Consider two very different matters. One is a matter of history and law. The other is a matter of society and law. The first is about the Covenant Chain, the crucial principles that lie at the heart of relations between indigenous nations in northeastern North America and the Crown. The second is about what we can expect from Canadian courts—the challenges we face when we bring these complex matters into the courts of another nation. The two matters are related.

Anyone who studies the historic relations between the Haudenosaunee—the Iroquois Confederacy—and European or settler nations, including the French, the British, the United States and Canada—will be struck by a recurring theme: the Covenant Chain, often called the Silver Covenant Chain.

Prominent anthropologists and historians have suggested that the Covenant Chain is somehow British in origin, or that its thinking is the result of the relations between the British and Haudenosaunee in the latter half of the 17th century. I don't think so. Instead, it has its roots firmly planted in Haudenosaunee law. It derives a depth and breadth of meaning from that legal system that carries powerful relevance today.

Sometime between five and eight hundred years ago—for our purposes the date is irrelevant except that it is definitely before "first contact" with Europeans—the Peacemaker brought five warring nations together into one Confederacy, one longhouse, and one family. The two latter terms are symbolic, and their symbolism is important. What emerged from his efforts was a complete, complex, respectable legal system that has survived to this day: the *Kaianeren:kowa*: the Great Goodness, or Great Law of Peace.

Once peace was established and the chiefs[1] of the Confederacy were appointed, the Peacemaker brought them together in a circle, a symbol of equality and power (just ask anyone who reveres the Arthur legend). Their arms would be joined so firmly that the circle would remain unbroken forever. If one of the chiefs should leave the circle, his antlers—the symbol of his office and his title—would catch upon the arms of his fellow chiefs like a deer's horns catch on the bushes, and his name would remain inside the circle, to be picked up by another member of his family, so they would still have a voice in the Council. We say the Chiefs in Council are brothers: the Mohawks, Senecas and Onondagas are the elder brothers, and the Oneidas and Cayugas are the younger brothers. The entire legal system is based on family relations—beginning with the principle that there will be no blood shed within a family. There are clan mothers; the nations, too, call one another brothers, but also nephews, and uncles, and grandchildren, all terms of law as well as affection. The Peacemaker transformed the clan system so that a Mohawk Wolf would be a cousin to a Seneca Wolf—so that the bonds of family would spread across all the nations. The two sides of the council reflect the duality that we see in so many ways

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[1] The proper word is *Roiane,* derived from *ianere,* goodness—literally, "a man of the good". Historic documents sometimes use "Sachem", derived from the Algonkian *sakima,* related to the Ojibway and Cree *okima.*

around us in the natural world. Unlike Parliament—the Government and the Opposition in the British House of Commons are two sword-lengths apart, so they cannot harm each other—a Haudenosaunee council is not adversarial. There is no "opposition", and no voting. The two sides are there to help each other, and to carry any issue toward a state of one-mindedness, consensus.

This is what the Peacemaker said:

> We therefore bind ourselves together by taking hold of each other's hands firmly and forming a circle so strong that if a tree fall prostrate upon it, it could neither shake nor break it, and thus our people and our grandchildren shall remain in the circle of security, peace and happiness[2].
>
> You, the Five Nations Confederate Lords, be firm, so that if a tree falls upon your joined arms, it shall not separate you or weaken your hold. So shall the strength of the union be preserved[3].

In another version:

> ...this is where it burns, the Great Fire, its smoke rising and piercing the sky; where the family is, the single family we have created; where they are forming a circle, the chiefs, linking arms. Moreover, this is what encircles the group: the Good Message, and the Power, and the Peace, and the Great Law; even if the wind were to rise and the tree to topple where they hold each other by the arms, the circle cannot break[4].

The symbols are consistent throughout the law, and throughout later treaty language: the circle; the joined arms; becoming family; the tree; the fire. One of the earliest wampum symbols of the Haudenosaunee is the Circle Wampum, with its two entwined strings around the circumference for the Great Peace and the Great Law, and its fifty strings for the fifty chiefs, stretched toward the centre and the fire.

In 1645, a Jesuit priest recorded the events of the first meeting between the French and the Algonquins and the Mohawks, at Trois Rivieres. It is said that this is "the first record of a treaty council with the Iroquois". The Mohawks, as the keepers of the eastern door of the Longhouse, would have been the speakers for the Haudenosaunee in dealings with the nations approaching from the east.

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2 A.C. Parker (Gawasowane), *The Constitution of the Five Nations*, 1916, p. 102. There are several written "versions" of the Great Law—each different in details, but essentially the same in matters of principle. Arthur Parker had published two versions, the first prepared by Seth Newhouse (Deyadokane), the other put together by a committee of the chiefs, perhaps in reaction to the pro-Mohawk excesses of the Newhouse version.

3 A.C. Parker (Gawasowane), *The Consitution of the Five Nations*, 1916, p. 45.

4 John Arthur Gibson (Skaniatariio), *Concerning the League*, Iroquoian and Algonkian Linguistics, Winnipeg, 2000, p. 462.

Between the Haudenosaunee, on one side, and the French and Algonquins, on the other, there would have been a fire, a council fire. The fire is an important concept, as well: it is a thing and a process and a place. It is also the symbol of a nation: Canadian law could not have possibly picked a more insulting, threatening word than "extinguish" to address the reduction of the rights of indigenous nations—to put out one's fire.

A Mohawk chief, Kitsaeton—and we should note in passing that Europeans often failed to distinguish between people with executive authority and those with authority and ability to speak, since European speakers in council usually had both—conducted the council's process. Where European orators tended to stand in one place and deliver their words in even, reasoned tones, Kitsaeton walked about, sang, danced, and acted out his words to drive them into the minds of the people across the fire. The attention of the French observers was riveted to his communication. With the tenth wampum[5] (the French used "necklace" or "collar" where the English used "belt"), the Mohawk speaker described the new relationship:

> He took hold of a Frenchman, placed his arm within his, and with his other arm he clasped that of an Algonquin. Having thus joined himself to them, "Here," he said, "is the knot that binds us inseparably; nothing can part us." This collar was extraordinarily beautiful. "Even if the lightning were to fall upon us[6], it could not separate us; for, if it cuts off the arm that holds you to us, we will at once seize each other by the other arm". And thereupon he turned around, and caught the Frenchman and the Algonquin by their two other arms—holding them so closely that he seemed unwilling ever to leave them[7].

Not long afterward, still in 1645, a similar council took place between the French, the Algonquins, the Hurons and the Haudenosaunee. The Jesuit Relations record that

> ...the Iroquois set himself to sing and dance; he took a Frenchman on one side, an Algonquin and Huron on the other, and holding themselves all bound with his arms. They danced in cadence and sang with a strong voice a song of peace[8].

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5 The French used "collier" or necklace to describe the wampums, because the Hurons made curved ones that could be worn around the neck; the British spoke of "wampum belts", because the Haudenosaunee and eastern nations made straight ones. The Haudenosaunee called the wampums *Kaswentha*, a reference to the flowing nature of the commitments through time. Eastern Algonkians called the shells *wampumpeag*, so that early Dutch and English records would mention *peake* to describe the dark shell beads.

6 The Thunderers are among the powerful beings of the sky, and the lightning bolt is their weapon. Generally, they are protectors of the people, and rain-bringers.

7 Francis Jennings, Ed. *The History and Culture of Iroquois Diplomacy*, Syracuse University Press, 1985, p. 141. See also Robert A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace: 1600-1800*, Routledge, New York and London, 1999, p. 53.

8 *Jesuit Relations*, 7:261. The Song of Peace, or Peace Hymn, is a part of the Great Law: it is the song of power that was used to bring the last holdout, Thadadaho, into the Peace—and a demonstration that spiritual power, including women's power, is required to complete peace.

A Huron delegate declared after this:

> It is done. We are brothers. The conclusion has been reached[9]; now we are all relatives—Hiroquois, Huron, Algonquins and French; we are now but one and the same people[10].

In 1677, thirteen years after the first written agreement between the Haudenosaunee and the British of New York[11], a similar council took place. The Mohawk speaker said:

> ...wee desire now that all that is past may be buried in oblivion[12], and do make now an absolute covenant of peace, which we shall bind with a chain...
>
> ...wee are now Com together to mak the Covenant...Seing that the Govr. Genll[13] & wee are one, and one hart[14] and one head, for the Covenant that is betwixt ye Govr. Genll and us is inviolable yea so strong yt if ye very thunder should break upon ye Covenant Chain it wold not break it sunder[15].

In 1685, the Senecas reaffirmed the relationship:

> Let the Chaine be kept cleane and bright[16] as Silver[17] that the great Tree that is can not break it a peeces if it should fall upon itt[18].

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9 In modern Mohawk, this would probably be *skariwat*, the matter has been concluded: the term used in council to indicate that the chiefs are of one mind about the issue.

10 *Jesuit Relations*, 7:289.

11 The agreement at Albany in September, 1664, when the British took over New Amsterdam from the Dutch, provided for free trade, separate personal criminal jurisdiction, and a military alliance—the stuff of modern international treaties—but it was not the making of the Covenant Chain: the Haudenosaunee described it as taking each other by the hand, not the arm.

12 In the making of the Great Law, the weapons of war between the nations were buried in a deep pit, to be swept away forever by high winds and underground streams. In modern English, the idea is expressed in the term "burying the hatchet". The other burial important to the Great Law was putting away the bones of the dead, so they could no longer be heard calling out for revenge.

13 From 1664 on, the relationship was not only nation-to-nation, but also executive-to-executive. The channel of communication was directly between the chiefs and the Governors.

14 The wampum that has become the Haudenosaunee flag, the Hiawatha Belt, depicts the Five Nations, with a tree in the centre that, reversed, becomes the one heart of the nations.

15 *The Livingston Indian Records, 1666-1723*, Lawrence Leder, Ed. Gettysburg, Pa. 1956, pp. 44-45. See also August 15, 1694: "We promise that the Covenant Chain shall be kept on our part so strong and inviolable that the Thunder itself shall not break it". Peter Wraxall, *An Abridgment of the Indian Affairs*, Benjamin Blom, New York 1968, p. 25.

16 It is said that bloodshed would eat through the silver chain like acid, and that neglect would allow the silver to tarnish.

17 Why silver and not gold? For several European nations, silver had protective powers; for the Haudenosaunee, it recalls the moon and the stars, and also carries protection.

When William Fenton, the alleged "Dean of Iroquoianists", suggested that the Covenant Chain was a British invention, for the Iroquois did not originally have metal, he must not have been speaking with the Haudenosaunee chiefs. The words they use to describe the Covenant Chain translate directly into English as "It joins their arms together"[19]. The relationship comes straight out of the Great Law of Peace.

To traditional Haudenosaunee of today, the words and songs and actions of the councils of the 1600s are not unfamiliar.

In a ceremony of adoption, in a longhouse today, one person takes the adoptee by each arm. With their arms joined at the elbow, the three walk up and down, from fire to fire (woodstove to woodstove, actually). The men conducting the adoption sing their personal song, their *atonwa*. This is one of the Four Sacred Ceremonies. The people keep time by stamping their feet, in approval. After this, one of the men who walked the adoptee up and down introduces him by his new name, his "real name", the name he will be known by from now on. From now on, he will have a name and a family and a clan, and a place to sit in the longhouse, and people to look after him and look out for him. He will also have a new set of responsibilities, because authority never comes without obligation, and he now has a whole set of new relatives. The speakers announce: now this person is our brother. Now we cannot be separated: he is one of us.

The ceremony of adoption is much rarer today than it was in the past today. Much more frequent—in each Longhouse, at Strawberries and Midwinter, there is a whole day devoted to announcing and introducing the children who receive their names at that time. Each child is carried by his uncle—his closest male relative—or, if the child is old enough, walks with his uncle, holding hands. The uncle sings his *atonwa*, and the child is introduced to everyone as a relative.

Adoption and naming are all about family. They are all about being relatives. They are all about relationships, and mutual aid, and caring for one another. That is what maintains the peace, and what binds Haudenosaunee society together. It is also the essence of the treaty relationship between nations, the Silver Covenant Chain relationship.

A Haudenosaunee person carries a name that belongs to his family and clan. Someone else carried that name before him, and someone will carry that name after him.

Just as Confederacy chiefs have permanent titles—names that pass from each chief to his successor, so the name does not die. The chiefs' titles are the personal names of the first chiefs of those families to join the Confederacy. In the same way, European governors

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[18] *The Livingston Indian Records, 1666-1723*, Lawrence Leder, Ed. Gettysburg, Pa. 1956, pp. 80-81.

[19] Michael Foster, *Another Look at the Function of Wampum in Indian-White Councils*, in Francis Jennings, Ed., *History and Culture of Iroquois Diplomacy*, pp. 110 and114.

had names that became titles: the first Dutch commissary of New York was Arendt van Curler, and you will see readily that every governor of New York through the 17th and 18th centuries was called "Corlaer", as the Governor General of Canada, his successor in the Covenant Chain, carries that title today[20]. Governor Penn of Pennsylvania was called "Onas"—the Big Feather, which is what pens were in those days. Governor Fletcher of Maryland was the Arrow Maker, or Great Swift Arrow. The Governor of Virginia, Lord Effingham, gave the Cayugas a cutlass in 1680, and became known as Ahsare:kowa, the Big Knife[21]. Titles are constants [22]. The laws of the Confederacy are all about continuity, constancy through time, maintenance of relationships. So, too, are the treaties made by the Haudenosaunee: they are extensions of the Great Law of Peace.

This should not be surprising.

The family relationship, the brotherhood, lies at the core of both Haudenosaunee law[23] and the Covenant Chain. Here are some of the important things to recognize about it.

It is about equality.

It is about reciprocity.

It is about *helping* each other.

It is, as we found ourselves reminding federal and Quebec politicians in 1990, fundamentally about *respect.*

It is about a respect-filled relationship that is supposed to endure. In 1744, the Governor of New York reaffirmed the Covenant Chain:

> ...we meet with equal sincerity in order to renew, strengthen and brighten the Covenant Chain that has so long tied you and the subjects of His Majesty the great King of Great Britain your Father and my Master in mutual ties of

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20 In contrast, George Washington borrowed the name that had been given to his grandfather—Kanatakarias, or "He Bites Villages". He was using the name well before he gave the orders for General Sullivan's campaign of rape and destruction, orders which legend now says gave Washington---and every successive President of the United States—the name of "Town Destroyer".

21 The aggressive Virginians were called "Big Knives" after the Governor, and the people of the United States today are called either Big Knives or Bostonians by indigenous nations across the continent.

22 In an un-Machiavellian moment, Niccolo Machiavelli noted that "it is not titles that honour men; it is men that honour titles.

23 Lewis H. Morgan wrote about the Haudenosaunee before he turned to studying kinship, becoming "the father of anthropology". Rather than turning his back on the Great Law, it is more likely that Morgan recognized that, to understand a legal system based on kinship systems that were very different from his own, he first needed to understand about families.

> friendship and benevolence which I hope will forever be inviolably preserved and continue as long as the sun and moon endureth[24].

Respect, mutual aid and reciprocity...these ideas, taken together, give entirely different shades of meaning and depth to the words of Theyanoguin[25], when he spoke on behalf of the Haudenosaunee to the Governor of Pennsylvania in 1755.

> What we are now going to say is a matter of great moment, which we desire you to remember as long as the Sun and Moon lasts. We are willing to sell to you this large tract of land for your people to live upon, but we desire that this may be considered as part of our Agreement that when we are all dead and gone your grandchildren may not say to our Grandchildren, that your Forefathers sold the land to our Forefathers, and therefore be gone off them. Let us all be as Brethren as well after as before giving you Deeds for lands. After we have sold our land we in a little time have nothing to show for it; but it is not so with you, your Grandchildren will get something from it as long as the world stands; our Grandchildren will have no advantage from it; they will say we were fools for selling so much land for so small a matter and curse us; therefore let it be a part of the present agreement that we shall treat one another as Brethren to the latest Generation, even after we shall not have left a Foot of Land[26].

Viewed through the lens of the Covenant Chain, these words are abundantly clear. He is saying: if this was simply a real estate transaction, we are not stupid—we know that you are getting the land for far less than its market value. But it is not just a land deal: it's part of something bigger, something that will stretch through time and bind our future generations. We are here to look after each other, to help each other. It's not about the money—it's about the relationship. It is not a one-shot deal. It is about the sun and the moon, about lasting commitments.

It is not frozen in time. It evolves, and meets the requirements and exigencies of the day. That other, more frequently referred-to, symbol of the relationship, the Two Row Wampum, with its parallel rows of purple wampum depicting the British sailing ship and the Haudenosaunee canoe, is significantly about the way the nations must travel together on the changing River of Life. As the river changes, their relationship remains constant.

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24 NAC RG10 Vol. 1820, pp. 276-290.

25 Theyanoguin or Deyanoka, also known as Henry Peters, or King Hendrick, held the Mohawk Turtle title of Tekarihoken when he gave this speech.

26 July 5, 1754, To William Penn. Pennsylvania Archives, Ser. 4, 2:698-707. See also Timothy J. Shannon, *Indians and Colonists at the Crossroads of Empire: the Albany Congress of 1754*, Cornell University Press, 2000, p. 166.

The Covenant Chain does not stop with the Haudenosaunee. Sir William Johnson, the first Imperial Superintendent General of Indian Affairs[27], used the Niagara Congress of the summer of 1764 to cement the peacemaking after the short, sharp war of the summer of 1763. At Niagara, he expressly extended the Covenant Chain relationship to the nations of the western Great Lakes. There were twenty-four nations present at Niagara. Here is part of Johnson's record:

> Brethren of the Western Nations[28], Sachims, Chiefs and Warriors;
>
> You have now been here for several days, during which time we have frequently met to renew and Strengthen our Engagements, and you have made so many Promises of your Friendship and Attachment to the English that there now only remains for us to exchange the great Belt of the Covenant Chain that we may not forget our mutual Engagements.
>
> I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire you will take fast hold of the same, and never let it slip[29], to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipeweighs at St. Mary's whilst the other end remains at my house, and moreover I desire that you will never listen to any news which comes to any other Quarter. If you do it, it may shake the Belt.
>
> ...I exhort you then to preserve my words in your Hearts, to look upon this Belt as the Chain which binds you to the English, and never to let it slip out of your hands.
>
> Gave the Great Covenant Chain, 23 rows broad, and the year 1764 worked upon it, worth about 30 pounds[30].

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27 Johnson had lived in the Mohawk River Valley since 1738; he had eight children with Konwatsitsiaienni (Molly Brant), and was intimately familiar with the principles and details of Haudenosaunee law.

28 Sir William Johnson listed the "Western or Lakes Confederacy" as including the Chippewas, Crees, Ottawas, Hurons, Menominees, Algonquins, Nipissings, Sacs, Foxes, Winnebagoes and Toughkamiwons. Probably because they were part of the "Seven Nations of Canada", which included the eastern Mohawks, he had placed the Algonquins and Nipissings in the Iroquois Confederacy, as well. *The Papers of Sir Williams Johnson*, University of the State of New York, Albany, 11:278-81.

29 In the treaty language of the 1700s, to hold the belt or the Chain loosely was to neglect it, or to be insincere. Renewing it annually was a means of keeping it in mind, and allowing it to remain fresh and pure.

30 *The Papers of Sir Williams Johnson*, University of the State of New York, Albany, 2:309-310.

In 1786, after the American Revolution, Sir William's son and successor, Sir John Johnson, reaffirmed the Covenant Chain with a second, similar wampum belt[31]. In 1818, at Drummond Island, the Ojibway wampum-keeper held the 1764 Covenant Chain belt in his hands in Council and recalled:

> Father
>
> This my ancestors received from our Father, Sir William Johnson. You sent word to all your red children to assemble at the Crooked Place (Niagara). They heard your voice—obeyed the message—and they next summer met at your place. You then laid down this Belt on a Mat, and said, "Children, you must all touch this Belt of Peace. I touch it myself, that we may all be Brethren united, and hope our Friendship will never cease. I will call you my children; will send warmth (presents) to your country[32]; and your Families shall never be in want. Look towards the rising sun. My Nation is as brilliant as it is, and its word cannot be violated[33].

In 1845, Thomas G. Anderson, the old Indian Superintendent, wrote of the Anishinabek on Manitoulin Island that:

> The Indians have no record of past events: all they know of the original engagements between the Government and themselves...is by tradition, except two memoranda (wampum belts) which they hold, the one being a pledge of perpetual friendship between the North American Indians, and the British Nation, and was delivered to the Tribes at a Council convened for the purpose, by Sir W. Johnson, at Niagara, in 1764[34].

Mik'maq records also refer to their relations with the Crown as a chain[35]. The symbol goes west to the Mississippi, north to James Bay. It is a meaningful, powerful political relationship.

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31 First depicted in a Paul Kane pencil sketch in 1807 when the wampum was kept at Mackinack, before the War of 1812 (NAC Picture Division N.D. 249, K3R8, p. 177), a more accurate picture of the four wampums kept by the Anishinabek is the rubbing made in 1852 when the wampums were kept at Wikwemikong, Manitoulin Island (*Michigan Archaeological Report*, 1901, pp. 52-55).

32 The annual presents from the King were corroborated by a second wampum given at Niagara in 1764, depicting twenty-four nations, a rock for Quebec, and the ship full of presents. The wampum was kept with the others by the Ojibways and Ottawas. The annual presents were the major expense of the Imperial Indian Department, though they were "capped" for twenty years after the War of 1812 and gradually reduced after that, until the provincial governments took over Indian affairs in the 1850s, and the presents became another broken promise.

33 *Report of the Commissioners on Indian Affairs*, 1845, Queen's Printer, Toronto, p. 269.

34 *Report of the Commissioners on Indian Affairs*, 1845, Queen's Printer, Toronto, p. 269. In fact, the keeper of the wampums in the 1830s, Jean Baptiste Assiginack, had written at least two separate accounts of the meaning of the wampums given by Sir William Johnson.

35 In 1761, the Governor of Nova Scotia told the Grand Chief of the Mik'maq, Toma Denny, that "Protection and allegiance are fastened together by links; if a link is broken, the chain will be

I used to be dubious when the old men told me: we paid our taxes for all time when we provided the British with land. When the Crown failed to keep its promises, they felt pain far beyond what in my cynicism I thought was appropriate—they were hurting as if members of their family had betrayed them.

But then, I was trained in Canadian law, trained to look for specific clauses in contracts, specific terms in written documents. I was not looking for, and did not understand, the family relationships that lay at the roots and core of the treaties.

The problem is—so are the judges that are going to be hearing the cases involving these treaties, these relationships, these laws.

For those who are used to thinking about treaties as isolated events, corroborated by single pieces of parchment and written records, it is important to understand that the treaties of the Crown with the Haudenosaunee are perceived, in Haudenosaunee law, as aspects of an organic relationship. If Treaty Number Four is a stone on which rights and relations are based, the Covenant Chain is more like a river. Event-based people, when asked what is a marriage, might say that it is a ceremony that takes place between two people, conducted by a third person, usually in front of witnesses, that results in the two becoming a married couple. In contrast, a people like the Haudenosaunee would say that a marriage is a relationship between two people that exists through time.

Treaty relations are about family relations. The idea is complicated, respectable, different, powerful. But we have to be careful how we use this. In the Canadian legal system, it is easy for the first attempt to go astray—and the nature of the system, and of precedent, means that the first misguided effort becomes an obstacle for those that follow.

That is why the lesson of the *Delgamuukw* case is so important. Talk to some people, and they will say that the Gitksans and Wethsuwelthens were simply trying to do it right this time, to avoid the traps and tricks that the Nis'gas ran into with the *Calder* case a generation earlier. Talk to others, and they will point out how the apparent gains in the case are actually the seeds of future injury—that nobody knows how much intensity of use will give you aboriginal title, and that the case is really a setup, to reduce the amount of compensation to be paid to aboriginal nations, by classifying the majority of their lands as "aboriginal rights" areas rather than places of the more valuable aboriginal title. All of these are respectable and complex debates that ought to be taking place, but they

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loose. You must preserve this chain entire on your part by fidelity and obedience with the great King George the Third, and then you will have the security of his Royal Arm to defend you…to build a Covenant of Peace with you, as upon the immovable rock of Sincerity and Truth". Denny replied that "each of the articles you have proposed [will] be kept inviolably by both sides. As long as the Sun and Moon shall endure; as long as the earth on which I dwell shall exist in the same state you this day see, so long will I be your friend and ally…". Nova Scotia Archives, 1, pp. 699-700, Ms. Doc. 37, No. 14, PRO CO 217/18/276.

are not what I think about when I consider that case. Instead, I want to focus on something in the trial judgment—as an example of a problem that will arise more often as the principles and provisions of indigenous legal systems are actually brought into the courts of Canada.

Raphael Lemkin was a Polish Jew who, more than any other single person (other than, pehaps, Adolf Hitler), was responsible for the creation of the United Nations Convention on Genocide. Lemkin worked tirelessly, often alone. He invented the word "genocide" in the 1930s and pressed at that time to have it declared an international crime like piracy. Any nation could arrest, try and convict a pirate. In the late 1930s, he sought to tell United States government officials of the horrors that Germany was perpetrating. That brought him to meet with Justice Felix Frankfurter of the Supreme Court. Lemkin no doubt believed that Frankfurter, as the "Jewish Judge", would be sympathetic to his message.

But Frankfurter's reply was: "I can't believe you. I don't think you are lying. But I just can't believe you"[36].

These words resonated. They explained something to me. I had heard them before—not the words, perhaps, but the *idea* that something was so alien, so strange that a thinking person was unable to believe it. Not unwilling, nor did he think it was a falsehood. But he just *couldn't believe it.* Where had I heard this before?

In preparing for the *Delgamuukw* case, the chiefs of the Gitksan and Wethsulwelthen nations had concluded that, two decades earlier, the Nisgas had failed to prove their case for their aboriginal rights and title because they had simply not explained enough. The elders determined to explain everything to the judge. One old lady told me: "We made ourselves naked in front of that man. We told him things we hadn't told our own children". They explained that the land was theirs because each year they would sing the land into continued existence; they would sustain it through the ceremonies. Like many indigenous peoples, they believe that the land will cease to exist—perhaps the *world* will cease to exist—if the ceremonies are not maintained.

Old Justice McEachern had never heard anything like it. In his decision, he rejected the evidence of the elders. But he did so in an unusual way: he said that while he believed they were sincere in their beliefs, he did not accept them. He *could not* accept them.

It is a small jump from there to the Federal Court of Canada in the *Mitchell* case, in which the federal government's lawyer tried to get the judge to follow the same path. Dogan Akman was cross-examining Chief Mike Mitchell, Kanentakeron. Here is my recollection of the cross-examination:

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36 Samantha Power, *The Problem From Hell: The United States in an Age of Genocide.*

"Chief Mitchell, you believe that you are a Mohawk and that you are a part of the Iroquois Confederacy. I can respect your right to believe that, and your sincerity in that belief. But you can understand that the Court does not have to accept that your belief is true. Do you understand me?"

"No. What do you mean?"

"Well, let me give you an example. When I first came to Canada, one of my favourite books was about settlers and aboriginal people. And in that book, one of the settlers is speaking with an aboriginal person, and he says: 'You people believe that you can change into wolves and run through the forest; and you believe that you can change into birds and fly through the air. I cannot believe that'. You see what I mean, Chief Mitchell, that we can respect your belief without accepting that it is true?"

"Well, we *could* do those things..."

Judge McKeown did not take the bait—but the Supreme Court of Canada did. McKeown accepted the combination of historical documents, expert opinion, and evidence of oral tradition that the Akwesasne Mohawks had assembled. The Supreme Court rejected the trial judge's conclusions of fact—an unusual move—and substituted its own decisions about what was true and what was not[37].

The Supreme court had done the same thing in the other direction in *Delgamuukw*, though, leaving the question of oral tradition—what peoples believe about their past and about themselves—in a kind of legal limbo.

In each case, though, the problem is "I can't believe it"—not "I don't believe it".

A Serbian lawyer friend of mine provided an illustration this problem. He had been brought up to believe that the Serbs are honourable, honest, decent people who, perhaps alone in the Balkans, adhere to a rigid code of decency. When the stories of the Serbs running concentration camps and committing atrocities, and eventually genocide, came to him, he could not believe them. Only when he visited Serbia and the people themselves who had done these things admitted them could he bring himself to believe that they were possible. Before he believed these things, he had to come to a place where he was *able* to believe them.

Getting to this place involves several different steps.

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[37] The Supreme Court also "re-characterized" the case. Where the Mohawks had proved that "trade" was integral to their distinctive society at the time of their "first contact" with Europeans, the Court decided that wasn't the issue—that the right claimed was actually "north-south trade", and not enough evidence had been presented to support the conclusion that it was "integral".

One is overcoming prejudices, and one's own built-in, built-up beliefs.

Another is overcoming the fear of the consequences of accepting the facts. In the *Benoit* case, which involves the oral tradition of Treaty Number Eight—a tradition that the Crown's representative promised freedom from taxation—the Federal Court of Appeal suggested that a court should be more reluctant to accept oral tradition evidence as the implications and impact of doing so become more severe.

Another, in the end, is overcoming the fear of the unfamiliar, and accepting the possibility that there is another way of looking at the world, another story.

Perhaps the key to all this is that idea—*the story*.

We are storytelling creatures. Our need to recount what has happened to us spawned language, broadened communication, created history and legends.

Our courts are also all about stories, in the end. True, they look for "cold, hard facts", and an element of every case consists of *things*: the murder weapon, the bus schedule, the photographs, or the bloody shirt. Increasingly, in a scientific society, the court looks for scientific proof, forensic proof: DNA samples, microscopic fibre tests, voice analyses. Increasingly, too, the court looks for scientific ways to test whether a story is true: that is what "lie detectors" are all about.

Yet in most cases, the bottom line is still the story. It is still a conflict between different people's stories about an event or a series of events, and the judge—or the jury—has to decide which story is "true".

Sometimes it is absolutely legitimate to tell someone: "I don't think you are lying; but I can't believe what you are telling me". We rarely have that honesty, but we frequently run into the situation. When Stockwell Day, in the 2000 election, admitted that he believed literally in all of the Bible; that the world was created in six days; that Adam and Eve were the first man and woman and coexisted with the dinosaurs, most Canadians recognized the sincerity of his beliefs. They didn't think he was lying—or perhaps, they didn't think that he knew what he was saying was not true. But they could not accept what he was saying: they *could not believe it*. That is a step removed from *they did not believe it*, which is the crucial test for a court.

There is not much difference between my own being unable to believe that a benevolent, bearded male father-figure God created the entire universe in six days, six thousand years ago, and Judge McEachern's inability to believe that the Gitk'san and Wethsuwelthen elders maintain and renew their land and the world through their ceremonies. In each case, the inability to believe stems from the idea being too strange, the story being too far

from one's own experience and upbringing, the consequences being too difficult to accept.

Why, then, is it all right for me to refuse to accept Stockwell Day's version of creation, but not all right for the Supreme Court of Canada to accept Judge McEachern's rejection of the Gitk'sans' beliefs about their connection to their land?

For aboriginal peoples, the question is crucial to how their rights will be treated in Canadian courts.

Especially where the issue before the court is a treaty, or a treaty relationship, the court has to consider how the parties understood the transaction. More important, the courts have said that they have to consider how the *Chiefs* understood the transaction, and they have to govern their interpretation of the treaty by that understanding[38]. The written record of the treaty was prepared and kept by the Crown's representatives. The "treaty" is not that document, though—it is the agreement itself, and the document is only one of the records of the agreement. In almost every case, the Indian understanding of the treaty was kept in people's minds. It became the *story* of the treaty, passed down through the generations. It became what the courts have called "oral tradition". Canadian courts have accepted oral tradition as evidence.

The same challenge appears when a Canadian court deals with aboriginal rights. Those rights are "jelled" when an aboriginal people meets a European for the first time[39]. But at this "moment of first contact", the European rarely wrote down all that he saw, rarely understood all its significance to the people, and rarely spent enough time with them to gain an appreciation of their culture. If an aboriginal right is a practice "integral to the distinctive culture" of the people, then part of the way to prove its existence and its importance is to hear what the people have to say about it today—what they learned and understood from their ancestors. Again, oral tradition. Stories.

Oral tradition is fragile. It depends upon transmission from person to person over time. It can be eroded or lost. It can become unreliable if individuals tamper with it, adding their own ideas, omitting the parts that don't interest them (just as old European maps became unreliable by being copied, or the works of the ancient Greeks evolved when the only way to pass them on was by copyists). The courts have not developed ways of testing the reliability of oral tradition. Again, they want to be scientific, and the fact is that this is still all about stories. It is all about deciding whose story is "true".

A story is more likely to be accepted as "true" if it has "hard facts" to corroborate it.

A story *may be* more likely to be true if more people know it and believe it.

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38 *Blueberry River Band v. The Queen,* Supreme Court of Canada,

39 Why a European? Why are aboriginal rights unaffected when you meet your first African, or Australian? What legal magic do Europeans carry? And isn't that racist?

Is a story more likely to be true if a scientist or anthropologist "verifies" it—the word itself means "makes it true"? In the case of oral tradition, usually all the anthropologist can do is testify that yes, indeed, the story is widespread and possibly old.

The danger, in situations where the court is on the boundary between "I can't believe" and "I don't believe", is that the court will turn to spurious science, and will turn its back on one of the last tools that aboriginal peoples have to bring the courts to a place of fairness. The court will accept the evidence of the scientist or anthropologist over that of the elder, not because it is more likely to be true, but because it is more familiar, more reassuring, more consistent with the conclusions with which the court will be comfortable. It is also presented in a way that is spoken, written and structured in patterns that are more familiar, and therefore more easily accepted by the court: the anthropologist and the judge are part of the same society, went to the same kind of universities, share the same religious tradition, the same social assumptions, the same urban environment. It is always tempting to believe the person who is easier to understand.

That approach allows the court to hide behind the science to get away from a persistent, nagging problem. The problem: we are still, despite all our science, storytelling creatures. And judges, despite all the science and ritual of the courts, are still asked to decide whose story is "true". And they know—they know when they go home at the end of the day, after all the testimony and lawyering—that their decisions were based not on science but on art and emotion and instinct. When the evidence gets strange enough, unfamiliar enough, they begin to enter the territory of "I can't believe it"—and they ought to be able to recognize that this inability is as much about them as it is about the evidence. They ought to be careful.

Judges are trained observers. Much of their work involves sifting evidence, seeking "truth". Most of the time, that truth consists of objectively ascertainable facts and events. Was this the man who robbed the bank? Was a blow struck? How much alcohol was in his blood? When a judge says "I don't believe it", the conclusion is reached on the basis of the judge's careful evaluation of testimony, the weighing of the credibility of the witness—by his demeanour, his choice of words, his eye contact with the judge (or lack of it). The statements by witnesses are accompanied by physical evidence. Judges are trained to decide facts. They are not trained to decide beliefs. Belief is a swamp. Unfortunately for us, it is *our* swamp.

All this sounds picturesque, even interesting to some unusual people—but why is it relevant to us, here, today?

Because we are dealing with cultures so different from the legal culture of Canada in the 21st century that we stand the risk, every time we go to court, of encountering a judge who can't tell the difference between "I don't believe it" and "I can't believe it". That is,

they don't even recognize they're labouring under something between a disability and an inability.

I can relate to this. After years of solitary travel, driving long distances with loud rock music pumping away in my car, I've suffered hearing loss. I didn't know it. I didn't realize I was reading lips. I didn't realize what I'd lost: I just turned up the volume. My inability to hear was one thing—but it spilled over into an inability to *listen.* I moved from a lack of hearing to a lack of understanding. And I didn't realize I'd crossed that boundary.

For me, the solution is somewhat simple. Eventually, people give up, or they yell at me. For the rights of indigenous nations, the solution may be equally stark: avoid court, or be very clear and blunt with the judges. They need to know that they don't know—that their inability to believe should not be confused with lack of proof or lack of truth...and on our side, we should not confuse that inability with prejudice. They're not refusing to hear what we're saying: they're just sort of deaf.

All of which comes back to the Covenant Chain.

Though the Covenant Chain was intended to be unbreakable, today, in court, it is sadly fragile. Anyone can argue it, but doing so poorly, without proper preparation, without overwhelming evidence, in the form of a careful combination of paper and people and wampum and experts—the chain will be broken and discarded, partly because it's so old, and foreign, and complicated that at some point it will be the kind of thing that a judge just can't believe.

We can't afford to find ourselves in that place.