

ARTICLE

# RECONCILING CROWN AND INDIGENOUS LEGAL ORDERS: THE RECIPROCAL BENEFITS OF RESERVING AN INDIGENOUS SEAT ON THE SUPREME COURT OF CANADA

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## I. PROLOGUE STORY<sup>1</sup>

Atanarjuat rose to his feet quickly when Chief Justice McLachlin walked in. Though this building was fancier than the others, Atanarjuat was no stranger to court. He was named Atanarjuat, meaning “fast runner,” after his great uncle and he learned quickly.<sup>2</sup> Atanarjuat appreciated that a criminal conviction was no laughing matter, but he never got used to the judge’s funny dresses and white bibs. He fought his smile as they walked in—first Chief Justice McLachlin, then Justices Abella, Moldaver, Karakatsanis, Wagner, Gascon, and Rowe. It was ironic how the powerful judges looked so small within the confines of the grand courtroom’s 12-meter-high, black walnut walls. Everyone took their seats. “Merci, thank you,” said Chief Justice McLachlin.

As he sunk into his seat, Atanarjuat felt the weight of his past, the current proceedings, and the consequences deep in his chest. He longed to be home in Iqaluit where he could speak Inuktitut with his Inuit family. The Judges would be talking about how his traumatic experiences in residential school should affect the amount of time he’d do for breaching his parole. “Atanarjuat Angilin and Her Majesty the Queen,” announced McLachlin. He thought: “at least I’m not Adam G4-125 anymore!” Humour was the only thing that made him feel better.

When the judges determined his sentence, they would consider available Inuit justice measures and how his experiences in residential school led to his appearance in court today. This was meant to be a way for the courts to deal with the disproportionate number of Indigenous people in Canadian prisons and was to be a step towards reconciliation, as he understood it. In a room full of non-Indigenous judges speaking the dominant culture’s languages to impose the rules of those cultures upon him, though, he couldn’t help but be reminded of residential school. He saw this environment as a step backwards rather than a step towards reconciliation.

## INTRODUCTION

In the residential schools that existed in Canada between the 1820s and 1990s, Indigenous<sup>3</sup> children experienced extreme emotional, physical, and sexual abuse. Among the greatest impact of residential schools were Indigenous peoples’ loss of self-respect and pride, and non-Indigenous peoples’ disrespect for their Indigenous neighbours.<sup>4</sup> The Truth and Reconciliation Commission of Canada (TRC) was created by the Indian Residential School Agreement to address the legacy of residential schools.<sup>5</sup> One of the

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1 Prologue Story adapted from/inspired by *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

2 The film *Atanarjuat (The Fast Runner)* (IsumaTV (14 January 2017), online: <<http://www.isuma.tv/atanarjuat-the-fast-runner>> (Igloodik: Igloodik Isuma Productions Inc., 2011)) inspired the name for the character in this story.

3 I use the term “Indigenous” to avoid the use of terms implying agreement with Canada’s legal approach to colonization. The term “Indigenous Peoples” is used to acknowledge the diversity of “Nations” and communities within Nations in what is now known as Canada. “Nation” is a term that I use to describe a group of Indigenous peoples with a distinct governance system and/or set of legal orders. The word “community” is used in this paper to refer to groups of people within Nations. The term “Aboriginal” is a colonial legal construct used to refer to the Indian, Inuit, or Métis people of Canada as per section 35(2) of the *Constitution Act*, 1982. I use that term when referring narrowly to laws, statistics, or quotations regarding the three legally recognized Indigenous groups in Canada.

4 The Truth and Reconciliation Commission of Canada (TRC), “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,” online: <[http://www.trc.ca/websites/trcinstitution/File/2015/Honouring\\_the\\_Truth\\_Reconciling\\_for\\_the\\_Future\\_July\\_23\\_2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf)> [TRC, “Honouring the Truth”] at vi.

5 *Ibid* at 24.

Commission's 94 Calls to Action is to develop a Royal Proclamation of Reconciliation.<sup>6</sup> The Proclamation is to include the following commitment as per Call to Action 45(iv):

Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.<sup>7</sup>

The Supreme Court of Canada (SCC) is a potential forum through which Indigenous and Crown constitutional and legal orders may be reconciled. Its essential features constitute a crucial aspect of Canada's Constitution, as affirmed by the *Constitution Act*,<sup>8</sup> and it functions as Canada's "exclusive ultimate appellate court."<sup>9</sup> Between 2000 and 2004, the percentage of cases heard at the SCC involving conflicts between Aboriginal peoples and the colonial state ranged between four and almost sixteen per cent.<sup>10</sup> These conflicts related to alleged breaches of treaty rights, assertions of Aboriginal rights under section 35 of the *Constitution Act*, compensation requests for the harm suffered by Indigenous people in residential schools, restorative justice principles for Aboriginal offenders,<sup>11</sup> principles set out in *R v Gladue*,<sup>12</sup> the *Indian Act*,<sup>13</sup> and family law matters concerning Aboriginal children with non-Aboriginal foster parents.<sup>14</sup> The amount of cases involving Aboriginal-state conflicts was notably disproportionate, considering that Aboriginal peoples made up only 3.3 per cent of Canada's population during this period. Chartrand et al. argue that given the disproportionate hearing rate of Aboriginal-state conflict cases, it makes practical sense to reserve a seat on the SCC for an Indigenous judge.<sup>15</sup>

With Prime Minister Trudeau's recent appointment of Aboriginal Minister of Justice and Attorney General Jody Wilson-Raybould and Chief Justice McLachlin's upcoming mandatory retirement in 2018, the momentum for ensuring Aboriginal representation on the SCC is building. Upon accepting the Truth and Reconciliation Commission's Final Report on December 15, 2015, Prime Minister Trudeau stated:

This is a time of real and positive change. We know what is needed is a total renewal of the relationship between Canada and Indigenous peoples. We have a plan to move towards a nation-to-nation relationship based on recognition, rights, respect, cooperation and partnership, and we are already making it happen... we will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the Calls to Action of the Truth and Reconciliation Commission.

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6 *Ibid* at 199.

7 *Ibid* at 199.

8 *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Constitution Act*].

9 *Reference re Secession of Quebec*, [1998] SCR 217 at para 77 and 9, 161 DLR (4th) 385 [*Secession Reference*].

10 Larry Chartrand et al, "Reconciliation and Transformation in Practice: Aboriginal Judicial Appointments to the Supreme Court" (2008) 51:1 *Can Pub Admin* 143 at 148 – 149 [Chartrand et al, "Reconciliation"].

11 *Criminal Code*, RSC 1985, c C-46, s. 718.2(e).

12 *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385.

13 *Indian Act*, RSC 1985, c. I 688 [*Indian Act*].

14 Chartrand et al, "Reconciliation," *supra* note 10 at 148.

15 Chartrand et al, "Reconciliation," *supra* note 10 at 148 – 149.

In this paper, I argue that reserving one seat on the SCC for an Indigenous Justice, either by convention or statute, would be an important step towards implementing Call to Action 45(iv).<sup>16</sup> The Justice would self-identify as Indigenous or possess status according to the *Indian Act*.<sup>17</sup> They would have some knowledge of Indigenous legal orders (including their own Nation's and possibly those of other Nations in what is now known as Canada) and would qualify as judges under the common law. In this paper, I refer to Indigenous legal orders as laws embedded in Indigenous peoples' "social, political, economic, and spiritual institutions."<sup>18</sup> Professor Val Napoleon states that "Indigenous law is part of and derives from an Indigenous legal order."<sup>19</sup>

In order to achieve reconciliation, both Indigenous and Crown legal orders must be addressed in a comprehensive, coherent, and legitimate manner. They must also be understood, accessed, and applied.<sup>20</sup> I argue that reserving a seat on the SCC for an Indigenous Justice would further the goal of reconciling Indigenous and Crown legal orders by enhancing the efficacy and legitimacy of both. Firstly, it would allow Crown legal orders to benefit from the influence of Indigenous legal orders. Second, it would enhance the SCC's legitimacy as a multi-judicial institution. Third, it would allow for better application of Crown laws related to Aboriginal peoples. Fourth, it would help maintain Indigenous peoples' confidence in the Court as the final arbiter of their rights. And finally, it would enhance the efficacy of Indigenous legal orders by allowing for their direct application.

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16 John Borrows also argues that all levels of the court system should include more Indigenous judges; see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 215-218. He notes at 215 that the idea of appointing an Indigenous Justice to the SCC was recommended in the RCAP Final Report and received resolutions of support by the Canadian Bar Association, the Indigenous Bar Association (IBA), the Canadian Association of Law Teachers, and the National Secretariat Against Hate and Racism in Canada. Further, John Borrows notes at 215 that Albert Peeling and Professor James Hopkins, in a position paper they prepared for the IBA, argue that "the appointment of Aboriginal persons to the Supreme Court is philosophically consistent with legal pluralism." See Albert Peeling and James Hopkins, "Aboriginal Judicial Appointments to the Supreme Court of Canada," Unpublished, April 6, 2004, paper prepared for the IBA, at 21. In Chartrand et al, "Reconciliation", supra note 10, it is argued that accommodating Indigenous legal traditions within Canada's juridical framework by appointing Indigenous judges to the SCC is justified from both a philosophical and legal perspective.

17 I argue that a spot reserved for a person who self-identifies as Indigenous should be available to certain non-status Indian and Métis people. The determination of who holds Indian status under the *Indian Act* is highly problematic for people who descend from someone who missed initial enrollment, people who descend from a woman who lost her status when she married a non-status man, and people (or their descendants) who lost their status when they completed a University degree or joined the army. I would argue that the determination of whether someone who self-identified as Indigenous could hold the seat would need to be made on a case-by-case basis, considering the unique circumstances of the individual's identity (and possibly oral or written evidence regarding their identity) and their connection to the Nation that they claim to be from.

18 Val Napoleon, *Thinking About Indigenous Legal Orders*, (National Centre for First Nations Governance, 2007) [Napoleon, *Indigenous Legal Orders*] at 2.

19 *Ibid* at 2.

20 Val Napoleon, "What is Indigenous Law? A Small Discussion," Unpublished, 8 December 2015, on file with the Indigenous Law Research Unit, University of Victoria, [Napoleon, "What is Indigenous Law?"] at 1.

## II. RECONCILING INDIGENOUS AND CROWN LEGAL ORDERS AT THE SUPREME COURT OF CANADA

Bringing Indigenous legal orders to the SCC through the appointment process would enhance the general efficacy of Crown legal orders (Aboriginal and non-Aboriginal) by allowing them to benefit from the influence of Indigenous legal orders. Aboriginal Crown legal orders include Crown laws relating particularly to Aboriginal peoples. While Crown legal orders operate from the top-down, through the judiciary, law enforcement, and government actors, Indigenous legal orders operate from the bottom-up through public institutions of Indigenous citizens organized in various ways.<sup>21</sup> Similar to Crown law, Indigenous law is organized as legal precedent existing in memory. Indigenous law is usually oral rather than written.

The commonalities and differences between Indigenous and Crown legal orders could intermingle in conversations between Justices on the SCC to enhance the law's efficacy. Indigenous legal orders are helpful sources for *all people* seeking guidance on how to exist peacefully in the present and going into the future.<sup>22</sup> Law is “an active collaborative and public process” and the issues it addresses (including community safety, fairness, and accountability) are universal.<sup>23</sup> Unique Indigenous legal orders can offer Crown legal orders new insights on how to effectively deal with these problems. Furthermore, the SCC would provide an important environment for putting the two legal orders in conversation with one another. Indeed, neglecting to turn to Indigenous legal orders for insights at the SCC is troubling considering the power that the Supreme Court has over Indigenous groups within its jurisdiction. As Professor John Borrows has noted, “when you build a structure on an unstable base, you risk harming all who depend on it for security and protection.”<sup>24</sup>

In their article advocating for reconciliation through Aboriginal judicial appointments, Larry Chartrand, Lisa Chartrand, Bruce Feldthusen, and Sarah Han argue that reserving an Indigenous seat on the SCC would be an important step towards ensuring the SCC's legitimacy as a multi-juridical institution.<sup>25</sup> As the court stated in the *Reference Re Supreme Court Act*, ss. 5 and 6 (“*SCA Reference*”),<sup>26</sup> reserving a third of seats on the SCC for Québécois judges was essential to ensuring the SCC's legitimacy as a bijuridical institution upon its creation. It is problematic to describe Canada's legal system as bijuridical, however.<sup>27</sup> A wide variety of sources—written, unwritten, statutory, and customary—lie at the heart of Canadian law and authority.<sup>28</sup> These include long-standing Indigenous legal orders<sup>29</sup> that were not extinguished by discovery, occupation,

21 Napoleon, “What is Indigenous Law?”, *supra* note 19 at 1-2.

22 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 10 [Borrows, *Canada's Indigenous Constitution*].

23 Napoleon, “What is Indigenous Law?”, *supra* note 19 at 1.

24 Borrows, *Canada's Indigenous Constitution*, *supra* note 22 at 15.

25 Chartrand et al, “Reconciliation,” *supra* note 10 at 150.

26 *Reference Re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21 at para 55, 1 SCR 433 [*SCA Reference* cited to SCC].

27 Borrows, *Canada's Indigenous Constitution*, *supra* note 22 at 15.

28 Canada Royal Commission on Aboriginal Peoples, *Report*, vol. 2, *Restructuring the Relationship* (Ottawa: Queen's Printer, 1996) at 179 [Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*].

29 Borrows, *Canada's Indigenous Constitution*, *supra* note 22 at 15.

prescription, or conquest.<sup>30</sup> Thus, Canada is best understood as a multi-judicial state.<sup>31</sup> Morphing the SCC into a multi-judicial institution by reserving Indigenous seats would be a meaningful way of recognizing it as such.

Indigenous legal order representation on the SCC would also better enhance the efficacy of applying Crown legal orders related to Indigenous peoples. The Court in *R. v Van der Peet* considered the issue of defining the Aboriginal rights recognized and affirmed in section 35(1) of the *Constitution Act*.<sup>32</sup> It stressed that Aboriginal rights must be interpreted differently from *Charter* rights because they are rights uniquely held by Aboriginal people.<sup>33</sup> Section 35(1) must be interpreted in a generous, liberal, and purposive manner.<sup>34</sup> Its purposes are to affirm Aboriginal rights and reconcile them with the existence of Crown sovereignty.<sup>35</sup> In order to achieve this purpose, courts must account for the perspective of the Aboriginal rights claimant in a way that is cognizable to the common law.<sup>36</sup> The courts in *Delgamuukw v British Columbia*,<sup>37</sup> and *Tsilhqot'in Nation v British Columbia*,<sup>38</sup> confirmed that judicial assessments of Aboriginal title as a specific subset of Aboriginal rights must account for both perspectives.

As argued by Chartrand et al., interpretations of section 35(1) which purposively, generously, and liberally take into account the perspective of Indigenous peoples, while also accounting for the common law perspective, would best be achieved by Indigenous justices trained in both Indigenous and common law.<sup>39</sup> The best way to interpret from an Indigenous perspective is to have an Indigenous person do the interpreting. Indigenous legal orders are inextricably intertwined with section 35(1) rights.<sup>40</sup> As per the court in *Delgamuukw*, “the [A]boriginal perspective on occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of [A]boriginal peoples.”<sup>41</sup>

The ability of non-Indigenous judges to properly interpret Indigenous legal orders has not withstood scrutiny, as those judges are “susceptible to the danger of only recognizing law within Indigenous societies if they find analogies to concepts within English law.”<sup>42</sup> Certainly Indigenous judges would be among the most qualified to analyze and apply Indigenous laws in order to glean an Indigenous perspective. Increasingly, Canadian law schools are offering programs that allow students to engage with Indigenous legal orders.<sup>43</sup> Among the most “innovative and ambitious” of these programs is the University of Victoria’s proposed joint common law and Indigenous law degree.<sup>44</sup> Such a program could train legal professionals to support the proper recognition of Indigenous legal orders in Canadian courts.

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30 *Ibid* at 21.

31 *Ibid* at 107.

32 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4<sup>th</sup>) 289 [*Van der Peet* cited to SCR].

33 *Ibid* at para 19.

34 *R v Sparrow*, [1990] 1 SCR 1075 at para 56, 70 DLR (4<sup>th</sup>) 385.

35 *Van der Peet*, *supra* note 32 at para 43.

36 *Ibid* at para 49.

37 *Delgamuukw v British Columbia*, 79 DLR (4<sup>th</sup>) 185 at para 84, [1991] 3 WWR 97 (BCSC) [*Delgamuukw* cited to DLR].

38 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 34, [2014] 2 SCR 257.

39 Chartrand et al, “Reconciliation,” *supra* note 10 at 149 – 151.

40 Borrows, *Canada’s Indigenous Constitution*, *supra* note 22 at 11.

41 *Delgamuukw*, *supra* note 37 at 148.

42 Borrows, *Canada’s Indigenous Constitution*, *supra* note 22 at 16.

43 Val Napoleon and Hadley Freidland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories” (2016) 51:1 *McGill Law Journal* 143 at 148 – 149.

44 *Ibid*.

There are many unique and distinct Indigenous Nations within Canada. An Indigenous judge from one Nation would need to reason across legal orders to apply the laws of another Nation—for example, a Nisga'a judge may need to reason through and apply an Anishnabek law. Or, as was the case at the Tsuu T'ina Nation Provincial Court between 1999 and 2007, an Anishnabek judge may need to reason through and apply Tsuu T'ina law. The Tsuu T'ina court is located on the Tsuu T'ina Nation reserve just west of Calgary. It works within the Western adversarial system and has the same jurisdiction as any Provincial Court; however, it is largely based on Tsuu T'ina laws and follows Tsuu T'ina protocols. The court must be presided over by an Aboriginal judge who “has an innate understanding of the cultural sensibilities of First Nations people through direct personal involvement with the culture, [has] resided on reserve and [has] worked with Aboriginal people.”<sup>45</sup> The judge is to be “from outside the Treaty 7 area to avoid community pressure and to set the tone of ‘non-interference.’”<sup>46</sup> Between 1999 and 2000, Judge Leonard Tony Mandamin sat on the Tsuu T'ina Nation Provincial Court, alongside two Tsuu T'ina peacemakers and in collaboration with Tsuu T'ina elders to implement Tsuu T'ina justice on the Tsuu T'ina reserve. While the Tsuu T'ina court has not operated without criticism,<sup>47</sup> it offers a concrete example of how an Indigenous judge may work to analyze and apply a different Nation's laws. Though Judge Mandamin is not Tsuu T'ina, his experiences and identity as an Indigenous person have placed him in a unique position that provides him with valuable tools for reasoning through Tsuu T'ina Nation's legal orders.

Although the legal orders of different Indigenous Nations are distinct and unique, an Indigenous judge is better equipped to understand the unique legal orders of another Indigenous Nation because of their experience engaging with Indigenous protocols and familiarity with concepts that are common to many Indigenous legal orders. For example, John Borrows discusses how Indigenous legal theories (though diverse and often overlapping with Western legal theories) may be less likely than Western legal theories to reflect a belief that humans must restrain nature in order to live within it.<sup>48</sup> As stated by Borrows, “[f]or many Indigenous people, the casebook for learning natural law requires an intimate knowledge of how to read the world; understanding natural law from this point of view does not require an intimate knowledge of how to read legal philosophy.”<sup>49</sup> Or, as is the case with Judge Mandamin, Indigenous judges familiar with the legal orders of their Nation may be better equipped than a non-Indigenous judge to navigate through concepts of restorative justice. According to Cree Judge Mary Ellen Turpel (as she then was), Crown legal orders are “grounded in a retributive theory of punishment” while Indigenous legal orders are often more concerned with healing and restoring social

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45 Catherine Bell, “Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada” in Catherine Bell and David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 252.

46 *Ibid.*

47 See Dale Dewhurst, “Parallel Justice Systems, Or a Tale of Two Spiders” in Catherine Bell and David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 217 for a critique.

48 Borrows, *Canada's Indigenous Constitution*, *supra* note 22 at 28.

49 *Ibid.*, at 29.

balance.<sup>50</sup> While particular laws relating to restorative justice are different across Nations, an Indigenous judge familiar with the concept may be among the most qualified to reason through and apply a particular Nation's restorative justice law.

Allowing that judge to do so would also enhance Crown law's legitimacy by bolstering Indigenous peoples' confidence in the Court as the final arbiter of their rights. The Court in *SCA Reference* determined that reserving Québécois seats on the SCC was not only to provide civil law expertise for legal purity and accuracy purposes;<sup>51</sup> the seats were also reserved to ensure that Quebec's legal traditions and social values were represented on the Court, thereby enhancing the confidence of Quebec citizens. In "Indigenous Legal Traditions: Roots to Renaissance," Val Napoleon and Hadley Friedland describe how the effect of disintegrating so many aspects of Indigenous legal orders as a result of colonialism would be "difficult to overestimate."<sup>52</sup> Indigenous legal orders have not only been discarded in the past, but even criminalized.<sup>53</sup> In the face of colonialism, Indigenous peoples and their legal orders have been remarkably resilient. Still, it has resulted in "disorientation, chaos, and fear" in Indigenous communities.<sup>54</sup> Currently, Indigenous peoples in Canada are significantly less confident than non-Indigenous peoples in the Crown's justice system and courts.<sup>55</sup>

Appointing Indigenous judges to the SCC would offer one means for strengthening Indigenous peoples' confidence in the judicial system. Merely recognizing Indigenous legal orders will not, on its own, cause them to spring to life.<sup>56</sup> They must be accessed, analyzed, synthesized, and applied in the real world.<sup>57</sup> Direct application of Indigenous legal orders would enhance their efficacy. John Borrows advocates for the direct application of Indigenous legal orders through different modern forums.<sup>58</sup> The vitality of Indigenous legal orders rests on their ability to exist as current, living systems that adapt to changing circumstances.<sup>59</sup> As stated in the *Secession Reference*, working out our constitutional problems requires "a continuous process of discussion... compromise, negotiation, and deliberation."<sup>60</sup> Appointing Indigenous judges to the SCC is one way to bring Indigenous legal orders into the discussion, thereby allowing for Indigenous people

50 Mary Ellen Turpel, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In" in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Issues* (Ottawa: Supply and Services Canada, 1993) at 174.

While restorative justice may generally be considered more important or preferable within many Indigenous Nations, it should be recognized that Indigenous legal orders can and do include more coercive and forceful responses as well. Because the Canadian state continues to be unaccepting of more forceful and coercive Indigenous legal orders, problematic assumptions have developed that conflate concepts of "restorative justice" with concepts of "Aboriginal justice" and ignore other aspects of Indigenous legal orders. See Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Marcus D. Dubber & Tatjana Hornole, eds, *The Oxford Handbook of Criminal Law* (New York: Oxford University Press, 2014), [Napoleon and Friedland, "Indigenous Legal Traditions: Roots to Renaissance"] at 237 - 238.

51 *SCA Reference*, *supra* note 26 at para 19.

52 Napoleon and Friedland, "Indigenous Legal Traditions: Roots to Renaissance," *supra* note 50 at 231.

53 *Ibid*, at 231.

54 *Ibid*.

55 See Statistics Canada, "Public Confidence in Canadian Institutions," by Adam Cotter, in *Spotlight on Canadians: Results from the General Social Survey*, Catalogue No 89-652-X (Ottawa: Statistics Canada, 2015). The survey finds that while non-Aboriginal people are 58% confident in the "justice system and courts," Aboriginal people are only 43% confident.

56 Napoleon, "What is Indigenous Law?," *supra* note 19 at page 3.

57 *Ibid*, at 3 - 4.

58 Borrows, *Canada's Indigenous Constitution*, *supra* note 22 at 8 - 11.

59 *Ibid*, at 8.

60 *Secession Reference*, *supra* note 9 at para 68.



to participate in their continual construction. Indigenous justices on the SCC would give life to Indigenous legal orders by applying restorative justice in line with section 718.2(e) of the *Criminal Code* or when considering the best interests of an Indigenous child in a family law context.

It may be argued that bringing Indigenous legal orders to the SCC could also be damaging to the Indigenous Nations whose legal orders are being reasoned through. One pressing and legitimate concern is that when Indigenous legal orders are taken out of their proper context (the Nation where they were created and where there are Elder members who are the experts at interpreting the Nation's laws), there is opportunity for them to be misinterpreted. This misinterpretation may serve Crown interests, but is incongruous with or harmful to the Nation's interests and worldviews. Measures to address this concern could include ensuring that an Indigenous judge trained in Crown and Indigenous law hears cases relating to Indigenous people as frequently as is possible at the trial court level, hears Elders and other Nation members as expert witnesses at trial, and travels to the Nation to hear Elders engage with their Nation's legal orders in the appropriate place at the appropriate time.<sup>61</sup>

## CONCLUSION

The goal of reconciling Indigenous and Crown legal orders would be furthered through a judicial appointment process which reserved three seats on the SCC for people who identify as Indigenous. This process would enhance the legitimacy and efficacy of Crown legal orders by allowing them to benefit from the influence of Indigenous legal orders, enhancing the SCC's legitimacy as a multi-judicial institution, allowing for better application of Crown laws related to Aboriginal peoples, and maintaining Aboriginal peoples' confidence in the Court. It would also enhance the legitimacy and efficacy of Indigenous legal orders by allowing for their direct application.

## III. EPILOGUE STORY – THIS IS MY VISION

Atanarjuat rose to his feet quickly when Chief Justice Worme walked in. After him came Justices Abella, Moldaver, Karakatsanis, Wagner, Gascon, and Rowe. Atanarjuat knew that the judges would be talking about how his traumatic experiences in residential school should affect his sentence for breaching his parole. He was not looking forward to being sentenced, but he was comforted by the fact that Chief Justice Donald Worme would take part in determining what his sentence would be. While he was in Kingston, he learned that Chief Justice Worme was the man that acted for the families of the young Cree men who police officers left to die in Saskatoon's freezing cold. Atanarjuat took his seat. "Merci, thank you, Qujannamiik, ay-ay," said Chief Justice Worme. Hearing Inuktitut made Atanarjuat feel more at home.

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61 This was the case in *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700.