The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150

Mark D. Walters[*] [1]

In the case of Connolly v Woolrich*, decided by the Québec Superior Court within ten days of Canadian Confederation in 1867, a judge upheld the validity of a marriage conducted according to Cree customary law in what is now northern Alberta. In doing so, the judge advanced a complex and far-reaching theory of legal pluralism and multi-layered governance within territories under the "joint occupation" of Europeans and Aboriginal peoples — territories that would soon become part of the new Dominion of Canada. Canada thus began its life with a constitutional vision that was inclusive and respectful of Indigenous legal traditions. However, that vision was quickly lost. For over one hundred years, the case of* Connolly v Woolrich *was forgotten. Only in recent years has the case found its way back into mainstream legal discourse. Indeed, it is now often feted as a model for a multi-juridical legal reality in Canada. But could this old case really provide a way forward for acknowledging Indigenous legal traditions in Canada today? There are good reasons to doubt this possibility, given the colonial legal sensibilities that informed the reasoning*

Dans l'affaire Connolly c Woolrich*, jugée par la Cour supérieure du Québec dix jours après la fédération canadienne en 1867, un juge confirma la validité d'un mariage conduit selon le droit coutumier cri dans l'actuel nord de l'Alberta. Ce faisant, le juge avança une théorie complexe et ambitieuse du pluralisme juridique et la gouvernance à multiples couches à l'intérieur de territoires sous « l'occupation commune » de peuples européens et autochtones — des territoires qui allaient bientôt faire partie du nouveau Dominion du Canada. Le Canada naquit ainsi avec une vision constitutionnelle inclusive et respectueuse des traditions juridiques autochtones. Cependant, cette vision fut vite perdue. Pendant plus de cent ans, l'affaire* Connolly c Woolrich *fut oubliée. Ce n'est que dernièrement que l'affaire est réapparue dans le discours juridique dominant. En fait, elle est maintenant souvent fêtée comme un modèle pour une réalité juridique multi-juridique au Canada. Se pourrait-il que cette vieille affaire offre véritablement une voie à suivre pour reconnaître les traditions juridiques autochtones au Canada aujourd'hui? Il y a de bonnes raisons*

* F.R. Scott Professor of Public and Constitutional Law, McGill University.

1 This essay is a revised version of a presentation that I gave at the "Wahkohtowin – Reconciliation" conference organized by the Centre for Constitutional Studies and the Faculties of Law and Native Studies, University of Alberta, held 21-23 September 2017. The conference was held within the territory of the Enoch Cree Nation and within the larger Treaty 6 territory. I wish to thank the Elders, both Cree and Métis, present on the occasion for their wisdom and insight. I am grateful also for comments from Hadley Friedland, John Borrows, and Robert Leckey on earlier drafts of this paper. I am also grateful for the many observations and comments offered by my students over the years, generally of course, but in relation to the case of *Connolly v Woolrich* in particular. Finally, I wish to acknowledge the funding assistance for my research provided by the Social Sciences and Humanities Research Council of Canada.

that the judge employed. However, after considering three readings of Connolly v Woolrich*, the incorporative, assimilationist, and reconciliatory readings, the author argues that, yes, properly interpreted,* Connolly v Woolrich *may indeed provide effective insights into the status of Indigenous legal traditions in Canadian law today. The case of* Connolly v Woolrich *may well be worth celebrating 150 years or so after it was decided.*

de douter de cette éventualité, étant donné la susceptibilité juridique coloniale qui influença le raisonnement employé par le juge. Toutefois, après avoir examiné trois interprétations de Connolly c Woolrich*, les interprétations d'incorporation, assimilationniste et conciliatoire, l'auteur soutient que, en effet,* Connolly c Woolrich *peut effectivement, si elle est correctement interprétée, apporter des perspectives qui ont de l'effet sur le statut des traditions juridiques autochtones dans le droit canadien aujourd'hui. L'affaire* Connolly c Woolrich *mériterait bien d'être fêtée, environ 150 ans après qu'elle fût jugée.*

I.

On the first day of July, 1867, the *British North America Act* was proclaimed in force and the Dominion of Canada came into existence.[2] On the ninth day of July, 1867, a Canadian judge ruled that a Roman Catholic marriage that had been celebrated between William Connolly and Julia Woolrich within the province of Lower Canada/Québec was a nullity because Connolly had married a Cree woman years before under the laws and customs of the Cree people, and he had still been at the relevant time married to her.[3] In reaching this conclusion, the judge, Justice Samuel Cornwallis Monk of the Québec Superior Court, not only recognized and applied the marriage laws of an Indigenous nation, but he accepted that Indigenous laws and governments generally — "the laws of the Aborigines" as he called them — remained in force, at least in certain circumstances, within territories claimed by the Crown that would soon become part of the new Dominion of Canada.[4] It could be said, then, that Canada began its life 150 years ago with a multi-juridical identity that embraced not only the common law and civilian legal traditions inherited from its English and French founders, but also the laws, customs, and traditions of the Cree and other Indigenous peoples whose territories the new country would encompass.[5]

2 *British North America Act, 1867* (UK) 30 & 31 Vict, c 3. Now *Constitution Act, 1867*(UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix I, No 5.

3 *Connolly v Woolrich and Johnson* (1867), 1 CNLC 70 (Que Sup Ct), [1867] QJ No 1 (QL) [*Connolly*, cited to QL], aff'd *Johnstone c Connolly* (1869), 1 RL 253, [1869] JQ No 1 (QL) (Que CA).

4 *Ibid* at para 24.

5 John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill LJ 153 at 159–160.

Yes, this *could* be said — but is it worth saying now? As we gather to reflect upon the state of the Canadian confederation after 150 years, as we confront the challenge of reconciliation between Indigenous and non-Indigenous peoples in Canada, and as we begin to think about the role that Indigenous legal traditions, including the Cree idea of *wahkohtowin*, might play in this process, we would do well to face the realities of our past directly and honestly. A true sense of reconciliation demands no less. One reality is that, in the years that followed confederation, Indigenous legal traditions were *not* generally recognized in Canadian law but were largely ignored or even suppressed. The case of *Connolly v Woolrich* is perhaps just a misleading outlier. Indeed, it may not even merit this status. Upon closer examination, it is clear that the case is a product of its time. Justice Monk's reasons offer a window into the mid-nineteenth century juridical mind, and what we see is far from edifying. In short, the prospects of finding insight, let alone inspiration, for the cause of reconciliation today by looking to a dusty old case are not good.

Although the prospects are not good, I still think the project is worth pursuing. There remains something oddly compelling about the *Connolly* case. It has been described as the "boldest and most creative common law decision on Indian rights in nineteenth-century Canada."[6] In the judge's reasoning, there are flashes of promise. It is true that a wide distance, temporally and culturally, separates us from Justice Monk, and as a result, his language is often troubling; however, his analysis has one advantage that only this distance can give: it is untainted by the hard legal history of the intervening 150 years. We might not agree with all of his answers, but we might learn something from him simply because his views about Indigenous law were not obstructed by the knowledge of what would happen to Indigenous peoples in Canada during the next century and a half.

I teach the *Connolly* case to my constitutional law students each year. Like many complex texts, whether in law, literature, or religion, it yields different meanings on different readings. I can now see that I have drawn from the case at least three meanings or messages that parallel my own evolving thoughts about the meeting of Indigenous and non-Indigenous legal cultures in North America. I will try to summarize these readings through reference to three general themes, which I will call incorporation, assimilation, and reconciliation. I will also suggest that the shift from the incorporation to the reconciliation reading involves a shift in conceptions about what law generally is, from

6 Sidney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 169.

a linear or positivist to a more circular or interpretive jurisprudence. After a brief account of the facts of the case, my plan is to say a few words about each reading of *Connolly v Woolrich*, with emphasis on the last reading, the reading about reconciliation.

II.

The story behind the case of *Connolly v Woolrich* began in 1803 near a fur-trading post at *Rivière-aux-Rats*.[7] Justice Monk located the post on the north-west shore of Lake Athabaska in what is now northern Alberta, outside of the Hudson's Bay Company territories or Rupert's Land.[8] However, historians have concluded that the relevant post was located near Nelson House in what is now northern Manitoba, within Rupert's Land.[9] The central characters in the story were "the daughter of an Indian chief of the Cree nation, named Susanne *Pas-de-nom*" (as Justice Monk described her), who was then about fifteen years old, and William Connolly, born in Lachine, Québec/Lower Canada, a descendant of French-Canadians and loyalist settlers of Irish heritage, who was then a seventeen-year old clerk at the post.[10] Like thousands of other young Indigenous women and young Euro-Canadian men engaged in the fur trade over the course of the seventeenth, eighteenth, and nineteenth centuries, they married. But under what law? Although the French and then British Crowns claimed the massive northwest fur-trading country, there was during these years little if any evidence (even within Rupert's Land) of European laws, institutions, or officials beyond the isolated posts or settlements that dotted the region. As it happened, in the year that Susanne and William were married, the United Kingdom Parliament tried to address this situation by extending the jurisdiction of the courts of Upper and Lower Canada over crimes committed within "Indian Territories" located beyond any local colonial jurisdiction, a statutory move that only seemed to confirm the absence of any meaningful or *de facto* imperial or colonial legal presence in the northwest that

7 For a detailed overview of the story, see Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991) at 9–22.

8 Monk J wrote: "The Rat River locality is, so near as I can ascertain, situate in latitude 58 degrees north and longitude west from Greenwich about 111 [degrees]. It is on the north shore of the lake [Lake Athabaska]" *Connolly*, *supra* note 3 at para 21.

9 Bruce Peel, "Connolly, William" in *Dictionary of Canadian Biography*, vol 7 (University of Toronto/Université Laval, 2003), online: <www.biographi.ca/bio/connolly_william_7E.html> [Peel, "Connolly, William"].

10 *Connolly*, *supra* note 3 at paras 2, 8; Peel, "Connolly, William", *supra* note 9; Bruce Peel, "Connolly, Suzanne" in *Dictionary of Canadian Biography*, vol 9 (University of Toronto/Université Laval, 2003), online: <http://www.biographi.ca/bio/connolly_suzanne_9E.html>.

could support the Crown's sweeping claims of sovereignty.[11] Young people like Susanne and William therefore married "*en façon du pays*" or by the "custom of the country."[12] The evidence led in the case suggests that William likely approached Susanne's parents with a gift to seek their consent to the marriage, and with this consent, and hers, their marriage began — or, as Justice Monk would conclude many years later, "he had married her according to the laws and customs of the Cree Indians."[13]

Susanne and William lived together for the next 28 years and had at least six children. William rose in the ranks of the North West and then Hudson's Bay Companies to become the chief factor, the highest-ranking company official, in what is now British Columbia — and a wealthy man. When he, Susanne, and most of their children moved to Lower Canada in 1831, Susanne was initially introduced within Montreal society as "Mrs. Connolly."[14] At this point, however, the story took its tragic turn.[15] Within the year, William left Susanne and married his second cousin, Julia Woolrich, the daughter of a wealthy merchant, in a Roman Catholic ceremony, a decision that appears to have surprised, among others, the governor of the Hudson's Bay Company, George Simpson.[16] William and Julia would raise three of the children from

11 See *An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Upper and Lower Canada, to the Trial and Punishment of Persons guilty of Crimes and Offences within certain Parts of North America adjoining to the said Provinces, 1803* (UK), 43 Geo III, c 138. See generally Hamar Foster, "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859" (1990) 34 Am J Leg Hist 1.

12 For reference to marriage by the "custom (or customs) of the country" or "*la façon du pays*" in Monk J's reasons, see *Connolly*, *supra* note 3 at paras 8, 85, 87, 88, 91, 99, 104, 116. Relationships like this were ubiquitous within the fur-trading country. See Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670-1870* (Winnipeg: Watson and Dwyer, 1980); Sylvia Van Kirk, "The Role of Native Women in the Fur Trade Society of Western Canada, 1670-1830" (1984) 7:3 Frontiers: A Journal of Women Studies 9; Jennifer SH Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: University of British Columbia Press, 1980); Jennifer SH Brown, "Partial Truths: A Closer Look at Fur Trade Marriage" in Theodore Binnema, Gerhard J Ens & RC Macleod, eds, *From Rupert's Land to Canada* (Edmonton: University of Alberta Press, 2001), at 59–80; Jennifer SH Brown, *An Ethnohistorian in Rupert's Land: Unfinished Conversations* (Edmonton: AU Press, 2017) [Brown, *An Ethnohistorian in Rupert's Land*].

13 *Connolly*, *supra* note 3 at para 179.

14 *Connolly*, *supra* note 3 at para 8.

15 For the details of the story after 1831, see John Adams, *Old Square-toes and his Lady: The Life of James and Amelia Douglas* (Victoria: Touchwood Editions, 2011), 39–41, 71–73; Adele Perry, *Colonial Relations: The Douglas-Connolly Family and the Nineteenth-Century Imperial World* (Cambridge, UK: Cambridge University Press, 2015) at 84–85 [Perry]

16 "You would have heard of Connolly's Marriage — he was one of those who considered it a most unnatural proceeding 'to desert the mother of his children' and marry another; this is all very fine, very Sentimental and very kind-hearted 3000 miles from the Civilized world but is lost sight of even by Friend Connolly when a proper opportunity offers." George Simpson to John G. McTavish, December 2, 1832. Perry, *supra* note 15 at 82, 84.

his relationship with Susanne and have two children of their own. They spent much of the next decade at the fur-trading post at Tadoussac, though William supported Susanne who remained in Montreal. When William and Julia returned to Montreal in the early-1840s, Susanne and two of her daughters from her relationship with William decided to move back west. Susanne may have intended to go to British Columbia to live with their eldest daughter, Amelia, who was by then Lady Douglas, wife of the first governor of the province, Sir James Douglas. However, when their youngest daughter, Marguerite, began religious training with the Grey Nuns in the Red River colony, Susanne decided to settle there, living in the Grey Nuns convent at St. Boniface until her death in 1862. William supported her financially, but upon his own death in 1849 he left his estate to his second "wife" Julia. Julia continued to provide Susanne some financial support; indeed, upon her death, her will directed an annual payment to "Suzanne (Sauvagesse)."[17] Social ties and responsibilities then were perhaps more flexible than we would now think.

The question, however, was whether Julia really was William's "wife." The plaintiff in *Connolly v Woolrich* was John, one of Susanne and William's children, who argued that the second marriage was a nullity and so upon William's death half of his estate should have gone to Susanne, as his surviving wife, and then her heirs, under Lower Canada's community of property regime. The courts in Québec agreed — not just Justice Monk but four of five Québec Court of Appeal judges as well. The case was appealed to the Judicial Committee of the Privy Council, but the parties reached an out-of-court settlement before the appeal was argued, a compromise that may have been encouraged by the most publicly prominent of the Connolly children, Amelia, and, in this respect, she may have been influenced by her husband, the governor of British Columbia.[18] As a result, a ruling on the question of the status of Indigenous law in Canada from the high court of the British empire was averted. I have often wondered whether the history of Indigenous peoples and Aboriginal rights in Canada might have been different had the Judicial Committee of the Privy Council considered and upheld Justice Monk's conclusions on Cree marriage custom. There is at least some reason to think that it might have been. Justice Monk's decision went well beyond the law of marriage. He was prepared to recognize Indigenous systems of law and governance generally.

As it was, the *Connolly* case became a sort of footnote to the legal history of Indigenous peoples in Canada. True, it was followed in several subsequent

17 Perry, *supra* note 15 at 85.

18 *Ibid* at 105–106.

decisions. Significantly, its principles were extended to recognize the validity of Indigenous customary marriages conducted within the Northwest Territories *after* English law and local governmental and judicial institutions were explicitly introduced.[19] However, it was distinguished or rejected by other courts, including those in Québec.[20] It received some attention from legal commentators and textbook writers early on — mostly as a case about the conflict of laws.[21] But its broader potential concerning the affirmation of Indigenous legal orders in Canada became, in effect, a "forgotten argument,"[22] a possibility that was "lost on all courts."[23]

Due to several related events, however, this somewhat obscure case was propelled back into the spotlight. First, starting in the 1970s, a new wave of academic writing on Indigenous legal issues emerged, and writers began to reference the *Connolly* case.[24] Second, the first volume of *Canadian Native Law Cases* appeared in 1980, and it included the trial and appellate judgements in the case.[25] Before the days when case law became digital and searchable online, this collection of cases involving Indigenous peoples and the law in Canada, many of which were previously buried in relatively inaccessible nineteenth-century case reports, was an invaluable resource. It revealed a hidden legal

19 *The Queen v Nan-E-Quis-A-Ka* (1889), 1 Terr LR 211 (NWTSC), 1889 CarswellNWT 14 at para 8; *Re Noah Estate* (1961), 32 DLR (2d) 185 (NWT Terr Ct) at 200, 36 WWR 577.

20 *Fraser v Pouliot et al* (1881), 7 QLR 149 (Que Sup Ct); *Fraser v Pouliot*(1884), 13 RLOS 1 (Que Sup Ct); *Fraser v Pouliot*(1885) 13 RLOS 520 (Que QB); *Robb v Robb* (1891) 20 OR 591 (Ont H Ct J (CP Div), [1891] OJ no 135 (QL); *Re Sheran* (1899), 4 Terr LR 83 (NWTSC), 1899 CarswellNWT 20.

21 Friedrich Carl von Savigny, *A Treatise on The Conflict of Laws: The Limits of Their Operation in Respect of Place and Time*, translated by William Guthrie (London: Stevens & Sons, 1869) at 26, 37; Alexander Leith & James Frederick Smith, *Commentaries on the Laws of England Applicable to Real Property by Sir William Blackstone*, 2nd ed (Toronto: Rowsell & Hutchison, 1880) at139; PE Lafontaine, "Le Domicile" (1881-82) 3 Themis - Revue de Legislation, de Droit et de Jurisprudence 289 at 297; "Pagan Marriages" (1888) 8 Can L Times 132; Howard W Elphinstone, "Notes on the English Law of Marriage" (1889) 5 L Q Rev 44 at 58–59; WHP Clement, *The Law of the Canadian Constitution* (Toronto: Carswell Co, 1892) at 581; AV Dicey and ABerriedale Keith, *A Digest of the Law of England with Reference to the Conflict of Laws*, 4th ed (London: Stevens & Sons Sweet & Maxwell, 1927) at 827; Walter S Johnson, "Domicille in Its Legal Aspects" (1929), 7 Can Bar Rev 356 at 365; Joseph H Beale, *A Treatise on the Conflict of Laws* (New York: Baker, Voorhis & Co, 1935) at 677; J G Castel, "Canadian Private International Law Rules Relating to Domestic Relations" (1958), 5 McGill L J 1 at 3.

22 Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992), 21 Man LJ 343 at 361.

23 Mary Ellen Turpel, "Home/Land" (1991) 10 Can J Fam L 17 at 24.

24 See e.g., LC Green, "Civilized Law and Primitive Peoples" (1975), 13 Osgoode Hall L J 233 at 244; Douglas Sanders, "Indian Women: A Brief History of Their Roles and Rights" (1975) 21 McGill LJ 656 at 660–661; Bradford W Morse, "Indian and Inuit Family Law and the Canadian Legal System" (1980), 8 Am Indian L Rev 199 at 222–225.

25 Brian Slattery & David Knoll, eds *Canadian Native Law Cases*, vol 1 (1763-1869) (Saskatoon: University of Saskatchewan, Native Law Centre, 1980).

past. Third, in the same year, Sylvia Van Kirk and Jennifer Brown published their ground-breaking books on women and the fur trade, both referencing the *Connolly* case.[26] Fourth, in the wake of the patriation of the Canadian constitution and the constitutional recognition and affirmation of "existing aboriginal and treaty rights" in 1982, legal academics turned to the question of Indigenous laws in Canada in a more focused way. An influential early piece in this line of scholarship was Norman Zlotkin's 1984 article, "Judicial Recognition of Aboriginal Customary Law in Canada," which explored the legacy of the *Connolly* case.[27]

From this point forward, academic references to the case proliferate, a notable example being the now-classic 1987 article, "Understanding Aboriginal Rights" by Brian Slattery in which the *Connolly* case was invoked to illustrate "the theoretical basis for the survival of native customary law in Canada, a phenomenon long recognized (but not always well understood) in our courts."[28] Several years later, the case received detailed attention in the Royal Commission on Aboriginal Peoples publication *Partners in Confederation*.[29] It then re-entered the modern judicial narrative in Canada. It was invoked by courts in British Columbia as a basis for understanding Indigenous customary norms and the residual and inherent legislative authority of Indigenous nations.[30] In legal-academic work, it has been consistently cited over the course of the last twenty-five years and references to the case continue today.[31]

26 *Supra* note 12.

27 Norman Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases" (1984), 4 CNLR 1.

28 Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 738. See also Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am J Comp L 361 at 367; James O'Reilly, "La Loi Constitutionnelle de 1982, Droit des Autochtones" (1984) 25 Cahiers de Droit 125 at 128; Chantal Bernier, "Les droits territoriaux des Inuit au large des côtes et le droit international" (1986) 24 Can YB Intl L 314 at 331; Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1990) at 13-19; Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v British Columbia*" (1992) 17:2 Queen's LJ 350 at 379-85.

29 Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group, 1993).

30 *Casimel v Insurance Corp of British Columbia*; 106 DLR (4th) 720; 82 BCLR (2d) 387 (CA); *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123; 189 DLR (4th) 333.

31 See e.g. Alain Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peoples autochtones" (1995) 36:3 C de D 669 at 710-11; John Borrows & Leonard I Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36:1 Alta L Rev 9 at 16-17; Michel Morin, *L'usurpation de la souveraineté autochtone* (Montréal: Boréal, 1997) at 197-200; Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79:2 Can Bar Rev 196 at 201-202; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 5-6; Michel Morin, "La coexistence des systems de droit autochtones, de droit civil et de common law au Canada" in Louis

Strangely, however, *Connolly v Woolrich* still seems to occupy a precarious place within Canadian legal discourse. It seems always to be just on the edges, but never quite within the mainstream, of legal thought — "a well-known but judicially-neglected case."[32] Part of the problem, in my view, is the inexplicable and indefensible turn in the mid-1990s by the Supreme Court of Canada from recognizing living and complete Indigenous normative systems or orders to a limited form of constitutional recognition for pre-contact and culturally-integral *fragments* of Indigenous orders — a rejection, I think, of the spirit of the *Connolly* case and the adoption of a rule not previously recognized within the common law tradition.[33] Despite the attention that it has received, then, the *Connolly* case still exists within the strange world of the alternative legal universe, a legal world that could have been but never was — at least not yet. I said to my students this year, after we discussed the case, what I say to my students every year: *Connolly v Woolrich* suggests that, in Canada, we have three sets of legal traditions: the common law tradition, the civilian legal tradition, and Indigenous legal traditions. But the place of this last set of traditions, at least from the general perspective of *Canadian* law, has been shadowy and aspirational rather than practical or real. However, perhaps this is about to change.

III.

I turn now to the three readings of the case. The first reading is about *incorporation* — by which I mean the incorporation of one legal tradition or set of laws by another legal tradition or set of laws, or, more specifically, the incorporation of Indigenous law into the common law of the British Empire and thus into the common law of Canada.

Perret and Alain-François Bisson, eds, *The Evolution of Legal Systems, Bijuralism and International Trade* (Montréal: Wilson Lafleur, 2003) 159 at 165; Sébastien Grammond , "L'appartenance aux communautés inuit du Nunavik: Un cas de réception de l'ordre juridique inuit?" (2008) 23:1-2 CJLS 93 at 94; Senwung Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2009-2010) 41:1Ottawa L Rev 101; Jeffery G Hewitt, "Reconsidering Reconciliation: The Long Game" (2014) 67 SCLR (2d) 259; M Nickason, "The *Tsilhqot'in* Decision: Lock, Stock and Barrel, Plus Self-Government" (2016) 49:3 UBC L Rev 1061 at 1067; John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795 at 814; Robert Leckey, "L'adoption coutumière autochtone en droit civil québécois," (2018) 59:4 C de D (forthcoming).

32 Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5:2 Tulsa J Comp & Int'l L 253 at 297.

33 Mark D Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44:3 McGill LJ 711 [Walters, "Golden Thread"]. See also Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v Pamajewon*" (1997) 42:4 McGill LJ 1011 at 1031.

I first read *Connolly v Woolrich* carefully in the early 1990s when I was a doctoral student. I had been struck at the time by the difference between American and Canadian judicial responses to Indigenous peoples. In a series of now-famous decisions from the 1820s and 1830s, the Chief Justice of the United States, John Marshall, examined English/British Crown practice regarding Indian peoples prior to American independence. He concluded that although the Crown had acquired underlying title to North America by discovery, the Indians retained a right of occupancy and diminished but meaningful rights of internal sovereignty and self-government; that, in other words, their legal orders remained more or less intact.[34] These early decisions would provide the basis for the doctrine of tribal sovereignty that still dominates federal Indian law in the United States today.[35] Why, I wondered, had Canadian judges not drawn similar conclusions given the history of colonial law and Crown practice that Canada and the United States shared?[36] Where was the equivalent Canadian doctrine of Indigenous self-government and sovereignty?

Given my interest in this question, the thing about Justice Monk's reasons in the *Connolly* case that leapt off the pages for me at this time was that he accepted the American legal interpretation of Crown practice. In developing his argument in favour of recognizing Cree marriage custom, Justice Monk quoted a long passage from the leading American case, *Georgia v Worcester*, including Chief Justice Marshall's observation that "history furnishes no example…of any attempt on the part of the crown to interfere with the internal affairs of the Indians" or to interfere with "their self-government, so far as respected themselves only."[37] Whether this was a completely accurate statement of Crown practice in pre-revolutionary America is, of course, a good question — though I think it does capture a basic truth about treaty relations between the Crown and Indigenous nations during the relevant time.[38] Did it capture a legal truth about Crown practice in the northwest fur-trading country as the eighteenth century gave way to the nineteenth century? Justice

34 *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823) [*Johnson*]; *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v Georgia*, 31 U.S. (6 Pet) 515 (1832) [*Worcester*].

35 David E Wilkins & K Tsianina Lomawaima, *Uneven Grounds: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001).

36 Canadian courts have relied upon the *Marshall* decisions in concluding that Aboriginal title burdens the Crown's underlying legal title, but have ignored them in relation to the question of Aboriginal sovereignty and self-government, without realizing that the two parts to *Marshall*'s reasoning were intimately connected. See Mark D Walters, "The Morality of Aboriginal Law" (2006) 31:2 Queen's LJ 470 at 507-510.

37 *Worcester*, *supra* note 34 at 546-547, quoted in *Connolly*, *supra* note 3 at para 23.

38 Mark D Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall" (2001) 24:1 Dalhousie LJ 75.

Monk thought that it did. Of course, Justice Monk's vision of things was, as I mentioned at the outset, unobscured by the realities that would follow in the decades to come. For Justice Monk, the American Chief Justice's analysis rang true: "Though speaking more particularly of Indian lands and territories, yet the opinion of the Court [*i.e.*, the Supreme Court of the United States in *Worcester*] as to the maintenance of the laws of the Aborigines, is manifest throughout. The principles laid down in this judgment…admit of no doubt."[39]

Justice Monk proceeded to quote several other sources, including British parliamentary debates in which Charles Fox insisted that it would be "ridiculous" to impose English law on Hindus and Muslims in British India,[40] and then he concluded: "I have no hesitation in saying that, adopting these views of the question under consideration…the Indian political and territorial right, laws, and usages remained in full force — both at Athabaska and in the Hudson Bay region."[41] In other words, no matter where within the Crown's domains Susanne and William were married, i.e., whether within or outside the Hudson's Bay Company territory known as Rupert's Land, Cree laws remained in force within Cree territories and communities and the marriage was valid according to those laws.

When I first read these statements in the early 1990s, they struck me as truly remarkable. There was simply nothing like them that I had seen elsewhere in Canadian law. However, I also came to see that Justice Monk did not really understand the full nature of Chief Justice Marshall's position. In the 1823 case of *Johnson v M'Intosh*, the American Chief Justice had asked the following question: what if a settler went into the territory of an Indian nation on his own and purchased land from that nation? Would he have obtained a property right cognizable in American law and enforceable by American courts? Answering his own question, Chief Justice Marshall said, *no*, the settler would not have acquired a property title cognizable in American law, for the land would still have been "part of their territory," i.e. the territory of the relevant Indian nation, and held by the settler "under their protection and subject to their laws," and therefore no American court could have "interpose[d] for the protection of that title" if the Indian nation later repossessed the land.[42]

39 *Connolly*, *supra* note 3 at para 24.
40 *Ibid* at paras 27-28.
41 *Ibid* at para 28.
42 *Johnson*, *supra* note 34 at 593.

There was, in other words, a firm line drawn between the American legal system (and presumably the British legal regime before American independence) on the one hand, and the legal systems of Indigenous nations on the other hand. Although Chief Justice Marshall did not consider Indian nations as *internationally* sovereign, he did think that they remained, in an important sense, *foreign* nations, a point reflected in the fact that, in American law at this time, Indians were considered as *aliens* against whom acts of *war* could be (and were) committed, as peoples who might "still be conquered" as Chief Justice Marshall put it, rather than as subjects or citizens protected by the rule of law.[43] Indigenous laws and rights of governance were acknowledged by American judges, but these laws and rights did not form part of *American* law during this early period.

Justice Monk came to a very different conclusion. Of course, the Cree law in the territory where Susanne and William were married was, in respect of Justice Monk's jurisdiction, *i.e.*, the province of Québec, a *foreign* law, in the sense that it was a law of a different jurisdiction, and hence it was a law that could be recognized in his court, if at all, only through the principles of private international law, or the conflict of laws, and in particular through the principle that the validity of a marriage is determined by the *lex loci contractus* or the local law of the place of solemnization. Justice Monk accepted this point explicitly.[44] However, he also thought that the Cree law in this case was in some sense a *British* law because the relevant Cree territory where the marriage was conducted fell within territories over which the Crown claimed, in some overarching sense at least, sovereignty. And, on this logic, the Cree law would have become a part of *Canadian* law just a few years later, when Rupert's Land and the Northwest Territories were transferred to Canada.

It is worth examining Justice Monk's reasoning on this point more closely. First, he concluded that both France and England claimed parts of the northwest in the seventeenth century "by discovery and occupancy" and that by the relevant "principle of public law" the laws of the "parent states" were "immediately and *ipso facto* in force" once these territorial claims by discovery and occupancy were established.[45] Or at least this would have been the case within the

43 *Ibid*.

44 *Connolly*, *supra* note 3 at paras 131-32.

45 *Ibid* at para 21. No authorities were cited for this point, but many could have been. See e.g. *Blankard v Galdy* (1693), 4 Mod 215, 91 ER 356 (KB) [*Blankard*]; *Dutton v Howell* (1693), Show 24 at 31 (*per* counsel), 1 ER 17 (HL) [*Dutton*]; *Anonymous* (1722), 2 P Wms 75 (PC); *Roberdeau v Rous* (1738), 1 Atk 543, 26 ER 342 (Ch); W Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769) I at 106-107.

French or English posts or settlements where traders and settlers were found. But what was the state of the law outside these isolated posts or settlements? Justice Monk quickly saw the weakness of the so-called discovery doctrine. The difficulty, he said, was that the discoverers had discovered a land that was held "by aboriginal nations" which had been in their possession "for ages."[46] Justice Monk continued:

> [W]ill it be contended that the territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated — that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not — that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives.[47]

Although he concluded that the Royal Charter granting the Hudson's Bay watershed (or Rupert's Land) to the Hudson's Bay Company in 1670 introduced English law into parts of the northwest, Justice Monk also concluded that the introduction of English law under this Royal Charter "did not apply to the Indians" and "nor were the native laws or customs abolished or modified"; on the contrary, he continued, "[i]t is easy to conceive, in the case of *joint occupation* of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail," and, indeed, "the dominions of the British Crown exhibit [many] cases of that kind."[48] Justice Monk no doubt had in mind the legal pluralism of British India, for he had already cited Fox's statement on this point. The analysis appears to have assumed, then, that the Crown did indeed gain some kind of sovereignty over lands in North America by discovery and occupation; however, it also assumed that Indigenous laws and governments continued within the territories possessed by Indigenous peoples but located beyond British posts or settlements, even in Rupert's Land where a Royal Charter seemed to contemplate the introduction of English law.

As noted, Justice Monk concluded that the Athabaska district where Susanne and William were married fell *outside* Rupert's Land; it was part of the territories claimed by France by discovery and occupation and then ceded to Britain by the Treaty of Paris in 1763. But this did not affect his ultimate conclusion on the status of Indigenous law. He insisted that during the French regime Indigenous laws and governments were left in place, and that upon

46 *Connolly*, *supra* note 3 at para 22.
47 *Ibid* at para 23.
48 *Ibid* at para 41.

obtaining sovereignty over the territory the British Crown did nothing to alter this state of affairs. In support of this conclusion, Justice Monk quoted the famous passage from the Royal Proclamation of 1763 by which the Crown recognized the territorial rights of Indians living "under Our Sovereignty, Protection and Dominion."[49]

We are now in a position to draw the various strands of Justice Monk's reasoning together. First, he stated that the Cree marriage law in this case was a foreign law for his jurisdiction. "I am clearly of opinion," he wrote, "that this case comes under the operation of the general rule of the *lex loci contractus* referred to," meaning the rule of private international law, or conflict of laws, according to which the courts of one jurisdiction recognize marriages that are valid under the laws of the jurisdictions in which they are conducted.[50] It is worth observing that American courts also recognized Indigenous laws pursuant to these principles of private international law.[51] Second, Justice Monk offered *another* reason for why he had to recognize Cree marriage laws, in departure from the early American approach (whether he knew it or not). He continued:

> There is besides, one answer to all this, and a very plain one. The supreme authority of the empire, in not abolishing or altering the Indian law, and allowing it to exist for one hundred years, impliedly sanctioned it, and 2nd, The sovereign power in these matters, by proclamation [of 1763], has tacitly acknowledged these laws and usages of the Indians to be in force, and so long as they are in force as a law in any part of the British empire or elsewhere, this Court must acknowledge and enforce them. This Indian custom or usage is, as regards the jurisdiction of this Court, a foreign law of marriage; but it obtains within the territories and possessions of the Crown of England, and until it is altered, I cannot disregard it. It is competent; it has been competent during the last hundred years, for the parliament of Great British to abrogate these Indian laws, and to substitute others for them has not thought proper to do so, and I shall not.[52]

This is, I think, one of the most remarkable passages ever written on Canadian constitutional law. In saying that it is remarkable, I do not wish to suggest that it is necessarily correct or without problems. It is remarkable because it sets forth a theory about the status of Indigenous laws in Canada

49 *Ibid* at para 43.

50 *Ibid* at para 142.

51 *Holland v Pack* (1823), 7 Tenn 157 (CA); *Morgan v M'Ghee* (1844), 24 Tenn 5 (Sup Ct) at 6-7; *Johnson v Johnson's Administrator* (1860), 77 Am Dec 598 (Mo Sup Ct) at 603; *Earl v Godley* (1890), 44 NW 254, 42 Minn 361 (Sup Ct); *McBean v McBean* (1900), 61 Pac 418, 37 Or 195 (Sup Ct). See also Felix S Cohen, "Indian Rights and the Federal Courts" (1940) 24 Minn L Rev 145 at 178.

52 *Connolly, supra* note 3 at paras 143-44.

that draws upon the early American cases but ultimately departs from them by insisting that, in the British half of North America, these laws were implicitly sanctioned by the Crown and could thus be said (for reasons developed below) to be incorporated within the broader common law of the British empire so as to become elements of British law that a British court was bound to recognize and enforce. And, to reiterate a point already made, within three years of this judgement the Northwest Territories would be transferred to Canada, and so on this account these "British" Indigenous laws would then have become "Canadian" Indigenous laws.

On this reading, then, there would have been a broad analogy between the status of Indigenous laws and the status of the French-based civilian law on property and civil rights that had become part of the law of the British province of Québec in the early 1760s and, by extension, part of the law of the new Canadian state established in 1867. It will be recalled that provisions within the Royal Proclamation of 1763 seemed to introduce English law into the province of Québec, but that in the early years of the British regime French-Canadian law was applied at least in relation to matters of private law. This pragmatic compromise was then given a legal explanation. It was argued that the relevant provisions in the Royal Proclamation of 1763 could not have been intended to displace the "*Maxim* of the *Common Law*," that local laws are generally presumed to continue in force in the Crown's newly-acquired territories.[53] To read the Proclamation as "importing English laws into a country already settled, and habitually governed by other laws" would have been to assume "an act of the grossest and absurdest and cruelest tyranny."[54] The *Connolly* case thus supports the conclusion that Indigenous laws were similarly incorporated by virtue of the imperial common law into British and later Canadian law.

Still, how this happened legally is left unclear by the decision. Although he referred vaguely to the experiences of legal pluralism elsewhere in the British empire, Justice Monk did not cite British cases on point. There was certainly judicial authority for the proposition that after the Crown asserted sovereignty over a territory by conquest or cession the local laws of the place were acknowledged and incorporated by the common law and continued in force so long as

53 C Yorke & Wm de Grey, "Report of Attorney and Solicitor General Regarding the Civil Government of Québec" in Adam Shortt & Arthur G Doughty, eds, *Documents Relating to the Constitutional History of Canada, 1759-1791* (Ottawa: SE Dawson, 1907) 251 at 255-256.

54 Sir Henry Cavendish, *Debates of the House of Commons in the Year 1774, on the Bill for Making More Effectual Provision for the Government of the Province of Québec* (London, Ridgway, Piccadilly: J Wright, 1839) at 29. Doubts on whether French-Canadian law survived within Québec persisted, however, and they were only resolved by the *Québec Act* (UK), 14 Geo III, c. 83, s 8.

they were consistent with basic principles of humanity and Crown sovereignty and, of course, to the extent that they were not altered by royal or parliamentary legislation.[55] Indeed, this was precisely the maxim of the common law that had been invoked to explain the continuity of French-Canadian law in his own province. The difficulty, which is one that he may have perceived, is that in the case of Indigenous nations in the northwest, there was no conquest or cession. He slid from the idea of "joint occupation" of territories to the idea that the Cree were under "the supreme authority of the empire" with no real explanation. Somehow, Cree peoples and territories became part of the empire and Cree laws were incorporated within the imperial common law. The incorporation thesis implies the subsuming of an inferior legal system within a larger one — an "inclusive" rather than an "exclusive" form of continuity.[56] The *Connolly* case shows, in other words, how Indigenous law may be seen to have been "received into Canadian law."[57]

A second difficulty with Justice Monk's reasoning on this point is the emphasis on implied royal sanction. Indeed, one might be forgiven for thinking that Justice Monk had just finished reading John Austin's work on jurisprudence, which was at this time becoming the dominant theory of law within the English-speaking legal world.[58] In restating the theory of legal positivism, Austin insisted that law is the command of the sovereign, the un-commanded commander, and customary, unwritten, or common law is law only insofar as one can say that it is impliedly or tacitly commanded by the sovereign; on this positivist view, all law must be traced back in linear fashion to one sovereign root. Was Justice Monk adopting an Austinian explanation that Cree law was "law" merely because the Crown impliedly sanctioned it? What about other justifications suggested by the common law, such as the injustice or cruelty of imposing strange laws upon distinct peoples? His view certainly appears premised upon the assumption, no doubt encouraged by legal positivism, that

55 *Calvin's Case* (1608), 7 Co Rep 1a at 17b, 77 ER 377 (KB); *Case of Tanistry* (1608), Davis 28 at 30 (*per* plaintiff), 80 ER 516; *Craw v Ramsey* (1669), 2 Vent 1 at 4, 86 ER 273; *Witrong v Blany* (1674), 3 Keb 401 at 402, 84 ER 789; *Dawes v Painter* (1674), 1 Freem 175 at 176, 89 ER 126; *Dutton*, supra note 45 at 31 (*per* plaintiff); *Blankard*, *supra* note 45 at 225-26; *Anonymous*, *supra* note 45; *Campbell v Hall* (1774) Lofft 655, 98 ER 848 (KB) at 741.

56 Walters, "Golden Thread," *supra* note 33 at 716-718.

57 John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 McGill LJ 629 at 632, n 7. See also Sébastien Grammond, "The Reception of Indigenous Legal Systems in Canada" in Albert Breton et al, eds, *Multijuralism: Manifestations, Causes, and Consequences* (Farnham: Ashgate, 2009) 45 (distinguishing between "soft" or "intra-state" pluralism at 47 and "hard" or "extra-state" pluralism at 49).

58 Largely ignored when first published in 1832, Austin's work in jurisprudence would have a profound impact on legal thinking throughout the common law world after its re-publication in 1861: John Austin, *The Province of Jurisprudence Determined,* 2nd ed (London: John Murray, 1861).

determining the status of a law involves an either/or choice — that Indigenous law is either outside and alien (the American approach articulated by Marshall) or inside and domesticated (the Canadian approach that he articulated). The latter approach seems to deny the sovereign separateness that the former approach accepts, but it gives Indigenous law a meaningful foothold in the law of the state.

I raise these various questions and queries about the case without answering them, though perhaps good answers can be developed. My main point, at this stage, is simply to observe that, for me, as a doctoral student in the early 1990s, at a time when there was virtually no acknowledgement within mainstream Canadian judicial discourse of Indigenous legal traditions, the abovementioned passages from the *Connolly* case were like gold. I was captivated by the idea that the immemorial laws, customs, and traditions of governance that gave normative shape to communities that were Indigenous to the lands that Canada encompassed could be seen as valid, integral and important parts of Canadian law, and that this incorporation of Indigenous law by Canadian law could be understood as largely the result of common law principles. In fact, the incorporation thesis was a central theme within my doctoral dissertation, submitted twenty-two years ago, with the rather awkward title: "The Continuity of Aboriginal Customs and Government under British Imperial Constitutional Law as Applied in Colonial Canada."[59]

IV.

I now turn to the second reading of *Connolly v Woolrich* — the *assimilation* reading. Since the submission of my doctoral thesis, I have learned more about Indigenous legal traditions than I knew then. Of course, I must acknowledge that whatever I have learned about Indigenous law is, at most, the tip of an iceberg, an iceberg that I know I will never really fully see or understand. I know just enough, however, to see that my early enthusiasm for the *Connolly* case was and is deeply problematic. There are serious difficulties associated with the incorporative approach to the continuity of Indigenous law. Looking at the arguments made in the case may shed some light on why.

The lawyers for the defendants in the *Connolly* case argued that "the usages and customs of marriage observed by uncivilized and pagan nations, such

59 Mark D Walters, *The Continuity of Aboriginal Customs and Government under British Imperial Constitutional Law as Applied in Colonial Canada, 1760-1860* (PhD Thesis, Oxford University Faculty of Law, 1995) [unpublished].

as the Crees were, cannot [be] recognised by this Court as giving validity to a marriage even between the Indians themselves, and more particularly, and much less, between a Christian and one of the natives…[for] there can be no legal marriage between two parties so situated under the infidel laws and usages of barbarians."[60] This argument reflects a line of thought offensive to our sensibilities today, but in its time, it was very powerful for judges and for public officials generally. Just several years earlier, the Chief Justice of the neighbouring province, Upper Canada, stated: "We cannot recognize any peculiar law of real property applying to the Indians — the common law is not part savage and part civilized."[61] The common law cannot, in other words, accommodate Indigenous legal ideas. Justice Monk rejected this line of reasoning — in part. He recognized Cree law. However, he was not immune from the societal attitudes of his day.

In considering his position, it is worth pausing to ask who Justice Monk was. Samuel Cornwallis Monk (1814-1885) was born in Nova Scotia, the son of loyalists who left Boston upon the outbreak of the American war of independence. His great grandfather had been an attorney general in the province, and his grandfather had been a provincial judge, and one of his uncles, Sir James Monk, was a Queen's Bench judge in Montreal. He was admitted to the bar in Lower Canada in 1837 and appointed to the Superior Court of Lower Canada in Montreal in 1859.[62] He was perfectly fluent in English and French, and he gained a reputation for being a scholarly and thoughtful judge — a reputation confirmed by his reasons in the *Connolly* case which ranged from Roman law, to medieval law, to canon law, to modern civilian and common law, and, of course, to Cree law.[63] He was the sort of judge who wrote poetry (including a 237-page poem on the Norman Conquest).[64] The journal kept by his daughter, Amelia, which she started writing in 1867, the year of the *Connolly* judgement, reveals a father who was extremely religious and also dedicated to his family

60 *Connolly*, *supra* note 3 at para 12.

61 *Doe dem Sheldon v Ramsay*(1851), [1852] 9 UCQB 105, [1851] OJ No 82 (QL) at 123 Robinson CJ.

62 Reverend J Douglas Borthwick, *History and Biographical Gazetteer of Montreal to the Year 1892* (Montreal: John Lovell & Son, 1892) at 218-19.

63 George Maclean Rose (ed), *A Cyclopædia of Canadian Biography: Being Chiefily Men of the Time; A Collection of Persons Distinguished in Professional and Political Life; Leaders in the Commerce and Industry of Canada, and Successful Pioneers* (Toronto: Rose Publishing, 1888) at 537: "His natural talents, united to his vast knowledge and graceful elocution, have made him one of the most instructive and agreeable persons to listen to whenever he has a judgment to deliver."

64 [Samuel Cornwallis Monk], *The Norman Conquest* (Montreal: 1870); [Samuel Cornwallis Monk], *The Saguenay: an unpublished poem* (Montreal: John Lovell, 1860).

and his children.[65] Monk came from an Anglican family, but his wife, Rosalie Caroline Debartzch, was a Roman Catholic of French-Polish background, and it seems that he came to identify as a devout Roman Catholic.[66]

What we know of Monk is consistent with the impression left by his reasons in the *Connolly* case — that he felt a powerful need for moral and religious reasons to ensure that relationships between Indigenous women and non-Indigenous men in the northwest were not sinful or evil but were true marriages. Whether he realized it or not, however, in the process of responding to the general sentiment, noted above, that the customs of uncivilized peoples could not be recognized, he assimilated Cree norms concerning intimate family relations into a Christian mould. The evidence in the case on Indigenous marriage customs suggested that divorce at will and polygamy were both permitted. However, Justice Monk stripped away any aspect of Indigenous law that he regarded as offensive to leave a core conception of marriage that he could recognize. He wrote:

> This law or custom of the Indian nations is not found recorded in the solemn pages of human commentaries, but it is written in the great volume of nature as one of the social necessities — one of moral obligations of our race — through all time and under all circumstances, binding, essential, and [inevitable] and without which neither man, not even barbarism itself, could exist [upon]earth. It is…an existing and immemorial usage…It exacts the solemn consent of parents, and that of the parties who choose each other, for; good or for evil, as husband and wife — it recognizes the tie and some of the sacred obligations of married life; and it would be mere cant and hypocrisy, it [would] be sheer legal pedantry and pretension, for any man, or for any tribunal, to disregard this Indian custom of marriage, inspired and taught, as it must have been by the law and the religion of nature among barbarians, who, in this essential element of a moral life, approach so near to the holy inculcations of Christianity.[67]

Justice Monk did not try to understand Cree legal tradition on its own terms, but reformulated it so that it resembled something that he could recognize and accept. Cree marriage custom could be enforced because it approximated the Christian ideal of marriage.[68] This is the *assimilationist* reading of the case. It shows the dangers associated with the incorporative approach to Indigenous

65 Jessica L Brettler Vandervort, *Faith, Family, Female Education and Friendship:* Retelling *Louise Amelia Monk's Adolescence in Bourgeois Montreal, 1867-1871*, MA Thesis, Concordia University Department of History, (Ann Arbor, Mich: ProQuest Dissertations Publishing, 2003) at 3-5.

66 *Ibid* at 12.

67 *Connolly*, *supra* note 3 at para 93.

68 See Grammond, *supra* note 57 at 55: "Judge Monk today passes for a particularly enlightened spirit for his time. However, one can criticize the fact that he sees indigenous law as a copy of Western law."

law: through incorporation into another law it is assimilated and transformed by a different legal culture. Of course, a modern non-Indigenous judge sensitive to cultural difference might do a better job than a nineteenth-century judge of curbing this assimilationist inclination. Still, I wonder whether non-Indigenous judges, and indeed non-Indigenous lawyers and non-Indigenous legal academics, myself included, might, despite their best intentions, *still* conceptualize Indigenous law using assumptions drawn from the common law or civilian legal traditions.[69]

The problem runs deeper than just unconscious interpretive bias. There may be good reason to think that Indigenous legal traditions, though diverse and varied, share a set of basic structural features that make their judicial enforcement difficult or even impossible. To appreciate this point, perhaps we can try to imagine the normative culture practiced within Cree societies in 1803. This is, of course, perhaps as impossible a task for me to perform as it was for Justice Monk. However, we have additional resources and perspectives that Justice Monk did not have, and so the attempt, though bound in some sense to fail, may still be helpful.

We may start with Susanne herself. She appears in the judgement and in the many accounts of the case as "Susanne *Pas-de-nom*." However, this was not the name of the fifteen-year old girl whom William married in 1803. Susanne was a name that she was given or adopted upon her baptism many years later. Indeed, Susanne may well have been a name that she wanted to use. However, the failure to acknowledge that she had a Cree name is one way of many in which the vast cultural differences that existed between her society and William's was diminished or even erased by judicial and legal interpretations of her life with William. In fact, her Cree name was *Miyo Nipay* — which in the Cree language means "Beautiful Leaf."[70]

For Miyo Nipay and her people, what was marriage? What was law? Consider the following account of Cree legal traditions from a report of the

69 See, for example, the difficulties that the trial judge had in understanding the Gitksan and Wet'suwet'en legal traditions known as *adaawk* and *kungax*: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 89-108, 153 DLR (4th) 193. See also *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 where the Supreme Court of Canada itself has struggled with Indigenous perspectives, suggesting that judges should "translate" Indigenous land uses into "common law" categories at para 51, an approach that could not help, as LeBel and Fish JJ, concurring, observed, to lead to deep misunderstandings and misapplications of "aboriginal customary laws relating to land":, at para 128.

70 Sylvia Van Kirk, "Tracing the Fortunes of Five Founding Families of Victoria" (1997/98) 115/116 BC Studies 149 at 152; Adams, *supra* note 15 at 3; Perry, *supra* note 15 at 2, 33.

University of Victoria Indigenous Law Research Unit based on interviews conducted with members of the Aseniwuche Winewak Cree Nation:

> At a general, cosmological level, one community member explained his belief that the Cree legal tradition needs to be understood as existing fundamentally within larger relationships. He argues that even the term, "law", can be a misleading term for Cree people, if they associate it only with the Canadian model of law, which assumes a Canadian-style judiciary. Instead, he explained his understanding that Cree law relies on "protocols" — the proper conduct for ceremony, hunting, address of others, life generally, or "everything." Underlying the importance of protocols, on this view, is the foundational importance of relationship between individuals and Creator, other humans, the land, and "nature."…Everything is seen as related parts of one whole…This worldview, with its emphasis on relationships and the interconnection of all aspects of life, is reflected throughout the stories and interviews. In particular, spirituality is not separated or elevated beyond other life realms…In general, relationships, between actions and consequences, between people and peoples, and between humans and the rest of the world, are assumed and permeate legal decision-making at many levels.[71]

This account reveals the contours of a complex understanding of legality that is extremely difficult for anyone from outside the Cree culture to comprehend fully today (let alone in 1867). It may involve norms that simply cannot be enforced by a court — or if these norms are enforced by a court perhaps they will invariably become in the process something else.

With respect to customary norms governing marriage, Jennifer Brown has recently observed that the word for marriage in the Cree language — *wikihtowin* — simply means "living together" and it invoked a very different set of expectations and ideals than the European and Christian conception of marriage; indeed, she observes that once missionaries arrived at fur-trading posts and tried to formalize marriages between Indigenous women and European men, the Cree began to distinguish between *wikihtowin* and *kihci-wikihtowin* or the "big living-together."[72] Although Justice Monk's description of Cree marriage makes it seem like a perfunctory transaction, it has been argued that Miyo Nipay's relations would have engaged in a fairly elaborate ceremony upon her marriage to William.[73] In their research on women in the fur trade,

71 Accessing Justice and Reconciliation Project, "Accessing Justice and Reconciliation: Cree Legal Summary", by Hadley Friedland (Victoria: Indigenous Law Research Unit, 2012) at 44. See, in more general terms, Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead LJ16.

72 Brown, *An Ethnohistorian in Rupert's Land*, *supra* note 12 at166-167.

73 Backhouse, *supra* note 7 at 10-11.

Van Kirk and Brown suggest that fur traders were drawn, in many cases unwittingly, into the complex normative worlds of the Cree, Anishinaabe and other Indigenous nations in which social structures and expectations, especially those surrounding kinship relations, were fundamentally different from European ideas about the status of marriage and the roles of men and women. Within these normative worlds, the exchange of material goods, political alliances, spiritual bonds, family and kinship relations — the public and the private, the political and the commercial, the community and the individual — were not sharply divided. Men might have several wives, but usually because of a sense of reciprocal responsibilities, a sense that men should care as hunters for widows of friends or brothers and that women in this position should contribute as skilled artisans to the well-being of their relations. The sense of duty that came with entering into a kinship relationship, of providing where possible for the extended network of relations that one gained, was powerful, but it was also voluntarily assumed and maintained. In societies without coercive state institutions, people were free to extract themselves from relationships that were not working, marriage included. Normative order, at the personal, family, and larger political levels — ultimately the norms that governed these different levels of organization blended — was something that was always in a state of motion, a fluid web of interlocking benefits and responsibilities in which personal liberty and community solidarity had to be worked out on an on-going basis.[74]

The Cree word *wikihtowin* or marriage appears very similar to the Cree word *wahkohtowin*, which, as I understand it, implies a more general legal norm or practice. In this respect, it is perhaps worth noting that a Cree-English dictionary published in 1865, just a few years before the *Connolly* case, defined the word *wekètoowin* as meaning "marriage," but it also defined another Cree word, *wechătoowin*, as meaning "fellowship" or "unity."[75] This second expression seems to track the idea of *wahkohtowin* that has more recently been described as "the overarching law governing all relations" within Cree societies, a normative ordering within which individuals and families and larger networks of kinship relations seek a mutual and reciprocal sense of balance within the natural and spiritual world around them, or, in other words, a distinctive form

74 See generally Van Kirk, *supra* note 12; Brown, *supra* note 12. See also Sarah A Carter, "Creating 'Semi-Widows' and 'Supernumerary Wives': Prohibiting Polygamy in Prairie Canada's Aboriginal Communities to 1900" in Katie Pickles & Myra Rutherdale, eds, *Contact Zones: Aboriginal and Settler Women in Canada's Colonial Past* (Vancouver: UBC Press, 2005) at 131.

75 EA Watkins, *A Dictionary of the Cree Language: as Spoken by the Indians of the Hudson's Bay Company's Territories* (London: Society for Promoting Christian Knowledge, 1865) at 443, 445.

of "Indigenous constitutionalism."[76] As Hadley Friedland writes, *wahkohtowin* describes "the centrality and importance of relationships and building relationships in Cree legal thought," and in this sense it "represents an essential background narrative or meta-principle for Cree laws."[77]

I wonder, then, whether Cree *wikihtowin* or marriage is, in the end, inseparable from Cree *wahkohtowin* or constitutionalism generally speaking. The author of the 1865 dictionary may have picked up on subtle differences in tone, emphasis, or inflection among Cree speakers when distinguishing slightly different words for marriage and a more general idea of normative unity. However, the similarity in words is probably significant. The recent work on Cree legal traditions referred to above confirms that sharp conceptual lines between kinds of kinship relations are not drawn within Cree societies. It suggests that differences between relations between spouses, parents and children, brothers and sisters, cousins, two-related villages, even entire nations, are differences in degree not kind, and that emphasis is placed not upon determining a fixed status for a person, an office, or even a community, but rather on the attitudes and actions needed to instantiate healthy relationships; in other words, that each relationship manifests in slightly different ways the general "background narrative" of *wahkohtowin*.

For a judge to identify one norm from this set of complex and shifting normative narratives and practices and enforce it with the crispness of a common law rule, in effect detaching it from the structures of governance out of which it emerges, may do far more damage than good. On the assimilationist reading of the case, I began to wonder whether it wasn't just as well that *Connolly v Woolrich* had become only a footnote to the legal history of Indigenous peoples in Canada. Perhaps it was best that Indigenous legal traditions have persisted during the last 150 years under the (Canadian) legal radar. As Aaron Mills has written, "what we call law exists as such only within its own lifeworld," and one "can't simply translate law across distinct constitutional contexts and expect it to retain its integrity and thus its functionality."[78]

76 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 84-85. See also John Borrows, "Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada" in Nathalie Des Rosiers, Patrick Macklem & Peter Oliver, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 13.

77 Hadley Louise Friedland, *Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada* (PhD Dissertation, University of Alberta Faculty of Law, 2016) [unpublished] at 192–193.

78 Aaron Mills (Waabishki Ma'iingan), "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 854-55.

The assimilationist reading of the case forces us to consider what it means for a norm, custom or practice to be part of "Canadian law." If Indigenous laws are incorporated within and form part of Canadian law, does it follow that they have to be judicially enforced in ordinary courts? We could imagine special Indigenous tribunals.[79] But would there need to be a link to the Canadian legal order — an appeal or judicial review in the general courts? Even (or especially) as Indigenous legal traditions gain better recognition from Canadian law, it will no doubt remain important for them to continue, as they have done all along, to operate within their own distinctive jurisdictional domains. There will, however, be times when it is necessary to vindicate Aboriginal rights for general courts to consider Indigenous law. On these occasions, Mills writes, "there are very serious questions, to be taken up in considering whether we may safely move law between constitutional contexts," or, in other words, whether we may move Indigenous law "out of its own lifeworld and into another."[80] We have only just begun to think about both the damaging and the restorative potentials of this prospect.

V.

I turn now to the third reading of *Connolly v Woolrich* — the reconciliation reading. I have read the case many times over the years, but the reconciliation reading is one that has only gradually emerged in my thinking about it. It is a kind of redemptive reading of the old text, an example, perhaps, of what Robert Cover once called "redemptive constitutionalism."[81] It is an account of the case that may seem at first to reflect all of the admirable and objectionable features of a "common law mind" struggling to craft a normative reality that honours a past that only barely evidences the kind of honour that the ideal of legality implies. Indeed, I cannot deny that it is partly that.[82] But of course if it is to be a reading of reconciliation it must be more than just that. I think it is clear that legality is a distinct value of political morality that must be treasured and nurtured if diverse peoples are to live together peacefully. But I am also drawn to the view that legality must, in effect, make its stand on the narrow ledge of a

79 Ghislain Otis, "La Protection Constitutionnelle de la Pluralité Juridique: Le Cas de l'Adoption Coutumière Autochtone au Québec" (2011) 41:2 RDG 567 at 604.

80 Mills, *supra* note 78 at 857.

81 Robert M Cover, "The Supreme Court 1982 Term Foreword: *Nomos* and Narrative" (1982) 97:4 Harv L Rev 4 at 33–35.

82 See generally Mark D Walters, "Histories of Colonialism, Legality and Aboriginality" (2007) 57 UTLJ 819. My friend, Paul McHugh, says I am a "common law seminarian": PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011) at 308. I doubt this was meant as a compliment — but I take it that way.

distinctive style of legal interpretation evidenced, but hardly monopolized, by a certain view of common law method.

The reconciliation reading is not an obvious one; it does not draw upon Justice Monk's reasoning directly, but rather on assumptions and ideas that are implied by his reasons. Perhaps the best way to explain this reading is to recall the dilemma faced by Samuel Monk. Monk, a deeply religious man who appears to have accepted Roman Catholicism, had to decide whether a Cree marriage between a man and a Cree woman was valid or whether the subsequent Roman Catholic marriage between that man and a Euro-Canadian woman was valid. Although William and Julia had both by this time died, the implications for the surviving members of the families were profound. No matter which side Justice Monk favoured, one of William's relationships would be held to be illicit and the children of that relationship illegitimate. The impact for that side to the dispute would, by the standards of the time, have been one of moral and social disgrace.

Justice Monk described the plaintiff, John Connolly, as the "obscure and stigmatized offspring" of William and Susanne who came forward "to vindicate his mother's memory and honor, and his own rights."[83] However, Justice Monk may have been aware that the result in the case would also impact the other members of the family, including John's sisters, one being a nun in the Red River colony and the other being Lady Amelia Douglas, the wife of the governor of British Columbia. Although Amelia declined to join as a party to the case, the litigation had drawn public attention to her own status and caused her considerable anxiety; she appears to have withdrawn from public life in a state of depression between the trial and appeal decisions in the case.[84] Of course, William and Julia's children would presumably have felt the very same kind of anxiety. Indeed, given the judge's own religious and social views, we might have expected him to side with Julia's memory, honour, and family over Susanne's memory, honour, and family. But he did not. Why?

There is no indication in his reasons that Monk sought to save the social standing of a nun in Red River or a governor's wife in British Columbia; but there is some evidence of his broader concern about the practice of so-called country marriages. The relationship between William and Susanne was not

83 *Connolly*, *supra* note 3 at para 168.

84 Marion B Smith, "The Lady Nobody Knows" in Reginald Eyre Watters, ed, *British Columbia: A Centennial Anthology* (Vancouver: McClelland and Stewart, 1958) 472 at 479-80. See also Sylvia M Van Kirk, *The Role of Women in the Fur Trade Society of the Canadian West, 1700-1850* (PhD Dissertation, Queen Mary College, University of London, 1975) at 305 [unpublished].

an isolated event. This kind of relationship defined the reality for a segment of British North American society that had developed over the previous century and a half or more. If fur traders were to abandon their "country wives," as they were called, on the grounds that they were not really "wives," what did that say about the moral character of Canadian society? It would mean that thousands of relationships, sexual relationships that produced children, were extramarital. This, Monk could not contemplate. In an important passage he wrote:

> The evidence shows conclusively that [Susanne's] status was that of a lawful wife, and not that of a harlot…The status of the Indian was not that of his concubine. I am not here to give expressions to loose social views of relationships such as these among which the [defendant] seeks to class Connolly's marriage to the Indian. … I am called upon to administer the law, and not to enforce popular views on these subjects… This [is] one way of doing things [referring here to the assumption by some fur traders that they could simply abandon women and families]! but the sooner this is checked the better; and the sooner these men understand that such outrages upon law and religion will not be sanctioned by our Courts, the more probability there is that such irregular practices will be discontinued.[85]

Victorian morality could not contemplate a section of society living outside the accepted norms of human behaviour. True, Monk accepted that country marriages might be repudiated in the northwest; after all, the custom of the country would define both the formation and the termination of such relationships.[86] But ending a lawful marriage is very different from leaving an unmarried partner. Furthermore, if a fur trader re-entered Canadian society without first ending a country marriage, his marriage would be acknowledged in Canadian law. "[I]t was not competent…for Mr. Connolly to carry with him th[e] common law of England to Rat River in his knapsack," wrote Justice Monk, "and much less could he bring back to Lower Canada the [Cree] law of repudiation in a bark canoe."[87] His basic point was that these marriages were *lawful* marriages in the place where they were celebrated *and* wherever the spouses moved, but they could be dissolved only according to the law of the place where the dissolution was desired. In this way, the judge could maintain the moral standards of his own society.[88] It was no doubt painful for Justice

85 *Connolly*, *supra* note 3 at para. 162.

86 *Connolly*, *supra* note 3 at para 159: "If this Cree marriage was dissolvable at pleasure, Mr. Connolly could perhaps have repudiated his Indian wife, had he done so while residing among the Crees, or where such a barbarous usage prevailed. He might have done so then, if he could do so at all--but when he came to Canada, that right ceased."

87 *Connolly*, *supra* note 3 at para 44.

88 *Cf* Bethany Ruth Berger, "After Pocahontas: Indian Women and the Law, 1830 to 1934" (1997) 21 Am Indian L Rev 1 at 43: "Justice Monk…was unique in placing the impact of this clash of cultures on the member of the insider culture rather than on the outsider. He recognized that marriage to an

Monk to rule that Julia's relationship with William was extra-marital. He did his best to explain that this conclusion did not reflect badly upon her character. He paid tribute "to the cultivated intellect and feminine virtues of the amiable lady whose name and position figure so conspicuously in this unhappy case."[89]

The base of the decision, then, is a *moral* vision about human relationships, one that insists upon the presence of a *normative* structure for the formation, development, and dissolution of these relationships, and, indeed, one that insists that this normative structure be a *legal* structure. Implicit within Justice Monk's reasoning, in other words, is the view that *morality* demands *legality*. True, the specific moral vision here is a decidedly Victorian vision of gender, marriage, family, sex, and sin, a moral vision that may be difficult to understand or appreciate completely today. For that matter, one must concede that this moral vision seems to offer very infertile ground for a *redemptive* reading of the law that would somehow further the ideals of reconciliation. Where, then, is my promised reconciliation interpretation of the case?

It is, I think, staring at us. Justice Monk is saying, in effect, that the moral integrity of human relationships (not just marriages or families but relationships generally) demands a social bond secured through law, and that social and political realities may be such that the only law capable of meeting this moral necessity is the law of a local community; in this case, an Indigenous people or nation. True, the social and political reality that led him to conclude that Cree law structured relationships in Athabaska in 1803 was the reality that no other law was actually capable of serving this function. "There were then," he wrote, "no houses except within the forts, no villages, no colonies, no plantations, no civilized settlements, no political or municipal limits, circumscription or institutions, in most of these places; there were no Courts of law, and pearcely any law, except the will of the trader, *and the native customs and usages of the Indians*."[90] The native customs and usages of the Indians supplied the law that the moral imperative for normative order required.

In time, alternative laws would be introduced into the northwest, as they already had been in other parts of Canada, that were *effective*, in the sense that there were officials and courts on the ground ready and able to impose them on Indigenous peoples. The question, then, is whether the principle underlying the *Connolly* case, the principle that the moral integrity of human relation-

Indian woman did not absolve the white man from the moral obligations which underlie the legal obligation not to simply abandon a wife of thirty two years."

89 *Connolly*, *supra* note 3 at para 168.

90 *Connolly*, *supra* note 3 at para 174 [emphasis added].

ships demands normative order through law, is a principle that can be satisfied through just any law that is, in this narrow sense, effective, or whether it means something more. I think it means something more. What did Charles Fox mean when, in the debates Justice Monk quoted, he said that it would be "ridiculous" to apply English law to Muslims and Hindus in British India? He meant, I think, that even if British authorities had the capacity to enforce English law, it would be wrong for them to try. Judicial statements in relation to India reveal why: it would be inappropriate to extend to one set of distinctive cultures the law of another culture.[91] The language used in relation to French-Canadian law in Québec, noted above, is equally instructive. It would have been *absurd* and *tyrannical* to impose a new law upon a people with an established law. It would, in other words, introduce a degree of irrationality and arbitrariness inconsistent with the basic demands of normative order that we now associate with the rule of law. Respect for the rule of law in a culturally diverse setting will mean respect for some form of legal pluralism. This is a simple idea that can be seen to animate at least some judicial interpretations of the *Connolly* case. It would be "monstrous," one judge said, to interpret legislation introducing English law into the northwest as extending to marriages between Indians so long as they remained "unchristianized" and "adhere to their own peculiar marriage custom and usages."[92] If the principle that the moral integrity of human relationships demands normative order through law is to be meaningful at all, it must be honoured equally for all peoples.[93] The rule of law cannot be selectively honoured.

But the forced imposition of alien laws upon Indigenous peoples in Canada did occur, and the effects have indeed been monstrous. It is beyond the scope of this essay to say how this wrong should be addressed. It is certainly not my contention that the answer will be found in the *Connolly* case. However, some general lines of thought that might guide us on this question have emerged from the discussion so far. Our consideration of the relationship between the Cree ideas of *wikihtowin* and *wahkohtowin* suggests that if the principle concerning the moral imperative of normative order means that Indigenous law

91 *The "Indian Chief"* (1801), 3 C Robinson 12 (as English law was "not applicable to the religious or civil habits of the Mohamedan or Hindoo natives" in India, they were "allowed to remain under their own laws" at para 31), 165 ER 367 (HC Admiralty); see also, *Freeman v Fairlie*, [1828] UKPC 2, 1 Moo Ind App 306 at 324-325; *Advocate General (Bengal) v Ranee* (1863), 2 Moo PCNS 22 at 60, 15 ER 811.

92 *R v Nan-E-Quis-A-Ka* (1889), 1 Terr LR 211 at 215, 1889 CarswellNWT 14 (WL Can).

93 *Cf* Gregg Strauss, "The Positive Right to Marry" (2016) 102 Va L Rev 1691 (there is a fundamental or inherent legal right to marry "because only law can create a system of equal intimate liberty" at 1765).

must be recognized in certain situations, then it is not laws or sets of legal rules or norms as such that must be respected but the interpretive practice or what Mills calls the "lifeworld" through which normative community is experienced that must be respected. Jeremy Webber has expressed this point clearly: "We should not aim to protect a predetermined body of norms…We should respect that order's practices of normative deliberation and decision making — the processes by which normative claims are discussed, disagreement adjudicated…and the resultant norms interpreted and elaborated."[94] Law is, as Webber observes, simply the interpretive practice of critical reflection and discourse about what normative traditions, practices, or customs really mean. To understand the potential for and character of "normative dialogue across legal orders," Webber continues, requires that we adopt a stance of humility and accept that different cultures will engage in the interpretive practices that instantiate law in markedly different ways.[95]

How might someone schooled in common law method do this? In thinking about inter-cultural legal dialogue, we should not discount entirely the value of resources found within particular traditions that might be shared by other traditions. Common law concepts like "crown", "state" and "sovereignty" may obscure deeper common law practices of interpretive discourse that may offer a richer sense of constitutionalism — an "ancient constitutionalism"[96] or a "humanist" constitutionalism.[97] These interpretive practices may suggest, in particular, that instead of assuming that law's authority emanates from some extra- or supra-legal source, like a sovereign person or body, we may see law as generated from within its own distinctive styles of explanation and justification. On this view, law's authority is something that we must demonstrate to each other by showing how the various legal rules, principles, values, institutions and arrangements that have developed, including distinct legal traditions valued by the different communities that find themselves, for better or worse, connected with each other, can be understood to be more than just an arbitrary jumble of contingent facts — even if this means an on-going attempt at refining the specific or concrete rules or institutions we accept and refining the general account of moral principle we think they instantiate to show some kind of balance or equilibrium. On this jurisprudential view, then, we would see law's authority as established through an explanation or interpretation about

94 Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 at 170.

95 *Ibid*. Also on dialogue between legal cultures, see Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill LJ 579 at 593.

96 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

97 Mark D Walters, "Legal Humanism and Law-as-Integrity" (2008) 67:2 Cambridge LJ 352.

relationships that reveals a sense of coherence within or between the various and distinctive aspects of normative order that a pluralistic society must acknowledge. This explanation would seek to show that these aspects of order cohere in light of a more general value of legality premised upon the equal respect due amongst and between communities as to the moral imperative of normative order. This is, of course, a circular interpretive process of discourse and justification — but the circle is, we may say, a "virtuous" one.[98]

One advantage of seeing law in this circular or interpretive sense is that it is released from the imperialistic impulse to locate a sovereign root for law's existence.[99] Indigenous law is acknowledged not because it has been incorporated within another law, or because it has been impliedly (or expressly) accepted or sanctioned by a sovereign king or parliament, but rather because it is one of many bodies of law that can be shown to fit together in a manner that best reflects the equal moral imperative for normative order. Though Webber may hesitate on this point, I think that it is possible, in this way, to see how laws can be reconciled, or at least reconcilable, despite deep cultural differences, to reveal a unified constitutional structure. Indigenous law matters not because it can be traced back in linear fashion to some (non-Indigenous) constitutional foundation, but rather because it emerges within a network of interlocking and connected legal domains that secure equally for each related community the moral imperative of normative order. Different legal traditions can fit together in this way, but on this view normative unity is understood in a circular or interpretive sense rather than in a linear or positivist sense and, in this distinctive way, legal unity and pluralism are reconciled.

I appreciate that this third reading of the old case of *Connolly v Woolrich* is only sketched here in general terms, and that its soundness will be open to many questions and doubts by others. I offer the reconciliation reading, then,

98 As Nelson Goodman observed in relation to coherence theories of moral reasoning, which are related to legal coherence theories: "This looks flagrantly circular…But this circle is a virtuous one." Nelson Goodman, *Fact, Fiction, and Forecast* (Cambridge: Harvard University Press, 1954) 63-64. For more detailed discussions, see Mark D Walters, "The Unwritten Constitution as a Legal Concept" in David Dyzenhaus & Malcolm Thorburn eds, *The Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) at 33; Mark D Walters, "Deliberating about Constitutionalism" in Ron Levy et al eds, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018) at 167.

99 Mark D Walters, "'Looking for a Knot in a Bulrush': Reflections on Aboriginal and Crown Sovereignty" in Patrick Macklem & Douglas Sanderson, eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) at 35. It may be an approach that offers one way to "decolonize law": Sheri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 CJLS 145 at 60.

as a suggestion about one possible perspective that might be developed in our on-going efforts to imagine reconciliation between the fundamentally distinct legal cultures that exist in Canada. Of course, even if plausible, this legalistic reconciliation can only be one part of the ideal of reconciliation towards which Indigenous and non-Indigenous peoples in Canada continue to work. I will close, then, simply by saying that when the old case of *Connolly v Woolrich* is re-read in a way that captures a spirit of legality that might attract allegiance from diverse peoples, its 150th anniversary may be worth celebrating — and, indeed, perhaps it gives us one more small but important reason to celebrate Canada's 150th anniversary.