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Unsettling Canada's Colonial Constitution

A Response to the Question of Domestic Law and the Creation of an Access and Benefit-Sharing Regime

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Abstract

The aim of this chapter is to explore how the Canadian domestic legal framework for Aboriginal rights could affect the implementation of an access and benefit-sharing regime (ABS) pursuant to the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* (NP). The chapter is divided into the following three sections. First, it briefly summarizes the limitations of the current s. 35 framework and shows how it is grounded on a unilateral notion of Crown sovereignty in which the only claim to Crown legitimacy is derived from the outmoded and racist fiction of discovery. Second, it shows that the Federal Government of Canada's move to fully endorse UNDRIP and move towards its implementation opens up the opportunity to remove the doctrine of discovery from Canadian law and build a s. 35 framework on a true *nation-to-nation* basis. Finally, it concludes by exploring how UNDRIP could be used to facilitate a proactive approach to self-determination, which includes control over traditional knowledge and biogenetic resources. This will establish what the necessary pre-conditions are for implementing an effective ABS regime in Canada.

INTRODUCTION

The aim of this chapter is to explore how the Canadian domestic legal framework for Aboriginal rights could affect the implementation of ABS pursuant to the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* (NP). The question of

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implementation draws out a line of tension in this area that stretches back to the adoption of the *Convention on Biological Diversity* (CBD) in 1992. In Article 15.1, the CBD recognized the 'sovereign rights of States over their natural resources' and that this right gave them the ability to determine access to genetic resources.[1] The implications of this could easily be overlooked. It is common for modern international legal instruments to be based on a simple model of a unitary nation-state (i.e. a state with a singular and sovereign people) and in such a state Article 15.1 would not be contentious. The problem is that there are a number of states where this assumption does not apply due to internal legal and political conflicts with Indigenous peoples. In these states, the constitutional basis of the domestic legal framework is contested and so cannot serve as a secure legal foundation for an ABS regime.

In Canada and other states like it (i.e. Australia, New Zealand, the United States and others), this problem is a particularly complicated area of legal contention. This line of tension is reflected in the NP. In the preamble, it acknowledges the *United Nations Declaration on the Rights of Indigenous peoples* (UNDRIP) and maintains that 'nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities.' The influence of UNDRIP is also reflected in how the NP attempts to develop 'international access standards' in Article 6.3 (f)–(g), which states that parties are to

> set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources; and establish clear rules and procedures for requiring and establishing mutually agreed terms.

While this sounds promising for Indigenous peoples, it is qualified by the phrase 'where applicable, and subject to domestic legislation.' This chapter examines this line of tension within the Canadian context and highlights some of the possible areas of contention relating to the current framework for s. 35 of the *Constitution Act, 1982*, which states that '[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.' With these points of contention in mind, I will then show how trends within the case law combined with recent changes to Canadian policy relating to Indigenous peoples at the Federal level offer the possibility of an alternative approach, which would adapt to the domestic legal framework to fit with the principles of self-determination and free, prior and informed consent in UNDRIP. This offers the possibility of establishing a stable domestic legal environment that is required for the implementation of any functional ABS regime.

The Supreme Court of Canada's current approach to s. 35 is designed on the presumption of actions taken by the Crown and therefore it positions Indigenous peoples as fundamentally defensive. The only proactive use that has been explored for s. 35 is for an Indigenous litigant to seek a declaration. This can be a very effective

strategy for shifting the grounds of policy negotiations with the Crown in some cases.[2] The problem for our present purposes is that the legal tests that would be applicable to concerns relating to the ownership of either traditional knowledge or biogenetic resources are problematic. Russel Barsh and James Youngblood Henderson aptly summarized the limitations of Aboriginal rights litigation almost twenty years ago, as they put it:

> If all the hurdles announced by *Sparrow*, *Van der Peet and Gladstone* are assembled, they form a formidable and intimidating barrier: the Aboriginal practice at issue must be shown to be preexisting and central; it must be shown never to have been extinguished by the Crown prior to 1982; it must have been infringed by government action after 1982; the government action must be shown to have lacked adequate justification; and it must be shown to go beyond the reasonable discretion enjoyed by the Crown as a 'fiduciary' to determine whether the Aboriginal community concerned has been given an adequate 'priority' in the enjoyment of the resources it has traditionally utilized. All of this translates into a heavier evidentiary burden at trial, more expense, and greater risk of an adverse ruling, amounting to a present-day extinguishment of the rights asserted.[3]

While this serves to illustrate the problems with the existing framework, we need to keep in mind that this process to a limited – but not insignificant – degree, cuts both ways. That is, were Canada to simply and unilaterally implement an ABS system that did not incorporate processes that require the prior and informed consent of Indigenous peoples then the inevitable litigation result would effectively render the ABS system inoperable.

The primary problem with the s. 35 approach is that it is predicated on the notion that the relationship between the Canadian government and Indigenous peoples is that of sovereign-to-subject. Under this view, prior to 1982, Canada had the right to unilaterally extinguish the rights of Indigenous peoples. This is predicated on the idea that Canada acquired sovereignty over Indigenous peoples via a combination of s. 91(24) of the *British North America Act, 1867* (now the *Constitution Act, 1867*) and the treaties, which it unilaterally interprets as being a *sui generis* set of ceding and surrender documents (a curious status as it relies on the idea that Indigenous peoples lacked the degree of civilization required to be recognized as sovereign and yet possessed enough to cede and surrender any rights they did possess in perpetuity).[4] This sovereign-to-subject model of Canadian sovereignty has been actively contested by Indigenous peoples for the last 150 years and its future is precarious at best. The case law has established that the basis of Aboriginal rights exists outside the Canadian legal system in the Indigenous occupation of land prior to the arrival of Europeans and that Crown sovereignty is '*de facto*' in nature.[5] This implies Canada is not currently in possession of *de jure* sovereignty over the whole of the territory that it claims and renders any ability to unilaterally extinguish Indigenous rights, at any point in time, legally dubious. An unsurprising fact is that the only possible

foundation for Canada's claims to sovereignty over Indigenous peoples is the pernicious and racist legal fiction known as the "doctrine of discovery."

Recent policy changes in Canada seem to indicate that the government is taking steps to change the sovereign-to-subject framework by adopting the current international norms expressed in UNDRIP. This is a move that was recommended by the *Truth and Reconciliation Commission* in 2015 in both the Final Report and the Calls to Action.[6] These recommendations have, at least potentially, begun to shape policy, as in 2016 the Federal Government endorsed UNDRIP without reservation and began moving towards implementation. As indicated by Hodges and Langford (Chapter 2) and Perron-Welch and Oguamanam (Chapter 6), it is also seen in the recently announced 'Principles respecting the Government of Canada's relationship with Indigenous peoples,' which directly recognizes that 'all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government' and that Indigenous self-government is 'part of Canada's evolving system of cooperative federalism and distinct orders of government.'[7] This affirmation supports a distinct move away from the sovereign-to-subject model of the relationship (and the doctrine of discovery that ultimately ground it) and towards a *nation-to-nation* model that draws on the history of treaty making between Indigenous nations and the Crown.

Given the problematic foundations of the existing framework for Aboriginal rights under s. 35, I have chosen to explore a different approach to the question of ABS implementation. Instead of simply assessing the fit between the NP and the existing constitutional framework, I will explore how UNDRIP offers a more flexible and, ultimately, more stable legal framework for implementing access and benefit-sharing (ABS) measures. This does not require full implementation of UNDRIP as a preliminary step. Rather, it requires that Canada align its domestic legal framework with the conclusions of the *Royal Commission on Aboriginal Peoples* (RCAP) regarding self-government. RCAP concluded that the inherent right of self-government is recognized and affirmed by s. 35 and further, that the emerging international principles provide additional support for 'the right of self-determination and the cultural and political autonomy of Indigenous peoples.'[8]

I want to be clear, I am not suggesting that Indigenous peoples should rule out the existing s. 35 framework. Rather, I want to highlight the fact that this framework should not be taken as *the* domestic framework. That is, it should not be understood to be solid all the way through and so unalterable. It is, like any legal framework, contested and open to change. The approach I would recommend is to understand and grapple with the technical intricacies of the current framework but to do so strategically so that the framework can be adapted to reflect modern international legal norms relating to Indigenous peoples. In my view, the bottom line of this approach is that the implementation of any ABS system must be consistent with the *nation-to-nation* relationship between the Crown and Indigenous peoples in Canada. In this regard, an UNDRIP-inspired pathway offers us a very promising way to move forward.

This chapter is divided into the following three sections. First, I briefly summarize the limitations of the current s. 35 framework and show how it is grounded on a unilateral notion of Crown sovereignty in which the only claim to legitimacy is derived from the outmoded and racist fiction of discovery. Second, I will show how the Federal Government of Canada's move to fully endorse UNDRIP and move towards its implementation opens up the opportunity to remove the doctrine of discovery from Canadian law and build a s. 35 framework on a true *nation-to-nation* basis. Finally, I will conclude the chapter by exploring how UNDRIP could be used to facilitate a proactive approach to self-determination, which includes control over traditional knowledge and biogenetic resources. This will establish what the necessary pre-conditions are for implementing an effective ABS regime in Canada.

THE LIMITATIONS OF THE EXISTING ABORIGINAL RIGHTS FRAMEWORK

Here, I will highlight some of the key elements of the current s. 35 Aboriginal rights framework, as developed by the Supreme Court of Canada. My treatment of this framework will be more summative than exhaustive due to space limitations. An exhaustive approach would need to survey a body of law that the Canadian Courts have developed over more than thirty years. My aim is more modest in scope. I will simply point out some of the principal features of the existing doctrine by referring to a small set of leading cases (*Sparrow*, *Van der Peet* and *Gladstone*) and show how the framework that they develop is dependent upon a unilateral notion of sovereignty.

In *Sparrow*, the Court was tasked with establishing an interpretive framework for s. 35(1) of the *Constitution Act*, 1982. The language of the provision itself is broad to the point of vagueness and so, the constitutional drafters leave the courts the task of drawing meaning out of it. The Court set out to do just that. Their task was made even more challenging by the fact that s. 35(1) is not a part of the *Charter* (which extends from ss. 1 through to 34) and thus is not subject to the limitations of s. 1 nor the notwithstanding clause in s. 33.[9] The Court recognizes this problem explicitly when it states that

> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words 'recognition and affirmation' incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act*, 1867. These powers must, however, now be read together with s. 35(1). In other words, *federal power must be reconciled with federal duty* and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[10]

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The approach that the Court adopts here is fundamentally imbalanced. This reading of the words 'recognition and affirmation' in s. 35(1) is based on s. 91(24), but the Court does not go on to question the meaning of that provision. The text of s. 91 (24) simply states that the exclusive legislative authority of the Parliament of Canada extends to all matters in relation to 'Indians, and Lands reserved for the Indians.' There is similarly no 'explicit language' in s. 91(24) that would grant the Crown undoubted sovereignty, legislative power and underlying title. Despite this fact since Lord Watson's decision in *St. Catherine's Milling* the courts have consistently read s. 91(24) as an unlimited grant of power over Indians and their lands.[11] In doing so, they have treated the meaning of the provision as being self-evident, but even from the limited positivistic terms of constitutional interpretation in the late nineteenth century, this is clearly an *interpretation*.[12] Nevertheless, the Court in *Sparrow* simply treats s. 91(24) as a kind of self-interpreting provision; as they put it '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.'[13] It is clear that the Court began their inquiry into the meaning of s. 35(1) with this conclusion firmly in place. This is why they refer to s. 91(24) as simply 'federal power', but what this interpretation misses entirely is any consideration of the legitimacy of this 'power.'[14] This interpretive decision is little more than begging the question (i.e. what is the nature of the relationship between Aboriginal peoples and the Crown?) and so there is little surprise that the framework that they have constructed upon it is circular.

If we extend our inquiry beyond the surface of s. 91(24) to its context, we see that the *British North America Act, 1867* was unilaterally imposed on Indigenous peoples in Canada. While s. 91(24) does assign exclusive legislative authority in relation to 'Indians, and Lands reserved for the Indians' to the Parliament of Canada, it does not determine the nature of this relationship. The pre-dominant approach in Canada has been to regard the relationship as being one of the sovereign-to-subjects, but the question then is how did this relationship get established. The historical record does not support conquest and the claim to construct consent out of the treaties requires feats of hermeneutic juggling. It can only resonate with those who are already convinced that the Crown is sovereign. This means that the ultimate foundation of s. 91(24) – and the entire legislative and administrative regime that is based on it – is the doctrine of discovery.[15]

For the last 150 years, Canada has made extensive use of this particular constitutional provision. It has been used as the constitutional basis for the establishment of the *Indian Act* and its associated administrative body. The first version of this legislation collected together a set of preexisting acts (most notably the *Gradual Civilization Act, 1857* and the *Gradual Enfranchisement Act, 1869*) and was passed in 1876. The *Indian Act* is the legislative expression of the sovereign-to-subjects relationship, but even in that regard, it is special. Indians cannot simply be thought of as either British subjects (which all Canadians were prior to 1948) or Canadian citizens as they were subject to a far more coercive system of governance. In my view, the

best way to understand the Indian Act is to see it as a type of emergency legislation without a time limit. I specify that it is a 'type' because it bears the basic hallmarks of emergency legislation (i.e. a high degree of administrative discretion coupled with a suspension of the rights and freedoms that characterize the 'normal' constitutional order), but it is also dissimilar to emergency legislation. The object of the legislation is not an emergency. Its object is 'Indians.' As John Borrows states,

> The *Indian Act* makes it easier to control us: where we live, how we choose leaders, how we live under those leaders, how we learn, how we trade, and what happens to our possessions and relations when we die.[16]

This control is not just history, but part of the present experience of Indigenous peoples in Canada.

This interpretation of s. 91(24) is the foundation of the framework of 'reconciliation' that the Canadian Courts have used since *Sparrow* for interpreting the meaning of the Aboriginal rights that were 'recognized and affirmed' in s. 35(1). Whether one elects to characterize the relationship between Canada and Aboriginal peoples via an analogy to the common law language of trusts, the vaguely religious overtones of reconciliation or the broader international language of treaties, the relationship must inevitably be qualified by the term '*sui generis*' because, unlike all three of the preceding types of relationships it allows one party to unilaterally subject the other to its terms.[17] The foundation of this relationship (which has been in place for over 150 years now) is the pernicious legal fiction of discovery, which provides the legal alchemy that enables the *mere assertion* of Crown sovereignty to diminish the rights of Indigenous peoples to be recognized as *peoples*. Thanks to this legal fiction Indigenous peoples suddenly become subjects of the Crown whose legislatures and courts then set to work to determine what rights continue to exist and the degree to which they can be infringed via a set of judicially constructed tests whose measures, are, at best, uncertain.

VAN DER PEET AND *GLADSTONE*

The *Van der Peet* test tightens the test set out in *Sparrow* by holding that the Indigenous claimant must demonstrate that an activity was integral to their distinctive culture *at the time of European contact* in order to ground a contemporary right.[18] This presents us with a rather immediate (and arbitrary) barrier to claims relating to TK or biogenetic resources as such claims would need to be grounded in pre-contact practices that are 'integral to the distinctive culture' of the claimant.[19] This test makes Aboriginal rights litigation into a process that is overburdened with the prohibitively expensive and time-consuming pre-trail process of historical and anthropological fact gathering. Once the evidence is marshalled and the expert witnesses contracted, the outcome then hinges on a test whose precision is, at best, subjective. What standard or measure determines whether or not a given practice

is 'integral' or merely an incidental practice 'piggybacking on integral practices, customs and traditions?'[20]

We have already covered how the framework in *Van der Peet* is overly restrictive on its specified timeframe and cultural analysis, but we should also note that it has a kind of invisible ceiling built into it. That is, it can accommodate rights that are 'internally limited' (e.g. 'food, social and ceremonial purposes' or the vague standard of 'moderate livelihood') but, it has thus far been unable to accommodate actual commercial rights. Some may point to *Gladstone* as a counter example to this given the fact that the Court recognized and affirmed the Heiltsuk Nation's right to 'to sell herring spawn on kelp commercially,' but Lamer C.J. placed this right within the existing regulatory framework and considerably expanded the applicable standard of the justification for infringement to one that balances the interests of the Aboriginal group against the interests of the 'broader community as a whole.'[21] This 'public interest' standard for infringement was explicitly rejected by the Court in *Sparrow* as they held that such a standard would be 'so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.'[22] As McLachlin J. (as she was then) rightly put it in her dissent in *Van der Peet* the 'public interest' standard 'is indeterminate and ultimately more political than legal.'[23] Despite these strong and principled objections, the 'public interest' standard in *Gladstone* remains firmly in place within the Canadian case law.[24] So, while commercial Aboriginal rights are *theoretically* possible within the current framework the *Gladstone* standard for justifying infringement will amount to a procedural barrier that will make such rights impossible.

The upshot for our purposes is the incisive observations of Barsh and Henderson made over twenty-years ago regarding the hurdles set in place by *Sparrow*, *Van der Peet* and *Gladstone* remain firmly in place. This does not mean that when it comes to the question of ABS implementation the existing domestic legal framework should be ignored. Rather, we should remember that in practice these hurdles tend to cut both ways. Canada may well unilaterally legislate an ABS system, but it conflicts with the rights and interests of Indigenous peoples, it will be subject to s. 35(1) litigation. This process is, as we have seen, weighted against Indigenous litigants, but it has real-world impacts on both the Crown and third parties as the cases are lengthy and their outcomes are uncertain. What this suggests is that there may well be a course of action that can reimagine the limits of the existing domestic framework for s. 35(1).

UNDRIP AND THE NATION-TO-NATION FRAMEWORK

The first step towards finding another way is to remove the doctrine of discovery from Canadian constitutional law. This means rejecting the approach taken by the Court in *Sparrow* and not simply assuming that s. 91(24) grants the Crown unilateral sovereignty over 'Indians, and Lands reserved for the Indians.' By rejecting this

assumption, I do not mean to suggest that the courts should then set off on some quixotic historical inquiry to re-ground the unilateral concept of sovereignty.[25] Rather, as Stephen Tierney rightly maintains, they should recognize that their model of a unitary 'nation-state'

> has been a central ideological device in legitimizing the dominant, monistic vision with which the plurinational state has masqueraded as *the* nation of the state. This vision has allowed dominant societies to renege upon the union commitments made at the time of the state's formation. The dominant society has been able to crystalize political power at the centre of the state, presenting it in the guise of legal legitimacy, and hence entrenching political hegemony in purportedly objective constitutional form.[26]

The way out of this is to disaggregate the notions of 'nation' and 'state' so that we can begin to come to grips with the plurinational reality of the Canadian state.[27] This means that s. 91(24) must be interpreted in a manner that is consistent with the fact that Indigenous peoples are and have always been *peoples*. This, in turn, means that the only legitimate constitutional order possible in Canada is one that is securely based on the constitutional principle of *quod omnes tangit ab omnibus comprobetur* ('what touches all should be agreed to by all') and includes Indigenous peoples along with the English and the French settlers as founding nations in a plurinational union state.[28] In short, we need an interpretation of s. 91(24) that is consistent with the *nation-to-nation* relationship between Indigenous peoples and Canada. Larry Chartrand provides us with one possible version of such a reinterpretation of s. 91(24). In his view, the Court should restrict it to a 'treaty power' that allows Parliament to 'negotiate with nations and peoples who occupy and possess territory that Canadian authority wishe[s] to acquire.'[29] Another broader way to characterize this type of interpretation – and sharpen the distinction between it and the current sovereign-to-subjects model – is to use the phrase 'power-*with*', which is the only way a *nation-to-nation* relationship makes sense.[30] This serves as an object of comparison that challenges the foundational claim of the current picture of federalism in Canada and moves towards the kind of democratic constitutionalism that could offer the possibility of a reconciliation based on dialogue and consent.[31]

Some may see this as good in theory but, maintain that it is impractical. Such a reader would likely point to the last 150 years of legislation and jurisprudence as proof that the presumption of the 'nation-state' is irrevocably embedded in Canada's constitutional culture. While it is true that there is a strong and consistent line of legislation and case law that has attempted to maintain the notion that Canada is a unitary 'nation-state', this line has also been subject to constant contestation from both Québec and Indigenous peoples. Canada is, as Peter Russell rightly argues, best thought of as country based on incomplete conquests.[32] The attempts to force the many nations composing it into a single mould has resulted in a crisis of

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legitimacy. This can be seen in both the Québec sovereignty movement and the struggles of Indigenous peoples to move out from the administrative despotism of the *Indian Act* and towards self-government. Both of these forces began to surface in Canadian national politics in the late 1960s and early 1970s. These are, in many ways, distinct sub-national group movements, but they also have a number of parallels, which extend far beyond this book. But even a cursory examination can show that the *Royal Proclamation of 1763* sets out a system of political and legal relationships that directly affects both Indigenous peoples and Québec. The Canadiens actively protested the *Proclamation* and this quickly led to the passing of the *Québec Act of 1774*, which restored the use of the civil law and the free practice of Catholicism among other things. In many ways, the current crisis of legitimacy with its risk of Québec's secession and struggles over Indigenous self-determination can be seen as part of a long wave of contestation against a unitary notion of a Canadian 'nation-state' dominated by the English settlers. This crisis does not need to result in the division of a single state into several smaller ones. Rather, legal pluralism offers them a way to address the troubling history of colonial imperialism and its ongoing legacy without simply declaring a legal vacuum. As Paul Schiff Berman helpfully puts it,

> by taking legal pluralism seriously we will more easily see the way in which the contest over norms creates legitimacy over time, and we can put to rest the idea that norms not associated with nation-states necessarily lack significance.[33]

The norms that have been neglected here are the legal and political systems of Indigenous peoples as well as the various Western traditions of anti-imperialism. From this pluralistic perspective, it can hardly be surprising that the *Sparrow* framework has only resulted in moving in circles. Only one set of norms have been seen as law, but there is no available narrative to explain how this came to be the case because the narratives of discovery and savagery are spent.[34]

This brings us to a consideration of Canada's recent policy changes regarding UNDRIP and its relationship with Indigenous peoples as posited by other contributors to this book (e.g. Hodges & Langford, Chapter 2; Perron-Welch & Oguamanam, Chapter 6). In 2016, the federal government formally endorsed UNDRIP without reservation and indicated that they would implement it. This is a significant change in policy from the preceding government's Statement of Support, which was issued in 2010, and stated that UNDRIP is a 'non-legally binding document that does not reflect customary international law nor change Canadian laws.'[35] The actual substance of this change is still an open question. In her speech to the United Nations Permanent Forum on Indigenous Issues, the Minister of Indigenous and Northern Affairs stated that Canada intends 'to adopt and implement the Declaration in accordance with the Canadian Constitution.'[36] The substance of this change hinges on what the government means by this. If it means that the existing

jurisprudence on s. 35 will be used to strictly determine the meaning of UNDRIP then the result would be no real changes other than a nominal claim to implementation. On the other hand, the Minister continued, saying that by adopting and implementing UNDRIP 'we are breathing life into section 35 and recognizing it as a full box of rights for Indigenous peoples.'[37] This could well signal that the implementation of UNDRIP will change the existing domestic legal framework.

There is a limit to what we can determine from this statement alone as no matter how finely we parse the words of the Minister we will not be able to get any further in determining the actual substance of implementation. We can situate it within a wider context to attempt to gain a little more insight. This naturally has its own challenges because as soon as we adopt a wider angle of focus we are confronted by a host of related facts and events all vying for our attention. I will confine my consideration of the context to a rough sketch of a couple of facts that I see as being key to the shaping the process of implementation.

First, there is the Final Report and the Calls to Action of the TRC, which was released in 2015 and explicitly calls for the federal government to adopt and implement UNDRIP as the framework for reconciliation. While these are the recommendations of a commission and not binding, their persuasive effect on policy-makers should not be underestimated. Second, the case law stemming from the sea-change in *Calder* – which recognized that Aboriginal rights arise from preexisting occupation and not the Crown – the courts have come to explicitly acknowledge that Crown sovereignty is uncertain with respect to 'pre-existing Aboriginal sovereignty.'[38] This led them to qualify Crown sovereignty as being based on an assertion and so *de facto* in nature. It is clear that in their view the remedy to this lack of legitimate or *de jure* sovereignty is through the judicially mediated process of reconciliation. As the Court put it in *Haida Nation*, '[t]he purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.'[39] The problem here, as I noted above, is that the existing framework is predicated on an interpretation of s. 91(24) that begs the question of Crown sovereignty (by implicitly using the doctrine of discovery).[40] It is difficult to see how the Court can simultaneously qualify the legitimacy of Crown sovereignty and then set out to remedy this via an interpretive framework that is predicated on the undoubted assumption of Crown sovereignty. The circularity is clear. It seems the Court is at risk of transforming the constitution into the very 'straightjacket' they warned against in *Reference re Secession of Québec*.[41] Simply put, the government is faced with the choice of continuing in the well-worn circles of the Court's current approach or actually using the process of implementation to breathe new life into this area of the Canadian Constitution and move forward with a nation-to-nation relationship with Indigenous peoples. Whatever course of action the government decides to take will have direct implications for any possible ABS system.

USING UNDRIP AS A GUIDE TO ABS IMPLEMENTATION

In this section, I move from the preceding constitutional considerations to a more focused examination of how UNDRIP could be used to guide ABS implementation. This is a speculative exercise and so I want to be clear that what I am attempting to do here is not to determine *the* way to use UNDRIP in this area, but rather to simply provide a sketch that could be of some use to policy-makers who are thinking of how this might be possible within the domestic legal architecture of Canada. I realize that I am not alone here. As this volume came together, I was excited to note that Tim Hodges and Jock Langford (Chapter 2) have associated UNDRIP with potential implementation of ABS in Canada.

The main point that I would like to make is that the *nation-to-nation* relationship should be the foundational framework for any ABS system. It is clear that the existing interpretation of s. 91(24) is dependent upon the doctrine of discovery and can no longer serve as the load bearing constitutional proposition. The presumption of unilateral sovereignty in the existing domestic legal framework should be bracketed. This is precisely where the guiding norms of UNDRIP (specifically self-determination and free, prior and informed consent) can be put to use. As Sheryl Lightfoot argues, international Indigenous rights and politics offer a transformational set of norms that hold the potential for 'a subtle revolution in global politics.'[42] Within the Canadian domestic architecture, these norms serve as support for removing all of the nineteenth century colonial legal norms that still persist within our jurisprudence. This means that s. 91(24) becomes a 'treaty power' that allows the federal government to relate to Indigenous nations and that the treaties can no longer be read as a *sui generis* set of surrender agreements with limited constitutional protections, but rather they are constitutional documents that cannot be unilaterally infringed.[43] An immediate concern that is typically voiced in response to this constitutional configuration is that it would grant Indigenous peoples a 'veto', but this is a misleading argument that trades on the idea that requiring consent is a violation of the principle of equality. Roger Merino provides us with a clear and direct response to this argument

> Self-determination and territoriality support the right of consent, wrongly called 'right to veto' because it does not derive from a special power conferred to Indigenous peoples due to their hegemonic position in the democratic system (as is the case with the presidential veto power), but it is an expression of their self-determination as peoples.[44]

It does not offend the principle of equality to recognize this. Rather, it offends the principle of equality to simply presume that Indigenous peoples are a part of *the people* within a settler state without their free, prior and informed consent. As Tierney helpfully puts it, '[m]istaken assumptions about the unitary nature of "the people" can generate constitutional models which fail to accommodate the

specific political needs of different *peoples* within the state'.[45] What this plurinational model of federalism offers us is a meaningful and substantial model of what the *nation-to-nation* relationship and of how UNDRIP can be used to 'breathe new life' into s. 35(1).

This shift to the *nation-to-nation* framework is of key importance when it comes to implementing an ABS system such as the NP. If the existing sovereign-to-subjects s. 35(1) framework is presumed to be *the* domestic legal framework, then, the new ABS system will suffer from all of the circular processes of litigation and political contestation that are all too familiar within the Canadian context. By shifting away from this framework and adopting the *nation-to-nation* model in line with the guiding norms of UNDRIP, it is possible to navigate the fraught legal waters between the sovereign rights of states and those of Indigenous nations.

This shift in framework results in a two-step approach to ABS implementation in Canada. First, we must recognize that respecting the norms of self-determination means that these processes are going to be driven in large part by Indigenous parties and that, as a result, the particular mechanisms through which shared governance and shared management regimes will be implemented will be case specific and depend to a large extent on the needs, capacities, and values of the parties to the agreements. Second, by recognizing that the domestic legal framework is incomplete, we can begin to look at a number of different areas of law and policy to learn by way of analogy and example. This allows policy-makers to turn their attention directly to the articles in UNDRIP and other relevant international Indigenous legal instruments as well as to other legal contexts (both indigenous and state-based) in order to establish an ABS system that respects the legal and political realities of Indigenous nations.

NOTES

1 See *Convention on Biological Diversity* (Rio de Janeiro, 14 June 1992) (CBD), Article 15.1.

2 Recent examples that comes to mind are *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 and *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257, but in *Tsilhqot'in* (as in most cases) the declaration is one remedy that is sought in conjunction with others to shield the claimants from Crown intrusion. The point being that swords are often difficult to distinguish from shields in their function and are often bundled tightly together.

3 R. X. L. Barsh and J. Y. Henderson, 'The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand' (1997) 42 *McGill LJ* 993 at 1004.

4 Antony Anghie makes this same point in some detail in Chapter 2 of his excellent book *Imperialism, Sovereignty and the Making of International Law*. (Cambridge University Press: Cambridge, 2001).

5 *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 at para 42.

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6 Truth and Reconciliation Canada. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

7 See Principles 1 and 4 in Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous peoples*, online: Government of Canada www.justice.gc.ca/eng/csj-sjc/principles-principes.html.

8 Report of the Royal Commission on Aboriginal Peoples. Volume 1: *Looking Forward Looking Back*. Part Two: *False Assumptions and a Failed Relationship*. (Canada Communication Group: Ottawa, Ontario, 1996) at 647.

9 The text of s. 1 states that '[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. This means the rights set out in the *Charter* (which, extends from ss. 1–34 and so does not include s. 35) are not absolute, but subject to unilateral Crown infringement via a judicially mediated reasonableness test. The test itself is set out by the Court in *R. v. Oakes*, [1986] 1 SCR 103. Section 33 is commonly referred to as the 'notwithstanding clause' and it allows for Parliament or the provincial legislatures to make an exception to ss. 2 or 7–15 of the *Charter*.

10 *R v. Sparrow*, [1990] 1 SCR 1075 at 1109 (emphasis added).

11 *St Catherine's Milling and Lumber Company v. The Queen*, (1888), 14 App Cas 46.

12 It is useful to cite the specific language of s. 91: 'It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, *in relation to* all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada *extends to* all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say'. It is patently clear that the phases 'in relation to' and 'extends to' in combination with 'Indians, and Lands reserved for the Indians' cannot simply be read as an unequivocal grant of unilateral *power over* Indians and their lands. See *The Constitution Act, 1867*, 30 & 31 Vict, c 3 (emphasis added); *St Catharine's Milling, supra* note 11.

13 *Sparrow*, *supra* note 10, at p. 1103 (emphasis added).

14 I do not want to suggest that the Court is unaware of the problems stemming from their interpretation. They explicitly cite an essay by Noel Lyon that indicates that they are aware of the problem posed by their interpretation of federal power. The part of Lyon's essay they cite states that 'the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.' Noel Lyon, 'An Essay on Constitutional Interpretation' (1988), 26 *Osgoode Hall LJ* 95at 100 cited in Sparrow, supra note 10, at p. 1106. Following this citation, the Court states that they will 'sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.' (ibid. at 1106). The Court is thus clearly

attempting to use federal power by a new set of rules, but the problem is that unilateralism (even in a judicially mediated form) cannot hope to resolve constitutional problems stemming from national pluralism. In any pluralistic context, we need to take account of other perspectives and interpretations of the constitution. For a recent interpretation of s. 35 through an Indigenous perspective see Sarah Morales, "a 'lha'tham: The Re-Transformation of s. 35 through a Coast Salish Legal Methodology' *National Journal of Constitutional Law* 37.2 (Jun 2017):145–76.

15 This is, to my mind, what Borrows' has in mind when he refers to the (Ab)originalism that can be seen and moves on to reduce s. 35 to little more than a procedural burden on Crown sovereignty. See chapter 4 in John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

16 John Borrows, 'Seven Generations, Seven Teachings' (2008) Research Paper for the National Centre for First Nations Governance, at 5.

17 For a critique of the Court's use of the analogy to the law of trusts, see Ryan Beaton, 'Aboriginal Title in Recent Supreme Court of Canada Jurisprudence: What Remains of Radical Crown Title?' (2014) 33 *Nat'l J Const L* 61.

18 *R v. Van der Peet*, [1996] 2 SCR 507 at para. 73. There was a wave of critical scholarship that followed the release of the decision: John Borrows, 'The Trickster. Integral to a Distinctive Culture' (1997) 8:2 *Constitutional Forum* 27; Leonard I Rotman, 'Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger and Van der Peet*' (1997) 8:2 *Constitutional Forum* 40; Bradford W Morse, 'Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v. Pamajewon*' (1997) 42 *McGill L J* 1011; Barsh and Henderson, *supra* note 11; and Kent McNeil, 'How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?' (1997) *Constitutional Forum* 8:2; Michael Asch, 'From "Calder" to "Van der Peet": Aboriginal Rights in Canadian Law, 1973–1996,' In: *Indigenous peoples' Rights in Australia, Canada and New Zealand* (ed.), Paul Havemann (Oxford: Oxford University Press, 1999); and for a more recent comparative analysis of aboriginal rights see Michael Murphy, 'Prisons of Culture: Judicial Constructions of Indigenous Rights in Australia, Canada and New Zealand' (2008) 87 *Can B Rev* 357).

19 *Van der Peet*, *supra* note 18, at para 70.

20 Ibid.

21 *R v. Gladstone*, [1996] 2 SCR 723 at paras 57, 73–74.

22 *Sparrow*, *supra* note 10 at p. 1079.

23 *Van der Peet*, *supra* note 18, at para 302.

24 Chief Justice McLachlin recently extended its application to the law on Aboriginal title in *Tsilhqot'in Nation* while simultaneously qualifying it by maintaining that '[i]f a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal people.' *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44 at para 84.

25 Robert Hamilton's forthcoming work shows that the unilateral model of sovereignty simply did not apply during the seventeenth and eighteenth centuries. Rather, the model the British employed during this period was both divisible and overlapped with several other

legal systems. I provide an extended review of how this divisible Imperial model begins to change towards a more absolute and territorial nation-state model in the nineteenth century in my forthcoming book *Reconciliation without Recollection: An Investigation of the Foundations of Aboriginal Law* (Toronto: University of Toronto Press).

26 Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004) at 16.

27 Ibid., at p. 5.

28 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*. (Cambridge University Press: Cambridge, 1995) at 74; Peter Russel makes a very similar point in his most recent book *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017).

29 Larry Chartrand, 'The Failure of the Daniels Case: Blindly Entrenching a Colonial Legacy,' (2013) 50:1 *Alta L Rev* 181 at 185.

30 Thanks to James Tully for suggesting adopting this term. He develops this term in two unpublished essays: *Violent Power-Over and Nonviolent Power-With: Hannah Arendt On Violence and Nonviolence* (Paper delivered at Goethe University 7 June 2011) [unpublished]; Richard Gregg and the Power of Nonviolence: The Power of Nonviolence as the unifying animacy of life (J Glenn and Ursula Gray Memorial Lecture, delivered at Colorado College, 1 March 2016) [unpublished].

31 Tully, *Strange Multiplicity*, *supra* note 28 at p. 136.

32 Russell, *supra* note 28.

33 Paul Schiff Berman, 'Federalism and International Law through the Lens of Legal Pluralism' (2008) 73 *Mo L rev* 1149 at 1158.

34 Discovery was rejected by International Court of Justice (ICJ) in *Western Sahara: Advisory Opinion of 16 October 1975* (The Hague: ICJ Reports, 1975).

35 Government of Canada, *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous peoples*, online: Government of Canada www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.

36 This citation is from the speaking notes for the Minister of Indigenous and Northern Affairs (Carolyn Bennett) for the Announcement of Canada's Support for the United Nations Declaration of Indigenous peoples, which was delivered on 10 May 2016. A copy can be found online: www.metisnation.ca/wp-content/uploads/2016/05/Speech-Minister-Bennett-UNPFII-NEW-YORK-MAY-10-FINAL.pdf.

37 Ibid.

38 In *Calder*, *supra* note 5 all six judges accepted that Aboriginal title was grounded in prior Aboriginal occupation of the land and not only in the Royal Proclamation or other Crown acts or legislation. Also see *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 20.

39 *Taku River*, *supra* note 5, at para 42. See also, e.g. *Haida*, *supra* note 40, at para 32.

40 For an account of how this creates problems in the Court's use of the concept of fiduciary duty see Ryan Beaton, *supra* note 17 and his forthcoming book.

41 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 150.

42 Lightfoot, S. (2016). Global Indigenous Politics: A Subtle Revolution. New York, NY: Routledge Press at 19.

43 For a detailed account of this possibility with the treaties, see the concept of 'treaty federalism' in Russel Lawrence Barsh and James Youndblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980) and, more recently, in Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

44 Roger Merino, 'Law and Politics of Indigenous Self-Determination: The Meaning of the Right of Prior Consultation' [unpublished] at 22.

45 Tierney, *supra* note 26, at p. 13.