Understanding the Progression of Mi'kmaw Law

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Over the past 250 years, the recognition and implementation of the aboriginal and treaty rights of the Santi Mawio’mi of the Mi’kmaq has been a hard and bitter struggle for justice. Building on Mi’kmaw Aboriginal knowledge and legal traditions that inform their aboriginal and treaty rights, the Supreme Court of Canada has affirmed a Mi’kmaw right to hunt, fish, and gather in their traditional territory. The author focuses on the progression of Mi’kmaw law, drawing on the original teachings of the Mawio’mi embedded in Netukulimk and then shifting to the current legal strategy that creates a constitutional jurisgenesis and a foundation for a long awaited constitutional reconciliation with the Mawiomi in Atlantic Canada. The argument not only reaffirms the importance of language, teachings, and history towards litigating Aboriginal law but also affirms the preexisting Aboriginal sovereignty of the Mawiomi as understood in their creation stories.

Au cours des 250 dernières années, la reconnaissance et la mise en œuvre des droits ancestraux et issus des traités du groupe Santi Mawio’mi de la nation Mi’kmaq ont été une lutte longue et pénible pour obtenir justice. Se fondant sur les connaissances autochtones ancestrales et sur les traditions juridiques qui sous-tendent leurs droits ancestraux et issus des traités, la Cour suprême du Canada a affirmé leur droit de chasser, de pêcher et de récolter sur leurs territoires ancestraux. L’auteur se penche d’abord sur la progression de la loi Mi’kmaw et s’inspire des enseignements originaux des Mawio’mi enchâssés dans la notion de Netukulimk, puis il se tourne vers la stratégie légale actuelle qui met en place les conditions propices à la création d’une loi constitutionnelle et à un rapprochement espéré depuis longtemps avec les Mawio’mi du Canada atlantique. Non seulement l’argument réitère-t-il l’importance de la langue, des enseignements et de l’histoire dans les litiges qui portent sur les droit des Autochtones, mais il affirme également la souveraineté autochtone préexistante des Mawio’mi telle qu’elle est décrite dans leurs récits sur la création.

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Introduction
I. Sappier-Gray decision
II. Mi’kmaq legal traditions and Netukulimk
III. Sovereignty of the Santi Mawio’mi
IV. Mi’kmaq territory
V. Long overdue constitutional reconciliation

Conclusion

Finally they met Nikanapekewisqw, Kluskap’s mother, a woman whose power lay in her ability to tell about the cycles of life or the future. She said to Kluskap that she was a leaf on a tree that fell to the ground; morning dew formed on the leaf and glistened while the sun, Niskam, began its journey towards the midday sky. It was at midday when Niskam gave life and a human form to Kluskap’s mother to bring love, wisdom and the colors of the world. The spirit and strength of Niskam entered into Kluskap’s mother. As part of the forest realm, she brought strength and understanding; strength to withstand Earth’s natural forces, and understanding of the Mi’kmaq world, its animals, and her children, the Mi’kmaq and the understanding of the means of maintaining harmony of the forces of nature. She told them that they will need understanding and cooperation, so they can live in peace with one another.¹

Introduction
Over the past 250 years, the recognition and implementation of the aboriginal and treaty rights of the Mi’kmaq has been a hard and bitter struggle for justice. Since the eighteenth-century treaties with the imperial Crown, the colonialists in Atlantic Canada, by their personal action, elected representatives and statutory law, have attempted to evade or terminate the Aboriginal sovereignty, laws, government, territory and rights of the Mi’kmaq Nation, the Santi Mawio’mi. By a broad and lasting strategy,

¹. I have heard this story most of my life. My translations and interpretation of the Mi’kmaq creation story rely on two written and translated sources. The first is Stephen Augustine’s English translation of the Creation story, see Canada, Report of the Royal Commission on Aboriginal Peoples, Looking Forward Looking Back, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1996) at 48-49 [RCAP Report]. Augustine’s story on “Mi’kmaq Knowledge in the Mi’kmaq Creation Story: Lasting Words and Deeds” (April 8 1977) online: <http://www.muiniskw.org/pgCulture3a.htm>. This story was passed down to him from Augustine’s grandmother, Agnes (Thomas) Augustine, who heard it from her husband Thomas Theophile Augustine, otherwise known as “Basil Tom.” Also, he relied on information provided by his great-grandmother Isabel (Augustine) Simon, in a long-standing family tradition. The other source is Reverend D. MacPherson in Souvenir of the Micmac Tercentenary Celebration (St. Anne de Restigouche: Frères Mineurs Capucins, 1910).
they have sought to ignore the Mawio’mi’s communal rights and replace it with federally generated and structured band councils, organizations, or individual entitlements. The first prime minister of Canada, Sir John A. Macdonald, informed Parliament that it would be Canada’s goal “to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion”. Canada introduced the elective band council system in 1869 as a way of undermining traditional governance structures. Through the power of the superintendent general of Indian affairs, Canada attempted to force the traditional government of the Mi’kmaq to adopt a municipal-style “responsible” government. The deputy superintendent general of Indian affairs referred to the traditional governance systems as “irresponsible”. This new system required that all chiefs and councillors be elected for three-year terms, with election terms and conditions to be determined by the superintendent general as he saw fit.

Since 1869, the Mawio’mi has consistently rejected this replacement process, but Canada has continually ignored it. For example, a 1960 federal order in council displaced the Mawio’mi in Nova Scotia by elected band councils. Then, in 1969, Canada unsuccessfully tried to transfer the band councils to the provinces as municipalities. These legislative and policy replacements have often been utilized to disregard the group-based rights of the Mawio’mi and the obligations of the Crown toward the Mawio’mi. And they are used to deny present federal responsibility for the structural discrimination and inequalities of dispossession of territory and treaty rights, forced assimilation, colonialism and racism. Indeed, the assimilative discourses and policies directed towards Mi’kmaq minimize and reproduce systemic racism and conceal and evade colonial law and its consequences. For example, Canada consistently denied any treaty with the Mi’kmaq before 1985, when the Supreme Court’s decision in

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2. This is an on-going process, which has a disjointed history, *RCAP Report*, *ibid.* at 141-48, 267-310.
4. *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6.*
5. *RCAP Report, supra note 1*, vol. 1 at 275.
Simon affirmed the validity of the Treaty of 1752. Canada has denied the Mawio’mi rights to self-determination and human rights under the International Covenant of Political and Civil Rights. Still, the Mawio’mi and its aboriginal and treaty rights have been affirmed in constitutional jurisprudence and in international human rights law.

Canada has acknowledged these past constitutional wrongs. In 1990, the Court stated:

there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654). As MacDonald J. stated in Pasco v. Canadian National Railway Co., [1986] 1 C.N.L.R. 35(B.C.S.C.), at p. 37: “We cannot recount with much pride the treatment accorded to the native people of this country.”

For many years, the rights of the Indians to their aboriginal lands — certainly as legal rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement’s The Law of the Canadian Constitution (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status.

In January 1998, as part of its response to the report of the Royal Commission on Aboriginal Peoples, Minister Jane Stewart issued a Statement of Reconciliation:

Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures.

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9. Simon v. The Queen, [1985] 2 S.C.R. 387 [Simon]. This policy was based in part on the Rex v. Syliboy, [1929] 50 c.c.c. 389 I D.L.R. 307 (Co. Ct.) decision, which was overturned in the Simon decision.


and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We must acknowledge that the result of these actions was the erosion of the political, economic, and social systems of Aboriginal people and nations.12

In Gathering Strength--Canada’s Aboriginal Action Plan (1998), the federal Crown affirmed that treaties, both historic and modern, would continue to be a key basis for the future relationship between Aboriginal peoples and the Crown.

Since 1982, with the recognition and affirmation of aboriginal and treaty rights in the patriated constitution of Canada, the courts were given the power to protect constitutional rights.13 Since 1985 the Supreme Court has been managing the constitutional relationship with the Mawio’mi against the dark shadow of a long history of injustice, grievances and misunderstanding. It has been slowly and carefully defining the collective constitutional rights—aboriginal and treaty rights—of the Mi’kmaq on a case-by-case basis.14 However, this judicial management has allowed the Crown to attempt to use the unjust past, resurrected as legitimate factual history, as evidence against the constitutional rights of the Mawio’mi. In two earlier landmark decisions, Simon and Marshall, the Court affirmed aboriginal and treaty rights and for the most part reversed decisions of the Nova Scotia courts.15

Once again in 2006, on another step on the long road to justice, the Mi’kmaq gathered in great anticipation of a Court decision in R.v. Sappier; R. v. Gray concerning an aboriginal and treaty right to harvest timber for domestic usage, a right that New Brunswick had tried once again to terminate. Their anticipation had been heightened, because the year before, in Marshall-Bernard, they had failed in their attempts to provide sufficient evidence to prove a commercial right to harvest trees under the trade provision of the 1760-61 Treaties or pursuant to aboriginal title.16

14. Ibid. at s. 35.
16. Ibid.
In the *Sappier-Gray* decision, the Court affirmed that the Mi’kmaq and Maliseet had an aboriginal right to harvest timber for domestic usage.

While the *Sappier-Gray* decision was a significant victory for the Mi’kmaq people, the implementation of the decisions by either the federal or provincial Crown has been slow and resistant, which continues to reveal a weakness in the justice system. It is not just historical grievances behind the Crown’s inaction that have hurt the constitutional rights of the Mi’kmaq people. Even the court victories in which the Mi’kmaq have prevailed have also harmed them because the court engaged in a limited analysis and the Crown failed to implement these rights.

The Mi’kmaq continue to be disheartened and frustrated by legislation, bureaucracy and administrative steps taken to corrupt their inherent and treaty rights. Neither the federal nor the provincial Crown has a coherent policy for implementing the constitutional rights of the Mi’kmaq. Only time and effort by the Mi’kmaq will tell whether the Crown will implement existing constitutional commitments. The harm to the Mi’kmaq that arises out of the delayed constitutional implementation is economical, political, and cultural and is not consistent with constitutional supremacy.\(^{17}\) However, the Mi’kmaq, in their self-determined way, continue to press for the recognition and implementation of their rights in Canadian society. Long after the recognition and affirmation of aboriginal and treaty rights in the Constitution, the Mi’kmaq await reconciliation of the past and a relationship with governments that truly reflect past promises.

What this paper will attempt to point out is the structure of aboriginal and treaty rights of the Mawio’mi and the current paradox in their interpretation and implementation both by the federal and provincial Crown and by us as Mi’kmaq people. It will try to recommend future treaty and constitutional reconciliation in which Mi’kmaq can exercise their constitutional rights and prosper. I write this paper from the view of a Mi’kmaw scholar, and a legal advisor to Mawio’mi, the traditional Grand Council of the Mi’kmaw Nation. It is written from within the Mi’kmaw legal traditions as it merges with constitutional law regarding aboriginal and treaty rights.

I. *Sappier-Gray* decision

The *Sappier-Gray* decision was the last in a trilogy regarding Mi’kmaw harvesting of their traditional territory. Previously, the Court in *Simon* and in *Marshall* had affirmed the Mi’kmaw treaty rights to hunt and fish. The

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New Brunswick Crown charged Dale Sappier and Clark Polchies (both Maliseet) and Darrell Gray (a Mi’kmaq) with unlawful possession of or cutting of Crown timber from Crown lands contrary to provincial law. Each cut and took the logs from lands traditionally harvested by their First Nations. At trial, each person asserted that he possessed an aboriginal and treaty right to harvest timber and he had no intention of selling the logs or any product made from them, but that the logs were intended for their personal use. Sappier took them to build a house and for community firewood. Those cut by Grey were to be used to make furniture and moldings for his home.

The trial courts acquitted them of the Crown’s charges, but on the basis of different constitutional rights. Sappier and Polchies had valid treaty rights, while Gray had a valid aboriginal right. Both Sappier and Polchies were acquitted because a valid 1725-1726 treaty with the Maliseet Nation existed and created treaty rights to harvest timber, but they were held not to have an aboriginal right. The Court of Queen’s Bench and the Court of Appeal upheld these acquittals and dismissed the Crown’s appeal. The Crown appealed these decisions to the Supreme Court of Canada.

In Gray, the trial court held that the Mi’kmaq benefited from an aboriginal right to gather and harvest wood for personal use on the traditional lands of Gray’s Mi’kmaw ancestors, but denied the existence of a benefit from the 1752 and 1779 treaty with the Mawio’mi creating a

18. *R. v. Sappier*, 2003 NBPC 2, [2003] 2 C.N.L.R. 294. The Crown admitted that the Treaty of 1725 and the ratification thereof in 1726 are valid Treaties and that the defendants are beneficiaries of those Treaties. The Crown’s concession about the validity of the Treaty is one of law. The trial judge confirmed the harvesting clause of the 1725 Treaty that confirmed the right of the Maliseet and Mi’kmaq peoples to “not be molested in their persons, Hunting, Fishing and Planting Grounds nor in any other [of] their Lawful Occasions by His Majesty’s Subject or their Dependents”. He found that lawful occasions included the right to harvest wood from forests for personal use. In rejecting the Aboriginal rights, Cain Prov. Ct. J. opined that any human society living on the same lands at the same time would have used wood and wood products for the same purposes. On this basis, he held that the practice of using wood to construct shelters or to make furniture was not in any way integral to the distinctive culture of the ancestors of the Woodstock First Nation. The learned trial judge ultimately concluded that the culture of this pre-contact society would not have been fundamentally altered had wood not been available for use because the Maliseet would probably have found some other available material to use in its place. The Supreme Court in *Sappier-Gray*, *infra* note 21 at para. 64 noted that, “The Treaty of 1725 was negotiated in Boston by the Penobscots and ratified by Mi’kmaq representatives at Annapolis Royal, Nova Scotia, in 1726.” However, it did not pronounce on the validity or geographical scope of the 1725 Treaty.


20. *R. v. Sappier and Polchies* 2004 NBCA 56, 273 N.B.R. (2d) 93. Robertson J.A., writing on behalf of the Court of Appeal, emphasized that a practice need not be distinct in order to found an Aboriginal right claim — it need only be integral to a distinctive culture. In his view, the fact that tree harvesting was undertaken for survival purposes, and that perhaps any human society would have done the same, was not determinative. Moreover, in direct response to Cain Prov. Ct. J.’s reasons, Robertson J.A. queried what other resource could have been used had timber not been available.
The right to harvest timber.\textsuperscript{21} Gray’s acquittal on aboriginal rights was set aside by the Court of Queen’s Bench,\textsuperscript{22} which found that the evidence presented at trial was insufficient to conclude that furniture-making for personal use was a central defining feature of the Mi’kmaw culture.\textsuperscript{23} Gray appealed the decision to the Court of Appeal on the grounds of the lower court’s denial of his defense of aboriginal right, but he did not pursue his treaty rights claim. The Court of Appeal found that he had made a successful claim for an aboriginal right to harvest timber for domestic or personal use at trial, and rejected the Crown’s extinguishment argument.\textsuperscript{24} The Crown did not attempt to justify the legislative infringement.\textsuperscript{25} The Crown appealed the Court of Appeal decision to the Supreme Court of Canada.

The Supreme Court dismissed both crown appeals, holding that in both cases the involved Maliseets and Mi’kmak had an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by Maliseet and Mi’kmaw society.\textsuperscript{26} The decision concluded that Mi’kmak and Maliseet had a right to use the harvested timber for the construction of a modern dwelling,\textsuperscript{27} and for “communities’ domestic needs for such things as shelter, transportation, tools, and fuel”.\textsuperscript{28}

The Court declared that the Crown had not discharged its burden of proving that these aboriginal rights had been extinguished by pre-Confederation and post-Confederation statutes.\textsuperscript{29} It emphasized that the power to extinguish aboriginal rights in the colonial period rested with the imperial Crown,\textsuperscript{30} and it was unclear whether the colonial legislature had ever been granted the legal authority to extinguish aboriginal rights.\textsuperscript{31} Even if the colonial legislature did have such authority, the Court found that the legislation relied upon by the New Brunswick Crown as proof

\textsuperscript{21} \textit{R. v. Sappier; R. v. Gray}, 2006 SCC 54, [2006] 2 S.C.R. 686 at paras. 15-16 [Sappier-Gray]. The trial judge in \textit{Sappier}, supra note 18 at 19-31, noted the unreported trial court decision in Gray and restated the Court’s opinion in \textit{R. v. Sundown} where the Court held that the construction of a log cabin was a reasonable incident to a treaty right to hunt. He stated: “And I would say if the Supreme Court of Canada has recognized as part of the tradition and the lifestyle of aboriginals that one can be able to build a hunting shelter, surely if the Court were confronted with a situation as to whether one could use wood to build a year-round shelter, that the decision ought to be similar.” at para. 22.


\textsuperscript{23} \textit{Sappier-Gray}, supra note 21 at para. 17. This characterization narrowed the trial court decision.

\textsuperscript{24} \textit{Gray}, supra note 22.

\textsuperscript{25} \textit{Sappier-Gray}, supra note 21 at para. 54-55.

\textsuperscript{26} \textit{ Ibid.} at paras. 21, 24-26, 72.

\textsuperscript{27} \textit{ Ibid.} at para 48.

\textsuperscript{28} \textit{ Ibid.} at para. 24.

\textsuperscript{29} \textit{ Ibid.} at paras. 56-61.


of extinguishment was primarily regulatory in nature.\textsuperscript{32} It held that the regulation of Crown timber through a licensing scheme did not meet the high standard of demonstrating a clear and plain intent to extinguish the aboriginal right to harvest wood for domestic uses.\textsuperscript{33} The Crown had made no attempt to justify this infringement.

The Court did not decide whether Sappier and Polchies or Gray also would benefit from a treaty right to harvest wood for personal uses.\textsuperscript{34}

The Court stressed that aboriginal rights are founded upon practices, customs, or traditions that are distinctive of the pre-contact culture of an Aboriginal people. The Court affirmed that an aboriginal right could be based on evidence showing the importance of a resource to the pre-contact culture of an aboriginal people. When direct evidence is not available, courts must be flexible and be prepared to draw necessary inferences about the existence and integrality of a practice and the importance of the resource.

In the Mi’kmaq context, the trial court relied heavily on the evidence of a recognized elder and historian, Mr. Gelbert Sewell, a Mi’kmaq and status Indian, who was declared an expert, “regarding oral traditions and customs which have been passed down through the generations and more particularly in the field of describing practices and customs relating to the use of and gathering of wood by aboriginals in the geographical area encompassed by the terms of the charge”.\textsuperscript{35} Mr. Sewell’s evidence was not contradicted by the Crown on cross-examination or by the introduction of any other documentary or historical evidence.

\textsuperscript{32} Ibid. at para. 59.
\textsuperscript{33} Ibid. at paras. 57-60.
\textsuperscript{34} Ibid. at para. 3.
\textsuperscript{35} \textit{R. v. Gray}, New Brunswick Provincial Court (No. 03190311, August 27, 2001) at 3. T. Arsenault Prov. Ct. J. stated that: “I have found and I do find that the evidence of Mr. Sewell was reliable and extremely useful to this court and I might point out that it was in no way diminished by cross-examination nor did the Crown in this case elect to contradict it by any documentary evidence or the evidence of any historian” \textit{ibid.} at 23.
Mr. Sewell testified about the Mi'kmaq practices and uses for wood, concluding that, "so, as far back as I can read in history or the oral tradition that has been passed down to me, it's been — we've been always gathering and we've been always using wood as, as, as a way of life". This evidence, detailing the many uses to which the Mi'kmaq put wood, is important given the communal nature of aboriginal rights. The trial judge accepted this evidence as proof that the practice of harvesting wood for domestic uses was integral to the pre-contact Mi'kmaq way of life.

The Court found enough evidence to reveal that the Mi'kmaw way of life during the pre-contact period was that of migratory peoples who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation. The record showed that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. From this evidence, the Court inferred that the practice of harvesting wood for domestic uses was significant, though undertaken primarily for survival purposes. A practice undertaken for survival purposes can be considered critically important and integral to the pre-contact Maliseet and Mi'kmaq. A practice of harvesting wood for domestic uses undertaken in order to survive is directly related to the pre-contact way of life and meets the "integral to a distinctive culture" threshold.

The Court has stressed that within the context of the pre-contact distinctive culture of the Mawio'mi, "culture" is an inquiry into the pre-contact way of life of a particular Aboriginal society, including means of survival, socialization methods, legal systems, and, potentially, trading habits. Relying on the Mi'kmaq Grand Council legal advisors, Russel Barsh and Sakej Henderson, Bastarache J. stated that:

The term Culture as it is used in the English language may not find a perfect parallel in certain Aboriginal languages... we can find no precise equivalent of European concepts of "culture" in Mi'kmaq, for example.

36. Ibid. at para. 16-19. He spoke of using the inner bark of a cedar tree for rope, and of cutting strips of it to be used in the construction of the old birch bark canoes. Birch bark and ash were used to make baskets. Birch, poplar and black spruce were fashioned into paddles. Any leftover birch or maple was used for firewood. He spoke of using cedar to make drums, and of how the Aboriginal peoples were also carvers. He testified that some of the figureheads on the first ships to arrive in Canada were done by Aboriginals. Mr. Sewell spoke of building camps and making pots out of wood. He testified that the pots were made out of large logs, using fire first to burn out the centre and then chiselling it out. He spoke of using bird's eye maple and curly maple in the construction of axe handles and boat paddles, either for sale or for gifts. He confirmed that the extraction of sap from maple and birch trees had been known to the Mi'kmaq for centuries. Finally, he spoke of the practice of fashioning spears for fishing out of ash.


38. Ibid. at paras. 27-28, 33.

39. Ibid. at paras. 38, 45-48.
How we maintain contact with our traditions is *tan telo’tlieki-p*. How we perpetuate our consciousness is described as *tllnulo’l’i’k*. How we maintain our language is *tlinuita’sim*. Each of these terms connotes a process rather than a thing. Ultimately, the concept of culture itself is inherently cultural.\(^{40}\)

The Court's reliance on Mi'kmaw language is an important step in analyzing Mi'kmaw way of life and culture. It is the revealing force behind their oral traditions, songs, and ceremonies. A court, therefore, must first inquire into the way of life of the pre-contact peoples and seek to understand how the particular pre-contact practice relied upon by the rights claimants relates to that way of life as expressed by their language.

In *Sappier-Gray*, the Court clarified the meaning of "distinctive culture". The Crown and some interveners argued that only cultural traits that are distinct or unique to that nation would be considered an aboriginal right. The Crown argued that cutting trees for personal usage was not a "distinctive" enough trait of the Mi’kmaq to be an aboriginal right; instead, it stated that any human society would practice this trait for survival and it was not integral to that specific culture. The Court affirmed the rejection of this argument, stating, "Section 35 seeks to protect integral elements of the way of life of these aboriginal societies, including their traditional means of survival."\(^{41}\) The Court explained that the qualifier "distinctive" incorporates an element of aboriginal specificity but does not mean "distinct".

The nature of the practice of an aboriginal right cannot be frozen in its pre-contact form but rather it can evolve into a modern practice protected as an aboriginal right determined in light of present-day circumstances. The Court established in *Simon* that treaty provisions should be interpreted "in a flexible way that is sensitive to the evolution of changes in normal" practice and confirms that courts should not use a "frozen-in-time" approach to treaty rights.\(^{42}\) In *Sappier-Gray*, the Court translated the pre-contact practice into a modern harvesting of wood for certain domestic uses that are directly associated with that particular way of life.\(^{43}\)

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40. Ibid. at para. 44.
41. Ibid. at para. 40. One should note that in a treaty rights analysis the access to resources and activities are not characterized as "traditional", *Marshall, supra* note 15 at para. 4, ("In my view, the 1760 treaty does affirm the right of the Mi’kmaq people to continue to provide for their own sustenance by taking the products of their hunting, and other gathering activities and trading for what in 1760 was termed ‘necessaries’") and paras. 7, 56, 66.
42. *Simon, supra* note 9 at 402.
The majority of the Court, in the words of Justice Bastarache, characterized this aboriginal right as having no commercial dimension. He limited the exercise of this right in modern Maliseet and Mi’kmaw communities. The harvested wood cannot be sold, traded or bartered to produce assets or raise money, even if the object of such trade or barter is to finance the building of a dwelling. Justice Binnie, however, disagreed with this commercial limitation. He noted that barter (and its modern equivalent, sale) within the reserve or other local Aboriginal community would reflect a more efficient use of human resources than requiring all members of the community to do everything for themselves. But he agreed that any trade, barter or sale of wood outside a reserve or other local Aboriginal community where the person lives would represent a commercial activity outside the scope of the aboriginal right established in this case. This analysis continues to confuse the pre-contact territories and activities in the constitutional framework with federal law and policy, a point I will address later. When combined with the lack of evidence on Mi’kmaw legal traditions and existing treaty rights of the Mi’kmaq this fragmented analysis lacks depth. However, the Court noted that very little evidence was led at trial with respect to the Maliseet and Mi’kmaw legal traditions or the actual harvesting practices. This is unfortunate, because it prevented the Court from understanding aboriginal rights from Mi’kmaw legal traditions and its sources. Instead it had to rely on the practices of the Mi’kmaw, implying that no Mi’kmaw law regulated these practices.

II. Mi’kmaw legal traditions and Netukulimk

The relationship between the Mi’kmaq and the forest ecosystem is more intimate than suggested in court. It is foundational to their worldview, integral to their legal traditions, and constitutional rights. This evidence was not before the courts, but it would have been useful to the courts

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44. Compare to Marshall-Bernard, supra note 15, where the Court rejected a commercial right to harvest because on the wording of the trade clause in the 1760-61 Treaties with the Mi’kmaq and a claim for Aboriginal title of the Mi’kmaq in the Miramichi because of an absence of evidence at trial court.
45. Sappier-Gray, supra note 21 at para. 25.
46. Ibid. at para. 74.
47. Ibid.
48. Marshall, supra note 15 at para. 42. ("I mentioned earlier that the Nova Scotia Court of Appeal has held on several occasions that the "peace and friendship" treaties with the Mi’kmaq did not extinguish aboriginal hunting and fishing rights in Nova Scotia: R. v. Isaac (1975), 13 N.S.R. (2d) 460 [Isaac], R. v. Cope (1981), 132 D.L.R. (3d) 36, Denny, supra.")
if properly presented as part of Mi'kmaq constitutional law, as well as the foundation of aboriginal and treaty rights as constitutional law of Canada. The relationship between the forest and Mi'kmaq people is deeply embodied in the Mi'kmaq knowledge system and legal traditions, a relationship beginning with the Creation story.

The Court has held that oral traditions, testimony, songs, and ceremonies were important to give direction to the courts in aboriginal right cases. Courts are required to give value and proper weight to the aboriginal legal system. In recognizing aboriginal title by the Gitksan and Wet'suwet'en, the Court found that “had the oral histories been correctly assessed [at trial], the conclusion on these issues of fact [regarding ownership of, and jurisdiction over, the traditional territories] might have been very different.” In Marshall-Bernard, the Court had affirmed that evidence of oral history is admissible, providing that it meets the standards of usefulness and reasonable reliability.

Researching and understanding Indigenous laws from within Indigenous perspectives has been a passion of Professor John Borrows, one of the scholars the Court relied upon in Sappier-Gray. At a conference


50. R. v. Van der Peet, [1996] 2 S.C.R. 507 at para. 68 (“In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case”); Delgamuukw, supra note 30 at para. 87 (“Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: Sioui, supra, at 1068; R. v. Taylor ... at p. 232. To quote Dickson C.J., given that most aboriginal societies “did not keep written records”, the failure to do so would “impose an impossible burden of proof” on [A]boriginal peoples, and “render nugatory” any rights that they have (R. v. Simon, ... at p. 408). This process must be undertaken on a case-by-case basis.”)

51. Delgamuukw, supra note 30 at para. 84-108, specifically at para. 107. The Court stated at para. 3 that the judicial treatment of oral histories of Aboriginal peoples and important practical problems relevant to the proof of Aboriginal rights and title are “endemic to aboriginal rights litigation generally”.


hosted by the Dalhousie Aboriginal Law Student Association in 2005, Professor Borrows aptly commented:

The future of aboriginal law will be determined by Aboriginal people researching their language and their culture for the true answers, because it is within the language and Indigenous laws that keys to the future of our rights will be decided.\(^{54}\)

Proper judicial consideration of Indigenous knowledge, legal traditions, languages and culture opens up the courts to a better understanding of aboriginal rights. These Indigenous evidences offer deep internal meanings that can be quite valuable to the clarification of aboriginal and treaty rights. However, such evidences cannot be learned in books; they are part of the language and oral traditions. It is in the places where Mi'kmaq gather, such as in ceremonies, Sweat Lodges, cultural meetings, births, wakes and funerals, and visiting Elders, that this knowledge and law are transmitted. These sources are still unfamiliar to the existing rules of evidence and judges have difficulty in comprehending them and giving them proper weight.

Mi'kmaw oral teachings, legal tradition, and ceremonies involve legends, stories, teachings of advisors, and narratives handed down through the generations.\(^{55}\) They are neither linear nor steeped in theories of historical or social progress and evolution. It is not a human-centred narrative, and it does not assume that human beings are anything more than one element in the natural order of the ecosystem.\(^{56}\)

In the Mi'kmaw understanding, time and history form a specific space that is filled with experiences and feelings. Talking about the past involves describing dreams and experiences: characters, events, and objects. No single account explains the collective past of the Mi'kmaq, nor does everyone know every specific detail of an event or know that event in the same amount of detail, but each person takes a certain place as a starting point for a discussion that is sometimes narrative, sometimes not. The progression of time is connected to the specific lives of known people;

\(^{54}\) John Borrows, Keynote Address — Lt Elmi'knik: for the future of the Mi'kmaw people, delivered at the Faculty of Law, Dalhousie University, February 18, 2005] [unpublished].


in other words, it is linked with memory and not with chronological time. Often no account deals with any fixed chronological time and dates for events can only be approximated.

The hereditary Mi’kmaw chief for the New Brunswick district (Sigenigteoag) and kep’ten of the Santi Mawio’mi, Stephen Augustine, has presented such evidence of the creation story of the Mi’kmak in other cases.\(^{57}\)

The creation story of the Mi’kmak establishes the relations between the Mi’kmak and their ecology; it also generates Mi’kmak knowledge and legal traditions behind their aboriginal and treaty rights.\(^{58}\) Mi’kmak knowledge is at the root of the oral tradition and ceremonies and in the teachings, stories, and performances that are passed down from generation to generation.

The teaching of creation among the Mi’kmak,\(^{59}\) which also creates their legal traditions, begins with the life-giver, Kisu’ulk,\(^{60}\) who generates the first bolts of lightning that unfold the grandfather sun (Naku’set), the dry Mother earth (Wsitqamu’k), the organism that generates the atmosphere (Kluskap), and unfolds its great cycles of nature. These lessons create the Mi’kmak legal traditions and law of netukulimk.

The spark people or fire peoples created the ancestors of the Mi’kmak who awoke in the world, ignorant of everything in it. Mi’kmak teachings say the people asked the life-giver how they should live. They were told to watch the sun, sky, and water and lands in the environment, and told to learn from the animals, fish, birds and the plants. They learned how and when to pray, to respect the nations of animals and fish, and to respect the nations of the trees and their dependents; they learned the vitality of the stars, the constellations, and the Milky Way, which is the path their spirits take to the other world. Most important of all lessons, they learned to live together as one people, kinuk, in harmony with all other humans, animals, and plants.\(^{61}\)

\(^{57}\) Courts have had difficulty characterizing hereditary chief and Kep’ten Augustine’s vast expertise. He is usually qualified by the courts as an expert ethno-historian able to give expert opinion evidence on the Aboriginal peoples and the Aboriginal perspective on Aboriginal-European relationships in Eastern North America, including the language, culture, and oral traditions and oral history of the Mi’kmaq Nation.

\(^{58}\) James [Sa’ke’j] Youngblood Henderson, First Nations Jurisprudence and Aboriginal Rights (Saskatoon, SK: Native Law Centre, 2006).

\(^{59}\) Stephen Augustine’s English translation of the Creation story, supra note 1.

\(^{60}\) In the Mi’kmak language, Kisu’ulk is a spiritual force. In the English language it should be translated as a verb or an action, rather than a person or a noun.

Through the endless process of transmission of knowledge and ceremonies, the Mi’kmaq come to understand their values and responsibilities to the environment and families. Mi’kmaw knowledge is centred on the process of sustaining a shared worldview, a cognitive solidarity, and a tradition of responsible action that combines the teaching of rights with responsibilities. The aboriginal land tenure and rights derived from netukulimk cannot be separated from their sovereignty or governance or law of the Mi’kmaw territory. Netukulimk and its laws are not based on race. It is usually based on kinship ties, specialized access to resources, and a high degree of equality and diversity. Mi’kmaq do not speak of living “there”; rather, each family or person “belongs” to a family and a space or territory. Belonging is a special responsibility of Mi’kmaw sovereignty, governance, and the law of netukulimk shapes other laws, legal choices, and placement. Ultimately, the law of netukulimk affirms the value of sharing as a standard of life.

Netukulimk is the responsibility to maintain the ecology and the human order using the principles of belonging and respect. It refers to the responsibilities and actions of the Mi’kmaw, thus it has been translated into human kinship relationships as a general analogy for ecological relations. The Grandmother and the Marten generate the relationship of life within the territory of the Mi’kmaq, the Nephew generates the relationship between life within the sea and the rivers of the territory, and the Mother generates the relationship between the plant lives within the territory. The Creation story thus animates the relationships central to how the Court has affirmed these relationships as aboriginal and treaty rights in Simon, Marshall, and Sappier-Gray. In Simon, the Court affirmed the harvest to hunt land life; in Marshall the right to harvest the sea life; in Sappier-Gray, the Court affirmed the right to harvest the trees. These cases generate a modern constitutional jurisgenesis that is harmonious with the Mi’kmaq creation narrative.

62. Albert Marshall, Chair of the Unamaki Elders Senate (Keynote Address presented to the Canadian Aboriginal Science and Technology Conference “Spirit of the East”, 23 September 2005) [unpublished].

63. Simon, supra note 9.


65. Sappier-Gray, supra note 21.
In the Mi’kmaw legal traditions, netukulimk has always been expressed as the legal processes of sustaining relationships or what is called in the English land tenure system, conservation or sustainability. Consistent with the verb-oriented reality enfolded in the Mi’kmaw language—a process of being with the universe—netukulimk was (and is) a widely shared, dynamic, and interrelated worldview that connects all things. The system of kinship relations unites everyone in a web of complementary rights and responsibilities. This order is non-hierarchical and reproduces itself without the need to accumulate more people, more land, or more goods. The most obvious and widespread manifestation of this reciprocal relationship is the totemic clan system. The clan system categorizes respectful ecological relationships as well as legal obligations, such as sharing and deference. This is a shared responsibility with the netukulimk under Mi’kmaw law. Conservation is an ambiguous constitutional category in Canada. It is not an express power of either the federal or provincial Crown, but it is linked to the aboriginal and treaty rights of the Mawio’mi; its reconciliation is necessary for everyone.

The Sappier-Gray decision is a significant affirmation of another part of the Mi’kmaw legal tradition. It affirms the relationship of the Mi’kmaq to their environment in the form of plant life. This case begins to recognize constitutionally and affirm the Mi’kmaw relationship to the plant kingdom, the green growing entities that provide the atmosphere for the earth. It protects the knowledge of herbs and plants for different purposes. It affirms the Mi’kmaq creation story, and in this case represents the meaning of Nikanapekewisqw (Kluscap’s mother) who came from a leaf of a tree to bring the knowledge of how to sustain and harvest the plant kingdom. The Mi’kmaq conceptualize plants and animals with a certain mntu (force) and consider them to be separate nations that are related to the Mi’kmaq. In an endless cycle, each life form is viewed as both a producer and a consumer with respect to the others. In the Mi’kmaw context, the right to harvest wood is part of the netukulimk, and is derived from pre-contact Mi’kmaw legal traditions of the Mi’kmaq, or its pre-contact legal system.

Both the Mawio’mi in its Netuklimkewe’l declarations and the Crown express concern that recognition of conservation is needed to prevent...
the uncontrollable and excessive exploitation of the natural resources of Atlantic Canada. Netukulimk is the part of Mi'kmaw constitutional law that inherently limits the quantities of those entitled to share in the various and seasonal harvests. In its previous analysis of the treaties with the Mi'kmaw, the courts have found it is implied that the Crown recognized and accepted the existing Mi'kmaw way of life and that it agreed that they could continue their hunting, fishing and gathering lifestyle.

Similar to most forms of Indigenous knowledge, Mi'kmaw knowledge and jurisprudence is based on an organic and knowable totality that is more important than any of its particular manifestations. It is a complete system of knowledge with its own concepts of epistemology, and its own ways of knowing nature, events, ideas, and human consciousness. The diverse manifestations of this knowledge system can best be learned by means employed by Mi'kmaw families, including language, ceremonies, practices, and teachings, and those who teach Mi'kmaw knowledge usually begin from a place where the land and its ecology are understood.

III. Sovereignty of the Santi Mawio’mi

The sovereignty of the Mawio’mi is derived from Mi'kmaw knowledge and legal traditions. The creation story explains the origins of the Mawio’mi and its sovereignty. Lightning bolts, sent by the life giver, created a Great Spirit fire. Out of the fire, the life giver generated sparks that created seven women and then seven men. These peoples created the seven families, who learned from Kisu’ulk how to live. The original term for seven families created by the Great Spirit fire in the creation story was *lnu’k* (or *l’mu’k*), “the people.” The term “Mi’kmac” refers to one of the seven families; it is derived from our language meaning “my relations”. The six other Algonquian families that extend across North America are the *Innu* (Montagnais, Naskapi, Attikamekw) to the north, the *Wabanaki* Confederacy (Abenaki, Maliseet, Penobscot, Passamaquoddy, Wampennoag, Narragansett) and the *Lenapi* or Delaware Confederation to the south; to

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68. Mi'kmaw Constitutional Law, supra note 49; Netukulimk, supra note 56.
70. Mi'kmaw Constitutional Law, supra note 49. See RCAP Report, supra note 1 vol. 4, (Perspectives and Realities) at 454 for the view that Aboriginal knowledge “is a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and their environment.”
72. Sappier-Gray, supra note 21 at paras. 21 and 34.
73. Creation story, supra note 1.
Understanding the Progression of Mi’kmaw Law

the west are the Anishenabi and Three Fires society in the central part of the west, the Eeyouchi or Cree Confederation of the northwest, and the Nitsi-pol-yiksi or Blackfoot Confederation and allies of the Plains of the southwest.

Mi’kmaw sovereignty is a consensual and spiritual alliance of seven related clans of relatives, each with their own districts. It arose as the relatives learned to live together as one people, kinuk, in harmony with their relatives and ecosystem. These relatives are united by the cognitive solidarity of maintaining the teachings of the Great Spirit fire and the seven sacred fires (tiipokeo or tiipuktea). After the passing of seven winters, the seven clans come back with their seven fires to rekindle the Great Spirit fire and the teachings of Life-Giver, Grandfather Sun (Naku’set), Mother Earth (wsitqamu’k), and the Atmosphere (Kluskap). They generated the Mi’kmaw ceremony for the renewal of the alliance of the seven clans. These people of wisdom and responsibility joined together in a circle to discuss shared interests and issues. This ceremony, over the generations, generated the Mawio’mi, or sacred gathering.

The Mi’kmaq became a united confederation, speaking their own language, free in the enjoyment of their own knowledge and traditions, and governed by their own laws and officers in their own territory. They retained the organization through extended family structures, shared ceremonies and dialogical gatherings.

These ceremonies unified the seven districts of the clans (sakamowti), established their sovereignty over a territory and people and certain harvesting places under the responsibility of certain families. From each district of kinsmen and their dependents (wikamow), the national members of Mawio’mi were selected for life by the families to represent the collective interest over the territory. Each year the Mawio’mi met at least twice on governance issues. It considered laws and policy of the netukulimk and the nikminen trading order, to have the kjisakamow or sakamow to address the assembled people about contentious issues, and to have the putu’s read the ulnapskoq or symbolic records of their alliances.

At these governance meetings, as well as the local or district meeting, the Mawio’mi reunited the clans, eliminated lingering conflict, discussed and problem solved important issues, and regulated the harvesting

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responsibilities under netukulimk. They took inventories of the resources of the land, and attempted to ensure that each family had harvesting responsibilities and sufficient planting and gathering grounds for summer, fishing stations for spring and autumn, and hunting range for winter. Once assigned, these properties were secure, and disputes were arbitrated by the kap'ten individually or in council.\textsuperscript{75} Also, they conducted ceremonies and the renewal of existing covenants, visited, discussed, acknowledged marriages, births and deaths, and shared in spirituality and thanksgiving.

The sovereign authority of Mi’kmaq governance is and always has been spiritual, persuasive, and noncoercive. It was developed to animate a discussion about the significant issues facing the Mi’kmaq and to seek a strategy for resolving the issues. It did not have power or armies to enforce its strategies. Rather, the continuity and authority of the Mawio’mi exists in the shared language, knowledge, and traditions, in a common bond—a comprehensive vision that transcends temporary interests. This bond arises naturally from the fate of being born into a munijinik (family), a wikamow (community), a mi’kma’ki (territory), and Lnu (People of the Nation).

This existing pre-contact sovereignty of the Mawio’mi was recognized in the 1610s by the Jesuitical emissaries of the Holy See who first described it to Euro-Christians and labeled it the “Grand Council”. The Jesuit priests described the division of the Mi’kmaq “commonwealth”, “nation”, or “polity” as seven, large, geographical districts under the direction of one Council, and its affiliation with other peoples and autochthonous States in the relationship of confederation the people called Nikmamen, and recorded as “lacmanen” or “ricamenen”.\textsuperscript{76} Beginning in 1610, kjisakamow Membertou, by his baptism and agreement, associated the Mawio’mi with the Holy See under what is known as the sacred pledge of friendship and alliance, covenant, or concordat in Catholic traditions, i.e. “what was agreed upon”. In Mi’kmaw legal traditions it was called a teplutakn, or treaty. In accordance with Mi’kmaw legal traditions, over the next few decades each district, family, and individual consensually ratified the alliance.\textsuperscript{77} After the alliance with the Holy See, which mediated the

\textsuperscript{75} Mi’kmaq Tradition, supra note 55 at 1.
\textsuperscript{76} Rueben Gold Thwaites, The Jesuit Relations and Allied Documents (Cleveland: Burrows Brothers Company) vol. 3 st 89-91, 101 [Jesuit Relations].
\textsuperscript{77} James (Sa’ke’j) Youngblood Henderson, The Mikmaw Concordat (Halifax: Fernwood Press, 1997).
relations of the French King and subjects, the traditional sakamoq were renamed as kep’tens (“captains”) to show the people the good path and to sit with the whole Mawio’mi as the government of all the Mi’kmaq. The relationship was extended to their relatives in other Algonquian-speaking confederacies, regenerating the Great Council of Fire or Putuswagn.

Similarly, the officers of the imperial British Crown, who arrived in Mi’kmaq territory between 1625 and 1794, gave the name “Mickmack Nation” to the Mawio’mi federated chiefs and kep’ten. The Crown formed treaties of peace, friendship, and protection with the Mi’kmaq and referred to these treaties as the covenant chain. By 1760, the British Crown officers began to comprehend the entire structure and governance of the Mi’kmaw Nation. The various treaties followed the legal traditions of the Mi’kmaw, were ratified by the Crown with the central Treaties of 1726 and 1752 and were consensually ratified by each district or family delegate. The Mawio’mi refers to this as the tesqunatek, the treaty order.

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78. In 1638, Father Paul Lejeune gives an account of the son of Iwanchou [Wanju or Juan Chou], the Mi’kmaq kep’ten of the Kepe’kewq district of Mi’kmaki around the Bay of Gaspé, went to France in the name of the Mi’kmaw Nation, and was said to have been very well received by the French sovereign, at whose feet he laid his Crown of Porcelain beads, Jesuit Relations, supra note 75, vol. 15 at 223, 225. This is confirmed by Ursuline Sister Cécile de Saint-Croix in Lucien Campeau, Monumenta Novae Franciae IV: Les grandes épreuves 1638-1640 (Montreal: Les Éditions Bellarmin, 1989) at 747 [Campeau] and Joseph Le Ber, Dernier pour le Canada en 1639: Lettre inédite d’une Ursuline (Dieppe, France: Imprimerie de ‘La Vigie de Dieppe’, 1939) at 30 and Father Nicolas Gondouin, a missionary at Miscou who accompanied the Mi’kmaw to France (Campeau, ibid. at 747, n.13; Jesuit Relations, ibid. vol. 71 at 142-143).

81. Covenant Chain, supra note 74. In R. v. Sioui, [1990] 1 S.C.R. 1025 at 1038 [Sioui] (“At the time with which we are concerned relations with Indian tribes [1760] fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens”) and at 1053-55 (“[w]e can conclude from the historical document that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations... Indian nations were regarded in their relations with European nations which occupied North America as independent nations.”)
or in the English language the Mi’kmaw compact or treaty federalism.\textsuperscript{83} The peace treaties left Aboriginal sovereignty, title, and rights with the Mawio’mi. They created some settlements under British law, established trade relations, created processes to resolve disputes about the separate peoples, and renewed the treaty relationship.

In general, the Court has ignored the sovereignty and governance structure of the Mawio’mi. In Marshall 2, it has narrowly characterized the existing treaties as “local” and assumed without any evidence of Mi’kmaw law and governance that these treaties were “not made for the benefit of the Mi’kmaq population as a whole.”\textsuperscript{84} However, the Court has noted that the imperial Crown wanted to consolidate the treaties into a comprehensive and all-inclusive treaty at a later date, but assumed it never happened.\textsuperscript{85} This may be a Crown’s perspective, but it is not a shared understanding of the Mawio’mi. The Mawio’mi assert the core treaty is 1725-26 with the rest of the treaties ratifying or renewals of this treaty apply to all Mi’kmaq according to Mi’kmaq law. This treaty relationship and framework has never been formally rejected by either the imperial Crown or the Mawio’mi.

Recently, the Court has noted that the controlling principle of aboriginal and treaty rights in the patriated constitution of Canada is Aboriginal sovereignty.\textsuperscript{86} Chief Justice McLachlin articulated this underlying principle: “Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal

\textsuperscript{83} James Youngblood Henderson, I.P.C., Treaty Rights in the Constitution of Canada (Scarborough ON: Thompson Carswell, 2007) [Treaty Rights]; Mark D. Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall” (2001) 24 Dalhousie L.J. 75. In the imperial law, the treaties with Aboriginal nations are empowered by the imperial act of state doctrine as well as constitutional supremacy. The imperial act of state doctrine states that the acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts or the state, Mabo v. Queensland (No. 2) (1992), 175 C.L.R. 1, [1992] 5 C.N.L.R. 1 at para. 26 [Mabo].

\textsuperscript{84} R. v. Marshall [1999] 3 S.C.R. 2 at para. 17 [Marshall 2]; Simon, supra note 9 at 407-08 (discussing s. 88 of the Indian Act). The Court in Marshall, supra note 15 at para. 5 and 26, did not refer to “local” but only to “identical” terms or “separate but similar” treaties.

\textsuperscript{85} Ibid.

\textsuperscript{86} Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511 at para. 20 [Haida Nation]. In Quebec Secession Reference, supra note 17 at paras. 48-54 the Court referred to the implicit unwritten norms in the written constitution of Canada as “underlying principles".
rights guaranteed by section 35 of the Constitution Act, 1982." In this sense, Aboriginal sovereignty is the foundation for the Aboriginal peoples’ legal traditions, heritage, treaties and rights.

In Van der Peet, the Court began to explain why the diverse Aboriginal confederacies, nations, tribes, peoples, societies, cultures, communities, and families exist in imperial law, and why they were recognized and affirmed as holding aboriginal rights in the common law and s. 35(1) of the Constitution Act, 1982:

because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

This simple fact is more than historical description; it is a fact or premise that creates the ultimate constitutional principle of pre-existing sovereignty, title, and rights of the Mawio’mi.

In its past decisions since patriation of the constitution, the Court has referred to Aboriginal sovereignty in many ways. It has used the

87. Ibid. at para. 20. Mi’kmaw sovereignty was implied in the analysis of the 1752 Treaty in the Simon case, supra note 9 at 399 when the Court unanimously rejected the Nova Scotia Crown invoking a 1929 decision of Acting Judge Patterson [R. v. Syliboy, supra note 9] that held the Mi’kmaq Indians were never regarded as an independent power because they were “uncivilized peoples or savages” and “the savages’ rights of sovereignty even of ownership were never recognized”. Chief Justice Dickson observed: “It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.” Thus, the Mi’kmaw sovereignty and ownership was recognized in the imperial treaties. See also, Sioui, supra note 81 at 1055. (“The British Crown recognized that the Indians had certain ownership rights over their land … [and] allowed them autonomy in their internal affairs, intervening in this area as little as possible.”)

88. Van der Peet, supra note 50 at para. 30; see also para. 20 (The Court cannot ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society) and para. 27 (what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of aboriginal peoples); Sappier-Gray, supra note 21 at para. 42. See also R. v. Sundown, [1999] 1 S.C.R. 393 at para. 35 [Sundown] (“Aboriginal and treaty rights… are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories.”). The immigrants to Canada also have parts of their cultural heritage protected in s. 27 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982, and in multicultural acts [Charter].
Eurocentric human science concepts of “nationality”, “political structures”, “societies”, “social organization”, and “culture” to discuss pre-existing Aboriginal “confederacies”, “nations”, and “tribes”, like the Mawio’mi. It has reoriented the constitutional relationship between Aboriginal sovereignty and the power of the Crown by generating the doctrine of the honour of the Crown and constitutional, sui generis (one of a kind) fiduciary obligations. These concepts are vital to reorient the Crown and its governments to Aboriginal sovereignty in a patriated constitutional order. In contrast to the concept of good governance in the colonial constitutional order, the Court’s decisions on aboriginal and treaty rights have generated a new theory of honourable governance as a constitutional mechanism between the representative of the Crown and Aboriginal peoples. It is a part of the deepening of our understanding of the innovative modalities of shared sovereignty.

Based on these innovative interpretations of constitutional law and the use of oral traditions and languages, the Court has revealed how Aboriginal knowledge operated to affirm and protect Aboriginal sovereignty in the patriated constitutional framework of Canada. The Aboriginal sovereignty

89. Sioui, supra note 81 at 1053, 1056; Van der Peet, supra note 50 at paras. 30 and 107; R. v. Côté, [1996] 3 S.C.R. 139 at para. 48 [Côté]; Delgamuukw, supra note 30 at para. 115; and Sundown, ibid. at para. 35. See Harold Cardinal and W. Hildebrand, Treaty Elders of Saskatchewan: Our dream is that our peoples will one day be clearly recognized as nations (Calgary, AB: University of Calgary Press, 2000); RCAP Report, supra note 1, vol. 2 (3) (Restructuring the Relationship, Governance), at 177–84 (Aboriginal nation as the vehicle for self-determination). It should be remembered that at the time of the treaties with First Nations, in “the British common law traditions or constitutional theory of the commonwealth no theory of the state or the nation exists”, P. Cobbett, “‘The Crown’ as Representing ‘the State’” (1903) 1 Commonwealth L. Rev. 23 [The Crown] at 30.
90. Delgamuukw, ibid. at para. 41 (aboriginal title arises out of the prior social organization and distinctive cultures of Aboriginal peoples on that land); Van der Peet, ibid. at para. 74 (aboriginal rights arise from the prior social organization and distinctive cultures of aboriginal peoples on a land); Côté, ibid. at para. 41 (“distinctive culture” of the Algonquin people); Mitchell v. M.N.R., [2001] 1 S.C.R. 911 [Mitchell] at para. 9 (“Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures.”)
93. Haida Nation, supra note 86 at para. 20.
of the Mawio’omi has always operated by its own force derived from Mi’kmaw knowledge, languages, and legal traditions. It is not about absolute power, but the subtle art of generating and sustaining relationships. It is a distinct vision about the way humans lived together and behaved in a kinship and an ecosystem, a distinct tradition of philosophies and humanities. It is a distinct philosophy of justice and legal traditions based on spiritual and ecological understandings and linguistic conventions that are interconnected. It is an implicit, inherent, dramatic, epistemic, unwritten, and living concept.

The sovereignty of the Mawio’omi separates them from all other groups and peoples who migrated to Atlantic Canada. It generates a distinct theory of equality of law behind holders of constitutional authority under constitutional supremacy. These judicial interpretative principles rely upon and animate the latent Aboriginal peoples’ knowledge and heritage. Aboriginal knowledge and legal traditions provide the content to Aboriginal sovereignty, title, and rights as well as the substantive, evidentiary, and procedural processes of aboriginal and treaty rights. They clarify the underlying jurisprudential framework of Aboriginal peoples’ rights. Aboriginal sovereignty and its implicit principles in s. 35 animate a resourceful constitutional analysis that searches for underlying principles of jurisprudence, which is an exceptional and extraordinary transformation in Canadian scholarship and law. It provides the Canadian scholarly and legal profession with a foundation for developing a sui generis constitutional analysis or method, perhaps based on Aboriginal languages, through which the imported jurisprudences can be reconciled with Aboriginal jurisprudence.

The Court has continually affirmed that the constitutional rights of Aboriginal peoples are communal or group rights, rather than individualized ones. This has maintained Aboriginal sovereignty. The source of the sovereignty and rights exists in Mi’kmaw and Maliseet knowledge,
language, and legal traditions; they are rededicated, preserved, and enhanced in the constitution by the existing aboriginal and treaty rights.\textsuperscript{102} These ancient communal rights have to be exercised by members of the Mi'kmaw and Maliseet community consistent with pre-contact Aboriginal sovereignty or its reconciliation in the treaties with the Crown, rather than through \textit{Indian Act} entities or status, race, or theories of abstract individualism.

The communal nature of the Mawio'mi sovereignty and constitutional rights created distinctive legal traditions and netukulimk responsibilities.\textsuperscript{103} These legal responsibilities are defined within the Mi'kmaw language and are the context for understanding treaties and their agreements. Understanding and respecting Mi'kmaw law requires Mi'kmaq and courts to move back to understanding the netukulimk. These legal responsibilities are needed now to rebuild our families, our culture, the language, our clans, and our nation. These indigenous laws could go a long way toward protecting ecological resources from exploitations from all groups, and would once again make the Mi'kmaq the guardians of the resource given by the Life Giver as explained in the creation stories and other oral traditions.

\begin{itemize}
\item \textsuperscript{102} Sappier-Gray, \textit{supra} note 21 at paras. 21 and 34; \textit{R. v. Powley}, [2003] 2 S.C.R. 207 at para. 13. (The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and promise of s. 35 with respect to Métis Aboriginal rights is to protect practices that are historically important features of distinctive communities and that persist in the present day as integral elements of Métis culture. The purpose and promise of s. 35 with respect to Métis Aboriginal rights is to protect practices that are historically important features of distinctive communities and that persist in the present day as integral elements of Métis culture.\textsuperscript{103} Sappier-Gray, \textit{supra} note 21 at paras. 21 and 34; \textit{R. v. Powley}, [2003] 2 S.C.R. 207 at para. 13. (The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and promise of s. 35 with respect to Métis Aboriginal rights is to protect practices that are historically important features of distinctive communities and that persist in the present day as integral elements of Métis culture.\textsuperscript{103} Sappier-Gray, \textit{supra} note 21 at paras. 21 and 34; \textit{R. v. Powley}, [2003] 2 S.C.R. 207 at para. 13. (The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and promise of s. 35 with respect to Métis Aboriginal rights is to protect practices that are historically important features of distinctive communities and that persist in the present day as integral elements of Métis culture.\textsuperscript{103} Sappier-Gray, \textit{supra} note 21 at paras. 21 and 34; \textit{R. v. Powley}, [2003] 2 S.C.R. 207 at para. 13. (The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and promise of s. 35 with respect to Métis Aboriginal rights is to protect practices that are historically important features of distinctive communities and that persist in the present day as integral elements of Métis culture.)
\end{itemize}
IV. Mi’kmaw territory
The Court in Sappier-Gray was not asked to deal with a claim of aboriginal title. The aboriginal right claim to harvest wood was nonetheless site specific. It concerned the exercise of an aboriginal right to traditionally harvest the forest by Gray within the Sigenigteoag district of the Mawio’mi (most of modern day New Brunswick). In its analysis the Supreme Court of Canada was not careful to distinguish between the description of pre-contact Mikmaq/Maliseet territory and current Indian Act reserves. In its analysis, the Court jumped from pre-contact practices to contemporary political designations without acknowledging the disruption caused by the federal crown’s exercise of authority under the Indian Act in the creation of reserves.

The Court in Sappier-Gray held that no clear legal authority from the imperial Crown to New Brunswick existed to extinguish aboriginal rights of the Mawio’mi. The Court analyzed a site-specific right based on the communal territory, a necessary geographical element of an aboriginal right. The Crown conceded in the case of Sappier and Polchies that the wood was gathered within the traditional Maliseet territory and the evidence established in the case of Gray that the harvesting of trees occurred within Crown lands traditionally used by the Mi’kmaq. The Court concluded that the practice of harvesting wood for domestic uses was integral to the pre-contact distinctive culture of both the Maliseet

104. Sappier-Gray, supra note 21 at paras. 50-53; Delgamuukw, supra note 30 at paras. 111-112 (Aboriginal title is a sui generis right in land and, as such, is more than the right to engage in specific activities which may be themselves Aboriginal rights) and paras. 137-39 (“aboriginal title is simply one manifestation of a broader-based conception of aboriginal rights” ... it is distinct from other aboriginal rights ... some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s.35(1)”); and Van der Peet, supra note 50 at para. 74 (aboriginal rights and aboriginal title are related concepts, aboriginal title being a sub-category of aboriginal rights which deals solely with claims of rights to land); R. v. Adams, [1996] 3 S.C.R. 101 at paras. 25-26 [Adams] and in the companion decision, Côté, supra note 91 at para. 38 (Court considered and rejected the proposition that claims to Aboriginal rights must be inherently grounded in an underlying claim to Aboriginal title; it held Aboriginal rights may exist independently of Aboriginal title; Aboriginal title is simply one distinct manifestation or species of Aboriginal rights, which was recognized and affirmed by s. 35(1)). See Kent McNeil, “Aboriginal Title and Aboriginal Rights: What’s the connection” (1997-98) 36 Alta. L. Rev. 117; John P. McEvoy, “Aboriginal Activities and Aboriginal Rights: A Comment on R. v. Sappier; R. v. Gray” (2007) 6:2 Indigenous L. J. 1 [Aboriginal Activities].

105. Sappier-Gray, ibid. at para. 58.

106. Ibid. at para. 52.

107. Ibid. at para. 53. In 2002, N.B. had allocated 5073 m$^3$ for commercial logging to the Mi’kmaq on-reserve at Pabineau Indian Reserve, New Brunswick Department of Natural Resources, Annual Report 2005-2006 (Fredericton: Department of Natural Resources, 2006) at 69.
and Mi’kmaq peoples. It held that Gray possessed an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by members of the Pabineau First Nation and that Sappier and Polchies possessed an aboriginal right to harvest wood for domestic uses that is necessarily limited to Crown lands traditionally harvested by members of the Woodstock First Nation. Justice Bastarache characterized this aboriginal right as limited to the exercise of this right in modern Maliseet and Mi’kmaq communities on the Indian Act reserves without any commercial dimension. Justice Binnie disagreed with this limitation; he noted that the exercise of the aboriginal rights by trade, barter or sale within the reserve or other local Aboriginal community would reflect a more efficient use of human resources. But he agreed with Justice Bastarache that any trade, barter or sale of the aboriginal rights to wood outside a reserve or other local Aboriginal community where the person lives would represent a commercial activity outside the scope of the aboriginal right established in this case.

The Court interpreted these site-specific rights as applying in the traditional territory attached to Crown lands around a federal Indian Act

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108. Ibid. at paras. 42-47 and 72. He used the word communities in para. 42-47, but in para. 72 referring to the members of Woodstock First Nation, Justice Binnie clarified it applied to reserves.

109. Ibid. at paras. 51, 52, and 72. The Court mentioned the members of the Pabineau First Nation in para. 72. The Court did not mention the case of R. v. Thomas Peter Paul (1996), 182 N.B.R. (2d) 270 (Prov. Ct.) held that another Mi’kmaw resident of Pabineau Indian Reserve had right to harvest timber under the Treaties of 1725 ratified in 1726. These treaties were not raised by the parties before the trial court as evidence, but arose from the trial court’s research in law and history pursuant to the concept of judicial notice see Sloui, supra note 81 at 1050. The trial court judge stated: “It is not a right restricted to personal use but a full blown right of beneficial ownership and possession in keeping with the concept of this is our land - that is your land.” On appeal, the Queen’s Bench court recognized the right to harvest timber as an incident to existing Aboriginal title of Mi’kmaq to Crown lands, 193 N.B.R. 2d 321 (Q.B.). The Court of Appeal reversed on both points and entered a conviction because of the “uncertainty” created by the lower court decisions, (1998), 196 N.B.R. (2nd) 292 (C.A.); leave to appeal to the Supreme Court denied, see (1998) N.B. R. (2d) 400. Because of the uncertainty, in 1998, the N.B. Crown entered into an interim commercial harvesting agreement on Crown land with the Maliseet and Mi’kmaq on-reserve. The interim agreement was substituted by a five-year agreement (2002-2007) without prejudice to the constitutional rights of either party. The 2005-06 allocation for the Maliseet First Nation at Woodstock was 13, 909 m³ and the Mi’kmaw First Nation at Pabineau was allocated 5073 m³, N.B. Department of Natural Resources, supra note 177 at 69. See Aboriginal Activities, supra note 108 at 3-4. In contrast to the agreement, it is disconcerting to see the Crown prosecute Sappier, Polchies, and Gray for the harvesting of wood for personal use.

110. Sappier-Gray, supra note 21 at para. 25.

111. Ibid. at para. 74.

112. Ibid.
reserve,\textsuperscript{113} rather than the district in unceded territory of the Mawio’mi. The Court’s substitution of a narrow definition of traditional territory by reference to federal law for the constitutional framework of s. 35 and s. 52(1) that aboriginal rights has constructed is disconcerting. Such unexplained substitution confuses constitutional supremacy with federal law and policy based on colonial assumptions, when they are different legal jurisdictions. While the judicial test for aboriginal and treaty rights reaches back in history to pre-contact, the implementation of constitutional rights in the present day has to confront the disconnection between constitutional rights of the Mawio’mi with the colonial and neocolonial federal administration of Indians. The courts have begun to displace the colonial discourse about Aboriginal sovereignty, tenure, law, and rights, but neither the federal nor the provincial Crown has decolonized the administration of Indians. The Crown’s avoidance of constitutional supremacy exacerbates the existing disconnect and inconsistency.

While the practice of aboriginal and treaty rights can be modernized, the Aboriginal sovereignty and territory that is the constitutional source of the rights cannot be substituted by federally or provincially created entities, such as the Indian Act bands or individual registered Indians. This is especially so when a continuing traditional sovereign and government, like the Mawio’mi, still exists. In Sappier-Gray the substitution of Indian Act bands and references to the Indian Act reserve system as the center for determining where one can exercise territorial harvesting rights and where they can use the wood, rather than reliance on the communal rights of the Mawio’mi districts under aboriginal title, rights or treaties, displaces the constitutional framework with federal and provincial law and policy. This approach gave little guidance on the constitutional geographic scope of the aboriginal right or traditional territory. The Court has rejected the displacement of the constitutional framework by federal law and policy approach stating that s. 35 did not constitutionalize federal law and policy, rather it constitutionalized pre-existing aboriginal and treaty rights which are held by Aboriginal peoples not the Crowns.\textsuperscript{114} It stated that historical

\textsuperscript{113} Ibid. at paras. 25 and 74. This is a similar approach that developed in the Court’s discussion in Marshall 2, supra note 84 at para. 17, of the local community to which the accused belongs under the Indian Act is a proper beneficiary of a communal treaty right. The Mawio’mi took the view that the treaty beneficiaries extended to every member of the Mi’kmaq Nation, and the Indian Act was irrelevant.

\textsuperscript{114} Sparrow, supra note 11 at 1101 (“Historical policy on the part of the Crown can neither extinguish the existing aboriginal right without clear intention nor, in itself, delineate that right. The nature of government regulations cannot be deterministic of the content and scope of an existing aboriginal right. Government policy can, however, regulate the exercise of that right but such regulation must be in keeping with s. 35(1).”)
policy on the part of the Crown could neither extinguish an existing aboriginal right without clear intention nor, in itself, delineate that right. The Court’s continued use of the federal Indian Act in constitutional rights litigation is inconsistent with constitutional supremacy and Mawio’mi rights, and as such the Indian Act should not have any place, force or effect in cases dealing with the context of s. 35 rights.

These judicial inconsistencies, intentional or not, reveal the need for constitutional reconciliation to address these constitutional issues in a comprehensive manner. The fragmentary case-by-case analysis of regulatory offences cannot capture the comprehensive issues. The Court has noted that negotiation and reconciliations under its constitutional framework is its preferred option, rather than litigation. The Crown has ignored the Court’s option for constitutional reconciliation, it continues to litigate against Mi’kmaq struggling to survive and rejects constitutional reconciliation for policy driven processes.

V. Long overdue constitutional reconciliation

In 1996, Governor General Roméo LeBlanc stated:

We owe the Aboriginal peoples a debt that is four centuries old. It is their turn to become full partners in developing an even greater Canada. And the reconciliation required may be less a matter of legal texts than of attitudes of the heart.

The judiciary has attempted to create a constitutional framework of the legal reconciliation in s. 35 jurisprudence, but the general change of attitude by the Crown or elected government has not occurred. It seems that they are still struggling to justify and conceal the wrong their ancestors perpetuated against the Mawio’mi. The Court has rejected the past Crown’s policy of

115. Ibid.
116. For a discussion of constitutional supremacy, see Quebec Secession Reference, supra note 17 at paras. 70-78. Section 52(1) of the Constitution Act, 1982, supra note 13 (“The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”); Quebec Secession Reference, supra note 17 at para. 72.
117. While Mi’kmaq have little choice in their prosecution by the Crown, Justice LeBel in Marshall-Bernard, supra note 15 at para. 142, expressed that summary convention courts are not the appropriate venue for aboriginal and treaty tenure litigation. The poverty of Mi’kmaq do not give them a choice of sustaining a civil case against either the federal or provincial Crown.
118. Sparrow, supra note 11 at 1105; Delgamuukw, supra note 30 at para. 186 and 207; Marshall 2, supra note 84 at para. 22.
120. The Crown’s attitude reminds me of the statement of J.M. Coetzee, a recipient of the Nobel Prize for literature: “Empire dooms itself to live in history and plot against history. One thought alone preoccupies the submerged mind of Empire: how not to end, how not to die, how to prolong its era” in Waiting for the Barbarians (New York: Penguin, 1980) at 133.
deliberate avoidance or abeyance of the constitutional rights of Aboriginal peoples and related misinterpretations that created the impoverished concept of its duty and rights. It has noted the past and present multitude of smaller grievances of Aboriginal people created by the indifference of some government officials to Aboriginal peoples’ concerns about their rights. This avoidance and indifference has represented the entire Crown policy toward the Mawio’mi. The Crowns have not confronted the need for constitutional reconciliations for the aboriginal or treaty rights in patriated Canada; instead they continue to rely on a costly strategy of case-by-case litigation with impoverished Mi’kmaw communities that fragments the unity of the aboriginal and treaty rights of the Mawio’mi, and on fragmentary and specific policy initiatives by the Crown that expressly avoid the constitutional rights of the Mawio’mi and Mi’kmaq.

The Crown has not lived up to its promise of treaty reconciliation. The Court has stated that the “subtext of the Mi’kmaq treaties was reconciliation and mutual advantage”. The various Crowns have not sought to restore the constitutional rights of the Mawio’mi, whose law and policy it had continually attempted to erode. The Crown’s policies are not consistent with the Court’s view of constitutional rights and the obligations of the Crown. The Crowns have continued to discriminate systemically against treaty rights of the Mawi’omi, relying on non-binding negotiations based on policy with its federally funded bands and organizations. These organizations and leaders have the best of intentions given the limitations of the Indian Act and its bureaucracy, but they seem to be struggling to make meaningful progress on specific issues.

Since 1977, the Mawio’mi, in conjunction with various Mi’kmaw organizations, has submitted comprehensive land claims and specific treaty-based land claims to the federal Crown. Federal policy, rather than constitutional law or a legal position, has generated the structure of

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121. Mikisew Cree Nation, supra note 95 at para. 1.
122. Marshall, supra note 15 at para. 3.
123. RCAP Report, supra note 1, vol.1 at 274-310.
124. Canada, Statement made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People, August 8, 1973. The comprehensive claims Policy occurred largely in response to the Court’s decision in Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, in which some judges recognized land rights based on Aboriginal title. The policy divides claims into the two broad categories of comprehensive and specific claims. Comprehensive claims, include claims of a different nature in Atlantic Canada, which the Mawio’mi and the Union of Nova Scotia Indians submitted are based on the assertion of continuing title to land and resources. Special claims involve violation of treaty rights and lawful obligations.
the claims and these policies have changed over time, but the Mawio’mi claims have not been resolved. Nonetheless, the submission of the various land claims of the Mawio’mi to the federal Crown in the constitutional framework establishes the knowledge of the potential existence of an aboriginal and treaty tenure and rights and the Crown’s duty of fair dealing and reconciliation.127

The federal and provincial Crowns have resisted implementing the aboriginal and treaty rights that have been adjudicated and affirmed. The implementation must still be worked out by consultation with the Mawio’mi and Mi’kmaq. It is a required constitutional process under the honour of the Crown, not a discretionary power.129 The Court has established the Crown’s duty of honourable dealings with communal rights under s. 35(1). It has stated that the honour of the Crown is involved in the process of treaty making. It infuses every treaty, governs treaty interpretations and treaty application. It assumes that the Crown intends to fulfill its promises and obligations, requires courts and administrators to interpret the treaties in a manner that maintains the honour of the crown, and infuses the performance of every treaty obligation. It is part of

125. Sparrow, supra note 11 at 1104-5. In 1986 this policy was reformed based on s. 35 of the Constitution Act, 1982, supra note 13, which recognized that Aboriginal and treaty rights presently exist or may be acquired via land claim agreements and the Coolican Report, Living Treaties: Lasting Agreements, A Report of the Task Force to Review Comprehensive Claims Policy, (Ottawa: Indian and Northern Affairs, 1986) produced as a result of extensive consultation with Aboriginal and other groups.
127. Haida Nation, supra note 86 at paras. 26-35.
128. Treaty Rights, supra note 83 at c. 41; Office of the Treaty Commissioner, Treaty Implementation: Fulfilling the Covenant (Saskatoon: Office of the Treaty Commissioner, 2007.)
129. Marshall, supra note 15 at paras. 63-64 (“To paraphrase Adams, at para. 51, under the applicable regulatory regime, the appellant’s exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi’kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown’s position was, and continues to be, that no such treaty rights existed. In the circumstances, the purported regulatory prohibitions against fishing without a licence (Maritime Provinces Fishery Regulations, s. 4(1)(a)) and of selling eels without a licence (Fishery (General) Regulations, s. 35(2)) do prima facie infringe the appellant’s treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the Badger test.”
130. Haida Nation, supra note 86 at para 19.
131. Ibid. and Mikisew Cree Nation, supra note 95 at para. 33.
133. Ibid. at para. 19; Mikisew Cree Nation, supra note 95 at para. 33.
136. Mikisew Cree Nation, supra note 95 at para. 54.
“managing change” and “managing” the relationship between the Crown and constitutional rights of Aboriginal peoples.137

In a fair and honourable treaty implementation process, the proper focus is on the issue of implementing the original treaties that harmonized pre-existing Aboriginal sovereignty with the assumption of Crowns, both federally and provincially. The imperial treaties with the Mawio’mi kep’tens and chiefs did not end the sovereignty of the Mawio’mi or the assumptions of the Crown. The assumptions of the Crown continue to avoid the recognition and implementation of these imperial treaties and communal rights—aboriginal and treaty rights—of the Mawio’mi in a constitutional framework. The Mawio’mi also continues to resist being led by federal or provincial Crown or bureaucracies. The Mawio’mi has proven its strength in its endurance and in its leadership of the people in traditional governance and foundations. It has animated and facilitated aboriginal rights based on pre-contact law and treaty rights based on their consensual agreement with the imperial Crown. The Mawio’mi has comprehended that its sovereignty is led from its Creation story, its legal traditions and from within the Mi’kmaw, not by the Crown, settlers, or bureaucrats whose interests and systems approaches are not only foreign, but unilaterally generate change by political desire or whim.

Over these tumultuous centuries, the Mawio’mi in cooperation with the organization and bands of Mi’kmaw has provided the leadership in building the source and natural resources of treaties and aboriginal rights, and international human rights. Its connections through the centuries to the entire nation, rather than parts of it, has provided the generations with Mi’kmaq language, values and concepts of laws. Since 1985, when the Court recognized the aboriginal and treaty rights of the Mi’kmaq, the courts, rather than the government and bureaucracy, have created the most positive changes occurring in Mi’kmaw communities. The Crown or its bureaucracy have not responded to these judicial decisions. They continue to try to assimilate constitutional rights into federal or provincial laws. They have done little to eliminate the relentless Third World poverty, lifestyles, and racism in which Mi’kmaq have to struggle to survive and animate their talents and competencies.

The constitutional reconciliation of aboriginal rights is also needed for the Mawio’mi. The treaties represent only the issues that the Mawio’mi and the chiefs could reach agreement on with the imperial Crown. In the absence of a specific treaty right, on those issues on which no mutual agreement was made,—the reserved aboriginal rights of the Mawio’mi,

137. Ibid. at paras.1 and 63.
a large residual power of Aboriginal sovereignty and tenure, which both the federal and provincial Crown need to address separately from implementation of existing treaty rights. These aboriginal rights need to be constitutionally reconciled with other constitutional powers. This theme of reconciliation of aboriginal rights pervades the contemporary judicial decisions on constitutional law and interpretation, but is still avoided by the federal and provincial Crowns.

Constitutional reconciliation is permeated with understanding and respecting aboriginal rights and the search for a positive, durable, and living constitutional relationship. As Madam Justice McLachlin (as she then was), dissenting, explained in the aboriginal rights context, “The desire for reconciliation, in many cases long overdue, lay behind the adoption of section 35 of the Constitution Act, 1982.”

The Court has offered different visions of constitutional reconciliation of aboriginal rights. Its concept of constitutional reconciliation is complex, contextually defined, and sometimes appears to be a development of different approaches to the constitutional convergence of constitutional powers and rights.

The initial concept of constitutional reconciliation was first articulated in R. v. Sparrow. In the context of subsistence and ceremonial fishing, the unanimous Court explained that because aboriginal rights are recognized and affirmed, but not clearly defined in s. 35, they are not absolute. The federal government, by virtue of its powers in section 91, continues to have some legislative powers with respect to Indians and Lands reserved for Indians in s. 91(24) and fisheries in s. 91(12). However, the Court stated that these powers are not absolute either, and since 1982, they have been qualified by s. 35 and s. 52 of the Constitution Act. 1982. Thus, federal power to legislate in respect of Indians and the fisheries must be reconciled with the federal duty to respect their constitutionally protected rights under section 35(1). According to the Court, the “best” way to achieve such reconciliation is by reading together the constitutional provisions

138. Van der Peet, supra note 50 at para. 310.
141. Ibid. at 1109.
142. Ibid.
and demanding government justification of any legislative measure that infringes aboriginal rights.

The Court has articulated the interconnected purposes of s. 35(1) that include: determining the historical rights of Aboriginal peoples and giving them constitutional force to protect against legislative powers;\textsuperscript{143} precluding the unilateral extinguishment of Aboriginal peoples' rights;\textsuperscript{144} assisting in reconciling the rights and interests that arise from their distinctive societies with the sovereignty of the Crown;\textsuperscript{145} providing Aboriginal peoples with a solid constitutional base for fair recognition of Aboriginal rights and negotiations and settlement of Aboriginal claims;\textsuperscript{146} committing to recognize, value, protect, and enhance their distinctive cultures;\textsuperscript{147} and

\textsuperscript{143} Sparrow, \textit{ibid.} at 1110; \textit{Delgamuukw}, supra note 30 at para. 126, notes that “the law of Aboriginal title does not only seek to determine the historic rights of Aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day”; \textit{Côté}, supra note 22 at para. 74. (“The text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict aboriginal and treaty rights, and they should both be subject to the same standard of constitutional scrutiny.”)

\textsuperscript{144} In \textit{Delgamuukw}, \textit{ibid.} at paras. 180-181 (The Court concluded that since 1871, provincial laws of general application did not have the constitutional competence under the division of powers to extinguish the doctrine of common law Aboriginal rights); \textit{Van der Peet}, \textit{supra} note 50 at para. 133 (L'Heureux-Dubé J., dissenting on other grounds) and 232 (McLachlin J., dissenting on other grounds).

\textsuperscript{145} \textit{Van der Peet}, \textit{ibid.} at para. 43 (Aboriginal rights are “the means by which which prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory”), para. 44 (“In order to fulfil the purpose underlying s. 35(1) — i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions”) and para. 57 (“those distinctive features of aboriginal rights which need to be acknowledged and reconciled with the sovereignty of the Crown”); and \textit{R. v. Gladstone}, [1996] 2 S.C.R. 723 [Gladstone] at para. 72 (“the recognition of the prior occupation of North America by aboriginal peoples or ... the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown”). In \textit{Delgamuukw}, \textit{supra} note 30 at para. 186, the Court stated that “[u]ltimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in \textit{Van der Peet}, \textit{supra} at para. 31, to be a basic purpose of s.35(1) — ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’. Let us face it, we are all here to stay”.

\textsuperscript{146} Sparrow, \textit{supra} note 11 at 1105 (“Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place”); In \textit{Van der Peet}, \textit{ibid.} McLachlin, J. (as she then was) dissenting on other grounds at para. 229-232 (s. 35(1) “seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples”); \textit{Delgamuukw}, \textit{ibid.}, at para. 186 (“As was said in Sparrow, at p. 1105 ... the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith”).

\textsuperscript{147} Powley, \textit{supra} note 106 at paras. 13, 18.
sanctioning challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected.  

The Court has noted that reconciliation will ultimately be achieved through good faith negotiated agreements between the Crown and Aboriginal sovereigns. It has emphasized that fair and just reconciliation will take into account both Aboriginal and common law perspectives and place equal weight on each. It has explained that the promise of rights recognition, constitutionally protected in s. 35(1), is realized and reconciled with Aboriginal sovereignty claims through the process of honourable treaty negotiations leading to just settlements of Aboriginal claims.

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions. It is time that the Crown listen and engage in treaty implementation and constitutional reconciliation with the Mawio’mi sovereign and communal, constitutional rights. The jagged case-by-case approach by the Court has provided an adequate foundation for these constitutional duties.

The concepts of constitutional reconciliation and the honour of the Crown represent a cornerstone for renewing constitutional approaches for addressing aboriginal and treaty rights of the Mawio’mi and implementing these rights. There is now a substantial body of constitutional law and jurisprudence that provides significant guidance as to how reconciliation with the Mawio’mi should be achieved in the Canadian constitutional context. The Court properly views constitutional reconciliation as a political process involving fair negotiations between holders of constitutional rights and powers, rather than constituting a final judicial remedy. The goal is a dynamic and honourable form of government with the Mawio’mi.

The Court conceives reconciliation as a process that flows from the rights guaranteed by s. 35(1) and the Crown’s constitutional duty of honourable dealing toward the rights of Aboriginal peoples. In the Mi’kmaq context this requires a reconciliation with the seven districts of the Mawio’mi and the Crown, rather than with the isolated bands of Mi’kmaw. There has

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148. Sparrow, supra note 11 at 1110 (The Court rejected the Crown’s argument at 1106-07 that s. 35 was merely of a preambular character not entitled to constitutional protection, instead holding: “By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification.”)

149. Delgamuukw, supra note 30 at para. 186; Haida Nation, supra note 86 at para. 20.

150. Van der Peet, supra note 50 at paras. 49 and 50; see also Delgamuukw, ibid. at para. 81.

151. Haida Nation, supra note 86 at para. 20, see note 8.

152. Mikisew Cree Nation, supra note 95 at para. 1.
to be a national reconciliation with the Mi’kmaq Nation, the holders of aboriginal and treaty rights, and the bands with the federal and provincial Crowns. The honour of the Crown requires a Mawi’omi reconciliation, since it arises from the “Crown’s assertion of sovereignty over Aboriginal peoples and de facto control of land and resources that were formally in control of that people.”\textsuperscript{153} The Court has attempt to define the constitutional rights in a context of regulatory offence cases, expand the Crown’s duties to consult and accommodate, urge negotiations of new treaties in good faith with holders of aboriginal rights, and articulate the limits of Crown infringements of constitutional rights.\textsuperscript{154} Such constitutional reconciliation with the Mawi’omi communal rights is overdue, and much needed to create honourable governance.

Conclusion
Since the Court’s recognition of aboriginal and treaty rights has affirmed the contemporary jurisgenesis of the Mi’kmaw creation story, the Crown and its agencies must acknowledge and establish a mechanism to implement treaty rights and constitutionally reconcile aboriginal rights of the Mawi’omi. This process should be guided by Mi’kmaw oral teachings, legal traditions, and the constitutional framework, rather than shaped by a policy framework developed unilaterally by the Crown. These teaching, traditions, and treaty are the origin of the constitutional relationship between the Mawi’omi and the Crown. They generate a \textit{sui generis} relationship that is empowered by the core precepts of the honour of the Crown. This constitutional relationship that has three distinct by often converging components: a respect for aboriginal law and tenure of the Mawi’omi, a mutual treaty relationship, and fiduciary relationship embedded in imperial law. Any of these relations give rise to distinct constitutional obligations of the Mawi’omi and the Crown that inform the obligation of honourable governance.

Our history as Mi’kmaq has showed us that we have persevered through many obstacles and many misfortunes. As Mi’kmaq in Atlantic Canada we have our own Indigenous laws, yet for a few centuries as today the courts and politicians have tried to persuade our people that these are not valid and must be abandoned. However, recent cases such as \textit{Simon}, \textit{Marshall}, and \textit{Sappier-Gray} have helped to paint a different picture of our future. At the same time this trilogy of Mi’kmaq Supreme Court victories affirm our sacred teaching in the Mi’kmaw creation story. Recent cases

\textsuperscript{153} \textit{Haida Nation}, supra note 86 at para. 32.

have pointed out that our laws, embedded in our languages, are important keys to advancing our rights. While the courts have accepted the arguments put forward by Mi’kmaw people regarding the meaning of *sui generis* treaty and aboriginal rights, it is for us, as Mi’kmaq leaders, now and in the future, together with Mi’kmaq people to truly define who we are for ourselves and what laws we seek to hold.

In the past the Mawio’mi has asked elected leadership at the band and organizational level to work together as a nation and not be divided by Canada’s strategy of using *Indian Act* bands to carry out a band-by-band approach to negotiating. This advice was supported in the report of the Royal Commission on Aboriginal Peoples, which advanced a nationhood approach to problem solving as an answer to the multiple economic and political issues.

That said, it must be stated that there are many *Indian Act* chiefs who have urged working together and gaining capacity as chiefs working together on behalf of their nation. They, along with the Mawio’mi, argue that temporary solutions that ignore long-term problems will continue to lead us down the wrong path. The Harvard project on American Indian Economic development is one example of research conducted showing how short-term nonstrategic decision-making is characteristic of the standard approach of Native Nations.¹⁵⁵ This approach has resulted in failed enterprises, highly dependant economies, and continued poverty and cultural stress.¹⁵⁶ This is why different approaches must be taken that take into consideration long-term strategies that decrease dependency on year-to-year funding agreements.

The Harvard project on American Indian Economic Development recommends a “Nation Building Approach”.¹⁵⁷ Part of that approach is having the “governing institution match indigenous political culture”. This cultural match gives legitimacy and respect to the administration and the nation in the eyes of its membership. Greater respect for laws within that membership is a direct result, which means an improved and more efficient government model.

The cultural match model has its difficulties in terms of possible “what if” scenarios. The problem that many of our leaders point to in terms of creating custom codes that are based on Mawio’mi laws is that the approval of the minister of the Department of Indian Affairs and Northern

Development is still needed to change existing citizenship or election laws. The Minister, of course, could base any refusals on a whim or any reason at all, as well as on concepts that are Eurocentric in nature, such as principles of democracy or individualism. This argument is valid in that there are constitutional challenges to protecting our Mawio’mi laws and constitutional rights; however, we must not be afraid of temporary failure. Fear is not part of our constitutional rights, it is a product of racism and colonialization of our last five generations, which has resulted in cognitive imperialism. During the constitutional table discussion that is showcased in the documentary “Dancing Around the Table,” The late Joe Mathias, a leader for the First Nations of British Columbia, stated, “Behold the turtle, it only moves forward when it sticks its neck out”. The Mi’kmaq must learn how to overcome obstacles in the same way and must take risks and be bold to make progress and protect Mi’kmaq identity that consists of political integrity, language and culture.

The Mi’kmaq have always adapted with the times and as we have evolved in other areas our methods of governance must also evolve. Yet, it is important to remember that as Mi’kmaq, we must keep those traditions alive that have set us apart from European or foreign settlers, for in those differences lay our aboriginal and treaty rights. By valuing our language, culture and customs and by engaging and learning from our Elders and knowledge holders, we learn from our land and our ecology, keeping in mind the responsibilities of being Mi’kmaq and that these are delicate resources that need to be nourished and protected. We have lived for numerous centuries in Mi’kma’ki and our multiple generations have learned from our land, our place, our environment, and we have an immense knowledge that is useful today as it will be tomorrow. Some of this knowledge we can share with others and in so doing preserve and protect that knowledge for future generations. It can help us to understand the full effect of using the land and resources respectfully, without exploitation of the resources and the ecosystem.

By continuing Mi’kmaq learning we need to include research of the language through and with our Elders and knowledge keepers. More can be learned about Mi’kmaq values, customs and traditions and about our indigenous laws for our everyday lives, whether as administrators or as leaders, as fathers and mothers. It is the responsibility of each of us

158. Protecting Indigenous Knowledge, supra note 65 at 86.
159. Directed by Maurice Bulbullian, Dancing around the Table (1987, National Film Board of Canada), is a film about the three conferences on the constitutional rights of Aboriginal peoples of Canada in 1983-85.
to hold on to Mi’kmaw law and aboriginal and treaty rights. These are imbedded in responsibilities to retain the teachings, knowledge, values, and strength of our nation, for now and for the future. Our Mi’kmaw laws and our population should not be replaced by Canadian influences, which in a few generations would make it impossible to tell who we are and what sets us apart from others.

We must use creativity and teamwork to advance our rights and our rightful place within Atlantic Canada. In so doing, we will ensure our spot as a prosperous nation, and at the same time ensure that we as well as others remain respectful of our delicate ecosystem. We have yet to really reflect as Mi’kmaq on how to move forward while ensuring that we adapt, evolve, and at the same time renew our traditional laws and values.

In concluding, it is important to acknowledge the value of the courts in helping to define for Canadians the law of the land, but we recognize that we cannot depend on them. Rather, it is up to us as Mi’kmaq leaders, scholars, lawyers, students, teachers, and experts to begin discussing reconciliation. As Mi’kmaq, how are we to move forward utilizing our strengths and centuries of experience in Atlantic Canada? Finally, we must not expect the federal and provincial Crowns, or the judicial system, to resolve our issues; we must look to our own teachings and balance our values, principles and goals in a just reconciliation process. By doing so we can take the first step towards creating a better future not based on another culture’s agenda or rules but rather on what we have always had within us.