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Article abstract

This article asks the Canadian legal community to look beyond the standard historical viewpoint that roots Canadian law in the British common law and French civil law traditions. The author discusses the historical foundations of Canadian law in a uniquely Canadian context, beginning with the earliest interactions between the First Nations and the Europeans. Drawing on the research outlined in his recent book, *A Fair Country*, the author challenges his audience to think of Canadian law as far more than the local implementation of foreign legal traditions. While Canada has freely borrowed from various legal traditions, the application of law in Canada has been a unique process intimately tied to Canadian history. The author calls on us to recognize a distinctly Canadian legal tradition which has grown out of Aboriginal law and subsequent local experience while being influenced by, but by no means limited to, common law and civil law traditions.

The Roots of Canadian Law in Canada

John Ralston Saul*

This article asks the Canadian legal community to look beyond the standard historical viewpoint that roots Canadian law in the British common law and French civil law traditions. The author discusses the historical foundations of Canadian law in a uniquely Canadian context, beginning with the earliest interactions between the First Nations and the Europeans. Drawing on the research outlined in his recent book, *A Fair Country*, the author challenges his audience to think of Canadian law as far more than the local implementation of foreign legal traditions. While Canada has freely borrowed from various legal traditions, the application of law in Canada has been a unique process intimately tied to Canadian history. The author calls on us to recognize a distinctly Canadian legal tradition which has grown out of Aboriginal law and subsequent local experience while being influenced by, but by no means limited to, common law and civil law traditions.

Cet article demande à la communauté juridique canadienne d'aller au-delà du point de vue historique standard selon lequel les racines du droit canadien se trouvent dans les traditions de common law britannique et de droit civil français. L'auteur retrace les fondements historiques du droit canadien dans le contexte unique du pays, en commençant par les premières interactions entre les Premières Nations et les Européens. En s'appuyant sur les recherches étayées dans son récent livre *Mon pays métis*, l'auteur enjoint le public à envisager le droit canadien comme beaucoup plus que la simple implantation locale de traditions juridiques étrangères. Bien que le Canada ait emprunté librement à diverses traditions juridiques, l'application du droit au Canada a toujours été un processus unique intimement lié à l'histoire canadienne. L'auteur nous interpelle pour que nous reconnaissions une tradition juridique canadienne distincte, issue du droit autochtone et de l'expérience locale subséquente, tout en étant influencée par les traditions de common law et de droit civil sans y être limitée.

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I would like to begin the written form of this lecture by acknowledging the Mohawk people on whose traditional land we are. This form of acknowledgement is commonly and correctly used in Western Canada. I have noticed that it is very slowly coming into use in southern Ontario and Quebec, yet I cannot think of places where it could be more important to make this a norm. Some of you, as law students, professors and judges, may feel that this is a mere formality. But if you consider various Supreme Court of Canada decisions over the last few decades, you quickly realize that there are different forms of belonging—forms outside of those European norms of ownership defined by buying and selling. These non-European ideas of the relationship between land and people have been recognized by our courts. They will play an increasingly important role in the complex way we understand what this land is and what form our relationships to it will take.

Madame la rédactrice en chef, je vous remercie pour votre invitation. Je suis très heureux d'être ici aujourd'hui, étant à ma façon un produit et un membre de l'Université McGill, qui m'a décerné un doctorat honorifique en lettres. Toutefois, comme je ne suis pas avocat, je vous prierais d'être indulgent si je me trompe dans certains énoncés de cet exposé.

En vérité, je suis un produit par deux fois de McGill, puisque j'ai aussi passé quatre années ici, de manière plus honnête, c'est-à-dire que j'y ai étudié pour décrocher mon diplôme. J'ai fréquenté l'Université dans les années 1966-69, à une époque où McGill était un lieu particulièrement excitant, car nous étions en grève la plupart du temps. Je conserve des souvenirs très animés de cette période, notamment d'avoir rencontré Frank R. Scott[1], qui était l'un des grands hommes de cette Faculté. Un soir, des étudiants ont décidé de mener une action provocatrice inédite et d'occuper le bureau du Président. J'étais moi-même devant le bureau, où plusieurs de mes collègues étaient déjà assis par terre, lorsque j'ai soudainement regardé à ma droite et vu un homme beaucoup plus grand et imposant à mes côtés. Il portait un costume ancien et distingué et dégageait une grande sagesse et certitude, tout en laissant deviner le mépris d'un homme de gauche qui regarde des jeunes de gauche essayant de bousculer l'ordre établi. Il fumait longuement une cigarette et j'essayais de trouver une manière intelligente d'aborder cet être impressionnant qu'était Frank R. Scott. Je me suis tourné vers lui et ai prononcé, avec un maximum de dignité, «Good evening, sir». Sa cigarette à la bouche, il a lentement aspiré une énorme bouffée et l'a envoyée en l'air avec un calme stoïque, puis s'est retourné vers moi. Il m'a considéré du haut de sa présence imposante, puis encore plus lentement, m'a

[1] Homme de lettres et d'engagement social, doyen de la Faculté de droit de l'Université McGill de 1961 à 1964. Frank R. Scott a notamment remporté les célèbres causes *Switzman v. Elbling* ([1957] R.C.S. 285, 7 D.L.R. (2e) 337), qui a reconnu l'inconstitutionnalité de la *Loi protégeant la province contre la propagande communiste* (S.R.Q. 1941, c. 52), ainsi que *Roncarelli v. Duplessis* ([1959] R.C.S. 121, 16 D.L.R. (2e) 689), qui a jeté les bases de la primauté du droit en droit public canadien.

répondu : «Hi». Ses yeux ont ensuite glissé vers la porte du bureau, et ce fut tout. Je suis parti, ayant compris que j'étais un étudiant et qu'il était un grand homme.

J'ai plus tard eu l'opportunité d'être invité à quelques reprises à prononcer des conférences devant des auditoires de juristes, notamment devant l'Association du Barreau canadien. Le juge en chef de la Cour suprême du Canada de l'époque, le très honorable Antonio Lamer, était assis juste à côté de moi. La conférence avait lieu dans une grande salle à l'acoustique un peu déficiente. Si mes souvenirs sont exacts, j'ai soutenu une série d'affirmations assez originales, donc assez risquées devant un parterre de juristes chevronnés. À chacune de ces affirmations controversées, je regardais le juge en chef pour évaluer sa réaction. Bien que révolutionnaire sur papier, c'était un homme qui ressemblait davantage à un gentleman d'une vieille école du dix-neuvième siècle. Il me regardait avec beaucoup plus de gentillesse que Frank R. Scott et chaque fois que je lançais l'un de mes propos risqués, il hochait la tête avec un sourire, en signe d'un parfait accord. Après la conférence, je l'ai remercié d'avoir manifesté son approbation envers mes propos. Il m'a répondu : «Cette salle est impossible. Je n'entendais absolument rien de ce que vous disiez».

Je suis heureux de parler aujourd'hui dans une faculté en avance sur beaucoup d'autres facultés de droit au Canada et ailleurs dans le monde, une faculté qui enseigne le droit civil et la common law ensemble, pas simplement en parallèle. La Faculté offre en plus un cours spécial intitulé «Aboriginal Peoples and the Law»[2]. Est-ce à dire qu'il existe un principe de droit autour duquel étudier les questions autochtones ? Je crois que les peuples autochtones n'approuveraient pas une telle interprétation du mot «droit». En lisant le syllabus du cours, j'ai retenu le passage suivant : «What does it mean to acknowledge the coexistence of Aboriginal legal traditions and European legal traditions in Canada?». Cette phrase touche le nœud de mon exposé, car à première vue elle laisse entendre une coexistence de systèmes juridiques qui n'ont jamais eu d'influence l'un sur l'autre.

Évidemment, les systèmes juridiques de droit autochtone, de droit civil et de common law existent séparément et simultanément au Canada. Or, il se trouve également des relations intimes entre ces systèmes, même si peu de gens, par exemple, se penchent sur les liens étroits entre la philosophie du droit autochtone et le droit civil ou la common law. L'ancienne chef de la Commission des revendications des Indiens, l'avocate Renée Dupuis, mentionne d'ailleurs que beaucoup s'en tiennent aux racines de la colonisation dans la manière de définir leurs origines, y compris dans le domaine juridique. En cherchant la vérité à travers les notes de bas de page et les précédents, l'origine des choses se retrouve toujours quelque part en Angleterre ou en France. Cela peut sembler logique d'un point de vue historique, mais il est alors impossible d'éviter une perspective et un état d'esprit colonial. Pour

[2] Kirsten Jane Anker, *Coursepack: Aboriginal Peoples and the Law*, Faculté de droit, Université McGill, 2008.

Renée Dupuis, au contraire, le droit coutumier autochtone s'insère dans le droit canadien, explicitement ou non[3].

Jean Friesen, historienne et ancienne vice-première ministre du Manitoba, soutient également une vision de l'histoire du Canada où les racines autochtones se mêlent à celles des deux systèmes juridiques européens[4]. Pourtant, les juristes agissent comme si la tradition du droit autochtone n'existait pas ou n'avait pas d'importance pour les citoyens comme vous et moi. Il est en effet très rare, en dehors des grandes décisions de la Cour suprême du Canada, que les gens parlent comme si leur droit quotidien était fondamentalement influencé par les principes du droit autochtone. Au niveau philosophique, les juges, particulièrement à la Cour suprême, sont bien en avance sur les avocats en général, les membres des gouvernements et les bureaucrates. Leur esprit intellectuel humaniste les amène à prendre davantage en compte le rôle des peuples autochtones dans les racines du droit canadien, et par conséquence, de notre civilisation.

Il faut donc regarder de manière intime l'effet d'un système juridique sur un autre et surtout, considérer les racines autochtones, au Canada, des systèmes juridiques dits européens. Je crois que le Canada est en grande partie bloqué dans son affirmation en tant que pays en raison de l'absence d'un tel examen généralisé. Nous avons une langue juridique européenne, alors que nos actions sont intimement influencées par les peuples autochtones. Nous vivons donc une contradiction importante entre les mots et la réalité. Il existe certaines différences au niveau provincial, mais le malaise et la difficulté à réconcilier le droit et la réalité bloquent tout autant le Québec que l'Ontario ou la Colombie-Britannique.

This sort of misunderstanding can be seen in the simplest of public rhetoric. For example, it is regularly asked in Western Canada: Who are the treaty people? We are. We are all treaty people because treaties are assented to by two sides. They were assented to by the Aboriginals and they were assented to by the other side. The other side? French representatives, British representatives, Canadian representatives. In the early days the assent took the form of an oral commitment.[5] Later on, it took the form of a classic European-style legal document.[6] In other words, we inherit the treaties along with everything else that we inherit through our history, and everybody in this room is a treaty person. If you immigrated to Canada three and a half years ago and became a citizen today, you are a treaty person. The fact that we so rarely talk this way—particularly in Central Canada—shows how hypocritical and superficial we are

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[3] Renée Dupuis, *Le statut juridique des peuples autochtones en droit canadien*, Scarborough (Ont.), Carswell, 1999.

[4] Kerry Abel et Jean Friesen, dir., *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, Winnipeg, University of Manitoba Press, 1991.

[5] Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992) at 177-78.

[6] *Ibid.*

when we talk about undoing the wrongs done to Aboriginal peoples over the last one hundred to one hundred and fifty years. The standard discourse, if you look at it from a linguistic point of view, has focused much more on *how do we get these people off our backs* than on *how do we rebuild this society by taking into account its reality*—that is, by taking into account the central role of Aboriginals in this society. If we begin with the concept that we are all treaty people, at least we are then on the right intellectual track.

What is the role of Aboriginal peoples at the core of Canada, and therefore at the core of Canadian law? I'm not making romantic statements here or asking romantic questions. I'm asking what I suppose you consider to be legal questions. The Supreme Court of Canada and many of the provincial courts have been perfectly clear on these issues. They have been explaining to the country and offering the country an honest and clear interpretation of our past, and therefore, of our present. The Supreme Court of Canada has made it perfectly clear what is going to happen over the next quarter-century in this country when it comes to dealing with the central role of Aboriginal peoples. Some of you will have studied these decisions. I hope that all of you have studied *Delgamuukw v. British Columbia*.[7] And *Guerin v. Canada*.[8] Or the *Tsilhqot'in Nation* case.[9] Frankly, I don't know how you can understand the way law is evolving in Canada without looking at these cases. I don't mean that those of you who are interested in Aboriginal law need to have looked at these cases. I mean that anybody who is going to deal with any part of law in Canada needs to understand these cases and their implications for Canada as a whole.

Let me take this a step further. I was speaking to the Indigenous Bar Association the other day. There were about five hundred Aboriginal lawyers and judges there. There are now almost two thousand Aboriginal lawyers and judges in Canada.[10] At this conference, Sákéj Henderson, one of Canada's great legal philosophers, who teaches at the Native Law Centre at the University of Saskatchewan, put forward his argument on the roots of sovereignty. He said the power of the Crown is derived from the original holders of the authority of the sovereign.[11] In other words, the Canadian state as a whole derives its legitimacy, authority and sovereignty from those treaties. Therefore the source—the roots—of our sovereignty and the legitimacy and authority of our state lie within Aboriginal civilization. These are not the products of colonial societies or European civilization. They don't come from Europe. They don't come from the people who came here. They come from the people who were here and are here. Once you suggest this idea—I would say this fact—that the source of Canadian

[7] [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.].

[8] [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin*].

[9] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, 65 R.P.R. (4th) 1 [*Tsilhqot'in Nation*].

[10] A statistic compiled from speaking to several Aboriginal law schools and organizations.

[11] See generally James [sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241.

legitimacy and sovereignty is Aboriginal, you will find that the way in which you talk about any aspect of Canadian law changes. It changes property law. It changes commercial law. It changes environmental law.

Again, is this romanticism? Do we say that the British are romantic because they keep referring to events and documents stretching back to the Magna Carta? Do we call the French romantic because they approach their current situations out of assumptions, decisions and commitments made under Richelieu or during the French Revolution? They have to go back to these roots because these are the foundations upon which they built their modern state.

We built our nation-state through the treaties. You can give a cynical or ugly interpretation to that. Or you can put a pretty picture on it. Or, indeed, you can be as utilitarian as possible and simply say, "that's what happened". But without a conscious acceptance of the full role of the treaties, all we are left with all deeply colonial, deeply romantic interpretations. Without the treaties, what we have been doing here for hundreds of years is nothing more than short-term and temporary. You only have a civilization if you are willing to come to terms with its fundamental roots.

The authority of the sovereign moved from Aboriginal civilizations to the Crown. For many people this idea throws us into the colonial context and their interpretations of Canada follow from that. But that's because they don't understand the Crown. The Crown is not a person. The Crown is not a monarch. The Crown is you. The Crown is a concept of the citizenry. If you refuse that idea, then you are falling into a trap which you yourself have set. It will lead you to limit yourself to a colonial mindset with a colonial history. If you believe that the Crown is an individual and not the citizenry then it means that you don't really want to be from here—whether you are francophone or anglophone. You really want to be from somewhere else.

That was why, in *Reflections of a Siamese Twin*, I addressed the common public description of Canada as a place of *two founding peoples and multiculturalism*. This phrase doesn't even scan properly or make grammatical sense. More to the point, this stylistic problem is the reflection of a real historical problem. So I pointed out that Canada was like a great building, constructed upon three founding pillars—Aboriginal, francophone and anglophone.[12] And that foundation was held together by the cement of the Metis people and the Metis idea. On top of that foundation we built an enormous edifice, as wave after wave of immigrants arrived to become citizens, after which they began to move effortlessly between the floors. But if any one of the three pillars is weak, then the whole building becomes unstable and risks falling over. That is true of every building and it's true of every civilization. No matter how ancient the foundations are, they have to be understood and maintained. If you look at the last fifty to sixty years of Canadian history, you will find that we have spent a great deal of time strengthening the francophone pillar, whether it's in Quebec or

[12] John Ralston Saul, *Reflections of a Siamese Twin: Canada at the End of the Twentieth Century* (Toronto: Viking Canada, 1997) at 81-100.

outside of Quebec, or whether it has to do with increasing the bilingualism of anglophones. For example, there are today almost three hundred and twenty-five thousand anglophone students in French immersion schooling across Canada.[13] Forty years ago there were none. This passing of laws, transferring of powers and money, creation of new responsibilities, building up of new and old groups, has been all about strengthening the francophone pillar. And we have done a reasonably good job of it. In fact, half of the bilingual people in Canada today are anglophones, most of them living outside of Quebec. That's a radical change from forty years ago.[14]

But the original pillar has been virtually ignored. There is an enormous need to complete the treaty negotiations as rapidly as possible, but more than that, to ensure that there is a proper transfer of money, power and responsibility to people who need it to make their lives work properly. The way in which Aboriginal questions are covered in our media makes it virtually impossible to sell this idea. On a regular basis we receive what one might call our weekly fix of disaster stories coming out of Aboriginal communities—suicides, glue sniffing, leadership corruption and so on. This makes most Canadians think that Aboriginal communities do not function. The First Nations philosopher Taiaiake Alfred believes that this mindset encourages what he calls the "politics of pity".[15] Non-Aboriginals concentrate on what doesn't work among Aboriginals. We say "what a pity" and shove Aboriginals to the margins of our political and social activity. I would say that this is a new form of racism—now you can be a racist while expressing well-meaning concern.

Let me give you another example. There are endless stories about the terrible lag in Aboriginal education. At the same time, the number of Aboriginals in post-secondary education has almost doubled in the last twenty years to approximately thirty thousand.[16] Yes, it should be sixty or ninety thousand, but if you go back a half-century you will find that it was then a tiny handful of people. In other words, Aboriginal peoples are fast reaching a critical mass level when it comes to post-secondary education. You see this in the large numbers of lawyers, doctors, engineers, nurses and so on. And I must say, that as I go across the country, the most interesting new elite I find are the rising young Aboriginal leadership. They are indeed young, well-educated, very smart, very angry and very determined to change things. In many ways they remind me of the new francophone elite of the 1960s.

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[13] Canadian Parents for French, *Immersion Enrolment by Grade and by Province and Territory 2006-2007*, online: Canadian Parents for French <http://www.cpf.ca/eng/pdf/resources/reports/enrolment/06-07_stats/IMMERSION-ENRL-06-07.pdf> (the exact total in 2006-2007 was 314,680 and this number likely includes both anglophones and allophones).

[14] 2006 Census: The Evolving Linguistic Portrait, 2006 Census: Bilingualism, online: Statistics Canada <http://www12.statcan.ca/census-recensement/2006/as-sa/97-555.p13-eng.cfm>.

[15] *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, Ont.: Broadview Press, 2005) at 20 (Alfred identifies the "conventional aspects of the politics of pity" as "self-government processes, land claims agreements, and aboriginal rights court cases").

[16] Indian and Northern Affairs Canada, *Aboriginal Education*, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ai/mr/is/aedu-eng.asp>.

And yet, how many Canadians have heard of Taiaiake Alfred at the University of Victoria. Or Guujaaw, the elected head of the Haida? Or Hayden King at McMaster University? Or Brock Pitawanakwat at the University of Winnipeg? I could go across the country naming person after person. Of course, many of them won't get a chance at real power because they are being held back by the mainstream of the Canadian system. One could say that one of the conscious or unconscious reasons for dragging out treaty negotiations is that it sidetracks the Aboriginal leadership from becoming involved with larger Canadian questions.

Joseph Gosnell is retired now, but for twenty-five years he led the Nisga'a. He could have been Governor General or foreign minister of Canada. Instead, he had to spend his entire public career fighting for a treaty settlement which could have been completed on the same terms after two or three years. Guujaaw has now devoted the same length of time to fighting for the Haida cause. If the Haida cause had been settled, it might have been possible for Guujaaw to play any number of national roles.

There are those in the legal profession and in the civil service who say they are not dragging out the treaty negotiations. Rather, they are being careful with public money. This is deeply untrue. You don't save public money by dragging a negotiation out over a quarter-century or a half-century. That's how you waste public money—through the costs of civil service time and legal costs on the Aboriginal side. But you also waste the lives of whole communities who are obliged to focus decade after decade on resolving these issues. They would like to be doing other things. It could be argued that one of the reasons that the current minister of health of Canada, Leona Aglukkaq, is an Inuit is because the fundamental political questions of Nunavut were settled a decade ago. Once they were settled, people could begin to get on to other things.

The argument I am making is this: Canada, in its current form—that is, as a mix of people who came from here and people who came here—has been a work in progress for some four hundred years. For the first two hundred and fifty years—and that is a historic average which alters in both directions depending on where you are—Aboriginal peoples were the dominant force or equal partners. Our esteemed European forbearers were a miserable little group of uneducated, generally unwashed and certainly poverty-stricken immigrants who did not know where they were and could not get through winter without dying in large numbers. They needed to be taken everywhere, and statues were then made of Champlain or another explorer pointing off into the distance. Of course, he had no idea where he was pointing because he hadn't yet been taken there. For the first two hundred and fifty years, the Aboriginals set the tone and the newcomers survived by adapting such things as their clothing, food, methods of transport and housing to indigenous practices. Remember, ours is the only imperial *experiment* in which the Europeans immediately abandoned their means of transportation and adopted the local means of transportation. They didn't do this for a short period of time. The great fortunes of Canada over its first two to three centuries were built on the use of the canoe up and down the great highways of transport—the rivers and lakes—used by the Aboriginal peoples. In other words, non-Aboriginals built the country with and on Aboriginal means and structures of communication until the arrival of the railroads.

Equally important is the reality that the immigrants found themselves adapting to Aboriginal ideas, philosophical ideas and intellectual approaches to organizing their societies. This is a very basic point which is almost never raised. Look at the department of philosophy at this university, or at l'Université de Montréal. What do we teach? Basically, we teach an inherited line of philosophy coming out of Europe. We scarcely teach ideas coming out of Asia or North Africa or elsewhere, despite the fact that the immigration patterns of this country might make that interesting. Of course, classes are offered in these areas. But what I'm talking about is the mainstream interpretation of what ideas there are and how they have evolved. Our departments of philosophy have continued to teach *our* ideas as if they arrived here in a straight line from Athens through Rome and Western Europe. And for four hundred years nothing original happened here. We simply vegetated from an intellectual point of view, except to the extent that we further developed the ideas received from Europe. You'll forgive me for oversimplifying this evolution, but it is close enough to the reality.

This inability to include Aboriginal ideas in our way of teaching mainstream philosophy prevents us from talking about ourselves and what we do here in any sort of interesting or relevant manner. This is another example of the contradiction between language and action. When that contradiction is great, the society is blocked. What do Kantian principles tell us about Canada? Start from the background which produced the Kantian principles: a highly urban civilization in which the closest anybody came to wilderness was a park. Go back to the idea of a man—Immanuel Kant—whose minute-by-minute existence could be clocked by his neighbours in urban Europe. How could this be the basis for the philosophical interpretation of a country like Canada?

Take the example of legal aid in Canada. Ottawa ran the Northwest Territories until the late 1950s as if it were a mere colonial outpost. The capital of the Northwest Territories was Ottawa. When things began to change, a judge was named to the North, a remarkable man called Jack Sissons. When John Turner became minister of justice, he took a great interest in the North. He traveled around from community to community with Justice Sissons, who had invented a new way of doing justice, carrying the whole court in small airplanes and bringing them into communities. John Turner took all of this very seriously and spent a great deal of time in the courtrooms listening to the cases and trying to understand the implications, the decisions, the new approach toward justice—a justice appropriate to the Arctic and the North. One of the things Judge Sissons kept pointing out to the minister was that this Southern idea of justice as a system of opposing sides which included the concept of paid defence simply could not work in a society not based on cash. He encouraged the minister to move in the direction of a non-cash–based justice system. Turner came back to Ottawa and developed a legal aid system for the Northwest Territories. This was the beginning of legal aid in Canada. It spread from Inuit principles of a non-financial–based society to the other territories and provinces of Canada. Curiously enough, you won't find any description of the roots of legal aid in writings on the subject. I suppose the Southern Canadian experts could not believe that something which had

become so important to the rest of Canada could have had its origins in Aboriginal civilization. I tell you this story to indicate the extent to which even in our own lifetime ideas that are adopted by the rest of the country from Aboriginal civilization are simply discounted or erased. You can imagine how much more common this was in the early history of the country.

One could argue the same thing about common law relationships. The Canadian justice system struggled for some time with what they called country marriages, traditional marriages, or informal marriages. In other words, they struggled with the fact that hundreds of thousands of Inuit and First Nations people seemed to be living in a married state and had not been married by Western-style churches or by the state. The state did not know what to do about it. After all, they felt they needed to affirm the legality of human relationships. In the Arctic, thanks again to Justice Sissons and his successor Justice William Morrow, changes were made in legal interpretations so that the Canadian state could accept that people who had not been married by the state were nevertheless entitled to many of the same benefits as married couples. Now, almost a fifth of the population of Quebec live precisely according to Inuit tradition.[17] Of course, I'm not suggesting that this is a direct and conscious result of legal reasoning, starting with the Inuit and ending with common law marriages across Canada. But it could be argued that once the state has accepted that one part of the population can live together in a manner which does not fit with the Western idea of a state- and church-justified marriage, it is only a matter of time before that principle begins to spread to other parts of the state. Once a legal, ethical, or moral situation has been accepted, it begins to spread the way a plant spreads seeds. The process is neither conscious nor intellectual. It is a process which comes out of the formalization of the occupation of intellectual space.

Take a third example. We tend to describe Canada as a multicultural experiment. Multiculturalism is not a word that I like or use. I prefer the term used in French, interculturalisme. It's a better word, although it is still not good enough. What we are attempting to suggest through these terms is that Canada is experimenting with a different sort of society. This is a society that mixes people together without the race-based horror and gnashing of teeth which are so common in Europe and, for that matter, the United States.

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[17] Statistics Canada, *Profile of Marital Status, Common-law Status, Families, Dwellings and Households for Canada, Provinces, Territories and Forward Sortation Areas, 2006 Census* (Statistics Canada catalogue no. 94-576-XCB2006003), online: Statistics Canada <http://www12.statcan.ca/english/census06/data/profiles/release/RetrieveProductTable.cfm?TPL=RETR&ALEVEL=3&APATH=3&CATNO=94-576-XCB2006003&DETAIL=0&DIM=&DS=99&FL=0&FREE=0&GAL=0&GC=99&GK=NA&GRP=1&IPS=94-576-XCB2006003&METH=0&ORDER=1&PID=89537&PTYPE=89103&RL=0&S=1&ShowAll=No&StartRow=1&SUB=0&Temporal=2006&Theme=67&VID=0&VNAMEE=&VNAMEF=&GID=841374> (1,221,860 people over 15 years old are in a common law relationship, out of a total population in Quebec over 15 years old of 6,293,620).

I say this knowing that in Quebec there have recently been difficult debates on the subject of interculturalisme, and that a commission recently completed its work on the topic. I am filled with admiration for the two professors who led the commission—Charles Taylor from McGill and Gérard Bouchard from l'Université du Québec. Once they allowed people to let off a bit of steam, it became apparent that the opinions of Quebecers were no different from the opinions of other Canadians. What's more, the atmosphere which gradually came out of the commission's work was that interculturalisme was a good thing and that only a very small minority of the population was opposed to it.

But there remains a serious intellectual problem. When you read about multiculturalism or interculturalisme in Canada, it is very difficult to understand where it comes from. How did it happen? It didn't pop out of Pierre Trudeau's back pocket in the 1970s. Where are the footnotes for interculturalisme? Where is the traceable linear history? The reason so much of this is vague is because our intellectual structure, which leads us back into European and U.S. history, simply does not help us on this subject. There is the old adage that Canada is not a melting pot. We repeat this phrase because the melting pot concept is an eighteenth and nineteenth century European idea that no matter how different people are, they can and indeed must be melted into a monolithic mythology and a monolithic loyalty to a monolithic nation-state. In other words, the melting pot is an expression of just how European the United States is.

What makes uncovering the roots of multiculturalism so complicated in Canada is that even at the height of some of the worst aspects of racism in Canada—the period of the Head Tax and anti-Semitism and so on—you find that there was nevertheless a clear idea that some sort of experiment was being attempted. For example, if you go back to Wilfrid Laurier's 1905 speech in Edmonton, welcoming Alberta into Confederation as a province, you'll find him speaking exactly in the manner that a prime minister of Canada would speak today.[18] He takes a large part of his time speaking over the heads of the anglophone and francophone elites at the front to address the new Canadians at the back—the Ukrainians, Poles, Jews, Swedes and Norwegians. And what is his message? Basically, that we want you to be citizens. We do not want you to forget where you come from. It's important that you keep certain things, but it's also important to understand that you are going to be part of this place. You have to think about that balance and how your children are going to both remember where they come from and become a part of where they are. That portion of the speech would have made a very fine contribution to the Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles.[19]

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[18] Sir Wilfrid Laurier, Address (Speech delivered at Alberta's inauguration ceremony, Edmonton, 1 September 1905) in Douglas R. Owram, ed., *The Formation of Alberta: A Documentary History* (Edmonton: Alberta Records Publication Board, 1979) 374 at 376-77.

[19] *Fonder l'avenir : Le temps de la conciliation* (Québec : Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, 2008).

Or you could go back to Louis-Hippolyte LaFontaine's "Address to the Electors of Terrebonne" in 1840—the single most important statement of political philosophy in the history of modern Canada.[20] Has anybody read it? Anybody? No. It's not taught. No doubt that's because it's too important to be taught. If you taught it and other documents such as this, you would have to think of yourself as coming from here as opposed to being mere colonial outcroppings of another continent. In the address, you will find a whole paragraph in which he lays out the nature of immigration and citizenship.[21] As with Laurier's speech, you could put this on a wall anywhere today and be perfectly happy. So now you're back in the 1840s. You could just as easily go back to the 1780s. If you did so, you would discover that the Loyalists were not British, middle-class, anti-democratic, order-loving Tories. That was an interpretation put in place in the late-nineteenth century when the false interpretation of Canada was established. If you go back to the eighteenth century and have a look at who they were, you'll find that they were mostly made up of minority groups. The single largest group came from German religious minorities. In fact, they were German speaking. Then came the Catholic Irish and Catholic Scots, and then the Aboriginals and the freed slaves.[22] Suddenly you realize that the Loyalists were very much constructed in the model of what today we would call interculturalisme. They were the perfect elements for a civilization of minorities, or an intercultural civilization. What's more, these people came largely from the northern fringes of the American colonies, a large number of whom were therefore used to living in what we might have called a Canadian way—that is to say, in close daily relationships with First Nations people and Metis people.

Now take one step further back. How were the French received by the First Nations when they first arrived? How were the Scots received by the First Nations when they arrived as the administrators of the Hudson's Bay Company? Suddenly, you begin to notice that the adaptation of the Europeans to the utilitarian and philosophical approaches of the Aboriginals had a method attached to it. That method was non-linear, non-rational, and non-European. It was an approach that involved the concept of the circle and the idea that those within the circle would happily *adopt* newcomers into the circle, providing they accepted certain basic rules. Once they were in the circle, everybody could work out exactly what their relationship would be. Now that sounds strangely familiar. It sounds like Canadian immigration policy at its best. We do indeed have a system of adoption into the circle on the basis of certain rules, after which we all take the time to work out exactly how these relationships will function over the long term.

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[20] *L'Aurore des Canadas* (28 August 1840) 1, reprinted in Dennis Gruending, ed., *Great Canadian Speeches* (Markham, Ont.: Fitzhenry and Whiteside, 2004) 13.

[21] *Ibid.* at 14-15.

[22] This information is based on statistics compiled from a variety of sources.

Canada takes nearly 1 per cent of its population every year in immigrants—over two hundred thousand people.[23] No other country does this. Eighty-five per cent of those immigrants become citizens.[24] In the United States, the number is less than 60 per cent.[25] In Europe, they are having a heart attack over 5 per cent.[26] How is it that we are able to do all of this without enormous anxiety? Why is it that Canadians feel relatively comfortable being so far out on the cutting edge? When you start looking at Aboriginal theories of justice, Aboriginal theories of citizenship, and Aboriginal theories of belonging, you begin to understand the roots of our approach toward immigration. Of course, it breaks down from time to time. Of course, there are things of which we need to be ashamed. Of course, there are a wide range of problems. But that is a separate discussion. These problems are distinct from the general line of thinking which led us to our modern approaches to immigration and citizenship. Our modern approaches are based on a non-Western model of civilization, a model which is non-linear and non-rational. Note the term non-rational, as opposed to irrational. This permits the use of a circular approach, an aracial or non-racial approach. Remember, it is the Europeans who brought the idea of race here and imposed it. The idea of the circle is based on concepts of family, community, and place. And the circle is based on what today we would call a civilization of minorities. That is to say, groups living separately and together overlapping and happily engaging in what one might call a multiple personality order.

When you publish a book, you are never quite sure what people will focus on. When *A Fair Country* came out, people immediately focused on the phrase that "we are a métis nation, a civilization inspired by Aboriginal ideas."[27] Suddenly it was as if the phrase "métis nation" had always existed. Indeed, it had always existed in our collective unconscious. And now I have begun hearing all across the country people using that phrase in their daily conversation. It works because it describes the Canada of today. But that is only so because it also describes the Canada of our past. I am not simply referring here to the mixture of peoples or the mixture of ideas. What I am referring to is our non-Western approach toward how to build a society.

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[23] Statistics Canada, *2006 Census: Immigration in Canada: A Portrait of the Foreign-born Population, 2006 Census: Highlights*, online: Statistics Canada <http://www12.statcan.ca/census-recensement/2006/as-sa/97-557/p1-eng.cfm> [Statistics Canada, *Immigration Highlights*] (an estimated 1,110,000 immigrants came to Canada from 1 January 2001 to 16 May 2006. Assuming immigration was relatively constant, the numbers come out to approximately 210,000 people per year).

[24] *Ibid.*

[25] Bryan C. Baker, *Trends in Naturalization Rates*, Fact Sheet (December 2007), online: U.S. Department of Homeland Security <http://www.dhs.gov/xlibrary/assets/statistics/publications/ntz_rates508.pdf>.

[26] Betty de Hart, *Recent Trends in European Nationality Laws: A Restrictive Turn?* (Brussels: European Parliament, 2008), online: European Parliament <http://www.europarl.europa.eu/document/activities/cont/200807/20080702ATT33276/20080702ATT33276EN.pdf> (5 per cent is an estimate based on Denmark's naturalization rate of 3.4 per cent, Austria's rate of 2.6 per cent, and the Netherlands' rate of 11 per cent).

[27] John Ralston Saul, *A Fair Country: Telling Truths About Canada* (Toronto: Viking Canada, 2008).

If you were to look at the 2007 *Tsilhqot'in Nation* case that I mentioned earlier, you would find that Justice Vickers has written a very interesting preface:

> Canada's multi-cultural society did not begin when various European nations colonized North America. Rather, multiculturalism on this continent has its genesis thousands of years ago with the receding of the last great ice age. ... Today's modern, multi-cultural communities seldom, if ever, look back at the Aboriginal roots of Canadian diversity. The evidence in this case has provided me with the opportunity to acknowledge the multi-cultural roots of our Canadian culture; roots to be honoured and respected.[28]

There is one other factor that warrants attention. As I pointed out, we constantly marginalize the role of Aboriginal peoples through "the politics of pity".[29] Of course, there are problems. But it would be difficult to think of any other group in Canada which has shown such resilience, such cultural strength. This strength can be seen at its most basic level—for example, in numbers. When the Europeans arrived, it is generally estimated that there were over two million Aboriginals.[30] In the latter part of the nineteenth century their population plummeted—largely because of disease and serious economic collapse—to under one hundred and seventy-five thousand.[31] But now it's back up to 1.6 million. It is on its way to 1.7 million and no doubt to 2 million.[32] This is wonderful news because it represents a further strengthening of the senior pillar in the foundation of this country.

If you look at the way this is described by journalists and academics, you will be horrified to realize that most of this successful population rebound is described as a problem. *What are we going to do about this large number of children? What are we going to do about crowding in schools and in houses on reserves?* The answer to those questions is that we should be getting on with it. We have been offered a remarkable opportunity to see the Aboriginal people of Canada rebound not simply culturally and in educational terms, but also in straight population terms. We should be happy about that and as fast as possible support the creation of good housing and education systems which will work. Very few countries get a second opportunity to get things right. In that sense, we are very lucky.

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[28] *Supra* note 9 at para. 1.

[29] Alfred, *supra* note 15.

[30] Dickason, *supra* note 3 at 63.

[31] *Ibid.* at 366.

[32] Statistics Canada, *Aboriginal Ancestry (10), Area of Residence (6), Age Groups (12) and Sex (3) for the Population of Canada, Provinces and Territories, 2006 Census—20% Sample Data* (Statistics Canada catalogue no. 97-558-XCB2006012), online: Statistics Canada <http://www12.statcan.gc.ca/english/census06/data/topics/RetrieveProductTable.cfm?TPL=RETR&ALEVEL=3&APATH=3&CATNO=97-558-XCB2006012&DETAIL=0&DIM=&DS=99&FL=0&FREE=0&GAL=0&GC=99&GK=NA&GRP=1&IPS=97-558-XCB2006012&METH=0&ORDER=1&PID=89146&PTYPE=88971,97154&RL=0&S=1&ShowAll=No&StartRow=1&SUB=0&Temporal=2006&Theme=73&VID=0&VNAMEE=&VNAMEF=&GID=614135 [Statistics Canada, *Aboriginal Ancestry*].

As Justice Vickers points out, Aboriginal people "have survived despite centuries of colonization. The central question is whether Canadians can meet the challenges of decolonialization."[33] In other words, Aboriginal peoples have proved their remarkable resilience over a long period of time. No other group in Canada has been put through such difficult tests and survived. None of us can claim such levels of mistreatment. So the question is not whether Aboriginal peoples will survive. The more interesting question is whether non-Aboriginal Canadians will survive. Do we have the guts to recognize who we are? Only in that way can we engage in the long-term building of our society.

All of this relates directly to legal scholars and students like yourselves. You need to understand in a more honest way the sources of Canadian law, which means the sources of the Canadian imagination and of the Canadian mythology.

You may have noticed that when you travel abroad Canada just seems to disappear. It's as if we are of no interest to people outside of our borders. Even the most successful Canadians find that in the international imagination they are somehow absorbed into the mythologies of other countries. One of the reasons for this is that we have not been describing ourselves as we really are. We have insisted on describing ourselves in a derivative European/U.S. manner. And that makes us deeply uninteresting to other people.

This colonial approach to describing ourselves is the reason why you don't know the "Address to the Electors of Terrebonne",[34] the reason why you spend so little time on the origins of Canadian democracy and how interesting, indeed original it was under the leadership of Louis-Hippolyte LaFontaine and Robert Baldwin, and Joseph Howe. We are still suffering from the way in which our history was rewritten in the late nineteenth and early twentieth century by the waves of pro-empire, Northern Irish Protestants, and anti-democratic, Catholic francophone elites. We have become a much better country, but we have not gone back and removed the false interpretations of our past which were imposed not that long ago. If you look at the different moments of great failure in Canadian history—those moments of institutionalized racism or the Conscription Crisis or the language crises—you will find that they represent attempts by the Canadian authorities or political movements to act in what could best be called a European manner. By that I mean that these were attempts to run Canada as if it were a monolithic European-style nation-state. These actions led to crises because they are not appropriate to the kind of country we are.

The reality is that this is a country of First Nations inspiration in which the Metis people represent an illustration of what we could be at our best. If you look at ideas which Canadians are comfortable with—for example, that restraint is essential to holding the country together or that violence is not a particularly appealing way to solve problems—you will begin to wonder where these ideas come from. Did they

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[33] *Tsilhqot'in Nation*, *supra* note 9 at para. 20.
[34] *Supra* note 20.

appear from somewhere in Europe in the middle of the ninteenth century? How did they take form in the twentieth century? At no point can you find the roots of these ideas in Europe. You can only find them by looking at Aboriginal approaches toward restraint and negotiation.

The role of the Metis people in all of this is central. Here is a remarkable phenomenon. Other colonial histories include what is often called métissage. But the circumstances in which this métissage occurred are very different from place to place. The particularity in the Canadian case is that the coming together of First Nations and immigrants took place in conditions where the Europeans were the weaker party, and the party in need on almost every front. Were there some advantages to the First Nations? Did they get something from their relationship with the Europeans? Yes. Yet most of what they got for those first two hundred and fifty years was a handful of technological advances. If you would like a modern comparison, it is a bit like the Chinese getting a hold of the computer, which had been invented in the West. The West held the advantage for about a decade. After all, we are only talking about technology, not cultural survival. And the Chinese soon made the computer their own. The same could be said for the ways in which Aboriginals used such things as metal or guns.

For the most part, if we were to analyze the marriages between First Nations and European individuals, and if we were to analyze them in European terms, it would be understood that the Europeans were effectively marrying up through a great many of what were in effect negotiated marriages with powerful First Nations families. After all, the young men in question had neither fortune nor property nor contacts. They scarcely knew where they were. They were marrying young women who spoke multiple useful languages and often belonged to very powerful trading and military networks. But this is not my central point. My point is that the creation of the Metis people in the context of Canada—which was very different from the métissage between slave owners and slaves in the United States or Spanish overlords and indigenous peoples in Latin America—happened in a context which has come to lie at the very heart of what makes Canada interesting. As I have been saying for years, this country is comfortable with its existence as a non-monolithic nation-state and is comfortable with its concepts of immigration and diversity. All of this falls into a context in which we are comfortable with the concept of uncertainty and complexity. We are comfortable with the idea of mixing people up, with the mixing up of ideas and not following a monolithic, linear road. If you listen very carefully to what is being said by Aboriginal leaders, you will note that their underlying discourse is to a great extent about the need for non-Aboriginal Canadians to embrace consciously the full implications of what it means to come from a complex society and to understand the origins of that complexity.

What is interesting about this country as it currently stands is the way in which it is—and we are—very much the result of the adjustments of the first two hundred and fifty years. Not that the adjustments stopped at that point. The point is that what works here at the most profound level can be traced back quite easily to the

seventeenth, eighteenth and early-nineteenth centuries. When you think about this country and attempt to find the origins for what we do, I invite you to go back and examine the European/U.S. idea of the nation-state. Then try to link this idea at a philosophical level to what we are doing here. The European/U.S. idea is based on a philosophical, theoretically rational linearity aimed at resolving problems in order to achieve clarity and certainty. That is the rational, Enlightenment idea. That is the idea of the monolithic nation-state for which so many people died in the Western world over the last few hundred years. Now, here we are in a country which is the oldest continuous democratic federation in the world and one of the two or three oldest continuous democracies in the world. Yet it is not based on that linear, rational idea of resolving problems in order to eliminate complexity. Rather, it is based on an idea of continuous negotiation and living with uncertainty and complexity. We are fully aware that we will not be achieving clarity in the process of solving problems. Somehow out of this system we have produced a number of revolutionary initiatives, such as single-tier health care or certain approaches toward legal aid—even if that legal aid has been slowly undermined over the last few years. We have done interculturalisme, or whatever you want to call it, without reference to anything coming out of the European/U.S. idea of the nation-state. Here we are, a non-monolithic state, built in the nineteenth century. The proper starting date for the modern form of Canada would be 11 March 1848, when responsible government was put in place. In other words, we began putting in place this atypical form of a nation-state at precisely the time when the rest of the West was obsessed with the legal systems and obligations of a monolithic nation-state: a state which would remove complexities. In fact, we began in a formal way heading down the non-monolithic road precisely at the moment when the European nation-states and the United States were beginning to charge off in the opposite direction—a direction which would lead to a series of murderous wars aimed at accomplishing intellectual purity, racial purity and clarity.

While Europeans spent at least a hundred years obsessed with banning languages, banning religions, banning races, and then going to war in order to accomplish these bans, we became a nation increasingly obsessed with avoiding such black and white situations. We did this by continuous negotiation. I cannot think of any other country that enjoys negotiating as much as Canada.

Go back to the treaty negotiations between the First Nations and the French, then the First Nations and the British and then the First Nations, Metis and the Canadians. You will find, when you examine these negotiations, particularly as time went by, that the equivalent of what we would call today a young whipper-snapper lawyer would arrive from Ottawa, efficacious, wanting to get on with business. He would usually be dealing with the First Nations leaders through senior Metis translators who were a great deal more than translators. They were the real leaders, for example, of northern Ontario and the Prairies. The Ottawa lawyers often would give brief utilitarian speeches and more or less say: *Here's the treaty, here's the land you get, here's some money, we're the owners, sign*. At that point, a series of chiefs and elders would speak, perhaps for four hours each, in order to explain the meaning of the world in the

context in which everyone lived and how this whole process was going to work and how the representatives from Ottawa were entering, thanks to the treaty, into the family and community with which they were negotiating. They added that this relationship would involve renegotiating conditions on an annual basis forever. When the young lawyer protested that things were dragging on, the translator would say something along the lines of "Sir, you're not listening." One hundred to one hundred and fifty years later the Supreme Court of Canada has said precisely the same thing to the federal government: *You have not been listening for a century to a century and a half. Here is the treaty, here are the conditions and here is the oral report as reported—accurately—by the signing people of what was agreed to at that time*. In *Delgamuukw* the phrase used by the Court was "In the circumstances, the factual findings cannot stand."[35] In other words, the Supreme Court of Canada rejected the linear, written, European-style interpretation in favour of the spatial, oral memory approach of First Nations.

Now this was a revolutionary decision for the supreme court of a nation-state to take, not because it was wrong, but because it rendered legal at the most important level an approach which was the opposite to that taken by Western law.

In Cree, I believe there is no word for justice. The equivalent word for justice is the word for talking. That is because you get justice by talking. Or more precisely, you get justice through people talking to each other, as if they have a real relationship within the circle. This could be opposed to an artificially constructed relationship of opponents, in which grown-ups act as if they are members of the Oxford Debating Union in order to decide important issues.

This is a country that does not seem to believe in the necessity of opposing individualism to the power of groups. In European and U.S. political philosophy, these two ideas are generally opposed to each other. Most debates in those countries are based upon the opposition between what is thought of as liberal individualism versus a more conservative, corporatist, or socialist approach toward group interests. When Pierre Trudeau wrote the *Canadian Charter of Rights and Freedoms*,[36] he wrote it as a European/U.S. document aimed at protecting individual rights. He then had to submit it and his restructuring of the constitution to the Canadian political process. And through that process we and our representatives began shoving in group rights. Today we have a *Charter* and constitution which on the one hand gives what appears to be a complete guarantee of protection to individual rights, and on the other hand what appears to be a complete guarantee of protection to group rights. There is no explanation as to how they fit together, because we do not need one. We have always done things like this. Why? Because this is pure Aboriginal theory. We have

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[35] *Delgamuukw*, *supra* note 7 at 1079.

[36] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7.

been adapting to it for four hundred years. The circle represents a concept of group rights, and within the circle there is a celebration of individual rights.

I have already mentioned that we are a society that works far more on the Aboriginal idea of the circle than on a Western, linear concept. This is particularly interesting today in the midst of a universally identified environmental crisis. Clearly the way in which we imagine ourselves—that of the circle and of our existence within the circle—should make us an ideal country for dealing with this sort of crisis. Indeed, a good part of the international environmental movement had its birth in Canada. The virtual inventor of the movement, Maurice Strong, is from Manitoba. The Greenpeace movement comes out of Canada, and there are many other examples of this sort. Yet we have had more difficulty than other Western countries in giving legal and political meaning to the way Canadians see themselves as being part of this place. There is a contradiction between the way we imagine ourselves and the way we act from a legal and administrative point of view. When there is such a precise and deep contradiction, people are brought to a halt. The Aboriginal idea of the role of human beings on the planet is very clear. It is essentially the opposite of the Western idea. The Western idea puts the human being in a position of rational dominance over the place. The Aboriginal idea puts the human being within the place. In other words, we are one of the participants, along with the geography and other living creatures on the planet. There are many philosophical phrases to describe that. One of the easiest to digest is wîtaskêwin, a Cree concept which means "living together on the land," or living with the place.[37] If we could accept in a conscious and intellectual way the relationship of Canadian society to Aboriginal ideas we would find it much easier to deal with Aboriginal questions. We would suddenly find that we had a language which worked with what we were and where we lived. We would also understand why we feel a certain way about the environment and yet only seem capable of acting in an opposing way.

When you look at Canadian notions of egalitarianism, you find that they are very difficult to reconcile with European/U.S. concepts, for example, the class struggle. We keep attempting to shove our egalitarian approaches toward public education or public health into European concepts of class struggle, the American idea of equality of opportunity, or the French notion of equality. Egalitarianism in Canada is quite a different issue. When you look at the Aboriginal approach to it, you find that it mixes effortlessly concepts of meritocracy and individualism with the needs of the group. One of the most important legal phrases in the history of Canada is some version of the phrase, "the single bowl and spoon" or "eating from a common bowl" or "the great bowl and spoon". I don't know how many of you know the phrase. I see not

[37] Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is that Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 39.

very many. Yet you will find it in almost every treaty, either directly or by implication.[38]

Since we are all treaty people it can easily be said that our society has been built upon a concept of us all eating from the common bowl, that is to say, living in an egalitarian society. This is part of the roots of the ideas which led to, for example, a single-tier health care system in Canada. Remember, there is no source for the idea of a single-tier health care in England, France, or the United States. Everyone else in the West set out consciously to create a two-tier public health care system. How did we come to have a single-tier system? You can't consciously trace it back to Aboriginal ideas. But where then did Canadians find the psychic energy to give themselves such a different approach toward health? The answer is that the concept of egalitarianism which lies deep within our subconscious, and which comes from Aboriginal theory, is there in spite of our consciously structured approaches.

We have an enormous amount of philosophical and legal work to do in order to make sense of ourselves on our own historic terms. For example, if you look at the legal roots of modern Canada, you find them more than anywhere else in the *Great Peace of Montreal* of 1701. That is a pretty good place to start if you are looking at how to rethink the nature of what we are. Of course, the *Great Peace of Montreal* was replaced in 1764 by the *Treaty of Niagara*. These treaties were the products of enormous gatherings, first between the Aboriginal leaders and the francophone leaders, then between Aboriginal leaders and anglophone leaders. Yet even a judge could live her whole life without ever hearing that the approach to justice in this country springs to a great extent, even in its written form, out of two Aboriginally dominated legal documents. We need to release all of this from our collective unconscious. We need to change the language we are using.

There is a story that René Lévesque at a certain point during his battles over the role of Quebec in Canada found himself chatting with a Mohawk chief about sovereignty. He said to the Mohawk chief, "you understand what I mean." And the Mohawk chief did indeed understand what he meant, while no one else—including members of Lévesque's own party—really did. Everyone else was attempting to use French, English and American concepts of sovereignty. The Aboriginal notion of sovereignty—which we are still having legal and political trouble understanding—is based on a concept in which harmony is achieved through balanced relationships. That is a very different philosophical approach to the Western concept of sovereignty. The country is already moving in more or less the right direction. You have all studied *Delgamuukw*. You know that this very old country has now rediscovered its oral roots and its oral reality. The difficulty is that in spite of this we continue to insist that decisions such as *Delgamuukw* are only specific decisions about specific Aboriginal

[38] For a more detailed explanation of the aboriginal concept of the "bowl and spoon", see generally Anthony J. Hall, *The American Empire and the Fourth World: The Bowl with One Spoon*, vol. 1 (Montreal: McGill-Queen's University Press, 2003) at 371-426.

issues. Were you to think of *Delgamuukw* as a statement about Canadian society, you would realize its enormous importance to all of us on almost any subject. It represents an understanding by the Supreme Court of Canada and the legal system as a whole that Canada belongs to a tradition which is quite different from the European tradition.

How could the oral play an important role in Canada's concept of itself beyond purely Aboriginal questions? That is a very easy question to answer. Almost 1 per cent of our population arrives every year as immigrants.[39] And 85 per cent of them become citizens.[40] This is almost double the American percentage and many multiples more than the European percentage.[41]

Most of these immigrants and citizens will live their entire lives in a relationship to Canada which is primarily oral. Their first languages will not be English or French. And while they may learn English or French, their fundamental relationship will remain oral. There is nothing wrong with that. Historically, the primary relationship between the original Aboriginals, francophones and anglophones was oral. Aboriginal culture was oral. The vast majority of the early immigrants came out of an oral, not a written culture, and continued to live that way. Finding themselves in this complex triangle only encouraged them to focus on the oral approaches. If you look at the waves of immigration throughout the nineteenth century and early-twentieth century you will find that, again, most immigrants came out of an oral tradition and they continued to live in Canada often for two or three generations within that oral tradition. One of the most interesting things about this country is that while we have developed ourselves as if we were a typical Western written society from a legal point of view, the reality of the political development of our society has been deeply and centrally oral. If we understand that, then we will have found very interesting ways to develop the relationship between citizens and to understand the originality of our approaches to key questions.

The acceptance of this orality also allows us an astonishing breakthrough toward our approaches to memory. This is something which the courts of Canada have been dealing with now for decades, and over the last twenty years they have come up with what I would call the right answers. If we could understand why our approach toward memory is different from those of courts and legal systems in other countries, then we would be able to understand how it is that non-Aboriginals came to adapt over the first two hundred and fifty years of our history to Aboriginal practices. This would help us get at the roots of our ethical behaviour.

Look at a case like *Guerin*, which was decided in 1984.[42] The concept of the honour of the Crown has been limited to an approach toward Aboriginal questions.

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[39] Statistics Canada, *Immigration Highlights*, *supra* note 23.
[40] *Ibid.*
[41] Baker, *supra* note 25; de Hart, *supra* note 26.
[42] *Supra* note 6.

Why would the honour of the Crown only apply to Aboriginals? The Crown's obligation to act in an honourable manner applies to any Canadian citizen. Surely *Guerin* is a decision of enormous importance for all citizens. I keep asking myself—why are we not using *Guerin* as an example in areas which are not specifically matters of law related to Aboriginals? In other words, *Guerin* in many ways is the source of an approach which represents justice for all Canadians. Why don't we think that way? Perhaps it is because of the terror of our organized leadership that Aboriginals might actually be the source of our civilization.

Louise Arbour has been a long-time advocate for extending citizens' fundamental rights to areas such as housing.[43] That would be a very Aboriginal approach. Perhaps the honour of the Crown gives us an approach toward environmentalism, toward wîtaskêwin.[44] Seen this way, the Crown has an obligation to look at the use of land in a way which goes well beyond concepts of interest and of ownership. Perhaps there are other sorts of human interest which we're not taking into account.

Let me finish with a few words on the question of Arctic sovereignty. As you know, there's a great deal of international conversation going on about this at the moment and our government is extremely excited. This excitement seems to come in fits and starts over the years, with much longer fits than starts. But when you analyze what people are saying about Canadian sovereignty in the Arctic, whether it is the government or the experts based in the South, it begins to sound like something coming out of the Austro-Hungarian Empire. There is a distant frontier which virtually no one has seen, and it is being threatened by enemies for indistinct purposes, or purposes which are simplified in their most traditional manner. We're going to send troops up there. We're going to send ships. We're going to defend ourselves. There are novels written about this sort of approach—*Le rivage des syrtes* by Julien Gracq,[45] *Il deserto dei Tartari* by Dino Buzzati,[46] or most recently *Waiting for the Barbarians* by J.M. Coetzee.[47] Not that I disagree with the necessity of having soldiers and sailors in the Arctic. It has long been preposterous that the whole of Nunavut contains one, and more recently two, junior officers on a permanent basis.[48] I think if you asked any Canadian officer in any one of the three services they would tell you that the defence of the Arctic must primarily be civil, although there is a real need for a military presence. There is a very real need not simply to enlarge the

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[43] *Gosselin v. Quebec (A.G.)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257.

[44] For the definition of "wîtaskêwin", see Cardinal & Hildebrandt, *supra* note 37.

[45] (Paris: Librairie José Corti, 1951).

[46] (Milan: Arnoldo Mondadori Editore, 1945).

[47] (London: Secker & Warburg, 1980).

[48] Department of National Defence, *DND Estimated Expenditures by Electoral District and Province for Fiscal Year 2006-2007* by Kamal Jayarathna (Ottawa: Department of National Defence, 2008) at 19, online: National Defence and the Canadian Forces <http://www.admfincs-smafinsm.forces.gc.ca/fp-pf/eeedp-edcep/2006-2007/doc/eeedp-edcep-eng.pdf> (regular personnel are permanent officers).

Canadian Rangers—the one truly Northern force—but to formalize them as a Regiment with Inuit and other Northerners in its officer-level leadership.

Our latest approach to Canadian sovereignty in the Arctic is very Southern in its conception. This is hardly surprising. It comes from a population of which only a tiny percentage has actually seen the Arctic.

It is not surprising then that our claim to Arctic sovereignty is based to a great extent on nineteenth-century English explorers—a not very bright group who spent a lot of time trying to find a way through the Arctic to the other side. In other words, they were not actually interested in being here; they wanted to go somewhere else. But while they were stuck in the ice, because they didn't listen to advice, they took the few seconds it required to claim the Arctic for the Queen. Later on, Canada got it from the Queen. Now, I am sure that this room full of lawyers would agree with me that this does not sound like a very good claim. However, we have tens of thousands of Inuit living in the Arctic who are Canadians, and who have been living there for thousands of years. That sounds like a good claim. In other words, it is ours because we live there. Are we using that argument? A little bit, but not as a primary approach. Why? Probably because we instinctively do not want to base our sovereignty on Aboriginal people. There is a sense deep within our political structures that we might risk something if we were to give too much credit or importance to Aboriginals because that would mean we would be admitting their importance and the primacy of their influence. We would rather risk our actual sovereignty in the Arctic on a second-rate claim based on second-rate English explorers. At this very moment, your taxes are being spent looking for Franklin's ships.[49] Now who would want to know where Franklin's ships were? He was a complete failure. He got his men killed because of his mediocrity and unwillingness to listen. Your money is being spent on the basis that somehow if we found these ships it would, I'm not quite sure how, strengthen our claim.

The second part of our claim is based on the law of the sea. We did quite well with that approach over the tepid shores of Canada. Why did we do well? Because the law of the sea—a Dutch law—is based on European principles which argue that you can own land but water is a place which is crossed by enemies. The law of the sea found its origins in the distance which someone on land could shoot a cannon ball across water in order to prevent the passage of enemies. With the expansion of technology, the distances have increased from a few hundred metres to a few hundred kilometres.[50]

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[49] Fergus Fleming, "In Franklin's Footsteps" *Ottawa Citizen* (8 October 2008) A19.

[50] A state's territorial sea may extend up to twelve nautical miles (roughly twenty-two kilometres) from its coast. A state's "exclusive economic zone" may extend up to two hundred nautical miles (three hundred and forty kilometres) from its coast: *Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 396, arts. 3, 57, 21 I.L.M. 1261 (entered into force 16 November 1994).

If you went to the Arctic and asked any Inuk, "what is the relationship between land and ice/water?" they would tell you that water and ice join land together. It is not very different from the Aboriginal principles which led to the Laurentian theories of Canada written by Harold Innis.[51] So, in the European tradition water divides land. Rivers divide opposing enemies. But in Canada, the history of rivers and water is one that links land and brings together both friends and people doing business. In the Arctic—the most extreme example of this approach—if you want to go from one village to another you get off the land as fast as you can and get onto water or ice. In other words, water and ice create a friendly joining together of land—the precise opposite of the law of the sea. We are using a law which is supposedly an international law, but in actuality is a temperate-climate, European law, in order to defend our position in the Arctic. You can see that there is some deep contradiction within that approach.

Wouldn't it be interesting if you were to take those ten women and two men who are the Inuit lawyers of Nunavut, perhaps led by former Premier Paul Okalik, and send them out onto the world circuit to explain Canadian sovereignty from the Inuit legal point of view?[52] Of course, that is an oral legal point of view. But the Supreme Court has already established the importance of orality. In fact, the insistence upon the orality of our legal principles would be a very interesting way to suggest the originality of our approach toward sovereignty in the Arctic. In any case, would it not be a fascinating and powerful intervention in international law to send these young lawyers out in order to make the argument for water and ice joining land together? I can tell you that it would cause confusion in many quarters and dismay in others at the international level. I can also tell you that from that moment on people would talk about Canada on a regular basis with fascination, because originality produces fascination and fascination produces respect.

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[51] Harold A. Innis, *The Fur Trade in Canada: An Introduction to Canadian Economic History* (Toronto: University of Toronto Press, 1999).

[52] It's worth noting that as this lecture goes to press, women now occupy the positions of Commissioner and Premier of Nunavut as well as Mayor of Iqaluit.