THE PERSPECTIVES OF ABORIGINAL PEOPLES OF CANADA ON THE MONARCHY: REFLECTIONS ON THE OCCASION OF THE QUEEN'S GOLDEN JUBILEE

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INTRODUCTION

The Constitution of Canada is a prismatic hodgepodge of treaties, royal instructions and proclamations, and UK legislation. The unifying factor is the constitutional monarchy that holds together a topocratic and collegiality federation. Treaties with Aboriginal nations created treaty federalism; subsequent UK legislation created provincial federalism. Both of these imperial documents are more prismatic than systematic. Prismatic thought is reflective of an infinite variety of perspectives of the same core of truth, which is simultaneously solid and shifting. This has been recognized as representing the federation called "the ironic confederation."

At the Queen's Golden Jubilee, it is time to reflect on the constitutional tradition and its meaning to Aboriginal peoples. While Aboriginal peoples have a distinct understanding of the meaning from other British citizens and subjects, the amalgamating principle of the federation is a shared principle of imperial treaties and acts. Both sources of federation create a constitutional duty to govern Aboriginal peoples by respecting their different laws and customs as vested in treaties. However, Aboriginal and treaty rights are independent from the medieval fiction of the king and queen represented by the absolute sovereign in British traditions. This nostalgic tradition inspired by the idea of British empire has concealed the constitutional realities of compacts and treaties that create the birthrights of the British and Aboriginal peoples and the legal pluralism of United Kingdom and British Commonwealth.

The constitutional monarchy in Canada is built on a consensual foundation that respects the law and customs of the Aboriginal peoples. The affirmation of Aboriginal laws, customs, traditions, and treaties is integral to the constitutional framework of Canada. Aboriginal rights and treaties are constructed or shaped on distinct foundations from the law and customs of the English peoples. They reflect the shared sovereign between the British and Aboriginal sovereigns that establishes and maintains Canada. Aboriginal peoples are part of the sovereignty of Canada. Aboriginal and treaty rights are integral parts of the Queen of Canada and her governments. This constitutional manifestation should not be ignored by Canadians, since it reveals the deep structure and unwritten law of legal pluralism upon which British traditions were blended with Aboriginal traditions to generate a new life-world. This vision continues to provide a guiding light to the dark past where colonization and racism was legally justified to multicultural peoplehood in a post-colonial era.

LAW AND CUSTOMS OF THE ENGLISH PEOPLE

The constitutional birthright of the English people has been codified into a series of statutes. The *Statute of Monopolies, 1623*, prohibits the exercise of legislative power to abrogate those rights.[1] The *Petition of Right, 1627*, prohibits the exercise of executive power to abrogate those rights.[2] The *Habeas Corpus Act, 1640*, prohibits the exercise of judicial power to abrogate those rights.[3] The *Coronation Oath Act, 1688*,[4] the *Act of Settlement, 1700*,[5] and the *Union with Scotland Act, 1706*[6] require the sovereign to affirm and recognize the constitutional birthright of the peoples, throughout the realm and kingdom.

At the Coronation Oath in 1688, at the beginning of colonization, the Archbishop of Canterbury asked the King and Queen: "Will you solemnly promise and swear to govern the People of this Kingdom of England, and the Dominions thereto belonging,

1 *Statute of Monopolies, 1623* (U.K.), 21 Jam. I, c. 3.
2 *Petition of Rights, 1627* (U.K.), 3 Car. I, c. 1.
3 *Habeas Corpus Act, 1640* (U.K.), 16 Car. I, c.10.
4 *Cornation Oath Act, 1688* (U.K.), 1 Will. & Mar., c. 6.
5 *Act of Settlement, 1700* (U.K.), 12 & 13 Will. 3, c. 2.
6 *Union with Scotland Act, 1706* (U.K.), 6 Anne, c. 11.

according to the Statutes in Parliament agreed on, and the Laws and Customs of the same?" They each responded, "I solemnly promise so to do."[7] This Oath created a constitutional compact with the English people in the dominions. William Blackstone notes that the Coronation Oath is a compact or contract for life between the sovereign and the peoples of the UK and Commonwealth.[8] It is a example of the Lockean social compact theory of government.[9] *Halsbury's Laws of England* identifies the Coronation Oath as an integral part of the constitutional law of the UK.

The Oath outlines the essential duties of the sovereign.[10] It established the sovereign's constitutional duty to govern the people of the United Kingdom of Great Britain and Northern Ireland according to the statutes of Parliament, to govern the peoples of the dominions by the law and customs of the same, and to cause law and justice in mercy to be executed in all judgments, to the utmost law of the sovereign's power. The Oath recognizes and affirms the imperial duty of protection of peoples' law and customs. This compact cannot be broken by a vote in Parliament. It can be broken only by the mutual consent of the sovereign and the people.

Queen Elizabeth II's Coronation Oath in 1953 reflected the new global context of the UK. Elizabeth II solemnly promised "to govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon, and of your Possessions and other Territories to any of them belonging or pertaining, according to their respective laws and customs."[11] This Oath affirms the constitutional responsibility of the sovereign and its governments to respect the diverse peoplehood of certain members of the Commonwealth, especially the peoples of Canada. It is consistent with the *Universal Declaration of Human Rights* in 1948.[12] As it is based on the legal plurality of the peoples' laws and customs, it affirms the constitutional principle of multi-legal and multicultural governance. It affirms the constitutional category of peoplehood and their different laws and customs as the integral purpose of governance. Also, it affirms constitutional protection of the heritage, laws, and customs for the peoples of Canada in governance.

LAWS AND CUSTOMS OF ABORIGINAL PEOPLES

Elizabeth II's Oath constitutionally assured Aboriginal peoples in Canada that the Crown would respect their Aboriginal birthrights. Since the *Coronation Oath Act*, the birthrights of Aboriginal peoples of Canada are to be governed by Aboriginal law and customs as well as treaties with the sovereign. In the *Canada Act 1982*, these Aboriginal birthrights were recognized and affirmed in the patriation of the Constitution of Canada. In the final constitutional enactment for Canada made by the Crown in Parliament of the UK, section 35 provided: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[13] These rights affirm the laws and customs of the Indians, Inuit, and Métis.[14] They are guaranteed equally to male and female person.[15] They are part of the supreme law of Canada with which every legitimate law must comply.[16]

The Supreme Court of Canada has interpreted the purpose of section 35(1) as providing "the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose."[17] This statement reaffirms the imperial protection of ancient laws and customs of the Aboriginal peoples of Canada as well as their treaties with the sovereign in the constitutional order of an independent state.

Aboriginal rights are developed from the ancient laws and custom of peoples of various Aboriginal nations. The Supreme Court has acknowledged that Aboriginal legal orders are *sui generis* — generated distinct from British or French laws and customs. They have existed independently of British or French law; they do not depend on consistency with British or French law.[18] The source and validity of these laws and

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7 *Cornation Oath Act, 1688*, *supra* note 4.

8 W. Blackstone, *Commentaries on the Law of England,* 14th ed. (Oxford: Clarendon Press, 1765) at book 1, c. 6.

9 Other statutes created the peoples duty to the sovereign as allegiance, which is either natural, local, or acquired. *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1991) vol. 6 at paras. 459–64.

10 *Ibid*. at para. 459. In Canada, the foreign jurisdictions of the sovereign were the last vestige of monarchical supremacy in the constitutional law of Great Britain. *Ibid*. at paras. 806, 981, 991.

11 See Elizabeth II's Coronation Oath, online: Oremus Homepage <www.oremus.org/liturgy/coronation/cor1953b.html>.

12 GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

13 *Constitution Act, 1982*, s. 35(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

14 *Ibid*. at s. 35(2).

15 *Ibid*. at s. 35(4).

16 *Ibid*. at s. 52(1).

17 *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31 [*Van der Peet*]; *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 32, 82 [*Quebec Secession Reference*].

18 *R. v. Côté*, [1996] 3 S.C.R. 139 at paras. 48, 49, 52 [*Côté*].

customs are embedded in Aboriginal heritages, languages, and laws.[19]

Aboriginal law and customs predate imperial power in North America.[20] They operate by their own force and are protected by British law either through imperial or Canadian constitutional law, or the common law. Justice L'Heureux-Dubé of the Supreme Court stated: "[I]t is fair to say that prior to the first contact with the Europeans, the native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs."[21] Justice McLachlin agreed, stating: "[A]boriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question."[22] She also concluded that the "golden thread" of British legal history was "the recognition by the common law [of] the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement."[23] The Lamer Court held that if Aboriginal people were "present in some form" on the land when the Crown asserted sovereignty, their pre-existing right to the land in Aboriginal law "crystallized" in British law as a *sui generis* Aboriginal title to the land itself.[24] Imperial law vested the pre-existing Aboriginal sovereignty in British constitutional law,[25] which protected the totality of the Aboriginal legal order from intrusion by either the reception of the common or statutory law in the British settlements. [26]

The Supreme Court has recognized that Aboriginal law is distinct from British or French law.[27] It reaffirmes the third constituitonal legal system or "order" in Canada. In *Côté*, Lamer C.J.C. stated that "[a]lthough the doctrine [of Aboriginal rights] was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there."[28] Aboriginal legal orders are distinct from the principles and abstract rights of the Enlightment;[29] they not only created modernity and its legal system but also underly the *Charter* interpretations of personal rights.[30] Neither the British nor the French legal tradition can adequately describe or characterize Aboriginal legal traditions.[31] The judicial interpretative principles are consistent with the sovereign's constitutional duty to govern the Aboriginal peoples of the dominions by their law and customs. It affirms as a principle of constitutional supremacy the right of the judiciary to generate justice in all judgments, to the utmost of its power.

Treaty rights are intimately related to Aboriginal sovereignty and law. The treaties establish an innovative transnational legal regime. They are the consensual reconciliations of Aboriginal sovereignty with British sovereignty. They are based on Aboriginal sovereignty and legal orders. They extend the constitutional duties of the Coronation Oath to protection of peoples' law and customs. The treaties are more detailed agreements about the sovereign's obligations than is the *Coronation Oath Act*. They affirm Aboriginal sovereignty and constitutional power within the British Commonwealth, the UK, and Canada. They established treaty rights of most of the Indian and Inuit peoples. They establish treaty delegation and obligations for the British sovereign and governments. This prerogative compact cannot be broken by any vote in any Parliament or assembly.[32]

The Supreme Court has held by virtue of Aboriginal law and spirituality, Aboriginal nations

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19 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 84–88, 114, 126, 145–46; *Van der Peet*, *supra* note 17 at paras. 29, 31, 60.

20 *Delgamuukw*, *ibid*.

21 *Van der Peet*, *supra* note 17 at para. 106.

22 *Ibid*. at para. 247.

23 *Ibid*. at para. 263.

24 *Delgamuukw*, *supra* note 19 at para. 145. Also see *Delgamuukw v. British Columbia*, [1993] 5 C.N.L.R. 1 (B.C. C.A.) at para. 46, citing *Mabo* v. *Queensland,* [1992] 5 C.N.L.R. 1 at 51 per Brennon J. (Austl. H.C.); *Côté*, *supra* note 18 at para. 49.

25 For a description of the development of imperial constitutional law, see M.K. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw* v. *British Columbia*" (1992) 17 Queen's L.J. 350; M.K. Walters, "*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785 at 789-803; and M.K. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J. 711.

26 *Côté*, *supra* note 18 at para. 49. Also, the Supreme Court has held that the law of Aboriginal title represents a distinct species of federal common law rather than a simple subset of the common or civil or property law operating within the province. *Roberts v. Canada*, [1989] 1 S.C.R. 322 at 340.

27 *Van der Peet*, *supra* note 17 at paras. 17, 20, 42.

28 *Côté*, *supra* note 18 at para. 48.

29 *Van der Peet*, *supra* note 17 at para. 19: "Aboriginal rights, however, cannot be defined on the basis of the philosophical precepts of the liberal enlightenment."

30 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [*Charter*].

31 *Delgamuukw*, *supra* note 19 at paras. 130, 189; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657 at para. 14; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R 85 at para. 34 per Dickson C.J.C.; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 678; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 382.

32 *Campbell v. Hall* (1774), 1 Cowp. 204, aff'd *R. v. Secretary of State*, [1981] 4 C.N.L.R. 86 at 99 per Denning M.R. (C.A.).

possessed pre-existing Aboriginal sovereignty at the time the British Crown asserted sovereignty over their territory.[33] Imperial prerogative treaties, instructions, proclamation and acts creating imperial constitutional law confirmed the inherent sovereignty of the Aboriginal nations.[34] The treaties created a constitutional order of treaty governance and established a framework of duty and obligations defining the government of the country through the Chief and Headmen and distributed power between the Chiefs and imperial Crown.[35] This is analogous to the *Magna Carta*, *Coronation Act*, and other constitutional documents that affirmed the law and customs of the people.

These consensual treaties replaced the general protective jurisdiction of the British sovereign over Aboriginal nations by its assertion of sovereignty over a foreign territory.[36] Under treaty federalism with the prismatic British sovereign, the diverse sovereigns jointly and consensually reign over most of Canada.[37] The Queen of Canada operates through the permission of the Aboriginal nations in the imperial treaties and constitutional law. In imperial law,[38] the treaties establish and acknowledge the shared sovereignty of Canada.

Under imperial law, the prerogative treaties operated independently from executive and legislative power in the UK, colonies and dominions.[39] The treaties reflect the constitutional monarch's duty to govern Aboriginal peoples by their laws and customs, and to protect their territorial possessions. The treaties were protected from any interference by the UK or colonial or dominion governments, which reflect the laws and customs of other peoples.

Elders of the Victorian treaties teach that the Aboriginal purposes in entering into the treaties or "covenant" with the British sovereign were to ensure that future generations: (1) would continue to govern themselves and their territory according to Aboriginal teachings and law; (2) would making a living (*pimâchiowin*) providing for both spiritual and material needs; and (3) would live harmoniously (*wîtaskêwin*) and respectfully with the treaty settlers.[40] These are fundamental obligations of Aboriginal peoples and the Great Mother, the Queen.

In the shared imperial treaty order, the British sovereign in the Victorian treaties affirmed territorial jurisdiction to Treaty chiefs and their laws and customs. The Chief's "promised and engaged" the British sovereign "that they will strictly observe [the] treaty, obey and abide by the law, and maintain peace and good order between each other."[41] The purpose of the

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33 *Delgamuukw*, *supra* note 19 at paras. 145–48.

34 See R. Dupuis & K. McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, vol. 2 (Ottawa: Supply and Services Canada, 1995) Domestic Dimensions at 4-47.

35 *R. v. Marshall*, [1999] 1 S.C.R. 456 at para. 78 [*Marshall*]; *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 24 [*Sundown*]; *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 78 [*Badger*]; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 404. See also J.Y. Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36 Alta. L. Rev. 46; and L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997) 36 Alta. L. Rev. 149.

36 *Delgamuukw*, *supra* note 19 at paras. 145, 166–69, 174, 176, 178.

37 See J.Y. Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241; Canada, *Final Report of the Royal Commission on Aboriginal Peoples*, vols. 1–5 (Ottawa: Supply and Services, 1995) vol. 2 at 20 (social contract), 52 (sacred compact) [*Report*]; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993) at 36.

38 George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1, prohibited British governors and subjects from encroaching on the lands of those "Nations or Tribes of Indians with whom We are connected." Rights confirmed by the Proclamation take precedence over other constitutional rights in accordance with s. 25 of the *Charter*, *supra* note 30, preserving their original priority as royal prerogative grants. Also, prerogative treaties and acts are protected under the *An Act to remove Doubts as to the Exercise of Power and Jurisdiction by Her Majesty within divers Countries and Places out of Her Majesty's Dominions, and render the same more effectual, 1843* (U.K.), 6 & 7 Vict., c. 94; and *An Act to remove Doubts as to the Validity of Colonials Laws, 1865* (U.K.), 28 & 29 Vict., c. 63, which are acts of Parliament of the UK.

39 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 9, 12, 129. See *Walker v. Baird*, [1892] A.C. 491 (J.C.P.C.); *Johnstone v. Pedlar*, [1921] 2 A.C. 262 (H.L.); *Eshugbayi Eleko v. Government of Nigeria*, [1931] A.C. 662 (J.C.P.C.); *Attorney General v. Nissan*, [1970] A.C. 179 (H.L.); *Buttes Gas and Oil Co. v. Hammer*, [1975] Q.B. 557 (C.A.). See generally J.D. Chitty, *A Treatise on the Law of the Prerogative of the Crown; and the Relative Duties and Rights of the Subjects* (London: Butterworths & Son, 1820).

40 H. Cardinal & W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day be Clearly Recognised as Nations* (Calgary: University of Calgary Press, 2000) at 31–47.

41 *Treaty 1*, The Queen and the Chippewa and Cree Indians (3 August 1871); *Treaty 2*, The Queen and the Chippewa Tribe of Indians (21 August 1871); *Treaty 3*, The Queen and the Saulteaux Tribe of the Ojibbeway Indians (3 October 1873); *Treaty 4*, The Queen and the Cree and Saulteaux Tribes of Indians (20 July 1874); *Treaty 5*, The Queen and the Saulteaux and Swampy Cree Tribes of Indians (24 September 1875); *Treaty 7*, The Queen and the Blackfeet and other Indian Tribes (28 June 1877); *Treaty 8*, The Queen and the Cree, Beaver, Chipewyan and other Indian Tribes (21 June–14 August 1899); *Treaty 9*, The King and the Ojibeway, Cree and Other Indians (6 November 1905 & 5 October 1906); *Treaty 10*, The King and the Chipewyan, Cree and Other Indian Tribes (1906); *Treaty 11*, The King and the Slave, Dogrib, Loucheux, Hare and Other Indian Tribes (27 June 1921). This clause was in *Treaty 1* (1871) and the 1923 Treaty, The King and Mississauga Indians, in a modified form.

"obey and abide" clause in the treaty article was to establish that the Chiefs would maintain peace and good order by the rule of law, rather than discretionary or arbitrary rule. This article is of no less constitutional authority in North America than the original grants of the king's prerogative authority to the courts and Parliament in England.

According to the English drafters of the treaties, the Chiefs promised to obey and abide by "the" law. The treaties made no mention of "Her Majesty's" law, or Canadian or territorial law, thus affirming Aboriginal law and custom they knew and lived by.[42] The Treaty Chiefs could not have agreed to engage the unknown customary or statute law of the British peoples. Even if the "obey and abide" clause is judicially interpreted to include Her Majesty's law, the prime constitutional duty of any of Her governments would be to respect the laws and customs of Aboriginal peoples.

The peace and good order clause of the written treaties affirms the residual Aboriginal authority in Treaty Chiefs to maintain their inherent authority throughout the ceded land, and affirms their Aboriginal law and customs as treaty governance. This clause operates similarly in spirit and purpose to the "peace, order, and good government" clause in section 91 of the *Constitution Act, 1867*.[43]

Moreover, in the Victorian treaties, the Treaty Chiefs and Indians "'solemnly promise and engage' to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen."[44] This is acquired treaty allegiance that brings treaty Indians under the protection of the sovereign and involves the sovereign's obligation to govern them by Aboriginal law and customs.

The treaty rights, obligations, and promises — as well as their underlying principles — acknowledge inherent Aboriginal orders, systems of law and rights, and way of life.[45] The promises and obligations of the treaties are the source of specific jurisdiction of the sovereign. Imperial law and the constitutional law of Canada have always protected them.[46] These "inviolable" compacts"[47] are exchanges of solemn promises[48] which are sacred.[49] The Crown's honour requires the courts to always assume that the sovereign intended to fulfill its promises to Aboriginal peoples.[50] Aboriginal rights not specifically delegated to the sovereign, or placed under its administrative jurisdiction in a treaty, are reserved in the Aboriginal orders.[51]

SHARED CANADIAN SOVEREIGNTY

The Queen of Canada has always affirmed and recognized the law and customs of Aboriginal peoples as part of Canadian sovereignty. As the Treaty Commissioner had emphasized to the Chiefs and Headmen in the Victorian treaties, the Queen is "always just and true. What she promises never changes."[52] "[T]he Queen always keeps her word, always protects her red men."[53] "I have told you before and tell you again that the Queen cannot and will not undo what she has done."[54] On 5 July 1973, Queen Elizabeth II confirmed her treaty obligations. The monarch stated that her government in Canada "recognizes the importance of full compliance with the spirit and terms of your Treaties."[55] In the *Canada Act 1982*, the Queen in Parliament affirmed that Aboriginal and treaty rights are part of the supreme law of Canada, and any law inconsistent with those provisions is of no force or effect.[56] The constitutional supremacy principle and the rule of law principle require that all government action

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42 *Ibid*. *Treaty 1* and the 1923 Treaty do not have similar "obey and abide" clauses.

43 *Constitution Act, 1867*, *supra* note 39.

44 See *supra* note 41. *Treaty 1* and the 1923 Treaty are silent on treaty subjects.

45 *Sundown*, *supra* note 35 at paras. 6, 11, 25, 33, 35–36; *Badger*, *supra* note 35 at paras. 76, 82; *Van der Peet*, *supra* note 17 at para. 31.

46 *Constitution Act, 1867*, *supra* note 30 at ss. 9, 12, 129; *Constitution Act, 1982*, *supra* note 11 at ss. 35(1), 52(1).

47 See *Campbell v. Hall*, *supra* note 32 at 204. See also Chitty, *supra* note 39 at 29.

48 *Sundown*, *supra* note 35 at paras. 24, 46; *Badger*, *supra* note 35 at paras. 41, 47.

49 *Badger*, *ibid*. at paras. 41, 47; *Sioui*, *supra* note 35 at para. 96; *Simon*, *supra* note 35 at para. 51; *Campell*, *supra* note 32. By comparision, in British common law the most sacred principles appear to be the sovereignity of the king and the rule of law, while the sacred principles of British positive law was parliamentary supremacy. In the Canadian constitutional order, the most sacred principles are federalism, democracy, constitutional supremacy and the rule of law, and the protection of minorities; see *Quebec Secession Reference*, *supra* note 17 at paras. 32, 49–82.

50 *Sundown*, *supra* note 35 at para. 46; *Marshall*, *supra* note 35 at para. 49; *Badger*, *supra* note 35 at para. 47.

51 *Marshall*, *ibid*. at para. 48; *Sioui*, *supra* note 35 at paras. 58, 87, 100, 120.

52 A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House Publishers, 1991) at 94.

53 *Ibid*. at 95.

54 *Ibid*. at 105.

55 Queen Elizabeth II, as quoted in J. Chrétien, "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People" (8 August 1973).

56 *Constitution Act, 1982*, *supra* note 11 at s. 52(1).

comply with the Constitution, including Aboriginal and treaty rights.[57]

The affirmation of Aboriginal laws, customs, and traditions in constitutional framework and remedies protecting the *sui generis* nature of the Aboriginal people of Canada was an exceptional transformation in Canadian law. It rejected colonial laws and changed the constitutional vision of Canada.[58] Each Aboriginal person brings this framework as their "birthright" or constitution heritage to the courts and to government consultations. Courts and public servants may not ignore these special constitutional rights that inform Aboriginal dignity and identities by relying on the law and customs of the English or French peoples. Every Canadian needs to grasp and respect the distinct Aboriginal order, its laws, heritage, knowledge, and languages.

As illustrated above, Aboriginal rights and treaties are constructed or shaped based on different traditions and distinct constitutional documents from the laws and customs of English people. However, these documents are based on similar principles. In comprehending constitutional governance of Canada, it is a mistake to rely exclusively on the imported parliamentary governance, laws, and customs of the newcomers.[59] Such a perspective ignores the shared, prismatic sovereignty that established and sustains Canada. Also, it violates the British sovereign's promises and agreements to govern Aboriginal peoples by their laws, customs and treaties. If the colonialists' quest was for self rule and responsible government from the imperial authority, they wrongfully ignored the Aboriginal and treaty rights of Aboriginal peoples.[60] The existing constitutional order has, however, corrected this mistake.

Canadian understanding of the nature of the mistaken relationship comes slowly. The legacy of protecting the laws and customs of Aboriginal peoples as shared sovereignty emerges from the deep past and from complex histories. The legacy is not a sentimental exercise in charity or guilt, but rather it develops out of constitutional supremacy and the rule of law. This vision continues to provide a guiding light for the dark past, where colonization and racism was legally justified.

The Supreme Court has rejected most of the colonial legal regimes and legal precedents, keeping only those principles that create constitutional convergence between powers and rights.[61] It stated: "Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers."[62] The Court sought to determine the legalities of the precolonial situation of Aboriginal law and customs and the sacredness of the treaties,[63] and to allow for their relevance to the present (postcolonial-to-be) and future situations. Their interpretative principles bracket and displace colonialism and its justifications in order to affirm the laws and customs of Aboriginal peoples in Canada.[64]

The protection of Aboriginal and treaty rights in imperial constitutional law and British common law created legally binding fiduciary obligations on government. These obligations regulate and supervise the actions of Canadian governments and citizens toward *sui generis* Aboriginal orders, and are articulated as constitutional and statutory fiduciary duties on the Crown.[65] These duties ensure the integrity and honour of the Crown.[66] This is the prismatic legacy of constitutional monarchy in Canada for Aboriginal peoples.

CONCLUSION

Aboriginal and treaty rights should not be ignored in reflections on constitutional monarchy, the shared sovereignty of Canada or constitutional governance. The affirmation of the laws, customs, and treaties of Aboriginal peoples reveals the deep structure and unwritten constitutional principles of legal pluralism upon which British traditions were blended with Aboriginal traditions to generate a new life-world. Nothing is wrong or unfair with Aboriginal peoples being part of the prismatic sovereignty of Canada. Aboriginal and treaty rights have always been part of

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57 *Quebec Sesession Reference*, *supra* note 17 at paras. 70–78.

58 *Côté*, *supra* note 18 at para. 51.

59 In the *Constitution Act, 1867*, *supra* note 39 at s. 91(25), the newcomers are constitutionally called "aliens."

60 See generally B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am. J. Comp. L. 361; and *Report*, *supra* note 17.

61 *Quebec Secession Reference*, *supra* note 17 at paras. 49–50, 91; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 373 per McLachlin J.

62 *Côté*, *supra* note 18 at para. 52.

63 *Badger*, *supra* note 35 at para. 41. See also *Campbell v. Hall*, *supra* note 32.

64 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at paras. 23–27. The Court refused to constitutionalize federal or provincial bureaucratic law of the colonial era. See also in treaty interpretation, *Simon*, *supra* note 35 at 399.

65 *Sparrow*, *ibid*. at para. 59.

66 *Ibid*. at paras. 58, 65; *Badger*, *supra* note 35 at para. 78; *Sundown*, *supra* note 35 at para. 24; *Marshall*, *supra* note 35 at paras. 49–52.

the integral foundation of the authority of the Queen of Canada and her governments. The affirmation of these first principles of constitutionalism in Canada and the Supreme Court's interpretation of these rights are remarkable affirmations of the laws and customs of Aboriginal peoples. It re-established the tradition of transnational legal order, legal pluralism, and peoplehood to Canadian constitutionalism. It ends the dark legacy of colonization and its oppressive legal order.

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