JOHN TAIT MEMORIAL LECTURE

CONFÉRENCE COMMÉMORATIVE JOHN TAIT

Creating an Indigenous Legal Community

John Borrows*

In this lecture, the author challenges us to move beyond the cases and statutes that preoccupy lawyers generally and to reach, in the spirit of legal pluralism, for law expressed elsewhere—in oral histories and everyday lives. By weaving indigenous oral and Western scholarly traditions together, he demonstrates the existence of a pluralistic indigenous legal community and argues that conceiving of Canada as a bijuridical country is inherently limiting. Only through a pluralistic, multijuridical framework can we fully respect the place of indigenous legal thinking.

It is also essential to recognize that the scope of indigenous law is not limited to Aboriginal communities. Indigenous law is more than just private or Aboriginal community law: it is a part of Canada's constitutional structure. In fact, both indigenous and non-indigenous peoples benefit from treaty rights. As such, failing to recognize the significance of indigenous law will result in the impoverishment of our understanding of Canadian laws and legal processes.

The author builds on this argument to suggest that we can create an even stronger indigenous legal community in Canada. He underscores the importance of committing to John C. Tait's notion of "dialogue" in building a strong sense of community. By moving in this direction, Canada can be a world leader by recognizing the central role of indigenous law in private law, community law, and—perhaps most importantly—constitutional law.

Dans cette allocution, le conférencier lance le défi d'aller au-delà des arrêts et lois qui préoccupent généralement les avocats pour s'intéresser, dans l'esprit du pluralisme juridique, à d'autres sources de droit telles que l'histoire orale et la vie au quotidien. En entrelaçant la tradition autochtone orale et la tradition académique occidentale, il démontre l'existence d'une communauté juridique autochtone pluraliste en soulignant qu'il est restrictif de concevoir le Canada comme un pays bijuridique. Seul un cadre pluraliste et multijuridique permet de donner sa juste place à la pensée juridique autochtone.

Reconnaître la portée du droit autochtone au-delà des communités amérindiennes est primordial. Plus qu'un simple droit communautaire privé ou autochtone, c'est une partie importante de la structure constitutionnelle canadienne. D'ailleurs, autochtones comme non-autochtones bénéficient de droits issus des traités. Ne pas reconnaître la valeur du droit autochtone appauvrirait notre compréhension du droit canadien et de son fonctionnement.

L'auteur propose donc que l'on crée une communauté juridique autochtone encore plus forte. Il souligne l'importance de s'engager à poursuivre la notion de «dialogue» avancée par John C. Tait afin de développer le sentiment d'appartenance communautaire. En faisant un pas dans cette direction, le Canada pourrait devenir un chef de file, reconnaissant le rôle primoridial du droit autochtone en droit privé, en droit communautaire et, plus important encore, en droit constitutionnel.

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Stephen Scott:

My Lords, ladies and gentlemen, my name is Stephen Scott, and I teach in this Faculty.

Au nom du Ministère de la Justice, qui est représenté ce soir par son sous-ministre, Monsieur Morris Rosenberg, et de la Faculté de droit de McGill, que représente son doyen, le professeur Nicholas Kasirer, je vous souhaite la plus cordiale bienvenue à la cinquième conférence commémorative John Tait sur le droit et les politiques publiques.

Je demanderais d'abord au sous-ministre de nous adresser la parole au sujet de la vie et de l'oeuvre de John Tait.

Morris Rosenberg:

Thank you, Professor Scott. I want to say first of all how happy I am to be back here at McGill. It normally takes an hour and forty minutes to get here—it took us about three hours today because of traffic and we just made it. I am very happy that we did because I think this is a very important lecture and it honours the memory of John Tait. In a minute I am going to tell you a bit about John Tait. I just want to note a couple of people who are here tonight. John's wife, Sonia Plourde, as well as John's brother, David, and his wife, Andrée, are able to join us today, and I am very pleased about that. Like John's family, many colleagues and many friends, this institution no doubt also takes great pride in the impressive legacy left by John Tait. As some of you may not know, John Tait was an outstanding graduate of the McGill Faculty of Law. After John passed away, we thought it would be apt to celebrate John's legacy at the place where he went to law school and the department where he spent six years as Deputy Minister.

So, I want to tell you a bit about John Tait, who was a truly kind and wise man, and why through this lecture we think that it is important that we continue to honour and remember him. John était un juriste eminent et l'un de nos fonctionnaires les plus aimés. John nous a laissé pour héritage son leadership, sa dévotion envers la fonction publique ainsi que l'envergure extraordinaire de sa vision et de son integrité. Il a laissé sa marque dans le développement du droit et de la politique au ministère de la justice, qu'il a dirigé en tant que sous-ministre, une marque indélébile et d'une immense portée qui continue d'influer le governement dans son ensemble, la collectivité juridique du Canada et bon nombre d'entre nous a titre personnel. John a vécu sa vie et pratiqué sa profession avec le plus haut degré d'engagement envers la justice et la dignité de tous les êtres humains. Au Ministère de la Justice, il a contribué a l'élaboration de la *Charte canadienne des droits et libertés*[1] de même que celle de la *Loi sur l'accès à l'information*[2] et la *Loi sur la protection des renseignements personnels*[3].

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[1] Partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11.

John's work with the Aboriginal community, both during his tenure with the Department of Indian and Northern Affairs, and later as Deputy Minister of Justice, demonstrated the strength of his values and his foremost belief in the promotion, protection, and respect of fundamental human rights. Throughout the 1980s and early 1990s, at a time when relations between Aboriginal peoples and government were marked by difficulties and mistrust, John helped to modernize the government's approach to its relations with Canada's Aboriginal peoples. He recognized that the voice of the Aboriginal community had been muted and he opened the door to inclusive consultations. Under his leadership, the concept of healing and sentencing circles progressed toward the mainstream. John's unique blend of sharp intelligence and caring humanity won him the respect of those with whom he worked and those whose lives he touched. John believed profoundly in our ability to shape the law to build a more humane, peaceful, and respectful society. He was a seeker of new ideas, fresh perspectives, and a strong proponent of Aboriginal rights. John would have been particularly interested in hearing Professor John Borrows speak tonight on the topic of "Creating an Indigenous Legal Community." John would no doubt have listened respectfully, reflected seriously, all the while contemplating how he could integrate what he learned tonight in his own work and daily endeavours. Speaking personally, having read Professor Borrows' book last year—enjoying it very much—and having had the pleasure of hearing him speak at the 2003 Cambridge Lecture Series, I look forward to his remarks this evening. Thank you very much.

Stephen Scott:

Thank you so much, Mr. Deputy Minister. I will now ask Dean Kasirer to introduce our guest speaker.

Nicholas Kasirer:

Chers membres de la famille Tait, Monsieur le sous-ministre Rosenberg, Monsieur le professeur Scott, Monsieur le professeur Borrows, chers collègues du Ministère de la Justice du Canada et de la Faculté de droit de McGill, j'ai l'honneur et le privilège de vous presenter notre conférencier pour cette cinquième conférence John Tait, le professeur John Borrows, professeur à la Faculté de droit de l'Université Victoria et titulaire de la Chaire Law Foundation en Justice et Gouvernance autochtone à cette université. En accueillant John Borrows à McGill, je salue un ami de la Faculté, un ami de l'association étudiante de droit autochtone d'ici et un chercheur de renommée internationale.

One learns a great deal about a person by looking at how he or she holds himself out as a jurist. Law professors tend to advertise their advanced degrees, their professional qualifications, awards and distinctions, as so many badges on their

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[2] L.R.C. 1985, c. A-1.
[3] L.R.C. 1985, c. P-21.

professorial sleeves. John Borrows has more university degrees and distinctions than most, but in his too modest biography he tells us who he is by starting with the fact that he is an Anishinabe and a member of the Chippewas of the Nawash First Nation. He is an Aboriginal scholar in a culture where scholarship is not always measured in traditional ways, or at least, the traditions of scholarship are pursued outside the confines of the ivory tower.

John Borrows confronted this paradox with candour and imagination recently in a paper called "Listening for a Change,"[4] dealing with the courts and oral history, so critical, of course, to understanding indigenous law. That paper, which was published a couple of years ago in the Osgoode Hall Law Journal, begins with a moving personal narrative: an oral history recounted by John Borrows' aunt.[5] In that is a message, I think, a powerful message of humility that resonates through John Borrows' work. He himself is a master of the Western scholarly mode. Indeed, he is one of Canada's most prolific and imaginative legal scholars. But here he turns the scholarly mode that he has mastered so well against himself. *Il donne la parole à sa tante*—and recognizes that his aunt, in some measure, is a jurist just as he is. The idea that law—be it scholarship, custom, title, rights—is to be found outside the usual sites of state-sponsored normativity is, I think, one of the overarching themes in John Borrows' extraordinary contribution to Canadian law. Indeed, part of his work serves to call into question what we mean when we think of Canadian law, challenging us to move beyond the catalogues of cases and enactments that preoccupy lawyers generally, and to reach in the spirit of legal pluralism for law expressed elsewhere: in oral histories, and more broadly speaking, in everyday lives.

Son travail a une résonance particulière à McGill. Nous nous préoccupons ici de multiples traditions juridiques, de pluralisme juridique, et les réflections de John Borrows — sur la citoyeneté autochtone par exemple — s'appuient sur la force du droit autochtone en tant que tradition juridique. Nous réclamons donc John comme l'un des nôtres. Un peu vaniteusement, sans doute, je vois dans son travail un défi lancé a la Faculté de droit de McGill de se surpasser, d'aller au-delà de la binarité droit civil/common law dans l'appréciation de ce qu'est le droit, pour faire une plus grande place au droit autochtone.

In Professor Borrows' recent scholarship he has added, at least in my reading, a new dimension to his work, signaling his immense maturity as a scholar. He has moved to a contemplative tone in his evaluation of Aboriginal justice. This links, I think, the theme of public service, so present in the legacy of John Tait and this lecture series, to John Borrows' work, adding—alongside the instrumental mission-oriented work of the public servant in law—a speculative voice, so key to some of the finest work pursued by colleagues in the Department of Justice today. Tonight, Professor

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[4] John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39 Osgoode Hall L.J. 1.

[5] *Ibid.* at 2-5.

John Borrows will speak on "Creating an Indigenous Legal Community." Please join Mr. Rosenberg, colleagues at the Faculty of Law and of the Department of Justice in welcoming our John Tait lecturer for 2004, John Borrows.

Stephen Scott:

Professor Borrows, the lectern is yours.

John Borrows:

Ahnee. Nigig Dodem. Kegedonce Nintishinikass. Neyaashiinigmiing Nintooci.

It is a great honour to be with you this evening to deliver this lecture in memory of John Tait. I appreciate the introductions and the hospitality of the university and the Department of Justice in inviting me to give this lecture. John Tait, for me, has always represented pragmatism and practicality. When I was a graduate student at the University of Toronto, I can remember a lecture that he delivered on indigenous issues. He was Deputy Minister of Justice and Deputy Attorney General of Canada at the time. It was 1990, early fall in Toronto, and we were gathered at the Toronto Convention Centre. He was wearing a dark suit and a tie, and he had to speak on the same panel as the leaders of Canada's national Aboriginal organizations. Most of the people in the audience were representatives from these organizations. Given what had just occurred through the Meech Lake Accord and some of the challenges that were there, it was not a particularly friendly audience. But he stood forthright and delivered a very constructive message. I can still remember his speech, pleading for practical experiments to implement real change in Aboriginal communities.[6] I have looked back at some of the notes of the time. He said: "We are now in a situation where the constitutional agenda of the country is stalled for the foreseeable future. The concerns of Aboriginal people, along with others, cannot be addressed until a means is found to re-establish the dialogue."[7] For John Tait, dialogue was to be re-established through pragmatic experimentation. As far as I could tell, what he wanted to do was take the facts on the ground, examine them in new ways, and come up with innovative experiments to fit Canada's circumstances in that era.

It is in this spirit that I hope my remarks will be delivered this evening. My subject is "Creating an Indigenous Legal Community." I want to start from where we are, and argue that we have a pluralistic indigenous legal community in Canada. Then I want to talk about how we can build on this, and create an even stronger indigenous legal community in this country. I think this is consistent with John's approach: building understanding through dialogue. He said in another report: "If there is an

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[6] John C. Tait, "The Constitutional Dilemma and the Two-Track Strategy" in Frank Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.: Oolichan Books, 1991) 41.

[7] *Ibid.* at 44.

image of how we wished our work to proceed and to be perceived, it is in the image of an honest dialogue."[8] He goes on:

> An *honest* dialogue requires an ability to speak forthrightly about difficult issues. This presents ... important challenges ... The first is that many of the issues we wished to discuss are complex and sensitive. There are good reasons why [we]… often shy away from them. They can be painful and awkward to confront and they can open up questions that may be difficult to handle.[9]

And there is no question that honesty and awkwardness are a part of dealing with Aboriginal issues in this country. But he goes forward, "If we wish to pursue an honest dialogue we have to be prepared for the consequences ... truth, or the whole truth, is not known at the outset. It only emerges from the dialogue itself."[10]

A few years ago, I had the opportunity to work for three years with the elders in Saskatchewan, dealing with the Office of the Treaty Commission, and gathered in round tables discussing the oral history of their treaties. We were dealing, in particular, with the peace and order clauses in the numbered treaties. At that gathering, there was an elder who spoke, Elder Simon Kytwayhat of the Cree Nation. He said something that is very similar, I believe, to what John Tait was trying to communicate through this notion of honest dialogue. And it goes as follows:

> A long time ago the Creator put a human being in this world. But then he asked the animals to come into a circle and he asked them what he could do to give this gift that he had for humans. He said this gift was special and he did not want them to be able to find it too easily because otherwise they would not be able to appreciate it. He said, "I want them to work for it. Where can I put it?"
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> So the animals thought for a while, having been asked this question. Eventually the grizzly bear spoke and said, "I will take that gift and I will take it to the mountains and hide it over there." And the council looked at one another and seemed to nod in agreement. The Creator contemplated it for a moment and then said, "No, they are going to go there, and they are going to find it. It will be too easy for them and then they will misuse it."
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> So, the council once again thought about this proposition of where this gift should be placed. Then the big fish, *kinosew*, said, "I will take it and I will hide it at the bottom of the ocean." Again there seemed to be some agreement from those assembled in council. The Creator, looking on,

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[8] Canada, Report of the Task Force on Public Service Values and Ethics, *A Strong Foundation* (Ottawa: Canadian Centre for Management Development, 1996) at 3 (Chair: John Tait).

[9] *Ibid.*

[10] *Ibid.*

> thought, and said, "No. They will find their way to that place. That gift will be easily attained. They will misuse it."
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> Then the buffalo next spoke and said, "I will take the gift to the berries and I will hide it in the midst of them." Again, there seemed to be some approval, although less forthcoming than before. Everyone turned to look to the Creator. "No, the people are going to go to the berries. They will find it over there too easily and they will misuse it."
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> Finally, the eagle spoke up: "I will take it to the moon. They cannot go there." Once again, the Creator spoke: "No, they are even going to go there. They will find it and they will too easily misuse it."
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> After some moments of silence, finally, the little mole spoke up from amongst the council, coming up from under the ground saying, "Creator, let me hide it. Let me take it some place." All the animals turned to look at the mole and were quite concerned that he would dare raise his voice in this gathering of the mighty. They wanted him to be quiet.

And then, Elder Kytwayhat said this, "You know, sometimes, when we do not listen to our people when they want to speak, we lose, because maybe they have an answer."

> And so the Creator asked the animals to give the mole a chance to speak. "Let's listen to him. Let's listen to the mole." So, they listened to him and the mole said, "Why don't you hide that gift inside those people? Place the gift within them. Then, when they do the work that is required to find it there, they will not misuse it."

And then Elder Kytwayhat concluded this teaching by saying, "You know, when we found that love there, and justice, and how to work together, and how to relate to one another as brother and sister, and how to talk with one another, I think that that is the way the elders looked at it, when they signed that treaty."

John Tait's writings and Simon Kytwayhat's teachings contain similar lessons. Both invite us to listen to a plurality of voices to arrive at some sense of where truth is.

It has been said that Canada is a bijuridical country. Bijuridical means a "state of facts: the co-existence of two contemporaneous legal systems in Canada."[11] While this concept is fair as far as it goes, it can also be problematic because it is underinclusive. The phrase "bijuridicalism", while helpful at one level, is also extremely limiting on another level. On its face, it does not recognize the existence of more than two legal systems operating in Canada. As such, it may prevent us from acknowledging the full

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[11] Marie-Claude Gervais, "Harmonization and Dissonance: Language and Law in Canada and Europe" in Department of Justice, ed., *Bijuralism and Harmonization: Genesis* (Ottawa: Minister of Justice and Attorney General of Canada, 2001) at 10.

weight of our legal inheritance as Canadians. Bijuridicalism is an incomplete model of dialogue, linguistically, juridically, and culturally.

We can do better. Numerous indigenous legal traditions continue to function in Canada in systemically important ways. They influence the lives of indigenous *and* non-indigenous peoples. Canada would be better described, as Nicholas Kasirer said, as multijuridical or legally pluralistic. The continued existence of indigenous law requires a pluralistic approach to understanding the relationships between Canada's *many* legal traditions. This reminder should carry us beyond bijuridicalism to search for more accurate and inclusive ways of describing the state of Canada's legal inheritance.

This task is not beyond possibility. In fact, it is the state of facts on the ground. We have recognized this before. In the first year of Canada's confederation, the Quebec Superior Court affirmed the existence of Cree law on the prairies and recognized it as a part of Canadian law: this is the *Connolly v. Woolrich*[12] case. In expressing this recognition, Justice Monk wrote: "Will it be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants?"[13] He poses the question, and then answers, "In my opinion, it is beyond controversy that they did not [cease to exist], that so far from being abolished, they were left in full force, and were not even modified in the slightest degree."[14] This doctrine applied by Justice Monk is known as the doctrine of continuity. Indigenous legal traditions have continued through Canada's history.

Indigenous law flows from sources that lie outside of the common law and civil law traditions. As described in 1973 in the *Calder*[15] case by the Supreme Court of Canada, such a unique source resides in the fact that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[16] These laws have no need for dependence "on treaty, executive order or legislative enactment."[17] They are "pre-existing" and have their own logic, as the Court said, "indigenous to their culture [though] capable of articulation under the common law."[18]

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[12] *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, 11 L.C. Jur. 197 (Qc. Sup. Ct.) [cited to R.J.R.Q.].
[13] *Ibid.* at 84.
[14] *Ibid.*
[15] *Calder v. British Columbia (A.G.),* [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [cited to S.C.R.].
[16] *Ibid.* at 328.
[17] *Ibid.* at 318.
[18] *Ibid.* at 375.

The Supreme Court of Canada has recognized this fact on many occasions in the past few years. In *Mitchell*,[19] Chief Justice McLachlin, writing for a majority of the Court, said:

> European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights.[20]

So, indigenous laws continue to exist in Canada, as Chief Justice McLachlin wrote in *Mitchell*, unless—and there are three qualifications—unless: "(1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them."[21] Now these are questions of fact, but most indigenous legal traditions, in my view, are compatible with the Crown's assertion of sovereignty. There is a wide degree of place for interaction and intertwining of indigenous legal values and the values found in the common law and in the civil law. It is often overstated that indigenous lifeways are on one side, non-indigenous ways are on the other side, and that there is no point of meeting between the two. I think it is also fair to say that many indigenous legal traditions have not been surrendered by treaties and have not been clearly and plainly extinguished by the Crown. Indigenous law exists today.

It is important, however, to recognize that indigenous law is not simply something that continues to apply in Aboriginal communities. It is more than just private or Aboriginal community law. Indigenous law is also a part of Canada's constitutional structure. Indigenous legal traditions shape and are embedded within our national legal structure.

When people came from other continents and arrived on the shores of North America, First Nations' laws, protocols, and procedures often set the framework for the first treaties between Aboriginal peoples and others.[22] These treaties were entered into on Aboriginal legal terrain. In the early 1700s, the French entered into treaties with the Anishinabek of the Great Lakes—those are my people: the Ojibwa and the Chippewa—and they did this by Anishinabek forms: wampum belts and ceremony. On the east coast, from 1685 until 1779, the peace and friendship treaties between the Mi'kmaq, Maliseet, Passamaquoddy, and the British Crown used similar principles grounded in indigenous protocols, procedures, and practices. In 1764, when the British were able to assert an interest in North America after the Seven Years War, they used indigenous legal traditions to transact their business and to bind themselves to solemn commitments.

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[19] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385 [cited to S.C.R.].

[20] *Ibid*. at 927.

[21] *Ibid.* See also Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727.

[22] See Robert A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997).

Many of you are familiar with this history. There was a war between the French and the English. In this war, indigenous peoples were largely allied with the French. When the French were defeated, the indigenous nations acted independently in the way peace was transacted with the British Crown. Governor Murray, in a case that you can read about called *Sioui*,[23] was able to enter into some treaties with the Wendat (Huron) people living around Quebec City. Many indigenous peoples throughout the Great Lakes areas said to the British, "Englishmen, although you have conquered the French, you have not conquered us. These lands, these forests, these lakes remain ours. And we will not part with them." And then these nations gave the British a choice: They could take up the hatchet, as the metaphor goes, or they could take up the pipe of peace and enter into a different kind of relationship. It was at that point that all of the forts the British had in the Ohio Valley were threatened. Many of them fell because of Aboriginal military might. The British, at that moment, recognized they could not just do what they wanted when entering into North America: they needed to somehow engage these people. And so, in 1763, King George III issued the *Royal Proclamation*.[24] This document, an executive proclamation, said to the Indians, "We will leave these several tribes and nations unmolested and undisturbed. We will not take your land unless this is done through a public ceremony. We will also not allow local settlers or local governments to transact this business of transferring land from yourselves to us." The distant imperial authority was the one to be empowered to take land and enter into treaty relationships.

But the British had just been at war against First Nations. Why should the Indians trust this piece of paper when it was not of anything according to their own making? So Sir William Johnson, who was the Superintendent of Indian Affairs, the lead colonial official dealing with Indian affairs in colonial North America, said, "We must bind them according to their own protocols, their own understanding." He sent runners from the Algonquin Nation with strings of wampum, which were beads that were sewn onto hide, to go and invite First Nations living around the Great Lakes area to come to a meeting the following summer in Niagara. These runners found themselves in Quebec, here along the river. They found themselves in the Maritimes area, in what became New Hampshire and Vermont and New York State, Ohio, over into Michigan and Wisconsin and Minnesota and Ontario, and out into Manitoba. You can read the journals of the traders that were there among the Indians in the winter of 1763 to the spring of 1764. You can read about what they said in their councils as to whether or not they should have this relationship with the British. They did agree to assemble, however, and two thousand First Nations people gathered there in 1764 at the Crooked Place, as they called Niagara, representing 22 different Nations. There they entered into an agreement that demonstrates the building upon indigenous legal protocols using indigenous legal traditions.

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[23] *R. v. Sioui*, [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 727.

[24] George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1.

I have a replica of the agreement from this time (showing wampum belt). This was one of many wampum belts circulated through the Council that took place in 1764. The white beads of this belt represent that the parties were to live together in peace, friendship, and respect. In other words, the first legal act that the Crown undertook in dealing with the First Nations populations was on the Indians' terms, in a way that expressed a desire, a hope, and an aspiration to live together. This was about, in some sense, integration, peace, friendship, and respect. In fact, the motif is continued as there are three white rows that separate these other two purple rows. Again: peace, friendship, and respect. But it was not all just about sharing. The agreement also spoke about Aboriginal peoples travelling down their River of Life in their canoe, controlling their own affairs, and non-Aboriginal peoples travelling down their River of Life, in their ship of state, controlling their own affairs. There was a measure of autonomy recognized in this relationship. At the same time, there was a recognition that there was going to be sharing. The other belts that were a part of this gathering reaffirm this meaning. I think it is quite significant that the first act that bound people together in what became Canada was an act aimed at the rule of law, aimed at drawing on the traditions that were already there. It was these traditions that infused and gave life to what the British wanted to do in North America.

Since that time there have been over 500 treaties in Canada, with many of them drawing on some form of indigenous legal tradition, even in later eras when indigenous peoples enjoyed less political influence. When I was meeting with the elders in Saskatchewan, again, around the peace and order clause, they talked about gathering in those councils, having beforehand consulted among themselves according to their traditions, having used their sacred medicine bundles, having used their pipes, and then when they met with the representative of the Crown, having a pipe ceremony, which was the most significant relationship that you could enter into between peoples on the prairies, with the Cree, the Lakota, the Dakota, the Nakota, the Dene, the Saulteaux, and the Blackfoot. These pipe ceremonies were regarded in many ways as being the heart of the agreement. And then the elders spoke to me about the words that would be used in conducting these pipe ceremonies: "Wahkohtowin", "Miyo-wicehtowin", "Pastahowin", "Ochinewin". These concepts rooting Aboriginal world views and then sharing them with the Crown, and the Crown bringing their view to the engagement. First Nations' laws, legal perspectives, and other indigenous frameworks have been present throughout the entire span of treaty making in Canada.

Since 1982, existing treaty rights have been recognized and affirmed in the *Constitution Act*,[25] thus enjoying the highest possible status in Canada's legal order. The continuation of treaty rights and obligations entrenches the continued existence of indigenous legal traditions in Canada. These past few weeks I found myself in Nunavut and in the Yukon. These agreements, although written in texts that look very familiar to us trained in the Western law, also find expression in these indigenous

[25] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

legal communities, whether you are dealing with the Kaska people in the Yukon, or the Inuit people in Nunavut.

First Nations peoples, however, are not the only beneficiaries under the treaties: non-indigenous peoples also have treaty rights. Both groups are recipients of the promises made in the negotiation process. You and I both have treaty rights, or should have. I have treaty rights in Ontario as a result of the activities of my great-great-grandfather, who signed a treaty dealing with the Bruce Peninsula area in 1854. If you are from many parts of Canada, you also have treaty rights. If you live in the Quebec region, if you are a Wendat person, some of your rights extend from what the Huron did on their side of the equation. If you are Québécois or Québécoise, if you are living in this territory, you also have treaty rights that extend from what Governor Murray did at that time. If you are from northern Quebec, your treaty rights flow from actions in the early 1970s between the Crown, Cree, Montagnais, and Inuit. The mutuality of indigenous and non-indigenous peoples as treaty beneficiaries is often overlooked because it is most often indigenous peoples striving to assert their rights. Yet there are a number of potential inheritors of treaty rights beyond indigenous nations, bands, and individuals. The British and Canadian Crowns certainly received many benefits from the treaties. Their citizens were able to peacefully settle and develop most parts of the country on a footing of consent. Non-indigenous Canadians trace many of their rights to do certain things in this country to the consent that was granted to the Crown by indigenous peoples in the treaty process.

Now, I realize this is a controversial point. It is not controversial looking at it from what my family told me about what my great-great-grandfather did, or what I heard from the elders in Saskatchewan. However, let us consider the alternatives if we do not create Canada based on consent: we have the options of discovery, conquest, and adverse possession or occupation. Discovery is the power by which rights to land are claimed based on European arrival in North America. That is a challenging concept, logically, because prior to the arrival of Europeans, indigenous peoples had already discovered these lands. What would give the Europeans or another power a right to claim land through discovery if it was not some notion of superiority—that the rights of Europeans were somehow greater because of who they were and because of the legal traditions that they brought with them? This notion of discovery has been rejected in the *Island of Palmas Case*,[26] and the *Eastern Greenland Case*.[27] We could say that conquest is another measure of Canada's creation. But there are a couple of points that have to be made. First, the facts on the ground do not often support a finding of conquest. Aboriginal peoples did not enter into large-scale wars with the British Crown here, in northern North America. The second thing to consider about conquest, at least as it is articulated under international law, is that when there is conquest, the rights of the people remain untouched, so that you would still have the continuation of indigenous legal traditions even under that formulation. What about

[26] *Island of Palmas Case* (1928), 2 R.I.A.A. 829, 4 I.L.R. 3.
[27] *Legal Status of Eastern Greenland Case* (1933), P.C.I.J. (Ser. A/B) No. 53.

adverse possession? Should being on someone else's land for a certain period of time create rights? Well, you need quiet possession to establish rights in this way, but indigenous peoples strongly dispute people claiming rights against them without entering into any relationship with them. So, it may be controversial to say that indigenous legal traditions are part of Canada, that many of the rights enjoyed by non-indigenous Canadians are based on consent, but the alternatives leave much to be desired. Consent is a better foundation.

As the Supreme Court of the United States recognized in the *Winans*[28] case, treaty rights are a grant of rights *from* the Indians, not *to* the Indians.[29] As we already noted in the *Mitchell*[30] case, indigenous peoples have rights and jurisdiction until those rights are expressly ceded or extinguished.

The Crown did not represent treaties as being temporary when they were signed. They were to last as long as the grass grows, the river flows, and the sun shines. The honour of the Crown should be preserved. Their representations should be taken at face value, as they "would naturally be understood by the Indians."[31] Justice Black of the Supreme Court of the United States said in the 1960s about US Indian treaties, "Great nations, like great men, should keep their word."[32]

Furthermore, treaties do not just have to be about history or the past. In fact, they should *not* just be about history or the past. They should be living agreements, promises about a future to which both parties aspire. If treaties were not lived up to in their first hundred years, that does not mean they should be discarded today. I have taught contract law in the past: its prime function is to protect promises relating to a future state of affairs. If law can do this for individuals and for corporations, then why not for nations? Treaties are capable of applying to the most recent immigrant from Jamaica, the old Ontario family of Scottish heritage, a Québécois family settled since 1650, as well as people from my reserve.

As the Supreme Court of Canada noted in *Sparrow*, "it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[33]

I hope I have made my first point: indigenous laws continue to exist in Canada. But I believe that recognition is just the first step. We should be more active in cultivating this indigenous legal community of which we are all a part. Of course, I am using "indigenous" in two ways as I make this point. I believe that Aboriginal legal communities should be strengthened, but I also believe that Canada can become more fully indigenous, more fully rooted in this place and less rooted in its colonial

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[28] *United States v. Winans* (1905), 198 U.S. 371, 25 S. Ct. 662 [cited to U.S.].
[29] *Ibid.* at 381.
[30] *Supra* note 19.
[31] *Jones v. Mechan*, 175 U.S. 1 at 11 (U.S.S.C. 1899). See generally *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 78, 177 D.L.R. (4th) 513.
[32] *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 at 142 (U.S.S.C. 1960).
[33] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1078, 70 D.L.R. (4th) 385.

past if it acknowledges, adopts, and creates laws that are founded in the experiences that they have had in these territories that now make up Canada.

In December of 1996, John Tait wrote a report entitled *A Strong Foundation*.[34] It was written "to help the public service to rediscover and understand its basic values and assist the public service to recommit to and act on those values in all its work."[35] He said something which I think is absolutely profound:

> We do not learn about the good from abstractions but rather from encountering it in real life, in the flesh and blood of a real community, and real people. Values are sustained by a community that believes in them and sees them acted out daily, in both concrete and symbolic actions. This points to the importance of leadership and of role models.[36]

In this vein, I think that much can be done to pay attention to the values that are "on the ground" as we attempt to integrate common law, civil law, and indigenous legal traditions. This diversity of sources can throw new light on old problems. One of the things that we hold up to the world as Canadians is a sophisticated pluralism, being able to work back and forth between the common law and the civil law. It gives us access to other countries with this mix, either belonging to a civil law or a common law tradition. Bijuridicalism allows us to play some role on the world stage. But think of what we could gain if we extended that analogy and included indigenous legal traditions as part of our inheritance. How many countries in the world function not just as civil law, or common law jurisdictions, but also find themselves with indigenous legal traditions in their mix? We have something unique in the world: the ability to say that these traditions are founded on consent.

I want to illustrate how I think this process of creation or recreation needs to occur. If I want answers to Anishinabek questions, I could go to the courts, read legislation from the library, or I could talk to some learned colleagues. I could also go to a legal source within my community. Anishinabek communities use precedential, standard-setting criteria to guide and judge action. For example, here is a story that deals with a woodland character known as Nanabush, who is a trickster character:

> Nanabush was walking from village to village when he noticed that the air was devoid of laughter. Everywhere he went, silence seemed to follow. Yet the sun shone brightly, the breeze was fragrant, and the smell of fresh pine was in the air. Even the moon stood out against the blue azure sky. He wondered, "Why no laughter? This is such a beautiful day." Nanabush was curious.
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> So as he approached a small encampment, he thought about how this place looked so empty. The dogs that should have been playing around the site of

[34] *Supra* note 8.
[35] *Ibid.* at 1.
[36] *Ibid.* at 2.

the camp were missing. There were no mothers by the fire, no men working at the nets needing repair. Then as he searched around he finally saw some movement inside one of the shelters. He peeked inside the lodge and saw someone moving: slow, weary. He called out "Ahnee! How are you?" Inside, a woman with bright dark eyes was sitting with her grandchildren. Others were slouched against the walls. The grandmother leaned forward with great effort. "Nanabush, what brings you here? We are so tired."

Nanabush looked for a moment, and saw the state that they were in. "I wanted to see how everyone was, the land was so quiet. Where is everyone? Why are you so tired?"

Then she spoke, "It is our children. They are so sad. They say they have nothing to do and they mope around the lodge all day. They have affected everyone. No one feels much like doing anything with them all being so sad."

Nanabush thought about this for a while as he walked away from the home. Then he heard a sound coming lightly over the breeze. It was the closest thing that he could hear to laughter. It was a brook, a small stream. As the rocks tumbled over one another, they gave a mimicry of laughter. He walked to the source of the sound. He looked at the rocks and the pebbles and the sand lying in the bed of the stream and pondered their effect on the water. He walked along the banks, gathering a few small coloured stones as he went and he filled his pouch. With that, he walked back to the centre of the village.

"Ahnee!" he called. "Come. See. Wagwahge." He was calling them to the centre place where the fire was almost extinguished in the middle of their village. The people again seemed sad. Slowly, wearily, they came out of their shelters. When everyone was there, curious, they looked at what Nanabush was calling them for. Nanabush at that point reached into the pouch that he had and grabbed a handful of stones and stood there before the people and flung them into the air. Everyone at that point stood back thinking that Nanabush had tricked them again, that they were going to be rained down on by these stones that were now hurled up. But they looked up, as they were in this mode of anticipation, and as they looked up, as each stone reached its zenith, it transformed.

In their fall, each one became nearly weightless, changed in midflight. Some were yellow, some were turquoise, orange, and green. Some were mixed, iridescent in the sun. Soon they started to flutter, catching the currents in the air above the circle. Eyes went wide below. The children started to smile and reached their hands into the air to try to catch them, though each butterfly seemed to be just out of reach. As they gathered energy, laughter could be heard from the tiny voices of the children gathered around Nanabush. The adults began to join in the chase. Grins

> broke out. Mothers and fathers playfully tussled with their kids, sometimes lifting them high into the air to try to catch these butterflies. The dogs eventually entered the fray, barking and weaving between the legs of the people in the village. And the butterflies sailed on, over and around the people, wherever they could be found. A reminder of the gift of laughter, and the beauty and joy that life brings.

I tell this story for a couple of purposes. One is that we have legal values within our communities to which we can turn to answer some of our pressing problems. Nanabush turned to what was there, what was familiar, what was nearby, and he was able to take those things that were familiar and nearby and transform them—transform them in such a way that he got people involved with what was going on in the community. We have a real crisis in the rule of law in Aboriginal communities; it is not a crisis because Aboriginal peoples do not have the rule of law, it is a crisis of legitimacy about the rule of law in Aboriginal communities. If Aboriginal peoples were able to start to see themselves and their normative values reflected in how they conduct their day-to-day affairs, I believe that would go at least some distance to diminishing some of our problems. It is not the whole solution, but it is a part of the solution.

As the Court said in the *Manitoba Language Reference*,[37] the rule of law is a normative order that sustains legality and legitimacy, and prevents anarchy, chaos, and disarray. Many of our communities are in a place of disarray because those values are not fully grafted onto how people are living their lives. Non-Aboriginal values have disrupted—but not replaced—our ancient traditions. If Aboriginal peoples were to more fully exercise their legal traditions, the state has traditionally wondered whether this would diminish Canada and threaten the territorial integrity of the country.

I spent some time down in Arizona as the executive director of the Arizona State University Indian Legal Program and participated in judicial education with tribal court judges. The country is not broken up because indigenous peoples have tribal courts and exercise the rule of law. In fact, most of the statutes tribal councils adopt are modelled on state statute, but every once in a while they will make a modification, change, or amendment to reflect their legal tradition. When tribal courts decide on a statute's interpretation, they follow many of the legal categories operating in the United States generally. At the same time, they are able to add their own twist to make it a fully contemporary tradition. Tradition can be the dead faith of living people or the living faith of dead people. Tradition has to live today in people's lives to be relevant.

The way traditions live in, say, the Navajo community is informative. They had their most pressing constitutional crisis about twenty years ago now when the tribal president was charged with taking kickbacks and bribes from uranium and coal

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[37] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1.

mining occurring on the reservation. As a result of these actions, he was charged, found guilty, and the tribal council suspended him without pay. The tribal president in effect said, "You cannot do that, that is beyond your jurisdiction, there is a separation of powers within our constitution." This could have destroyed the Navajo nation. It was taken to their courts, who took their statutes and talked about the responsibilities that a president has within their legal community. Then they took the common law of trust and the political trust doctrine and spoke about that as another source of authority to add to the decision-making process. But then they took the story of the Naat'aaniis. When the Navajo were placed within the four corners of their sacred mountains, there was a battle between the hero twins. At the end of this battle there was a truce, which led to some agreement as to how leaders should act with their people. In fact they were the servants of the people, and were not to stand out in front of the people. This court blended these three legal traditions together. Was it less Navajo because they used statute and trust law? No. It was a contemporary application and I think that can be the case in creating an indigenous legal community within Canada.

We can take many of these legal traditions and have them live in a contemporary form. I want to talk about one particular example of a law coming from our community in 1838. It was recorded by Jarvis, who was the Superintendent of Indian Affairs. It is actually a case about capital punishment, so it can be very challenging. I want, though, to be able to draw the principles out of this case rather than focus on the capital punishment aspect. It goes as follows:

> He came among us the very beginning of last winter, having in the most severe weather walked six days without either kindling or fire or eating any food.
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> During the most part of the winter he was quiet enough but as the sugar season approached he got noisy and restless. He went off to a lodge and there remained ten days, frequently eating a whole deer at two meals. After that he went to another lodge when a great change became visible in his person. His form seemed to have dilated and his face was the colour of death. At this lodge, he first exhibited the most decided professions of madness and we all considered that he had become a Windigo. He did not sleep, but kept on walking around in the lodge saying, "I shall soon have a fine feast." Soon this caused plenty of fears in the lodge among both the young and the growing. He then tore open the veins of his wrist with his teeth and drank his blood. The next night was the same. He went out from the lodge and without an axe broke many saplings about nine inches in circumference. He never slept but worked all that night, and in the morning brought in the poles he had broken up and in two trips filled a large sugar camp. He continued to drink his blood.

If I were in law school, I would say these are the facts of the case: the community is encountering a tense situation, where someone is being both threatening to others and self-destructive. So now let us look at the legal principles they followed to confront their problem.

> The Indians then all became alarmed and we started off to join our friends.

What a great first foray to be able to try to deal with a pressing challenge—friendship:

> The snow was deep and soft and we sank deeply into it with our new shoes, but he without shoes or stockings barely left the indent of his toes on the surface. He was stark naked, tearing off his clothes as fast as they were put on. He continued drinking blood and refused all food, eating nothing but ice and snow.

Now the next legal principle, counselling together:

> We then formed the council to determine how to act as we feared he would eat our children.

Next legal principle:

> It was unanimously agreed that he must die.

Unanimity. Next legal principle:

> His most intimate friend undertook to shoot him, not wishing any other hand to do it.

This was not an act of retribution or fear, this was an act of compassion, love, and friendship.

> After his death, we burned the body and all was consumed.

Another legal principle, restoration to the individual:

> The lad who carried into effect the determination of the council has given himself to the father of him who is no more, to hunt for him, plant, and fill the duties of a son.

Next legal principle, communal restoration:

> We have also all made the old man presents and he is now perfectly satisfied.

And then Jarvis concludes:

> This deed was not done under the influence of whiskey. There was none there. It was the deliberate act of this tribe and council.

Now, if we were to take this legal case and apply it in today's circumstances, I think it is quite obvious that as Anishinabek people, we recognize that mental illness is a severe issue, and that it would be dealt with through other means. There are medical, there are social, there are community places to help someone who finds him or herself in that situation. I do not want to get caught up in this case being about a

Windigo, as it relates to mental illness and capital punishment. A Windigo can stand for other things: a Windigo is someone who is intemperate, never satiated in their hunger, always full of appetite, continually consuming that which is around them. There are Windigos in our communities, they are just of a different form. This case can help us figure out some answers to our pressing questions: go with our friends; form a council; be unanimous; and act in such a way that you take responsibility for the decision you make.

Could you imagine a judge, passing a sentence and then having to go stand in the shoes of the person that is affected by the sentence that he or she has just passed? There is a different kind of approach in this sentencing responsibility.

There are things that can be done to create an indigenous legal community by paying attention to the ideologies within indigenous communities. These ideas are not just of benefit to Aboriginal peoples but can conceivably benefit all Canadians. What a vibrant country we live in to have access to different legal standards under the civil law and under the common law. Although they are sometimes similar, sometimes they present different answers. To go to another tradition and realize there is further guidance and wisdom from which we can learn is, I think, an incredible, imagination-opening idea, one that exists there on the ground, and that could help create a legal community. Law schools could be doing more to profoundly affect our notion of our legal inheritance. I really admire what is happening here, at this university, in trying to integrate both common law and civil law in the legal education experience. I look forward to the day when there is a law school that does the same with Aboriginal legal traditions.

When I teach indigenous lands, rights, and governance, I teach Anishinabek law each and every single class. I look forward to the day when Anishinabek law is front and centre. The University of Victoria has the Akitsiraq Law School in Nunavut with some excellent students. I was able to spend four months there in 2003. I would teach contract law and I would try to supplement it with Inuit legal materials, and try to supplement it with land claims, framework legislation, and agreements, but I could only do so much. The students had a role. They would take what I taught them and they would speak among themselves in Inuktitut and keep me filled in with what they were learning and then throw it back at me. Through that iterative process, we would come up with the legal concept under contract law. There was also a role for elders. When I would leave for an hour and a half, Lucien would come in and, as an Inuit elder, would teach them the law of obligations from an Inuit perspective. When these students graduate, they will have an opportunity to try to make their multijuridical education a reality in the territory of Nunavut. This shows how there are things that we can do in legal education to help create an indigenous legal community: it should not just be the far north—it should permeate throughout our communities.

A lot has been done through harmonization in the past few years. There is the *Federal Law—Civil Law Harmonization Act, No. 1*[38] that came into effect on 1 June 2001. According to section 8.1,

> Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.[39]

I imagine creating an indigenous legal community with some kind of *Harmonization Act*, with an associate or assistant deputy minister of justice attached to it who has the resources to work out how these things can be compatible and not tear apart but strengthen our fabric as a country.

There are things the civil service could do in creating an indigenous legal community. I had a wonderful opportunity last January to be able to go across the country and perform an Aboriginal cultural audit of the Department of Justice. There I met Aboriginal employees, non-Aboriginal employees, and managers in Montreal, Toronto, Iqaluit, Winnipeg, Saskatchewan, Edmonton, Vancouver, and spoke to people in Whitehorse, Yellowknife, and Halifax. I got this sense of a very deep, rich, and educated group of people that have a profound interest in Aboriginal legal issues—both Aboriginal and non-Aboriginal people. It was a great blessing and privilege to meet these people and see the good work that was being done as they were going from place to place.

Things can be done in the public service to follow what John Tait was saying: taking the state of facts as we find them and moving forward. There are things the judiciary and law societies could do to develop an indigenous legal order in Canada.

The Ojibwa have a law about how to learn. Their word for look is "Nuh": if you were walking through the forest and someone said "Nuh", you were not just to look by visually focusing your eyes on what surrounds you. You were to literally try to see and feel out of all parts of your body, to take it all in, to look with all your being and to discover what is there. I think that as we approach the creation of an indigenous legal community, it is important that "Nuh"—that we look—that we engage not just with what we visually see with our eyes, but with the vast reservoir of feeling and emotion that is attached, with how people want to live in their communities, by their values, through their laws, and work with one another through peace, friendship, and respect.

I appreciate your attention and I am really glad to be here. Thank you very much.

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[38] S.C. 2001, c. 4.
[39] *Ibid.*

Stephen Scott:

Thank you, Professor Borrows. We have some time for questions. There are microphones on either side of the room. It might be helpful if you identify yourselves when you ask the question, although that is not necessary. Are there some questions in the house?

Question 1:

Audience Member:

> I'm a third year student here at McGill. One of the things that I just want to hear your views on was, short of the government passing laws saying Aboriginal legal traditions should be taken into account, courts are left with the large and important issue of proof. I just wanted to hear your thoughts on proof in such cases.

John Borrows:

Well, there are a couple of points to make. First of all, the court has a legal framework to receive indigenous legal traditions. They call the law dealing with Aboriginal rights *sui generis*—which means it is unique and of its own kind. The court said in the *Simon*[40] case that when you interpret treaties, you look to international law by way of analogy, but that is not determinative. The court said in the *Delgamuukw*[41] and *Van der Peet*[42] cases that Aboriginal law is a source to which the courts look to determine answers to questions before them. The idea is to reconcile indigenous and non-indigenous legal traditions by paying attention to the Aboriginal perspective on the meaning of the right at stake. In *Van der Peet*, they said a morally and politically defensible conception of Aboriginal rights will incorporate both legal perspectives. So there are doctrines the court can use to engage in that exercise; they do not have to wait for further legislation or constitutional amendment. There is a challenge about education and about judges being able to recognize Aboriginal law when they see it and not devalue it because they are more familiar with applying the civil law or the common law tradition.

In terms of proof, that is an interesting question. If you are trying to prove title, or prove a right, what are the standards you look back to? Part of what I am suggesting is that Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some way to bring to the decision-making process those laws that arise from the standards of the indigenous people before the court. It is a challenge, though, to move something from evidence into law and perhaps back again.

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[40] *R. v. Simon*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390.
[41] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw*].
[42] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet*].

Question 2:

Audience Member:

> I am just going to follow up and maybe ask for something more specific in the sense that from my understanding the courts are taking a fairly narrow reading of the issue of proof, and in fact using common law or civil law evidence rules to interpret proof brought by Aboriginal peoples. How could that be moved forward in the vein that you are arguing for, short of educating the judges?

John Borrows:

You could have an amicus curiae appointed to argue the law on the point. You could have an intervener bring to the action the Aboriginal legal perspective on the meaning of the rights at stake. You could have Aboriginal and non-Aboriginal lawyers learn the law of their clients, and not just introduce Western law into the legal argument (such as *Van der Peet* and *Delgamuukw*), but Nanabush and the butterflies, etc. They could say, "Here is the broader ground upon which we invite you to make your decision."

Question 3:

Audience Member:

> I was lucky enough to be one of your pupils, and I subscribed very early to the idea you propose about merging Aboriginal law with modern Canadian law. I find myself in a situation today. Currently, I am the secretary of the Cree government of James Bay. I have some concerns and would like your opinion.
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> The Cree government of James Bay is composed of chiefs from nine communities. They act through four corporations that exist under federal and provincial laws: some are legislated, some are under the *Canada Business Corporations Act*,[43] or *Loi sur Les Compagnies*.[44] We created recently another corporation through which this government can act.
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> We are sitting in a meeting one day and it got to the point that the Grand Chief was saying, "Look, we are switching hats every five minutes, we are doing notice, agenda, ... I do not even know what board we are at this moment." So I told him, "Why do you not just do the meeting the way you want to do it. Following the meeting, the treasurer, the executive director, and I will sit down,

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[43] R.S.C. 1985, c. C-44.
[44] L.R.Q. c. C-38.

> figure out what everyone said, and put it in the right boxes. Ok, you guys made something that is a federal decision, we will put that under the Grand Council that is federally incorporated. You did something that was provincial, we will put it under the minutes of another head." So we went ahead just doing it that way. It made his life much easier because he got to stop announcing every five minutes that we have switched entities.
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> The great thing that came out of that was now our meetings are in our own language. Because we do not have to say, "Who is proposing the resolution," which does not translate well in Cree or, "Who is seconding". The rules of the corporate bylaws and the *Canada Business Corporations Act* itself with regard to who can address the meeting were pushed away and anybody who is at the meeting speaks according to traditional rules. In that sense, I am very pleased in that it has just crept in and happened very quietly. It has been an empowering event and has happened very, very subtly. The part that concerns me is that it is not happening at an institutional level and sometimes I question whether I have done something wrong here, in the sense that I have separated the two groups more than anything. Because now they are not dealing on a daily basis with the *Canada Business Corporations Act*; it is myself plus two other administrators that do that. For the time being, I am comfortable with it but I am wondering if in the long term we are doing more damage than good because we are having a sort of separation occurring where we have got a small group of people acting as traffic police?

John Borrows:

Great question, thank you. Interesting note: common law changes by the very fact that you are trying to articulate something in Cree. There is a Cree court in Northern Saskatchewan that Justice Gerald Morin runs and it is all in Cree. The lawyers are Cree and the court reporters are Cree. Just that very act alone changes it because, as you know, Cree language divides the world between things that are living and things that are not living, rather than dividing the world between what is masculine and what is feminine. When you start to identify things that are living, you realize that there are different legal obligations that you might have than if you just have language which does not sort out the world in that way.

To get to your main point, you are seeing some of the advantages of using Cree law and process to solve your problems. There are, though, potential disadvantages that could follow and you must take care. One of the things that could be tried I learned in Saskatchewan this morning. There is a beautiful new university in Regina called the First Nations University of Canada—it is a Douglas Cardinal building and an inspiration to see. The University is set up under an FSIN (Federation of

Saskatchewan Indian Nations) statute. In their legislative assembly, they pass laws every term; the authority to carry on the work of the various entities (such as the First Nations University) is delegated through First Nations statute. It may be that you have a similar structure in James Bay, or could think about having a structure where chiefs draft up a statute and create decision-making criteria that incorporates Cree law and the *Canada Business Corporations Act*. As secretary, you would then have the responsibility of effectively integrating the two in daily decision making.

Question 4:

Audience Member:

> Thank you. Well first, this is a bit of a joke, but when I was in high school we had this theory that the people who always talk about sex and see sex everywhere are those who were not having any. Sometimes I have this feeling in law school and in my contact with bureaucracies that they see law everywhere, or at least potential places for law. I would be interested to hear what you would have to say about how Aboriginal legal traditions can actually teach us given their special groundedness in local communities' histories and lived experience about the actual limits to law and places where it is inappropriate to legalize. We still have this tendency, even maybe in the Ministry of Justice, to rush into legalizing when they see a problem, when maybe they do not look for other types of consensus or dialogue.

John Borrows:

It certainly is the case that my view of the law is not legal positivistic, but that law and society are intermingled; in traditions, there are many rules and standards that affect people's behaviours, and there are consequences for not following those rules. My view of law is broad in that way. In terms of what we could learn from indigenous peoples in taking these concepts forward, I was trying to suggest ways our nation could be built on consent, and not on force or discovery or conquest or some other principle. Would that not be an amazing lesson for the world? These are aspirations embedded in the treaties, and so many countries would love to have a similar starting point. We do not have to make it up—it is there in our country's fabric.

There are also many things you could consider in order to better understand language. You study indigenous words and you get a world view focused on relationships people should have with one another in terms of their obligations and responsibilities. This is the case with environmental law; there are things that people are trying in the criminal justice context. In fact, as Morris Rosenberg mentioned, the idea of sentencing circles has some of its roots in indigenous legal traditions, in gathering together and trying to come to a resolution in that format.

Are there limits? I think there are limits. The professionalization of the decision making through lawyers takes law out of the hands of people, like I was describing in that Windigo story. Why should you need to hire somebody at $100 an hour when through kin, through story, through ceremony, through speaking with elders, you can deal with challenges on other bases? I think that speaks to the limits of formal law. And of course, Aboriginal peoples' experiences—of being overridden by laws that did not recognize their rights, and acted as tools of destruction, not just tools of order—these are lessons which should be kept in mind. Thank you.

Question 5:

Audience Member:

> I am a practitioner in Aboriginal, Environmental, and Constitutional Law here in Montreal. I would have a longer question beginning with Maitland and the history of the common law but I will spare you those learned references. Your talk is very helpful. A lot of what you had to say left me with some of the same frustration I felt in studying the jurisprudence. The examples always go back to private law and criminal law…

John Borrows:

Except for the treaties, right?

Audience Member:

> Yes, except for the treaties. But I am interested in seeing what you have to say about how this project is going to play out when it starts to threaten the real economic interests in terms of dividing up the resources of the nation? It seems to me, for example, there has been some—bait and switch is not the right term—but there has been a kind of a reduction of what is going to be delivered under *Delgamuukw*. We have gone from accommodation in *R. v. Gladstone*[45]—that had to have a process and a substantive aspect and a real economic aspect which is, for example, in the separate reasons of LaForest in *Delgamuukw*—to what governments are now offering which is you can be part of a multi-stakeholder process. Or, we have consultations called "environmental assessments" but it does not actually allow you to be part of the decision, only for you to have your say. That is one thing on which I would be interested to hear what you have to say.

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[45] *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648.

> The other thing is the lack of progress on the poverty of sources. It seems to me that there are limits to going up the historic chain. James Bay and the Northern Quebec Region, which was just mentioned, is a real watershed effort but I am not sure how much progress we have made since then. When I look at the Nunavut agreement—and you have a lot of, perhaps, experience on the ground with it, I would be interested to hear what you have to say—but when I look at that agreement it seems to me that in a place where you could have had new arrangements and direct democracy (it is a small population), you instead have thrust on these poor people an incredible growth of administrative tribunals, boards, and mechanisms which are ill-adapted and unnecessarily heavy. If you could just comment on the lack of progress and poverty of sources on the one hand, and also this question of when the economic crunch really comes.

John Borrows:

I can sense your frustration and share it in some respects. The justification of infringement test seems weighted against indigenous rights. The way treaties are sometimes implemented does not allow, it seems, for more community-based processes. And so, let us acknowledge those problems. The question is: what do we do about them? I think we try to make arguments that are persuasive as to how to push forward. Part of what I am trying to say could be applied to the issues of infringement and justification. There could be access to First Nations views around consultation, consent, compensation, and accommodation. Indigenous legal traditions could be used for the implementation of the land claims agreements.

Stephen Scott:

Thank you. You will have a chance to ask further questions when you meet with Professor Borrows in the reception that follows. I would simply wish to address a word of thanks.

Few tasks, I think we can agree, present greater challenge to the Canadian polity than achieving a balance that is satisfactory to the Aboriginal peoples between the preservation of traditional ways of life and the achievement of material standards of living comparable to those of Canadian society at large. Added to this are the complications, first, of redressing historic grievances arising from the spoliation of Aboriginal peoples—I do not think that term is too strong—and, second, of achieving optimal forms of autonomous Aboriginal government. These forms, I would argue, should be so designed that they neither aggravate the centrifugal forces which, at the best of times, threaten to tear the Canadian federation asunder, nor render our structures of government so complex and costly as to impede our efforts at achieving a national economic performance which, alone, can give us the means to discharge our tasks. Not least of these tasks is

provision to our Aboriginal peoples, by themselves wherever practicable, of clean water, first-rate health, educational, and other services, and an environment as little degraded as possible.

All these things must be accomplished within the framework—and, indeed, through the machinery—of a Canadian legal system whose strengths you, Professor Borrows, would seek to enhance, and whose weaknesses you would redress, by giving it a more truly indigenous character in many senses of the term "indigenous".

We are grateful to you, Professor Borrows, as a leading thinker and writer on Aboriginal issues in Canada, for your address this evening and for your many other contributions to the national debate. We wish you well in all your endeavours.