads to the pervasive and clinging belief in the status quo as a natural, predetermined, and necessary institutional expression and legal thought.

Trans-systemic legal symbiosis establishes the premises to understand, respect, and substantially converge and reconcile the Eurocentric legal traditions of common law and civil law with the distinct, constitutionalised legal traditions of the Aboriginal peoples. These Eurocentric and Aboriginal legal traditions represent distinct genealogies of legal order, distinct linguistic traditions. Trans-systemic symbiosis must

reveal not only the uneasy distinctions between these legal traditions and their methods but also the latent shared consciousness (if any) about the terms of life. Many distinct challenges exist in both searches toward a justified order.

Trans-systemic constitutional symbiosis is a way to sustain the existing commitment to patriated constitutionalism, the rule of law, legal traditions, and a regime of rights. It is a way of animating the constitutional commitment to remedy the past legal and political abuses of Aboriginal legal traditions by the extraordinary problems created by colonialism. This *pianissimo* remedy of affirming their Aboriginal and treaty rights and their *sui generis* legal traditions makes the powerless peoples in Canada the beneficiaries of constitutional reform. These constitutional reforms and the doctrine of the honour of the Crown establish the legal authority to tame the power of the majority with its rights-defeating advantages and to protect the impoverished from obvious disadvantages.

Trans-systemic symbiosis creates a distinct method for the courts and for academics for approaching Aboriginal traditions and knowledges. It is a way of being cognitively alive, of being conscious as humanity changes the presence of colonial traditions, decolonising legal inheritances into the future, to create a framework for just societies. It seeks to identify and to resolve the unstable relation between assumptions about governmental power and their methods, policies and practices of their institutions, and the inherent and constitutional rights of Aboriginal peoples. It allows for an imaginative and noble intellectual effort to construct and reconstruct power into honourable action, policy, and practices. It operates in detail to generate decent and just action to improve governance. As the sense of honourable government in politics is broadened, lifeways becomes the controlling mission of trans-systemic legal symbiosis. It addresses what the nature of political power and legal knowledge is and what it means to think like a postcolonial lawyer. It is a convergence of theoretical, constitutional, and practical. It has a potential for sharpening, deepening, and expanding the lenses through which one perceives justice.

* James (Sa'ke'j) Youngblood Henderson, I.P.C., is a member of the Chickasaw Nation. He is the Research Director at the Native Law Centre of Canada and teaches Aboriginal law at the University of Saskatchewan.

- 1 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 ('*Haida Nation*'), [20].
- 2 *Canada Act 1982* (UK) 1982, c 11.
- 3 *Constitution Act 1982* s 35(1), being Schedule B to the *Canada Act 1982*, *ibid* ('*Constitution Act 1982*'). Among the Mikmaq, s 35 is called *mst kowey Pilua'sik*, or the 'force that changes everything'.
- 4 *Canadian Charter of Rights and Freedoms*, s 15(2) and s 25, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982*, ('*Charter*'). See *R v Sparrow*, [1990] 1 SCR 1075, 1110 ('*Sparrow*') and *R v Kapp*, [2008] 2 SCR 483 ('*Kapp*').
- 5 See generally Harold Cardinal, *The Unjust Society* (Hurtig, 1969) ('*Unjust Society*'); George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Collier-Macmillan Canada, 1974); Russel L Barsh and James Y Henderson, 'Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and Constitutional Renewal' in (1982) 17:2 *Journal of Canadian Studies* 55; and Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Penguin Books Canada, 1994) ('*In the Rapids*').
- 6 Section 52(1) of the *Constitution Act 1982*. This is often called the constitutional supremacy clause. See also *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 313 and *Hunter v Southam Inc* [1984] 2 SCR 145, 148.
- 7 See generally *R v Sparrow* [1990] 1 SCR 1075, 1106-16.
- 8 Ron Chen and Jon Hanson, 'Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory' (2004) 77 *Southern California Law Review* 1103.
- 9 *R v Van der Peet*, [1996] 2 SCR 507 ('*Van der Peet*'), [62], [68]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 ('*Delgamuukw*'), [73]-[77], [80]-[84], [87], [98]; *Mitchell v MNR*, [2001] 1 SCR 911 ('*Mitchell*'), [27]-[39].
- 10 See, eg, the hysterical response of the Crown, governments, and the public to the Court's decision in *R v Marshall*, [1999] 3 SCR 456 ('*Marshall*') on commercial fishing under a 1760 treaty: Leonard I Rotman, 'My Hovercraft is Full of Eels': Smoking Out the Message in *R v Marshall*' (2000) 63 *Saskatchewan Law Review* 617, and Parker Barss Donham's articles reprinted in Robert B Anderson and Robert M Bone (eds), *Natural Resources and Aboriginal People in Canada: Readings, Cases and Commentary* (Captus Press, 2003) 365.
- 11 *Van der Peet*, [31].
- 12 *Sparrow*, 1109-10.
- 13 *Ibid* 1105-90.
- 14 *Ibid* 1091-93, 1109-1110.
- 15 Section 52 of the *Constitution Act 1982*.
- 16 *Kapp*, [78]-[110], Bastarache J.
- 17 *Ibid* [103]; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, [52], L'Heureux-Dubé J.
- 18 *Mitchell*, [34]; Marie Battiste and James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich, 2000) 21-38 [*Protecting Indigenous Knowledge*]; J M Blaut, *The Colonizer's Model of the World: Geographical* Blaut, *The J.M. Blaut, Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993); Vassilis Lambropoulos, *The Rise of Eurocentrism: Anatomy of Interpretation* (Princeton University Press, 1993).
- 19 *Constitution Act 1982*, s 52(1).
- 20 *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec*, [1998] 2 SCR 217 ('*Quebec Secession Reference*'), [72].
- 21 Lamer CJC stated in *Manitoba Provincial Judges Assn. v Manitoba (Minister of Justice)*, [1997] 3 SCR 3, [109] that these unwritten norms and principles are embraced implicitly by the preamble to the *Constitution Act 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, which he characterised as 'the grand entrance hall to the castle of the Constitution.'
- 22 *Quebec Secession Reference*, above n 20, [72].
- 23 *Ibid* [50].
- 24 *Ibid* [49]. Symbiosis is not a familiar legal expression. It is a biological concept that describes a process or a state of living together of interdependent parts, representing a cooperative, mutually beneficial relationship between the parts of the constitution. It is a holistic approach, rather than a deductive approach.
- 25 *Ibid. Paul v British Columbia (Forest Appeals Commission)* [2003] 2 SCR 585, [24]; *Adler v Ontario* [1996] 3 SCR 609, [38]; *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319, 337, McLachlin J (as she then was); *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)* [1987] 1 SCR 1148, 1196, and 1207.
- 26 *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319, 337, McLachlin J (as she then was).
- 27 *Canadian Charter of Rights and Freedoms*.
- 28 *Reference Re Bill 30, An Act to Amend the Education Act (Ont)* above n 25, 1206. Estey J noted the *Charter* cannot provide for the automatic repeal of any provision of the Constitution of Canada. For a similar principle in Aboriginal rights, see *Sparrow*, 1109. The Court includes the document enumerated in s 52 of the *Constitution Act 1982*, as well as other documents, above n 3, *Quebec Secession Reference*, above n 20, [32].
- 29 *Ibid*.
- 30 *Ibid*, [49]-[54]. *Van der Peet*, [21], affirmed that Aboriginal rights have to be interpreted using a purposive approach as explained in *Hunter v Southam Inc*, 155.

- 31 *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, 744-47 ('Manitoba Reference'); *Sparrow*, above n 4, 1103-4 and 1105-10.
- 32 *Ibid* 748-49.
- 33 *Ibid* 745; *Sparrow*, 1107.
- 34 *Manitoba Reference*, 740, 746, 748-49.
- 35 *Sparrow*, 1106-7.
- 36 *Sparrow*, 1107, relying on *Manitoba Reference*, above n 31, 745.
- 37 *Sparrow*, 1107.
- 38 See generally *Marshall*, [62]-[66], [107].
- 39 *Delgamuukw*, [173].
- 40 *Marshall*, [54].
- 41 *Ibid* [64].
- 42 *Quebec Secession Reference*, above n 20, [85]. The Court's concept of sovereignty of peoples is consistent with Elizabeth II's Coronation Oath in 1953. Oremus Homepage www.oremus.org/liturgy/coronation/cor1953b.html; James Youngblood Henderson, 'Aboriginal Peoples of Canada Perspectives on the Monarchy on The Queen's Golden Jubilee.' (2003) 13(1) *Constitutional Forum* 9-15 and 'Sui Generis and Treaty Citizenship' (2002) 6(4) *Citizenship Studies* 415.
- 43 *Quebec Secession Reference*, above n 42, [78].
- 44 *Ibid* [67].
- 45 Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (Routledge, 2001), 44-45; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).
- 46 For the foundation of parliamentary supremacy, see Thomas Hobbes, *Leviathan, or The Matter, Forme, and Power of a Common-wealth Ecclesiastical and Civill*, CB Macpherson (ed) (Penguin Books, 1968); John Austin, *The Province of Jurisprudence Determined*, and *Lectures of Jurisprudence*, 3 volumes. (John Murray, 2nd ed, 1861-63); Albert Venn Dicey, 'The True Nature of Constitutional Law' in *Introduction to the Study of the Law of the Constitution* (1885; Macmillan, 10th ed, 1962) ('Dicey'). But see Henry William Rawson Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172, 188; Paul G McHugh, 'Tales of Constitutional Origin and Crown Sovereignty in New Zealand' (2002) 52 *University of Toronto Law Journal* 69.
- 47 Robert Francis Vere Heuston, *Essays in Constitutional Law* (Stevens & Son, 2nd ed, 1964) 1.
- 48 *MacCormick v Lord Advocate* [1953] AC 396; *British Railways Board v Pickin* [1974] AC 765, 768. See *Making International Law*, above n 45; Trevor R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 3, 271.
- 49 Dicey, above n 46, 39-40. J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999), argued that Dicey's analysis of the sovereignty of Parliament was a re-statement or a declaration of a central theme in English legal history.
- 50 Alfred William Brian Simpson stated: 'Dicey announced that it was the law that Parliament was omniscient, explained what this meant, and never devoted so much as a line to fulfilling the promise he made to demonstrate that this was so', 'The Common Law and Legal Theory' in Alfred William Brian Simpson (ed), *Oxford Essays in Jurisprudence* (2nd series, 1973) 77, 96. The principle has been largely developed and written about in extra-judicial settings as 'historic' common law; however, relatively few judicial decisions on parliamentary sovereignty exist and thus little scope for the courts to give acceptance or substance to the doctrine. For a judicial example, see *British Railways Board v Pickin* [1974] AC 765, 768.
- 51 This view was expounded by Austin in *Lectures*, above n 46. The 'Genius of the British Constitution' was proclaimed in a letter by Lt Gov J G Simcoe [Upper Canada] to Lord Dorchester, 9 March 1795, in Ernest Alexander Cruikshank, (ed), *The Correspondence of Lieutenant Governor John Graves Simcoe, with Allied Documents relating to his Administration of the Government of Upper Canada*, vol. 3 (Ontario Historical Society, 1925) 321-2.
- 52 *Ibid* Lecture II, 'The Sovereignty of Parliament'; Lecture V, 'The Rule of Law: its Nature'; Lecture VIII, 'The Connection between the Law of the Constitution and the Conventions of the Constitution.' These principles were presented as ahistorical and timeless, rather than an 'invented' tradition.
- 53 *In the Rapids*, above n 5, 168-185.
- 54 *Constitution Act 1867*.
- 55 *R v Burah*, [1878] 3 AC 889; *Hodge v R*, [1883] 9 AC 117; *Powell v Apollo Candle Company*, [1885] 10 AC 282.
- 56 Bruce Ryder, 'Aboriginal Rights and *Delgamuukw v The Queen*' (1994) *Constitutional Forum* 43.
- 57 For recent suggestions that Parliament lacks unlimited legislative competence, see T R S Allan, 'The Limits of Parliamentary Sovereignty' [1985] *Public Law* 614; Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72; Lord Woolf, 'Droit Public – English Style' [1995] *Public Law* 57; Sir Stephen Sedley, 'Human Rights: A Twenty-First Century Agenda' [1995] *Public Law* 386; 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 *Law Quarterly Review* 443; Lars Puvogel, 'A.V. Dicey and the New Zealand Court of Appeal—Must Theory Finally Give in to Legal Realities' [2003] 9 *Canterbury Law Review* 111.
- 58 Geoffrey deQ Walker, *The Rule of Law - Foundation of Constitutional Democracy*, (Melbourne University Press, 1988), 161; Mathew D J Conaglen, 'Judicial Supremacy: An Alternative

- Constitutional Theory' (1994) 7 *Auckland University Law Review* 665, 666.
- 59 Henry William Rawson Wade, *Constitutional Fundamentals*, (Stevens, 1989) 68.
- 60 Justice Michael Kirby, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights' [1998] *Commonwealth Law Bulletin* 496.
- 61 Hans Kelsen called the ultimate operative legal rule in a legal system as a *grundnorm* even though its authority cannot be explained in traditional legal analysis, *The Pure Theory of Law*, M. Knight, trans (1934; University of California Press, 1967) [*Pure Theory of Law*] and *General Theory of Law and State*, A. Wedberg, trans. (Harvard University Press, 1945). H.L.A. Hart used the term 'ultimate rule of recognition' rather than *grundnorm*, *The Concept of the Law* (Clarendon Press, 1961) ('*Concept of Law*'). Joseph Raz uses the term 'chain of validity' in *The Concept of A Legal System—An Introduction to the Theory of Legal System* (Clarendon Press, 1970) ('*Concept of Legal System*') and in 'Kelsen's Theory of the Basic Norm' in *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 122. Such rules are justified historically rather than legally, George Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-examined' (1976) 92 *Law Quarterly Review* 591.
- 62 For an example, prior to the Court's statement in *Haida Nation*, above n 1, see the Crown's assertion of sovereign incompatibility in *Mitchell*, above n 9, [61]-[64], [67], [133]-[135]. Also see John Borrows, 'Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*' (1999) 37 *Osgoode Hall Law Journal* 537.
- 63 For an example, see James Youngblood Henderson, Marjorie Benson, and Isobel Findlay, 'Part IV Displacing Colonial Discourse', in *Aboriginal Tenure in the Canadian Constitution* (Carswell, 2000).
- 64 *Sparrow*, [62]; *R v Badger*, [1996] 1 SCR 771 ('*Badger*'), [78] and [85].
- 65 *Haida Nation*, [20].
- 66 *Van der Peet*, [30]; *R v Sappier*; *R v Gray*, [2006] 2 SCR 686 ('*Sappier-Gray*'). See also *R v Sundown*, [1999] 1 SCR 393 ('*Sundown*'), [35].
- 67 This fact of there being distinctive ways of life or cultures already in North America operates in an analogous way to the facts that generate sovereignty in British law, *Quebec Secession Reference*, above n 20, [142] ('No one doubts that legal consequences may flow from political facts, and that "sovereignty is a political fact for which no purely legal authority can be constituted ..."', Wade, above n 46). See also articles listed in above n 57.
- 68 See Leroy Little Bear, 'Aboriginal Rights and the Canadian "Grundnorm"' in J. Rick Ponting (ed), *Arduous Journey: Canadian Indians and Decolonization*. (McClelland and Stewart, 1986); *Pure Theory of Law*, above n 61.
- 69 *The Concept of the Law*, above n 61. In the British legal system, the rule of recognition expresses that there are internal conventional criteria, agreed upon by officials, for determining which rules are and are not part of the legal system.
- 70 Section 35(1) of the *Constitution Act 1982*, above n 3; *Badger*, above n 64, [76]-[79]. *Van der Peet*, above n 9, [20].
- 71 *Haida Nation*, [20].
- 72 Canada, *Report of the Royal Commission on Aboriginal Peoples*, 5 vol. (Minister of Supply and Services Canada, 1996) ('*RCAP Report*') vol. 1, *Looking Forward, Looking Back*, 616-97.
- 73 See James Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Thomson Carswell, 2007) ('*Treaty Rights*'). Treaty federalism was the first step in the imperial plan in North America. Through over 400 treaties with the First Nations, the First Nations sovereignty and nationhood were recognised and established in imperial law of the United Kingdom. These imperial treaties create the first constitutional federalism in British North America that preceded British colonialism. These conditional treaties permitted British settlements within the First Nations territory and permitted them to be ruled by British or French law.
- 74 *Van der Peet*, above n 9, [29].
- 75 *Ibid* [30].
- 76 Section 52(1) of *Constitution Act 1982*, above n 3. The general principle of treating like cases alike is central to the concept of equality in law, *Concept of Law*, above n 61, ch. VIII. It is characterised as a matter of justice, coherence, integrity or fairness, and equality. Its corresponding principle treats distinct cases differently and is also a matter of equality.
- 77 *R v Adams*, [1996] 3 SCR 101 ('*Adams*'), [26].
- 78 *Delgamuukw*, above n 9, [126]; *Van der Peet*, above n 9, [38]-[40]; *Casimel v Insurance Corp. of British Columbia* (1993), 106 DLR (4th) 720 (BCCA); *Campbell v British Columbia*, [2000] BCJ. No. 1524 (BCSC), [83]-[110], [134]-[135].
- 79 *Delgamuukw*, *ibid* [111]; *Van der Peet*, *ibid*, [74]; *Adams*, [25-26] and in the companion decision in *R v Côté*, [1996] 3 SCR 139 ['*Côté*'], [38]; and *Kruger v The Queen*, [1978] 1 SCR 104, 109.
- 80 The Court found these constitutional principles in the express and implied acts of imperial treaties, law and judicial interpretation, *Treaty Rights*, above n 73, Part 1.
- 81 *Van der Peet*, [29], [31], [40].
- 82 The Court recognised the jurisprudential framework for analysing Aboriginal rights embedded in s 35(1) in *Sparrow*, above n 4, *Van der Peet*, *ibid*; *R v N.T.C. Smokehouse Ltd.*, [1996] 2 SCR 672 ; *R v Nikal*, [1996] 1 SCR 1013; *R v Gladstone*, [1996] 2 SCR 723 ['*Gladstone*']; *R v Pamajewon*, [1996] 2 SCR 821; *Adams*; *Côté*; *Delgamuukw*, [2]; and *Mitchell*.
- 83 *Sparrow*, 1110; *Delgamuukw*, [126]; *Côté*, [74].

- 84 *Delgamuukw*, *ibid*, [180]-[181].
- 85 *Sparrow*, 1110.
- 86 *Van der Peet*, [43]; *Delgamuukw*, [186].
- 87 *Sparrow*, 1105; *Van der Peet*; *Delgamuukw*, [18].
- 88 *R v Powley* [2003] 2 SCR 207, [13], [18].
- 89 *Marshall*, [78]; *Sundown*, [24]; *Badger*, [78]; *R v Sioui* [1990] 1 SCR 1025, 1043; *Simon v The Queen* [1985] 2 SCR 387, 404.
- 90 *Sparrow*, 1099, 1101-02; *Van der Peet*, [44]-[46]; *Sappier-Gray*, [45].
- 91 See *Campbell*, [106]-[107].
- 92 *Van der Peet*, [19]; *Côté*, [52].
- 93 Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso, 1996); Antony Anghie, above n 45. These philosophical precepts are the political theory as expressed by Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Adam Smith, the American founding fathers, etc.
- 94 James Youngblood Henderson, *First Nation Jurisprudence and Aboriginal Rights: Defining the Just Society* (Native Law Centre, 2006) 116-177.
- 95 *Van der Peet*, [19]. This principle prohibits European jurisprudence and law from operating in the analysis of Aboriginal rights and jurisprudence. However, European jurisprudence has arisen in the translations from Aboriginal interest to modern rights, *R v Marshall*; *R v Bernard*, [2005] 2 SCR 220 ('*Marshall-Bernard*'), [48].
- 96 *Van der Peet*, [20].
- 97 *Sparrow*, 1112.
- 98 *Delgamuukw*, [148]; *Van der Peet*, [41]; and *ibid* [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*, above n 4, which provides: 'This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.'
- 99 *Sparrow*, 1112.
- 100 See John Burrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002) and *Canada's Indigenous Constitution* (University of Toronto Press, 2010) ('*Canada's Indigenous Constitution*').
- 101 *Van der Peet*, [68]; *Delgamuukw*, [82], [84]-[87]; *Mitchell*, [29]-[34].
- 102 *Delgamuukw*, [82], [87]; *Mitchell*, [29]-[34].
- 103 *Ibid* [84], [87].
- 104 *Sparrow*, 1106; *Van der Peet*, [21].
- 105 *Ibid* [21].
- 106 *Sparrow*, 1106; *Van der Peet*, [22].
- 107 *Van der Peet*, [21].
- 108 See Treaties, Royal Instructions, Royal Proclamations, and Mark David Walters, 'British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v British Columbia*' (1992), 17 *Queen's Law Journal* 350 ('British Imperial Constitution Law'); *Delgamuukw*, [114].
- 109 *Delgamuukw*, [112]-[124]; McLachlin J (as she then was) in *Van der Peet*, [263]-[275]; *Calder v Attorney General of British Columbia*, [1973] SCR 313 ('*Calder*').
- 110 McLachlin J in *Van der Peet*, [275].
- 111 *Sundown*, [35].
- 112 *Van der Peet*, [49]-[50].
- 113 *Van der Peet*, [38]-[40]; *Delgamuukw*, [114], [126], [145]-[146].
- 114 *R v Secretary of State for Foreign & Commonwealth Affairs (Secretary of State for Foreign & Commonwealth Affairs)*, [1981] 4 CNLR 86 (Eng CA), 89-90.
- 115 *Campbell*, [83]-[88].
- 116 *Van der Peet*, [68].
- 117 *Delgamuukw*, [84]-[88]: *Mitchell*, [27]-[35], [37], and [48].
- 118 *Delgamuukw*, [125]-[132].
- 119 *Van der Peet*, [40]; McLachlin J (as she then was) dissenting on this point, [247].
- 120 *First Nation Jurisprudence*, above n 94; *Canada's Indigenous Constitution*, above n 100.
- 121 Harold Cardinal and Walter Hildebrand, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognised As Nations* (University of Calgary Press, 2000) 14-20.
- 122 The dissenting justice, L'Heureux-Dubé, in *Van der Peet*, [151]-[162] rejected the majority interpretation of distinctive culture; her argument was accepted by the Court in *Sappier-Gray*, above n 66, [40]-[45], which forged the 'way of life' test.
- 123 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, (Stanford University Press, 2nd ed 1985) 2.
- 124 *Mitchell*, [34].
- 125 Robert M Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 9. See also Anthony T Kronman, 'Precedent and Tradition' (1990) 99 *Yale Law Journal* 1029, 1066.
- 126 As *L'Interprétation des Institutes de Justinian*, M le duc Pasquier (ed) (Paris, 1847) [*Justinian Institutes*], 1.2.12 articulates: 'All of our law is related either to persons or to things or actions'. In contrast, Aboriginal legal traditions begin with actions, with the cosmology of creation or dreams, rather than persons or things.
- 127 H Patrick Glenn, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50 *McGill Law Journal* 863; Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), 1-45.
- 128 *Campbell*, [85] ('Aboriginal laws did not emanate from a central print-oriented law-making authority similar to a legislative assembly, but took unwritten form').

- 129 *Van der Peet*, [56], [59]-[61].
- 130 *Ibid* [71].
- 131 *Ibid* [70] and L'Heureux-Dubé J, dissenting, [206]; McLachlin J, dissenting, [254]-[259]; *Sappier-Gray*, [45], changed the test to 'pre-existing way of life'.
- 132 *Delgamuukw*, [114].
- 133 *Ibid*.
- 134 Peter W Hogg, *Constitutional Law in Canada*, (Carswell, 3rd ed, 1992) ('*Constitutional Law*') 21.
- 135 *Delgamuukw*, [114], [133]-[134], [136]; compare to *Mitchell*, [70].
- 136 *Delgamuukw*, [114], [133]-[134], [136]; McLachlin J (as she then was), dissenting on other grounds, in *Van der Peet*, [253]; L'Heureux-Dubé J, dissenting on other grounds in *Van der Peet*, [112].
- 137 *Badger*, [76].
- 138 *Van der Peet*, [28]. However, the Court noted that in the common law tradition, Aboriginal rights existed at the pleasure of the Crown and under the principle of parliamentary supremacy may be extinguished when the intention of the Crown in Parliament is clear and plain or regulated, any time, *Kruger v The Queen*, 112; *R v Derriksan* [1976] 2 SCR v.
- 139 *Van der Peet*, [28].
- 140 *Mitchell*, [34]; *Canada's Indigenous Constitution*, above n 100.
- 141 First Nation Jurisprudence, above n 94; Protecting Indigenous Knowledge, above n 18, 50; Stephanie H Inglis, *Speaker's Experience: A Study of Mi'kmaq Modality*. (Phd Thesis, Memorial University of Newfoundland, 2002 [unpublished]); Helga Lomosits, 'Future is not a tense' in Jeff Bernard, (ed) *Signs, Cultures, Conviviality form a Semiotic Point of View* (Wien: Herausgeberin, 2004) <http://www.inst.at/trans/15Nr/01_2/lomosits15.htm>. In Eurocentric linguistics as applied to Algonquian languages, this characteristic is called a 'complex polysynthetic morphology' or a 'sophisticated verb system'.
- 142 *Delgamuukw*, [12]-[14], [73]-[88]; *Mitchell*, [35].
- 143 Henderson, above n 94.
- 144 See generally on performance legal cultures, Bernard J Hibbits, 'Coming to Our Senses: Communication and Legal Expression in Performance Cultures' (1992) 41 *Emory Law Journal* 874.
- 145 McLachlin J (as she then was), dissenting in *Van der Peet*, [262].
- 146 See *Sappier-Gray*, [45].
- 147 *Ibid* [45]; *Delgamuukw*, [126], [145]; *Van der Peet*, [30]; *Sparrow*, 1112; *Calder*, 328.
- 148 *Sappier-Gray*, *ibid*, [45]; *R v Marshall*, above n 10; *Marshall-Bernard*, above n 95, [49]; *Delgamuukw*, [149] and La Forest J [194]. Mi'kmaq language gives the complex concept of *mimajaqn* as the name of the way of life or meaning of holistic livelihood, which is translated as 'actually life' or 'actualising life'.
- 149 The Anishinâbê speak often of their way of life as *bemodewewan*, which is a holistic philosophy, of spiritual, social, cultural, political, and legal existence that is viewed as inseparable. Nêhiyawak (Cree) use *pimâcihowin* (livelihood).
- 150 The right to life is enshrined in art 3 of the United Nations' *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948); in art6 (1) of the *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 999 UNTS 171 (16 December 1966) entered into force on 23 March 1976; article 7 of the United Nations' *Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, Un Doc A/RES/61/295 (13 September 2007) making it a legally enforceable right in every United Nations member state. Additionally, the right to life is included in s 7 of Canadian *Charter*.
- 151 *Final Report of RCAP*, above n 72, vol. 4, 454.
- 152 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), [8]. For a more comprehensive analysis, see *Protecting Indigenous Knowledge*, above n 124.
- 153 *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), [6, 12-13]. See the 2000 revisions in Siegfried Wiessner and Marie Battiste, 'The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous People' (2000) 13 *St Thomas Law Review* 383-390.
- 154 *Delgamuukw*, [148].
- 155 *Ibid* [138].
- 156 Taiaiake Alfred, 'Sovereignty' in Joanne Barker (ed), *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (University of Nebraska Press, 2005) 33.
- 157 Ward Hunt Goodenough, *Cooperation in Change* (Russell Sage Foundation, 1963) 7.
- 158 A Irving Hallowell, *Culture and Experience* (University of Pennsylvania Press, 1955) and 'Ojibwa Ontology, Behavior and World View' in Stanley Diamond (ed), *Primitive Views of the World* (Columbia University Press, 1960), reissued as *Culture in History: Essays in Honour of Paul Radin* (Columbia University Press, 1969) 49.
- 159 *Marshall-Bernard*, [61].

- 160 *Mitchell*, [34].
- 161 *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700; [2008] 1CNLR 112, [132].
- 162 *Ibid* [20].
- 163 *Sparrow*, 1107-8; *Haida Nation*; *Mikisew Cree First Nation*, [2005] 3 SCR 388 ('*Mikisew Nation*'). David M Arnot, 'The Honour of the Crown' (1996) 60 *Saskatchewan Law Review* 339 ('Honour of Crown'); Brian Slattery, 'Aboriginal Rights and the Honour of the Crown' (2005) 29 *Supreme Court Law Review* (2d) 434; Timothy Huyer, 'Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation' (2006) 21 *Windsor Review of Legal and Social Issues* 33.
- 164 Section 52 of the *Constitution Act 1982*, above n 3, *Sparrow*, 1101, 1109, 1116-7, 1120-1121; *Van der Peet*, [24].
- 165 *Sparrow*, 1106-09; *Guerin v The Queen* [1984] 2 SCR 335 ('*Guerin*') was read together with *R v Taylor and Williams* (1981), 34 OR (2d) 360 ('*Taylor and Williams*'); *Delgamuukw*, [162]-[164]; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 ['*Blueberry Band*']; *Wewaykum Indian Band v Canada* [2002] 4 SCR 245, [81] ('*Wewaykum Indian Band*'); *Haida Nation*, [18]. Michael Coyle, 'Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duty Toward Aboriginal Peoples' (2003) 40 *Alberta Law Review* 841-66; J Timothy McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (LexisNexis Canada, 2008).
- 166 *Badger*, [52]; *Haida Nation*; *Mikisew Nation*. See Patrick Macklem, 'The Crown's Duty to Consult: The Current Legal Landscape' and Jack Woodward and Robert J.M. Janes, 'Fulfilling the Promises of Consultation: Strategies and Tactics', Proceedings of the 1999 Annual Institute of Continuing Legal Education, entitled First Nations, the Environment and Development: the Emerging Duty to Consult (Canadian Bar Association, 1999); Thomas Isaac and Anthony Knox, 'The Crown's Duty to Consult Aboriginal People' (2003) 41 *Alberta Law Review* 841; Richard F. Devlin and Ronalda Murphy, 'Contextualizing the Duty to Consult: Clarification or Transformation?' (2003) 14:2 *National Journal of Constitutional Law* 167; Monique Passelac-Ross, 'The Trapping Rights of Aboriginal Peoples in Northern Alberta' (2005) *Canadian Institute of Resource Law*, Occasional Paper #15; Ashely B Aliffe, 'Externalizing the Duty: A Cause of Action where Crown Failure to Consult First Nations Results in Third Party Loss' (2007) 16 *Dalhousie Journal of Legal Studies* 47.
- 167 'Aboriginal Rights and the Honour of the Crown', above n 163, 436; Ria Tzimas, '*Haida Nation* and *Taku River*: A commentary on Aboriginal Consultation and Reconciliations' (2005) 29 *Supreme Court Law Review* (2d) 461; Gordon Christie, 'Developing Case Law: The future of Consultation and Accommodation' (2006) 39 *University of British Columbia Law Review* 139.
- 168 James [Sa'ke'j] Youngblood Henderson, 'Dialogical Governance: A Mechanism of Constitutional Governance' (2009) 72 *Saskatchewan Law Review* 29.
- 169 *Haida Nation*, [16]. Similar concepts are developing in the United States, *Cobell v Norton*, No. 1:96CV01285 (DDC) is a class action law suit involving the question of whether the government adequately kept records to show how it handled money from oil, gas, grazing and other royalties it has held in trust for Indians.
- 170 *Adams*, [54]; *Marshall*, [63]-[64]. The common law tradition did not require that public power be justified publicly.
- 171 *Haida Nation*, [35].
- 172 *Ibid* para 41.
- 173 *Ibid* [42]; *Delgamuukw*, [168].
- 174 *Ibid* [38]-[39]. For 'deep consultation', see [44].
- 175 *Quebec Secession Reference*, above n 20, [76], [78].
- 176 *Mikisew Nation*, [1].
- 177 *Haida Nation*, [58]-[59].
- 178 'Honour of Crown', above n 163. Ironically, the original concept of the honour of the Crown was the leading principle that held European aristocratic society together, which is often called a feudal or oligarchic order. Honour was the recognition by others in an ordered hierarchy that one excels in the virtues peculiarly suited to one's unalterable rank or estate. These virtues of one's rank created not only privileges and entitlements but also duties and obligations. Each rank equates the good, the beautiful, and the sacred with its own honour, that is to say, with the strivings and virtue that distinguished it from other estates, affirmed their autonomous identity, and developed their own internal community. See Roberto Mangabeira Unger, *Law in Modern Society* (Free Press, 1976), 150-3.
- 179 *Mikisew Nation*, [1].
- 180 *Badger*, [41]; *Marshall*, [16], [78]; *Haida Nation*, [16].
- 181 *Mitchell*, [9].
- 182 *Ibid*, this duty characterized as 'fiduciary' in *Guerin*.
- 183 *Ibid* [9].
- 184 *Haida Nation*, [19].
- 185 *Ibid*.
- 186 *Ibid* [17].
- 187 *Ibid* [19].
- 188 *Ibid*; *Mikisew Nation*, [33].
- 189 *Badger*, [52].
- 190 *Haida Nation*, 19; *Mikisew Nations*, [28], [33].
- 191 *Taylor and Williams*, 123.
- 192 *Haida Nation*, [19]; *Mikisew Nation*, [33], [52].
- 193 *Mikisew Nation*, para 54.

- 194 *Haida Nation*, [17]-[18].
- 195 *St. Catherine's Milling and Lumber Co v R*, (1888), 14 AC 46 (PC).
- 196 *Guerin*; *Blueberry Band*, above n 165; *Wewaykum Indian Band*, above n 165, [81]; *Haida Nation*, above n 1, [18].
- 197 *Mikisew Nation*, above n 163, [22], discussing the decision of Rothstein, JA for the Federal Court of Appeal, [2004] 3 FCR 436, [24].
- 198 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, [24], where the Court held that the Crown submissions that they owed only a 'common law' duty of fair dealing to First Nations whose rights were affected was an 'impoverished view' of their duty.
- 199 *Haida Nation*, [27].
- 200 *First Nations-Federal Crown Political Accord* (2005) Indian and Northern Affairs Canada <<http://www.ainc-inac.gc.ca/ai/mr/nr/ma2005/02665afn-eng.asp>>.
- 201 *Manitoba Language Rights*, 753, concerned the severe practical consequences affected by the Court's clear and unambiguous conclusion that, as a matter of law, all Manitoba legislation, at issue in that case was unconstitutional. The Court's concern with a legal vacuum and the maintenance of the rule of law was directed in its relevant aspect to the appropriate remedy, which was to suspend the declaration of invalidity to permit appropriate rectification to take place. It declined to strike down all of Manitoba's legislation for its failure to comply with constitutional dictates, out of concern that this would leave the province in a state of chaos. In so doing, it recognised that the rule of law is a constitutional principle, which permits the courts to address the practical consequences of their actions, particularly in constitutional cases.
- 202 *Marshall*, [63-64]; *Mikisew Nation*, [33], [38], [44], [47]-[50], [57] ('the honour of the Crown infuses every treaty and the performance of every treaty obligation'); [63] ('If the respective obligations are clear the parties should get on with performance').
- 203 *Mikisew Nation*, [33], [38], [44], [47]-[50], [57] ('the honour of the Crown infuses every treaty and the performance of every treaty obligation'), [59] ('The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground...'), and [63] ('The more serious the impact the more important will be the role of consultation.').
- 204 *Van der Peet*, [42].
- 205 *Ibid* [49]-[50]; *Delgamuukw*, [81].
- 206 *Haida Nation*; *Delgamuukw*, [82], [114]; *Van der Peet*, [17], [20]; *Van der Peet*, [230] McLachlin J (as she then was), dissenting.
- 207 *Van der Peet*, [42] quoting Brian Slattery, 'The Legal Basis of Aboriginal Title', in Frank Cassidy (ed) *Aboriginal Title in British Columbia: Delgamuukw v The Queen* (Oolichan Books, 1992), 120-21 ('Professor Slattery has suggested that the law of aboriginal rights is "neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities") and British Imperial Constitutional Law, above n 108, 412-13 ('The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined . . . a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives').
- 208 See generally, H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, 2nd ed 2004); Doin' the Transsystemic, above n 127; Special issue on Transsystemic legal studies (2005) 50 *McGill Law Journal* 697.
- 209 *Sappier-Gray*, [45]; *Marshall-Bernard*, [49]; *Van der Peet*, [30]; *Badger*, [76]; *Calder*, 328.
- 210 See McLachlin J's summary of British common law principles in *Van der Peet*, [263]-[276], especially, [269].
- 211 *Van der Peet*, [42]. *RCAP Report*, above n 72 vol. 1 Looking Forward, Looking Back, 229, 675-697 stated 'Canada must develop "a national policy of reconciliation and regeneration" embracing the values of "mutual recognition, mutual respect, sharing, and mutual responsibility'. However the Commission doubted the courts' ability to contribute to its version of reconciliation. They saw that courts were 'unwitting instruments of division rather than instruments of reconciliation', xxvi.
- 212 Justice Binnie in *Mitchell*, [129] (Crown sovereignty is a way of describing the Canadian state, a state that 'aboriginal and non-aboriginal Canadians together form...'); [167] (perceiving Crown sovereignty as a sovereignty 'shared' by Aboriginal and non-Aboriginal peoples is 'essential to the achievement of reconciliation as well as to the maintenance of diversity...').
- 213 *Van der Peet*, [43] (Aboriginal rights are 'the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory'); [44] ('In order to fulfil the purpose underlying s 35(1) — eg, the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions'); [57] ('those distinctive features of aboriginal rights which need to be acknowledged and reconciled with the sovereignty of the Crown'); and *Gladstone*, above n 82, [72] ('the recognition of the prior occupation of North America by aboriginal peoples or ... the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown').

- 214 *R v Powley*, [2003] 2 SCR 207, [13], [17].
- 215 *Delgamuukw*, above n 9 [186], where the Court stated that '[u]ltimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, at para 31, to be a basic purpose of s 35(1) – 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Let us face it, we are all here to stay'; *Haida Nation*, [20].
- 216 *Haida Nation*, [32].
- 217 *Sparrow*, 1098-99, 1111; *Côté*, [76]; *Mitchell*, [11]; *Marshall-Bernard*, [39].
- 218 *Côté*, [27], [31], [56].