FROM RECOGNITION TO RECONCILIATION

Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights

EDITED BY PATRICK MACKLEM AND DOUGLAS SANDERSON

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Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights

More than thirty years ago, section 35 of the *Constitution Act, 1982*, recognized and affirmed "the existing aboriginal and treaty rights of the aboriginal peoples of Canada." Hailed at the time as a watershed moment in the legal and political relationship between Indigenous peoples and settler societies in Canada, the constitutional entrenchment of Aboriginal and treaty rights has proven to be only the beginning of the long and complicated process of giving meaning to that constitutional recognition.

In *From Recognition to Reconciliation*, twenty-three leading scholars reflect on the continuing transformation of the constitutional relationship between Indigenous peoples and the Canadian state. The book features essays on themes such as the role of sovereignty in constitutional jurisprudence, the diversity of methodologies at play in these legal and political questions, and connections between the Canadian constitutional experience and developments elsewhere in the world.

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Introduction: Recognition and Reconciliation in Indigenous-Settler Societies

PATRICK MACKLEM AND DOUGLAS SANDERSON

On a clear day in early May 1990, two dozen black-gowned lawyers expectantly rose as one as the justices of the Supreme Court of Canada filed into the courtroom to render judgment in *R v Sparrow*.[1] The lawyers had reason to be attentive. *Sparrow* was the first decision of the Court to interpret section 35(1) of the *Constitution Act, 1982*, which provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 35 was included in the constitutional reforms that ushered in formulas to amend the Constitution of Canada without the approval of the Parliament of the United Kingdom of Great Britain and the *Canadian Charter of Rights and Freedoms*. Lower courts across the country had offered a range of conflicting views on its nature and scope. Whatever the outcome, the Supreme Court of Canada's decision would have significant consequences for the constitutional relationship between Aboriginal peoples and the Canadian state.

At issue in *Sparrow* was the constitutionality of federal fishing regulations imposing a permit requirement and prohibiting certain methods of fishing. The Musqueam First Nation, located in British Columbia, had fished since ancient times in an area of the Fraser River estuary known as Canoe Passage. According to anthropological evidence at trial, salmon is not only an important source of food for the Musqueam but also plays a central role in Musqueam cultural identity. The Musqueam regard salmon as a race of beings that had, in "myth times," established a bond with humans, which required the salmon to come each year to

1 *R v Sparrow*, [1990] 1 SCR 1075.

give themselves to humans, who in turn treated them with respect by performing certain rituals. The Musqueam argued that the federal fishing requirements interfered with their Aboriginal fishing rights and, as a result of section 35(1), were invalid.

In jointly authored reasons by Chief Justice Dickson and Justice La Forest, a unanimous Court held that the constitutional recognition of Aboriginal and treaty rights "renounces the old rules of the game" and "calls for a just settlement for aboriginal peoples."[2] The Court found for the Musqueam nation and held that Aboriginal rights recognized and affirmed by section 35(1) include practices that form an integral part of an Aboriginal community's distinctive culture. If such rights existed as of 1982 – that is, if such rights had not been extinguished by state action before 1982 – then any law that unduly interferes with their exercise must meet relatively strict standards of justification. Specifically, such a law must possess a valid legislative objective, and any allocation of priorities after implementing measures that secure the law's objective must give top priority to Aboriginal interests. The Court also indicated that in future cases it might require that such laws infringe the right in question as little as possible, and that infringements be accompanied by fair compensation.

Understanding Aboriginal and treaty rights as constitutional checks on the exercise of the sovereign authority of the Canadian state, as the Court proposed in *Sparrow*, no doubt changed "the rules of the game." Yet what these changes mean in terms of the constitutional relationship between Aboriginal peoples and the Canadian state remain matters of deep contestation. In *Sparrow*, the Court was quick to declare that "while British policy towards the native population was based on respect for their right to occupy their traditional lands, ... 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."[3] Although Aboriginal and treaty rights check the exercise of sovereign power, they do not, according to the Court in *Sparrow*, challenge the constitutional validity of sovereignty itself.

Constitutional recognition of Aboriginal peoples and the fact of Canadian sovereignty was subsequently described by the Court as a

2 *Ibid* at 1105–06, quoting Noel Lyon, "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall LJ 95, at 100.

3 *Ibid* at 1103.

relationship in need of "reconciliation." In *R v Van der Peet*, the Court was faced with a claim by the Sto:lo First Nation that it possessed an Aboriginal right to engage in commercial fishing. In developing a general approach to the interpretation of Aboriginal rights, Chief Justice Lamer, for a majority of the Court, stated, "With regards to s. 35(1), ... what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of aboriginal peoples; it must identify the basis for the special status that aboriginal peoples have within Canadian society as a whole."[4] In Chief Justice Lamer's view, constitutional recognition of existing Aboriginal and treaty rights is based on the "simple fact" that "when Europeans arrived in North America, aboriginal peoples were already here, living in distinctive communities on the land, and participating in distinctive cultures, as they had done for centuries."[5] The purpose of section 35(1), in his opinion, is twofold: to constitutionally recognize the fact of prior Indigenous presence in North America and to reconcile this fact with the assertion of Crown sovereignty over Canadian territory.

One way the Court has sought to reconcile constitutional recognition of a prior Indigenous presence with Canadian sovereignty is to extend constitutional protection to Indigenous territories in the form of Aboriginal title. In *Delgamuukw v British Columbia*, hereditary chiefs of the Gitksan and We'suwet'en nations claimed Aboriginal title to 58,000 square kilometres of the interior of British Columbia. The Gitksan sought to prove historical use and occupation of part of the territory in question by entering as evidence their *adaawk*, a collection of sacred oral traditions about their ancestors, histories, and territories. The Wet'suwet'en entered as evidence their *kungax*, a spiritual song or dance or performance that ties them to their territory. Both the Gitksan and Wet'suwet'en also introduced evidence of their feast hall, in which they tell and retell their stories and identify their territories to maintain their connection with their lands over time. The trial judge admitted the above evidence but accorded it little independent weight, stating that, because of its oral nature, it could not serve as evidence of a detailed history of extensive land ownership.[6] He concluded that ancestors of the Gitksan and Wet'suwet'en peoples lived within the

4 *R v Van der Peet*, [1996] 2 SCR 507, at 537.
5 *Ibid* at 538 [emphasis deleted].
6 *Uukw v R*, [1987] 6 WWR 155, at 181 (BCSC).

territory in question prior to the assertion of British sovereignty, but predominantly at village sites already identified as reserve lands. As a result, he declared, the Gitksan and Wet'suwet'en did not own or possess Aboriginal title to the broader territory.[7]

On appeal, the Supreme Court of Canada ordered a new trial. Although its reasons for doing so were predominantly procedural, it took the opportunity to provide a definition of Aboriginal title that swept away many of the procedural and substantive hurdles Aboriginal people faced in their attempts to obtain legal recognition of their rights to ancestral territories. Specifically, the Court held that Aboriginal title is a communally held right in land and, as such, comprehends more than the right to engage in specific activities that may themselves constitute Aboriginal rights. Based on the fact of prior occupancy, Aboriginal title confers the right to exclusive use and occupation of land for a variety of activities, not all of which need be aspects of practices, customs, or traditions integral to the distinctive cultures of Aboriginal societies. The Court held further that the trial judge erred by placing insufficient weight on the oral evidence of the Gitksan and Wet'suwet'en: "[T]he laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[8]

Another way the Court has sought to reconcile the fact of a prior Indigenous presence with Canadian sovereignty is to conceive of treaties between Indigenous peoples and Canada as instruments of reconciliation, in *R v Sioui*.[9] The respondents in *Sioui* were members of the Huron band on the Lorette Indian reserve in Quebec. They were convicted of cutting down trees, camping, and making fires in a provincial park, contrary to provincial legislation. They alleged that they were engaged in ancestral customs and religious rites protected by a treaty entered into by the Huron and the Crown in 1760. Justice Lamer held for the Huron and offered a broad interpretation of the treaty's provision for "the free Exercise of [the Huron] religion, [and] their Customs."[10] Because the text of the treaty makes no mention of the territory over which treaty rights may be exercised, Quebec argued that the treaty right did not extend to activities performed in park territory.

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7 [1991] 3 WWR 97, at 383 (BCSC).

8 *Delgamuukw v British Columbia, supra* at 1069.

9 [1990] 1 SCR 1025.

10 [1990] 1 SCR 1025, at 1074.

Justice Lamer held that this issue had to be resolved "by determining the intention of the parties ... at the time it was concluded."[11] He acknowledged the possibility of different interpretations of the parties' common intention and stated that the court must choose "from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests" and those of the Crown.[12] Justice Lamer was of the opinion that "the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons at the time, so long as the carrying on of the customs and rites is not incompatible with the particular use made by the Crown of this territory."[13]

These early efforts by the judiciary to comprehend Aboriginal and treaty rights as instruments of reconciliation have been refined in subsequent jurisprudence by the Court. But the Court's contributions, however refined, do not exhaust the meaning of recognition and reconciliation in Indigenous-settler societies. "Recognition" can and often does connote many different meanings in the context of Indigenous-settler relations. It can refer simply to the moment of constitutional entrenchment, a meaning underscored in the Canadian context by the text of section 35(1) itself. But recognition is a variable concept. Recognition can occur in a wide range of contexts outside of the constitutional sphere – most notably, as a political act – and constitutional recognition itself can assume different forms. One of these forms is recognition of a constitutional pluralism, an acknowledgment of a plurality of constitutional orders within the boundaries of Canada. Indigenous peoples, from before contact and to this day, constitute political and legal orders, exercising lawmaking authority over territory and people. The extent to which section 35(1) recognizes this complex fact of constitutional pluralism is critical to the evolving relationship between Indigenous peoples and the Canadian state.

"Reconciliation" also admits of many different interpretations. For our purposes, it plays the primary role of a constitutional objective ascribed primarily by the judiciary to the entrenchment of Aboriginal and treaty rights. "The reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown," according to the Court,

11 *Ibid* at 1068.
12 *Ibid* at 1069.
13 *Ibid* at 1070.

is the underlying "purpose" of constitutional recognition of Aboriginal and treaty rights.[14] Reconciliation thus is a juridical concept developed by the judiciary to ascribe meaning and purpose to recognition. But it too carries a richer meaning. Reconciliation implicates acts and processes that seek to bring justice to Indigenous-settler relations in a host of legal, political, social, and methodological settings beyond the constitutional context of these relations. And what constitutes reconciliation, of course, is a matter of deep political contestation.

Each chapter in this collection, in its own way, explores recognition and reconciliation. Yet, while each is unique in its contribution, five central themes animate the collection as a whole. The first is the role that the concept of sovereignty occupies in constitutional jurisprudence relating to Indigenous peoples and Canada. Constitutional norms possess the capacity to unsettle the concept of Canadian sovereignty and to engage with concepts of Indigenous sovereignty. To the extent that Indigenous societies were sovereign nations prior to contact, and at least remnants of their sovereignty remain in the wake of Canada's emergence as a sovereign state, how are we to understand the nature of Canadian – and Indigenous – sovereignty today?

Patrick Macklem's chapter describes an ethos of constitutional pluralism in early encounters between Indigenous peoples and colonists in New France and British North America that failed to take root as an organizing principle for the relationship between Indigenous legal orders and the Canadian state. He identifies legal and political developments that replaced this ethos of legal pluralism with its antithesis: a monistic account of sovereignty, with decidedly non-Indigenous sources of legal authority initially grounded in British law and subsequently in the Constitution of Canada. Macklem then identifies three developments that could form a foundation for a resurgence of an ethos of legal pluralism. Two are occurring inside Canadian law, looking out to Indigenous legal norms for validation. The third is occurring beyond Canadian law and is not necessarily looking in to Canadian legal norms for validation.

Mark Walters highlights judicial resistance to questioning traditional conceptions of sovereignty and considers theoretical and practical reasons for doing so. He acknowledges that there are good reasons in legal principle for why judges might resist hearing challenges to the legal existence

14 *R v Van der Peet*, [1996] 2 SCR 507, at para 31.

of the Canadian state by Indigenous peoples. However, he also argues that, in certain circumstances, inquiry into the legality of Crown sovereignty may be an essential part of completing the task of building the Canadian state. According to Walters, most claims for Aboriginal rights do not represent existential challenges to Canada at all, and "Crown sovereignty" is invoked to obscure what is really just a balancing of Indigenous and non-Indigenous interests. If Aboriginal rights are sui generis, as courts have ruled, then it would appear that the judicial conception of Crown sovereignty in Aboriginal rights cases is equally sui generis. It is time, therefore, to dismantle the idea of Crown sovereignty with a view not to challenging but defending the ideal of legality in Canada.

In contrast, Jeremy Webber argues that judicial reluctance to engage with questions about Indigenous and Canadian sovereignty may have salutary consequences by permitting the accommodation of divergent interpretations of the location of sovereignty. He calls for an "agnostic constitutionalism," which brackets fundamental disagreements about Canadian and Indigenous sovereignty, "so that divergent positions on these fundamental issues might be permitted to persist in the medium or even long term, without those questions having to be decided once and for all." He develops these claims by engaging with four different conceptions of sovereignty vying for constitutional attention and exploring the role that conceptions of sovereignty have played in practical decision-making, both within and outside the courts.

Brian Slattery's contribution focuses on what the judiciary, notwithstanding its relative silence on questions relating to sovereignty, has said about the purpose of section 35. Slattery argues that by assuming that the two goals of recognition and reconciliation can be advanced by a single set of legal principles, the Court has gone astray. He recommends the formulation of two sets of principles: principles of recognition and principles of reconciliation. The former would enable courts to identify the full range of rights held by Indigenous peoples at the time they entered into settled relations with the Crown, that is, historical Aboriginal rights. The latter would govern the process of translating historical rights into contemporary rights. Although courts play the leading role in applying principles of recognition, they play a lesser, though still crucial, role in principles of reconciliation. Reconciliation cannot be imposed by judicial fiat – no matter how well-intentioned. As such, principles of reconciliation provide the legal framework within which a modern settlement of Indigenous claims may be achieved by treaty between Indigenous peoples and the Crown.

The second theme of this collection of essays is the methodologies at play in legal and political questions involving Indigenous peoples. Legal and political questions involving Indigenous peoples and the Canadian state raise complex methodological and epistemological questions about how particular categories and ways of understanding shape the development of constitutional norms and the boundaries of political possibility. Constitutional law offers several different potential paradigms for understanding Indigenous-state relations. Beyond the constitutional realm, epistemological assumptions about the nature of individual and collective identities shape and arguably constrain our capacity to make sense of Indigenous difference. Indigenous knowledge offers dramatically different categories and ways of understanding. What does "reconciliation" mean in the context of methodological and epistemological contestation?

Paul McHugh's contribution identifies the emergence of a loose intellectual consensus regarding "common law Aboriginal title" in the decade before the enactment of section 35. He argues that consensus replaced an older method of comprehending Indigenous-settler relations in terms of a "political trust" with what purported to be a form of property that appealed to a most intensively common law principle based upon longevity of possession. By the mid-1990s, as courts – not only in Canada but in Australia and New Zealand as well – amplified the proprietary dimensions of Aboriginal title and rights that section 35 recognizes, the doctrine's limitations as a constitutional mechanism for the structuring of Indigenous-settler relations became evident just as its retrospective gaze – and revisionist character – became even more pronounced. According to McHugh, more recent developments in all three jurisdictions do not discard the proprietary paradigm but add to it a reconceptualized notion of the "honour of the Crown." This has given section 35 a constitutional function beyond that of a reaffirmation of the proprietary paradigm that was already a hallmark in 1982.

Like McHugh, Dale Turner examines the common law character of the constitutional dialogue on the meaning and content of section 35(1). He notes that, when in Canadian courts, Indigenous peoples must articulate their arguments in the language of the common law when seeking constitutional justice in Canadian courts. Turner contends that, since 1982, Indigenous knowledge and ways of thinking have been "re-configured" in profound ways. Indigenous knowledge has come to be understood and valorized in two different, but related, contexts. First, there are the forms of Indigenous knowledge that are