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Amar Bhatia

Osgoode Hall Law School, York University

Beverley Jacobs

Faculty of Law, University of Windsor

Jonathan Rudin

Aboriginal Legal Services in Toronto

Douglas Sanderson

Faculty of Law, University of Toronto

Mark Walters

Faculty of Law, McGill University

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Reconciliation and the Constitution: A Transcript of the Roundtable

Amar Bhatia, Beverley Jacobs, Jonathan Rudin,
Douglas Sanderson, and Mark Walters*

As described in the opening piece in this Volume of the *Supreme Court Law Review*, unprecedented national media and political attention was given to the relationship between Indigenous people and the Canadian state in 2016. As part of our conference, we asked a group of people to come together and talk about the future of the Constitution as a means or an obstacle to reconciliation with Indigenous peoples and First Nations in Canada. Amnesty International's most recent global report on the State of the World's Human Rights praised Canada's action regarding refugees, but then noted that "[c]oncerns persisted about the failure to uphold the rights of Indigenous Peoples in the face of economic development projects".¹ We asked our panelists about the connection between the rhetoric of reconciliation and the situation on the ground. Would the Court continue to play a significant role in the development of section 35 Aboriginal rights? Are these discussions likely to play out in courts, at constitutional amendment conferences, or in the political arena?

Generously contributing their thoughts and knowledge were, in alphabetical order, **Amar Bhatia**, who joined Osgoode's full-time faculty on July 1, 2014 after serving as a Catalyst Fellow and Visiting Professor at Osgoode for the 2013-14 academic year. He articulated and worked in union-side labour and employment law in Toronto before returning to graduate school, and his current work looks at issues of status and authority of migrant workers and Indigenous peoples under Canadian immigration law, Aboriginal law, treaty relations, and Indigenous legal traditions; **Beverley Jacobs**, now appointed to the University of Windsor

* Amar Bhatia, Assistant Professor, Osgoode Hall Law School; Beverley Jacobs, Assistant Professor, University of Windsor Faculty of Law; Jonathan Rudin, Program Director, Aboriginal Legal Services in Toronto; Douglas Sanderson, Associate Professor, University of Toronto Faculty of Law; and Mark Walters, F.R. Scott Professor of Public and Constitutional Law, McGill University.

¹ Amnesty International, *Amnesty International Report 2016/17: The State of the World's Human Rights*, 22 February 2017, available at: <<https://perma.cc/U6PY-RVNZ>>.

Faculty of Law. She lives and practices law at her home community of Six Nations of the Grand River Territory in Southern Ontario. For the past 20 or so years, much of her work has focussed on anti-violence work including advocacy for families of missing and murdered Indigenous women and girls and educating the public about the history and impacts of colonization, which has resulted in the historic traumas that are occurring to Indigenous peoples; **Jonathan Rudin**, hired in 1990 to Aboriginal Legal Services and has been with ALS ever since, now as Program Director. He co-wrote the Royal Commission on Aboriginal Peoples' report on Justice – Bridging the Cultural Divide – and was a member of the Research Advisory Committee of the Ipperwash Inquiry; **Douglas Sanderson**, on Faculty at the University of Toronto Faculty of Law, was managing editor of the inaugural edition of the *Indigenous Law Journal* in 2002 while a student. He went on to get his LL.M from Columbia University. Professor Sanderson is a member of the Opaskwayak Cree Nation, and he has been deeply engaged in Aboriginal issues from a policy perspective. Professor Sanderson's research areas include Aboriginal and legal theory, as well as private law (primarily property law) and public and private legal theory. His work uses the lens of material culture and property theory to examine the nature of historic injustice to Indigenous peoples and possible avenues for redress. Moving beyond the framework of common law property rights and constitutional land/treaty rights, his scholarship focuses on Aboriginal institutions, post-colonial reconciliation, and rebuilding community; and finally, **Mark Walters**, F.R. Scott Professor of Public and Constitutional Law at McGill University since 2016. He has been a full time legal academic since his appointment to the Faculty of Law at Queen's in 1999 and he researches and publishes in the areas of public and constitutional law, legal history, and legal theory, with a special emphasis on the rights of Indigenous peoples, institutional structures, and the history of legal ideas. In addition, Osgoode Hall Law **Dean Lorne Sossin** contributed his considerable talents as moderator.

We did not ask Panellists to submit papers for this Roundtable, but the issue is so critical, and the contributions so thoughtful, that we were determined to ensure the widest possible dissemination. What follows is a text produced from a transcript of the event. We sent each speaker the transcript of their portion and invited them to edit for clarity, and to provide references that might assist the reader who wants to learn more, before reassembling the whole for publication. Our hope is that what follows will help to inspire, provoke, and inform our ongoing

conversations about the practical and political meaning of “reconciliation” — and its relationship to our constitutional order.

Benjamin Berger & Sonia Lawrence, Editors of this Volume

Lorne Sossin: [A]s we bring this conference to its conclusion, to its crescendo, by giving time to the really remarkable group assembled for this last panel on the vexing and compelling issues around reconciliation. We’ve already heard a bit about that in the panel on *Daniels*, for those who were a part of that discussion, and of course the theme of Reconciliation circles around so many issues of importance to those gathered here today.

To join me in what will be a more conversational [and] interactive panel on the topic, we’ve assembled people from different perspectives and life experiences, but all who are wrestling with the common issues of where Reconciliation comes from, what it means, where it is going, and if it will take us where we need to go.

....

Beverley Jacobs: I am going to introduce myself in my language first. <Introduction in Cayuga>. What I said to you was “Greetings of Peace to You” in Cayuga language, which is one of the Six Nations which forms the Haudenosaunee Confederacy. I am Bear Clan from the Mohawk Nation, which is another one of the Six Nations. I practice law part-time and I live at the Six Nations Grand River Territory. I grew up in my community all my life and lived there until I went to law school. I want to share some experiences and I am going to try and be as quick as possible because I do not want to steal the stage from my co-panelists. But what I want to talk about is this issue about reconciliation; but it is more than reconciliation. It is about truth — the truth about the history of this place called Canada. Coming from Haudenosaunee culture and my upbringing, I was

raised very...politically, I guess you would say — raised very traditionally and spiritually within my longhouse tradition, and raised with chiefs and clanmothers and faithkeepers from the time I was born. And so, my experiences come from that.

In talking about the truth about this place called Canada: the history of Canada does not exist from 1867. It does not exist from the creation of the *British North America Act 1867*. In fact, the history of it goes way back. When we discuss the history of legislation and law or colonial laws and when we start talking about that history, our original history comes as a result of truth and reconciliation. Our relationship was about having peace with early colonizers—one of them was the British—and with the British, there was an early treaty relationship called the Silver Covenant Chain. It was our Haudenosaunee Leadership and the Colonial Leadership that came to this relationship, and it was about the land, and our relationship to the land and how we would share this land.

There were basic principles of this treaty relationship, and I always use these principles to also understand healthy relationships. There are very basic principles of a healthy relationship: friendship, peace, and respect. That was the original relationship that we were supposed to have. The British used an “Iron Chain” that represented this relationship and it was later changed to silver because they thought iron would rust. They wanted to make sure those links would not rust and fall apart. Then it was established later in the years as a Wampum Belt, the Covenant Chain.

All of that was built into this. [Bev raises and points to the Two-Row Wampum Belt]. I just want a show of hands to tell me if you know what

this is? Oh good, there are a lot. I am happy about that, because this represents Truth and Reconciliation: this is what we must return to. And this is what was based on those original principles of peace, trust, respect, and friendship. I won't explain the Covenant Chain, because that would require an additional 10 minutes, but the history of this Belt is about sovereignty. Haudenosaunee peoples have had a sovereign identity since colonization and our Leadership and our Confederacy have been very consistent in that message since colonisation. So, this vessel (on the belt) is a colonizer ship. Our Confederacy Leadership created this relationship first with the Dutch, then with the French, then with the British, and then with the United States. It was based on a Nation-to-Nation relationship, and that we would continue on this river of life not interfering with each other's ways based on those basic principles.

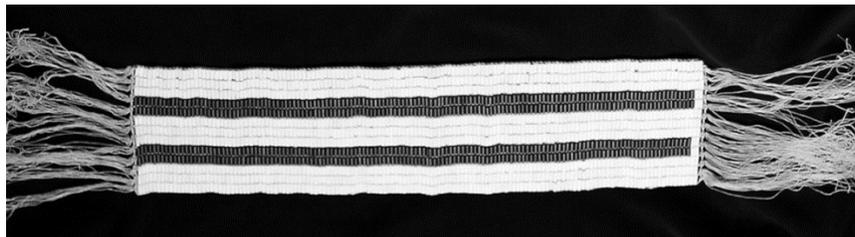


Figure 1: Two Row Wampum belt (Reproduction) Photograph by Nativemedia (Own work) [CC BY-SA 4.0 (<http://creativecommons.org/licenses/by-sa/4.0>)].

With respect to the *BNA 1867* and s 91(24) and its establishment: it was unilateral, it was colonial, and it reflected genocidal policies, and its creation was to annihilate us as a people. It was about controlling “Indians” and “lands reserved for Indians”. That is what was established under the *BNA 1867*, now called the

Constitution. All of the sudden we became wards of the Crown, where the Federal Government had control of us as “Indian People,” and controlled our lands and we became forced into their ship (on the wampum, belt). What has happened is that as a Confederacy, the Haudenosaunee Confederacy that still exists today... it is now a very thin line (on the wampum belt) compared to this (the line signifying the colonizer’s ship on the Belt) because we were never able to practice our own sovereignty and develop our own institutions that were part of that.

Who gave Britain the authority to do this? They violated the Two Row Wampum relationship immediately. And when you are violating a relationship, it is called violence. And so we have been in a violent relationship since colonization to this day: it has not ended, we are still in it. Because now we are forced into these legal institutions, and trying to define what that means within this colonial legal process and institution. So, part of this is understanding that: that is what I call truth. The truth of history. The truth of law. And if we are going to reconcile this relationship, that truth has to be understood, and it has to be respected.

Until we get to that point, we are going to continue to hash out what this all means, and we, as Indigenous peoples, are going to suffer, as we have suffered, as a result of those colonial racist policies. So that is my “spiel.” That’s how I am going to start this. Because that is what this is about: it is about truth. It is more than just reconciliation. We must be honest about that and the relationship that we have. For me, as an Haudenosaunee person who has now been trained in this colonial legal system, and I have been trained [also] in my own canoe, about my own laws and customs and language. And I know

what has happened. So, this is based on my own experiences, and I can speak the truth about that. So thank you. Nia:wen (Thank you).

Mark Walters:

We were asked to consider the Chief Justice of Canada's comment, that now is a constitutional moment of sorts where we need to figure out what it means to, as she put it, "reconcile interests of First Nations' interests with Crown sovereignty".

Bev has just mentioned sovereignty, but I think Bev had a different kind of sovereignty in mind than Crown sovereignty. It's important to note the formula that the Chief Justice used when making her suggestion concerning reconciliation. The formula, the passage that she's paraphrasing, was first used in the *Van der Peet*² case in 1996 as a way of explaining what the point of s 35 of the *Constitution Act, 1982* is: to reconcile the pre-existence of Aboriginal peoples with Crown sovereignty. This has always sounded to me a bit like reconciliation as resignation. Aboriginal peoples need to be resigned to the fact that they live under Crown sovereignty.

The Chief Justice has said other things about reconciliation at other times. In fact, in *Van der Peet* itself, she was in dissent, and she expressed reconciliation in an entirely different way: she said there must be a reconciliation of the diverse legal cultures of Aboriginal and non-Aboriginal peoples,³ which strikes me as a much better way of putting the point.

And, then, many years later, in the famous *Haida Nation*⁴ case, [at] paragraph 20, she says something very different again and much more in line with

² *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 (S.C.C.).

³ *Id.*, at para. 232.

⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.).

what Bev has in mind. She says the treaty process must be one about reconciling “pre-existing Aboriginal sovereignty with assumed Crown sovereignty”, that, in other words, “sovereignty claims” must be reconciled through “honourable negotiation”.⁵ Maybe that’s a more promising way to think about reconciliation than the way that she put it more recently, a way that, as mentioned, appears to have been drawn from the older *Van der Peet* case.

I know I only have a few minutes to start things off. I think there’s a slide that I’ll just refer to quickly. Since Bev was mentioning the Covenant Chain series of treaties, I thought it would be helpful to put up [referring to PowerPoint] an image of the two Wampum Belts given at the Niagara Treaty of 1764, which was one of many council meetings where the Covenant Chain was affirmed.

The imagery, I think, is quite remarkable. In both of [the] belts, the idea of linking arms or holding hands is emphasized, suggesting a conception of reconciliation and suggesting as well that reconciliation is hardly a new idea. It’s an ancient idea. My sense, although this is not something I’m qualified to speak about, is that reconciliation is deeply integral to Indigenous legal cultures. I think it’s also a concept that must be very deeply integral to the non-Indigenous conception of legality or the rule of law. Once we start thinking about the meeting of legal cultures, maybe reconciliation is the concept that allows the two cultures to come together in terms of their respective conceptions of law and legal relationships. So I’ll stop there for now.

⁵ *Id.*, at para. 20.

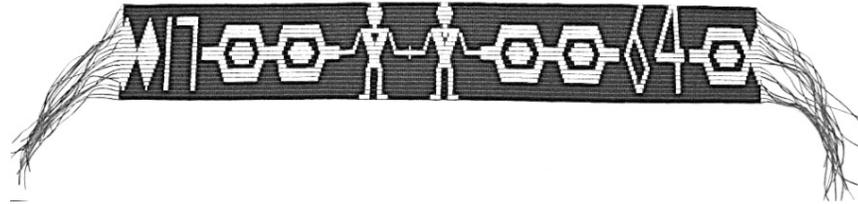


Figure 2: Photograph of replica of The Covenant Chain Wampum presented by Sir William Johnson at the conclusion of the Council of Niagara. This replica was commissioned by Nathan Tidridge and created by Ken Maracle of the Seneca Nation.

Lorne Sossin: Excellent. Thank you very much. Douglas, the question for you is, is this judicial creativity or are they making stuff up?

Douglas Sanderson: They are totally making stuff up. Ni-ti-ki-ni-son, Amo Binashe, amisk ni dodem. My Cree name is Amo Binashe, it means hummingbird, and I'm from the Beaver Clan of the Opaskwayak Cree. Go fighting Cree!

I want to begin by answering a question that I'm sure is on all your minds and the answer is yes, these chairs are a thousand times more comfortable. Literally, a thousand times.

Mark Walters: It's warm up here too!

Douglas Sanderson: Yeah. So, the idea of reconciling First Nations' interests with Crown sovereignty, I think highlights a contrast with what I think is the fundamental lesson that should have come out of the Truth and Reconciliation Commission's Report. And I think the Report makes clear that the chief injustice — the stealing and abusing children is of course terrible and awful — but the primary problem was the belief that Indigenous cultures were less valuable than settler cultures. That mindset underlay the policy of the residential schools.

What does it mean to believe that Indigenous cultures are as valuable as settler cultures? Well,

if we take that teaching seriously, then there are implications. One of the implications is that we have to look at the way Court continues to essentialize Indigenous people and Indigenous cultures. And we're going to talk more about that in the next round.

But the idea of sovereignty itself and the idea that the Crown is asserting sovereignty over Indigenous people is part of that essentialization of Indigenous people. McLachlin CJ says in *Tsilhqot'in*,⁶ the latest Aboriginal title case we have, that what the Crown is asserting is something she calls "radical title."⁷ And when she says this, there's no footnote about what radical title is. There is no commentary. There is no explanation. She just says that radical title is being asserted.

I went looking to figure out what radical title is and it's complicated but in Imperial history, what radical title is, is the right of a sovereign to assert sovereignty over a foreign territory. It does not give them the right to occupy the land but it gives them the right to create laws that give the land away.

Strangely, occupation has been at the core of civil law since, at least, Roman times—two thousand years. And at least since medieval times in the common law tradition, occupation of land is possession of land, and possession is the root of title at common law. We forget that when Europeans beg[a]n the period of exploration in the sixteenth and seventeenth century, it's also the time that they begin developing concepts of international law. How is it that European nations are going to interact with one another when they

⁶ *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257, 2014 SCC 44 (S.C.C.).

⁷ *Id.*, at paras. 12, 18, 69, 71.

encounter each other at the high seas and on distant lands? Occupation plays an essential role in the development of international law: it founds the foundational concepts of international law.

But what happens is that European Powers decide that occupation is something that they get to assume and that Indigenous people don't get to assume. And this is an idea that is not far off in our current day. If you remember back to the trial decision in *Delgamuukw*,⁸ there, McEachern CJSC felt that Indigenous peoples lived lives that were nasty and brutish and short; that they were too disorganized to have property rights... to have the ability to occupy their own lands and territories they've lived in for ten thousand years, because they weren't civilized enough to have laws that would allow them to fully occupy their land in the way the Europeans were able to.

And today's Court continues a version of this legal fiction. We're going to talk about that in the next round and how, I think, we can begin to address these legal fictions. Thanks.

....

Jonathan Rudin:

Thank you, Lorne. Thank you, Mark. So I'm going to talk about reconciliation in a slightly different way. And I'm going to say that I'm troubled by the way we use reconciliation in law. And I think we use reconciliation and I think it can obscure reality. So if you think about the TRC [Truth and Reconciliation Commission], as Douglas said, we are talking about an event or a series of events that were done. So, for the residential school — there is a legacy from the residential school. The TRC makes a number of recommendations, wonderful recommendations,

⁸ *Delgamuukw v. British Columbia*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.) [hereinafter "*Delgamuukw (Trial)*"].

that acknowledge the harm that was done by residential school and its legacy.⁹

And in the context of an act or a series of acts like residential school, we can think “Well, what do we do to reconcile that?” But the difficulty with the term reconciliation, as I hear it, and I think, people understand it, is: We did something, we Canadian non-Indigenous society, we did something — it wasn’t good, it still has its impacts, we have to try and fix it. That’s “reconciliation”. But that misses a whole set of things that are going on now. And I’ll start with a look at three Supreme Court cases that were not *Charter* cases: *Williams*,¹⁰ *Gladue*,¹¹ and *Ipeelee*.¹² And those cases all say that Aboriginal people face, in the criminal justice system, direct and systemic discrimination. That direct and systemic discrimination doesn’t arise from a thing. That’s not a circumstance of residential school. That’s an attitude that is held and behaviors that are undertaken by people in power.

If we talk about ... If we say “reconciliation”, that makes it sound like there was something that was done. It’s not something that was done, it is something that is — it is something that currently is happening. And when we talk about reconciliation as though we’re fixing something that happened, it makes it seem like something is not currently happening. It is currently happening.

We see it all the time. It is playing out in Saskatchewan in the *Colten Boushie* case.

⁹ Truth and Reconciliation Canada. (2015). 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.

¹⁰ *R. v. Williams*, [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, 159 D.L.R. (4th) (S.C.C.).

¹¹ *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, 171 D.L.R. (4th) 385 (S.C.C.).

¹² *R. v. Ipeelee*, [2012] S.C.J. No. 13, [2012] 1 S.C.R. 433, 2012 SCC 13 (S.C.C.).

I've spent a lot of time in Thunder Bay and Indigenous kids—Indigenous people in Thunder Bay—get things thrown at them when they're on the street, when they're going to school. That is not a thing that was, that is a thing that exists, it has always existed independent of anything that Aboriginal people, Indigenous people ever did. It's an attitude that needs to be confronted directly and sometimes, I think the term reconciliation obscures that reality and that's what I'll start with. Thank you.

....

Amar Bhatia:

Thank you. Thanks for also having me on the panel, where I feel highly unqualified, but here we go.

I just wanted to talk about a couple ideas of reconciliation as someone who's mostly interested in this topic from immigration law and refugee law [perspectives], and dealing with migrant worker issues as well. Also [as] someone who is a son of immigrants from India and the Philippines, I didn't automatically think about some of these issues dealing with title and treaties when I was here at law school at Osgoode.

Part of [what] my understanding about reconciliation has come to mean since then is going to *Delgamuukw* and the idea about reconciling with Crown sovereignty. Also there's the phrase that was at the end there, talking about how we're all here to stay¹³ and the idea that we are all stuck with each other. This resonated for me in the sense that for immigrant and migrant demands, there's often a demand for permanent status, for secure status to be here to stay. But that

¹³ *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 at para. 186 (S.C.C.) [hereinafter "*Delgamuukw*"].

kind of contrasts with these different ideas of reconciliation that are highly contested.

Part of the idea of reconciliation is to have respect for relations. Coming out of the TRC, in some definitions outside of the Court is to work towards respectful relations, maybe even ones characterized by peace, friendship, respect and trust. And that's a little bit different if you're thinking about who is here to stay, in the context of what other folks were mentioning, which is these permanent structures of colonial law, of criminal law that people are living with.

And there, I think there's a different idea, it's outside of law. The idea of settler colonialism, where it's relating with all of these areas of law. It has to do with the taking of land, the removal of people from the land, and then the replacement of those people by other people. So, if you look at law within the structure of settler colonialism, then you can kind of measure, I think, the comments and rhetoric about reconciliation: that is, to say, what is it [the State] doing about the land that was taken, what is it doing about the people who are removed from that land, and what is it doing in the context of the replacement of those people on those lands.

I guess there's a lot more to say about that, but we've also talked about sovereignty. Just to keep in mind, maybe when I come back in the second round. There's a few things you need for sovereignty in one definition of it, right? You have to have a defined territory, you have to have a permanent population, you have to have a government, and you have to have the capacity to enter into international relations.

You can look at any of those things through the lens of Aboriginal law and Indigenous law and see how they play out. If you're looking at it in

the context of defined territory, and the title decisions we've been talking about, either you would have title or you would have a treaty. Right? And that's supposed to be how you work towards reconciliation.

In terms of the permanent population, there's been talk about giving control back over membership determination, and that's where I'm interested in the immigration context. But it doesn't go to the level of allowing First Nations, for instance, to adopt folks who don't have Canadian citizenship or permanent resident status for that matter. So it sort of stays within the borders of the state sovereignty as to who can become a member, and I think that's one of the measures of whether or not you're having reconciliation that addresses settler colonialism. Because I don't think it was the case before, that Indigenous nations were limited in who might be an immigrant in the context of who might be a member. That's only something that the colonial state imposed that we continue through the *Citizenship Act*, the *Immigration Act* and the *Indian Act*.

Lorne Sossin:

Thanks, Amar. Thanks to all the panelists for getting started and I think where we are left as we move now to our second round of really where we can take the concept of Reconciliation — to what extent can it bring us to a better set of relationships, a better set of constitutional and societal outcomes? How can we come to terms with recognizing the problematic point of origin of Reconciliation in the colonial experience.

At the moment, we don't have a shared understanding of Reconciliation, or even what tense in which to speak of it: is reconciliation what we need to prepare for, or a process that is already underway? Is it something that is born of the very same presumptions and biases that animated the

colonial enterprise of asserting sovereignty or is it a process of reconciling sovereignty itself, peoples, communities, and individuals. Clearly the TRC process gives us a window into what is both going to be a personal and community, legal and social and interpersonal journey.

So, because Reconciliation can mean all those things, some have recognized that is an ideal vessel through which, to express all the different layers of relationships with Indigenous peoples, legal and otherwise, that need to be mediated. It will mean many things to many people. And that's why you'd be hard-pressed to find many people who disagree or oppose Reconciliation. What they disagree about is whether Reconciliation has any shared meaning, who should be doing the heavy lifting and where it's going to take us.

So, as we bring texture to where the concept of Reconciliation comes from (and not just the Chief Justice's statement, but this discourse that so dominates Nation-to-Nation politics and our Constitutional s 35 and other legal interpretations), we come back to the question of where should it go. This question brings us to the second round of questions. We'll stick to the same order.

Bev Jacobs:

Okay. Thank you. So, in my impassioned introduction, I talked about being raised in my "canoe," in the sense of understanding this relationship... because this is how I was raised, when I said I was raised politically. That's how strong our people have been — to continue to understand this relationship, which was also based on peace. Our Constitution is called the Great Law of Peace.

The Great Law of Peace enabled international law to occur because it brought together five, then later six, separate Nations.

And one of the principles of the Great Law of Peace was called the Tree of Peace. When it was planted, its roots were to spread, and anyone who was to find its roots and follow the source, they would be protected under the branches of the Great Law. And in our language, “onkwehonwe” means human being. It doesn’t mean that there’s a color. It means that we’re all human. Our laws are based on humanness and about human relationships and relationships with all the natural world.

Our Constitution, the Great Law of Peace, is very complex and it includes everything. There’s no separation between spirituality or healthiness or ceremony or leadership. It all encompasses the same thing. And so when we establish those relations with other Nations, we thought that was going to be the same way with the colonizers.

We have never forgotten or ever stopped believing that. It’s always been inherent in our relations to have peaceful relationships. And that’s what reconciliation is.

So whose responsibility is it? It’s all of our responsibility. When it comes to educating about this history — about how Eurocentric Canadian law is trying to reconcile Indigenous peoples within the [one] ship. And that’s difficult to do because it also is very complex when people are not educated about our history and who we are as a People. And that’s frustrating, it’s very frustrating. I’ve been in politics, in colonial Canadian politics as a leader of the Native Women’s Association of Canada, and sitting at political tables and talks with parliamentarians on the other side. They gave me ten minutes to meet and to have a conversation about the real history but most do not have a clue about the *Indian Act* or about the impacts of

colonization and where the sources of these genocidal policies have come from.

So that's the frustration. And then there's teaching. I have been teaching not only undergraduate level courses but in law school as well. In law school, students say "How come I didn't learn this before? How come I'm just learning about this now?" And so that's where the frustration and, hopefully, where this reconciliation comes into place in establishing peaceful relationships. That we're all on the same intellect, that we're all in the same way of thinking, because that's what our teachings have always taught us: to have one mind. That's what that meant. That we were all going to have one mind. We're all going to come into this room and we're all going to have that same intellect and reason to have peace.

So, it didn't just mean that we have peace as an individual and within our Nationhood, but rather that we think that you too have peace and that your Nationhood has peace. And so I wonder about that. I wonder about that understanding of what peace means and what peaceful relationships means. That's where my response to the Chief Justice and the comment of [reconciling] First Nations interests with Crown sovereignty comes in. We're not a special interest group. That's been out of Canadian Law for a long time. We're not a special interest group, and that's what Canadians think. Canadians think that we're a minority group with special interests. That's not the truth.

The truth is that our lands and our nationhood have been stolen away as a result of colonial law. And that law was used as a tool of assimilation and that law was based on colonial and genocidal policies. That's the truth. So part of this whole process was coming to an understanding about these laws and policies. I had to come to peace with that as a Haudenosaunee person. And so,

how do we bring this relationship back? It's like returning back to this healthy relationship of peace, trust and respect. Our teachings are very simple.

There has to be a return to the teachings and principles of the Covenant Chain and the Two Row Wampum. It has to. It has to, because there are things happening in the natural world that we don't have control of as human beings. And that's what our teachings are about. Our teachings are about this humanness and how we need to have these relationships with each other; peaceful relationships, because we need to learn how to live on Mother Earth. That's inevitable. So, it's not just up to us as Indigenous peoples to reconcile with Canadian genocidal policies. We're all descendants of this. Everyone has a responsibility to understand that.

Thank you.

Mark Walters:

Thanks, Bev. I'm glad I get to follow you because you have given me lots of ideas about what to say. I'll go back to the Haudenosaunee Great Tree of Peace, because of course there's another tree in the room, I guess you could say, the "Living Tree" of the Constitution of Canada. Both the Haudenosaunee and Canadian Constitutions are trees.

I like your tree better [Bev], actually. The Living Tree of the Canadian Constitution seems to be growing in one direction from a single root. The branches and foliage develop, but everything must be traced back to that single trunk and its root, and I have a suspicion that this image has something to do with the character of Crown sovereignty.

In contrast, your tree has many roots, and the roots themselves are growing and spreading

outwards; so, in other words, the tree is growing in both directions at once. It's a better image, because it's less linear. There seems to be no beginning to the tree—no single sovereign point of origin.

This leads me back to Crown sovereignty. The conception of reconciliation of Aboriginal peoples or interests with Crown sovereignty seems to imply quite a linear conception of law, something that is traced back to a root or originating phenomenon, namely, Crown sovereignty. However, perhaps part of the reconciliation process is for non-Indigenous people to rethink their bold conception of what law is. Perhaps it is time to contemplate the possibility of a more circular and less linear view of what law is, a more interpretive or dynamic view of what law is. But getting in the way of this reconception of law is the originating root for Canadian law, the Crown sovereign. Oddly enough, the term "Crown sovereignty" isn't used very often elsewhere in our law. This is largely because the Crown isn't really sovereign in Canada, and indeed in the British constitutional tradition the Crown hasn't been sovereign since the 17th century at least. The conception of "Crown sovereignty" therefore seems to be *sui generis*, to borrow an expression; it is unique to Aboriginal law cases in Canada.

In the Westminster tradition, Parliament may be sovereign or the Crown-in-Parliament may be sovereign. But in Canada we don't even recognize that. We have a Constitution that limits the sovereignty of legislatures at both federal and provincial levels. I am not sure why this business of referring to "Crown sovereignty" in Aboriginal law cases developed. But I think we should get rid of it because it's getting in the way of what we really mean; if you look closely at the cases,

when the courts refer to Crown sovereignty, what they are really referring to is the legislative sovereignty of either the provinces or of Parliament. However, legislative sovereignty in Canada is already constrained by so many constitutional rules and laws that to speak of sovereignty at all is, again, misleading. Stripped of the language of sovereignty and Crown, what is usually at stake in these cases is simply the ability of the legislature to act in the public interest subject to relevant constitutional laws and principles.

To rephrase the statement from *Van der Peet* with these points in mind, then, what the Court is really saying is that we have to reconcile the fact that Aboriginal people have certain rights with the broader public interest. However, once we see the task in those terms, the rigidity of Crown sovereignty is replaced by a more supple notion. Sovereignty seems fixed and uncompromising. You can't question sovereignty, can you? No, it will be said, because without its sovereign foundation our country will fall apart...the trunk of the Living Tree will be chopped down, or something like that. But if we are merely adjusting our sense of the public interest to accommodate Aboriginal rights, then the consequences are far less dramatic: the public interest is not fixed and unbending; it can and must make room for Canada's Indigenous reality. So, the things that are being reconciled may be seen in a completely different light and, if so, then I would suggest that a different kind of balance altogether might be reached than one in which Crown sovereignty is on one side and weighs so heavily in the scales. Those are my thoughts for now.

Lorne Sossin:

That sounds great.

Mark Walters: For now.

Douglas Sanderson: Alright. Thank you. When we finished in the last round, I was talking about *Delgamuukw* at the trial level,¹⁴ and I know you're all thinking "well, oh, but it was appealed and it went all the way to the Supreme Court and then we got the *Delgamuukw* test for Aboriginal title." But, I think the Court goes off the rails in *Delgamuukw* in some significant ways and I'm going to talk about the ways in which the Court makes things up.

So the approach that the court lays out for itself is the *sui generis* approach, thank you, Mark. It is not like other things, they say, which gives the court a pretty free hand to shape Aboriginal law in any way that it really deems fit.

One of the things that happened in *Delgamuukw* at the Supreme Court level is procedurally, Lamer CJ says, "Chief Justice McEachern, you did a really crappy job running the trial. You didn't deal with the evidence problem... so we're going to have a new trial." And then he says, "Oh, but first let me lay out the test for Aboriginal title even though I don't have any evidence before me, except the evidence that I just said was too crappy to run a trial."

So he lays out the test, and one of the parts of the test is this idea that Aboriginal title lands are held communally. And it's another part of the judgment where there is no footnote. There's no explanation. Lamer feels it in his gut that Aboriginal title is held communally because he's seen like... Western movies, I guess, and read Louis L'Amour novels or something? Had he actually evaluated the evidence that was submitted by the anthropologists including Mills

¹⁴ *Delgamuukw (Trial)*, *supra*, note 8.

and others, he would have learned that Gitskan and Witsuwet'in lands are held by Chiefs and Houses and they exercise authority, and we have ways of transferring those chiefly titles that come with distinct property interests. There was a reason why, when the Russians first encountered the Gitskan they called [them] "Men of Property."

So, [to] the idea that title lands are held communally, Lamer CJ then extends the idea that they are held inter-generationally, in fact. And this puts a very serious constraint on the use of Aboriginal title lands. Lamer CJ says Because the lands have to be held inter-generationally, it means that you cannot develop the land in a way that would destroy the First Nation's attachment to the land. And the example given is that you cannot develop a parking lot on a hunting site. So if you can't build a parking lot, why would you build a road? If you can't build a road, what on earth could you possibly do in your territory?

And this is all based on something that Lamer just made up. That he just felt strongly about. Because he has an idea of what Aboriginal people and Indigenous people are like. The Court essentializes Indigenous people and then uses that to limit rights and title.

Lamer CJ actually goes further, right? So remember, the case is being thrown, [and] ordered for a new trial. He lays out the test and then he says, "Well, now I'm going to talk about justification of trenching Aboriginal title rights." All of this is totally *obiter*, there's no reason for us to be having this discussion. There's no part in the *Delgamuukw* trial where the government is trying to justify its actions in some place.

And so, what have we learned? Well, we've learned because First Nations people have to reconcile their title with the assertion of Crown

sovereignty, that means that Aboriginal title rights can be trenced by governments wanting to do things like build hydroelectric dams or engage in forestry or mining or the settlement of foreign populations. This is like the one place in our Constitution, the court just comes out and says, “I understand you have the Constitutional protective right, but the government has a policy. They want to settle some foreigners, so your Constitutionally protected right has to give way.”

But I don’t think it has to be this way. First of all, I’m not going to deny that the Crown can act as a sovereign. We have a pretty nuanced sense of sovereignty in Canada. We already split between the federal and provincial governments, so I think there’s a way that we could share the idea of sovereignty [with Indigenous peoples]. In fact, there is a case on this. Someone challenged the Nisga’a treaty, and the reason they challenged it was because the Nisga’a had, in the Nisga’a treaty settlement... they were allocated powers that are federal and provincial. They act as a federal actor and a provincial actor within their territories. Someone challenged them. The case is *Sga’nism Sim’augit (Chief Mountain) v. Canada*.¹⁵ And the court said, the BC Court of Appeal said no, the distribution of power under ss 91 and 92 is not absolute.

So there’s no reason that we couldn’t distribute jurisdiction more fairly to the Indigenous Peoples. And there’s a way that we can come to respect Indigenous laws and territory. And it has nothing to do with s 35. In fact, s 35, the *sui generis approach*, has taken us takes us completely the wrong way.

¹⁵ *House of Sga’nism v. Canada (Attorney General)*, [2013] B.C.J. No. 179, 2013 BCCA 49, [2013] 2 C.N.L.R. 226 (B.C.C.A.).

Everyone forgets now, but in 1980 there was a case called *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*.¹⁶ It involved Indian people asserting Aboriginal title over the land. So, it was pre-Charter, pre-section 35. It made its way up to the Federal Court of Appeal, and Judge Judson, I think, settles the case on the basis of common law customary law. He asks five questions. He says, “Do you have laws relating to land?” And we might also add related to government, if you’re asking that question. “Have you had these laws since time immemorial?” Check. “Are they cognizable to the common law? Can the common law look at those laws and understand them?” Yes, check. “Are they repugnant to the common law, do they create some set of laws or values that the common law just can’t stand?” No. “Have those laws been extinguished explicitly?” No. You have title.

We can ask ourselves the same questions about Indigenous rights to govern their territories. The “jiggery pokery” of the *suis generis* approach has allowed the court to essentialize Indigenous people and then use those characterizations against Aboriginal rights and title. And there’s no need to do it. A common law tradition has room for Indigenous title and Indigenous governmental rights. And it’s about time that we deferred to the traditions of the common law to seek justice for Indigenous people in Canada. Thank you.

....

Jonathan Rudin: Thanks. As Lorne said, we [at Aboriginal Legal Services Toronto] spend a fair amount of time in court ... And again, our focus is not exclusively but deals a lot with criminal issues because Indigenous

¹⁶ *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development)*, [1979] F.C.J. No. 184, [1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 (TD) (F.C.C.).

people are massively over-represented. Because there's systemic and direct discrimination towards Aboriginal people, so we spend a lot of time in court. Can we achieve reconciliation through courts? So here's the pessimistic part. We haven't. Not only we haven't, but the court has explicitly rejected that option when they had it.

In 2015, the Supreme Court of Canada had the case of *R. v. Kokopenace*,¹⁷ which was a *Charter* case, it was a fair trial and right to jury case brought by Mr Kokopenace who had been convicted of second degree murder in Kenora. I won't go through all the details. The Ontario government... basically, there were no First Nations people who lived on reserve who were really on the jury rolls in the Kenora district because the Ontario government couldn't give a crap to do the work to get people on. That, admittedly, is my opinion. Also, the opinion that belongs to Aboriginal Legal Services and the opinion that we've developed after being involved in this issue by the time it got to the Court, for 10 years.

The majority decision in *Kokopenace*, [written by] Justice Moldaver... one of the reasons... there were many reasons to reject this argument. But one argument that Ontario brought was: "the reason why Aboriginal people aren't on juries is because they don't want to be on juries. And there's a lot of reasons for them, it's very complicated." And they pointed to a Justice Iacobucci's report on First Nations' representation on juries in Ontario, which was commissioned as a result of Ontario ignoring Indigenous people in the first place.

¹⁷ *R. v. Kokopenace*, [2015] S.C.J. No. 28, [2015] 2 SCR 398, 2015 SCC 28 (S.C.C.).

And Ontario's argument is "Well, we can't really fix this ourselves because it's very complicated and Indigenous people have lots of reasons they don't want to be on juries." And Justice Moldaver says, "Yeah, it's really hard. Reconciliation needs to happen." He compliments Ontario for the steps that they were taking, because they are taking steps, and he says "But that's not for us. That's not for the court to do, that's someone else. So let's move on and we'll let this happen somewhere else." And the Minority decision—there was [also] a concurring judgment by Justice Karakatsanis—but in the Minority decision, written by Chief Justice McLachlin and Justice Cromwell, Justice Cromwell said: "Well, the reason Aboriginal people aren't participating in juries is because they don't have any faith in the system, and the reason they don't have any faith in the system is because of what the state did, so it hardly lies with the state to say we can't fix a problem, 'cause we created something and it's so intractable that we can't fix it. That doesn't seem right at all." But that was the minority.

So, that's a very depressing decision and I will, without making too much comment, just contrast that with Justice Moldaver not being concerned at all in *Jordan* with revamping the whole system¹⁸ ... although there are very complex reasons for that [the need to revamp the right to trial within a reasonable time jurisprudence], but that's okay to sort of impose a bunch of arbitrary guidelines [in the *Jordan* context]. Anyway.

But nevertheless, because we are gluttons for punishment, and my colleague Emily Hill is here, we are both gluttons for punishment as are all of us at Aboriginal Legal Services. We continue with this task of trying to challenge the way that laws work.

¹⁸ *R. v. Jordan*, [2016] S.C.J. No. 27, 2016 SCC 27, [2016] 1 S.C.R. 631 (S.C.C.).

But the way we're trying to do it, we're trying to do it differently and we'll see if this works. We have been a part of a number of section 15 challenges to criminal law. Because if you start with the finding by the Supreme Court that Aboriginal people face direct and systemic discrimination in the criminal justice system, that's a finding of the court. And we look at the section 15 jurisprudence, the state is not supposed to make inequality worse, and we have many examples, and Joe Arvay [the Keynote speaker at Osgoode Constitutional Cases Conference] talked about a number, we have many examples of how the state has made this worse. This should be a s 15 issue. This is an issue of equality. This isn't an issue of arbitrariness, overbreadth, or gross disproportionality. Let's get away from s 7, let's call it what it is.

What it is, is a perpetuation of inequality. So we have done this twice, we've lost once, we won once at the OCJ level, we will eventually get this matter heard at the Superior Court because there are no *Jordan* rules on appeals. These things can take forever. And we're starting another one in Brampton.

But this is what we're starting to do and in the whatever number of years it's going to take, because I do agree with Joe [Arvay] as well, the federal government is not hurriedly repealing the mandatory minimums, so there's lots of room for us to continue litigation, sadly — we'll have a better sense if we're able to be successful. And I just want to say, if we're not successful, it could be that we don't make a good argument, it's not necessarily that if you don't like us you're a racist. It's possible there's better arguments but I'll be interested in whether the courts are willing to grapple with those issues because they often are not, and so we're trying to put it front and centre and see what happens.

Lorne Sossin: Excellent. Amar, to close off our second round.

Amar Bhatia: So, I just wanted to pick up on some of the things that folks have talked about in relation to sovereignty and, also, as I was mentioning before in terms of, for instance, the “permanent population” part of the sovereignty definition... which may be inappropriate... but I’m going to run with it and see how that works compared to reconciliation.

If you need a permanent population to have sovereignty, you could also have a society reproduce itself. How does this happen? Historically this was happening through treaties for the settlement of foreign populations, also even for the infringement of title... that phrase ‘settlement of foreign populations’ is still there.

And then what does that mean in terms of having reconciliation? The idea that we’re all here to stay that can work both for reconciliation and that could work for migrant rights, that can also work for continuing the settler colonialism that I mentioned before. It doesn’t actually disrupt that structure.

If you want to maybe talk about it in a way that would work towards reconciliation that does challenge that structure, the TRC has talked about that as part of their calls to action and that people should be educated about the treaties, and specifically in the context of citizenship, immigration, settlement, multiculturalism, “newcomers”, there’s the idea that you should educate folks about the treaties there. I think the government is actually going to follow through with this one, which is to put recognition and acknowledgement of the treaties in the Citizenship Oath.

So, partly, this is again bringing that idea of this awareness of the treaties in order to move people towards reconciliation. But what that doesn't really get to is the idea about who gets to be a citizen in the first place and on what basis. If historically the treaties were used in order to settle the lands, and these are treaties that are between parties that are formed by both colonial law and Indigenous law, then presumably these [are]... I like to think of them as the first immigration laws. And I think that also means that Indigenous nations still have authority over immigration matters.

So if you're simply restricting reconciliation to folks who are already citizens, I don't think that really gets to the question of how societies can reproduce themselves. One example in this context is if a First Nation tries to adopt a failed refugee claimant through a band council resolution, do you think that would keep that person in the country? Anyone? ...

So, show of hands if you think that will keep someone in the country. Yeah. Aspirationally? One person... one and half hands. It doesn't keep someone in the country, partly because if you're adopted under a Band Council Resolution, then that doesn't actually give you *Indian Act* status. And so this goes to court and the argument is made that if this is happening, that the adoption should read into the *Immigration Act* that this person has Indian status and should also be allowed to stay in the country... just like others who are allowed to enter and remain... those who have citizenship in Canada.

The court kind of laughs this off, they don't really advance a full-blown articulation of the treaty right about why that's important. But partly it is

because of the floodgates fear. As you can imagine, anyone in immigration and refugee law, this is like the big fear: the opening of the floodgates, which is a bit hilarious again in the settler colonial history of Canada that they're worried about that. Anyway, without any irony, they say, "how can we have almost 600 First Nations being in charge of these decisions about immigration and citizenship and things like that, it just doesn't make any sense."

Another fear was that if somebody like a failed refugee claimant is adopted into a band, that they're in some kind of indentured status to that band that can revoke their membership and then they'll be out of luck in terms of their security of staying in the country.

So, on the floodgates fear: if you just compare how many people Canada gives labor market opinions to and the immigration context for work permits ... It's much more than 600. If you look at the fear about an indentured status: again if you're comparing to the temporary worker program that we run —where agricultural workers can never get permanent status, where caregivers have even lost some of the guarantees they had before about apply[ing] for permanent resident status—it doesn't really make a lot of sense to me in terms of the fears about why this would happen [or of why] they say this should not be possible.

I think that's kind of a different and longer question, but partly it goes to essentializing people and who actually has control over the determination of their membership and their Nation, and why it is that only Canada gets to decide this for everybody. I think, if you measure reconciliation by that, it's still going to fall short.

Douglas Sanderson: Listening to Amar talk I was reminded of something that happened to me last fall. Or maybe it was in the summer with all the Syrian refugees who were coming to Canada. And I thought, “what do you have to do to adopt a Syrian refugee?”

There’s the government of Canada website, and so I went on the website and you have to answer this questionnaire and the very first question is “Are you a status Indian?” And I was blown away! I thought “I can’t do this anymore!” Just filed it away and completely forgot about it until this very minute. So they *really* do not want status Indians adopting... it’s like, that will get you out of the game right away.

Lorne Sossin: That is more an invitation for more discussion than a comment that should close our discussion, but we are sadly at that time. I’ll invite those — I hope there are many in this category—who have some more questions to stay around for a few minutes after the formal end of the panel. Before I wrap up I just want to share a reflection that Murray Sinclair offered when he was standing here a week or so ago, giving a really wonderful lecture sponsored by the History Department here at York University. ...

[I]t goes to, I think, a theme, that’s been woven throughout each of these comments. Murray Sinclair made the point that reconciliation isn’t itself decolonizing. By saying the word it makes you feel good; but that good feeling is not one that you should trust. Reconciliation, if it is going to be meaningful at all, should be hard for Indigenous communities, because it invokes pain both individually and shared and that continues, and [moreover], for non-Indigenous people, it also should be hard, because there is a lot of work to do to decolonize.

Murray Sinclair's point was that invoking reconciliation does not change any of the colonizing tendencies that seem so embedded in the whole existential structure of Canada's history. I think that was something that resonated again for me here — and I will of course, reflect on much of what I learned and I hope you do as well.

END

