

COMPARATIVE ANALYSIS OF CANADIAN LAW, ABORIGINAL LAW AND CIVIL LAW TRADITIONS

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I Introduction

When Canada was colonised, the British common law was applied to the inhabitants of Canada. The purpose behind colonialism was to rid the country of Indian people. Duncan Campbell Scott spoke to Parliament in 1920 and stated that '[o]ur object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question.'¹

Aboriginal people² in Canada have historically and continue to endure numerous and horrific harms resulting directly from the imposition of the common law that rigorously and relentlessly delivers policies of colonisation and assimilation. Aboriginal life has been dramatically altered economically, politically and socially. In present day society, the harms inflicted are reflected within the disproportionate levels of incarcerations, poor health, unemployment, poverty, addiction and violence statistics that are the realities of Aboriginal life in Canada.

In spite of the disproportional status, Aboriginal people hold special constitutionally entrenched rights. Aboriginal and treaty rights are recognised and affirmed in the *Canada Act 1982 (UK)* ('*Constitution Act 1982*'). The Supreme Court recognises the constitutional supremacy of these rights and has provided principles for the legislature, governments and lower courts to follow. Aboriginal and treaty rights are remarkable sets of rights that recognise Aboriginal people as distinct rights bearing holders of unique customs, practices and traditions. Moreover, these rights are constitutionally entrenched as the Supreme law of Canada. However, 25 years have elapsed since the Constitution of Canada was amended. In light of these incredible rights, Aboriginal people still suffer disproportionately.

This paper will use a comparative law approach (civil law, common law, Aboriginal law) with an eye to providing insights to some of the legal flaws in the common law that have adversely affected Aboriginal people in Canada. It is suggested that although civil law provides much needed principles that can benefit a common law analysis, when applied within the Indigenous legal traditions, civil law does not carry the same constitutional status. Therefore, it is impossible to reconcile with the *sui generis* nature of Aboriginal and treaty rights jurisprudence in Canada and therefore cannot offer a relative alternative. Alternatives from the civil law traditions will then be canvassed for assistance while they are compared with the existing common law and Aboriginal law.

Part One of the paper will look at historical matters and principles that govern Aboriginal legal traditions through an examination of the development of Aboriginal laws in general and the development of some specific Aboriginal laws. Their contemporary relevance will be noted. The process of colonisation will be examined through the imposition of the British common law and is an attempt to reconcile Aboriginal laws with British common law.

Part Two will examine broad general principles of the European Civil Codes through an examination of its history. Specific general principles will be examined to assess if the applicability of certain principles would assist in addressing the legal problems that face Aboriginal people in Canada today.

Not only will the constitutional entrenchment of (*sui generis* nature) Aboriginal and treaty rights in a civil and common law system be explored, but a multi-juralistic approach may provide a solution to the problems Aboriginal people face in Canada.

II Part 1: Principles of Legal Traditions

Professor John Henry Merryman describes a legal tradition as:

... a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.³

Law tells stories about the culture that shaped it. These stories are entrenched in a legal system and influence how legal norms are created and applied in the system and how facts are translated into language and concepts of law. Laws affect ones' daily life through these stories as much as the specific rules, and standards that comprise it.⁴

Comparative law is used as a technique to help explore and question a legal system; it is an instrument to help a legal system improve. Comparative law understands that to focus clearly on the issues; one must step back and view them from a distance:

When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation.⁵

Comparative law is the migration of ideas between systems and is a 'fertile source of legal development'.⁶ Comparative law borrows other country's legal ideas, systems and subsystems from inside and outside the law.⁷

When comparative law is used to assist in solving a particularly troublesome problem, it isn't the idea that a specific solution will be found, but a deeper understanding of the problem will result or perhaps a source of inspiration for solving the problem will result. 'Comparison often picks up issues or makes connections that remain invisible to other research strategies', and is used to expand the legal theatre of observation.⁸ It follows then that a critical evaluation must be completed to analyse these important discoveries.

Legal pluralism is 'the simultaneous existence within a single legal order of different rules applying to identical situations'.⁹ This term is used to refer to all situations where a body of law interacts with another system of norms, whether or not that system is designated as law.¹⁰ Canada is, at least at the theoretical level, legally pluralistic. Civil law and common law organise laws in different ways even though there are, at first glance, seemingly similarities amongst them. Canada as a juridical pluralistic state provides the courts with opportunities to draw on varied sources of law to sustain order.

At times, the results of the applications will be the same. For English common law, its development is historically grounded within the influences of continental Europe.¹¹ Every legal system in the world has some characteristics affiliating it with civil law or the common law.¹² The features that define it are of European origin making these bodies of law Eurocentric in nature (particularly when one examines Aboriginal law in Canada).

A Development of Aboriginal Laws

Aboriginal law was given by the Creator through sacred ceremonies and is binding and unalterable. The promises and agreements encompass sacred principles, values and laws that are to govern every relationship and interaction. The law not only informs relationships among humans, but with all ecological orders.¹³ Accordingly, Aboriginal law has been described as follows:

Powerful laws were established to protect and to nurture the foundations of strong, vibrant nations. Foremost amongst these laws are those related to human bonds and relationships known as the laws relating to *miyo-wicêhtowin*. The laws of *miyowicêhtowin* include those laws encircling the bonds of human relationships in the ways in which they are created, nourished, reaffirmed, and recreated as a means of strengthening the unity among First Nations people and of the nation itself. For First Nations, these are integral and indispensable components of their way of life. These teachings constitute the essential elements underlying the First Nations notions of peace, harmony, and good relations, which must be maintained as required by the Creator. The teachings and ceremonies are the means given to First Nations to restore peace and harmony in times of personal and community conflict. These teachings also serve as the foundation upon which new relationships are to be created.¹⁴

The many laws of Aboriginal people in Canada differ and are as diverse and varied as other nations throughout the world. In Canada, Aboriginal people speak over 50 different languages and have traditions, customs and laws which are historically different. The history of each First Nation, Inuit community or Métis community can be traced to their various regions or territories they originated from. Large differences existed then (and now) between Aboriginal people and as a result, all have developed different customs and conventions to guide their relationships. These customs and relationships then became the foundations for the various complex systems of Aboriginal law.¹⁵

Professor John Borrows comments:

To make laws, Indigenous peoples draw upon the best legal practices and procedures of their own culture, and of others. They compare, contrast, accept and reject legal standards from many sources, including their own. Indigenous law is a living system of social order and control. Some might call this revisionist, and thereby seek to undermine Indigenous governance and law. This criticism would be unfortunate and inaccurate. Law and governance is strongly revisionist, as it must be continually re-interpreted and re-applied in order to remain relevant in changing conditions. Law can become unjust and irrelevant if it is not continually reviewed and revised. Indigenous law is no different, and should not be held to higher standards.¹⁶

Although there is significant written material on Aboriginal laws, it has been largely left out of the development of Canadian law.¹⁷ There are many reasons that Aboriginal laws have been omitted from Canadian law, including the fact that common law has been recorded in writing while Aboriginal law passed from generation to generation through storytelling and oral tradition. Further, the common law evolved in a foreign culture while Aboriginal people and non-Aboriginal people developed culturally along separate paths without a shared past. A racial superiority (coloniser/colonised) may have surpassed any wonder felt by the first entrants to North America as the laws of the land, values or culture were generally thought of as uncivilised, devalued and forcibly swept away through assimilation policies by the Canadian government.

The Supreme Court of Canada has underscored:

[W]hen Europeans arrived in North America, aboriginal peoples *were already*, here living in communities on the land, and in participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates [A]boriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now, constitutional status.¹⁸

At the time of colonisation there were Indian nations, organised at different levels into hundreds of bands. Professor Sidney Harring comments:

Aboriginal people had their own laws and legal institutions, but these traditions were bound up with all other aspects of their societies. Law, leadership, religion, family, band and national structures, and economic activity were not differentiated the way they were in British and European societies.

...

Indigenous laws and legal traditions varied widely from nation to nation but were often characterized by an integrative and meditative quality designed to resolve disputes efficiently and restore traditional relationships.¹⁹

Author Rupert Ross explains that the Salish people of British Columbia had common threads of dispute prevention and resolution, respect and a minimalisation of open dispute. As to the Dogrib people of the north '[t]he traditional legal system ensured that people understood what the rules were and that they were expected to follow the rules, that is, socialization ensured that the rules were the base for the normative way of behaving.'²⁰

James Dumont in his *Round Table Report on Justice for the Royal Commission on Aboriginal People ('RCAP')* comments on the Anishabek people and the law:

The Anishinabe justice system is one that leans toward wise counsel, compensation, restitution, rehabilitation, reconciliation and balance, rather than obligatory correction, retribution, punishment, penance and confinement. As a people whose spirit and psyche revolves around a core of vision and wholeness that is governed by respect, it is natural that a system of justice be evolved that, in desiring to promote and effect right behaviour, not only attends to balance and reconciliation of the whole, but does so by honoring and respecting the inherent dignity of the individual.²¹

In relation to the Cree people in Central Saskatchewan:

Long ago if someone in your community did something wrong, an Elder would go and talk to him or her. After this if they continued to do their harmful actions then two Elders would go and see him or her. If this didn't work then the Warrior Society was sent to see them. This time if this didn't work then the whole community would go to the person's teepee and destroy everything they had. After this if he/she felt sorry for them - the things they done then the community would help replace everything that they destroyed. If this didn't work then there would be banishment or outright death.

The person who has done wrong had many chances to make things right- their wrongs, if they didn't take responsibility for their own actions they would face dire consequences. We also see that the whole community was involved in helping this individual learn from their mistakes and stand by them and help them rebuild their lives.²²

In the following section the laws of three specific groups of Aboriginal people are examined: Haudenosaunee, Métis and Inuit. They are a small representation of only three Aboriginal groups noted in the *Constitution Act 1982* (Indian, Métis and Inuit). These Nations are representative and illustrative of the complexity of Aboriginal laws in Canada, although they do not represent the sum total of all Aboriginal laws nor of all Aboriginal people.

B Some Specific Written Aboriginal Laws

(i) The Iroquois Confederacy and the Great Law of Peace, *Kaianerekowa*

The Haudenosaunee people (also known as the Iroquois Confederacy) historically lived in Ontario, Quebec, New York and Wisconsin. The Iroquois Confederacy consists of the original five nations: the Mohawk, Oneida, Onondaga, Cayuga, and Seneca plus the Tuscaroras who joined in 1722.²³

The basic societal values of the Haudenosaunee people include respect, reasoning, fairness, caring, citizenship, integrity and co-existence. In 1807, Chief Joseph Brant wrote the following on Haudenosaunee laws:

Among us we have no prisons, we have no pompous parade of courts; we have no written laws, and yet judges are revered

among us as they are among you, and their decisions are as highly regarded.

Property to say the least, is well guarded, and crimes are as impartially punished. We have among us no splendid villains above the control of our laws. Daring wickedness is never suffered to triumph over helpless innocence. The estates of widows and orphans are never devoured by enterprising sharpers. In a word, we have no robbery under the color of law.²⁴

These values were transferred into a complex and sophisticated set of written laws called the Great Law of Peace or *Kaianerekowa*. This set of laws brought all six nations of the confederacy together and had a large impact on the democracy of the United States and on Indigenous peoples in Canada and the United States.²⁵ Today, The Great Law of Peace²⁶ is known as one of the world's greatest legal codes, as a 'testament to the power of human creativity and accomplishment'.²⁷

(ii) Métis Laws

As the Métis people of Canada were born from two distinct cultures, European and the First Nations people of Canada, the traditional laws were mixed between the two lifestyles and evolved with everyday practicalities. Although many Métis followed the traditional ways and laws of the Indian people, others were influenced by their European brothers and sisters as the Métis culture, language, political identities and legal traditions evolved. Métis laws and social control methods practiced by the Métis were determined by their traditions, culture and worldviews. When the Métis entered Confederation with the Dominion of Canada in 1870, their laws were already over a century old.²⁸ The Métis were crucial to the opening of the west and the fur trade and were integral to the Red River Buffalo Hunts in the early 1800s.²⁹ The purpose of the Buffalo Hunt Law was to bring order to their economic and social activities. The Métis enacted laws, rules and regulations around the buffalo hunt which became the 'Laws of the Prairie' and the beginning of law enforcement in the area and were later adopted by the North West Mounted Police.³⁰ The codified version of the Buffalo Hunt Law states:

1. No buffalo to be run on the Sabbath day;
2. No party to fork off, lag behind, or go before, without permission;

3. No person or party to run buffalo before the general order;
4. Every captain with his men in turn, to patrol the camp, and keep guard;
5. For the first trespass against these laws, the offender to have his saddle and bridle cut up;
6. For the second offence, the coat to be taken off the offender's back, and be cut up;
7. For the third offence, the offender to be flogged;
8. Any person convicted of theft, even to the value of a sinew, to be brought to the middle of the camp, and the crier to call out his or her name three times, adding the word 'Thief', at each time.³¹

Hundreds of families would be involved in the hunt as well as their Red River carts, horses and equipment for processing and preserving the meat and hides. It is also important to note that there were many oral and customary laws that regulated the hunt and other aspects of Métis life including laws on family, trade, political organisation, trade and land use.³²

The Métis people were crucial to the progress of Canada and to the creation of the *Manitoba Act 1870*.³³ Métis law was important to the development of Canada and established a democratically elected government in St Laurent, near Batoche.³⁴ Métis legal traditions are a strong and important part of Canada's legal inheritance. Their laws have survived in customary form, and still have political and practical relevance today.³⁵

(iii) Inuit Law

The Inuit people live in the Arctic in regions of Canada, Alaska, Siberia and Greenland. Currently the Inuit people are implementing their legal traditions in contemporary laws resulting from their land claims agreement and powers of public governance in Nunavut.³⁶

Zebedee Nunguk in RCAP comments on the traditional laws of the Inuit people:

The bulk of disputes handled by the traditional ways pre-contact mostly involved provision of practical advice and persuasive exhortation for a correct and proper behavior, which were generally accepted and abided by. In more serious cases, offenders were ostracized or banished from the clan or group. In these cases, the ostracized or banished

individuals were given no choice except to leave the security and company of the group which imposed this sentence. The social stigma of having such a sentence imposed was often enough to reform or alter the behavior which was the original cause of this measure, and people who suffered this indignity once often became useful members of society, albeit with another clan in another camp. Our oral traditions also abound with stories of such people who went on to lead lives useful to their fellow Inuit as providers, and in some cases, leaders of their own groups or clans. It can be said that Inuit were completely self-sufficient in this aspect of their lives, as they were in every other respect, prior to the arrival of other peoples in their homeland. This was the practice when Inuit culture was still untouched by outside influences, and the culture and language was strong. Inuit possessed a very strong sense of adequacy which was honed by the constant struggle for survival in the most unforgiving and harsh climate on earth. Survival and sustenance of the collective was the primary factor which dictated the decisions of a justice and dispute resolution nature. There was, moreover, no question about who had the responsibility to make such decisions. The Elders and the most able providers were the undisputed leaders and arbiters of resolving conflict when it arose in the traditional life of the Inuit.³⁷

Among the most important legal terms in Inuit law are *maligait*, *piqujait* and *tirigusuusiit*. *Maligait* refers to things that have to be followed. It is a relational term focusing on the result of a request (the obligation to obey). *Piqujait* deals with things that have to be done. *Tirigusuusiit* refers to things that have to be avoided. If a person transgresses *tirigusuusiit*, they will face consequences from their actions.³⁸

Today, the Nunavut Territorial Government is one of the most important institutions implementing Inuit legal traditions in Canada. The government has taken guidance from *Inuit Qaujimajatuqangit*³⁹ to structure its legislative and administrative agenda and actions by referring and incorporating Inuit legal traditions and principles in the legislature and throughout its regulations and legal proceedings.

(iv) Summary

It is evident that a fully functioning social order with traditional laws existed prior to the imposition of the British common law and the Civil Code of Quebec⁴⁰ in Canada. These laws are still being applied in various contemporary

contexts today. The content and meaning of the various laws of the individual Indian Nations in Aboriginal legal history is important. Although many have been written, either in whole or part, in English, these can only be fully known by oral tradition through the Elders in their respective languages and Nations. Pieces of this history have been studied and written about in shards and are continually evolving with changing conditions. The fur trade altered traditional law of property as Indian Nations became commercial trappers and traders. The British common law and Aboriginal laws are two separate legal orders, but noted are the receptions and responses of each, for instance the negotiations of the legal status of Six Nations lands by Chief Joseph Brant where each attempted to reach a compromise that would protect (sic) traditional laws and culture and allow both societies to live alongside each other. Further, the Treaty negotiations were a place where two sets of laws met and attempted a compromise that would protect traditional laws and lands. As Canadian officials increasingly wielded their powers, the Indian people learned how to respond to the same. However, an imbalance was noted early:

This is a miserable legal history of oppression, violence and domination. Indigenous people were victims of every kind of legal violence, fraud and theft. They lacked the education and means to use the civil courts to protect their interests. This legal chicanery was the subject of a number of official reports in the nineteenth century Upper Canada (Ontario) and the Maritimes.⁴¹

As typified by the Haudenosaunee, the Métis and the Inuit nations, strong legal systems were in place within the Aboriginal communities in Canada prior to contact/control by the British. While some laws were in written form, the source and the bulk of legal order was grounded within the oral traditions which, in turn, informed the written laws. Diverse Nations with various customs, practices and traditions maintain common threads that govern their relationships. Principles of respect, community involvement and restoration of harmony are but a few common principles. Indigenous peoples' laws hold modern relevance for them and for others. While the laws have ancient roots, they speak to the present and future needs of not just Indigenous people, but all Canadians in the Aboriginal law, common law and civil law traditions. Indigenous legal orders contain guidance about how to live peacefully in the world, how to create stronger order and how to overcome conflict.

C Colonisation

(i) Application of the English Common Law

Unlike the laws of Aboriginal nations, the British common law developed through the legal traditions of the Romans, the Normans, church canon law and Anglo-Saxon law.

When Canada was colonised, the British common law was applied to the original inhabitants of Canada. Colonialism became the main force behind the spread of a pluralistic legal system. Aboriginal people and non-Aboriginal people were subject to different laws.⁴² The *British North America Act 1867* ('*BNA Act, 1867*')⁴³ was the original legislation that provided for the formation of the Dominion known as Canada. The distribution of legislative powers between the federal and provincial governments was listed in ss 91 and 92 of the *BNA Act 1867*. 'Indians, and Lands reserved for the Indians' fell within the legislative authority of the Parliament of Canada pursuant to s 91(24) of the Act. The Parliament of Canada continues to have legislative authority over 'Indians, and Lands reserved for the Indians'. The operative federal legislation is through the *Indian Act*.⁴⁴

Colonisation is a process that was imposed with the industrialising of North America and continues to exist today in the marginalisation of Aboriginal people in Canada. For example, Sharlene Razack describes a 'white settler society' as one that is established by Europeans on non-European soil. In its origins lay the dispossession and near extermination of Indigenous populations by Europeans. As it evolves, a white settler society continues to be structured by a racial hierarchy. In the national mythologies of such societies, it is believed that European people came first and that it is they who principally developed the land; Aboriginal peoples are presumed to be mostly dead, dying or assimilated. European settlers thus became the inhabitants most entitled to the fruits of new lands, unimagined wealth, power, human (slavery) and natural resources.⁴⁵ In addition, an imperial vocabulary developed in the nineteenth century with words and concepts such as 'inferior' or 'subject races,' 'subordinate peoples,' 'dependency,' 'expansion,' and 'authority.'⁴⁶ Razack explains that:

[a] quintessential feature of white settler mythologies is therefore, the disavowal of conquest, genocide, slavery,⁴⁷ and the exploitation of the labour of peoples of colour. In North America, it is still the case that European conquest

and colonisation are often denied; largely through the fantasy that North America was peacefully settled and not colonised.⁴⁸

In North America, the settlers were the people who invaded the land and had their identity, beliefs, standards and culture maintained and solidified in the institutions of the lands that they invaded.

From a global perspective, Taiaiake Alfred and Jeff Corntassel comment:

There are approximately 350 million Indigenous peoples situated in some 70 countries around the world. All of these people confront the daily realities of having their lands, cultures, and governmental authorities simultaneously attacked, denied, and reconstructed by colonial societies and states. This has been the case for generations.

...

[In Canada] the results are measured in losses of cultural identity, marginalization and health status that fall well below that of mainstream Canadians.⁴⁹

In Canada, the intent behind colonisation was to subjugate, by force if necessary, take possession of the land, assimilate the people through forced religious indoctrination, and promote adherence to Western society's norms, rules, organisation, and ways of living and thinking. Assimilation was the goal in attempting to colonise Aboriginal peoples, and the *Indian Act* proved to be a useful and powerful tool. Education played a large role in this assimilation project. Residential schools were a product of the *Indian Act* of 1876, which allowed the Minister of Indian Affairs to control education for Indians. The residential school experience entailed a separation of children from almost all family members. Parents were not allowed to visit their children in residential schools. If children were allowed to return home at all, they were only sent home for two months out of the year.⁵⁰ One of the many diseases that were largely spread in residential schools was tuberculosis, which ultimately reached epidemic levels.⁵¹ Besides the starvation and disease experienced in residential school systems, physical, mental and sexual abuse was rampant.⁵² Sákéj Youngblood Henderson describes the source of colonialism as eurocentrism being a 'dominant intellectual and educational movement that postulates the superiority of Europeans over non-Europeans.'⁵³ The effects of the imposition of the British common law and the resulting

colonisation are measured in losses of cultural identity, marginalisation, social ills and a health status that fall well below that of mainstream Canadians.

D Legal problems - Reconciling Diverse Legal Systems

Aboriginal laws are separate from the common law, and exist in Aboriginal society through daily actions, and through (oral and written) teachings of the Elders and law keepers. They interact with the common law and the civil law and produce sets of obligations for Aboriginal people.⁵⁴ The sources of all laws are derived from the divine, natural, positivistic, deliberate and customary. The source of law determines how a certain set of laws is to be applied. Laws are not frozen in time and Aboriginal laws are not simply a matter of historical significance – they are applied with each subsequent generation in accordance with the social standards of the changing times: the same methods are applied to the common law and civil law.⁵⁵

To determine if the application of the English common law can help address the legal flaws in the common law system, an examination of the placement of Aboriginal and treaty rights in Canadian law must occur. The following section will review the *Constitution Act 1982*.⁵⁶

Since 1982, Aboriginal and treaty rights have been recognised and affirmed by s 35(1) of the *Constitution Act 1982*:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.⁵⁷

This recognition and affirmation of Aboriginal and treaty rights means that these rights are protected by Canada's Constitution,⁵⁸ thereby changing the structure and scope of legislative power. By entrenching Aboriginal and treaty rights in the Constitution of Canada, these rights are given the highest protection by law in the country. As a result, neither the federal Parliament nor the provincial or territorial legislatures can alter the rights of Aboriginal peoples in Canada.⁵⁹

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.⁶⁰

Aboriginal people in Canada have constitutionally entrenched rights that are not possessed by any other individual or group of Canadians. The entrenchment of Aboriginal and treaty rights in the Constitution means that every Aboriginal man, woman, and child carries a remarkable set of constitutional rights.⁶¹ Constitutional rights authorise the fair distribution of power. They limit federal and provincial authority over systems which affect them. Aboriginal people argue that constitutional difference is relevant to the just distribution of services, entitlements and treatment of Aboriginal people as merely 'other peoples' ignores their constitutional rights and creates inequality of services for Aboriginal people.

The constitutional protection extended to Aboriginal and treaty rights stems from s 35 of the *Constitution Act 1982*. Section 35 recognises and affirms existing Aboriginal and treaty rights, as opposed to delegated or conferred rights, and implies that such rights owe their existence to inherent human rights. Human rights are the rights to which all human beings are justly entitled merely by virtue of their being human. (This approach to rights is known as a natural rights approach.) Consequently, according to the natural rights concept, each Aboriginal person equally possesses certain immutable rights by virtue of his or her Aboriginal rights. The Supreme Court has confirmed that it is the duty of a just government to protect these inherent rights. These inherent rights are not dependent upon Canadian law for their existence. The implications of these constitutional rights have not been studied or reconciled by either the federal or provincial governments. As Lamer CJC stated in *Van der Peet*:

... what s.35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights, which fall within the provision, must be defined in light of this purpose ...⁶²

Aboriginal rights are inherent to all Aboriginal people in Canada and are passed down from generation to generation. They are derived from Aboriginal knowledge, heritage and law.⁶³ Aboriginal rights and fundamental freedoms stem directly from recognition of the inherent and inalienable dignity of Aboriginal Peoples. In addition to Aboriginal rights, some First Nations communities possess treaty rights. The Supreme Court of Canada has recognised that Indian treaties constitute a unique type of agreement that attract

special principles of interpretation.⁶⁴ It has defined a treaty as representing an exchange of solemn promises between two sovereign nations – the Crown and Indian nations – whose nature is sacred.⁶⁵ According to the Supreme Court, treaties entrench a legal relationship between the Crown and an Indian nation with the intent to create obligations. These obligations are derived from the intent and context of the treaty negotiations. The controlling premise of treaties is that the parties are only bound by those rules to which they have consented. Treaty obligations and rights result from formal negotiations and explicit consent. Treaties were recorded in the English language, but the Supreme Court has held that treaty rights arise from promises made to the Indian nations by the sovereign's agent during negotiations. Often these rights were not included in the written treaties.⁶⁶

The Supreme Court of Canada has laid out certain principles of interpretation when there may be an infringement of Aboriginal or treaty rights. The courts have seen a number of cases dealing with the duty of consultation. The obligation to consult with Aboriginal Peoples arises out of the trust-like relationship which exists between the Crown and the Aboriginal peoples and the concomitant fiduciary duty owed by the federal and provincial Crown to Aboriginal peoples. This fiduciary duty is incorporated in s 35(1) of the *Constitution Act 1982*,⁶⁷ *Sparrow*,⁶⁸ *Delgamuukw*⁶⁹ and subsequent decisions have held that the Crown has a fiduciary duty to Aboriginal peoples when a government decision or action may have the effect of interfering with an Aboriginal or treaty right, which obligation requires the Crown to consult with the affected Aboriginal peoples.⁷⁰

The Crown's fiduciary relationship with Aboriginal peoples has been described as *sui generis* in nature or of its 'own kind or class'.⁷¹ Legal scholar Leonard Rotman explains that the Crown/Aboriginal relationship is 'rooted in the historical, political, social and legal interaction of the groups from time of contact'.⁷² Fiduciary law, as part of the common law, is also part of the *sui generis* relationship and thus applies when determining if the Crown has breached its obligations to Aboriginal peoples.⁷³

Although the Constitution recognises Aboriginal and treaty rights and the Supreme Court of Canada has recognised their *sui generis* nature, these *sui generis* rights have been constitutionalised. Through the examination of the English common law it is evident that progress since 1982 when Aboriginal and treaty rights were entrenched in the

Constitution, that there have not been substantial changes in the living conditions for Aboriginal people in Canada. The following section will look outside of the common law to the civil law to determine if there are any general principles that may be applied in Canada's situation to help address the legal flaws in the common law system that has created an unjust society for Aboriginal people in Canada.

III Part 2: Principles of Civil Law

A Civil Law Legal Traditions

Civil law tradition has its origin in Roman law and was codified through the *Corpus Juris Civilis* of Emperor Justinian. It is characterised not only by Roman law, but is also influenced by German law and customs, Canon law and Law of the Merchants.⁷⁴ It developed in continental Europe in a highly structured fashion through civil codes. Codification developed particularly in the 17th and 18th century as a response to political ideals. Codification expresses concepts of the rule of law which required certainty, structure and uniformity. The codification of European private laws was completed in 1804 for the Code Napoleon, in 1896 and 1900 for the German Civil Code. These two codes have served as models for most other civil codes.⁷⁵ Many Asian nations fashioned their codes after the German code, for instance Japan and South Korea, the German Code was also introduced into China.⁷⁶

Many areas of the codes are in contrast to the common law, but civil law specifically distinguishes public and private law; commercial and private law. Civil law also places a very high value on legal academics, whose importance flows from the authority of the Commentators of the Roman law period.⁷⁷

While most of Canada follows the common law, Quebec follows civil law. The origins of the Quebec Civil Code stem from the period when New France became a Royal Province in 1663. Canada's civil law originally derived from a decree by King Louis XIV which was amended in 1667, 1678 and 1685.⁷⁸ In 1763, an attempt was made to abolish civil law in New France and the British common law was imposed. This however, proved to be a problem with the French settlers in New France. As a result, the British reinstated the civil law system (for property and civil rights) in the *Québec Act, 1774*. Civil law has survived in Quebec since that time.⁷⁹ Obviously influenced by the 1804 Code Napoléon in France, the *Civil Code of Lower Canada* was enacted in 1866.

Civil law in Lower Canada (Quebec) continued after Confederation in private law matters which was delegated through s 92(13) of the *British North America Act 1867 (UK)*, which gave the provinces exclusive power over 'property and civil rights'. This continued Quebec's legal tradition although the federal government retained jurisdiction over criminal law. In 1955 and 1994 the *Civil Code of Lower Canada* was amended. The new *Civil Code of Québec* contains ten books and includes some concepts from common law.⁸⁰

From a historical perspective, the early 1900's saw the courts, Parliament, and legislatures outside Quebec paying very little attention to civil law within Quebec. It was said that the influence of the common law was appearing in the judicial interpretation of civil law of Quebec.⁸¹

In some Supreme Court of Canada decisions it appeared that civil law was in danger of being absorbed into the common law of the rest of Canada.⁸² There was a lack of reciprocity between the two systems that caused many to worry about the continued vitality of the civil law tradition. However, since 1949 the influence of civil law became more prominent.⁸³ The Supreme Court of Canada replaced the Privy Council as the country's final appellate body. Since then the growth in the influence of civil law on common law has been most noticeable, as bi-jurality has successfully blended these two bodies of law. Both the Supreme Court of Canada and the Parliament of Canada have taken steps to re-balance the relationship between the two systems. This dialogue has created a richer body of laws as resources for solving legal problems.⁸⁴

Civil law in Quebec has been greatly enhanced by its broader recognition in Canada and the world. To gain this recognition, civil law jurists did not have to concede the autonomy of the system's single source and intellectual approach to the civil law system. Once the courts and Parliament acknowledged the authority and scope of civil law, it became easier for its influence to grow. Because it has been more firmly recognised by Canada's dominant legal institutions, civil law has been revitalised and its bi-juridical definitions more clearly defined.

Using Quebec as an example, it can be said that the use of comparative law to provide solutions to social problems is crucial. This notion is valid even if the country seeking the solutions is not a civil law country.⁸⁵ Canada is currently a bi-juridical country where the civil code is used in Quebec

and the common law is successfully used in the rest of the provinces. The common law recognises the civil law in Quebec as they draw upon each other's laws to provide solutions and enhancements to complex legal problems. The following section will look at some basic principles of the civil law tradition that may be useful in comparing the common law to laws that affect the health and social well being of Aboriginal people in Canada.

B Applicable General Principles

In many civil law systems 'general principles of law' may be considered a primary source of law which can give rise to binding legal norms.⁸⁶ Some applicable principles include *abuse of rights* and *unjust enrichment*. These are two principles that have been written about extensively by the French writers.⁸⁷ The application of these principles is subject to interpretation depending on the country and the applicable civil code. Glendon notes four types of code and statute interpretation techniques: a) easily answered, as the issue is most obvious and most plausible; b) occurs when there is an unclear provision; c) occurs when there is a gap in legislative text (with 'b' and 'c', specific interpretative methods must be utilized that will clarify); the fourth is when the law is silent and the judge must use discretion in interpretation.⁸⁸ The judge aims to discover the express or implied will of the legislature,⁸⁹ this is particularly true when a code carries a 'general clause'. These general clauses may be akin to common law principles of equity (eg, estoppel or laches). Although not expressly provided for in civil codes, *equity can be found in judicial discretion*. General clauses can be used to modify the effect of a rigid code provision or to 'set the course of a new development.'⁹⁰ In France and Germany general clauses may reign over the subject matter of the entire code using general principles of law. For instance Article 6 of the French code requires that individuals must follow *public order* and *good morals* (*contra bonos mores*) in their dealings. Article 138 of the German Civil Code provides that a transaction that offends good morals is void. In the performance of obligations both the German and French code provide for the *good faith* in the performance of obligations.⁹¹ The principle of good faith runs through all of the civil codes, it is a cornerstone of the civil law.

Both the civil law and the common law have a common principle in that the *Rule of Law* is a fundamental premise. There are institutional arrangements to foster this rule. For instance, it stresses the independence of the judiciary and in

Eastern Europe, the establishment of constitutional courts. It is a disposition to take law seriously, it is concerned with process and following form as it is with substantive results.⁹²

A further general principle is that the top of the hierarchy must reflect and interact with the bottom of the law for it to be effective. This is equally true for the civil and common law and demonstrates the problem with the colonisation techniques used by the British in Canada. For instance, the transferring of a set of customs from one part of the world to another for its application is a feature of principle based laws. In the instance of New France and the Civil Code of Quebec who is directed from the top, with Royal ordinances, and edicts and decisions from the Conseil Souverain (Sovereign Council) proclaiming the laws by which people would live.⁹³ Fortunately, there was some early recognition that law is not effective if it does not *reflect local values*.⁹⁴ The same principle holds true to this day.

C Customary Law

The issue of custom (although this list is not exclusive) as a source of law is important as it is a well recognised as a written source of law in many codes. For instance, the Spanish Civil Code (article 1), Louisiana Civil Code (Article 1), Cannon Law (Can, 27), and the Civil Code of Iraq have all included custom in their written codes. As noted earlier in this paper, the distinguishing of custom into laws have been illustrated here through an examination of general Indigenous laws in Canada and through the examples provided in First Nation, Métis and Inuit laws. Further, it has been argued that Aboriginal law is merely a set of customs and that societies have laws only if the laws are declared by some recognised power that is capable of enforcing such a proclamation.⁹⁵ Aboriginal law is customary, positivistic, deliberative, and/or based on theories of divine or natural law. The Supreme Court of Canada has disagreed with an approach that discounts Aboriginal customs:

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or cultures, in effect subhuman species.⁹⁶

While courts and legislatures are important sources of law in Canada, it has long been accepted that a society does not need these institutions in order to possess law. For instance, the Supreme Court of Canada has instructed that Aboriginal peoples possessed legal traditions and continue to possess them. In *R v Mitchell*, decided in 2001, it wrote that 'European settlement did not terminate the interests of Aboriginal peoples arising from their historical occupation and use of the land. To the contrary, Aboriginal interests and customary laws were presumed to survive the assertion of sovereignty.'⁹⁷

IV Part 3: Comparative Analysis

All legal systems require mechanisms to promote growth and certain aims. Some objectives may be in conflict such as predictability and flexibility; stability and growth. In the common law system, predictability and flexibility are provided through case law and legal precedent. Flexibility and growth have been limited by principles of equity and the techniques to distinguish precedent. In the civil tradition, predictability and stability were concrete through the written law of the codes, the flexibility and growth through the general clauses which temper the rigidity of the codes. In both systems, statutory law has affected these mechanisms for maintaining equilibrium. Statutory law is not stable or entirely rational as it is susceptible to frequent amendment and is subject to political processes. The courts are called upon to rule upon problems of social conflict which can't be resolved on reasoned elaboration of principles. Both the civil system and the common law system are still affected by their 'Roman inheritance of legalism and administration and share common problems of legitimation in modern states.'⁹⁸ These mechanisms are imperative to note as they are just as important when examining Aboriginal law – these mechanisms are common to all three legal systems.

A Comparison of Indigenous Law, Civil Law and Common Law

We have noted earlier that Aboriginal and treaty rights are constitutionalised in the common law through s 35 of the *Constitution Act 1982*. The Supreme Court of Canada states that these rights are *sui generis* in nature. The Canadian jurisprudence on Aboriginal and treaty rights state that the *sui generis* nature is embedded within these rights. This is an established principle in Aboriginal law.

This is not like the common law or the civil law traditions. The common law jurisprudence is not *sui generis*, it is the common law. Civil law traditions of written code, customary law and general principles of law are not *sui generis* in nature. Common law is classified as common law, civil law is classified as civil law. They both fall within their specific categories of named law.

The civil law operates in codes under the division of Parliamentary or governmental authority. We have examined its history in civil countries and in Quebec. Its judicial authority is limited (however we have noted that there is judicial discretion, although this may be hidden, particularly in the French judgments). The common law is a judiciary driven body of law which is often in conflict with the statutes.

The use of comparative law on this level is difficult to reconcile as Aboriginal law, civil law and common law are not on the same level. They do not all possess *sui generis* rights. They cannot be compared from a hierarchal perspective because Aboriginal law is completely unlike civil or common law because of the *sui generis* nature of its jurisprudence in the common law.

However, it is possible to recognise a multi-juridical system that consists of common law, civil law and Aboriginal law. It has already been established that two bodies of law exist in Canada. The Honourable Justice Bastarache stated 'Bijuralism in Canada is more than the mere "co-existence" of the two legal traditions. It involves the sharing of values and traditions.'⁹⁹ It is then logical to follow the examples of the development of the civil law in Canada and the co-operative spirit seen of blending the common law with the civil law to enhance each other's laws thereby creating a multi-juridical system in Canada that recognises three sets of laws.

Professor Borrows supports this approach:

Canada's balanced, somewhat decentralized, federal state is one of the country's great strengths. It makes it possible to reconcile diversity with unity. It creates the potential for experimentation in the 'social laboratory' that each constituent part of our federation encourages. The more explicit recognition of Indigenous legal traditions could lead to useful experimentation and innovation in solving many of Canada's pressing problems. Furthermore, the affirmation of Indigenous legal traditions would strengthen Canadian democracy by placing decision-making authority much

closer to the people within these communities. Aboriginal peoples would be better served in the federation if they had the recognition and resources to refine law in accordance with their perspectives. This is important because central and provincial governments are more remote from Aboriginal peoples, physically and culturally. They also tend to be less responsive to the Aboriginal electorate than Aboriginal governments would be if they could exercise greater responsibility for their own affairs. A greater recognition of Indigenous legal traditions could provide some counterweight to the bi-culturalism and bi-elitism that sometimes infects Canada's polity.¹⁰⁰

It is a well accepted principle that there isn't just a dichotomy between common and civil law, in comparative law a trichotomy is used between three large legal systems. This civilian law fact then supports the argument that a multi-juridical approach may be utilised in Canada to assist in analysing the legal flaws produced by the English common law in relation to Aboriginal people.

It is also possible to benefit from some certain civil law methods and legal solutions/ideas/recommendations that might prove useful for further consideration that could assist Canadian law in developing new laws or recognising old laws that may assist in alleviating some of the problems the common law has presented for Aboriginal people in Canada. The fact that civil law is already an accepted reality in the common law makes it easier to implement some principles, ideas and recommendations from the European civil codes.

B For Consideration

A cautionary note is that when foreign law is imported and applied by a lawyer or law maker and the discovery is made that the law is an imported one; they are then faced with the problem of how to undertake comparative research in order to interpret how the law operates in the country of its origin.¹⁰¹ Language and interpretation of language is crucial. It must also be put into some type of comparative cultural context as well. Before any concepts are borrowed, it is imperative that further research and assessment is required to determine if these solutions are viable.

Professor John Borrows comments on the comparison of the specialisation of practitioners of Indigenous law and Canadian law:

The high degree of specialization necessary to understand, produce or practice Canadian law may be considered analogous to the special positions, ceremonies and hard work required by some Indigenous legal traditions. The substantial resources, societal position, or family connections required for Canadians to receive legal education, practice law, or become a judge may not be far removed from the hereditary privileges in some Indigenous societies.

In civil law it has been noted that the Sharia courts that function in Africa and the Asian parts of the British commonwealth are presided over by non-Europeans and who, as a rule, are not trained in the common law (they apply their Indigenous laws). Particularly, in Africa, local judges are insulated from the common law by statutes prohibiting counsel from appearing in these jurisdictions. An appeal will go to 'professional' judges and the lower court findings will be considered facts and not freely reviewable on appeal.¹⁰² This process may appeal to the reform of Aboriginal law courts and justice.

If required, broad general principles may be garnered from the civil law and applied to the existing common law when dealing with Aboriginal people; these have been discussed earlier, in 2.2 Applicable General Principles. They include good faith, good morals and equity. The civilian and common law courts will act against abuse of rights and unjust enrichment. All legal systems work from the Rule of Law premise.

IV Conclusion

This paper has used a comparative approach because law tells stories about the culture that shaped it. These stories are entrenched in the legal system and influence how legal norms are created and applied in the system and how facts are translated into language and concepts of law. Laws affect ones' daily life through these stories as much as the specific rules and standards that comprise it. This paper has offered a general view of Aboriginal laws and some specific laws to illustrate the complexity of the societies historically and in their current modern day context. Colonisation (and its devastating impact on Aboriginal people) and the application of the English common law - specifically the application of constitutional supremacy have been noted. The Supreme Court of Canada has provided certain general principles of interpretation when dealing with Aboriginal and treaty rights. The Supreme Court recognises the constitutional

supremacy of these rights. There is however, a large gap between what the legislature and the government has been directed to do and what is being done. There also remains a very large gap between the judicial status between Aboriginal and non-Aboriginal people in Canada.

Civil law has then been examined to discover its history and the cultures that have shaped it. Of particular note is the history of the Quebec Civil Code and its interaction with the common law of the rest of Canada. European civilian traditions have been noted in their historical and current contexts.

This paper has attempted to provide reconciliation between the common law and Aboriginal laws in Canada. It has been unsuccessful as the evidence proves that twenty five years have elapsed since the entrenchment of Aboriginal and treaty rights. The common law therefore offers no sustenance to the ailing Aboriginal and treaty rights it has enshrined.

This paper then proceeded to examine civil law in the context of Aboriginal and treaty rights, but the *sui generis* nature of the jurisprudence prevented any type of comparative analysis. We are then left with using broad principles of the civil law or using some specific possible remedies found in certain civil law countries. A multi-juridical system that consists of common law, civil law and Aboriginal law may be a logical approach to consider as it has already been established that two bodies of law exist in Canada that share values and traditions with a co-operative spirit of blending the common law with the civil law. The addition of Aboriginal laws will only serve to enhance Canadian law and may assist in solving some of the flaws created by the common law alone.

Comparative law has successfully been used to explore and question the common law and Aboriginal legal systems and the tools provided may assist a system to improve and resultantly may see a positive impact in the daily lives of Aboriginal people.

Appendix A

The Great Law of Peace¹⁰³

1) *The Birth and Growth of the Peacemaker*

A boy is born to the virgin daughter of a Huron woman. Ashamed and depressed, the grandmother tries to destroy the baby three times, until she is told in a dream that the boy

is destined to bring forth a good message from the Creator. He grows rapidly and is honest, generous and peaceful.

2) *The Journey to the Mohawks*

The Peacemaker leaves in a white stone canoe for the land of the Mohawks where he finds war, killing, destruction and cannibalism. He announces that he is there to deliver a message from the Creator that war must cease.

3) *Jikonsahseh Accepts the Message*

The Mother of Nations takes in the weary Peacemaker and feeds him. He explains the principles of Peace, Righteousness and Power and the concept of the longhouse as a metaphor for the Great Law. She accepts the message, and in doing so, women are given priority in the League as Clan Mothers.

4) *Ayenwatha Converts to Peace*

Looking into the smoke hole of a house, the Peacemaker sees a man carrying a human body to the cooking fire. About to eat the flesh, the man appears into the pot but sees the face of the Peacemaker and is magically transformed. The Peacemaker teaches him to bury the body and eat deer meat instead. The antlers of the deer will be symbols of authority. The former cannibal, Ayenwatha, accepts the message of peace.

5) *Peacemaker proves himself to the Mohawks*

To prove his power, the Peacemaker sat in a tall tree that was chopped down into a deep ravine but emerged unharmed. The Mohawk chiefs accept the message.

6) *The Confrontation with Tododaho*

An evil and deadly wizard of the Onondaga with a twisted body and snakes for hair, blocked the path to peace. Tododaho made it so that the chiefs could not gather, making the waterways tip over their canoes.

7) *Ayenwatha's Daughters are killed*

A witch, Osinoh, transformed into an owl and killed the daughters, casting Ayenwatha into a deep depression.

8) *Ayenwatha Leaves Onondaga*

He left his home at Onondaga and became lost in his sorrow. He 'split the sky' heading southward.

9) *Ayenwatha invents wampum*

Using either twigs, bird quills or shell beads, Ayenwatha makes strings of wampum that he hangs across a suspended wooden pole in an attempt to sooth himself.

10) *Ayenwatha institutes protocols*

He visits a Mohawk community and is given a honoured seat as a chief. He teaches them to make a signal fire at the edge of the clearing to announce the arrival of a peaceful visitor, how to make wampum, and how to use the wampum strings to deliver messages. He leaves to continue his search for consolation.

11) *The Peacemaker Condoles Ayenwatha*

Using 8 of the 13 wampum strings made by Ayenwatha, the Peacemaker removes the pain and suffering of Ayenwatha and restores his mind so they can bring forth the message of the Creator. The Peacemaker decides that wampum will be used to carry that message.

12) *Emissaries seek out Tododaho*

The Peacemaker sends transformed animals - crows, bears, deer - to locate Tododaho.

13) *The Cayuga, Oneida and Seneca Join*

The two messengers visit the various nations as well as several visits with Tododaho. The other nations accepts the message. Tododaho still refuses.

14) *Hai Hai - The Peace Hymn*

With the combined power of all the assembled leaders who had accepted the message, the two messengers lead a procession, singing a magic song to soothe Tododaho. The song thanked the League, the Great Peace, the Honored Ancestors, the warriors, the women, and the families. Tododaho shouted his objection as the procession approached his encampment.

15) *Tododaho is Transformed*

With all of the other chiefs assembled, the Peacemaker promised to give Tododaho a central position in the Confederacy and to make Onondaga the capital for the Grand Council. He finally accepted the message and the messengers combed the snakes from his hair, straightened his body and dressed him properly. Tododaho became a man of peace.

16) *The Circle of Chiefs*

The messengers established the chieftainships as the protectors of peace. They were given instruction about what it takes to be a good chief. They announced the roll call of chiefs by nation and clan. The protocols for selecting chiefs, operating the council, and the role of the Clan Mothers was described. Warnings of the future were given. Deer antlers were placed on the heads of the chiefs, a wing fan to sweep

dirt away from the council fire, and a pole to flick creatures away from the fire. The League was completed.

17) *The Cultural Metaphors*

The Peacemaker established the symbols of the Great Law. The longhouse has five fireplaces but one family. Wampum will record the messages. The Tree of Peace was planted in the center of the circle of chiefs. An eagle was placed on top to watch out for enemies. The White Roots of Peace stretched out across the land. The weapons of war were buried under the Tree. A meal of beaver tail was shared. Five arrows were bound together. The council fire was kindled and the smoke pierced the sky. These are all symbols of power that comes from the unity of peace.

18) *The Protection of the League*

Laws for adoption, emigration and rights of individuals and nations were established to allow those who seek peace to join. Warring nations would be given three warning they would be subdued.

19) *The Condolence Ceremony*

The same procedure used on Ayenwatha will be used when a chief dies in order to console the mourners and reaffirm life. This Requickening Address will maintain the stability and mental health of the Chiefs and the Confederacy.

20) *The Peacemaker Departs*

The message delivered and the Confederacy completed, the Peacemaker leaves but announces that in a future time of strife he will return. He also asked that his name not be used except in special cases.

Appendix B

The Laws of St. Laurent

The Métis Laws at St. Laurent contained the following provisions:

Article I. On the First Mondays of the Month, the president and members of his council shall be obliged to assemble in a house indicated before hand by the president, in order to judge the cases that may be submitted to their arbitration.

Article II. Any Counsellor who, unless by reason of illness, or impossibility shall not be present at the indicated place shall pay a fine of five Louis.

Article III. The president who by his own fault shall not meet his Counsellors in the indicated place shall pay a fine of five Louis.

Article IV. Any captain refusing to execute the orders that he shall receive in the name of the Council shall pay a fine of three Louis.

Article V. Any soldier, who shall refuse to execute the orders of his captain shall pay a fine of one Louis and a half.

Article VI. Any person who shall insult the Council or a member of the Council in the public exercise of his functions shall pay a fine of three Louis.

Article VII. Any person who shall be guilty of contempt of any measure of the Council or of one passed in a general Assembly, shall pay a fine of one Louis.

Article VIII. Any person wishing to plead shall inform the President beforehand and shall deposit with him, as security, the sum of five shillings.

Article IX. In every case the plaintiff shall deposit two Louis, five shillings with the President to remunerate him and the members of the Council for their loss of time, but at the termination of the case, the person losing shall pay all the costs and the plaintiff if he gains shall receive back the money deposited.

Article X. Any person shall call the Assembly together, shall pay five shillings to the president and to each member, should he come to a compromise with the other side and abandon the prosecution of the case.

Article XI. Every witness in a case shall receive two and a half shillings a day.

Article XII. Any case once brought before the Council, can no longer be judged by any arbitrators outside the Council.

Article XIII. Any person judged by the Council, shall be allowed ten days to make arrangements with the person with whom the quarrel is; at the expiration of that term the Council shall cause its order to be forcibly executed.

Article XIV. Any person, who only has three animals, shall not be compelled to give up any one of them in payment of

his debts: This clause does not apply to unmarried men, who shall be compelled to pay even to the last animal.

Article XV. Any person who shall be known to have taken another person's horse without permission, shall pay a fine of two shillings.

Article XVI. Any contract made without witnesses shall be null and void and its executive cannot be sought for in the Council.

Article XVII. Any bargain made on a Sunday even before witnesses, cannot be prosecuted in Court.

Article XVIII. Any bargain any contract any sale shall be valid, written in French, English or Indian characters even if made without witness, if the plaintiff testified on oath to the correctness of his account or contract.

Article XIX. Any affair decided by the Council of St. Laurent shall never be appealed by any of the parties before any another tribunal when the government of Canada shall have placed its regular magistrates in the country, and all persons pleading do it with the knowledge that they promise never to appeal against the decision given by the Council and no one is permitted to enjoy the privileges of this community, except on the express condition of submitting to this law.

Article XX. Any money contribution shall not exceed one Louis and every public tax levied by the Council shall be obligatory for the inhabitants St. Laurent, and those who shall refuse to submit to the levy shall be liable to pay a fine, the amount of which shall be determined by the Council.

Article XXI. Any young man, who, under pretext of marriage, shall dishonour a young girl and afterwards refuses to marry her, shall be liable to pay a fine of fifteen Louis: This law applies equally to the case of married men dishonouring girls.

Article XXII. Any person who shall defame the character of another person shall attack his honour, his virtue or his probity shall be liable to a fine in proportion to the quality and rank of the person attacked or to the degree of injury caused.

Article XXIII. Any person who shall set fire to the prairie from the 1st August and causes damage shall pay a fine of four Louis.

Article XXIV. On Sundays and obligatory festivals the river ferrys shall be free for people riding or driving to church, but any person who shall crop without going to church, shall pay as on ordinary days.

Article XXV. All the horses shall be free, but he whose horse causes injury or annoyance shall be warned and should he not hobble his horse he shall pay a fine of 5 shillings a day from the time he was warned to look after his horse.

Article XXVI. If any dogs kill a little foal, the owner of the dogs shall be held responsible for the damage done.

Article XXVII. Any servant who shall leave his employer before the expiration of the term agreed upon, shall forfeit all right to his wages: in the same way, any employer dismissing his servant without proper cause shall pay him his wages in full.

Article XXVIII. On Sunday no servant shall be obliged to perform any but duties absolutely necessary, however, on urgent occasion, the master can order the servant to look after his horses on Sundays only after the great mass: he shall never prevent him from going to church, at least in the morning.

1 John Leslie and Ron Maguire (eds), *The Historical Development of the Indian Act* (Treaties and Historical Research Centre, Indian Affairs and Northern Development, 2nd ed, 1978) 115. Duncan Campbell Scott was the Deputy Superintendent of Indian Affairs from 1913-1932.

2 The term 'Aboriginal peoples' is intended to encompass all original inhabitants of Canada as recognised by the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 s 35 ('*Constitution Act 1982*') at s 35(2), meaning Indian, Métis and Inuit peoples in Canada. The most common term in international law, 'Indigenous peoples', will also be used and is intended to encompass these same groups where applicable.

3 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, (Stanford University Press, 2nd ed, 1985) 1.

4 Mary Ann Glendon, Michael Gordon and Paulo Wright-Carozza, *Comparative Legal Traditions in a Nutshell*, (West Group, 2nd ed, 1999) 13.

5 Rudolf Schlesinger et al, *Comparative Law – Cases-Text-Materials*, (Foundation Press, 6th ed, 1998) 14.

6 Ibid 10, ft 27.

7 Ibid ft 26.

8 Glendon, above n 4, 7.

9 Andre-Jean Arnaud, *Legal Pluralism and the Building of Europe* (2007) European Network on Law and Society <<http://www.reds.msh-paris.fr/communications/texts/arnaud2.htm>>.

10 Schlesinger, above n 5, 289, ft 23.

11 Ibid 289, ft 30. Edward I, while creating the Statues of Westminster may have been influenced by his cousin and brother in law and the Spanish Code called *Las Siete Partidas*.

12 Ibid 285.

13 Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan* (University of Calgary Press, 2001) 7.

14 Ibid 15.

15 John Borrows, *Indigenous Legal Traditions in Canada*, Law Commission of Canada (January 2006) ft 33. See also Marie Battiste and James Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publishing, 2000).

16 Ibid ft 36.

17 Sidney Harring, *White Man's Law* (University of Toronto Press, 1998) 9.

18 *R v Van der Peet*, [1996] 2 SCR 507, [1996] 4 CNLR 146 para 30 [Lamer CJC's emphasis].

19 Harring, above n 17.

20 Ibid.

21 Ibid 256.

22 When the author was employed as Director of Justice for Saskatoon Tribal Council in Saskatoon Saskatchewan, she organised and facilitated bi-yearly gatherings of the Elders to ensure the methods implemented for justice initiatives were on track with the traditional and cultural requirements of the three cultural groups of the Tribal Council – Cree, Dakota Sioux and Saulteaux.

23 Haundenosaunee, *Great Law of Peace* (18 January 18 2007) <http://sixnations.buffnet.net/Great_Law_of_Peace/>.

24 Letter from Joseph Brant to unidentified correspondent, 1807, quoted in Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (University of Toronto Press, 1999) 108.

25 Donald A Grinde Jr and Bruce E Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (American Indian Studies Centre, 1991); Bruce E Johanesen, *Forgotten Founders: How the American Indian Helped Shape Democracy* (Harvard Common Press, 1982). See also John Borrows, 'Wampum at Niagara: Canadian Legal History, Self-Government, and the Royal

Proclamation' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada* (UBC Press, 1998).

26 See Appendix A, *Great Law of Peace*.

27 William Fenton, *The Great Law and the Longhouse* (University of Oklahoma Press, 1998).

28 Fred Shore and Lawrence Barkwell, *The Past Reflects the Present: The Métis Elders' Conference* (Manitoba Métis Federation, 1997) in Lawrence J Barkwell, Anne Carrière and Amanda Rozyk, *The Origins of Métis Customary Law: With a Discussion of Métis Legal Traditions* (2007) Louis Riel Institute <<http://www.metismuseum.ca/media/document.php/07232.pdf>>.

29 Arthur Ray, *Indians in the Fur Trade*, (University of Toronto Press, 1974) 205.

30 Louis Riel Institute, *Buffalo Hunt* (2005) <<http://www.louisrielinstitute.com/culture/buffalohunt.php>>.

31 Métis Resource Centre, *Laws of the Hunt* (25 April 2002) Métis Resource Centre <<http://www.metisresourcecentre.mb.ca/History/LawsHunt.htm>>.

32 See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, Vol. 3 (1996); Métis families divided responsibilities between men and women as they ranged on extended hunting expeditions from permanent settlements, such as Red River:

Our men did all the hunting, and we women did all the tanning of the buffalo hides, jerky meat making, pemmican and moccasins. For other supplies, we generally had some trader with us...who always had a supply of tea, sugar, tobacco and so on.

33 *Manitoba Act*, 1870 (UK) 32 & 33 Vict c 3. The Act provided for not only the creation of the province of Manitoba, but for French language rights and distribution of 1.4 million acres of land to the Métis as well as for protection for settled and common lands.

34 See Appendix B, *The Laws of St. Laurent*.

35 In Alberta, Métis people operate a quasi-judicial system to deal with disputes about membership, land dealings, surface rights, and any other matter to which the parties agree. This body is called the Métis Settlement Appeal Tribunal. It is based on historical legal traditions in a contemporary context. It has an extensive body of Métis jurisprudence and deals with many issues including membership, hunting, fishing, trapping, timber, and other matters relating to land. Their laws are on equal status with provincial laws. Métis in other parts of Canada have followed the patterns of the Alberta Métis when enacting their own laws in a contemporary fashion.

36 *The Nunavut Act*, SC 1993, c 28 as amended brought Nunavut into being 1 April 1999 (s 3) and provided, at s 29, that the ordinances of the Northwest Territories and 'the laws made under them effective March 31, 1999 will be duplicated for Nunavut.'

See also, Nunavut Court of Justice, *Nunavut Legislation Gateway – Law Library* (4 December 2010) <<http://www.nucj.ca/library/index.htm>>.

37 Royal Commission on Aboriginal Peoples, above n 32, record 14447.

38 Mariano Aupilaarjuk, Marie Tulimaaq, Emile Imaruittuq, Lucassie Nutaraaluk, Akisu Joamie in Jarich Oosten, Frédéric Laugrand and Wim Rasing (eds) *Interviewing Inuit Elders, Volume 2: Perspectives on Traditional Law*, (Nunavut Arctic College, 1999).

39 Jaypetee Arnakak, 'Commentary: What is Inuit Qaujijajatuqangit?' *Nunatsiaq News*, 25 August 2000.

40 The Civil Code of Quebec came into effect on 1 January 1994 and replaced the Civil Code of Lower Canada enacted by the Legislative Assembly of the Province of Canada in 1865 (in force since 1 July 1866). See Justice Quebec, *Civil Code* (5 December 2010) <<http://www.justice.gouv.qc.ca/english/sujets/glossaire/code-civil-a.htm>>; See also Part 2 below for a discussion on the Civil Law.

41 Haring, above n 17, 10.

42 Schlesinger, above n 5, 316.

43 The *British North America Act, 1867* (UK), 30 & 31 Vict, c 3 (*BN Act, 1867*) was renamed *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 through the *Constitution Act 1982* (enacted as Schedule B to the *Canada Act 1982* (UK), 1982, c 11), which came into force on 17 April 1982.

44 Formal broad definitions of the term 'Indian' came into effect in 1850 when the legislation governing Indians was created (See the term 'Indian' as defined in *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, SC 1850, c 42, s 5. Section 3 of the *Indian Act* of 1876 states '[t]he term "Indian" means "any male person of Indian blood reputed to belong to a particular band," "any child of such person," "any women who is or was lawfully married to such person."' (*Indian Act, 1876*, SC 1876, c 18) In 1906 the *Indian Act* was amended to define a 'person' as an individual *other* than an Indian. *Indian Act 1906*, SC c 81, s 2(c). For a general discussion of the effect of this section, see *Atkins v. Davis* [1917] 38 OLR 548 (Ont SCAD). An amendment to the *Indian Act*, redefining the term, was not made until 1951. (See, eg, *R v Point*, [1957] 22 WWR 527, in which the court held that 'the accused, on the evidence, is an Indian within the meaning of the *Indian Act*, RSC 1952, c 149, and being an Indian is a person definition *Indian Act*, s 2(1)(g) and being a person is subject to the application of s 44(2) of the *Income Tax Act*.) These restrictions denied the entry of Indian men and women into medical schools and the legal profession from 1869 until voluntary and involuntary enfranchisement was repealed in the *Indian Act* in 1985. (See Jim West, 'Aboriginal Women at a Crossroads,' (September 2002) *First Nations Drum* <<http://>

www.firstnationsdrum.com/Fall2002/PolWomen.htm>. The main focus of the bill was to make the *Indian Act* conform to s 15 of the *Canadian Charter of Rights and Freedoms*.) A brief synopsis of the *Indian Act* reads:

Status soon came to have other implications. Status Indians were denied the right to vote, they did not sit on juries, and they were exempt from conscription in time of war (although the percentage of volunteers was higher among Indians than any other group). The attitude that others were the better judges of Indian interests turned the statute into a grab-bag of social engineering over the years.

Bill Henderson, *Notes on the Indian Act* (15 January 1996) Henderson's Annotated Indian Act <<http://www.bloorstreet.com/200block/sindact.htm>>.

- 45 For more on the Doctrine of Discovery, see Robert A Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990); Robert A Williams, 'Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous peoples' right to Self-Determination' (1991) 8 *Arizona Journal of International & Comparative Law* 51; for Papal Bulls and their effects, see James Muldoon *The Americas in the Spanish World Order, The Justification for Conquest in the Seventeenth Century* (University of Pennsylvania Press, 1994); James Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World 1250–1550* (University of Pennsylvania Press, 1979).
- 46 Edward W Said, *Culture And Imperialism* (New York: Vintage Books, 1994) 9.
- 47 See also Peter C Newman, *Caesars of the Wilderness* (Viking, 1987) 21, quoted in Jack Weatherford, *Native Roots: How the Indians Enriched America* (Fawcett Columbine, 1991) 274–275.
- 48 Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (University of Toronto Press, 1998) 1–2 in Patricia Monture-Angus, 'The Lived Experience of Discrimination: Aboriginal Women Who are Federally Sentenced & The Law: Duties and Rights' *Submission of the Canadian Association of Elizabeth Fry Societies ('CAEFS') to The Canadian Human Rights Commission for the Special Report on the Discrimination on the Basis of Sex, Race and Disability Faced by Federally Sentenced Women*, (2002). See also, Sherene Razack, 'Gendered Racial Violence and Spatialized Justice: The murder of Pamela George' in Sherene Razak (ed) *Race, Space and the Law: Unmapping a White Settler Society* (Between the Lines, 2002) 121–156.
- 49 Taiaiake Alfred and Jeff Corntassel 'Being Indigenous: Resurgences Against Contemporary Colonialism' *Government and Opposition*, (Blackwell Publishing, 2005).
- 50 Canadian Broadcasting Corporation, *Abuse Affects the Next Generation* (2 April 1993) CBC Archives <http://archives.cbc.ca/IDC-1-70-692-4008/disasters_tragedies/residential_schools/clip6>. See also Appendix C Residential Schools in Canada. Officially, residential schools operated in Canada from 1892 until 1969. At one time there were 88 schools operating in Canada. Although the Government of Canada officially withdrew in 1969, a few of the schools continued operating throughout the 1960s, 70s and 80s. Akaitcho Hall in Yellowknife did not close until the 1990s. These schools were run through a partnership between the federal government and the churches. An estimated 100 000 to 150 000 First Nation, Métis and Inuit children attended residential schools. Thousands of former students have come forward to claim that physical, emotional, and sexual abuse were rampant in the school system and that little was ever done to stop it or to punish the abusers. Assembly of First Nations, *Residential School Update* (Assembly of First Nations, 1998). See also, The Aboriginal Healing Foundation, *Announcements* (2011) <www.ahf.ca>.
- 51 Robert George Ferguson, *Studies in Tuberculosis* (University of Toronto Press, 1955) 6. Cited in George Graham-Cumming, *Health of the Original Canadians, 1867–1967*, *Medical Services Journal of Canada* 23(2), 115–166. By 1929 the Indian death rate in this area was 20 times greater than for the non-Aboriginal population (Graham-Cumming, 134). Regarding the health of the pupils, the report states that 24% of all the pupils which had been in the schools were known to be dead, while at one school on the File Hills reserve, which gave a complete return, to date 75 per cent were dead at the end of the 16 years since the school opened. (emphasis added) (Peter Henderson Bryce, *The Story of a National Crime – Being a Record of the Health Conditions of the Indians of Canada from 1904–1921* (James Hope and Sons, 1922) in Maureen Lux, *Medicine That Walks: Disease, Medicine, and Canadian Plains Native Peoples: 1880–1940* (University of Toronto Press, 2001) 192.
- 52 'The first claim against the federal government and the churches for abuse in residential schools was filed in 1990. By 1996, 200 such claims had been received. In 2003 there were about 12,000.' Canadian Broadcasting Corporation, *We are Deeply Sorry* (7 January 1998) CBC Archives <http://archives.cbc.ca/IDC-1-70-692-4011/disasters_tragedies/residential_schools/clip9>.
- 53 James Sa'ke'j Henderson, 'Postcolonial Ghost Dancing: Diagnosing European Colonialism' in Marie Battiste (ed) *Reclaiming Indigenous Voice and Vision* (University of British Columbia Press, 2000) 57, 58. See also Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989); Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (University of Saskatchewan Native Law Centre, 2001);

- Alfred, above n 49; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001); Taiaiake Alfred, 'Deconstructing the British Columbia Treaty Process' *Balayi: Culture, Law and Colonialism - Volume 3* (2001).
- 54 Some non-Aboriginal people may be subject to the same laws if they live on reserve or in some First Nation, Métis or Inuit communities.
- 55 Borrows, above n 15.
- 56 *Constitution Act 1982*.
- 57 Ibid. Modern treaty making takes the form of land claims agreements, which s 35(3) of the *Constitution Act 1982* specifically recognises as treaty rights. Section 35(3) provides that '[f]or greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.'
- 58 The Constitution, however, is not the source of Aboriginal and treaty rights. These rights are not delegated by the British Parliament to the Aboriginal Peoples in Canada. Rather, Aboriginal and treaty rights are inherent in the Aboriginal Peoples of Canada by virtue of their being Aboriginal Peoples and the agreements to which they consented. (Yvonne Boyer, 'Aboriginal Health: A Constitutional Rights Analysis' in *Discussion Paper Series No. 1, Aboriginal Health: Legal Issues* (National Aboriginal Health Organization and the Native Law Centre of Canada, 2003) 10.
- 59 Peter W Hogg, *Constitutional Law of Canada*, (Carswell, 4th ed, 2002) 5–22.
- 60 *Constitution Act 1982*, s 52.
- 61 Ibid s 35. These Aboriginal and treaty rights are 'guaranteed equally to male and female persons' in s 35(4).
- 62 *R v Van der Peet* [1996] 2 SCR 507, [1996] 4 CNLR 146, para 31.
- 63 *Indigenous Knowledge*, above n 15, 212–213. See also above n18, para 31; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, [1998] 1 CNLR 14, reversing in part (1993), 10 DLR (4th) 470, [1993] 5 CNLR 1 (BCCA), varying in part [1991] 3 WWR 97, [1991] 5 CNLR 1 (B.C.S.C.) [*Delgamuukw*].
- 64 *R v Sundown* [1999] 1 SCR 393, 24, [1999] 2 CNLR 289 [*Sundown* cited to SCR]; *R v Badger* [1996] 1 SCR 771, 778, [1996] 2 CNLR 77 [*Badger* cited to SCR]; *R v Sioui* [1990] 1 SCR 1025, 1043 [1990] 3 CNLR 127 [*Sioui* cited to SCR] and *Simon v The Queen* [1985] 2 SCR 387, 404, [1986] CNLR153 [*Simon* cited to SCR].
- 65 *R v Badger* [1996] 1 SCR 771, para 41. See also James Sa'ke'j Youngblood Henderson, 'Interpreting Sui Generis Treaties' (1997) 36 Alberta Law Review (No 1) 46.
- 66 Ibid.
- 67 *Haida Nation v BC and Weyerhaeuser* (2002), 99 BCLR (3rd) 209, [2002] 2 CNLR 121, paras 33–36 (CA); additional reasons, (2002), 5 BCLR (4th) 33, [2002] 4 CNLR 117 (CA) [*Haida Nation*].
- 68 *R v Sparrow* [1990] 1 SCR 1075 [1990] 3 CNLR 160.
- 69 *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, [1998] 1 CNLR 14.
- 70 Ibid para 138, 168; See also *Sparrow*, above n 68, 181, 187, above n 67, paras 64, 100, 101; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2001), 214 FTR 48, [2002] 1 CNLR 169, paras 95, 156; *Halfway River First Nation v. British Columbia (Minister of Forests)* (1999), 178 DLR (4th) 666, [1999] 4 CNLR 1 (BCCA) para 49, 160; *Gitksan First Nation v British Columbia (Minister of Forests)* (2002), 10 BCCR (4th) 126 [2003] 2 CNLR 142, para 89; *R v Noel* [1995] 4 CNLR 78, 93 (NWTTC). See, Louise M Mandell, 'New Law on Consultation – The Impact of the British Columbia Court of Appeal – Reconsideration of Haida and the Taku River Tlingit Decisions' (Paper presented at the Canadian Aboriginal Law Conference, Pacific Business and Law Institute, Vancouver, December 2002).
- 71 *Sui generis* is a Latin term meaning 'of its own kind', 'unique or peculiar'. *Blacks Law Dictionary* (West Group, 7th ed, 1999); Rights that are *sui generis* do not fit into categories of French or English law (*R v Guerin* [1984] 2 SCR 335 [1985] 1 CNLR 120, cited Jack Woodward, *Native Law* (Carswell, 2002) 5-7).
- 72 Leonard I Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (University of Toronto Press, 1996) 3. Accordingly, the unique character of this relationship gives rise to the Crown being regarded as a fiduciary. See above n 71.
- 73 Ibid 14.
- 74 Glendon, above n 4, 16.
- 75 See David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 2000); David Johnston, *Roman Law in Context* (Cambridge University Press, 1999); Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1976); Tony Honore, *Justinian's Digest: Character and Compilation* (Oxford University Press, 2010).
- 76 Ibid 32.
- 77 Schlesinger, above n 5.
- 78 Borrows, above n 15, 81.
- 79 John Briery and Roderick Macdonald (eds) *Québec Civil Law: An Introduction to Québec Private Law* (Emond Montgomery, 1993).
- 80 1. Persons 2. The Family 3. Successions 4. Property 5. Obligations 6. Hypothecs 7. Evidence 8. Prescription 9. Publication of Rights 10. Private International Law.
- 81 See generally France Allard, 'The Supreme Court of Canada and its Impact on the Expression of Bijuralism', in Justice Canada, *The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism* (Department of Justice, 2001). See also Jean-Maurice Brisson and André Morel, 'Droit fédéral et droit civil : complémentarité, dissociation', *The*

- Harmonization of Federal Legislation with Québec Civil Law and Canadian Bijuralism* (Department of Justice, 1997) 213, 231.
- 82 David Howes, 'From Polyjurality to Monojurality: The Transformation of Québec Law, 1875-1929' (1987) 32 *McGill Law Journal* 523.
- 83 *Béliveau St-Jacques v Fédération des employées et employés de services publics Inc* [1996] 2 SCR 345; *Québec (Public Curator) v Syndicat national des employés de l'Hôpital St-Ferdinand* [1996] 3 SCR 211; *Godbout v City of Longueuil* [1997] 3 SCR 844; *Aubry v Éditions Vice-Versa* [1998] 1 SCR 591.
- 84 Department of Justice Canada, 'Canadian Legislative Bijuralism' (26 January 2007) <<http://www.justice.gc.ca/eng/bijurilex/index.html>>.
- 85 Glendon, above n 4.
- 86 Ibid 125.
- 87 Ibid 129, 130.
- 88 Ibid 139.
- 89 Ibid 140.
- 90 Ibid 141.
- 91 Ibid.
- 92 Ibid 312, 313.
- 93 Melanie Brunet, *Out of the Shadows: The Civil Law Tradition at the Department of Justice* (Supply and Services, 2000) 5.
- 94 Glendon, above n 4, 21.
- 95 *Calder v AGBC* [1973] SCR 313, 346-347.
- 96 Ibid.
- 97 *R v Mitchell* [2001] 1 SCR 911, para 8.
- 98 Glendon, above n 4, 148
- 99 Justice Michel Bastarache, 'Bijuralism in Canada', (Luncheon on Bijuralism and the Judiciary, Department of Justice, Ottawa, 4 February 2000).
- 100 Borrows, above n 15, 194.
- 101 Schlesinger, above n 5, 19.
- 102 Ibid 292, ft 37.
- 103 Haundenosaunee, 'Great Law of Peace' Haundenosaunee <http://sixnations.buffnet.net/Great_Law_of_Peace/>(accessed January 18, 2007).