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First Nations Legal Inheritances in Canada: The Míkmaq Model

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BEFORE ANY IDEA OF "CANADA" EXISTED, there was the reality of a northern Atlantic to Pacific homeland of the Aboriginal peoples, as the source for all of their legal inheritances. The land was settled by the acquiescence of the First Nations, sometimes by treaties, often grudgingly by physical occupation, occasionally by martial force, and slowly by European immigrants creating colonial societies as enclaves within an Aboriginal world. Legacies of colonialism and racism have allowed little understanding in modern Canada about the First Nations' legal inheritances. The establishment of a new post-colonial order in Canada in 1982, where inherent and treaty rights of the Aboriginal people were made part of the supreme law of Canada, has been a first fragile step toward the revitalisation of the First Nations' legal inheritances and to the maturity of Canada as a nation.

In the formation of the Canadian identity, the Aboriginal societies have always exerted a profound but subtle influence on the non-Native immigrants and their man-made societies and laws. The knowledge base of the First Nations remains mostly in indigenous worldviews, languages and rituals. Learning them is an intimate process which takes time and patience. Not unlike learning a new language, there are no shortcuts to understanding the First Nations' legal inheritances. Our learning process, however, must take the non-Native beyond language, into the deep structure of another worldview. And before all else, one must be prepared to recognise that First Nations had their own legal systems, before the arrival of the Europeans, and that they still do.

The First Nations' legal inheritances are a realm of freedoms, united by a deep and lasting communal worldview.¹ This worldview can be symbolised as a medicine wheel,² in which the Four Responsibilities can be translated as peace, kindness,

¹ European scholars, such as Claude Levi-Strauss and François Jacob, have pointed out that the human brain has a need to "make sense" of the surrounding world. As Freud and Jung pointed out, modern consciousness is a very recent acquisition, a fragile awareness, menaced by specific dangers and easily injured. Throughout history, people have created "worldviews" that are comprehensive explanations of the cosmic forces which impinge on their lives. Often Eurocentric worldviews are encountered in the form of religion, where answers are offered to questions of origins and purposes of life. Worldviews are holistic constructs in which the past, present, future and the environment are meshed. They are often compared to "paradigms" in modern science and dialectics: T. Kuhn, *The Structure Of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

² The medicine wheel is an ancient symbol used by almost all of the First Nations of North and South Americas. It is a circle representing the wholeness of life, divided into four sections. There are

sharing, and trust.³ As this essay will demonstrate, the indigenous legal inheritances, of freedoms within a circle of communal responsibilities, dramatically entered pre-modern European thought and then the modern Canadian political and legal discourses.⁴

The unique blend of indigenous freedoms and European traditions generated the modern Canadian conceptualisation of egalitarian democracy, modern liberty and human rights. Neither society emerged unchanged by the experience. This essay is about legal inheritances from the First Nations as distinct jurisprudence and as an inheritance for all Canadians.

I. Two Colonial Traditions and the First Nations

The most consistent theme in the original descriptions of First Nations peoples by European discoverers was amazement at their personal liberty, in particular indigenous freedom from monarchic rulers. By looking at the structure of indigenous societies, Europeans reported back the possibility of living without centralised or aristocratic rulers.⁵

Michel de Montaigne, a French writer who never travelled to America, writing in the latter part of the sixteenth century, concluded that the indigenous people in Brazil were “still governed by natural laws and very little corrupted by our own.” He noted the lack of magistrates, forced services, riches, poverty and inheritance and considered the indigenous society as an ideal society.⁶ In the following centuries, the French missionaries,⁷ Louis Armand de Lom d’Arce, baron de Lahontan,⁸ all of whom travelled to America, and others who did not, like Jean-Jacques Rousseau,⁹ continued to contrast the indigenous freedoms of the noble “sauvage” with “civilised” man living within European feudalism. Aware of these distinctions, European thinkers forged ideas associated with the Enlightenment by selectively incorporating

many different ways of expressing the four basic concepts. The sections represent aspects of life. When teaching about a person it can represent artificial divisions—mind, spirit, heart and body surrounding will—and how they are intimately related and inseparably connected. When teaching about the earth the divisions represent the fire, land, air, and water surrounding the people.

³ These are incommensurable analogies to English language. There can be many variations on these analogies without changing meaning. One of the great attributes of a realm of freedom is tolerance for a diversity of thought and meanings, as opposed to the singular authority of meaning that the classical mind asserts.

⁴ H.S. Commager, *The Empire Of Reason: How Europe Imagined and America Realized the Enlightenment* (Garden City, New York: Anchor Press, 1977).

⁵ *The Jesuit Relations and Allied Documents: Travel and Explorations Of the Jesuit Missionaries In New France, 1610–1791*, E. Kenton, ed., (New York: Vanguard Press, 1954) [hereinafter *Jesuit Relations*]; W. Brandon, *New Worlds For Old: Reports From the New World and Their Effect On the Development Of Social Thought In Europe 1500–1800* (Athens, Ohio: Ohio University Press, 1986).

⁶ M. de Montaigne, *Essays*, trans. J.M. Cohen (Baltimore: Penguin Books, 1959).

⁷ *Jesuit Relations*, *supra* note 5; J. Lafitau, *Customs Of the American Savages Compared With Those Of the Earliest Times* (1724): *Mohawks*.

⁸ *New Voyages To North America* (London: H. Bowicke, 1703): *Huron*.

⁹ Jean-Jacques Rousseau, *Discourse On the Origins Of Inequality* (1754).

such notions of liberty into European thought, often challenging the monarchy, the aristocracy and the church, and even the need for money and private property.¹⁰

This was not the only line of continental European thought. Many writers throughout *ancien régime* France argued, as Thomas Hobbes did, against liberties and freedoms.¹¹ Although he had never been to America, Hobbes argued that indigenous life was “solitary, poor, nasty, brutish and short.” The natural state of man, as he understood it, was that of “war of all against all.” It was only through total subjugation of everyone to a ruler that an individual could be protected from others.

These beliefs were shared, in varying degrees and forms, by the English adventurers who first settled on the north Atlantic coast. They made few efforts to discover the nature and substance of Aboriginal legal systems or their laws. Henry Spelman, perhaps the first Englishman to live among the tide land First Nations of Virginia, apologised in his memoirs that “concerning ther lawes my years and understandinge made me the less to looke after bycause I thought that Infidels were lawless.”¹² Spelman’s pre-conception was shared by most of the commentators of his age. Believing that the indigenous people had no laws, most immigrants did not look for them. John Smith was to write of Powhatan in the colony of Virginia that neither “[h]e nor any of his people understand any letters wherby to write or read; the only lawes wherby he ruleth is custome.”¹³

Nearly a century later, Robert Beverley, Edmund Burke and Dr. Douglass continued this tradition. Beverley explained that “having no sort of Letters ... they can have no written Lawes; nor did the Constitution in which we found them, seem to need many. Nature and their own convenience has taught them to obey one Chief, who is arbiter of all things among them.”¹⁴ Likewise both Edmund Burke and Dr. Douglass criticised the lack of any “absolute compelling power” among the First Nations of North America.¹⁵

The indigenous people came to be seen as either governed by pure arbitrary will, as Smith and Beverley conceived it, or living in a rude democratic chaos as Douglass and Edmund Burke argued. These theories were constantly contradicted by the abundant evidence from their own writings for the existence of routine, orderly,

¹⁰ J. Weatherford, *Indian Givers. How the Indians Of the Americas Transformed the World* (New York: Crown Publishers, 1988) at 124–125; J. Blaut, *The Colonizer’s Model of the World Geographical Diffusionism and Eurocentric History* (New York: Guilford Press, 1993).

¹¹ *Leviathan* (1651).

¹² H. Spelman, “Relation of Virginea” in A.G. Bradley, *Travels and Works Of Captaine John Smith, President Of Virginia, and Admiral Of New England* (New York: B. Franklin, 1965) at ci, cx–cxi.

¹³ J. Smith, “A Map of Virginia, With a Description of the Country, the Commodities, People, Government and Religion,” in Bradley, *supra* note 12 at 41, 81.

¹⁴ R. Beverley, *The History and Present State Of Virginia*, in L. Wright, ed. (Chapel Hill: University of North Carolina Press, 1947) at 225–226.

¹⁵ E. Burke, *An Account Of the European Settlements In America*, 3d ed., (London: Dodsley, 1760); W. Douglass, *A Summary, Historical And Political Of the First Planting, Progressive Improvements, and the Present State Of the British Settlements In North America* (London: Dodsley, 1760).

customary processes, especially in the area known to English law as family law.¹⁶ Despite this, almost all foreign observers agreed that the First Nations people lacked systematic, positive law.

This theory had certain self-serving implications. If First Nations had nothing resembling English laws and institutions, then they had nothing, at least not until they acquired the English ways. One implication was drawn by John Locke and his disciples. They reasoned that because property was a creature of positive law, societies lacking positive law had no property.¹⁷ Locke envisaged law as wholly the instrument of social policy, arising only when resources became so scarce that “men” had to agree on some scheme for allocating them. The absence of law therefore implied an absence of scarcity. The “fact” that Indians had no law conveniently proved that they would not mind giving up at least a portion of their lands to the English.

Another implication drawn by the immigrants was that the indigenous peoples needed French or English law to define and allocate property rights. According to Locke, “[t]he great end of men’s entering into society being the enjoyment of their properties in peace and safety, and the great instrument of means of that being the laws established in that society, the first and fundamental positive law of all commonwealths is the establishing of the legislative power.”¹⁸

With some pride, Frenchmen and Englishmen looked upon their own laws as the most rational, efficacious, and perfect in the whole world; hence the crown in each case was initially uncritical of any proposals to transplant English legal traditions alongside Aboriginal societies. The colonial governments in America, however, had no illusions. As early as 1669, the governor of New York suggested that frontier villages should appoint constables among the Natives “to keep them in ye better order.”¹⁹ The executive council anticipated resistance from the imposition of English law upon the First Nations people. Two years later, the council cautioned the settlers at Narragansett against imposing English law on the Natives.

Related measures were taken by Massachusetts, which had organised Aboriginal townships and appointed Native officers and judges.²⁰ The Aboriginal court system,

¹⁶ R. Beverley, *supra* note 14 at 170–71; W. Byrd, *History Of the Dividing Line Betwixt Virginia and North Carolina* (W. Boyd, ed. 1967) 166; Spelman, *supra* note 12 at cviii; “An account of the Indians in Virginia” (1959) 16 *William and Mary Quarterly* at 228, 233–34.

¹⁷ J. Locke, *supra* chapter 5. A similar argument is found in C. Molloy, *De Jure Maritimo Et Navali: Or, A Treatise Of Affaires Maritime and Of Commerce*, (1679) ch. 5; a leading figure in Connecticut land speculation, John Bulkey, popularised Locke in North America: J. Bulkey, *An Inquiry Into the Rights Of the Aboriginal Natives To The Lands In America, and the Titles Derived From Them* (1724).

¹⁸ *The Second Treatise Of Government*, T. Peardon, ed., (Indianapolis: Bobbs-Merrill, 1952) 11, s. 134 at 75; also see A. Smith, *An Inquiry Into The Nature And Causes Of the Wealth Of Nations* (1776), chapter 1, part 2; W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (1765) at 5.

¹⁹ *Documents Relative To the Colonial History Of the State Of New York*, [E.B. O’Callaghan, ed.,] (Albany: Weed, Parsons, 1855, reprinted 1986) at 430.

²⁰ Y.K. Kawashima, “Legal Origins of the Indian Reservation in Colonial Massachusetts” (1969) 13 *American Journal of Legal History* 42 (1969); N. Salisbury, *Manitou and Providence: Indians, Europeans and the Making of New England, 1500–1643* (New York: Oxford University Press, 1982).

first established in 1658, provided for trial before a Native magistrate, appeal to a panel of Native magistrates under the supervision of an English judge, and transfer of felony cases to the English common law courts. Subsequently, the general court of the colony sought to promulgate regulations to be enforced by the Aboriginal courts and eventually did replace them altogether with English justices. Similarly, in the colony of Connecticut, the assembly frequently attempted to appoint Native constables and draft laws for them.²¹ The same pattern existed in Maryland and Virginia,²² and the same process occurred in parts of what is now Canada.

The function and effects of these colonial regulations and policies were to alienate traditional leaders of the First Nations and suppress their customary legal culture and institutions. That in turn could clear the way for common law confiscation of resources and subjugation of Native peoples. The creation of Native constables and courts did not allow respect for the tribal autonomy of the First Nations. Inherent in the process of choosing that constabulary and giving it the force of common law was the controlling power of English settlers to create new tribal leaderships, maintained and promoted by the English, through which all commands and favours from the royal government would issue. Established in power and property, it could draw allegiance away from traditional Aboriginal leaders, institutions and processes.

These early attempts failed. The “lawless” First Nations rejected the imposition of French and English laws, with their externally chosen leadership.²³ Thus, one result was an innovative strategy of treaty federalism, establishing an international relationship between First Nations and Great Britain and France through treaties, that was distinct from the colonial settlements. These treaties recognised and respected tribal autonomy and Aboriginal legal institutions. They united the First Nations directly to the English crown as protected partners.²⁴

II. British Law and Treaty Federalism

The best illustration of the process that shaped treaty federalism was the case of *Mohegan Indians v. Connecticut*.²⁵ In many ways, this case was the First Nations’ *Calvin’s Case*, in which like Charles Dicken’s barely fictional *Jarndyce v. Jarndyce*, the case went on and on, beginning in the late seventeenth century, continuing until 1773. This seminal case isolated the legal principles concerning the relationship of tribal sovereignty to the English colonies in America. These principles resolved and

²¹ *The Public Records Of the Colony Of Connecticut*, (1850) C. Hoadley & J. Trumbull, eds., at 299; *ibid.* at 39, 56–57, 66, 117 (first model code for Natives); 256–57, 440, 483 (Native constables “to serve warrants, publish order, and to gather the tribute”); *ibid.* at 55, 86, 122–23, 140, 326, 518 and 540.

²² W. Stitt Robson, “Tributary Indians in Colonial Virginia” (1959) 67 *Virginia Magazine of History & Biography* 49; (1969) 1 *Archives Of Maryland* 329–332.

²³ R. A. Williams, Jr., *The American Indian In Western Legal Thought* (New York: Oxford University Press, 1990) at 151–226.

²⁴ R.L. Barsh and J.Y. Henderson, “Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and Constitutional Renewal” (1982) 17 *Journal Of Canadian Studies* 55–81.

²⁵ J. H. Smith, *Appeals To the Privy Council From the American Plantations* (New York: Octagon Books, 1950) 422–42.

explained the crown's claimed prerogative jurisdiction in America. For a time these principles challenged the concept of the "lawless" Natives in favour of tribal autonomy and legal institutions. Brought by the statutory guardian of the Mohegan Indians, Captain John Mason, the lawsuit helped to define the relationship of the First Nations resident within the proclaimed boundaries of a crown colony. Oweneco, son of the renowned Mohegan leader Uncas, for the Mohegan Tribe through his appointed guardian (Mason) petitioned the Queen-in-Council in 1703 to establish a royal commission to inquire into the legality of the actions of the colonial assembly. He alleged that his tribe had been deprived of lands reserved to them by treaty, through Connecticut colonial legislative action on behalf of English settlers.

The dispute turned on interpretations of a series of treaties and agreements negotiated between 1659 and 1681. Uncas had granted some form of title over Mohegan lands to Mason, an officer of the colony that named him official guardian for the Mohegan peoples. Mason also apparently "entailed" a smaller tract of land for the benefit of the tribe. In the latter transaction, in 1681, following an agreement that prohibited anyone from acquiring the reserved Aboriginal lands without the colony's consent, Uncas had allegedly turned over the "entailed" land to colonial authorities. The Mohegans claimed that the effect of the 1681 agreement was simply to grant the colony of Connecticut a right of first purchase for the land. The colony alleged that the transaction relinquished Aboriginal title and began parcelling out the land for settlement. Thus Oweneco and Mason petitioned the crown for assistance in resolving the legal issues.

The Privy Council's answer to the Mohegan petition expounded the legal rights of protected tribes under the crown's treaties. Attorney-General Northely of Whitehall determined that royal charters establishing the colony did not include Aboriginal lands protected by such treaties. These Aboriginal lands were protected by crown prerogative, while the royal charters covered only domestic jurisdiction in the common law. Hence, the Queen could lawfully establish a court within the colony with an appeal to the Queen-in-Council.²⁶

The Queen established such a prerogative court, the 1705 Royal Commission, which held in an *ex parte* hearing that protected Aboriginal lands were not intended to pass to colonies under their royal charter. The 1705 court's decision restored the confiscated land to the Mohegan Tribe.²⁷

The colonial government of Connecticut appealed. They challenged the Queen's jurisdiction to establish an extraordinary court within a royal colony. They argued that Connecticut had acquired absolute title to the Aboriginal lands by conquest, that the tribe was subservient to colonial authority, and that the Royal Commission was illegal because it determined title to land without a jury. The Privy Council rejected the colony's arguments, upholding the 1705 judgment that the Mohegan Tribe was a sovereign nation and was not subservient to the colony.²⁸

²⁶ *Ibid.* at 425; J.Y. Henderson, "Unravelling the Riddle of Aboriginal Title" 5 *American Indian Law Review* 97-99; Bruce A. Clark, *Native Liberty, Crown Sovereignty* (Montreal: McGill-Queen's University Press, 1990) 39-45.

²⁷ *Supra.* note 25 at 425.

²⁸ *Ibid.* at 426.

In 1743, His Majesty established a Royal Court of Commissioners to review the Privy Council's decision on the 1705 judgment. In this new review court, the crown affirmed both the decision of Attorney General Northely and the prerogative jurisdiction over the case.²⁹ The Royal Court of Commissioners affirmed that Native tribes were exclusively under the exceptional jurisdiction of the crown in international affairs and not subordinate to either parliament or a colonial government.³⁰ Moreover, it rejected Connecticut's assertion that European treaties, the Mohegan treaties, and the royal charter extinguished Aboriginal polity within the colony's boundaries.

One issue that the 1743 court had to decide was who had jurisdiction to determine title to land in the colonies. The British subjects in possession of Mohegan lands raised this matter, questioning whether the Royal Commission could lawfully determine title to land without a jury under the Connecticut colonial charter and the common law in a colony. They argued that the Mohegans were subject to Connecticut laws and governance and that the proper jurisdiction was in the colonial courts rather than imperial courts. The 1743 Royal Court rejected their claims. Commissioner Daniel Horsmanden, later chief justice of New York, speaking for the majority held, over one dissent, that:³¹

The Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated with as such, they have a polity of their own, they make peace and war with any nations of Indians when they think fit, without control from the English.

It is apparent that the crown looked upon them not as subjects but as a distinct people, for they are mentioned as such throughout Queen Anne's and King George II's commissions by which they now sat. And it was plain, in my conception, that the crown looked upon the Natives as having the property of the soil of these countries; and that their lands were not, by his majesty's grant of particular limits of them, for a colony thereby impropriated in his subjects till they had made fair and honest purchase from the Natives.

The 1743 Royal Court also held that colonial controversies with the tribes of Indians protected by treaties were neither controlled by the laws of England nor by the colonial charters or laws, but rather by "a law equal to both parties, which is the law of nature and of nations."³² By the treaties, the First Nations held a separate prerogative jurisdiction from the colonies. They were controlled by the "crown-in-council" in London, under the royal executive's jurisdiction over foreign affairs, not by local colonial officers who were, after all, appointees of the same crown.

The governor of Connecticut appealed the 1743 decision to the Privy Council, in its judicial capacity and responsibility for the British Empire. The 1743 Commission's decision was then affirmed without comment;³³ but by then additional treaties,

²⁹ *Ibid.* at 427–28.

³⁰ *Ibid.* at 425.

³¹ *Ibid.* at 427–8; *Certified Copy Book of Proceedings Before the Commission of Review (1743)*, (1769) 118.

³² *Ibid.* at 434.

instructions and the Royal Proclamation of 1763 had already enshrined these principles of tribal autonomy and the continuity of their legal institutions in English positive law.³⁴

The 1743 decision in *Mohegan Indians* clarified the status of the First Nations in the imperial law of Great Britain. It recognised treaty federalism and Aboriginal law as the twin bases controlling the common law in Canadian colonisation. Henceforth, controversies between Aboriginal nations and colonial authorities were to be exclusively under his majesty's foreign jurisdictions, as subject to the royal prerogative, rather than the parliament of the United Kingdom or any colonial or local assembly. Treaties with Aboriginal nations or tribes created independent and separate jurisdictions in the imperial law, as distinct from colonial authority.

It was under this prerogative regime that the 1749 Instruction of Cornwallis creating the colony of Nova Scotia was issued. Cornwallis was required to "send for the several heads of the said Indian nations or clans and enter into a treaty with them promising them friendship and protection on our part." One purpose was to grant his majesty an exclusive right to negotiate with Aboriginal inhabitants for their lands and thus establish terms for lawfully recognised settlements. Hence, his majesty directly instructed the governor and council that before they could establish any English land tenure system within the proposed settlements, they had to "settle and agree with the Inhabitants of our Province for such Lands, Tenements & hereditaments as now are or hereafter, shall be in our power to dispose."³⁵ Consistent with the crown concept of treaty federalism and the *Mohegan* decision, royal instructions in New England, Nova Scotia, and other colonies respected Aboriginal governments and their legal systems, in particular their proprietary rights. These prerogative instructions accepted Aboriginal legal systems and land tenure, and implemented the policy of fair and honest purchases from First Nations.³⁶ Prerogative treaties such as the Wabanaki Compact (1725) and the 1726 ratification by the Míkmaq district chiefs affirmed the notions of First Nation's territorial sovereignty under crown protection. The scope of British crown authority in North America thus depended on consensual agreements with the freely associated First Nations. Crown prerogative formed the first and fundamental legal structure for the British Empire, often called the hidden constitution of Canada.³⁷

³³ January 15, 1771.

³⁴ B. Slattery, *The Land Rights Of Indigenous Canadian People, As Affected By the Crown's Acquisition Of Their Territories* (Saskatoon: Native Law Centre, 1979); Clark, *supra* note 26. For a comparative example, see R. L. Barsh and J. Y. Henderson, *The Road, Indian Tribes And Political Liberty* (Berkeley: University of California Press, 1980).

³⁵ L. Labaree, *Royal Instructions To British Colonial Governors 1670–1776* (New York: D. Appleton-Century Co., 1935), 469.

³⁶ *Royal Instruction of 1761, Royal Proclamation of 1763*; see, J. Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) *University of British Columbia Law Review* 1 at 2, 6, 7, 41.

³⁷ B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Bolt, J. A. Long & L. L. Littlebear, eds., *The Quest For Justice* (Toronto: University of Toronto Press, 1985) 114–138.

This was the legal context in which European immigrants would be delegated the limited authority to govern their settlements and purchase Aboriginal lands. From this small basis in law, the immigrants created out of their English birthrights new forms of colonial government, then responsible government by the mid-nineteenth century and eventually the nationhood of Canada after 1867. Henceforth, the constitutional history of Canada should have contained two strands: treaty federalism and provincial federalism. But for more than a century, a denial of treaty federalism and a return to the conception of the "lawless" Natives would justify provincial federalism's systematic imposition of English common law. Since 1867 the Canadian government used provincial federalism to create a new imperialism that routinely suppressed treaty federalism and reinforced Christian assimilationist missions. The medicine wheel's peace and trust remained an unrealised ideal, while European colonisers turned their Aboriginal hosts into colonists in their own lands.

III. The Míkmaq Legal Model of Freedoms

First Nations laws have received only ephemeral attention and documentary evidence remains fragmentary. Familiar examples of federations of indigenous family structures were the Haudenosaunee (the people of the Long House or Iroquois League uniting the Mohawk, Onondaga, Seneca, Oneida, and Cayuga families), and the Lakota³⁸ federations in the Plains. There are few indigenous structures which were not federated. The Haudenosaunee have been called the founding fathers of the United States federal concept.³⁹ Knowledge of the Haudenosaunee comes from their written constitution, called Kaianerekowa or Great Law of Peace.

These examples illustrated how First Nations created and inhabited a normative universe. They were not lawless or unorganised peoples. These constitutions conventionally defined the centre of their shared traditions. It was a centre dedicated to a shared vision and a bridge among component tribes. Their customary constitutions were attempts to maintain a world of right and wrong, of just and unjust, of proper and improper conduct. To the immigrants who had come to identify the normative realm with the paraphernalia of social control—the domains of force and punishment—the indigenous constitutional realms were invisible.

Less familiar in the literature are the Muskogean⁴⁰ and Algonquian federations which surrounded the Haudenosaunee. Like the Haudenosaunee, these federations

³⁸ The federation was composed of seven major divisions: the Oglala, Sicanug, Miniconjou, Hunpapa, Siasaps (Black Feet), Itazipcho, and Oohenonpa. It is sometimes referred to as the Seven Councils. Over time, dialectical difference divided the original group into three linguistic entities—Dakota, Nakotas, and Lakotas.

³⁹ B. Johansen, *Forgotten Founders: Benjamin Franklin, the Iroquois and the Rationale for the American Revolution* (Ipswich: Gambit, 1982); Daniel K. Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Chapel Hill: University of North Carolina Press, 1990); B. Burton, "Iroquois Confederate Law and the Origins of the U.S. Constitution" (1986) *Northeast Indian Quarterly*; C. Colden, *The History of the Five Indian Nations Depending on the Province of New York* (Ithaca: Cornell University Press, 1958 reprint of 1727 ed.).

⁴⁰ The so-called Five Civilized Nations—the Tsulakke (Cherokee: principle people), Creeks, Choctaws, the Chickasaw and Seminoles. See R. Strickland, *Fire and the Spirits: Cherokee Law for Clan to Court* (Norman: University of Oklahoma Press, 1975); J. P. Reid, *A Law of Blood: The Primi-*

were based on similar principles of a national unity for tribal regions. In contrast, their constitutions were not written but enfolded in their language and rituals.

The Algonquian model of the Míkmaq Nation⁴¹ will be used in this essay to illustrate the operation of an Aboriginal legal system based on freedoms. The Algonquian language family is spoken along the north Atlantic coast and across North America to the foothills of the Rocky Mountains, from Labrador south to North Carolina and Tennessee.⁴² This language group of more than fifty First Nations⁴³ surrounded the linguistic islands of the Iroquoian and Lakota confederacies. To avoid abstraction and to base discussion on a particular language, people and space, I will use their oral and written traditions to exemplify the medicine wheel worldview as it related to law.

A. Peace: Democratic Federated Nations

Neither European adventurers nor missionary priests of the seventeenth century who encountered the sacred order of the Míkmaq (*Míkma'ki*) perceived an unorganised society. They did not find the anarchy that their state of nature theory presumed. Instead, they reported a natural order, with a well-defined system of consensual government and both an international and domestic law. While the Míkmaq order was built on different premises from European society, about sources of authority, upward from the family unit rather than the downward monarchic state, a coherence was achieved in their transnational goals.

The missionary priests initially observed the operations of the *Awitkatulik* order in Míkmaq. They described it from their contextual European heritage and biases. As early as 1616, Father Biard described the “commonwealth” or “sovereign” of the

tive Law of the Cherokee Nation (New York: New York University Press, 1970).

⁴¹ There are many different spelling for the Míkmaq. I use the Doug Smith-Bernie Francis system that is the official phonemic orthography of the *Santé Mawłomi* (Grand Council) of the Míkmaq. It is different from the English orthography. It is comprised of a, á e, é, i, f, j, k, l, m, n, o, ó, p, q, s, t, u, ú, w. See, M.A. Battiste, “An Historical Investigation of the Social and Cultural Consequences of Micmac Literacy” (Ph.D. dissertation, Stanford University; Ann Arbor: Xerox Publications, 1983) at 162. Míkmaq is plural, and Míkmaq is singular. Its derivation is uncertain; it was either “our kin” or “allied people,” or “people of the red earth”, depending of how it was pronounced. Some of the other spelling variations are Micmacs, Mickmakis, Migemaq, Mic Mac, Mikmakiques, Migmagi, Micque Macque. In colonial literature, they were also labeled as Abenakis, Eastern Indians, Tarrantines, Acadians, Gaspeians, Toudamand, Cape Sable Indians, and Souriquois.

⁴² This word is said to be derived from the French understanding of the sounds that referenced the distinct rock formation from around the Great Lakes, where the ancient idiographic script or rock drawings were carved. The Champlain explorers mistook the sound for the name of the First Nations of the place (*Algoounequins*). H.P. Biggar, ed., *The Works of Samuel de Champlain*, 7 vols. (Toronto: Champlain Society, 1922–36) vol. 1 at 105ff. It is often spelled Algonkin or Algonkian. Later, anthropologists used the word for the common language group. Some assert that the word is derived from the Míkmaq term *alkoome*, which referred to people who stand in the canoe and spear fish in the water, or *allegonkin*, the dancers or *el legom'kwín* (friends, allies). See P. Hessel, *The Algonkin Nation* (Amprior: Kichesippi Books, 1987) at 11–14. This is a typical chicken-or-egg issue in linguistics.

⁴³ In addition to the Míkmaq, there are the Wabanaki (Abenaki), Maliseet, Montagnais-Innu, Naskapi, Odawa, Algonkians, Ojibwa, Saulteaux, Cree, Blackfoot, Blood, Peigan to mention a few. O. P. Dickason, *Canada's First Nations* (Toronto: McClelland and Stewart, 1992) at 63–67.

Holy League or Grand Council of the Mikmaq people.⁴⁴ He noted the seven geographical hunting districts that comprised their national territory, roughly forty-seven thousand square miles in modern Atlantic Canada, from Newfoundland to Quebec and northern Maine.⁴⁵ He commented on the Mikmaq's continued use and regulation of their lands and territorial waters. Like other Europeans, he was amazed at how the commonwealth was bound together by councils, held at all levels of Mikmaq society, from the local family to the extended families at a regional level.

There was much the European observers failed to grasp. Mikmaq oral tradition says that originally all the Eastern Algonquian families were closely related and spoke a mutually intelligible language. These peoples have been labeled by modern archaeologists as the "Maritime Archaic peoples." We only know that "the archaic people were of the same gene pool as the Mic Mac, but that's all we can say."⁴⁶ In the ancient Algonquian language, the concept of Algonquian peoples in a collective sense was usually expressed as "*skwijinu*." In the Mikmaq version of the Algonquian language, the Archaic peoples were described a "*sáqewéjfk*" (our ancient ancestors).⁴⁷

A thousand years before the great civilisations of Mesopotamia and Egypt, oral history says that the ancient ones began the Mikmaq federation. They are said to have been in the Atlantic provinces at least 11,000 years ago following the great herds of caribou across the tundra. By 5000 B.C., they began calling themselves "*Nikmaq*" a possessive awareness of their spiritual and collective unity. The concept is a verb, which can roughly translate into an English noun as "my kin-Friends."⁴⁸ From the Creator, the *Nikmaq* had learned to live in the developing forest, on the tundra, the sea and the river systems.⁴⁹ They constructed ocean-going canoes and made long journeys and trading expeditions from northern Labrador and Newfoundland to South America. They followed the rivers of the continent to create new forest village sites, as well as coastal villages. By the tenth century B.C., a large number of the *Nikmaq* chose to organise themselves into a spiritual and interactional

⁴⁴ *Supra* note 5 at 87.

⁴⁵ V. Miller, "Aboriginal Micmac Populations: A Review of the Evidence" (1976) 23 *Ethnohistory* 117-27 at 124

⁴⁶ S.A. Davis, (1989) 5 *Atlantic Insight* 1989; S.A. Davis, *The Micmac* (1991); S.A. Davis, "The Archaeology of Nova Scotia" [unpublished manuscript, 1990].

⁴⁷ Similar terms appear in other Algonquian languages, but with different phonetic spellings. It appears as "skejim" among the Wabanaki or "*skicin*" or "o-ski'-tchin" in Maliseet or Champlain's "Ethinmen." Interestingly, the Aboriginal concept of "*skwijinu*" roughly corresponds to the Norse explorers used of the phonetic word "skraeling" in the 11th century to describe Aboriginal peoples of the new world. The "Skraeling" were described as having "skin canoes" and "wooden containers." The term was used to describe the Aboriginal peoples of northern Newfoundland: Harp, "The Cultural Affinities of the Newfoundland Dorset Eskimo" (1964) *National Museum Of Canada Bulletin* 200, as well as those they met in the south, see Carl Sauer, *Northern Mists* (Berkeley: University of California Press, 1968) at 127.

⁴⁸ See, *supra* note 41.

⁴⁹ M.A. Battiste "Micmac Literacy and Cognitive Assimilation" in Jean Barman et al. eds., *Indian Education in Canada, Vol. 1: The Legacy* (Vancouver: University of British Columbia Press, 1986) at 23-44.

community. Their fidelity to the community was labeled “*Mikmaq*”—the unpossessive core of “*Nikmaq*”—which referred to all allied peoples. The term distinguished the spiritual-political community from those of other Algonquian speakers in North America.

The initial confederation among the Mikmaq was called *Awitkatultik* (many families living in one house).⁵⁰ The *Awitkatultik* was an equivalent of the modern national confederation such as Canada. The initial confederation was composed of six districts (*Sakamowti*), and later other districts were added. Each district was a legal abstraction, as well as an extended family under the guidance of a “*Sakamow*” (district chief, elder, leader). The *Sakamow* had collective responsibility along with the “*saya*” (leaders of many extended families) and “*kaptins*” (community spiritual leaders), to guide districts in all matters. On a daily basis these leaders, as heads of families, created order and continuity in governance. Each Mikmaq was represented by these leaders. In fact, the oral tradition insisted that everyone participated in all decisions of the “*wikamou*,” the regional and local councils.

Within each district, the local family council was the basic unit of government, administering the justice system. The *wikamou* met every night except during harvest season. This created decisions by consensus. Everyone could speak at these deliberative sessions. In the rituals, every family was equal and each Mikmaq had an equal right to participate. Mikmaq customs and rituals fostered vigorous discussion and, if a Mikmaq could not agree with the emerging consensus, *wikamou* custom suggested withdrawal from the debate to promote harmony. If a dissenter persisted, they were ignored, never ousted or chastised. The *wikamou* were responsible for the maintenance of regional decisions and for redressing any wrongs within the district.

These allied leaders and their families formed one national council—the *Santé Mawłomi* (“holy assembly” or Grand Council)—to advise the Mikmaq and defend the people. Similar to the local and district council, the *Mawłomi* was always a deliberative body, without powers to legislate or adjudicate. The *Mawłomi* task was to facilitate consensual decisions across districts and families.

The Mikmaq, similar to other First Nations peoples, recognised binding obligations only if they derived from consent. This may be called dialogical sovereignty. They resolved difficulties, rather than avoided them. The *Mawłomi* sought consensus on policy and conciliation on regional strategies. For a certain period, these decisions were inviolate but could be periodically reviewed every third or seventh year.

The national *Mawłomi* deliberations were led by any two elective heads of state: the *KjiSakamou* (Grand Chief) and a spiritual leader *KjiKaptin* (Grand Captain). These leaders guided discussion and implemented the consensus.⁵¹ They were seen

⁵⁰ Centuries later, this union was later referred to as the “Cross-Assemblies”: LeClercq, *The First Establishment Of the Faith In New France* (1691), ed. and trans. by John Shea (New York: J.G. Shea, 1910) at 152; see also Saint-Vallier 1688, *ibid.* at 189–90; the Holy League, *supra* note 5 at 89–91, and eventually the Mikmaq Nation in the treaties.

⁵¹ The role and position of the Great Chief was described by Marc Lescarbot, a French lawyer and the earliest writer about Port Royal: “He has under him a number of families whom he rules, not with so much authority as does our King over his subjects, but with sufficient power to harangue, advise, and lead them to war, to render justice to one who has a grievance, and like matters. He does not impose taxes upon the people, but if there are any profits from the chase he has a share of them, without

as first among equals, appointed and symbolic spokesmen who continued the discourses among all the First Nations and within the allied families. The geographical location of the *Mawłomi* shifted easily with the election of the *KjiSakamow*, as his home district became the annual meeting place. They were the voices of spiritual and political wisdom, keepers of the rituals of a people of a particular space, and their membership reflected the shifting choices of the Míkmaq. Within the family structure of the district and village, policy choices and customary laws were maintained. Neither the officers of the *Mawłomi* nor the seven *Sakamowti* provided unity for the Míkmaq.

The unity of the Míkmaq Nation resided in their cognitive realm: their language, culture, and spirituality. The leaders were only symbols of that cognitive realm, keepers of the natural order. They were chosen because they symbolised and exemplified the qualities of leadership: wisdom, courage, kindness, generosity and an even temper. The family or clans were the managers of the unity. Míkmaq believed themselves tied together by a deep and lasting consciousness. Typically, their communal bond rested more on a shared worldview than on a sense of fate. The natural facts of being born into a clan, a territory, a spiritual realm, or a race were secondary. These predetermined circumstances were important only insofar as each actually contributed to a shared worldview or mental experience. The very core of indigenous community was, and remains, the sense of having a view of the world in which others participate, a view whose hold over the groups was so strong that it never needed to be spelled out. This cognitive solidarity was precisely the condition of moral and social communions that were the foundation of customary federations, their laws and their indigenous freedoms.

In this worldview, European types of legal abstractions and fictions were rare. The Míkmaq worldview was not an expression of esoteric ideas and -isms but more of a cognitive realm created by a verb-centred language.⁵² This verb-centred language emphasised the flux of the world, encouraging harmony in all relationships. This was the centre of their legal institutions and heritage. It reflected their belief that the world was made according to an implicit design that could be at least partially apprehended and enforced by them,⁵³ not simply as a matter of balancing rights and wrongs or of reducing conflict resolution to trial by battle, trial by ordeal or adversarial denunciations characteristic of medieval Anglo-French laws.

In the creation of the Míkmaq Nation, there came to exist a common body of insights about how to preserve that which already existed. The family became the unit which educated each child into an understanding of these insights. This

being obliged to take part in it"; *supra* note 5 at 57. For Haudenosaunee, see Calder, *supra* note 39 at xx.

⁵² Like the structure of Algonquian languages, Míkmaq language created sounds out of the forces in the ecology, the verbs, rather than the noun-object orientation of English. Thus many ideas in English are expressed in Míkmaq as verbs. English nouns can be created out of Míkmaq verbs. See Battiste, *supra* note 41; J. Fidelholtz, *Micmac Morphophonemics*, Abstracts International, 34, no. 5 (Nov. 1973): 2595A; and J. Y. Henderson, *Governing the Implicate Order* (Ottawa: Centre of Linguistic Rights, University of Ottawa, in press).

⁵³ Henderson, *ibid.* .

education provided a sense of direction or growth for all members. Like other indigenous federations, the Míkmaq defined themselves linguistically. Language, rather than territorial boundaries, was, and remains, at the core of the Míkmaq consciousness and normative order. Strangers were defined as those who spoke a different language.⁵⁴ The greater the difference in language, the more the Míkmaq believed that they did not share similar consciousness or traditions or anything important with the strangers. There was a different customary code for strangers and visitors than for Míkmaq. Despite this belief, the Míkmaq and other First Nations peoples developed a flexible transnational normative order. In the case of different languages, a symbolic (sign) language existed.

B. Kindness: Domestic Law

The normative order of the Míkmaq presumed existence of a firm consensus about right conduct and shared responsibilities. Oral traditions taught that the key to understanding their domestic law was kindness, with emphasis on empathy. They did not create any European-style system of written positive rights. Instead they lived within the complex encoding of rituals and commitments that renewed their understandings and experiences. In English thought, this order might be seen as similar to a broad family law, but that analogy is far from adequate.

Míkmaq customary law was a subtle and complex normative order, where flux was the universal norm and there was no noun-based system of positive law. To codify this subtle order would be to change it. From a Míkmaq perspective, to freeze their understandings into rules violated processes designed to balance the inherent flexibility of their worldview.

No one person made or declared the customary rituals and solutions. "Rules" were local solutions based on the experiences and consensual understandings. Customary laws were implicit guidelines developed from examples or tacit models of conduct, rooted in a spiritual force, similar to instinct in the animal world and as natural as gravity to modern science. These guidelines were captured in oral traditions and rituals, and the shared hardships and joys of living. They could be initiatory, daily, and informal as well as celebratory, expressive, and performative. They were also critical or analytical, creating positive and negative examples for human conduct, which ultimately led to the selection of leaders.

Míkmaq customary law produced a matrix of processes which provided guidelines in broad outline, not in precise detail. But its standards were neither universal, objective nor enforced by man-made institutions. Initiating the customary process was a family responsibility, remedy was a clan function.

In this private law, and similar to classical Roman law, matrimony was not a legal category; it was a personal decision and part of family management based on equality. In fact, there was no word in the Míkmaq language for male or female, or gender. Until the partners consented to be allied, each was free to enjoy their bodies as they pleased. Once the partners and their families had consented to a union, fidelity

⁵⁴ Originally, the sentiment of an individual biological person who did not speak the Algonquian language was embodied in the concept of "*L' nuk*." This is a term similar to "*Innu*" and "*Inuit*." Nowadays, this is commonly used in a different sense to refer to the racial heritage of Aboriginal people.

was required as a matter of self-discipline. But after the union, both partners were free to separate at any time. The families settled any further problems that might arise.

The Mikmaq believed that orderly processes presupposed and evoked balance in the soul and the environment. Harmony was perceived as being derived from awareness, participation, kinship education, and continuing rituals. The emphasis on all the processes was on self-control or discipline, rather than authority from above, precedential experience or competition. Responsible behaviour was rewarded with honour, respect, and solidarity.

In a Mikmaq's worldview, the self tended to be seen as an integral part of the family and ecosystem, rather than as an independent entity. Aggressiveness of any sort threatened violence and required human mediation. The distinguishing mark of a true person was his or her willingness to withdraw from conflict and to think good thoughts. An inability to balance passions and conflicts was seen as irresponsible and was not honourable behaviour. Coercive law by an artificial institution was generally absent, if not vigorously opposed. Aggressiveness within the family was thought of as wrongful and contrary to human dignity and responsibility. The very fact that a human solution was needed to resolve a conflict created an uneasy disharmony, a crisis of conscience. The place to find solutions to most predicaments was in the extended family structure, rather than the *Mawłomi* or district chiefs. Like the weather, solutions were not predictable, not always based on a logical sequence.

"Reason" was, and is, based on an awareness of forces implicit in reality and in one's relationship to them. This has been called the implicate order, the enfolded order behind daily life.⁵⁵ Indigenous reasoning knew no distinction between "is" and "ought," or the "what might be," or between theory and practice, which so dominated European theory. Mikmaq reason was not broken into distinct faculties, into the choice of means for achieving one's private interest by juxtaposing what is with what ought to be.

Mikmaq consciousness conceived the ideal as within actuality. Thus, the right or the good was not something towering above the natural and social worlds. Mikmaq law, religion, child rearing and art expressed the unity of the ideal and actuality as at root inseparable. Their flexible, verb-centred language, denied their members the experience of moral doubt.

Europeans noted the Mikmaq's domestic law regulating conflicts⁵⁶ and called it "*habenquedoic*." This referred to a process originally translated by the Europeans as a sort of "he did not begin it, he has paid him back: quits and good friends." It

⁵⁵ James Adair, *History of the American Indians* (London: E. & C. Dilly, 1775). I have drawn my inspiration from D. Bohm, *Wholeness and the Implicate Order* (Boston: Routledge & Kegan Paul, 1980) and our dialogues.

⁵⁶ *Supra* note 5 at 95. See generally the Mikmaq society in Eurocentric literature; P. Nietfeld, *Determinants of Aboriginal Micmac Political Structure* (Ph.D. dissertation, University of New Mexico, 1981); L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979); B. Hoffman, *The Historical Ethnography of the Micmac of the Sixteenth and Seventeenth Centuries* (Ph.D. dissertation, University of California, Berkeley, 1955); W.D. Wallis, *The Micmac Indians of Eastern Canada* (Minneapolis: University of Minnesota Press, 1955).

was the law of peace, rather than the law of punishments, and was intimately related to conduct among other animate creatures. Today this age-old concept is usually referred to as “*Mikmaway*,” the Mikmaq way.

In this private dispute resolution system, almost all offences and quarrels were adjudicated with and between families. The essential principle of customary law was that controversies should be prevented. Harmony, not justice, was the ideal. When controversies did occur, the predicament should be quickly settled. If not, organised and specific violence could follow. Kinship pressure pushed to find the quickest solution and to restore harmony.

Abstract Eurocentric legal principles were never the best means for describing or understanding Mikmaq remediation processes. Typically there was no intent, malice, negligence, accident, omission, or excuse or other elements to be weighed and no exclusive focus on individual causation and responsibility for an act. But, there was vast consideration of mitigating forces and circumstances in determining satisfaction. In Mikmaq law the operative concept was shared liability within one’s extended family, rather than personal liability. Culpability or guilt, as grounded in English and French laws, mattered far less than that causation was shared equally by one’s family and the forces of the environment.

Mikmaq laws had no concept of an innocent or guilty individual. This usually perplexed the European legal mind. Both French and English law often asserted that no person ought to be punished for what another did. This individualistic theory produced *post facto* punishment rather than prospects for preventive social control. By making the entire family responsible for the actions of its members, Mikmaqs gave everyone a responsibility to encourage proper behaviour and a caring society among their relatives. Knowing that any extended family member might serve as a substitute in the case of a particular grievance also made families avoid a revenge cycle or aid in escape. Collective responsibility increased certainty in the management of behaviour and harmony. Repentance was usually remedy enough, when expressed by both the offender and his family. The offending family made peace by offering presents and other suitable atonements. The presents were acknowledgements of sorrow and kindness. Their function was to take the bad spirits away and restore good thoughts.

Great offences were “avenged” by the offended immediate family. But in exceptional circumstances, or if the immediate family was unable to do so, the extended family intervened. The offended family had a right to retaliate; the offender’s family had the duty to remain faithful to harmony and stoically remain indifferent to the conflict. In family based cultures, blood ties could often cross or even cause conflicts to grow out of control. Punishment was not the direct responsibility of the *Mawłomi*, or general council.⁵⁷ The Mikmaq did not have any method or ordeal, no adjudicatory system, no inquisitional system, no specialised professional élite, no remedial

⁵⁷ Similarly among the Algonkins, for example, a priest stated: “From the beginning of the world to the coming of the French, the Savages have never known what it was to solemnly forbid anything to their people, under any penalty, however slight. They are a free people, each of whom considers himself of as much consequence as the other; and they submit to their chiefs only in so far as it pleases them.” *Jesuit Relations*, *supra* note 5 at 51.

procedures or concepts, simply because they did not think in terms of public wrongs. It was a private and customary tort law.

Depending on the seasons, either the families or *wikamou* acted as courts. The enforcement of agreed remedies identified the justice component. Their discussions which led to remedies were supposed to project shared understandings for the future. Customary remedies were based on a principle of forgiveness and forgetfulness, rather than any law of individual responsibility and guilt. Míkmaq's shared social conflicts; they did not have a benefit and harm principle. In determining proper remedies for any predicament, the families forged their own justice. A collective sense of restitution or satisfaction remained the controlling issue in controversies. Major disputes, however, could be discussed and reconciled in district councils and the *Mawlomi*, as subject to the extended family jurisdiction.

Often foreign observers, beginning with the Jesuits, noted that First Nations had few coercive sanctions with which to punish wrongdoers. But the families created justice as fully as did any French or English magistrate. Indigenous law grew exclusively from interpreting human behaviour. Although committed to an ongoing order based on the boundaries of self-discipline, as the alternative to coercion, harsh remedies could be enforced for a lack of self-discipline and respect for others. The Míkmaq had a law of retaliation in *Nikmanen* law, their international law, discussed at page 26 below, and a law of vengeance and satisfaction in domestic law. What they did not have was a law of punishment, either physical or economic. When encountering the English legal processes, Míkmaq's viewed it as a program that lowered human dignity and fostered disharmony by reminding people of the original violence, thus creating further resentment.

Family vengeance was different from punishment. Limited only to the killing of humans, its effects were immediate and final. It was supposed to initiate a process of healing among the involved families and a time of reconciliation and affirmation of the best values of Míkmaq society. Banishment was another drastic family remedy, mainly for intrafamily disputes. It was more than territorial banishment, it was the act of being a cognitive exile to foreign languages. It permitted extended families to renounce formally its collective responsibility for a member.

The Georgian treaties with the Míkmaq and their friends affirmed the existence of their Míkmaq legal order and recognised the need to place limits on the coercive English legal system. The treaties presumed a dual legal order. For example, the *Wabanaki Compact* (1725) provided that "no private Revenge shall be taken" by either the Wabanaki or the English. Instead, both agreed to submit any controversies, wrongs or injuries between their peoples to his majesty's government for "Remedy ... there in a due course of Justice."⁵⁸ These treaties illustrated the need for a vision of order which both validated each legal system and integrated consensual norms for harmony in the future.

⁵⁸ Article 6, affirmed by the Míkmaq in 1726 and 1749, in P. A. Cumming and N. H. Mickenberg, eds., *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada in Association with General Publishing, 1972) chapter 7, Appendix 3 at 295-309. Similar provisions suspending indigenous law and providing British justice in colonial courts were common within other British treaties with the First Nations.

The system was of personal, rather than territorial, jurisdiction. The treaty terms prevented a Wabanaki or ally from asserting their law if an Englishman offended their people, and vice versa. The Wabanaki agreed that as a birthright, the English settlers were governed by English law in all of their conduct. This prevented the application of Algonquian law, especially the law of private revenge, if the English man killed or wronged a Wabanaki or any ally and prevented a Wabanaki family in its duty and right of retaliation to kill another Englishman or the actual killer in the reverse case. Under the treaty, the Aboriginal law of the land was suspended in these cases and transferred to English law and justice. In controversies between "Indians" however, the Aboriginal law applied. Under terms of the treaty, the Wabanaki agreed to maintain peace by allowing controversies between English settlers and the Wabanaki to be settle by his majesty's laws and tribunals.

In the 1726 Accession to the *Wabanaki Compact*, the Míkmaq district chiefs maintained and clarified their personal jurisdiction over their people in the English settlement. They took responsibility for "any robbery or outrage" by Míkmaq in the English reserves. They expressly promised to make satisfaction and restitution to the "parties injured." This extended customary law of the Míkmaq to relations with the new English settlements. Thus when a Míkmaq was alleged to have robbed or committed an outrage against any Englishman, even if it happened in the settlements, English law did not apply. In all other cases between the peoples, the *Wabanaki Compact* was followed and the chiefs agreed to make application for redress according to English law.

The *Míkmaq Compact* (1752) continued these promises.⁵⁹ The grand chief and delegates, however, explicitly clarified the processes of law. They specifically limited the scope of the English law in any controversy between the English and the Míkmaq to his "Majesty's Courts of Civil Judicature."⁶⁰ The terms of the treaty established an explicit retraction of the Míkmaq's consent to English criminal legal remedies and political solutions. This reflected their abhorrence of state-imposed violence. They rejected the idea of law as power, preferring an ideal of shared civil harmony for private wrongs. In this manner they attempted to accommodate English law to their traditions.

English authorities had difficulty requesting that the *Mawłomi* or *sakamow* or *saya* punish an alleged Míkmaq offender. If the Míkmaq assumed jurisdiction over the dispute, they would usually forgive and forget. Some Englishmen knew how to take advantage of the Míkmaq forgiveness, often counting upon them to forgive fraudulent offenses if they admitted remorse, i.e., sincerity was never a probative issue to the Míkmaq mind, in order to avoid punishment.

Faced with clashing values, the best alternative in a controversy between a Míkmaq and an Englishman was for the Míkmaq to withdraw and disassociate himself from the conflict, thereby maintaining harmony and allowing a limited civil remedy in an English court or the giving of satisfaction to injured parties. Míkmaq, however, had no tolerance for the disruptive English common law remedies of capital

⁵⁹ *Wabanaki Compact*, 1725, Accession Treaties of 1726, 1749 are incorporated in Article 1.

⁶⁰ Article 8. See B. Witkin, "26 August, 1726: A Case Study in Mi'kmaq-New England Relations" (1993) 23 *Acadiensis* 171 at 175.

punishment (including public drawing of internal organs and quartering of the body), incarceration, and whipping.

The terms of these compacts and treaties affirmed the First Nations' capacity to maintain legal autonomy and dual jurisdictions. Neither community could presume to impose a unitary legal system on the other. Each community had the liberty and capacity to create and interpret law within their space, and to encourage harmony between the two cultures. The terms of the treaties established that consensual rules validated and legitimated boundaries, and bridged the two co-existing legal inheritances.

C. Sharing: Property

The *Mawłomi* developed a defined concept of space where families annually allocated their livelihoods among themselves. One family also often managed the resources for allied families and their friends. Their image of territory was one of a dedicated, sacred space. They not only used what was physically available to them, but the *Mawłomi* made choices about the rate of resource use, within sustainable limits, and modified natural resources in selective and sustainable ways, to increase availability and distribution. To do so, they created an international customary trading code as part of *Nikmanen* law.

"*Mík máki*" was the word-concept for recognition of national territories. It translated as the "land of friendship," stressing the voluntary political confederation of the various Algonquian families into the holy assembly, with their shared worldview. In modern terms, *Mík máki* described the territory extending from present day Newfoundland and St.-Pierre de Miquelon, westward to the mainlands of modern Nova Scotia, New Brunswick, northern Maine, Prince Edward Island, the Magdalene archipelago, and the Gaspé Peninsula of Québec.

Although it is possible to view *Mík máki* as territorial, in the Míkmaq worldview the term has traditionally expressed a sacred space with an implicate, or entwined, order. This sacred space was not cosmological; rather, it was the result of millennia of down-to-earth field observations and direct encounters recreated in remembered stories. This data and knowledge was directly encoded within language and symbolic literacy. All life-forms were viewed as inter-connected. Perceptions of differences were viewed as superficial illusions. Similar to other First Nations, the Míkmaq did not regard territories as "natural." Instead they viewed *Mík máki* as created by interactions between their ancestors and the ancestors of other species. Hence, the entire landscape constituted a symbolic historical and educational record, testifying both to unique experiences and to the identity of the Míkmaq and their allied peoples. The sacred space contained the many life-forces (*mntu*). The Míkmaq animation of their environment required respect for the stones, trees, rivers, coasts, oceans, animal beings, the spirits of dead animals, humans, and their spirits: all isolated into independent keepers of the *mntu*. For example, the Míkmaq conceptualised every plant or animal as having a specific animate power, with a spirit that made each. They considered each species to be a "separate nation."⁶¹ In this sense, "nation"

⁶¹ LeClercq, *supra* note 50 at 225.

meant one's birth-identity, as the original Latin term *natio* denoted. An important feature of this potentially volatile order was the use of human kinship as a general analogue for ecological relations.⁶² Plants, animals, and humans were related, and each was a producer and a consumer with respect to the other, in an endless cycle. The implication in all of this for law centred on where the Míkmaq located control: not a human control over the natural order, as in the artificial English landlord's law-of-the-land, but rather Míkmaq law as an integral part of the ecological order.

The Míkmaq cultivated an awareness of these life-forces (*mntúk*) and of a covenant with the keepers of these forces. This was the foundation for their idea of property. One had to respect and live in harmony with these intelligible essences. A sacred relationship of respect existed among all *mntu* within the national territory. A crude statement of the worldview of *Mík máki* was that it had an order of spirits that a respectful human could participate in, but not possess or own. The allied people felt that they were part of the spiritual forces of the land. Inherent in their worldview was a conviction that the universe contained a limited amount of energy (*mntu*), that it was continually running down and hence required renewal by all participants. Their conception of a sacred order as dynamic, finite, and fragile had important consequences for the way Native peoples managed and participated in the use of resources.

As humans, the Míkmaq retained an obligation to protect the ecological order and right to share nature's resources; but only unborn children in the invisible sacred realm had any ultimate ownership of the land or ecological place. In the custom of the Míkmaq, the *Santé Mawlomi* was the "trustee" of the sacred order and territory. It had the responsibility to allocate and regulate the natural resources of *Mík máki* among the allied people and through the *Nikmanen* trading customs. This was more of a right to discipline consumption and conserve resources, rather than anything like European concepts of ownership.

Inherent in this sacred order was the conviction that natural resources had to be renewed as well as shared. Rather than managed, which implied human domination, the First Nations developed rituals for sharing or harmonising the human and spiritual realms. Such renewal rituals and ceremonies recognised a harmony which emphasised stability in hunting, fishing, trapping, harvesting, or trading without making them feel independent of the resources.

The focus on the sharing of resources paralleled the focus on consensus in creating governing structures and on mediation in family law. Just as the users of natural resources were only the managers of shared property, the councils of the Aboriginal nations were the managers of shared power, and the families were managers for shared responsibilities for their members' behaviour.⁶³ The goal to maintain harmony

⁶² C.I. Vecsey and R.E. Venerable, eds., "American Indian Environmental Religions" in *American Indian Environments: Ecological Issues In Native American History* (Syracuse: Syracuse University Press, 1980) at 1-45; A. Tanner, *Bringing Home Animals: Religious Ideology and Mode of Production of the Mistassini Cree Hunters* (New York: St. Martin's Press, 1979); A. Tanner, "The Significance Of Hunting Territories Today" in *Cultural Ecology. Readings On The Canadian Indians And Eskimos*, Bruce Cox, ed., (Toronto: Macmillan Canada, 1978) at 101-114; F. Speck, *Penobscot Man: The Life Of a Forest Tribe In Maine* (Philadelphia: University of Pennsylvania Press, 1940) 208.

⁶³ R. Barsh, "The Nature and Spirit of North American Political Systems" (1986) 10 *American Indian Quarterly* 181-198.

in a fragile ecosystem required proper human behaviour; and this in turn served to prevent the waste of resources. Food-gathering, hunting and fishing demanded that every morsel be put to good use.

Sharing the harvest of a sacred space was neither random nor universal, but based on patterns, kinship and correspondence.⁶⁴ It was an honour, a duty and a privilege; and those who had little to share but still did so gained greater prestige, influence and dignity. In Míkmaq language, “*netukulimk*” referred to the responsibility of a Míkmaq user to be mindful of the life-givers, the content of the resources to be used, and the need for sharing within the human community. Feasts after the harvest were an integral part of sharing of resources and of the sharing of knowledge about sustaining them. The Míkmaq could not understand the possessive nature of Europeans that drove them to hoard things.⁶⁵

The sentiments of *netukulimk* were embodied in the concepts of *Mík máki*, described as a vast network of family sites and paths within their space.⁶⁶ Míkmaq words for particular locations were encoded to identify both the particular uses of a place and that place’s special significance for specific families. Certain families had responsibilities to use certain animals, plants, materials and access sites, e.g., hunting and fishing traps, because of their particular relationships. This was illustrated by the totemic clan system, their songs and stories, and the ceremonies that linked the present and the past.

Admittedly it was, and remains, difficult for French and English trained jurists to find English legal principles of “ownership” and “property” rights in the Míkmaq worldview. Both sets of legal ideas were culturally specific. Rather than attempt to understand and recognise another system and its assumptions, it has too often been easier to deny that First Nations even had a system of property rights or at least of private property rights. The modern Canadian courts still maintain their own inherited fictions.⁶⁷ The *netukulimk* responsibilities within the First Nations were distinct from the equally unique English legal notion of a “possessory estate” under the crown’s original title.⁶⁸ The Míkmaq *sui generis* tenures were different in defining which rights could be acquired, the extent to which other persons could be excluded, and the nature of the resource-occupying entity. The most elusive to English notions of tenure were the rules governing the sharing of resources.

Apart from the medieval monastic tradition in the Euro-British world, sharing had traditionally been seen as a threat to personal autonomy or choice, to a social system protective of inherited class or earned wealth, and thus a threat to rights and

⁶⁴ R. Barsh, “Backfire From Boldt: The Judicial Transformation of a Coast Salish Proprietary Fishery into a Commons” (1991) 4 *Western Legal History*; Paul Sillitoe, *Roots Of the Earth: Crops In the Highlands Of Papua, New Guinea* (Manchester: Manchester University Press, 1983).

⁶⁵ *Jesuit Relations*, *supra* note 5 at 173-177.

⁶⁶ T. Ingold, *The Appropriation of Nature: Essays on Human Ecology and Social Relations* (Iowa City: University of Iowa Press, 1987); Hugh Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre, 1981); Tanner, *supra* note 62; Speck, *supra* note 62 at 206.

⁶⁷ *Delgamuukw v. B.C.* [1993] 5 C.N.L.R. 1 (B.C.C.A.).

⁶⁸ *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

responsibilities. Altruism, a European morality of sharing and sacrifice within a particular relationship, was usually seen as inconsistent with the law's championing of individualism, the pursuit of private interest and personal gain: the early Christian norms of love, sharing, and anti-materialism notwithstanding!

The Mikmaq view shared this radically alternate vision for a proper social order, as against what had come to be the early modern French and English worldviews. It was about generosity and the sharing of whatever one possessed, with an open handedness that amazed the immigrants.⁶⁹ What Europeans failed to grasp was that this was more than a hospitality ritual. It was a way of life as well as a system for proprietary tenure. Greed was always considered a wrong, even though private family management of resources, along with a bundle of rights and duties, was the legal norm.

Mikmaq *netukulimk* responsibilities, in the form of "property rights," were acquired through kinship rather than use or purchase. Everyone had relative claims through birth and marriage to the use of a great variety of sites and resources throughout the sacred space, which could also be claimed by others on the same ground. Often the word for kinship and ownership was the same. It was inconceivable in a Mikmaq worldview, however, that a human could claim an exclusive use or entitlement to a particular site or that any family could lose their relationship to a site. This applied both to men and women.

The breadth of the space, the travelling to resources, the harvest cycle, and the concept of sharing helped limit the creation of conflicts which, when they did arise, the *sakamowti* and *wikamou* resolved by customary rituals and mediation. The presence of conflicts as well as ecological conditions were biannually reviewed by the *Mawłomi* in the allocative process and renewal ceremonies. If too much conflict existed, the hunting, fishing, trapping, cultivation or harvesting site was reallocated by the *Mawłomi* to another family or families until the conflict was eliminated.

Renewal ceremonies also emphasised the relationship between space and claims in the Mikmaq worldview. Certain ceremonies were bound to a specific location, and could not be transported. They symbolically reiterated and renewed the ancient relationships between a particular family and a particular ecosystem. The grounding in a particular ecosystem has been categorised as "geopiety."⁷⁰ In the various renewal ceremonies, various family claims were continually being asserted and adjusted. While each renegotiation affected family allegiance and identity, this was seen as ultimately unimportant. The primary motive was the periodic equalisation of shared rights in the ecosystem by the *Mawłomi* among the collective families.

This customary legal process created considerable confusion among English and French colonists. They concluded that the First Nations were migratory and that "ownership" was essentially collective or communal. Eurocentric ideas about property were particularly stymied by the Aboriginal idea that within the sacred space

⁶⁹ See generally, *Jesuit Relations*, *supra* note 5.

⁷⁰ J. Inglis, *Traditional Ecological Knowledge. Concepts and Cases* (1993), M. Johnson, ed., M. Johnson, ed., *Lore: Capturing Traditional Environmental Knowledge* (Hay River: Dene Cultural Institute, 1992); Vecsey and Venerable, *supra* note 62; also see Joseph E. Brown, *The Spiritual Legacy Of the American Indian* (New York: Crossroad, 1982).

most resources were an extended family responsibility, more managerial than proprietary, with no ultimate dominion in a sovereign. While Míkmaq tenure differed from English tenures and estates, it did bear comparative resemblance to the Roman civil law's concern with the external property relations of the *familia*.⁷¹

But the most difficult point about Míkmaq tenure for the English mind was that each family or personal claim to a resource or space was valid only insofar as it was based on permission by local or regional consensus. And also reminiscent of classical Roman law, the Míkmaq did not distinguish between personal and real property. Their tenure treated all things as property, equally.

In fact, the sacred space itself was not individualised. Ultimate tenure was held by the *Mawłomi* for future generations. A family or an "individual" had no right to withhold the use of the resources or the products of their use from another insider. After seven generations a family could gain a vested interest by proven custodianship, by having provided services to the elderly, and generally by generosity. But by then, any vested interest was spread through many places and families. The system of kinship relations united everyone in an implicate web, a broadly woven network of rights and responsibilities of the ecosystem. Each person was simultaneously a parent, child, uncle, or cousin to others. Family responsibilities were "strong" enough to create incentives to conserve, but "weak" enough to create incentives to share.

The Wabanaki and Míkmaq attitudes toward sharing was also witnessed in almost every treaty. The *Wabanaki Compact* (1725), and a direct incorporation in the *Míkmaq Compact* (1752) by Article 1, provided,⁷²

That His majesty's Subjects the English Shall and may peaceably and quietly enter upon Improve and forever enjoy all and singular their Rights of God and former Settlements, properties, and possessions within the Eastern parts of the said province of the Massachusetts Bay Together with all Islands, inlets, Shoars, Beaches, and Fishery within the same without any molestation or claims by us or any other Indian and be in no ways molested, interrupted or disturbed therein.

Saving unto the Penobscot, Naridgwalk and other Tribes within His Majesty's province aforesaid and their natural Descendants respectively all their lands, Liberties, and properties not by them convey'd or sold to or possessed by any of the English Subjects as aforesaid. As also the privilege of fishing hunting, and fowling as formerly.

The 1726 Míkmaq ratification of the *Wabanaki Compact* had further promised that the Míkmaq "shall not molest any of His Majestie's subjects or their dependents in their settlements already made or lawfully to be made, or in their carrying on their traffick and other affairs within the said Province [of Nova Scotia or Acadia]."⁷³

In extending the Aboriginal proprietary practice of sharing with the immigrants, under their purchase theory, all of the Georgian treaties recognised and guaranteed the sacred order to the First Nations. They agreed to allow the English coastal settlements to exist under their own jurisdiction and law within their reserved lands. But peaceful enjoyment of such settlements was not to be equated, in the Míkmaq

⁷¹ C. Noyes, *The Institution of Property* (New York: Longmans, Green & Co., 1936) at 221.

⁷² Cumming and Mickenberg, *supra* note 58 at 301, 307.

⁷³ *Ibid.* at 302 (Treaty No. 239).

worldview, with any cession of Aboriginal land tenure to the settlers or their abstract sovereign “over the great waters.” Sharing with the strangers, who were seen as guests in a limited place in the shared space, affirmed but could not affect their underlying understanding of ancient tenure or title. The coastal settlements would be viewed by Mikmaq as secular refuges carved out of the general sacred space, in the same manner as customary family responsibilities existed in Mikmaq thought, as recognised under the treaties. Consistent with the Mikmaq mind and *Nikmanen* law, the peaceful enjoyment of the British settlement was harmonised not only by the peaceful enjoyment clause but also by the crown’s promise to provide.⁷⁴

... provisions, as can be procured, necessary for the Familys and proportional to the Numbers of the said Indians, which shall be given them half Yearly for the time to come; and the same regard shall be had to the other Tribes that shall hereafter Agree to Renew and Ratify the peace upon the Terms and Conditions now stipulated.

Additionally, to “Cherish a good Harmony” the crown promised that “so long as they shall Continue in Friendship” the Mikmaq would annually receive “Presents of Blankets, Tobacco, some Powder & Shott.”⁷⁵

The *Mikmaq Compact* thus illustrated the pervasive concept of sharing and the exchanging of gifts, which were the fundamental premises of their concepts in ecology, social structure and property. The treaties created boundaries for communal and autonomous law and an insularity for both the reserved lands and the enclaved British settlements. They also created an integrated world of mutual obligations and a reality based on freedom of association.⁷⁶

D. Trust: Transnational Alliances

The Algonquian order illustrated the development of a voluntary transnational law, perhaps like that of the medieval Holy Roman Empire and the “Law of Nations” in Europe. In North America it was not based on family structure but on consensual agreements among the First Nations. In the Algonquian worldview, this order was a matter of trust.

The boundaries of the Mikmaq Nation in the Algonquian order remained unchanged for centuries, despite shifting alliances. They were surrounded by either their Nikmaq or the ocean. The Nikmaq (allies) of the Mikmaq Nation included the *Beothuk* (up river people) in Newfoundland, the *Wulustukw keuwiuk* (beautiful river people; Maliseet-Passamaquoddy) of southwestern New Brunswick and north-eastern Maine, the *Wabanaki* from Maine to the Ottawa valley, various *Innu* or Montagnais groups north of the Saint Lawrence River, *Inuit* or “Eskimo” from the Strait of Belle Isle, and in the 1500s the Saint Lawrence *Haudenosaunee* (Mohawk).

⁷⁴ *Mikmaq Compact, 1752*, article 5. Cumming and Mickenberg, *supra* note 58 at 307-9. This is the start of the crown’s notion of equalisation payments and a redistributive economy.

⁷⁵ *Mikmaq Compact, 1752*, article 6 These terms are often called annuities. These provisions were contractual considerations by the English settlements for trading rights with the *Mikmaki*.

⁷⁶ R.R. Garet, “Communality and Existence: The Rights of Groups” (1983) 56 Southern California Law Review 1001.

The *Nikmaq* of the Míkmaq Nation spoke similar languages and lived in similar maritime and forest environments. The allies had consensually united and disunited with the Míkmaq Nation according to more immediate needs. Sometimes they cooperated in “raids” against common enemies, particularly against the Mohawk and the “*Armochiquois*.”⁷⁷ The existence of the random raids was of less interest than the purposes behind the raids. The rationale was not for territorial acquisition or wealth, but rather that resort to group force was allowable to end a conflict or enforce customary trading laws. The *Nikmanen* problem was not to negotiate peaceful interludes between raids but rather to maintain a peace based on mutual harmony and honour.

The Europeans were careful to record the Míkmaq’s *Nikmanen* or transnational confederations.⁷⁸ Confronted with a well populated land, an organised government and economic order, the Europeans were forced to adjust their concepts of law and rights to deal with an allied peoples and the system that sustained the alliances. The law of *Nikmanen* governed the relations between their allies and other First Nations, which they extended to accommodate the Europeans’ presence.

The welcome of Europeans in the Algonquian order, allowing for their different visions of order, law and justice, probably forced both parties to reconsider respective political and legal ideas that might lead to a universal, if elementary, code for human interaction. By asking how to regulate the activities of individuals, this search raised the moral question of how European governments and laws ought to interact with North and South American First Nations. The search helped to inspire development of the international rule of law and universal human rights.⁷⁹

From a *Nikmanen* perspective, relations with Europeans were part of a continuing process of trying to sustain peace, or at least staying neutral, in European imperial conflicts, since they seemed to be constantly at war. Even the European need to try to take credit for victory when the war ended was viewed as a source for disharmony. While initially drawn into the process, under *Nikmanen* law a military victory required the victor to give presents and share with the losing party, to satisfy the reality that both parties had breached the law. Like domestic law, *Nikmanen* law did not view aggression as justifiable, even if unavoidable. They had no view of defeat, nor did they view such a category as more than a cycle of temporary changes. Peace and harmony were the norm, not a lofty ideal, so self-discipline and forgiveness had to include the giving of presents and satisfactions after military raids, to encourage

⁷⁷ A. Morrison, ed., “Membertou’s Raid on the Choacoet Almouchiquois: the Micmac Sack of Saco in 1607” in *Papers of the Sixth Algonquian Conference*, W. Cowan, ed., (Ottawa: National Museums of Canada, 1975). These members of the Wabanaki Confederacy were named by Champlain and lived from the Saco River in extreme southwest Maine to Cape Cod. They were primarily an agricultural people with whom the Míkmaq traded.

⁷⁸ Jesuit Relations, *supra* note 5 at 87, 90-91.

⁷⁹ Francisco de Victoria, *De Indis et De Jure Belli Relectiones*, ed. by Nys (Washington, D.C.: Carnegie Institution, 1917). Reclaiming these traditions in the modern context is the purpose of M.E. Turpel (*Ani-Kwe*), particularly in her article “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-1990) 6 *C.H.R.Y.B.* 3-45. Also, see Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas: 1492-1992* (Vancouver: Douglas & McIntyre, 1991).

good feelings, amity, and international harmony. Needless to say, this worldview often confused English negotiators, who defined peace in terms of submission and reparations from the defeated.

The Míkmaq First Nations, like most First Nations conceived treaties as living agreements rather than mere documents. Often the cordiality of the discussion was seen as more important than the substance of the terms. Propositions were made orally at conferences and agreed to one by one with the exchange of symbolic gifts. The agreements created a permanent, living relationship beyond the particular obligations or rights. Typically this relationship was expressed in terms of kinship—the English king as “father” and the colonists as “brothers.”⁸⁰

To preserve the kinship, as within a natural family, the Míkmaq and the English representatives were obliged to meet routinely from time to time to renew friendships, reconcile misunderstandings, and share each others understandings, experiences and resources. Thus most of the treaties were in reality renewal ceremonies. In documentary form these ceremonies mostly consisted of a transcript of the proceedings and the substance of the agreement summarising the nature of the international kinship, often characterised by the metaphor of the chain. By European standards the agreements could be unnervingly succinct or vague, but this was not the result of some failure to agree or of naiveté. It was the result of abiding by the Algonquian worldview, languages and protocols, by the acceptance by the British crown of the flexible, kin-like nature of the confederation with the First Nations. These treaties did not place the First Nations under the crown or under the immigrant governments, reflecting as they did the Aboriginal view of lawful order and procedure.⁸¹ The proceedings and treaties cannot be accounted for solely on the basis of English or French, common or civil, laws, or *Nikmanen* law. The terms of the treaties drew upon the practices of all parties; thus the modern Supreme Court of Canada has characterised them as *sui generis*.⁸²

The *Míkmaq Compact (1752)* illustrated the tenacity of the Míkmaq to apply their customary doctrine of forgiveness to a totally different normative world. For example, Article 2 stated that:

all Transactions during the Late War on both sides be buried in Oblivion with the Hatchet, and that the said Indians shall have all favour, Friendship & Protection shewn them from this His Majesty's Government.⁸³

⁸⁰ This was a common treaty practice. J.G.A. Pocock, “Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi” (Irdell Memorial Lecture, Department of History, University of Lancaster, 10 October 1991).

⁸¹ See, H.F. De Puy, ed., *Bibliography of the English Colonial Treaties with the American Indians* (New York: AMS Press, 1971); A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords Clark & Co., 1880); B. Wildsmith, “Treaty Responsibilities: A Co-Relational Model” (1992) *University of British Columbia Law Review* 324; B. Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) *Osgoode Hall Law Journal* 681, at 683-684.

⁸² *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sioui* [1990] 1 S.C.R. 1025.

⁸³ Compare with similar concepts in the Wapapi Akonutomakonol. See, Robert M. Leavitt and David A. Francis, eds., *Wapapi Akonutomakonol: The Wampum Records* (Micmac-Maliseet Institute, University of New Brunswick, Fredericton 1990).

Life in this new legal world required each party to know not only the meaning of the alliance and its terms, but also what resulted when two normative systems were passing through each other.⁸⁴

Although the Mikmaq Nation affiliated with the British crown, it was as an independent equal. The treaties did not diminish their international status or their customary law. The imperial crown affirmed and acknowledged this relationship and status. The Aboriginal purpose for the treaties was to acquire stability and harmony for the Mikmaq. They were seeking security for their way of life, not domination. Accordingly, their protected domestic jurisdictions were recognised according to the laws of nature, by custom and affirmed by their treaties. These inherent rights continued within Aboriginal jurisdictions unless expressly transferred to the crown. Treaty federalism united independent Aboriginal nations under one Crown, but not under one law.

The *Nikmanen* order and the treaties, the “great King’s Talk” displayed four distinctive characteristics of the Mikmaq legal mind: a fondness for consensual jurisdictions; a quest to share peace and friendships through insular, collective autonomies; an abhorrence of violence and war as an aberrant condition; and a flexible respect for legal pluralism. These traits predated the Anglo-French arrivals and grew from a Mikmaq empirical methodology, based on a collective experience that could not be reduced to documents negotiated with a never to be seen monarch across the ocean.⁸⁵

IV. Many Clouds, No Rain

The core of the colonial régime’s policy after the treaty era increasingly became an attempt to terminate Aboriginal and treaty rights,⁸⁶ to eliminate any multiplicity

⁸⁴ J. Y. Henderson, “The Status of Indian Treaties in International Law” in Proceeding of the 1993 Conference of the Canadian Council of International Law, Aboriginal Rights and International Law, (Ottawa: October 21-23, 1993) at 132; See, Charles Alexandrowicz, *The European-African Confrontation: A Study in Treaty-Making* (Leiden: Sijthoff, 1973); Charles Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967); Felix F. Cohen, *Federal Indian Law* (Charlottesville: Bobbs-Merrill, 1942); Sir Mark F. Lindley, *The Acquisition of Backward Territory* (New York: Negro Universities Press, 1969); Morris, *supra* note 81.

⁸⁵ By the law of the constitution of Great Britain, the imperial crown acted as the representative of the nation in the conduct of foreign affairs, and what was done in such matters by the royal authority was the act of the whole nation, binding in general upon itself without further sanction. Treaty negotiations were conducted by agents appointed by the crown. In concluding a treaty, the crown always acted in its sovereign character and never as agent or trustee for any of its subjects, unless it expressly declared itself to be so acting. Anything done in such manner without the royal authority was merely the act of private persons: 8 *Halsbury’s Laws of England* 984-85, citing Blackstone, *Commentaries*, 14th ed., vol. 1 at 252, 256. Lord Arnold Duncan McNair stated in this *Law of Treaties* (Oxford: Clarendon Press, 1961) at 54, that the United Kingdom courts have dealt with initial treaties made with Native tribes “in the same way as they would have dealt with a treaty with a foreign state”. See also Reiff, (1936) 30 *American Journal of International Law* at 67-69.

⁸⁶ See, H.A. Bulhan, *Frantz Fanon and the Psychology of Oppression* (1985); A. Memmi, *The Colonizer And The Colonized*, trans. Howard Greenfield (1st ed. New York: Orion Press, 1965); Frantz Fanon, *The Wretched of the Earth*, trans. Constance Farrington (New York: Grovenors Press, 1965); J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization*, (Toronto: McClelland & Stewart, 1986); P. Moynihan, “The Decolonization of Modern Law: Dismantling the Relation

of laws. The problem was one of power, not law. Canada was born under the assumption that society can be imagined and created by humans. Colonialism rejected any expression of society as part of the ecosystem.

Colonial law as applied to First Nations people justified itself as based on a superior and privileged understanding of one race over the other. It treated Aboriginal law as a primitive nihilism, based on a state-of-nature premise that lacked the substance of the English common law tradition.

Any resistance by the First Nations to colonial law, any insistence that the colonists live up to crown promises by allowing them to live according to their own laws, turned the colonial courts into instruments of repression. Legislative bodies and the courts, armed with no inherently superior interpretive insight, no necessarily better law than that of First Nations customs and their treaties, acted as institutional guarantors for the colonial order. All First Nations were excluded from the electorate and any other inclusory forms of political participation and citizenship. Rather than implement treaty obligations, the federal and provincial legislatures attempted to destroy the First Nations and Métis societies and their legal system.⁸⁷

In the Míkmaq context, for example, in 1929 the county court of Nova Scotia held in *R. v. Syliboy* that Míkmaq were never regarded as an independent power capable of making treaties, because they were savages.⁸⁸ The *Syliboy* precedent defined the extreme but logical credo of colonial law in Canada. Even though it was a decision of an acting justice in a county court, it achieved the respect of the Judicial Committee of the Privy Council in London and was reported in the first *Dominion Law Report* of Canada. Thus, the *Mikmáki* became a non-treaty area and the Míkmaq were denied their Aboriginal and treaty rights, forcing them deeper into poverty and despair.

The case was overruled in 1985, when the Supreme Court of Canada reversed this interpretation of the 1752 treaty.⁸⁹ Chief Justice Brian Dickson, speaking for a unanimous Court, overruled the colonial precedent that held “[t]he savages’ right of sovereignty, even of ownership, were never recognized” by the crown or international law. He further rejected Judge Patterson’s holding that the Míkmaq of Nova Scotia lacked the legal capacity to make treaties as an independent party. The Court recognised such law for what it was: rooted in the biases and prejudices of another era in Canadian law, inconsistent with a growing sensitivity to Native rights in Canada and unconvincing as a matter of substantive law.⁹⁰

between Race and Liberal Law” (1993) 8 Canadian Journal of Law and Society 191-203; “The Native American Struggle: Conquering the Rule of Law. A Colloquium” (1993) 20 New York University Review of Law and Social Change 199-415; R.N. Clinton “Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law” (1993) 46 Arkansas Law Review, at 77-159.

⁸⁷ *Indian Self-Government in Canada: Report of the Special Committee on Indian Self-Government* (Ottawa: Queen’s Printer For Canada, 1983) Chapter 2, 11-24; R.L. Barsh “Indian Law: Indian’s Law and Legalism in American Indian Policy: An Essay on Historical Origins”, D.E. Green and T.V. Tonnessen, eds., *American Indians’ Social Justice and Public Policy* (Madison: University of Wisconsin, 1991) 8-43.

⁸⁸ [1929] 1 D.L.R. 307 at 313, 50 C.C.C. 389 (Nova Scotia County Court).

⁸⁹ *Simon*, *supra* note 82 at 399.

The legal sensitivity to Native rights has come within section 35(1) of the *Constitution Act, 1982*.⁹¹ The new Canadian recognition affirmed existing, ancient customary rights of the Natives peoples, as well as of their treaties with the imperial crown. Section 35 (1) simply stated:

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

For Natives peoples of Canada, section 35(1) established the borderline between a demeaning colonial law and post-colonial law. It was a reaffirmation of the Aboriginal order and the treaties. It is a complete circle, back to the original foundations of Canada.

Section 35(1) was the first explicit provision in Canadian law giving legal force to these treaties. Lord Denning had ruled that this section transferred the treaty obligations of the imperial crown to Canada. British courts, however, refused to pronounce upon the contemporary nature and extent of Aboriginal and treaty rights, because to do so would be to assert jurisdiction over Canada. Thus the obligation of pronouncing on treaty rights was vested in the Canadian courts.⁹² The Supreme Court of Canada acknowledged in *Sparrow* the colonial legal mentality.⁹³

And there can be no doubt that over the years the rights of the Indians were often honoured in the breach in *Pascoe v. Canadian National Railway Co.* ... We cannot recount with much pride the treatment accorded to the native people of this country.

For many years, the rights of the Indians to their aboriginal lands—certainly as *legal* rights—were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights

The Court continued by quoting from an *Osgoode Hall Law Journal* analysis that

... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that was accumulated by 1982. Section 35 calls for just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

Aboriginal and treaty rights were the original contexts for constitutional alliances that constructed a colonial Canada. Section 35(1) affirmed both customary indigenous rights (Aboriginal rights) and positive law rights (treaty rights) as enduring,

⁹⁰ *Ibid.*

⁹¹ April 17, 1982, *Canada Act 1982*, c. 11 (U.K.), Schedule B, in Part II entitled "Rights of the Aboriginal Peoples of Canada". see K. McNeil, "The Constitutional Rights of Aboriginal Peoples of Canada" (1982) 4 *Supreme Court Law Review* 255.

⁹² *The Queen v. Secretary of State for Foreign and Commonwealth Affairs* [1981] 4 C.N.L.R. 86 (Eng.C.A.); *Manuel v. A.G. of England* [1982] 3 C.N.L.R. 13 (Eng. Ch.D.).

⁹³ [1990] 1 S.C.R. 1075 at 1103, 1106.

inter-related sources of contemporary constitutional law in Canada. Those Aboriginal rights not delegated to the Crown remained in the customary law of the Aboriginal nations. Treaty rights remain written agreements that embody a consensual balance between reserved Aboriginal rights and certain specific delegated rights to the imperial crown. Both sources are an integral part of the supreme law of Canada and afford the Aboriginal peoples constitutional protection against hostile provincial legislative or private exercises of power.⁹⁴

Even after examining the positive elements of the First Nations legal inheritances, and questioning the negative assumptions in much of the colonial law, it is easy for Canadians to conclude that First Nations' legal inheritances remain irrelevant to the modern world. Yet to ask Aboriginal peoples to acquiesce in or accommodate the Eurocentric legal paradigm, in one way and another, is to ask them to deny their own legal inheritances and constitutional rights. At least one prominent legal scholar has noted how the Euro-Canadian legal paradigm is now a disintegrating legal tradition, no longer capable of perpetuating the colonial rule of law.⁹⁵ At the same time, judicial decisions⁹⁶ and inquiries⁹⁷ into the Canadian legal system have shown that Aboriginal peoples have been and are still victimised by the existing legal systems and those who control them. Faced with this colonial legacy, little reason exists for First Nations to validate their oppression.

Modern Canadian lawyers can no longer ignore the sense of disintegration within the colonial legal traditions that exists now in the post-colonial legal order. We belong to a period of both colonialism and resistance against it. We have a theoretical avoidance of the colonial contamination of Aboriginal law, and an Aboriginal discourse of suspicion and shame about the legal order that made them prisoners in their own land. Quests for a Canadian identity, as in most other post-colonial societies, have centred on a search for new ways to define national and political integrity, identity and authenticity.⁹⁸ Post-colonial legal theories and societies struggle to become free from a shared past of domination, oppression and intolerance that stressed assimilation to a single standard of law and identity. If Canadian lawyers, judges and legislators are to create an integral jurisprudence that meets the needs of all Canadians, they must accept post-colonial legal pluralism. Inherent in such a jurisprudence is one that can accept the languages, values, customary laws and

⁹⁴ *Ibid.* Also, see: Simon and Sioui, *supra* note 82.

⁹⁵ H. Berman, *Law And Revolution* (Cambridge: Harvard University Press, 1983) at 33-45. See also R.M. Unger, *Politics: A Work in Constructive Social Theory* (Cambridge: Cambridge University Press, 1987).

⁹⁶ Simon and Sioui, *supra* note 82, and Sparrow, *supra* note 93. Also see Wildsmith, *supra* note 81.

⁹⁷ *Royal Commission On the Donald Marshall, Jr., Prosecution: Commissioner's Report; Findings and Recommendations* (Halifax: The Commission, 1989); *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: The Inquiry, 1991); *Justice On Trial: Report Of the Task Force On the Criminal Justice System And Its Impact On the Indian And Métis People Of Alberta* (Edmonton: The Task Force, 1991); *Report Of The Saskatchewan Indian Justice Review Committee* (Saskatchewan: The Committee, 1992).

⁹⁸ B. Ashcroft, G. Griffiths and H. Tiffin, eds., *The Empire Writes Back: Theory and Practice in Post-Colonial Literature* (New York: Routledge, 1989).

treaties of Aboriginal peoples. An authentic Canadian law will accept and encourage the First Nations' right to restore their own legal systems, within a broad Canadian framework. With each generation the Occidental and Oriental immigrants' descendants can move closer to understanding the Aboriginal conceptualisation of the sacred ecological order. Ancient spirits continue to invite them into new realms, into new certitudes, that will further affirm First Nations legal inheritances.