CREATING CONSTITUTIONAL SPACE FOR INDIGENOUS PEOPLES: CANADA'S AMBIVALENCE

(Draft)

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1. INTRODUCTION

A. THESIS

In my talk, I would like, first, to give a brief overview of where things stand in relations between indigenous and non-indigenous peoples in Canada. Although it will be brief, I hope that my overview and analysis will bring to light some of the problems and concerns connected with Canada's efforts to create constitutional space for its indigenous peoples.

Stated very abstractly, let me say that I shall - again, briefly - argue and conclude that Canada's recent focus in constitutional law on the difference and diversity of indigenous peoples to the near exclusion of things they share in common with non-indigenous peoples is both a departure from its earlier legal tradition and a narrowing of the legal space formerly available to indigenous peoples.

B. WHERE I WORK AND LIVE

I live and work in Vancouver, British Columbia, Canada. I am an associate lawyer with the law firm, Peter Grant and Associates. We represent indigenous people, including indigenous governments, exclusively. I practice mainly in the area of constitutional law.

Canada is a federal state. It has 10 provinces and 3 territories. Bordering the Pacific Ocean, British Columbia is the western-most province. British Columbia's land area (944,735 sq. km) is almost twice the size of Spain's (504,782 sq. km). Its population (around 4.2 million) is less than 1/10* of Spain's (around 46 million). This year, 2008, marks the 150th year since British Columbia's founding as a

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British Colony.

2. SECTION 35 OF *CONSTITUTION ACT, 1982*

The *Constitution Act, 1982* initiated a new era in the history of Canada's constitution and thus a new era in the history of Canada itself. Section 35 of the 1982 Act signaled Canada's commitment to building a new relationship with its indigenous peoples (i.e. aboriginal peoples). Section 35
says:

> 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

I would like to draw your attention to and elaborate on a few things in this text before proceeding to my main discussion.

First, Section 35(2) says that the aboriginal peoples whose rights are protected by Section 35(1) include the Indian, Inuit and Metis peoples of Canada. Unlike many in the United States who still call themselves Indians or American Indians, Indian peoples in Canada prefer to be called "First Nations". First Nations peoples live in nearly every region of Canada except the far north, where the Inuit live. The origin of the Metis is found in the early stages of the fur trade in Canada. First French, and then to a lesser extent Scottish and to an even lesser extent English and other male fur traders took up with First Nations (or sometimes Inuit) women, remained in the country, and raised families. In some places, most notably in Manitoba, communities with distinctive cultures arose, neither First Nations nor

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French nor Scottish, etc.

Second, the rights protected by Section 35 are of two kinds: aboriginal and treaty rights. Stated simply, aboriginal rights are rights arising from aboriginal peoples' prior occupation of Canada - that is, prior to European contact[1], the Crown's assertion of sovereignty[2], or the Crown's effective control,[3] as the case may be. Treaty rights are rights contained in treaties negotiated with the Crown. Treaties in Canada mainly concerned the formation of military alliances, the restoration of peace after hostilities, and the surrender of aboriginal rights to/on lands in exchange for certain Crown promises, such as the reservation of parcels of land protected from the encroachment of settlers and ongoing hunting and fishing rights on lands not taken up for settlement or other purposes. Section 35(3) is concerned with the future negotiation of treaties of the latter kind.

The earliest treaties were negotiated with First Nations peoples. All of the historical treaties, that is, treaties signed roughly before 1930, are with First Nations peoples. There are a small number of modern treaties, about one dozen, beginning in the 1970s, with most concluded within the past decade. In British Columbia, a handful of treaties were negotiated on Vancouver Island in the 1850s. In these treaties, the First Nations gave up their rights to certain parcels of land in exchange for, among other things, promises that they could continue hunting and fishing as they had formerly. In 1901, the federal Crown concluded a treaty with First Nations whose territories included the northeastern quadrant of British Columbia. In the past decade, three other treaties have been concluded. What this means - and it is important to note for purposes of this

[1] ' Aboriginal rights of First Nations and Inuit peoples, such as hunting and fishing rights, must trace their origin to pre-contact, that is, to prior to their contact with Europeans. The time of contact varies across Canada, roughly from the 1500s to the 1900s.
[2] Aboriginal title, which is an exclusive right to the occupation and use of the land, must trace its origin to the Crown's assertion of sovereignty. Again, the time of the Crown's assertion of sovereignty varies across Canada. Regarding British Columbia, the prevailing view is that the Crown asserted sovereignty over the general area in 1846. Aboriginal title is an aboriginal right under Section 35(1). It is now somewhat customary in Canadian legal/academic circles to rely on context to indicate whether we are speaking of aboriginal rights so as to include aboriginal title or so as to exclude it. In any case, Section 35(1) is taken to include aboriginal title.
[3] The aboriginal rights of Metis peoples, again such as hunting and fishing rights, must trace their origin to pre-control, that is, to prior to when Europeans achieved political and legal control of the area.

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paper - is that most of the land in British Columbia is still subject to the aboriginal rights of the Province's First Nations peoples.

The final thing to note is that the rights protected by Section 35(1) are collective rights. An aboriginal right is a right held by an aboriginal people. For example, the Gitanyow people, whose ancestral territory is in north central British Columbia, claim aboriginal title to their lands. (Indeed the Supreme Court of British Columbia has confirmed that they have a strong claim to title.[4]) Although it requires Gitanyow individuals to act upon their title, it is the Gitanyow people to whom the right belongs.

The remaining portion of my paper is focused on Section 35(1). For the sake of convenience, I shall henceforth speak simply of Section 35 rather than Section 35(1). I trust this will cause no confusion.

3. MAGNITUDE OF THE TASK

As I stated earlier, Section 35 of the *Constitution Act, 1982* signaled Canada's commitment to building a new relationship with its aboriginal peoples. And as the words of the provision suggest, this new relationship is to be built upon the Canadian state's recognition and affirmation of the aboriginal and treaty rights of Canada's aboriginal peoples. Something important left unsaid by the provision is that the Canadian state's history of ignoring, disrespecting, and sometimes even denying the aboriginal and treaty rights of aboriginal peoples - and the ever present consequences of this history for aboriginal peoples and Canadians - gave rise to the need for Section 35's constitutional imperative.

For those unfamiliar with the particulars, including, sadly, many Canadians, it is important to gain some sense of the magnitude of the commitment undertaken by the state in 1982.
There are 60-80 historically based indigenous nations in Canada. These nations

[4] ¡***Error.r Solo el documento principal*** *Wii'litswx* v. *British Columbia (Minister of Forests),* 2008 BCSC 1139.

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divide into 1000 or so local communities or "bands". Roughly 50% of these bands are in British Columbia. The number of bands in British Columbia reflects the fact that at the time of Spanish and English contact in the late 18th century, the area was the most densely populated region north of the Mexico City area. The population - later decimated by the introduction of European diseases - was sustained by the abundance of sea and river life and in particular by the wild Pacific salmon. The diversity of the population is reflected in the fact that 11 distinct indigenous languages exist within the Province.

The Supreme Court of Canada has rejected a one-size-fits-all approach to the rights of Canada's aboriginal peoples. Thus the rights recognized and affirmed by Section 35 are the rights of particular aboriginal peoples, with their own particular cultures, traditions, and histories. In consequence, no two aboriginal peoples needs occupy the constitutional space afforded by Section 35 generally, in exactly the same way or to the same extent.

4. ABORIGINAL RIGHTS AND THE COMMON LAW

The constitutional space potentially occupied by any given aboriginal people is proportionate to their rights as recognized and affirmed in Section 35. This is true for both aboriginal and treaty rights. Here I wish to focus on aboriginal rights.

The doctrine of aboriginal rights existed prior to the *Constitution Act, 1982.* To understand the doctrine, it is helpful to know that the British Crown recognized that North America (and elsewhere) was already inhabited by independent indigenous nations, with their own institutions and laws. Because it did not look upon the land as *terra nullius,* it did not consider itself free to deal with the land with no regard for the prior occupants' claims. Indeed under English law, unless otherwise modified or abrogated, the institutions and laws of the prior occupants were to continue much as they were before the Crown's assertion of sovereignty over the people and their lands.[5]

Unfortunately, those responsible for upholding the honour of the Crown in British

[5] This is known as the doctrine of continuity.

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Columbia eventually adopted a contrary view. Although a few treaties were signed with First Nations peoples on Vancouver Island in the 1850s prior to the settlement and development of the areas, colonial authorities basically ignored the rights of the prior indigenous inhabitants after settlement of the Province began in earnest in the 1860s. For more than 120 years thereafter, successive colonial and then Provincial governments in British Columbia took the position that the First Nations peoples of the Province had no legal rights arising from their prior occupation and even if they did, their rights had been extinguished through colonial acts or instruments. It was only after being pushed by the courts, and especially by the Supreme Court of Canada, in the 1970s and 1980s that the Province began to modify its stance.

But to return to the main thread of my argument... in principle, those aboriginal institutions and laws compatible with Crown sovereignty were incorporated into the English common law. This meant that aboriginal institutions and laws could be recognized by the courts.

As the earliest example of such recognition by a court in Canada, let me mention the case of *Connolly* v. *Woolrich*[6]*.* This case, decided on July 9, 1867 - a mere 8 days after Canada's confederation, involved an estate of a man of European descent who, after leaving Quebec to work in the fur trade in the West, had married a Cree woman according to Cree custom in 1803. He later returned to Quebec, left her and married another woman in Quebec under Quebec law. The issue in *Connolly* was whether the marriage according to Cree customary law was valid under Canadian law. Having found that the marriage possessed three characteristics of marriage cognizable by Canadian law (that is, voluntariness, permanence, and exclusivity), the court concluded that the marriage was valid.

The *Connolly* case is a clear example of the potential for the incorporation and recognition of aboriginal institutions and laws into a dominant, overarching legal system. Unfortunately, this potential went largely unrealized in the subsequent history of Canada.[7]

[6] *Connollyv. Woolrich,* (1867), 17R.J.R.Q. 75.
[7] A few subsequent cases have confirmed the power of the common law courts to recognize aboriginal customary marriages and adoptions.

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Despite the common law's potential for recognizing a broad spectrum of aboriginal institutions and laws, aboriginal rights existing under the common law were always subject to Parliament's power to extinguish them at will.

5. ABORIGINAL RIGHTS AND THE CONSTITUTION

In its first decision dealing with the meaning and effect of Section 35, the 1990 *Sparrow* decision[8], the Supreme Court of Canada found that the constitutionalization of aboriginal rights in 1982 had protected them from the State's powers of extinguishment. Henceforth, they could only be extinguished with aboriginal consent. And although the State could still infringe such rights, it could do so only with proper justification.
The Supreme Court of Canada went on to say that the protection afforded to aboriginal rights by Section 35 had the immediate effect of providing "a solid constitutional base upon which subsequent [treaty] negotiations can take place."[9]

In its second opportunity to consider the meaning and effect of Section 35, the 1996 *Van der Peet* decision, the Supreme Court established a test for determining whether a "practice, custom or tradition" qualifies as an aboriginal right under Section 35. The Court formulated the test as follows: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition *integral to the distinctive culture* of the aboriginal group claiming the right."[10]

6. THE EFFECTS OF THE SHIFT FROM COMMON LAW TO CONSTITUTIONAL PROTECTION

The Supreme Court of Canada's adoption of the "integral to distinctive culture" test for determining whether a "practice, custom or tradition" is an aboriginal right under Section 35 is, I trust you can see, a noticeably more narrow approach to the

[8] /Error! Solo el documentoprincipalR. v. Sparrow, [1990] 1 S.C.R. 1075.
[9] *Ibid.,* at para. 53.
[10] *R. v. Van der Peet,* [1996] 2 S.C.R. 507 at para. 46.

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potential accommodation of aboriginal peoples, institutions, and laws under the common law.

By interpreting Section 35 are protecting only those expressions of aboriginal cultures that define them as distinctive, the Supreme Court in effect denied protection to features of their cultures shared by broader Canadian society. To put it another way, it drew a dichotomy between aboriginal and non-aboriginal practices, traditions, and customs which meant that "aboriginal culture and aboriginal rights ... [became] that which is left over after features of non-aboriginal cultures have been taken away."[11]

7. NEGOTIATED TREATIES — THE PREFERRED WAY OF FILLING CONSTITUTIONAL SPACE

- Supreme Court of Canada has repeatedly said that negotiations are the preferred way of resolving aboriginal claims and thus of defining an aboriginal people's constitutional space.
Justice -McLachlin who was writing in dissent from the majority decision.

- Treaties are the Court's preferred way for dealing with aboriginal people's prior sovereignty over the land and themselves, their institutions, their laws, their aboriginal rights generally.

- The problem has been that the Canadian state has shown little interest in negotiating treaties that go very far in reflect an aboriginal people's prior sovereignty, institutions and laws. The Court's narrow approach to aboriginal rights is part of the problem.

- In British Columbia, where treaty negotiations have been ongoing for more than a decade, most of the negotiations are stalled. A large number of First Nations refuses to enter into such negotiations.

[11] *Ibid,* at para. 154. The words are those of Madam Justice -now Chief

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8. THE ROOT OF THE PROBLEM

If one considers the loss of the potential - albeit insecure - space for aboriginal peoples under the common law an unfortunate and detrimental turn in the history of aboriginal and non-aboriginal relations in Canada, as I do[12], one may inquire as to what the Supreme Court of Canada's shift pivoted on.

In my opinion, its shift pivoted upon its focus on the fact that the peoples whose rights are protected by Section 35 are *aboriginal* to the near exclusion of the fact that the aboriginals whose rights are protected are also *peoples.* The incorporation of aboriginal institutions and laws into the common law was in recognition of the fact that these are the institutions and laws *of peoples* who were already inhabiting the land when Europeans arrived. At its most basic, to say that these peoples are aboriginal is just to say that they were already there.

One of the results of the Court's focus on *aboriginality* and thus difference to the exclusion of the fact that aboriginal peoples *axe peoples* as are, for example, the Quebec French, is that courts almost always deal with aboriginal rights as individual rights, despite their talk about collective rights.

9. ADVANCING ABORIGINAL INSTITUTIONS AND LAWS UNDER CURRENT JURISPRUDENCE

Difficult, challenging, but not impossible. Example:

- Wii'litswx: Gitanyow people - 7 forest licences - years of overharvest and inadequate reforestation
- Provincial government had a duty to recognize Wilp system and territories. Political and social organization, 8 houses, hereditary leadership, hereditary chiefs - tied to Ayookw - law - stewardship. Institutions: feasting - potlatch - poles - crests.

[12] In fairness, I should note, although I cannot go into it here, that the Supreme Court of Canada has slowly been walking away from the position it took in the *Van der Peet* case.

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- Duty to consult and accommodate - revenue sharing - linked to renewing Wilp system.
- We've managed to do this under Van der Peet test: First time -political structure, self-government; first time - duty re sharing economic benefit derived from their land and resources.
- Province will appeal the decision.

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