

## **ACCOMMODATING INDIGENOUS LEGAL TRADITIONS**

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## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>Preface</b>	<b>2</b>
<b>Introduction</b>	<b>3</b>
<b>Chapter One - Characterizing Indigenous legal traditions</b>	<b>7</b>
<b>Chapter Two - Justifying Accommodation</b>	<b>11</b>
<b>1. Indigenous Legal Traditions as Section 35         Aboriginal Rights</b>	<b>11</b>
<b>2. Accommodation as a Right Accorded to Indigenous         Peoples in International Law</b>	<b>13</b>
<b>3. Accommodation in Order to Achieve Equality</b>	<b>16</b>
<b>4. Pluralism already Exists</b>	<b>18</b>
<b>Chapter Three – Entrenching Indigenous Legal Traditions</b>	<b>18</b>
<b>1. Indigenous Judicial Appointments</b>	<b>21</b>
<b>2. Harmonization of Indigenous and non-Indigenous Laws</b>	<b>25</b>
<b>3. Respect for Indigenous Government and Governance</b>	<b>27</b>
<b>4. Institutional Reform</b>	<b>29</b>
<b>Conclusion</b>	<b>31</b>
<b>Bibliography</b>	<b>35</b>
<b>Acknowledgements</b>	<b>38</b>

## **Preface**

On March 4, 2005, a one-day Forum was held in Ottawa to dialogue on the proper place of Indigenous legal traditions within the Canadian juridical framework.<sup>1</sup> Presenters included Aboriginal and non-Aboriginal legal scholars, practitioners, and Aboriginal leaders from various regions across Canada. The combined knowledge and experience of these presenters demonstrate the solid basis for accommodating Indigenous legal traditions alongside common law and civil law traditions.<sup>2</sup> The theme and substance of this Discussion Paper is based on that shared knowledge, as well as materials and papers presented at the Forum.

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Winnipeg, MB  
March 2005

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<sup>1</sup> This gathering was held by the Indigenous Bar Association, in conjunction with the Aboriginal Law Section of the Canadian Bar Association.

<sup>2</sup> List of presenters appears in appendix. On behalf of the Indigenous Bar Association, the writer wishes to express appreciation to the presenters for sharing this knowledge.

## **Introduction**

On April 19<sup>th</sup>, 2004, Prime Minister Paul Martin signaled Canada's willingness to embark on a new collaborative relationship with Canada's Indigenous peoples. At the historic Canada-Aboriginal Peoples Roundtable he stated: "We will ensure a full seat at the table as we have ensured today to Aboriginal communities and leaders. No longer will we in Ottawa develop policies first and discuss them with you later. This principle of collaboration will be the cornerstone of our new partnership."

The Prime Minister's statement has been interpreted as an opportunity to begin a process of reconciliation between Indigenous and non-Indigenous peoples. As aptly noted by Grand Chief Phil Fontaine, all efforts at reconciliation will require transformative change, which in turn will entail a multi-faceted approach to achieve both procedural and substantive reform". This includes the manner in which Canada addresses the constitutional rights of Aboriginal peoples, as well as the content of existing laws and policies.

Transformative change can and should entail accommodation of Indigenous legal traditions within Canada's pluralistic state. In this Discussion Paper, the Indigenous Bar Association proposes how Indigenous legal traditions can be accommodated within Canada's juridical framework. Accommodation of Indigenous legal traditions within Canada's legal framework is a timely issue in terms of situating the proper place of Indigenous peoples and their legal traditions within Canada's pluralistic state. In various regions of the country,

citizens live according to the laws of both the common law or civil law systems. Many citizens also live according to the Indigenous legal traditions of the societies to which they belong. Given this reality, it is inaccurate to characterize Canada as bijuridical. Rather, this country is a multi-juridical state, where the distinct laws and rules of three systems come together within the geographic boundaries of one political territory.

The Indigenous peoples of Canada whose legal traditions are referred to throughout this Discussion Paper include, among others, “the historic and contemporary nations of the Innu, Mi’kmaw, Maliseet, Cree, Montagnais, Anishinabek, Haudenosaunee, Salish, Kwakwaka’wakw, Haida, Tsimshian, Gitk’san, Tahltan, G’wichin, Dené, Inuit, and Métis peoples.”<sup>3</sup> Just as with any of the various peoples of the world, the legal traditions of these distinct societies and cultures are in many ways diverse from one another. Notwithstanding this diversity, each of these peoples share a common experience that their Indigenous legal traditions are not reflected in Canada’s multi-juridical state.

Often the belief systems of Indigenous and non-Indigenous peoples are complementary to one another; in certain circumstances, they are diverse. Notwithstanding this diversity, it is important to acknowledge that none of these systems are superior to the others. In each case, the legal traditions are unique

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<sup>3</sup> Borrows, John. *Indigenous Legal Traditions in Canada*, Unpublished paper for IBA/CBA Forum on Indigenous Legal Traditions. Ottawa, March 2005 at p. 10.

and integral to the society in question, and are based on fundamental beliefs and values of the society.

The proper place of Indigenous peoples is not merely as subjects of either the common law or civil law legal system, with their Indigenous legal traditions treated as insignificant, irrelevant and unenforceable. As will be demonstrated in this Discussion Paper, true justice demands that Canada's juridical state make room for Indigenous legal traditions and that these traditions be acknowledged along with the common law and civil law systems.

This Paper will begin with a descriptive discussion about Indigenous legal traditions. Through examples provided, it will be demonstrated that Indigenous legal traditions and systems of law both pre-dated and post-dated the arrival of Europeans and imposition of the common law and civil law systems of justice. More importantly, these examples will demonstrate the crucial role that Indigenous legal traditions played in the historic harmonization of relations between Indigenous nations, as well as between Indigenous nations and the European newcomers. This discussion will demonstrate that Indigenous legal traditions historically had a legitimate and valid role in the evolution of the Canadian state and that, in consideration of this history; Indigenous legal traditions should be embraced as an integral aspect of the country's juridical foundation.

Chapter two involves a discussion of the legal and moral bases for recognizing the legitimacy of Indigenous legal traditions. First, drawing on principles of Canadian constitutional law, it will be demonstrated how Indigenous legal traditions can be characterized as existing Aboriginal and treaty rights, and that they therefore should be accorded constitutional protection and recognition under Section 35(1) of the *Constitution Act, 1982*. A second constitutional argument will be set out based on principles of equality as guaranteed by the *Canadian Charter of Rights and Freedoms*<sup>4</sup>. It will be argued that Canada's pluralism warrants comparable accommodation of Indigenous legal traditions. Lastly, at the international level, the rights of Indigenous peoples are progressively being recognized. As a party to these international agreements, it will be demonstrated how legally and politically, Canada is obligated to acknowledge and accommodate Indigenous legal traditions.

Meaningful accommodation of Indigenous legal traditions within the framework of the Canadian legal system is an attainable goal. Drawing back to the means of securing space for Indigenous legal traditions in the Canada juridical system, the final chapter of this Discussion Paper will elaborate on four mechanisms that make this possible: Law reform, governance structures, public education, and institutional reform. Each is described with recommendations for incremental or immediate implementation.

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<sup>4</sup> *Canadian Charter of Rights and Freedoms*, s. 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

## **Chapter One - Characterizing Indigenous legal traditions**

Norms are a projection of the behaviors expected of members of a given society. The formation of social norms and mores, including those governing spiritual practices and traditions and those guiding relationships with other people and other forms of life evolved as part of Indigenous peoples' relationships with the land and its resources. While these relationships may have been altered by an increasing emphasis first on a fur trade economy and then by the formation of a new society of non-Indigenous immigrants, most Indigenous communities continue into the present to practice and honor these traditional beliefs and values or Indigenous legal traditions.

Indigenous societies have practiced legal pluralism in various forms well before the arrival of European settlers and colonists. These systems of law governed the conduct and behavior of individuals in relation to the land, as well as towards other members of the society. As an example, it is a fundamental belief of many Indigenous societies that the Creator placed Indigenous peoples on the earth to act as stewards of the Earth and its gifts. At its root, this belief system is based on the notion that mankind must therefore respect the living Earth and all of its resources, that living in harmony with the Earth and all mankind is "the law". Various nations (and within these nations, various clans, or families) have specific responsibilities that enhance their ability to respect the Earth and the

resources that have been provided for their continued existence, as well as the Earth's. It is a fundamental principle of Indigenous legal philosophy that if these responsibilities are not fulfilled, or if the Earth and its resources are harmed, mankind suffers.

Indigenous legal traditions also governed relations between Indigenous nations, facilitating the maintenance of peace, trade and alliance between nations.

Historic interactions between Indigenous nations demonstrate the existence and nature of Indigenous legal traditions. Various Indigenous nations historically had treaties or agreements between each another about how they would inter-relate, including rules about peace and war, inter-marriage, and traditional territories.<sup>5</sup>

Borrows describes Indigenous legal traditions which governed the treaty relationship between the Haudenosaunee and the Anishinabek in 1701:

*The agreement was orally transacted and is recorded on a wampum belt (a mnemonic device with shells forming pictures sewn onto strings of animal hide and bound together). The 1701 belt has an image of a "bowl with one spoon". It references the fact that both nations would share their hunting grounds in order to obtain food. The single wooden spoon in the bowl meant that no knives or sharp edges would be allowed in the land, for this would lead to bloodshed. This agreement is still remembered by the two nations today.<sup>6</sup>*

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<sup>5</sup> *Supra*, note 3 at 12.

<sup>6</sup> Borrows, *supra* at 13, citing Victor Lytwyn, "A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region", *Papers of the 28<sup>th</sup> Algonquian Conference*, ed., by David H. Pentland, (Winnipeg: University of Manitoba, 1997) at 210-227 and Paul Williams, "Oral Traditions on Trial" in S. Dale Standen and David McNab, eds., "*Gin Das Winan Documental Aboriginal History in Ontario*, Occasional Papers of the Champlain Society, Number 2, (Toronto: The Champlain Society, 1996) at 29-34.

When Europeans first arrived to this continent, Indigenous legal traditions played a critical role in the establishment of early treaty relations between Indigenous nations and the newcomers. For example, the peace and friendship treaties entered between Indigenous nations in eastern Canada were based largely on traditional Indigenous values and practices that governed inter-tribal relations.

In addition to treaty making, Indigenous legal traditions were acknowledged in other spheres such as inter-marriage between European men and Indigenous women. Notably, Indigenous legal traditions or customary laws relating to marriage were formally acknowledged and accepted into the common law in the case of *Connolly v. Woolrich*<sup>7</sup>, where the Privy Council determined that a customary marriage according to Indigenous Cree traditions was valid.

The source and structure of Indigenous legal traditions may vary among and between Indigenous peoples. For some societies, traditions may be conveyed in the form of storytelling or songs. “Masks, totem poles, medicine bundles, trees, birch bark scrolls, petroglyphs, button blankets, land forms, or crests”<sup>8</sup> are examples of memory devices that have been used to preserve and transmit traditions and belief systems.<sup>9</sup>

As with the common law and civil law systems, designated persons or authoritative representatives of Indigenous societies are custodians of traditional

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<sup>7</sup> *Connolly v. Woolrich* (1867), 17 R.J.R.Q, 75 (Quebec Superior Court)

<sup>8</sup> *Supra*, note 3 at 25.

knowledge. Typically this role is fulfilled by Elders or other respected persons who have earned respect amongst members of the group. These knowledge keepers are charged with the responsibility of retaining and transmitting the legal traditions of the society.

The rule of law in any society whether codified in written form or not, is a normative order that sustains legality and legitimacy and prevents anarchy and chaos and disarray. In many cases, Indigenous legal traditions are unwritten, sacred beliefs and traditions that are passed on orally through the generations. Sometimes these laws are “codified” in devices such as the wampum belt that was used by the Haudenosaunee and the Anishinabek. More importantly though, the values, beliefs, indeed understandings of law are embedded within these devices and stories, and are emanated through the continuing practices, customs and traditions of the society. This reality illustrates a fundamental principle about law and its institutions, that the existence of law is distinct from its institutional form. Thus, “while courts and legislatures are an important source of law in Canada, a society does not need to have such institutions to possess law.”

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<sup>10</sup> *Supra*

## Chapter Two - Justifying Accommodation

### 1. Indigenous Legal Traditions as Section 35 Aboriginal Rights

The 1982 entrenchment of Aboriginal and treaty rights in the Canadian Constitution was Canada's first formal commitment to recognize and affirm the customs, practices and traditions of Indigenous peoples. The relevant constitutional provision, Section 35(1) of the *Constitution Act, 1982* reads:

*The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.*<sup>11</sup>

It can be argued that, *a fortiori*, Section 35 reflects Canada's acknowledgement of the continuing existence and therefore legitimacy of traditional laws, beliefs and practices of the Indigenous peoples of Canada within the constitutional framework. This in fact seems to be the interpretation of Section 35 (1) that has been given by the Supreme Court of Canada in landmark cases. For example, in *R. v. Van der Peet*<sup>12</sup>, the Supreme Court considered whether or not members of the Sto:lo Nation had an existing Aboriginal right to fish for food and ceremonial purposes. With respect to the meaning to be accorded Section 35, the court stated:

*...what s. 35 (1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in **distinctive societies with their own practices, traditions and cultures**, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision*

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<sup>11</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>12</sup> *R. v. Van der Peet* [1996] 2 S.C.R. 507 (S.C.C.)

*must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.*<sup>13</sup>

What is significant about this statement is the court's reference and acknowledgement of distinctive Indigenous societies, and their practices, traditions and cultures. Common sense dictates that these distinctive societies, with distinct practices, traditions and cultures, possessed and exercised customary laws and beliefs, and forms of governance.

Both claimants and decision-makers involved in claims based on Section 35 Aboriginal and treaty rights acknowledge that while the *Constitution Act, 1982* recognizes Aboriginal and treaty rights by elevating them to constitutional status through the enactment of Section 35, this legislative action did not create them. Rather, Aboriginal and treaty rights are sourced in the actual customs, traditions and practices of the Aboriginal groups. It is precisely because of this prior existence that the practices are constitutionally protected.

With respect to determining the source of Indigenous rights, the Supreme Court of Canada has reconciled this prior existence within the common law by characterizing these historic practices, customs and traditions as Aboriginal and treaty rights. McLachlin C.J.'s comments in *Mitchell v.*

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<sup>13</sup> *Supra*, paga. 31.

*M.N.R.*<sup>14</sup> are helpful in illustrating this point. In that case, the Supreme Court considered whether the Mohawk of Akwasasne had an existing Aboriginal right to trade with other First Nations without paying customs duties. The appellant's argued that based on their autonomous nationhood, the Mohawk should be able to freely travel and trade across the international border. This right, they claimed, was sourced not in the common law, but in their pre-existing autonomous nationhood.

With respect to the continuing existence of Indigenous laws, customs and traditions, McLachlin C.J. wrote for the majority of the Court:

*European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights...*<sup>15</sup>

Notwithstanding the ensuing debates that may arise with respect to ascertaining the source of Indigenous legal traditions, these statements are illustrative of the argument that Section 35 itself is an appropriate constitutional basis for recognition and reconciliation Indigenous legal traditions within the Canadian constitutional framework.

## **2. Accommodation as a Right Accorded to Indigenous Peoples in International Law**

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<sup>14</sup> *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911 (S.C.C.)

<sup>15</sup> *Supra*, at para. 10.

In December 1993 the United Nations General Assembly proclaimed the International Decade of the World's Indigenous People. The stated objective of the Decade was "the promotion and protection of the rights of Indigenous people and their empowerment to make choices which enable them to retain their cultural identity while participating in political, economic and social life, with full respect for their cultural values, languages, traditions and forms of social organization".<sup>16</sup> Clearly the right to practice and uphold Indigenous legal traditions falls within the ambit of the UN's stated objective.

Since 1974 Indigenous peoples' representatives in international fora have sought formal recognition of Indigenous laws and the inherent right of self-determination accorded to all peoples.<sup>17</sup> This increased attention has given rise to numerous changes within the UN system; existing entities and instruments have been altered to make specific reference to customary law, Indigenous peoples and Indigenous issues. Symbols of Indigenous legal traditions are prominent at the international level. Songs, ceremonies and prayers of various Indigenous peoples of the world are highlighted in fora involving Indigenous representation. "Indigenous Law" is being specifically referenced in newly developed instruments.

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<sup>16</sup> Programme of Activities for the International Decade of the World's Indigenous People (1995-2004) (para. 4) General Assembly resolution 50/157, December 1995, annex.

<sup>17</sup> Wilton Littlechild, Guest-lecturer, CBA/IBA Ottawa Forum on Indigenous Legal Traditions, March 4, 2005

The following articles relating to incorporating of Indigenous legal traditions and laws were approved by the Inter-American Commission on Human Rights<sup>18</sup> on February 26, 1997, at its 1333rd session, 95th regular session in Geneva, Switzerland and form part of the Proposed American Declaration On The Rights Of Indigenous Peoples:

### **Article XVI. Indigenous Law**

- 1. Indigenous law shall be recognized as a part of the states' legal system and of the framework in which the social and economic development of the states takes place.*
- 2. Indigenous peoples have the right to maintain and reinforce their Indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.*
- 3. In the jurisdiction of any state, procedures concerning Indigenous peoples or their interests shall be conducted in such a way as to ensure the right of Indigenous peoples to full representation with dignity and equality before the law. This shall include observance of Indigenous law and custom and, where necessary, use of their language.*

### **Article XVII. National incorporation of Indigenous legal and organizational systems**

- 1. The states shall facilitate the inclusion in their organizational structures, the institutions and traditional practices of Indigenous peoples, and in consultation and with consent of the peoples concerned.*
- 2. State institutions relevant to and serving Indigenous peoples shall be designed in consultation and with the participation of the peoples concerned so as to reinforce and promote the identity, cultures, traditions, organization and values of those peoples.*

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<sup>18</sup> The Organization of American States is a regional international organization encompassing 34 member states, including Canada and the United States. The human rights component of the OAS is the Inter-American Commission on Human Rights (ICHR). The primary mandate of the ICHR is to promote respect for and defense of human rights in the Hemisphere.

In spite of these advancements, violation of Indigenous peoples' rights continues throughout the world, including Canada. In 2003, a UN Experts Seminar on the Administration of Justice was held where the panel tabled the following concerns:

1. *Noted lack of recognition of Indigenous laws by nation state parties*
2. *Noted subordination of Indigenous laws by nation state parties*
3. *Nation states were noted to have failed in introducing mechanisms which would enable incorporation of Indigenous laws*
4. *General non-recognition of Indigenous laws, legal traditions and legal systems*<sup>19</sup>

Canada, according to Littlechild, continues to be unsupportive of recognizing Indigenous legal traditions.

### **3. Accommodation in Order to Achieve Equality**

In addition to the logical conclusion that Indigenous legal traditions can be characterized as existing Aboriginal and/or treaty rights, it is arguable that the *Charter of Rights and Freedoms* guarantees the accommodation of Indigenous legal traditions within the existing juridical framework.

A fundamental goal of the Canadian Constitution is to reconcile unity and diversity and to recognize peoples' interdependence even in the face of difference.<sup>20</sup> Recognition of difference and differential treatment for reasons

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<sup>19</sup> Wilton Littlechild, Q.C., Panelist, CBA/IBA Forum on Indigenous Legal Traditions. Ottawa, March 4, 2005.

<sup>20</sup> Borrows, *supra*, note 3, citing *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 43.

relating to that difference has been held by the Supreme Court to be an effective mechanism to achieve equality. In *Law v. Canada*<sup>21</sup>, the court held that distinctions in treatment would sometimes be necessary in order to achieve true equality in a meaningful sense. Moreover, the court observed, “whether or not differential treatment is fair will always be a contextualized determination that depends on the right at issue, the person’s socio-economic status, and that of comparative groups.

The principles set out by the court in *Law* can be applied to the issue of accommodating Indigenous legal traditions in the Canadian framework. In order to accommodate Indigenous legal traditions, differential treatment of Indigenous peoples and their belief systems, traditions and practices reflected in those legal traditions is warranted for the purpose of achieving that accommodation. As stated by the court, whether or not that differential treatment is fair must be contextualized. The right at issue is the right to have Indigenous values, beliefs and systems of law reflected in Canada’s multi-juridical state. Similar to the right of the people of Quebec to have the civil law system accommodated within the federal state, a right that has been recognized and codified and constitutionally protected<sup>22</sup>, Indigenous peoples possess the right to have their legal traditions accommodated.

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<sup>21</sup> *Law v. Canada* [1999] 1 S.C.R. 497 (S.C.C.)

<sup>22</sup> *Quebec Act (1774)*, 14 George III, c. 83 (U.K.)

#### **4. Pluralism already Exists**

As a federal state, both provincial and federal laws apply throughout Canada, resulting in differing legal rules in various parts of the country. At times the laws of each jurisdiction will contradict each other and where this occurs, reconciliation will be required. It is because of federalism that legal doctrines such as the doctrine of immunity and continuity arise, facilitating the reconciliation process. For the purpose of this Discussion Paper, it is significant to note that the existence of these different regimes does not bring the legal system into dispute. Rather, as noted by Borrows, this form of pluralism enables the provinces to enact laws applicable to local circumstances.

There are additional examples of pluralism emanating within Canada. For example, admiralty law and military law apply and are respected by the Canadian and provincial governments. International doctrines such as diplomatic immunity are respected by Canada. In consideration of these examples of pluralism, incorporation of legal traditions that are in fact indigenous to peoples of Canada is not an unrealistic vision. Rather, accommodation of Indigenous legal traditions is consistent with pluralism, as it exists in Canada's juridical order.

### **Chapter Three – Entrenching Indigenous Legal Traditions**

Continued failure to reflect and make space for Indigenous values and beliefs creates critical problems for many Aboriginal people and communities in Canada:

*"We have a real crisis in the rule of law in Aboriginal communities. And it is not a crisis because Aboriginal peoples don't have the rule of law; it is a crisis of legitimacy about the rule of law and Aboriginal communities. If Aboriginal peoples were able to start to see themselves and their normative values reflected in how they conduct their day-to-day affairs, I believe that would go at least some distance to diminishing some of the problems that we have. It is not the whole solution, but it is a part of the solution."*<sup>23</sup>

As stated by the Supreme Court in the *Québec Secession Reference* case, "to be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of and accountability to, the people, through public institutions created under the Constitution".<sup>24</sup> State institutions can empower people by providing equal opportunities and ensuring social, economic and political inclusion and access to resources. People will only be empowered if legislatures, electoral processes and legal and judicial systems work properly and are reasonably reflective of their values and beliefs.

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<sup>23</sup> Borrows, John. *John C. Tait Memorial Lecture*, Montreal. Cited at <http://canada.justice.gc.ca/en/dept/pub/jc/vol4/no4/page4.html>

<sup>24</sup> *Reference Re Quebec Secession Reference* [1998] 2 S.C.R. 217 (S.C.C.)

Indigenous peoples in Canada do not seek secession from the rest of Canada.

As stated by the *Royal Commission on Aboriginal Peoples*, it is not their goal to undo confederation. Rather, it is their goal to complete it:

*It is well known that the Aboriginal peoples in whose ancient homelands Canada was created have not had an opportunity to participate in creating Canada's federal union; they seek now a just accommodation within it. The goal is the realization for everyone in Canada of the principles upon which the constitution and the treaties both rest, that is, a genuinely participatory and democratic society made up of peoples who have chosen freely to confederate. Canada's image of itself and its image in the eyes of others will be enhanced by changes that properly acknowledge the indigenous North American foundations upon which this country has been built. Aboriginal peoples generally do not see themselves, their cultures, or their values reflected in Canada's public institution. They are now considering the nature and scope of their own public institutions to provide the security for their individual and collective identities that Canada has failed to furnish.*

*This Commission concludes that a fundamental prerequisite of government policy making in relation to Aboriginal peoples is the participation of Aboriginal peoples themselves. Without their participation there can be no legitimacy and no justice. Strong arguments are made, and will continue to be made, by Aboriginal peoples to challenge the legitimacy of Canada's exercise of power over them. Aboriginal people are rapidly gaining greater political consciousness and asserting their rights not only to better living conditions but to greater autonomy.<sup>25</sup>*

Accommodation and incorporation of Indigenous legal traditions within Canada's juridical order would be integral to the achievement of the goals of Aboriginal peoples as articulated by the Commission.

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<sup>25</sup> Peeling, Albert and James Hopkins, "Aboriginal Judicial Appointments to the Supreme Court of Canada", Unpublished Paper prepared for the Indigenous Bar Association, April 2004, citing "Looking Forward, Looking Back, Vol. I, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Supply and Services, 1996)

Transition from assimilationist and integrationist policies to policies of accommodation of Indigenous values, including legal traditions must encompass the totality of government, law, legal institutions, and social and political rights.<sup>26</sup> Notwithstanding the challenges that this transition will pose for all Canadians, meaningful accommodation of Indigenous legal traditions is an attainable goal. In this section, we highlight four mechanisms to facilitate accommodation: Indigenous judicial appointments, Law reform, governance structures, public education, and institutional reform.

## **1. Indigenous Judicial Appointments**

In a paper commissioned by the Indigenous Bar Association, Albert Peeling and James Hopkins argue, “the appointment of Aboriginal persons to the Supreme Court is philosophically consistent with Canadian Legal Pluralism...<sup>27</sup>.

As a matter of fairness, and “just as the recognition of the civil law of Québec makes it necessary that there be representation of Québec judges specifically on the Supreme Court, so too the recognition of Aboriginal laws and customs as living law in Canada makes Aboriginal representation necessary if the legitimate claim of the Supreme Court to be the final arbiter in cases concerning Aboriginal peoples is to be maintained.”

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<sup>26</sup> Havemann, Paul in *Indigenous Law and the State*, Morse, Bradford W. and Gordon R. Woodman, eds., Foris Publications Holland, Province RI, USA , at p. 92

<sup>27</sup> *Supra*, note 25

While increasing the diversity of the judiciary generally is a laudable goal, arguments for guaranteed Aboriginal representation on the Supreme Court go beyond arguments for racial diversity and reflect the unique constitutional status of the Indigenous peoples of Canada. Given this fact, it is our opinion that a seat on the Supreme Court bench should be reserved, by convention or by statute, for an Aboriginal appointment. Through the legislative amendment process, this goal can easily be achieved.

The *Supreme Court Act*<sup>28</sup> governs the Supreme Court appointment process.

Section 5 of the *Act* states:

*Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.*<sup>29</sup>

Section 6 provides that at least three of the Supreme Court justices must come from Quebec. By convention, an additional three are selected from Ontario, two from the Western provinces, and one from Atlantic Canada. The Minister of Justice recommends the puisne appointments while the Prime Minister recommends the Chief Justice.

Peeling and Hopkins aptly note that the current appointment process, as outlined above, is consistent with Canadian legal pluralism<sup>30</sup>. Guaranteeing the appointment of an Indigenous person to the Supreme Court of Canada,

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<sup>28</sup> *Supreme Court Act*, R.S.C. 1985, c. S-26.

<sup>29</sup> *Supra*, section 5.

<sup>30</sup> *Supra*, note 26 at p. 12.

through either statutory amendment or convention would carry a profound symbolic message to both Indigenous and non-Indigenous Canadians, acknowledging the constitutional status of Indigenous peoples and their legal traditions.

An alternative argument based on Aboriginal rights recognition can be raised for Indigenous representation on the Supreme Court of Canada. If Indigenous legal traditions are to be recognized and affirmed under Section 35 of the *Constitution Act, 1982* as continuing Aboriginal rights, and if these rights are to truly be given meaning to, recognition and accommodation of these traditions will entail institutional reform, including the judiciary. As set out in this Discussion Paper, the values, beliefs, laws and customs of Indigenous peoples have been absorbed into the common law as Aboriginal rights. Pursuant to the provisions set out in the *Constitution Act, 1982*, Aboriginal and treaty rights are now constitutionally protected<sup>31</sup>; government is obligated to recognize and affirm these rights. This commitment is a positive obligation, and extends to both substantive and procedural matters<sup>32</sup>. If Aboriginal rights are both procedural and substantive, as the Supreme Court has found, it makes sense that guaranteed Aboriginal representation be provided for in the courts.

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<sup>31</sup> Specifically Section 35 of the *Constitution Act, 1982* reflects Canada's commitment to recognize and affirm the existing Aboriginal and treaty rights of Aboriginal peoples. "Aboriginal peoples" includes the Indian, Inuit and Metis peoples of Canada, as set out in subsection (2) of that Section. Section 25 of the *Constitution Act, 1982* provides that the Charter of Rights is not to be construed as abrogating or derogating from the Aboriginal and treaty rights protected by Section 35, thus further securing these rights.

<sup>32</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.) at para. 62

Reconciliation of Indigenous and non-Indigenous legal traditions rightfully should include active Aboriginal participation. If there were any residual question about the role of Indigenous peoples in this process, the courts have clearly stated that the reconciliation process should encompass Indigenous perspectives and realities:

*In assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the Aboriginal people claiming the right. In Sparrow, supra, Dickson C.J. and La Forest J. held, at p. 1112, that it is 'crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake.' It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35 (1) is the reconciliation of the pre-existence of distinctive Aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating Aboriginal rights claims must, therefore, be sensitive to the Aboriginal perspective, but they must also be aware that Aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of Aboriginal rights will incorporate both [Aboriginal and non-Aboriginal] legal perspectives'. The definition of an Aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by Aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the Aboriginal perspective, yet do so in terms which are cognizable to the non-Aboriginal legal system."<sup>33</sup>*

In addition to reasons relating to Aboriginal rights recognition and legal pluralism, it has been argued by academics that greater diversity on the Supreme Court is a matter of competence and capacity. At the March Forum, Professor Joanne St. Lewis, Faculty of Law, University of Ottawa effectively spoke about how an

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<sup>33</sup> *Supra*, note 12, pp. 550-51, cited in Peeling, *supra* at p. 18.

Aboriginal justice member of the court would facilitate the representation of a broader variety of authentic experiences and perspectives which are integral to equality rights issues generally – race, class, gender, culture. All of these issues would be addressed with the appointment of an Aboriginal justice. This, St. Lewis, stressed, “is what fundamental justice is all about”.<sup>34</sup>

## **2. Harmonization of Indigenous and non-Indigenous Laws**

Accommodation of Indigenous legal traditions through guaranteed Indigenous representation on the Supreme Court of Canada was identified by all presenters at the Forum as the most obvious and timely means of achieving reconciliation. However, judicial appointments are only one means of accommodating Indigenous legal traditions.

In order to protect Indigenous legal traditions and to facilitate their reception and accommodation in Canada’s pluralistic state, the existing juridical order must be harmonized. This is consistent with the direction given by the Supreme Court in the *Manitoba Language Rights Reference* case, where it stated that the “protection and facilitation of the rule of law may require the creation and maintenance of an actual order of positive laws which preserves and embodies

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<sup>34</sup> Professor Joanne St. Lewis, Panel Presenter, IBA/CBA Forum, Ottawa, March 4, 2005. See also Richard Devlin *et. al.*, “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a “Triple P: Judiciary” 38 *Alberta L. Rev.* 734 (2000)

the more general principles of normative order”.<sup>35</sup> True harmonization will reflect Canada’s three legal traditions – English, French, and Indigenous.

The legal traditions of many Indigenous societies are not retained in written form, but are retained and passed on through traditional practices and custom. With a view toward harmonizing their traditional belief systems with that of non-Indigenous society in order that Indigenous values are more accurately reflected in Canada’s juridical order, Indigenous peoples could codify certain elements of these traditions. This is not to suggest that oral traditions are less worthy or irrelevant. Rather, as a means of achieving reconciliation and accommodation, Indigenous peoples could work with federal and provincial governments to harmonize certain of their legal principles with those reflected in the common law and civil law traditions. Indeed, harmonization was the goal of the *Federal Law-Civil Law Harmonization Act*<sup>36</sup>, which came into force in June 2001. This federal legislation is intended to harmonize federal laws with the *Civil Code of Québec*, taking into account both the common law and civil law traditions in matters of legislative interpretation.

Harmonization of laws between the common law and civil law system demonstrates the possibilities that also exist for accommodation of Indigenous legal traditions. Harmonization within Canada of Indigenous legal traditions with the common law and civil law systems would be consistent with the

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<sup>35</sup> *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721 at p. 749.

<sup>36</sup> *Federal Law-Civil Law Harmonization Act, No. 1*, R.S.C. 2001, c. 4

accommodation of Indigenous beliefs, customs and values in countries throughout the world. Indeed in many jurisdictions Indigenous legal traditions on matters relating to traditional land holding<sup>37</sup>, the role of elders in the administration of customary practices<sup>38</sup>, legal proceedings<sup>39</sup> and leadership authority<sup>40</sup> have been explicitly provided for in legislation and constitutional provisions<sup>41</sup>.

### **3. Respect for Indigenous Government and Governance**

Notwithstanding the important role that harmonization legislation can play in the accommodation of Indigenous legal traditions, it is important to note that modification of positive law is only one available mechanism. For example, it remains open to Canada to recognize customary Indigenous governments and leadership processes, their decisions and decision-making processes, and traditional Indigenous dispute resolution processes.

Indigenous legal traditions are inseparable from governance powers.

Governance is a process whereby societies or organizations make important

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<sup>37</sup> *Cook Islands Act* 1915 (NZ), s. 422 states: 'Every title to and interest in customary land shall be determined according to the ancient custom and usage of the native of the Cook Islands'.

<sup>38</sup> *Tokelau Amendment Act, 1996 (NZ)*, Preamble, para. 4 reads: 'Traditional authority in Tokelau is vested in its villages, and the needs of Tokelau at a local level are generally met through the administration of customary practices by elders.'

<sup>39</sup> *Laws of Kiribati Act, 1989*, sch. 1, para 2, 'customary law shall be recognized and enforced by, and may be pleaded in, all courts, except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest.'

<sup>40</sup> *Constitution of the Republic of South Africa, Act 109 of 1996*, s. 211. (1) The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution.

<sup>41</sup> Footnotes 26 to 39 are cited by Borrows, *supra* at 51.

decisions, including who will be involved in this process of decision making. Factors such as history, culture and traditions influence how governance decisions are made. Accordingly, it makes sense to ensure that Indigenous peoples are involved in and determine their own internal governance matters as well as be equitably represented in governance matters relating to public institutions.

Canada acknowledges Indigenous peoples' inherent rights to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and resources".<sup>42</sup> What is required is acknowledgement and acceptance of these practices and values as Indigenous legal traditions having a legitimate place within Canada's juridical system.

Federal and provincial governments could amend policies and laws affecting the recognition of Indigenous governments and their decision-making. As an example, courts could recognize the important role that traditional justice plays in the resolution of disputes within Aboriginal communities; courts could recognize and accept customary leadership selection processes, adoption practices, marriage practices, land-holding and management, and estate matters – all of

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<sup>42</sup> Borrows, *supra* at page 40, citing Canada. The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, [http://www.ainc-inac.gc.ca/pr/pub/sg/plcy\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html).

which are currently subject to externally imposed legislative regimes such as the federal *Indian Act*.<sup>43</sup>

At the March Forum, Clement Chartier, President of the Métis National Council shared with participants the vision of the Métis Nation regarding nation-to-nation relations:

*The MNC proposes a mutually agreeable “Canada-Métis Nation Relations Act” be developed and passed by the federal government... This proposed legislation would be an important first step in Canada’s recognition of the Métis Nation and our contributions to the Canadian federation... The Act would commit the parties to a new nation-to-nation approach between Canada and Métis governments by recognizing democratic and accountable Métis Nation self-government institutions at the national, provincial, regional and community levels... The implementation of this relationship requires the federal government to facilitate the ability of Métis governing bodies to fulfill their responsibilities towards their constituents...<sup>44</sup>*

The vision of the Métis Nation, as with most other Indigenous peoples within Canada, is based on one of respect, reconciliation and cooperation between Indigenous and non-Indigenous Canadians and governments.

#### **4. Institutional Reform**

As aptly stated by Professor John Borrows, University of Victoria, “if we consider the time, hard work, and commitment given to learning the

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<sup>43</sup> *Indian Act*, R.S.C. 1985, c. I-5

<sup>44</sup> Métis National Council, Canada-Aboriginal Peoples Roundtable Negotiations Policy Paper. January 12 13, 2005. Provided by President Chartier to CBA/IBA Forum. Ottawa, March 2005.

common law or civil law in law school, why do we expect more from Aboriginal systems of law?" If Indigenous legal traditions become cognizable and accessible, they are more likely to be respected and given legitimacy.

Accommodation and recognition of Indigenous legal traditions can be facilitated by actions taken by a variety of legal institutions such as provincial law societies, provincial bar societies, and legal and governance educational institutions. Law school curriculum could easily be expanded to include mandatory or optional courses on Indigenous legal traditions. Provincial bar admission courses could address issues of particular relevance and significance to jurisdictions where Aboriginal issues are prominent in the practice of law.

Reconciliation stands in need of practitioners from both the bar and bench who can build bridges of accommodation between different legal conceptions of rights and responsibilities. Professional legal education societies could offer specialized courses to practitioners interested in developing their practice in an area of Aboriginal law. The role of Indigenous professional associations such as the Indigenous Bar Association could be expanded to include participation in the reform of the judicial appointment process. It could assume a governance role,

participating in the accreditation of Indigenous legal educational programs.<sup>45</sup>

The opportunities are virtually endless to reform legal and governance institutions for the purpose of accommodating and reflecting Indigenous legal traditions. A more fundamental matter to this process lies in the genuine commitment of Canadians, through these institutions to provide opportunities for this accommodation to occur.

## **Conclusion**

Many academics and legal theorists maintain that Indigenous legal traditions were not surrendered by treaties and were not extinguished prior to 1982. According to principles of constitutional law, these Indigenous laws continue to exist, and are now absorbed into the common law. Indeed, this is the interpretation of Indigenous legal traditions that has been given by the Supreme Court of Canada.<sup>46</sup>

Notwithstanding the strong legal and theoretical arguments that can be made about the proper place of Indigenous legal traditions in the Canadian legal framework, taking steps to incorporate and accommodate Indigenous legal traditions poses many challenges. Where they are acknowledged as existing at

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<sup>45</sup> Borrows, *supra* at 55.

<sup>46</sup> *Ibid*, note 14.

all, Indigenous legal traditions are often portrayed as “primitive and outdated, or as exotic and frivolous. They are most often not understood as being necessary or significant in contemporary society, whether that society is Aboriginal or not. An unfortunate consequence of this tends to be the development of ignorant and ill-informed attitudes in mainstream society about Aboriginal peoples, their beliefs, customs, values and traditional practices.”<sup>47</sup> Overcoming these biases, which span through many generations will require extensive and multi-faceted changes to existing legal processes and institutions.

As we move into the twenty-first century, where both domestic and international laws recognize the inherent rights of peoples, ignorance of Indigenous legal traditions is no longer justified. Legal pluralism properly should reflect all three of Canada’s legal traditions –English, French, and Indigenous. If we are to expand our concept of legal pluralism, we must give contemporary legal shape to, and make room for, Indigenous legal principles and traditions.<sup>48</sup> As with common law and civil law, Canadian citizens must be given the opportunity to gain knowledge, awareness, and respect for, Indigenous legal traditions.

In this Discussion Paper, we have set out examples of how Canada’s juridical system could be more reflective of Indigenous legal traditions through the

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<sup>47</sup> Weber, Lisa and C. Weber-Pillwax. “*What is a Crime? Pimatsiwin Weyasowewina: Aboriginal Harvesting Practices Considered*” Case Study prepared for the Law Commission of Canada, January 2005.

<sup>48</sup> Jackson, Michael. Speakers Notes from IBA/CBA Forum, Ottawa. March 2005.

implementation of domestic legislation, policy changes and institutional reform, thereby providing opportunity for increased knowledge, awareness and respect for, Indigenous legal traditions.

Although a strong legal argument can be made for it, this Discussion Paper has not been prepared as a structured, legal argument for recognition and accommodation. Rather, it is intended to be a persuasive statement about why and how Indigenous legal traditions can be accommodated within the framework of Canadian legal pluralism. It has been prepared from a conciliatory position, one based on the presumption that reconciliation between Indigenous and non-Indigenous legal traditions can be achieved within the existing legal and constitutional structures.

“A plurality of traditions need not weaken, threaten or overwhelm Canada’s historic and constitutional framework”.<sup>49</sup> Indeed, both the historic and contemporary constitutional framework of Canada provides the necessary basis for reconciling and accommodating Indigenous legal traditions within the Canadian common law. Canada is strengthened by respect for diversity, including respect for and recognition of the place of Indigenous legal traditions in Canada.

In closing, we note that the reconciliation process noted by Grand Chief Fontaine in his speech March 4, 2005 at the Forum is only at the

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<sup>49</sup> Borrows, *supra* at p. 7.

beginning stages in Canada. In order that true and transparent reconciliation to be achieved, more dialogue must occur with the goal of developing options for accommodation based on recognition of the legitimacy of Indigenous legal traditions to Canadian pluralism.

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