Northwest Territories Eenjit
Dagwidįį'è' Tr'igwahtsii
Geenjit Nadhat Kat"

MEETING RIA 07-19-21

SPECIAL COMMITTEE ON RECONCILIATION AND INDIGENOUS AFFAIRS
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MAY 14, 2021
COMMITTEE ROOM 'A' - YELLOWKNIFE, NT
1:00 PM

AGENDA

1. Prayer
2. Review and Adoption of Agenda
3. Declarations of Conflict of Interest
4. Public Matters:
    a) Presentation: United Nations Declaration on the Rights of Indigenous People with Dr. Joshua Nichols, Assistant Professor, Faculty of Law
5. In-Camera Matters:
    a) Committee Business
6. New Business
7. Parking Lot
8. Date and Time of Next Meeting: Wednesday, May 18, 2021 at 10:00 AM
9. Adjournment

Introduction

Territorial Acknowledgement: I would like to acknowledge that I am speaking to you from Treaty 6 traditional territory and I would also like to thank the Special Committee for inviting me to speak today.

Given that the fact that speakers you have heard from thus far have focused the majority of the attention on UNDRIP and that you will soon have the benefit from Professor Gunn's expert advice; I will be focusing my attention on the relationship between s. 35 and UNDRIP. I will do this by taking a historical and contextual approach to the development of reconciliation in the case law and to its relationship with s. 91(24) of the *Constitution Act, 1867*. I will begin by unpacking what the Court in *Sparrow* referred to as the constitutional "background" and show how the presuppositions that structure the s. 35 case law are reliant on the colonial era legal fiction of discovery. In short, while Canada may well be the leader in developing a constitutional

doctrine of Aboriginal rights, this doctrine is foundationally flawed and in need of a principled remediation.

From this basis I will then move onto a more detailed account the prospective implementation of UNDRIP and the implications for the current interpretations of Aboriginal law. I will then conclude by outlining some of the guiding principles that could help us move beyond the colonial limitations of the existing understating of reconciliation.

The Foundations of Aboriginal Law

The Canadian courts have struggled—and continue to struggle—with the legacy of colonialism. There are a series of cases that have relied on colonial legal doctrines that diminish the legal standing of Indigenous peoples by appeal to a hierarchy of civilizations. In these cases, the courts recognize the colonial version of Crown sovereignty, which allows them to posit that the assertion of Crown sovereignty strips Indigenous peoples both their political existence and their lands and leaves them with a box of rights.

This constitutional model of reconciliation is unable to meaningfully progress because it presents us with a narrative where Indigenous peoples are magically transformed into a cultural minority on their own territories by the mere assertion of European sovereignty. This is not the only model of reconciliation that the courts have developed, but it is one that we do need to honestly and openly account for if we want to move towards an understanding of reconciliation that is based on the forms of mutual recognition that we can see, however imperfectly, in the process of treaty making.

Over 30 years ago in *Sparrow*, the Supreme Court has recognized that section 35(1) of the Constitution Act, 1982, "represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights" (Sparrow at 1105). Despite this the Court went on to hold that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to

such lands vested in the Crown" (Sparrow at 1103). This statement establishes the "background" that allows the Court to reconcile "federal power" under s. 91(24) with the "federal duty" that is recognized and affirmed in s. 35.

The obvious problem with this "background" is there no legal explanation for the disappearance of Indigenous sovereignty and this brings it into tension with the Court's prior rejection of colonial doctrines that dimmish the legal capacity of Indigenous peoples.

For example, as Justice Dickson stated in 1985 in *Simon v. The Queen* the colonial doctrines of civilizational hierarchy that Justice Patterson relied on in *R v Syliboy* "reflect the biases and prejudices of another era of our history" and that "[s]uch language is no longer acceptable in Canadian law." (Simon v. The Queen, [1985] 2 SCR 387 at 399).

The thin (to the point of being nonexistent) basis for the "background" the Court articulates in *Sparrow* is apparent when we consider the precedents

the Court relied on: the 1823 decision of the US Supreme Court in *Johnson v M'Intosh*, the *Royal Proclamation of 1763* and three specific pages from the Supreme Court of Canada's 1973 decision in *Calder*.

The citations do not provide a clear and stable foundation for the Court's articulation of Crown sovereignty.

It is not clear, for example, the precise principle the Court cites *Johnson v M'Intosh* as supporting. Certainly, it would be a stretch to suggest that Johnson stands for the proposition that Indigenous peoples lost all sovereign and self-governing authority over their territories upon European 'discovery' and that such discovery subject them to unfettered Crown regulatory authority. Yet, this seems to be the precise sense in which the *Sparrow* Court uses the case.

Further, as anyone familiar with Federal Indian Law in the United States knows, *Johnson v M'Intosh* is the first case in the Marshall Trilogy and

lays out a version of the doctrine of discovery that the subsequent two cases go on to reject.

In addition, the specific pages cited from *Calder* include Hall J's move from *Johnson v M'Intosh* to *Worcester v Georgia* and Judson J's statement that the origin of title does not come by way of European recognition, but the fact "that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."

Despite this fact the Canadian courts have continuously interpreted s. 91(24) in a way that unilaterally excludes Aboriginal peoples from the division of powers and subjects them to the concurrent jurisdiction of both Parliament and the Legislatures. This unilateral exclusion has no legitimate historical basis and it has served to inform the approach that the Court has taken to the interpretation of treaties, the *Indian Act*, as well as the test for the infringement of rights and title. This unilateral exclusion is clearly evident in recent decisions. For example, in *Tsilhqot'in Nation* it can be seen in both the

continuation of the unilateral right of infringement and the removal of the doctrine of interjurisdictional immunity from Aboriginal title lands, which results in overlapping provincial and federal jurisdiction, leaving no meaningful room for Indigenous jurisdiction.

There is another way of reading s. 91(24), namely, as a power to negotiate with Indigenous nations as *equal partners in confederation* and an obligation to honor existing agreements regarding Indigenous lands. The notion of Indigenous peoples being in an equal partnership with the Crown is not a new one, in fact, it was a recommendation that the Royal Commission of 1664 made to Charles II.

The possibility of this alternative interpretation of s. 91(24) highlights the problematic foundations of the Court's current approach to s. 35. If we turn our attention to the foundation of the Court's interpretation of s. 35 in *Sparrow* (the very first case to interpret s. 35) we see that the Court's unquestioning assumption of Crown sovereignty, legislative power and

underlying title necessarily entails that the Court is holding Indigenous peoples in a sovereign-to-subjects relationship on the basis of nothing more than unilateral proclamation. By interpreting s. 91(24) as "federal power" over Indians and their lands the Court magically transforms Indigenous peoples into subjects. The only possible basis for this reading is a pernicious and racist set of 19th century European legal fictions (i.e., the doctrine of discovery and *terra nullius*).

We would do well to remember that it is the *Sparrow* Court that introduces the term "reconciliation" into the case law. But, we need to ask ourselves what exactly is being reconciled here? They take two provisions of two constitutional documents separated by 115 years and with the magical words "never any doubt" they manage to maintain s. 91(24) as "federal power" and convert s. 35(1) into a paternalistic "federal duty" to be managed and mediated by the Courts. This is the foundation of the so-called "full box of rights" approach to s. 35.

If the "background" set out in Sparrow is simply accepted, we are driven to conclude that the Crown has sovereignty, legislative power and underlying title, whereas s. 35 provides *Charter-like* protections a *sui generis* species of rights. This seems to fit with the Court's claim in the *Secession Reference* that s. 35 is an example of Canada's long tradition of protecting the rights of "minorities".

But this conclusion begs the question of what exactly happened to Indigenous sovereignty. In order to backfill this omission the courts have either recharacterized the treaties as surrender agreements or simply adopted colonial era legal fictions (like the so-called doctrine of discovery) to diminish the legal capacity of Indigenous peoples and thereby pave the way for the Crown's unilateral assertion of sovereignty as having the effect of locking Indigenous peoples into a constitutional straightjacket that they can only leave if they are able to avail themselves of democratic institutions that were imposed upon them.

Neither of these options provide a solution to the problem, rather they add in the troubling notion that the courts are providing the color of legality to the Crown's unilateral assertion of sovereignty over Indigenous peoples. Such a move necessarily brings us into what Professor David Dyzenhaus has referred to as a grey hole in the constitutional order. It is concerning not only because of the negative effects it has had on Indigenous peoples but also on the form of sovereign authority that it necessarily attributes to the Crown—that is a mysterious prerogative power that enables the executive to declare sovereignty over other peoples and thereby dissolve their national character without being subject to judicial review. This is the kind of absolute sovereign authority that both the *Glorious Revolution of 1688* and later the *American Revolutionary War* in 1775 were reacting against and this rejection forms the core principles of the constitutional tradition that Canada has inherited. Simply put, the stakes of simply accepting the background of *Sparrow* at face value are nothing less than the meaning of the rule of law.

This box of rights conception of s. 35 is by no means the only available approach to Indigenous-Crown relations. In fact, I argue that by removing the colonial legal fictions that persist within s. 91(24) the legal paradigm of the Indigenous-Crown relationship shifts from *Charter-like* rights to jurisdiction within a federal division of powers. This also has the benefit of being an interpretive move that is squarely within the purview of the Supreme Court. As the "guardians of the constitution" they are tasked with interpreting its provisions and so, they cannot claim that they require a new provision from the legislative branches. Rather, they bear the full responsibility of retaining a reading of s. 91(24) that can only be grounded on colonial legal fictions. By providing a realistic interpretation of the nature of federal power under s. 91(24) the Court could no longer rely on it to treat s. 35 as if it were within the *Charter* and therein subject to either the reasonable limitations imposed by s. 1 or the provincial override of s. 33. This paradigm shift from contingent rights to jurisdiction is indeed a realistic possibility as the Court

can draw from its own reasoning in the *Secession Reference* and *Manitoba Language Rights* to reset the relationship. This is what the Prime Minister's rhetoric of the *nation-to-nation* relationship should mean, as RCAP argued and as Indigenous peoples have consistently maintained for the last 250 years. And it is precisely this struggle that the UNDRIP legislation that you are contemplating could play a role in.

UNDRIP Implementation

With the "background" of *Sparrow* in mind I would like to now turn our attention to what role UNDRIP implementation could play in removing colonial presuppositions from the process of reconciliation. In order to provide you with an overview of my approach I will need to start by providing some basic context.

On May 10th, 2016, Canadian Indigenous Affairs Minister Carolyn Bennett addressed the Permanent Forum on Indigenous Issues at the United Nations and officially endorsed UNDRIP, without the qualifications attached

by the previous government. She further stated that Canada intends "…. nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution." This is a distinct shift away from the previous government's approach to UNDRIP, which held it to be "aspirational".

On September 21st, 2017 Prime Minister Justin Trudeau addressed the United Nations General Assembly and reiterated this commitment. He took this opportunity to point to the many legacies of colonialism in Canada. As he put it,

> The good news is that Canadians get it. They see the inequities and they're fed up with the excuses and that impatience gives us a rare and precious opportunity to act. We now have before us an opportunity to deliver true meaningful and lasting reconciliation.

While we could dismiss this statement on its own as a continuation of the status quo of the current judicially mediated process reconciliation this is not necessarily the case. In fact, this status quo interpretation is distinctly countered by the Prime Minister's insistence that the basic norms of UNDRIP are not "aspirations", but rather they will be used to guide the process of

reconciliation, they provide, in his words, "a way forward." As the Prime Minister noted in his speech,

> We are in uncharted territory. No one has paved the way for us, but we cannot wait. The time has come for us to pave the way together. The time has come to get off the beaten path, to move away from old outdated colonial structures and to establish new structures which will respect the inherent right of indigenous people to govern themselves and to determine their future.

What this should clearly signal is that the language of law and policy relating to reconciliation in Canada is entering a period of sudden and potentially dramatic change.

On November 28th, 2019 the Province of British Columbia passed Bill 41 or the Declaration on the Rights of Indigenous Peoples Act. This legislation implements the United Nations Declaration of the Rights of Indigenous People (UNDRIP) as Provincial law. Bill 41 is modeled on proposed federal legislation, which was first introduced by Romeo Saganash as a Private Member's Bill C-262 on April 21st, 2016 and ultimately died on the order paper in the Senate. We are told that a new federal legislation is

now in development, but it is clear that we are now entering uncharted territory.

The actual meaning of this change hinges on the question of what implementation in accordance with the Canadian Constitution actually looks like. At this point it seems that there are two possible approaches to implementation.

My aim here will be to outline these two possible approaches, examine their underlying assumptions and suggest that the way forward is to stop seeing s. 35 as a "full box of rights" and start seeing it as jurisdictional in nature. I will then conclude by pointing to how this nation-to-nation approach to Canadian federalism is a more adequate reflection of the last 250 years of Indigenous-Crown relations.

A) Status Quo or Reconciliation via the Sparrow Framework

In the same 2016 speech Minister Bennett also stated that s. 35 of the Constitution Act, 1982 provides a "robust framework" and a "full box of

rights". This could be read as a signal that the current Sparrow framework, with all of its unilateral principles and doctrines, will be used to restrict the content of UNDRIP. If this is the case, then it seems that, from the perspective of the federal government, the "box of rights" is already full and the change of policy little more than a slight shift of emphasis. This approach is grounded on the Supreme Court's existing interpretation of the relationship between s. 35(1) and s. 91(24). As I have already noted the foundation of this "full box of rights" approach is little more than unilateral assertions and a collection of citations from *Johnson v. M'Intosh*, the *Royal Proclamation of 1763* and *Calder,* which all connect back to the doctrine of discovery.

Given these unstable foundations what would occur if UNDRIP implementation was used as a way of maintaining the status quo? Naturally, any answer to this question at this point in time will be speculative as we do not know the specific legislative approach that the federal government will take. Some scholars have already begun to raise questions of the

compatibility of the basic principles of UNDRIP with the existing jurisprudence and their conclusions point to significant problems. The only thing that we could say for certain is that if the government elects to take the status quo approach the recondite complexity of the current s. 35(1) jurisprudence will only increase.

At the moment the so-called "full-box of rights" subdivides roughly into rights, title, treaties and the duty to consult and accommodate. Each one of these areas is beset by thorny jurisprudential questions from the question of the possibility of commercial or unlimited rights (*Ahousaht*), the problem of provincial jurisdiction (*Tsilhqot'in Nation*), the interpretation of treaties (*Grassy Narrows* and *Chief Mountain*), to cumulative effects, and delegation (*Clyde River* and *Chippewas of the Thames*). The process of litigating claims via s. 35(1) is costly, procedurally complex and uncertain. Even cases in which the Court seems to offer a clear decision the practical outcomes of that

decision may well be marginal (*Gladstone*) or so delayed that the actual value of the process itself is undermined (*Ktunaxa*).

It is difficult to see who exactly benefits from a process of litigation that takes decades to resolve any given conflict and then results in decisions whose jurisprudence is so dense and convoluted that the only certainty it can deliver is the promise of further litigation to work on the new legal knots it has tied. This "full box of rights" does not offer the kind of procedural clarity and legal certainty that the government's promises to third party proponents nor does it serve the Indigenous peoples who struggle with dreadful environmental and socio-economic problems. The only real beneficiary of the existing convoluted system of multi-layered consultative processes, secretive MOUs, and the production of voluminous expert reports, are the experts, consultants and lawyers who operate it.

I am not suggesting that these various professionals are unnecessary to the solution to the problem of the Indigenous-Crown relationship. I am, after

all, included in their number. Rather, if the process itself is demonstrably failing to deliver on even its most basic aims (namely, procedural clarity, legal certainty and improving the everyday reality of Indigenous peoples) then it is about as productive as an expedition guided by a blank map. As I see it, there is no need to bother asking whether this box is full or empty, it is simply the wrong kind of box altogether.

The real path to reconciliation—that is the one that is not circular—is the one that leads to a *nation-to-nation* relationship. This is more than a change in language, it is a change in the legal-political paradigm from rights to jurisdiction and this is precisely where UNDRIP implementation can offer a real way forward.

B) Nation-to-Nation Federalism

The first point that we need to be cognizant of is that UNDRIP does not introduce the possibility of a shift to an inherent jurisdictional approach to Indigenous-Crown relations. The roots of this approach extend back over 250

years to the *Peace and Friendship Treaties* in the early 18th century, to *Royal Proclamation 1763* and the *Treaty of Niagara 1764* (we can refer to this model as Treaty Federalism or, following John Borrows, as Canada's Indigenous Constitution) and continue past confederation even as the rights based approach becomes the dominant model in the mid-19th century. The practices of Treaty Federalism persist to this day in the practices of treaty making and negotiated settlements. The jurisdictional approach also surfaces in a number of key government reports. Immediately following the patriation of the constitution in 1982 the *Penner Report* recommended that the proper approach to s. 35 was for the federal government to "occupy and vacate" s. 91(24) to clear jurisdictional space for Indigenous self-government.[1] They also clearly indicated that the rights based solution of devolving powers to municipal like Indigenous governments "fails to take account of the origins and rights of Indian First Nations in Canada" and they presciently warned

[1] Parliament of Canada, Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (Ottawa: Ministry of Supply and Services, 1983) at 3 (hereinafter the *Penner Report*) at 46.

that litigation in the Supreme Court was not the best possible solution as the procedure is "difficult to execute and uncertain in its outcome."[2]

The question of where the Indigenous right of self-government fits into the constitution was also slated to be resolved in the constitutional conferences following 1982, but the failures of the Meech Lake and Charlottetown accords has left this as the unfinished business of the Canadian constitution. This point is forcefully driven home by the recommendations in the *Report of the Royal Commission on Aboriginal Peoples* in 1996 and again in the Final Report and Calls to Action of the *Truth and Reconciliation Commission* (TRC) in 2015.[3]

The point of this summary is that UNDRIP does not introduce the possibility of a jurisdictional approach to s. 35. Rather, UNDRIP offers a set of tools that help us to see what has been taking place within Canada over the last 250 years.

[2] Ibid, 45-47.
[3] Truth and Reconciliation Canada. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

Implementation should not be understood as simply making an international legal instrument conform to the existing confines of the Canadian constitution. It should be seen as an opportunity to reconsider the fundamental presuppositions about the relationship between Indigenous peoples and the Canadian constitution. Put differently, UNDRIP is not the source of this shift from rights to jurisdiction; it simply provides a set of tools to help move the existing nation-state model to the diverse federalism that Indigenous peoples have consistently advocated for and patiently practiced for the last 250 years.

This point is clearly driven home by the TRC in the Final Report. They recommended that Canada move beyond the old sovereign-to-subjects framework and adopt the current international norms expressed in UNDRIP. The Commission forcefully reminds us that,

> The Doctrine of Discovery and the related concept of *terra nullius* underpin the requirement for Aboriginal peoples to prove their pre-existing occupation of the land in court cases in order to avoid having their land and resource rights extinguished in contemporary Treaty and land claims processes. Such a

> requirement does not conform to international law or contribute to reconciliation. Such concepts are a current manifestation of historical wrongs and should be formally repudiated by all levels of Canadian government.[4]

This is a clear and direct rejection of the absolute interpretation of s. 91(24) and the framework of reconciliation that has been built upon it. It is a rejection of the racist fictions of international law that continue to inform the interpretation of Canada's constitutional order. They continue,

> We are not suggesting that the repudiation of the Doctrine of Discovery necessarily gives rise to the invalidation of Crown sovereignty. The Commission accepts that there are other means to establish the validity of Crown sovereignty without undermining the important principle established in the Royal Proclamation of 1763, which is that the sovereignty of the Crown requires that it recognize and deal with Aboriginal title in order to become perfected. It must not be forgotten that the terms of the Royal Proclamation were explained to, and accepted by, Indigenous leaders during the negotiation of the Treaty of Niagara of 1764.[5]

This constitutes a re-positioning of the basis for the legitimacy of Crown sovereignty from the racist fictions of discovery and *terra nullius* to the processes of mutual agreement and consent that are found in the histories of

[4] *Ibid,* Vol. 6, at 32-3.
[5] *Ibid.*

treaty making. This also necessarily shifts Indigenous peoples from being wards who are subject to unlimited sovereign power to being *peoples* in a nation-to-nation relationship with the Crown.

We can think of this as being a change from conceiving of Canada as a unitary nation-state with a ridged unilateral version of sovereignty to being a nation-to-nation federal state whose concept of sovereignty is, and has always been *flexible and shared* (even if only honored in the breech).

The current Canadian government is making clear steps towards realizing this shift from a sovereign-to-subjects rights-based approach to a nation-to-nation jurisdictional approach. The legislative adoption of UNDRIP is one step towards returning to real, meaningful reconciliation. It helps by move forward in two interrelated ways. First, the contrast and tension between UNDRIP concepts like self-determination and free, prior and informed consent and our domestic jurisprudence allows us to have more meaningful debates over the future of reconciliation. This contrast helps to

highlight the continued reliance on 19th century colonial fictions in Canadian domestic law, which have managed to hide in plain sight because they are so familiar that many have failed to even account for them.

Second, it reminds us that Indigenous peoples and the Crown share sovereignty. The nature of this partnership is described in the final Report of the Royal Commission on Aboriginal Peoples, vol. 2, as "shared" sovereignty at pp. 240-41

> "Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government."

The concept of "shared sovereignty" is instructive as it helps to clarify what the Court in *Sparrow* meant when it stated that the relationship between the Crown and Indigenous peoples is "trust-like, rather than adversarial"[6]. The clarification is provided by the fact Indigenous peoples are sovereign "by virtue of their constitutional status rather than by delegation." Justice Binnie rightly summarizes the nature of the concept of "shared sovereignty" in *Mitchell* as being "partnership without assimilation."[7]

This is the other side of our s. 35 jurisprudence, it is founded on the principles of mutual recognition and consent. I think it is helpful to remember that the Supreme Court has stated that the concept of the honor of the Crown recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies[8] by imposing "a heavy obligation" on the Crown to reconcile with Aboriginal peoples as equals in

[6] Sparrow, at 1108
[7] Mitchell v. M.N.R., [2001] 1 S.C.R. 911 at para. 130
[8] R. v. Van der Peet, [1996] 2 S.C.R. 507, at para. 248, per McLachlin J., dissenting; cited with approval in Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14 at para. 67.

confederation.[9] The substantial meaning of this equality is based in the fact that the assertion of Crown sovereignty must be reconciled with the fact remains that Aboriginal peoples were here first, and they were never conquered.[10] Thus, the terms "occupation" and "trust-like" cannot be understood as diminishing the status of Aboriginal peoples as sovereign peoples, to do so would be to conflate partnership with assimilation.

The concepts from UNDRIP thus do not interduce the notion of "consent" into Canadian law, they remind us of the fact that it has always been a part of our constitutional history. And if we are sincere in our desire to confront the hard truths of our colonial history and move towards meaningful reconciliation, it is the version of our constitution that is built upon the guiding principles of treaty making that we will need to follow.

[9] Ibid, para. 68
[10] Haida Nation, at para 25