TRACKING JUSTICE:
The Constitution Express to Shared Sovereignty

Louise Mandell, QC

Indigenous Peoples and their allies opposed the patriation of the Canadian Constitution. I extend great gratitude for the quality of their generosity. I am not able to name all those who participated and influenced events. This is my story. Each story is one of many threads of connection. As these stories are told, we may begin to see how invisible or seemingly random threads are woven together into a single stunning tapestry, blanketing Canada with hope that justice will prevail for Indigenous Peoples and for all creation.

I have been given four Indigenous names. Each name has gifted me with belonging: *Snuutdanah* of the W̱SÁNEĆ (Saanich) Nation; *Nnang tllga kihlgid* of the Skedans Clan of the Haida Nation; *Eek-sum-ga no-gad* of the Kwakwa̱ka̱'wakw (Kwakiutl); and Old Woman Otter (*Nisa me I moonees sake*) of the Piikáni of the Blackfoot Nation. I am the granddaughter of Jewish immigrants to Canada, who fled anti-Semitism in Europe. I was the first woman in my family to graduate from law school. This was in 1976. I articled with the great storyteller William (Bill) Deverell. Through a maze of synchronicities, I met the late and great Grand Chief George Manuel who hired me to represent the Union of BC Indian Chiefs (UBCIC) at the West Coast Oil Ports Inquiry. My dear friend, the late Leslie Pinder, worked at a big downtown law firm at the time. Then at a firm Christmas party at the Vancouver Club, where women were supposed to use the side door, Leslie walked through the front door and caused an uproar. The upshot was her joining me at UBCIC.

With my partners Leslie Pinder and Clo Ostrove, we established the then all-women law firm Mandell Pinder, working exclusively for Indigenous Peoples for more than forty years. This was when Aboriginal Rights litigation was in its infancy. I had the privilege of supporting UBCIC during the time when the Constitution was patriated over its objections and, afterwards, litigating constitutional rights. In 2014, I was appointed as the second chancellor of Vancouver Island University (VIU).

SEPTEMBER 1980

UBCIC is awakening to the news of the patriation of the Constitution. It is September 1980 and I am with Grand Chief George Manuel, president of the UBCIC and the World Council of Indigenous Peoples, who has summoned UBCIC's legal department into his spacious yet unpretentious office at 440 West Hastings. Sitting with me are Leslie Pinder and Mary Lou Andrew. Leslie and I are UBCIC's first in-house lawyers, and Mary Lou, an Elder from Seabird Island Reserve, is our most immediate boss. Cautious, skilful, with a mother's love for the Fraser River, Mary Lou teaches us how to use our legal skills to be effective advisors for UBCIC; she teaches us to listen with the ear of our heart.

Grand Chief George is leaning over – more like leaning into – a legal-sized document, which he has just removed from an unmarked brown envelope. He wears thick, black-rimmed glasses. The document is a briefing to the federal cabinet, with no indication of its authorship. In bold letters, it is marked "STRICTLY CONFIDENTIAL." It is obvious that this document should not be in our possession. He hands the document to Leslie, who reads aloud:

> There is likely to be a major effort by Canada's Native Peoples to win national and international support (especially at Westminster) for their stand against patriation. If the Native Peoples press forward with their plans and if they succeed in gaining support and sympathy abroad, Canada's image will suffer considerably. Because Canada's Native Peoples live, as a rule, in conditions which are very different from those of most other Canadians – as sample statistics set out below attest – there would be serious questions asked about whether the Native Peoples enjoy basic rights in Canada:
>
> a) Indians have a life expectancy ten years less than the Canadian average;
>
> b) Indians experience violent deaths at more than three times the national average;
>
> c) approximately 60% of Indians in Canada receive social assistance;
>
> d) only 32% of working-age Indians are employed;
>
> e) less than 50% of Indian homes are properly serviced;
>
> f) in Canada as a whole, the prison population is about 9% Native, yet Native Peoples make up only 3% of Canada's population. In 1977, there were 280 Indians in jail per 100,000 population, compared to 40, the national average.

> Native leaders realize that entrenching their rights will be enormously difficult after patriation, especially since a majority of the provinces would have to agree to changes that might benefit Native Peoples at the expense of the provincial power. They therefore demand an entrenchment of Native rights before patriation.[1]

Silence takes hold. The four of us do not yet understand how foreboding our speechlessness is. We have entered a paradigm shift where issues of voice and entitlement to speak, as well as to be heard, are the dominant metaphors of the political and legal discourse.

The silence between us is broken by Grand Chief George. With clarity and precision, he explains this newly minted, draconian strategy to eliminate the Indigenous Peoples' voice from patriation politics. He sees the roots of the strategy in Trudeau's White Paper of 1969, which was Canada's own Final Solution to the "Native problem."[2] He recalls Trudeau's words when Jean Chrétien, then minister of justice, introduced this policy and outlined the constitutional change that was needed to implement it: full jurisdictional powers over "Indians and Indian lands" would be transferred to the provinces; Indigenous Peoples would become "Canadians as all other Canadians":[3]

> Perhaps the treaties shouldn't go on forever. We must be all equal under the laws and we must not sign treaties amongst ourselves …
>
> But aboriginal rights, this really means saying, "We were here before you. You came and you took the land from us and perhaps you cheated us by giving us some worthless things in return for vast expanses of land. We want you to preserve our aboriginal rights and to restore them to us." And our answer is "no."[4]

Hanging on the wall of Grand Chief George's office is a photograph of more than two hundred Indigenous leaders, each one immaculately dressed. They look on as witnesses to our meeting. We can feel their collective presence. I have a sense of being visited – like the tap of a bird on the window – news being delivered. They are standing on the

---

[1] As cited in Louise Mandell, "The Union of British Columbia Indian Chiefs Fights Patriation," *Socialist Studies: A Canadian Annual* 2 (1984): 171–72; Victor. O'Connell, n.d., "The Indian Condition on the Canadian Constitution," chapter of unpublished manuscript, on file with author.

[2] Canada, Minister of Indian Affairs and Northern Development, "Statement of the Government of Canada on Indian Policy," 1st Sess., 28th Parl., 1969 (Ottawa: Queen's Printer).

[3] As cited in Peter Cumming and Neil Mickenberg, eds., *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972), 331.

[4] Cumming and Mickenberg, 331–32.

steps of the former residential school in Kamloops in 1969; they've just formed the UBCIC. They joined together to advance the land question and oppose the White Paper, which threatened their very survival. This is the same residential school where, in 2021, some 215 unmarked graves of children were found.

I first heard the land question in 1977. I was UBCIC's legal counsel at the West Coast Oil Ports Inquiry. Oil companies were competing for the winning proposal to build a port to service oil tankers. The late Godfrey Kelly, a Haida Elder, was testifying on a panel about the risks of tanker traffic. He spoke in such a loving way about the Haida, who, he said, are the most fortunate people on earth because of the wealth of seafood they harvest year-round on Haida Gwaii. He told stories about the species of fish whose home waters were Haida Gwaii, mentioning Haida place names, which sounded like music to me. Then, he politely raised the land question. I heard the land question asked in a number of ways: "Where's the government's bill of sale? Where is the government's authority to put the fish at risk, when the Haida never surrendered our land?"

One way that the land question sounds, or perhaps the voice of the land question at its deepest, is: How did Canada's laws come to cover Indigenous territories when Indigenous laws already lived there? Our life question is the question life asks. The land question was a question waiting to find me. I was born in 1947 into a Toronto Jewish family – the first post-Holocaust generation. As a young girl I was drawn to Holocaust stories like a moth to light. How was it possible that six million Jewish people, and other victims, including Poles, Roma, Soviet prisoners of war, gays and lesbians, Catholic priests and Christian pastors, Jehovah's Witnesses, disabled people, and courageous resistors – how could these people all be murdered, with such meticulous premeditation, under cover of law? I went to law school. I was a legal thinker with a finely tuned mistrust of the law. I knew that laws were not neutral. Working with UBCIC, I found a value system that felt like a mother tongue.

Grand Chief George sounded the alarm. Trudeau's proposal for constitutional change was "beyond consultation, beyond administrative battles with government, beyond petty politics." It was "hitting at the roots – the very existence of the Indian Nations." If passed, the Canada Bill (the "Bill") would enable Canada to get rid of the special constitutional status of Indigenous Peoples, just as Trudeau and Chrétien had tried to do in 1969.

More than one hundred Chiefs gathered at a UBCIC assembly in the fall of 1980 to act against the proposed constitutional reform. While resolute, their position was inclusive, reflective of legal orders

whereby relationships are made and grow based on values of mutuality, respect, and reciprocity. They had welcomed the newcomers as partners. Confederation was a pact among founding peoples on their land and it included them. Their consent to constitutional reform was connected to the honour of the Crown. So their voices would need to be included in the constitutional discussions. The resolution they passed at that assembly reads, in part:

> Indian Nations in Canada were never conquered. European traders, and, in later years, settlers, were made welcome in the land and environment which was alien to them. Throughout years of European settlement and expansion, Indian Nations sought a mutual accommodation, one that would permit a bountiful land to be shared to the benefit of all.
>
> Indian rights to land, resources, culture, language, a livelihood and self-government are not something conferred by treaties, or offered to Indians, or concessions by a beneficent government. These are the rights that Indian Nations enjoy from time immemorial. These rights are pre-existing and inviolable. A Canadian Constitution can accommodate Indian rights – it cannot diminish, alter or eliminate them.
>
> Indian Nations understand the Constitution to be a pact among founding peoples, among which we include ourselves. We understand our special constitutional relationship with the federal government to be in the nature of a partnership with the federative system, which was intended to permit us to survive and prosper as Indian Nations, while contributing to Canada's total development.
>
> … exclusion of Indian participation from a broad constitutional review [is] the first mistake which federal authorities have to correct. Until this is done, Indian Nations reject the proposed federal resolution in total as a hostile and aggressive measure and are prepared to employ all means to resist its implementation.[5]

By placing these two documents (the government briefing and the UBCIC's resolution) side by side, we view a conversation. In effective conversation both parties not only have a voice but also listen. The UBCIC Chiefs are speaking to Canada about a partnership anchored in the past that extends, with mutual benefit, into the future. Canada's audience, however, is not the Indigenous Nations. If the international

[5] As cited in Mandell, "The Union," 164–65.

community learns about Canada's treatment of Indigenous Peoples, they will question "whether the native peoples enjoy basic rights." Canada's image will be tarnished. The Indigenous voice must be silenced. The conversation is broken.

Listening, speaking, silence. These are powerful forces that can change the course of history. There is a wonderful Zulu greeting, "Sawubona," which means "I see you"; and the response to which is, "I am here." This open-hearted recognition of each other is central to building belonging. During the *Delgamuukw* trial, a lengthy test case on Aboriginal Title in British Columbia, the late Mary Johnson, a Gitksan Elder, was giving evidence of her adaawk (Oral History), expressed in part in a dirge song. Despite the significance of the song's showing ancient territorial ownership, the trial judge didn't want to hear it. "I have a tin ear," the late Chief Justice McEachern said. "It's not going to do any good to sing to me." Indeed, it didn't do any good. He ruled that Aboriginal Title, if it existed in British Columbia, which he doubted, had been extinguished.[6]

Spiralling forward in time, in November 2012, the late Honourable Chief Justice Lance Finch spoke at the first Continuing Legal Education Conference dedicated to a discussion of Indigenous law. He described listening as "the duty to learn." He said, "Reconciliation is not about making space for Indigenous peoples, their laws, and legal orders within the Canadian legal framework, but as newcomers we have to find *our* place within *Indigenous* landscapes."[7] Listening is being open to a relationship of mutuality. Listening involves opening oneself up to the possibility of being changed. We listen so we can know the needs of the other. Listening is where love begins.

Speaking is always a part of liberation – it is a storytelling process; breaking stories, breaking silences, making new stories. Indigenous poet Joy Harjo wrote: "To speak, at whatever the cost, is to become empowered rather than victimized by destruction. In our tribal cultures, the power of language to heal, to regenerate, and to create, is understood."[8]

Silence is the absence of voice. It is what allows hypocrisies and lies to grow and flourish, crimes to go unpunished. Our voices are an essential

---

[6] *Delgamuukw v. The Queen and Registrar* (1986), 5 B.C.L.R. (2d) 76 (S.C.). This ruling was overturned at the Supreme Court of Canada (SCC), *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[7] The Honourable Lance Finch, "The Duty to Learn, Taking Account of Indigenous Legal Orders in Practice," CLEBC Indigenous Legal Order and the Common Law Conference, 15 November 2012, emphasis added.

[8] Joy Harjo and Gloria Bird, "Introduction," in *Reinventing the Enemy's Language: Contemporary Native Women's Writing of North America*, ed. Joy Harjo and Gloria Bird (New York: W.W. Norton, 1997), 21–22.

aspect of our humanity: to be rendered voiceless is to be dehumanized. The Crown's original claim of *de facto* sovereignty was based on doctrines in which Indigenous laws were silenced. The colonizers declared the land *terra nullius* – empty land – and then strove to empty the land of its real owners, of Indigenous laws, culture, Oral Traditions, ways of learning, knowing, and teaching. Indigenous laws were muffled, outlawed; Indigenous People were unable to speak for their relatives to whom they had obligations.

Indigenous voices were strategically excluded from fora of debate and discussion about constitutional reform. One Elder put it this way: "Canada is inside playing hockey with us, but they won't let us in the door. All we hear from the outside is the call of them scoring."

RING THE BELL THAT STILL CAN RING

Grand Chief George saw this moment as pivotal to the future of Indigenous Nations' survival as distinct peoples within Confederation, and he wanted to make sure that all Indigenous communities knew about their unique and historical constitutional status and the plans of the Trudeau government around patriation. This was before the Constitution Express was in anybody's mind. Mary Lou organized meetings in communities throughout the province. Leslie and I were part of the team, sent by UBCIC, to explain what was being proposed and to discuss the legal implications. As the months passed, we attended dozens of community meetings. Over time we noticed that many people already knew what we were talking about before we arrived. Before some meetings, Elders would come forward and say, "We will go with you," or "We will sit with you, so people will know how important it is to work together." The gymnasiums were so full that, with characteristic wry humour, one Chief commented that we drew a bigger crowd than bingo night.

One early morning a floatplane dropped me off on a dock. I had been sent to speak in a remote community that still had no electricity. The morning was quiet. I heard a motorboat approaching. Ducks scattered. A young man, Clifford Hanuse, was driving the boat. "Are you a lawyer?" he shouted. "Yes," I hollered. "Do you know anything about this so-called *BNA Act*?" "Yes." He swung the boat around and said, "OK. Get in." I jumped in body and soul. I was wrapped in a larger story and some part of me was curious, excited, grateful that I was included in this journey along an uncharted path. There was no map, mapping past our past,

forging a different history, redesigning power. It was a good day boating together up the Wanukv River to the Wuikinuxv Village.

Although many people who attended the meetings had little knowledge of the *British North America Act* (*BNA Act*), they had a deep understanding of what they called "the Queen's law," passed orally from generation to generation. In the Okanagan, the Elders would say what sounded like "Ha'Queen," which meant, "the Queen said." "Ha'Queen – the government cannot bring down their law against the people for living from the land." "Ha'Queen – the government cannot take charge of our people and our lands without a treaty." I realized that what was being spoken of showed an accurate understanding of the applicable law when the Crown sought to plant overseas settlements on territories occupied by Indigenous Peoples. This was international law, which became the law of Canada, stated in the Royal Proclamation of 1763. The law required the Crown to recognize the pre-existing occupation by Indigenous Peoples of their territories as well as their possession of land, laws, and legal orders as legal rights, with the incremental perfecting of Crown sovereignty through treaty making. The Royal Proclamation of 1763 was issued by Britain as a statement of Indigenous sovereignty and Crown honour to prevent local governments in Canada from overstepping the fundamental principle of Indigenous consent.

So much for this law. It was ignored by British Columbia. The few treaties concluded in the pre-Confederation period on Vancouver Island were also ignored and then forgotten. It was not until 1964, when a pre-Confederation treaty was raised as a defence in a hunting charge, that the Court ordered the Crown back into the treaty relationship.[9] Under cover of law, Crown governments secured control over Indigenous territories. The Crown derived its authority through force.[10]

In successive revisions to the *Indian Act*, meagre reserves were established for Indigenous Peoples who, by a miracle, survived introduced diseases. There was a prohibition against the Potlatch and the Sundance. Cultural destruction was legalized. Ceremonial regalia were confiscated. Indigenous people could not leave the reserves without a permit. Some Elders today recall a time when they could not congregate unless reading a Bible or singing hymns. Access to justice was foreclosed. The *Indian Act* made it illegal to raise money to go to court to fight the land question or to hire lawyers to assist. This legal barrier remained in place

[9] *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), affirmed (1965), 52 D.L.R. (2d) 481 (S.C.C.).

[10] Austin Sarat, ed., *Law, Violence and the Possibility of Justice* (Princeton, NJ: Princeton University Press, 2001).

for the next quarter of a century.[11] Eventually, residential schools carried out this policy of cultural eradication. Genocide was the midwife to Canada's birth.

The Truth and Reconciliation Commission (TRC) states simply: "The Canadian Government pursued this policy of cultural genocide because it wished to divest itself of its legal and financial obligations to Indigenous Peoples and gain control over their land and resources."[12]

I digress. All the while I was participating in meetings and considering strategies to oppose patriation, I was also participating in legal orders, whose unwritten laws I didn't yet recognize as law. We expect a parallel universe between legal orders, but Indigenous legal orders are so unlike Western legal traditions. Indigenous legal orders include the Creator, supernatural beings, helpers and healers, ancestors, and descendants. They are engulfed in ceremony and a culture transmitted orally across generations, embodying principles to live by, giving rise to rights and responsibilities.

Our clients were generous and gracious teachers. Over time I began to see the contours of Indigenous laws and legal orders. I worked in the company of people who loved their territories, who lovingly named each bay and inlet, mountain and meadow. Love is remembering our place in the story of Creation. The Indigenous (hi)stories take us back to a remembering of origins, to when the gods first shaped humans out of clay, back to when animals spoke with people, to when the sky and water were without form and all was shaped by such words as "let there be light."[13] These legal orders give collective expression to an ancient consciousness, intense and holy, honouring the spark of the divine inside all life. Humans, the natural world, and the universe are one living entity. Contained within these legal orders is an understanding that all things are connected – that humankind is not separate from nature; that there are natural laws beyond human laws, and ways above ours that must be honoured and respected. We can't be human in isolation. The Tlingit have a saying: "In this world we are just walking along, holding each other's hands, going back and forth in time."

Ethics are transmitted as evolutionary currents to the next generation. In Indigenous legal traditions, law tends to be a verb. Law is embodied

---

[11] *Indian Act,* R.S.C. 1927, c. 98, s. 141.

[12] Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), 6. https://publications.gc.ca/collections/collection_2015/trc/IR4-6-2015-eng.pdf.

[13] Linda Hogan, *Dwellings: A Spiritual History of the Living World* (New York: Simon and Schuster, 1995).

– we are our law walking. Indigenous laws are participatory, made and remade through an engagement with life. Laws are exercised through harvesting practices, ceremonies, the consciousness we bring to our relationships. Laws are alive. Our clients said: "When we block the road, this is our law … 'tanks but no tanks.'"

Grand Chief George had a talent for bringing people together and treating us all like we had something to give and to say. Everyone matters. Everyone has an opportunity to speak. Consent is a hallmark of respect. I observed the organic process of consensus building. I could tell when a consensus was emerging in the room. I sensed the air get lighter and there was humour – some of the heaviness lifted and people would joke with one another. UBCIC would reflect the consensus in a resolution: "be it resolved," and the resolution would spell out our instructions clearly. But I knew that a consensus had formed before UBCIC formally instructed Leslie and me to commence a legal case in the courts in London to stop patriation.

The legal focus of the case would be based on the consent of the Indigenous Nations as being necessary for patriation of the Canadian Constitution from Britain. Indigenous laws, legal orders, the Royal Proclamation, and treaties were the oldest roots of the living tree of Confederation. Consent elevated the process of constitutional renewal into an exercise in statesmanship, decolonization, and nation building. To make this case in the British courts, we had a rich constitutional history to draw from but no precedents. I don't recall ever questioning or being asked for an opinion about the odds of winning or losing such a case. This was the chosen option not because it stood a chance of success but because it was the right thing to do.

This was 1980. Leslie and I had been out of law school for only a few years. No brief too big, no brief too small.

THE TRAIN LEAVES THE STATION

Prime Minister Pierre Trudeau's avowed intention to patriate Canada's Constitution without the involvement of Indigenous Nations was met by Grand Chief George's famous and oft-repeated words referring to the land question: "They will never give it back – we have to take it back." He told us to act on three levels – the political, the legal, and that of the press. He warned against fighting "bare bones political" or "bare bones legal." He illustrated this by referencing the *Calder* case,[14] where

[14] *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

the Nisga'a went to court in response to the White Paper while, at the same time, UBCIC formed and advanced Aboriginal Title and Rights collectively and politically. The campaign to stop the patriation of the Bill without Indigenous consent was another stunning example of this three-pronged play.

In many of the meetings we attended, I noticed that the strength in the rooms often came from an alliance between the "yes, can do" energy of the youth and the steady patience and knowledge of the Elders. I don't know if this alliance was unique to the movement, but it was powerful. UBCIC did not have money but was wealthy in Indigenous law-abiding citizens who wanted to participate, to do what their law bids them to do. When UBCIC made the announcement that it was putting together a train, the support was already there.

UBCIC staff members Debra Hoggan and the late Rosalee Tizya, both with an amazing talent to do the impossible if that was the only thing that could be done, arranged for a train that would leave the Vancouver station in a few short weeks. The communities raised the money needed to pay for it. Before Christmas 1980, hundreds of Indigenous people scraped together funds to board the train – made quilts, harvested mushrooms, sold livestock, sold stereos, had bake sales and yard sales, and passed around the hat – fundraising the old-fashioned way. Artists and brothers Barry and the late Derek Wilson gathered silver dollars and carved the coins on one side, selling these to raise money for the train. Some people had no money, but they showed up at the station and boarded the train anyway. I was at the train station along with hundreds of people honouring those who boarded it with prayers, drums, songs, speeches, and packages of food, sending them along in a good way.

The train left the Vancouver station, stopping in Ottawa and New York, and then it was on to Europe. The last stop was London. They called it the Constitution Express. When I speak of the Constitution Express, I include all the people on the train as well as the ancestors who guided the work of this sacred project: taking it back, standing up for Indigenous laws, standing up for treaties, standing up for the principle of Indigenous consent, standing up for self-determination, fighting for their nationhood and for hope, seeing justice as achievable.

For the Constitution Express there was no need for silence, no need for fear. To be visible, and to have their stories told and heard, was to satisfy a true and deep need. These people displayed a pure-hearted enthusiasm to dismantle the hypocrisies of the system that Canada wished to keep hidden, referring to it as a "domestic problem." The

voices of the Constitution Express called the laws back to the land. They told the story of a stolen landscape, how Canada's policies and laws impoverished Indigenous Peoples and their homelands. Speaking up is how civilizations heal.

The Constitution Express was the acceleration of the land question through political time. It is impossible to speak about this time without acknowledging the intense spirituality of the movement – staying on message, advancing through prayer and ceremony.

THE LEGAL STOPS ALONG THE WAY

The lawyers were instructed to use, or to create, all possible fora, not just the courts, to present and broadcast arguments supporting Indigenous consent. In November of 1980, UBCIC, Treaty 9 Nations from Northern Ontario, and the Indian Association of Alberta (IAA) made written submissions to the Fourth Russell Tribunal on the Rights of the Indians of the Americas concerning the plight of Canadian Indigenous Peoples in the constitutional debate.[15] The Russell Tribunal's report condemned Canada's treatment of Indigenous Peoples and their exclusion from constitutional reform:

> A significant number of Indian Nations in the Americas have preserved their own identity and cultural initiative, in spite of the unremitting efforts of genocide and ethnocide directed against them. The program of cultural destruction and social oppression of the native people of the Americas did not cease when the several countries of the American continent declared their independence. On the contrary, the machinery of internal colonialism has been continuously consolidated, ruthlessly seeking the disintegration of Indian communities.[16]

Meanwhile, the Constitution Express rolled across the country, making headlines day after day. Leslie and I were in Ottawa with a small team of people, preparing for the day when the Express arrived at its first destination. Grand Chief George had a heart attack and was in an Ottawa hospital. He had turned over the reins of the train to his eldest son, the late Chief Bob Manuel, and to Chief Wayne Christian, Chief Archie Pootlass, and Grand Chief Saul Terry. Building collective

---

[15] See Feltes and Venne, this issue.

[16] Russell Tribunal on the Rights of the Indians of the Americas, Robin Wright, Jack D. Forbes, Fons Eickholt, and Frank van Vree, *The Rights of the Indians of the Americas: A Summary Report on the Results of the Fourth Russell Tribunal* (Amsterdam: A WIP Publication, 1981), 3.

strength and cohesiveness, they cared for one another through the sacrifices and growth that came with the journey.

From his hospital bed, Grand Chief George instructed Leslie and me to create a legal document addressed to the Queen. We were told that, when the Constitution Express arrived in Ottawa, the people would go to the Governor General's residence and hand-deliver this document. And so, stamped with seals and an official blue court ribbon, we created a document entitled "A Petition and Bill of Particulars." The petition stated the legal case as to why Indigenous consent was required for patriation. It appealed to the honour of the Crown, reminding the Queen of the fundamental principles of British justice, Crown obligations towards Indigenous Peoples, and the Royal Proclamation and treaties that wove consent into the constitutional fabric. The bill of particulars contained an agenda for decolonization and nation rebuilding. It was diplomatic, solutions-oriented, and provided a roadmap for doing the right thing during this process of constitutional reform.

Leslie and I found our precedent for the petition and bill in the tradition of the many elegant petitions and powerful letters that, over the century, had been addressed to heads of Crown governments and to the Queen.[17] I have come to understand how these petitions, so beautifully written, were themselves a reflection of Indigenous peace-making traditions and values. These ancestors saw the newcomers as partners – part of their family. This vision derives from their legal order related to bringing resolution and peace by making opposing sides close kin, extending the love and concern for those whom you have wronged or who have wronged you. Brothers and strangers are one. This is a way of experiencing the world – a world where one lives in relation, where there is no "other." It is a very personal, relational interaction.

Leslie and I were there to greet the train when it pulled into the Ottawa station. As friends disembarked, I saw how tired people were: some carried single bags, some were holding the hands of children, others helping Elders. I saw beauty everywhere – it was an ethical beauty in people's eyes, and love – hugging, laughing, telling stories. Sufi poet Rumi says: "Justice is what love looks like in public." I felt this quality of love at the train station that day – a kind of happy light – holding together and splitting apart at the same time, like the act of being born.

[17] A select example of declarations and petitions from British Columbia Indigenous Peoples can be found in Delphine Derickson, *We Get Our Living Like Milk from the Land* (Penticton, BC: Theytus Books, 1994), 109–16.

There were people who disembarked whom I didn't recognize. The train had travelled across the country, picking up support and supporters along the way. I found out later how this happened. Spiralling forward in time, twenty-five years after the Constitution was patriated, I spoke at a symposium on the negotiations that led to the Bill. I had the privilege of listening to a brilliant Indigenous historian. She told a story about how, when she was a little girl, she had gone with her grandpa to the train station to show their support for the people who rode the Constitution Express as it passed by their Prairie community. She held her grandpa's hand and recalled waving at the people, who waved back from the train windows. Then, her grandpa sent her running home to tell her mom that he'd gone to Ottawa. He was so moved by the importance of the work that, without so much as a toothbrush, he boarded the train. He returned weeks later, invigorated and well. This experience and his stories inspired her education, her work and writings, her life.

As the train neared the Ottawa station, Trudeau announced that the Parliamentary Standing Committee, which previously had excluded Indigenous participation, now extended timelines to February 1981 to hear submissions from those on the Constitution Express and other Indigenous representatives.[18] Nobody on the train or among the UBCIC leadership attended the Standing Committee – a forum incapable of changing the status quo because it *was* the status quo. The people on the Express had their sights on nation-to-nation constitutional renewal.

The people who disembarked the train headed straight to Governor General Schreyer's residence. They presented him with the petition and bill, asking that he deliver this to the Queen. The petition and bill were also delivered to the Government of Canada. Then, the Constitution Express journeyed to New York, where the petition and bill was hand-delivered to the United Nations. Contained in the Bill was a request that Canada respond by a fixed date to the Chiefs' request for a meeting to begin the work it described in detail. The Government of Canada went silent.[19]

UBCIC's political and legal activities then moved to Europe. UBCIC sent Pauline Douglas to set up headquarters in a three-bedroom apartment near Earl's Court station, London. Later, Mary Thomas (Secwepémc, from Williams Lake) would be selected by the Cariboo Tribal Council to coordinate the lobby alongside Valerie Morgan (Secwepémc, from

[18] Mandell, "The Union," 173.
[19] As cited in Mandell, "The Union," 173–75.

Bonaparte). They also lived and worked in this apartment. Leslie and I stayed there with my baby son Max when we came to London.

When UBCIC staff arrived in London they joined Indigenous lobbies that had started in 1979, led by the National Indian Brotherhood (NIB), the IAA, and the Federation of Saskatchewan Indians (FSI). But the London lobby can be traced further back to the turn of the century, when separate delegations of hereditary and elected leaders from many nations in British Columbia – Squamish, Cowichan, Secwepémc, Syilx, Tsimshian, Nishga – journeyed to England calling on the Crown to fulfil its obligations. Some of these Nations tried, without success, to get a case before the Privy Council regarding Canada's illegal expropriation of their lands. By the time UBCIC arrived in London in 1980, the NIB had gone home while the FSI remained, staffed by Victor O'Connell. The IAA continued to have a lobby, led by Sharon Venne and Wallace Manyfingers.

Meanwhile, the Constitution Express lobbied in major European cities, advising that Canada was misrepresenting the position of the Indigenous Nations abroad. Indigenous people told stories about being denied basic human rights and about Indigenous exclusion from constitutional reform. They sought help for their plight at this critical time in history, urging that letters be written to put pressure on the leaders in Canada and Britain regarding the necessity and justice of seeking their consent to patriation.

When Leslie and I first arrived in London, the Special Foreign Affairs Select Committee, chaired by Conservative MP Sir Anthony Kershaw, was investigating the role of Westminster in the request to patriate the *BNA Act*. The British Foreign and Commonwealth Office (FCO), led by Lord Peter Carrington, secretary of state, rendered a decision, publicly declaring that any outstanding obligations to the Indigenous Peoples of Canada were no longer Britain's responsibility. Although the Select Committee was an all-party parliamentary advisory body, it deferred to the legal advice of the FCO and advised Parliament that it would be inappropriate to even discuss "Indian issues" during debates of the Bill. The committee relied on J.R Freeland, a lawyer from the FCO. When asked whether the British courts had ever ruled on whether the Crown had existing legal responsibilities under treaties made with Indigenous Peoples, Mr. Freeland replied: "Not to my knowledge."

UBCIC hired Ian Brownlie, QC, DCL, FBA, and renowned professor of international law at Oxford University, to assist the legal team to navigate Britain's political and legal landscape. UBCIC's legal team

in London also included Michael Jackson, QC, our brilliant, beloved teacher from UBC law school. Michael had articled at a prestigious law firm, Oppenheimer, Nathan and Vandyk. In Britain, you could not instruct a barrister except through the intermediary of a firm of solicitors, and so Oppenheimer introduced us to Barrister John MacDonald, QC, who would argue the Manuel case.

Ian Brownlie prepared an opinion for UBCIC, challenging the advice of the FCO in the form of written submissions to the Select Committee. FSI retained Rosalyn Higgins (professor of international law, University of London), who wrote a memorandum asking publicly a series of questions: Which obligations devolved? Had notice ever been given to the Indigenous Peoples? Could the treaties, as a matter of constitutional and international law, have become the responsibility of Canada? The memorandum was picked up by the London press but was omitted from the official list of submissions to the Select Committee, [20] along with the written submissions of the IAA, the NIB, the Inuit Committee on National Issues, and the Native Council of Canada. Ian Brownlie was refused permission to make oral representations to the committee.[21]

The lawyers prepared two memoranda of law on behalf of UBCIC, endorsed by the IAA and the Four Nations Confederacy of Manitoba, addressed to the UK attorney general. As the attorney general can refrain from placing before Parliament a bill that is legally flawed, the memoranda set out the cases to support this course and to seek a judicial opinion about its legality. One memorandum outlined objections to Canada's request from the Indigenous perspective; the second memorandum set out the arguments presented by the provinces that opposed patriation for different reasons. Manitoba was one of three provinces that launched a case in Canada seeking a reference whether the Bill could be patriated without provincial assent. The Supreme Court of Canada (SCC) ultimately ruled the need for provincial consent to be a matter of constitutional convention more than a legal necessity.[22]

The Indigenous memorandum urged the UK not to consent to the Bill until Crown obligations to Indigenous Peoples had been met. It proposed that Indigenous Peoples take on the Crown's duties directly, taking over its authority to approve constitutional amendments.[23] The UK

[20] As cited in Mandell, "The Union," 177–78; O'Connell, "The Indian Condition on the Canadian Constitution," 4–6.

[21] As cited in Mandell, "The Union," 176–77.

[22] *Resolution to amend the Constitution,* [1981] 1 S.C.R. 753.

[23] Emma Feltes, "'We Don't Need Your Constitution'": Patriation and Indigenous Self-Determination in British Columbia" (PhD diss., University of British Columbia, 2021).

should retain its supervisory role (with the amending formula) under the *BNA Act* until "it can be devolved to the Indian Nations or devolved with their consent to another body and under no circumstances should it be blindly eliminated or devolved to the Federal or Provincial government."[24]

Ian Brownlie created an opportunity for Michael, Leslie, and me to present the legal case against patriation at an All Souls College Conference at Oxford University. When the taxi driver asked where we were heading, my dyslexic tendency to malapropism engaged, and I asked to be taken to "All Stars College." He dropped us off at our destination. Michael presented the case, based on the memorandum prepared for the attorney general. The conference subject matter was the need for provincial consent to patriation, and Ian Brownlie, by extending an invitation to us, allowed us to gate-crash the conference and introduce our agenda of Indigenous consent. All the attorneys general made essentially political arguments to the assembled dons. Ours was the only legal/constitutional argument, and it received the most attention in the questions afterwards. Our presentation at All Souls College got a considerably better reception than did the UBCIC lawyers when we sought leave, which was refused by the Manitoba Court of Appeal, to have the question expanded in the Manitoba case to include Indigenous issues.

The Indigenous memorandum was also used for a parliamentary lobby. It was a huge undertaking since there were 635 Members of Parliament and about 400 "working peers" of the House of Lords. Chiefs, leaders, Matriarchs, and Elders from all parts of Canada participated in a working coalition in London. While the Treaty Nations had their own case to bring to England, they converged with the position of those Nations from British Columbia, where no treaties had been concluded: Indigenous consent was required for patriation.

Chiefs and Elders who were in London at any given time attended pre-arranged daily meetings. Meetings with an MP or a lord usually took place in their government offices, which were often very small – a desk and a few chairs. The Chiefs and Elders had come a long way, and, for some, a ceremony was required. Ceremony is a vehicle for belonging. A speaker from the delegation would open the meeting with a prayer and

[24] Union of BC Indian Chiefs, Indian Association of Alberta, and Four Nations Confederacy of Manitoba. *The Indian Nations and the Request from the Canadian Federal Government based upon the Proposed Resolution for a Joint Address to her Majesty the Queen Respecting the Constitution of Canada: Memorandum of Law*, fol. 452, box 1, Correspondence and Papers of Sir John Biggs-Davison, MP (1943–1988) (BD), Canada: Canadian Indians (1981–1982), Parliamentary Archives, London, UK.

make the introductions. Then the delegation would tell the MP why it had travelled such a long way to attend this meeting. People told their stories – nobody used notes, they all spoke from their hearts. I saw my job as a bridge, as someone who could translate what the MPs heard into what the law required of them: to speak up during the parliamentary debate, to refuse to pass the Bill because it was flawed, and to send it back to Canada to obtain Indigenous consent. One challenge was how little the MPs knew about Indigenous Peoples and their legal and political circumstances. This was apparent at one meeting, jointly attended by Chiefs from Saskatchewan and British Columbia, when a member of the House of Lords turned to the gathered group and asked where they were from. One Chief responded, "Saskatoon, Saskatchewan." The British politician turned to his researcher with alarm, saying under his breath: "They don't speak English."

The legal historian Frederic Maitland commented: "So long as law is unwritten, it must be dramatized and acted. Justice must assume a picturesque garb, or she will not be seen."[25] I can still see in my mind's eye the late John Tootoosis, the Cree-speaking Elder from Saskatchewan who was 82 years old when I was introduced to him in the corridor of Parliament. He was wearing a treaty medal, which had been presented to his great-uncle, Poundmaker, one of the chief negotiators of Treaty No. 6 in 1876.

Dancers, drummers, and singers from the FSI performed in London, Liverpool, and Birmingham. A delegation attended the annual conferences of both political parties in Blackpool and Brighton, and then travelled to Edinburgh and Glasgow. At these events, the Chiefs urged that letters be written to MPs to oppose patriation of the Bill, which required Indigenous consent, and many letters were written.

The Constitution Express arrived in London in November 1981 and held a Potlatch ceremony in Westminster. The Potlatch is derived from legal orders whereby disputes and conflicts are resolved through connecting. Feasts, Potlatches, conferences, and other community institutions allow people to gather to channel these disputes into more productive and harmonious relations. Potlatches belong to a culture with a gifting economy, so different from a commodity economy. In a gifting economy the essence of a gift is that it establishes a relationship: to give, to receive, to reciprocate. A gift establishes a feeling bond between people. Prestige is based on what a person does with power and courage.

[25] As cited in H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 58.

Families opened their homes and showed great hospitality and personal support for the people on the Constitution Express. At the Potlatch, the hosts gifted those who attended.

The Potlatch in Westminster was a reminder of elegant connections, celebrating ties with the Queen during this time of constitutional crisis. Because the Potlatch was on foreign territory and there was not just one but many hosts from British Columbia, diplomacy was required, and Potlatch Protocols were adapted. A society that called itself Friends of the Red Indians phoned the UBCIC office in London to ask if they could come to the Potlatch in full regalia. "No," was the answer, but many came in deer hide, beaded and feathered anyway, speaking with British accents. The hosts were inclusive. The work of the Potlatch began.

The Potlatch opened with a prayer, and the Elders gave thanks. I heard the beat of the drums, and ancient prayer songs filled the room. The laws were called in. I hold an enduring memory of my son Max, then aged two, now a musician, with a bowl on his head and a wooden spoon in his chubby little hands, drumming the bowl on his head in time to the Constitution Express song, which carried the heartbeat of the movement to the world. I felt an old feeling that stretches the spirit. We were unifying into one congregation.

Listening – witnessing is part of a familiar legal order. For a document to be valid, it needs to be witnessed. Money passes when a trust is created. Members of Parliament, church, and community groups were invited to witness, and they were paid. Orality, no cameras – a witness is physically present, watching, listening, remembering, and then telling the story of the Potlatch to others.

Speaking – leaders from different Nations in British Columbia spoke about their histories, territories, and their treatment by Canada. They spoke about the Queen's word and about reciprocating the loyalty shown by the Indigenous Nations who honoured their relationship with the Queen through the generations. Their words ignited a sense of responsibility. Consent was a political relationship. Britain was called upon to fulfil its historic and international obligations, to do what the Royal Proclamation sought to do – protect consent.

Universal principles directing collective action, the hallmarks of law, appeared and were obvious. Respect – the Elders were fed first. There was smoked and wind-dried salmon, and stories of the fish and where they were caught. The British press spilled a lot of ink on this Potlatch.

Forces inside Canada also generated political pressure. One was a force of nature – women. New pressure was mounted by Indigenous women

from across British Columbia who occupied the offices of the Department of Indian Affairs in "the black tower" in downtown Vancouver. The occupation would last for seven days, calling for the resignation of Regional Director Fred Walchli, among other things. The women demanded an inquiry into the deplorable living conditions on reserves. The occupation made news in London.

Around seventy people were arrested and charged with mischief. Clo Ostrove had joined the legal department at UBCIC as an articling student. While Leslie and I went back and forth to London, Clo dedicated her considerable talents to organizing and participating in a team of remarkable lawyers from the BC Law Union, who successfully defended all the "mischiefs."

The defendant for the first mischief case was Mary Louise Williams, from Mount Currie. Just before court began, in the halls the late Beatrice Jack from Gold River gave Mary Louise medicine to put under her tongue, and Beatrice did the same. The court convened. The arresting officer was called as the first witness and took the stand. He was asked to identify the accused. To our amazement, he glanced past Mary Louise, who was sitting at counsel table, and positively identified Beatrice Jack, who was sitting in the body of the courtroom. The case was dismissed for lack of proof of identity. There are certain things that happen, and when they do, you must bow in humility to the fact that there is something running through you that is bigger than you – something vast and holy.

While these events were going on in London, the draft bill included section 34, a provision recognizing Aboriginal and Treaty Rights, but this was removed because of opposition from some of the provinces. Then the draft section 34 read: "The aboriginal and treaty rights of the aboriginal peoples of Canada *as they have been or may be defined by the Courts* are hereby recognized and affirmed and can only be modified by amendment" (emphasis mine).[26]

Time spirals. I recall a community meeting where I was reporting on a case that we had lost at trial. I was feeling sad, frustrated, disappointed. An Elder gave me a lesson about "Indian time." "Give up trying to make this moment different than it is. Accept this moment as if you chose it. Let's see what Creator has in mind. Everything that happens is on Creator's time." This wonderful advice grounds me – what might seem to be the worst thing that has happened may turn out for the best. The wording of section 34 reflects a consistent Crown litigation and negotiation position, namely that Crown sovereignty is presumed perfected

[26] Author's personal papers.

and absolute (subject to duties towards Indigenous Peoples the Crown believes it fulfils), while Indigenous Nations Title and sovereignty is presumed to be contingent on court (or Crown) recognition.

In November 1981 an agreement was reached between Ottawa and the provinces (except Quebec), and section 35 was included in the bill, worded differently than in the previous draft. Section 35 read: "Existing Aboriginal and Treaty Rights are hereby recognized and affirmed."[27] When this wording was agreed to, premiers and their advisors were confident that the word "existing" meant "extinguished."[28] Section 35 was included in the Bill that was on its way to the British Parliament for debate.

But the Constitution Express was not about section 35 – it was a fight for nationhood, for jurisdiction to steward their territories, for self-determination within Canada. Indigenous Nations were still on track to stop patriation.

DANCING WITH THE GHOST

Prime Minister Thatcher had made a controversial promise to Prime Minister Trudeau that her government would use its parliamentary majority to secure passage of the Bill as quickly as possible, subject to the formalities of due process. Shining a light through the cracks of British culture and justice into the dark and murky corners of the halls where that promise was made, we see illusions being manufactured and weaponized. These illusions were silent players in events that transpired in London after the Bill arrived.

The illusion maker is "The Ghost."[29] The Ghost subverts justice. The Ghost is masterful, using the power of collective fear, and separation in acquiring and maintaining Crown power. The Ghost inspires fear-based fictions, including that we are separate – separate from God, from each other, from nature – luring us to believe in a loveless state. Never underestimate the power of the Ghost. In Nazi Germany, fear created the fiction that the moment is unsafe and exceptional. Citizens traded their real freedom and liberties for guaranteed fake safety. The task for

---

[27] Ian Waddell, "Building a Box, Finding Storage Space," in *Box of Treasures or Empty Box? Twenty Years of Section 35*, ed. Ardith Walkem and Halie Bruce (Penticton, BC: Theytus Books, 2003), 18.

[28] Louise Mandell and Leslie Hall Pinder, "Tracking Justice: The Constitution Express to Section 35 and Beyond," in *Patriation and Its Consequences: Constitution Making in Canada*, ed. Lois Harder and Steve Patten (Vancouver: UBC Press, 2015), 197.

[29] Louise Mandell, "The Ghost," in *Aboriginal Law since Delgamuukw*, ed. Maria Morellato, (Aurora, ON: Canada Law Book, 2009), 55–85.

the Third Reich was to maintain and manufacture the unsafe moment. The Ghost breeds a form of cultural insanity. This is how forms of violence are taken for granted, and normalized. Those who believe these ideas, believe themselves to be normal. There is a comfortable contract between personal egos and a whole egocentric culture.

This Ghost worked for Her Majesty the Queen. In a paper I prepared for the fortieth anniversary of the UBCIC, I described the encounter with "The Ghost":

> Most Ghosts begin their sojourn in fine fettle. This Ghost was a stowaway in the enterprise of European colonial imperialism. It landed in the newly claimed British Columbia with the first settlers. The Ghost created the kind of thing that a Ghost is really good at building: illusions. The first illusion: by planting the flag, the Crown claimed complete ownership and jurisdiction over everything.
>
> The Ghost then began to spread lies about the Indigenous Peoples, who had stewarded the land beautifully and successfully for generations and centuries. As with all good lies, these came with many alternative fallbacks. The Ghost's mantra is denial and its favourite illusion is terra nullius: the land was unoccupied; or, if occupied, it was by people who were not really civilized; or, if civilized, they did not have concepts of land ownership; they did not have real laws; or, if they did have laws or rights, they were all extinguished; or, if not extinguished, the land they used was just small, spotty, postage-sized parcels (just the size of reserves, actually). And the Ghost was a boaster. The Crown represented a superior race of people with a real government which made real laws and had real state power. The Ghost whispered: "First Nations are primitive – without laws. The Crown is superior – worthy of the greatest respect and absolute deference."
>
> There were, however, other voices that softened and ameliorated the hubris and manifest destiny extolled by the stowaway. The Queen would not take the land and then just turn her back on the Indigenous Peoples. No, the Crown would bring great benefits to the natives, the Ghost proclaims. The Crown was committed to bringing civilization to these less evolved and less fortunate races.
>
> The benevolent goal of assimilation would take time. Meanwhile, the Crown would watch over her Indians and protect them. They were better off living on Indian reserves, but the children should be separated from the regressive influence of their native communities,

> put in residential schools where they would be suitably educated. Until the natives were fully civilized, they could continue their hunting, gathering, and fishing for food – as long as the Crown did not need the land and resources for development. The Crown would let them. The Crown was honourable.[30]

I turn the clock backwards and then forward to reveal the Ghost's clever footwork, using illusions to dodge the rule of law. The Ghost creates illusions and its favourite tool is stereotyping. The Holocaust did not begin in the gas chambers but with the stereotyping of Jewish people, making them less than human, until finally it was possible to take them by cattle cars to slaughter. Stereotypes function as a stand-in for the real. Indigenous Peoples are distorted as "savage Indians" without laws – their territories a juridical vacuum, available to be ruled by the superior law of the Europeans.

In *Calder* the Ghost took control of the argument that Aboriginal Title depends on Crown recognition expressed in the Royal Proclamation of 1763, which did not apply to BC. Overruled said the Court: Aboriginal Title arises from ancient occupation; these are *inherent* legal rights, neither derived from the Crown nor dependent on the Crown for recognition nor definition. [31]

In *Sparrow*, the Ghost used section 35 as a trick, dancing in the argument that "existing" within section 35 is an empty box until the Crown agrees or a Court decides what rights will fill it. Existing rights according to the Ghost reflects the state of Crown interference of Aboriginal rights as of 1982. Such a position must be "rejected" said the Court: "existing" means the opposite, it means "unextinguished" and the Constitution holds the promise of rights recognition and reconciliation.[32]

The Gitxsan and Wet'suwet'en hereditary Chiefs, on behalf of their houses and clans, went to court in *Delgamuukw* compelling Crown governments to argue the legitimacy of colonization. Chiefs, Elders, Matriarchs, and Knowledge Keepers gave evidence on the source of their title and governing authority, including their laws, Oral Histories, legal orders, ceremonies, hereditary names, and long-time occupation of their territories as well as their complex spiritual cultures, songs, crests, and harvesting and stewarding practices. And they challenged Crown governments to prove the legal basis upon which they asserted Crown title and absolute control over their territories.

---

[30] Mandell, "The Ghost," 55.

[31] *Calder v. Attorney General of B.C.* (1970), 13 D.L.R. (3d) 64 (B.C.C.A.) at 156 and 200. See also *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

[32] *R v. Sparrow*, [1990] 1 S.C.R. 1075 at 1091–93.

I had the privilege of litigating the extinguishment question over several decades, which gave me a front-row seat to witness the parade of stereotypes used by Crown governments, seeking to diminish Indigenous Peoples and their legal rights. Extinguishment is a rash assertion of Crown sovereignty. The extinguishment arguments that the Crown governments raised in the *Calder* case were re-argued and made more sophisticated in the *Sparrow*, *Delgamuukw*, and *Tsilhqot'in* cases.[33]

The Crown's defences boiled down to two doctrines, the Doctrine of Discovery and the doctrine of *terra nullius,* which were argued in all their declining alternatives. The Doctrine of Discovery is based on the false assumption of the superiority of Crown governments. The doctrine of *terra nullius* is based on the false assumption of the inferiority of Indigenous Peoples, whereby ancient civilizations are portrayed as too primitive to possess legal rights to land and governance under the common law.

Crown extinguishment defences could not have been maintained without stereotypes, woven through cross-examination and legal argument. The stereotypes included that the law arrived in Indigenous territories with the first colonial legislature and governors. Indigenous Peoples never had effective control of their territories since warfare, disease, scarcity, and inter-tribal conflict constantly altered their living arrangements. The arrival of the Europeans and Western sovereignty broke up their low-level social order and gave Indigenous Peoples the evolutionary advantages of the Western experience. Indigenous Peoples are not Nations, they are Band groupings. Indigenous landscapes are portrayed as devoid of laws, organization, or even a sufficient Indigenous population to exclusively occupy and control the land. This is a landscape of isolation of people, (Bands not Nations), and of territory (small spots, not contiguous territory; hunting blinds and salt licks, not watersheds). At trial, the Court in *Delgamuukw* said that pre-contact Gitxsan and Wet'suwet'en societies did not act as they did because of institutions; rather, they did so "because of survival instincts that varied from village to village."[34] In 2012, the BC Court of Appeal in the *Tsilhqot'in* case described the Tsilhqot'in harvesting practices as exercised "more or less on an opportunistic basis" and managed "to a limited extent"[35] and the Tsilhqot'in are described as "roaming" over their lands.

These illusions supported Crown theories that title never existed, a position reflected in the 1970 decision of Justice Davey of the Court of

[33] *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313.
[34] *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 at 373.
[35] *William v. British Columbia*, 2012 B.C.C.A. 285 at para. 216.

Appeal in *Calder*, who said: "I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed that the Crown recognized them when it acquired the mainland of British Columbia by occupation."[36] Crown theories proliferated that title was extinguished impliedly by legislation and executive acts which set up the machinery to grant land, while denying Aboriginal Title. In the *Tsilhqot'in* case these stereotypes supported a new theory of occupation which was extinguishment by litigation. If the Nation fails to prove exclusive occupation (which, under the theory, can only ever be in small spots) the land not proven is vacant Crown land and becomes the absolute property of the Crown. This theory reminds me of occult-like concepts of astral projection. This practice enables the Ghost to travel through different bodies to accomplish its purposes. We see something similar happening here. The Ghost bends the courts to extinguish title when legislative or executive acts fail to accomplish this same purpose. The Crown's "possession" is embodied in three heads of the state.

OVERRULED, SAID THE COURT: THE STARTLING REALITY, AFTER DECADES OF LITIGATION

Crown governments failed to come up with one legal defence to justify more than a century of colonial violence, denial, and dispossession. Crown extinguishment arguments were all defeated, including that extinguishment was accomplished by the Crown granting interests in land (including fee simple) that were incompatible with the continuation of Aboriginal Title.[37] Aboriginal Title has not been extinguished in British Columbia and, further, that the province has no power to extinguish it.[38] The land wasn't *terra nullius*, the law was.

Aboriginal Title is territorial and confers ownership and jurisdictional rights to the land, including its use, enjoyment, occupancy, possession, economic benefits and the right to proactively manage it.[39] This means that Aboriginal Title lands are not Crown lands, and the forests vest in Indigenous peoples and not in the Crown.[40] Crown title is what is left when Aboriginal Title is subtracted from it. The Court also made clear

---

[36] *Calder v. British Columbia (Attorney General)*, [1970] 13 D.L.R. (3d) (BCCA) at 66–67
[37] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 172–83
[38] *Delgamuukw*, SCC at para. 175
[39] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 94.
[40] *Tsilhqot'in Nation*, SCC at para. 94.

that it is the Nation, not Band Councils, that are the proper title and rights holder.

In the *Campbell* case the Ghost dusted off old arguments that all jurisdiction is vested in either Federal or Provincial governments. Overruled, said the Court; Indigenous laws and legal orders pre-existed and survived the assertion of Crown sovereignty;[41] Crown sovereignty was never absolute in Canada, and jurisdiction is not exhaustively divided between Crown governments.[42]

In *Haida Nation* the Ghost danced a two step: the Haida people should formally prove their claim and, until then, they have no legal right to be consulted or have their needs and interests accommodated, rattling fear about "the breath of the Haida claim to Haida Gwaii."[43] Overruled, said the Court: Crown sovereignty is constrained by constitutional obligations arising at the assertion of Crown sovereignty. These include concluding and implementing Treaties, and duties of consultation and accommodation embedded in Crown decision-making The honour of the Crown "is always at stake" as a "core legal precept."[44]

This dance with the Ghost through the Courts unmasked disguises, and stripped the Crown of the title and sovereignty it assumed. The only legal rationale is the repudiated and racist Doctrine of Discovery given expression in *Johnson v. McIntosh* (adopted with approval by the SCC),[45] where the US Supreme Court held that the European nations acquired sovereignty over, and underlying title to, Indigenous lands by discovery. To Godfrey Kelly I would now say that the Crown stole it "fair and square" – this was *de facto*.

Law cannot be separated from or understood apart from culture. North America's colonizing culture carried the Ghost that continues to haunt our law, our courts, and our parliaments. Back in 1982, this Ghost haunted all three spaces in London.

THE COURT CASES AND PARLIAMENTARY DEBATE ON THE BILL IN LONDON

The court cases in London targeted the Bill, and each case was based on Indigenous consent. Three representative actions were brought or joined by Indigenous Nations from Alberta, New Brunswick, Nova

[41] *Mitchell v. Canada (Minister of National Revenue – M.N.R.)*, [2001] 1 S.C.R. 911, 2001 SCC 33 at para. 8.
[42] *Campbell et al. v. AGBC et al.*, 2000 BCSC 1123, 79 B.C.L.R. (3d) 122.
[43] *Haida*, SCC at paras. 8, 64, and 66.
[44] *Haida*, SCC at paras. 17, 25, 32, and 33.
[45] 21 U.S. (8 Wheat.), 543 (1823).

Scotia, Ontario, Manitoba, Saskatchewan, British Columbia, and the Northwest Territories: *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs* (*Alberta* case);[46] *Chief Robert Manuel and Others v. Attorney-General* (*Manuel* case);[47] and *Noltcho and Others v. Attorney-General* (*Saskatchewan* case).[48] These cases are a testament to the considerable unity of opposition to the Bill as well as to Indigenous Nations' distrust of Canada clear across the country, even after section 35 was included.

THE ALBERTA CASE: WILL THE REAL QUEEN PLEASE STAND UP

At the time of concluding treaties, the Queen's representative said and recorded these words:

> The Queen has to think of what will come long after today. Therefore, the promises we have to make to you are not for today only but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.[49]

The *Alberta* case threw open the curtain, exposing Her Majesty the Queen. Who is the Queen on whose behalf these treaty promises were made? Who is the binding party to the treaties? The case was launched by the IAA together with the Union of New Brunswick Indians and the Union of Nova Scotia Indians signing on. It was a judicial review of the FCO decision that all Crown treaty obligations had become obligations of Canada. The case proceeded on the record of decision by the FCO and law alone. It maintained "that treaty or other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom." These obligations, as a matter of law, were made by consent and had never devolved to Canada.

The Treaty Nations understood their treaty partner was the Queen (or King), a hereditary sovereign, reigning as head of England. The Queen is dead, long live the Queen. There will always be a Queen or a King for as long as the sun shines and rivers flow. The Queen was linked to

---

[46] *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta et al.*, [1981] 4 C.N.L.R. 80 (*Alberta* case).

[47] *Manuel v. A.G. England*, [1982] 3 W.L.R. 821, [1982] 3 C.N.L.R. 13 (*Chiefs* case).

[48] *Noltcho v. A.G. England*, [1982] 3 All E.R. 706 (Ch. D.) U.K. (*Saskatchewan* case).

[49] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke and Co., 1880 [reprint, Saskatoon: Fifth House, 1991]), 96.

the Treaty Nations' ancestors, to this and future generations, by transgenerational obligations sealed by ancient fidelity to one's word.[50] This accords with familiar Indigenous legal orders, whereby a Chief's name is passed to a successor, along with rights and responsibilities, obligations and debts. Names hold beliefs, belongings, and relationships. Within some Indigenous legal orders, a successor Chief lifts the power of the name by living skilfully for the benefit of the House or Clan and by stewarding the land. By failing to uphold sacred responsibilities, a successor Chief tarnishes the name.

The treaty partners understood that the federal government would be a trustee for them and the Queen – to safeguard the Queen's honour and to uphold the treaties. It would administer Crown obligations under section 91(24) of the *BNA Act* and protect treaty obligations from Provincial legislative overreach.

Leave to hear the *Alberta* case was granted by the Court of Appeal, and all three judges wrote separate decisions. Lord Justice Kerr held that the treaty partner was Canada, since by 1867 a government had been established, and Crown obligations rested with the Canadian government. It was irrelevant to this analysis what the treaty parties knew or were told. Nor did it matter that Canada, in 1867, had not achieved independence as a Commonwealth country. The question of Canada's independence from Britain was irrelevant.

Lord Justice May thought Canada's independence was key to the question. With the *Statute of Westminster, 1931*, the Canadian government assumed responsibility for treaties.[51]

In the last judgment of his illustrious career, Lord Denning disagreed with both other justices, finding both the Royal Proclamation and the treaties to have created binding obligations on the Crown and agreeing with Indigenous Peoples that their treaty partner was the British sovereign. This was initially. At the time of treaty-making the British sovereign was single and indivisible; however, by constitutional usage and practice, this changed in the first half of the century. The British sovereign, the Queen, the Crown, was divisible and then divided. Not only did the Crown divide, but obligations that were previously binding on the British Crown also divided, becoming obligations of the Crown in respect of Canada. Canada became a sovereign entity recognized by the Imperial Conference of 1926, and the *Statute of Westminster* gave

[50] James (Sa'ke'j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson, 2007), 1–3.

[51] *Statute of Westminster*, 1931, 22 Geo. V, c. 4 (U.K.).

legal force to the recognition. Lord Denning concluded that the treaty obligations transferred to the Queen in right of Canada as a matter of constitutional convention.

At one point in the proceedings Lord Denning asked, "What do the Indians want?" He was told that the Indigenous Nations did not trust Canada. Legal counsel for IAA told the Court that his clients understood that their treaty partner was the Queen of England and that they needed England's protection now that the Constitution was to be patriated. Lord Denning assured Indigenous Peoples that they had nothing to fear because new protections were afforded by section 35:

> There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown – originally by the Crown in respect of the United Kingdom – now by the Crown in respect of Canada – but, in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada "so long as the sun rises and the river flows." That promise must never be broken.[52]

Lord Denning disagreed with the Kershaw Report where it was said that there is "no reason to suppose" the Proclamation "was in any way entrenched or protected against the legislative power of the Canadian Parliament."[53] Lord Denning held up the Royal Proclamation, as "equivalent to an entrenched provision in the Constitution of the colonies in North America. It was binding on the Crown 'so long as the sun rises and the river flows.'"[54]

Would the treaty partners have danced with this Queen?

The second reading of the Bill was delayed until the Court of Appeal gave judgment on the *Alberta* case. With the *Alberta* case concluded, the Bill was debated by the British Parliament. The MPs had met Chiefs and Elders who travelled to tell them their story; they had read the morning papers reporting about the Potlatch and the *Alberta* case. The debate about the Bill was dominated by the Indigenous issue. When the *BNA Act*

---

[52] *Alberta* case, at 91, 99.

[53] As quoted in Mandell, "Union of British Columbia Indian Chiefs Fights Patriation," 177.

[54] *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians*, [1981] 4 C.N.L.R. 86 at 91–92, 99.

was passed in 1867, Indigenous Peoples were absent from the discussion, as they were on the fourteen occasions up until 1975 when amendments to the *BNA Act* were debated in Westminster. This time, twenty-seven of the thirty hours spent debating the *Canada Act* in both houses dealt with Indigenous Peoples, with forty-four MPs voting against the Bill. Many of the opposing votes came from the Scottish, Irish, and Welsh parties, who knew first-hand what England's domination was like.

The FSI and IAA had drafted amendments to the Constitution package in hopes that a British MP would present them before Parliament. They proposed a new schedule to the Bill that would: change the substance of section 35 to confirm the rights recognized in the Royal Proclamation, including Treaty Rights; recognize the inherent right to self-government, to determine the nature of their nationhood, and to define citizenship; confirm their right of access to the Crown; establish an office for the protection of Aboriginal and Treaty Rights; and, finally, require that any amendments to the Constitution that affect Indigenous Peoples be made with their consent. David Annals, a Labour MP, was one of the MPs who supported the amendment, which went into committee but did not come out the other end.[55] In debating the Bill, Annals pointed out how little was really being asked of the MPs and what a huge contribution their doing justice would bring to the world:

> The Indians are not asking for material assistance from us or for money. They are asking us to ensure, as we promised, that their constitutional status is protected in the renewed Canadian Federation. They have asked us for the constitutional tools to enable them to develop their own Nationhood, their own forms of self-government and to preserve their traditions.[56]

The Thatcher promise was kept. On 17 April 1982, the *Canada Act* was proclaimed, and on 20 April 1982, the British government served motions to strike both the *Saskatchewan* case and the *Manuel* case.

THE SASKATCHEWAN CASE

The *Saskatchewan* case, like the *Alberta* case, raised the question of whether the treaties were binding on the British Crown and whether they imposed obligations that constituted trusts remaining in force, requiring the consent of the treaty partners to patriation.[57]

[55] See Feltes, "'We Don't Need Your Constitution.'"
[56] As cited in Mandell, "The Ghost," 31.
[57] Mandell, "Union of British Columbia Indian Chiefs Fights Patriation," 185–89.

The Treaty Nations had different legal strategies. The *Alberta* case was initiated as a judicial review, whereby the legal question was determined without a record of evidence and therefore had the advantage of a speedy hearing. The *Saskatchewan* case was brought as an action because the Chiefs wanted the Court to hear Elders' evidence about who they understood their treaty partner to be and about Canada's violating treaties. They would never have concluded a treaty with Canada – they entered a treaty relationship with the British sovereign as a protection against Canada.

None of this evidence was ever spoken or heard. Vice-Chancellor Megarry heard the motion to strike, and strike he did. Relying on Lord Diplock's decision in the House of Lords in the *Alberta* case, he concluded:

> In the result, my conclusion is that the Alberta case is decisive of the present case, despite the suggested distinctions, and the language of emphasis of the Appeal Committee in that case requires me to strike out the statement of claim in the Noltcho action, or at the very least justifies me in doing so, and this I do.[58]

THE MANUEL CASE FROM BRITISH COLUMBIA

The *Manuel* case was brought as an action by 124 Chiefs representing Nations in British Columbia, with joint participation from the Four Nations Confederacy of Manitoba and the Grand Council of Treaty 9 in Ontario. The case was a representative action, with Chief Bobby Manuel as lead plaintiff. The question raised by this case was: Who is the Dominion of Canada for the purpose of this constitutional amendment? The *Statute of Westminster*, section 4, provides that the laws passed by the British Parliament for the overseas dominions would apply only at the request and with the consent of a dominion. Section 7 stated that the *BNA Act* can be amended at the request of the Dominion of Canada. The Chiefs pleaded that the Dominion of Canada included the Indigenous Nations, as sovereign parties to the Constitution, and that they had not been not consulted and did not consent to this request.

An action requires evidence, and the Chiefs wanted their story to be heard. This did not happen, but it was not through lack of trying. The lawyers prepared documentary evidence about the history and policy governing the British Crown surrounding the Royal Proclamation of 1763;

---

[58] *Saskatchewan* case.

the treaties; Indigenous Nations' relationship to their territories, their laws, and legal orders; and Crown/Indigenous dealings. Note that this was before computers. Leslie and I carried the documents we needed to prove consent in a legal briefcase we called "Oscar." Oscar was too heavy for either of us, and so we each held up one side, walking together this way from the airport to our hotel and through the streets of London.

Oppenheimer was generous with its support for the legal team and allowed us to use the office after hours. One evening Michael and I were photocopying documents to organize and to give to the London lawyers. This was in the middle of the night, and Michael and I broke both photocopiers. In my memory the room suddenly went quiet. We were surrounded by huge, carefully organized piles of documents, and we were stopped in our tracks by two broken copy machines. I feel forever connected to Michael by our eruption of laughter at our clients' audacious courage and our difficulties seeking to prove consent in the British courts.

What follows is the architecture of the legal arguments developed for the *Chiefs* case. It is an architecture of relationships.

The Royal Proclamation, 1763, reflected fundamental principles of law and Crown justice, recognizing Indigenous rights to their land and jurisdiction as part of the common law. This was also an economic relationship. "Indeed the treatment of aboriginal title as a compensable right can be traced back to the *Royal Proclamation of 1763*.[59] The Royal Proclamation was intended to control local governments by enshrining a consent-based relationship within imperial law. This principle was formed in consultation with Indigenous Peoples through inter-societal negotiations.[60]

---

[59] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, at para. 203.

[60] Matthew Dennis, *Cultivating a Landscape of Peace: Iroquois-European Encounters in Seventeenth-Century America* (Ithaca, NY: Cornell University Press, 1993); Gregory Evans Dowd, *War under Heaven: Pontiac, the Indian Nations, and the British Empire* (Baltimore: Johns Hopkins University Press, 2002); Randolph C. Downes, *Council Fires on the Upper Ohio: A Narrative of Indian Affairs in the Upper Ohio Valley until 1795* (Pittsburgh: University of Pittsburgh Press, 1940); Gilles Havard, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century*, trans. Phyllis Aronoff and Howard Scott (Montreal and Kingston: McGill-Queen's University Press, 2001); Eric Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673–1800* (Cambridge: Cambridge University Press, 1997); Wilbur R. Jacobs, *Wilderness Politics and Indian Gifts: The Northern Colonial Frontier, 1748–1763* (Lincoln: University of Nebraska Press, 1966 [1950]); Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from Its Beginnings to the Lancaster Treaty of 1744* (New York: Norton, 1984); Francis Jennings, *Empire of Fortune: Crowns, Colonies and Tribes in the Seven Years War in America* (New York: Norton, 1988); Francis Jennings, William N. Fenton, Mary A. Druke, and David R. Miller, eds., *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and*

The Royal Proclamation and the *Treaty of Niagara, 1774*, wove relationships of peace, friendship, and respect into the Canadian constitutional fabric.[61] This law, and the treaties, endowed Canada with an Indigenous foundation based on the rule of law.[62]

Canadian law is only one system of authority. Another source is found within Indigenous legal systems. Indigenous sovereignty existed before contact, and this order of government stands on its own. Its powers do not derive from the Crown or the Constitution. Crown recognition is not required for Indigenous Peoples to possess and use land and resources and exercise governmental law-making authority.

From its earliest beginnings to the present time is a golden thread showing the recognition by the common law of the ancestral laws and customs of the Indigenous Peoples who occupied the land prior to European settlement.[63] This golden thread is woven through Canada's Constitution by the doctrine of continuity, creating a bedrock of legal pluralism.

Four entitles are assigned a degree of sovereignty by the *BNA Act* – the Indigenous Nations, Parliament, the provincial legislatures, and the UK Parliament. Section 91(24) assigns to the federal government primary constitutional responsibility to conclude treaty on behalf of the Crown and "to safeguard one of the most central of Native interests – their interest in their lands."[64] Section 109 imposes constitutional constraints on Provincial Crown title. When Aboriginal Title has not been addressed, the lands, mines, minerals, and royalties are not available to the province as a source of revenue.[65] The UK government holds the amending formula placing Great Britain in the position to safeguard

---

Their League (Syracuse, NY: Syracuse University Press, 1985); Dorothy V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago: Chicago University Press, 1982); James H. Merrell, *Into the American Woods: Negotiators on the Pennsylvania Frontier* (New York: Norton, 1999); D. Peter MacLeod, *The Canadian Iroquois and the Seven Years' War* (Toronto: Dundurn 1996); Jane T. Merritt, *At the Crossroads: Indians and Empires on a Mid-Atlantic Frontier, 1700–1763* (Chapel Hill: University of North Carolina Press, 2003); Larry L. Nelson, *A Man of Distinction among Them: Alexander McKee and British-Indian Affairs along the Ohio Country Frontier, 1754–1799* (Kent, OH: Kent State University Press, 1999); William R. Nester, *"Haughty Conquerors": Amherst and the Great Indian Uprising of 1763* (Westport: Praeger, 2000); Timothy J. Shannon, *Indians and Colonists at the Crossroads of Empire: The Albany Congress of 1754* (Ithaca, NY: Cornell University Press, 2000); J. Russell Snapp, *John Stuart and the Struggle for Empire on the Southern Frontier* (Baton Rouge: Louisiana State University Press, 1996).

[61] John Borrows, "Constitutional Law from a First Nations Perspective: Self Government and the Royal Proclamation," *UBC Law Review* 28, no. 1 (1994): 1.

[62] Henderson, *Treaty Rights*.

[63] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 ("*Van der Peet* case") at para. 263.

[64] *Delgamuukw* at para. 176.

[65] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.); *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, at paras. 174, 175; ("*Haida*") at paras. 57, 58.

the unique constitutional position of Indigenous Peoples in Canada and Crown obligations made through treaties.

The Dominion of Canada is a political system of cooperative federalism, within which Indigenous legal orders constitute a rich weave of distinctive laws requiring Indigenous consent for patriation. The Crown's ongoing legal obligation to uphold Indigenous Peoples' consent is an essential and overriding feature of Canadian federalism.

The writ was served on 10 December 1981, one day after Jean Chrétien brought the request from Canada to London. On 25 February, the Chiefs successfully made an application for a speedy trial, and 8 June 1982 was set for the hearing.[66] On the first day of the second reading of the *Canada Act*, Ennals urged Parliament to await the decision on the *Manuel* case:

> Last week Mr. Justice Vinelot ordered the British Government, who had been pleading for more time, to prepare their defence by March 16. The pressure is on the British Government in the same way as the British Government is putting pressure on us to pass the legislation. Mr. Justice Vinelot said that the Indian case raised issues of great constitutional importance that must be clarified at the earliest moment. He noted that if the Indians succeeded, the Bill would be declared unconstitutional and of no effect. He recognized the supremacy of Parliament but noted that it was the proper function of the courts to interpret that supremacy.[67]

The British government chose instead to outrun the courts. The motion to strike was successful.

The Ghost can be heard, quietly chuckling at the Court's reliance on the doctrine of parliamentary supremacy to strike the *Manuel* case. This was the very doctrine that the Trudeau government felt needed to be constrained by the Bill, adding constitutional protection to fundamental rights and freedoms. The *Manuel case* sought a judicial interpretation as to what constitutes the Dominion of Canada. The Bill recited that it was passed by the "Dominion of Canada"; the British Parliament passed the Bill, and this simple legislative recital was good enough for the courts.

The treaty partners could not have forseen that Treaty Rights could be so easily overrun by parliament and legislative assemblies. For the Prairie Nations, the 1930 Transfer Agreements clinched the deal, transferring natural resources to the Provinces. The doctrine of parliamentary supremacy is post facto.

---

[66] Mandell, "Union of British Columbia Indian Chiefs Fights Patriation," 188.

[67] United Kingdom, House of Commons Debates, 23 February 1982, hansard.millbanksystems.com/commons/1982/feb/23/canada-bill#S6CV0018P0_19820223_HOC_234.

The Bill was passed into law without Indigenous consent, but Indigenous Peoples loudly and clearly put on the record the vitality of Canada's constitutional roots planted in the soil of legal pluralism and a federalism which acknowledges not only the newcomers but also Indigenous legal traditions.

Some incalculable mix of courage, culture, and character allows us to dream beyond established and accepted facts and reach for previously unimagined truth. The train was an incubation space. For days people travelled together, ate, slept, talked, and dreamed. Many who rode the trains became leaders, lawyers, scholars, writers, artists, activists. These were the children of ancestors who passed to them the legitimacy of the struggle, and they did the same for the next generations. Some went on to contribute to section 35 jurisprudence, to the monumental work of the Royal Commission on Aboriginal Peoples. Some placed their sorrows and burdens before the Truth and Reconciliation Commission, resulting in 194 Calls to Action, addressing the question: How do we heal a national wound that caused such a spiritual rupture? The culture we create and the ideas we spread affect the minds of those who outlive us. The Constitution Express contributed to the campaign leading to a public settlement for residential school survivors, to the Calls for Justice by the Murdered and Missing Women and Girls Inquiry, and the Idle No More movement. Some participated in the negotiations leading to the passage of the *United Nations Declaration of the Rights of Indigenous Peoples* (*UNDRIP*),[68] to British Columbia's historic *Declaration of the Rights of Indigenous Peoples Act* (*DRIPA*),[69] and the *United Nations Declaration on the Rights of Indigeneous Peoples Act* (*UNDRIP Act*)[70] which is Canada's first substantive step towards ensuring federal laws reflect the standards set out in UNDRIP.

Those who travelled on the Constitution Express were so generous. They did the best thing that could have been done for our children and grandchildren, for those we love, which is to be that force that stands up for what is right and, in so doing, pushes the boundaries of opportunity and of possibility.

---

[68] *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, UNGAOR, 61st sess., supp. no. 49, UN Doc A/RES/61/295 (2007).

[69] *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44.

[70] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

THE LAST STOP: SMELL THE SCENT OF A PROMISED CHANGE

The train returns to the station and to a changed landscape. Section 35 makes reconciliation a constitutional imperative. *De facto* Crown sovereignty is not perfected until it is reconciled with pre-existing Indigenous sovereignty through honourable negotiations.

The Royal Commission on Aboriginal Peoples held up the achievement of section 35 as "provid[ing] the basis for recognizing Aboriginal governments as constituting one of three orders of government in Canada."[71]

The Doctrine of Discovery has been repudiated by the final report of the Royal Commission on Aboriginal Peoples and by the World of Council of Churches, and, at its 2012 session, the UN Permanent Forum issued a report that "calls on States to repudiate such doctrines as the basis of denying Indigenous peoples basic rights." *UNDRIP* offers a commitment to end stereotyping and to repudiate the Doctrine of Discovery as "racist, scientifically false, legally invalid, morally condemnable and socially unjust."[72] Principles of free, prior, and informed consent, and the right to self-determination are fundamental to UNDRIP's human rights framework.

According to the SCC: "The doctrine of *terra nullius* … never applied in Canada, as confirmed by the Royal Proclamation (1763)."[73] The Court has also rejected other legal artifices that "reflect the biases and prejudices of another era in our history [as] no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."[74] What we have learned from Indigenous people who spoke to the highest Court, and what has emerged is that we are a multi-juridical order, with different cultural narratives, worldviews, titles, and jurisdictions co-existing and operating on the same landscape. Canada is a legally pluralistic state comprising civil law, common law, and Indigenous legal traditions. Legal pluralism is not frozen in time: it is part of our present structures and will be a part of our future.

Yet, it appears to be in the DNA of Crown governments to resist change. While speaking beautiful words, committing to a renewed

---

[71] *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(1) at para. 168.

[72] *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, 4th preamble para. Similarly, see UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, see https://www.refworld.org/docid/3ae6b3940.html.

[73] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 69 (*Tsilhqot'in*).

[74] *Simon v. The Queen*, [1985] 2 S.C.R. 387 at para. 21.

Nation-to-Nation relationship with Indigenous Peoples based on recognition of constitutional rights, respect, cooperation, and partnership, when Indigenous and Crown governments come to different decisions about how the land is used and managed, Crown governments resort to old Doctrine of Discovery conduct. A case in point is the opposition of the Wet'suwet'en hereditary Chiefs to Coastal GasLink pushing ahead, to put a pipeline through Wet'suwet'en territory without their consent. They oppose further investment in a fossil fuel economy while the earth speaks her symptoms. Even after the SCC recognized Wet'suwet'en law and the authority of the hereditary Chiefs to speak for their land, Crown governments and Coastal GasLink hold up the authority of Band Councils against the hereditary Chiefs, and resort to military-style arrests of Wet'suwet'en people and other land protectors.[75]

Indigenous Peoples implementing Indigenous laws is the condition for bringing about reconciliation. Human rights are the ground that will rebuild Canada and will lead to reconciliation. Section 35 cannot revitalize Indigenous laws until it is informed by self-determination. There can be no reconciliation without reconciliation with Mother Earth.

The question is whether Crown governments will vacate jurisdictional space they have illegally occupied based on false assertions and assumptions in order to make space for the reassertion of Indigenous laws where these laws were deliberately erased. While this is already happening in child welfare,[76] when it comes to sharing jurisdiction, and the benefits and revenues which flow from Indigineous territories, Crown governments have been slow to change their negotiation and litigation mandates.

Jurisdictional agreements are key to shifting the colonial paradigm on the ground by operationalize shared sovereignty. DRIPA provides for agreements to be reached for achieving Indigenous consent before the exercise of a statutory power of decision.[77] To date there have been no such agreements concluded, but there are now several framework agreements in British Columbia which begin this groundbreaking work.

---

[75] See https://www.yintahaccess.com/historyandtimeline, which includes an excellent history and timeline, as well as https://www.yintahaccess.com/mediacentre, which provides more detailed press releases on recent events.

[76] In this context, Indigenous Peoples can "give notice" of their intent to exercise their jurisdiction, but their laws will not prevail over federal or provincial laws. Alternatively, Indigenous Peoples can request a tripartite coordination agreement resulting in the Indigenous laws prevailing over federal and provincial laws (if "reasonable efforts" were made to reach an agreement after twelve months, this can be done even if no agreement has been reached). See https://www.canada.ca/en/indigenous-services-canada/news/2019/06/an-act-respecting-first-nations-inuit-and-metis-children-youth-and-families-has-received-royal-assent.html.

[77] *DRIPA*, articles 6 and 7.

I turn to the historic framework agreement that has been reached between the Haida Nation and Crown government. The agreement is called *GayGahlda "Changing Tide" Framework for Reconciliation*, and it was signed by the Haida Nation, Canada, and British Columbia on 13 August 2021.[78] This framework agreement is unique in that negotiations are based in principle on a mutual recognition of Haida and Crown titles and legal orders co-existing, both having a jurisdictional and economic component and requiring negotiated accommodations over the lands and waters of Haida Gwaii with an agenda for achieving this. In keeping with Grand Chief George's wisdom to not go bare bones legal or bare bones political, in *Changing Tide*, litigation and negotiation work together, narrowing the issues in the litigation as agreement is reached through negotiation, with a dispute resolution process outside the Court.[79]

Although *Changing Tide* is not legally binding, it provides an opportunity to transform colonial relationships and adversarial litigation into a historic Reconciliation Agreement within a short timeframe. The beauty of this opportunity is that there are no overlapping or shared territory issues on Haida Gwaii, the Haida constitution settles who represents the Haida, and the successful shared decision-making and territorial protection regimes, extending throughout Haida Gwaii have created contemporary models which are stepping stones to a path leading home.[80]

As chancellor at VIU, I was witness to an upwelling of the future in the present. I stood in a river of social innovation, creativity, commitment, collaboration, and dedicated purpose among post-secondary institutions meeting the challenge of the TRC Calls to Action to educational institutions to fix a problem through education that was caused by education. We tell our story through language, and we will change it that way. Dr. Ralph Nilson, OC then President of VIU, (named Kwa'kwa'ni in the Kwakwa̲ka̲'wakw language) presented honorary doctorate of law degrees to nine Haida Elders of the Skidegate Haida Immersion Program (SHIP)

[78] See https://www.haidanation.ca/wp-content/uploads/2021/08/GayGahlda-Changing-Tide-Framework-Agreement-13Aug2021-FINAL-w-SCHEDULES-CHN-M-R-M-B.docx.pdf.

[79] The *Haida Title* case has been in litigation since 2002 and under case management since 2016.

[80] The Gwaii Haanas Agreement from 1993 is a model commented on with approval in *Moresby Explorers Ltd. v. Canada (Attorney General),* 2001 FCT 780. Other agreements include Protocol Agreements with the local communities of Haida Gwaii; a Strategic Land-Use Plan Agreement with the Province of British Columbia in 2007 and the 2009 *Kunst'aa Guu-Kunst'aayah* Reconciliation Protocol to move forward with shared management of lands and resources for a quarter of the land area in the northern part of Haida Gwaii, including coastline and the near shore areas; and an agreement with Canada to jointly manage the marine portions of the Gwaii Haanas area as a Haida Heritage Site and National Marine Conservation Area Reserve; a memorandum of agreement to jointly manage the *SGaan Kinghlaas* (Bowie Seamount) area with Canada as a Haida Heritage Site and marine protected area.

for their role in language preservation and revitalization as well as for their resilience: Dr. Gwaaɢanad, Diane Brown, Dr. Jiixa, Gladys Vandal, Dr. Sing.giduu, the late Lorna Jormanainen, Dr. Taalygyaa'adad, Betty Richardson, Dr. Sɢaanajaadsk'yaagax̲iigangs, Kathleen Hans (Golie), Dr. Niis Waan, Harvey Williams, Dr. Ildagwaay, the late Bea Harley, Dr. Gaayinguuhlas, the late Roy Jones, and Dr. Yang K̲'aalas, Grace Jones.

These Elders worked together for decades to give those who came after them a chance to know the beauty of the Skidegate dialect of the Haida language. They also served as custodians of Oral History that had been transmitted by their ancestor Skaay to John Swanton, an anthropologist who published volumes of his work with Haida people, around the turn of the last century. The late Solomon Wilson, who learned from Skaay, left a legacy unmatched in the amount of Haida law and Oral Histories he put on tape. The SHIP Elders translated these tapes, creating a link to the future in an unbroken chain of laws and Oral Histories connecting Haida law to the golden thread of the common law.

What gives me hope is that Haida laws of the land can speak and are speaking. Haida speakers are speaking the Haida language which carries Haida law. Haida and Crown leaders are in a dialogue about achieving a Reconciliation Agreement, grounded in a framework agreement which provides space for both Haida and non-Haida legal orders co-existing throughout Haida Gwaii.

In the patriation process, Indigenous Peoples were shut out of jurisdictional discussions. This is the unfinished business of Confederation. Indigenous laws and legal orders, with their sacred connections and transmuted ancient consciousness, need jurisdictional space to grow and deepen. In a reconciling world, rather than competing, the Crown and Indigenous authorities can complete each other, bringing together the best from both cultures and legal orders to decolonize, decarbonize, and to steward our fragile Earth. Then the journey of the Constitution Express will lead us back home, where we can all be better guests in the territories of Indigenous Nations and on Mother Earth.

With love and gratitude I thank UBCIC and Dr. Grand Chief Stewart Phillip (Honorary) for his powerful and gentle leadership, and all those who carried the torch across generations, seeking a just resolution to the land question, for passing on that fierce and beautiful light. My deepest respect also goes to my partners and friends at Mandell Pinder, White Raven Law, and Rush Crane Guenther, with whom I practised law. I honour VIU for its reconciliation culture of kindness.

All my relations.

Indigenous protest on Parliament Hill in Ottawa. *Source*: Photo courtesy of Union of British Columbia Indian Chiefs

A group of people wait to board the Constitution Express in Jasper. *Source*: Photo courtesy of the Union of British Columbia Indian Chiefs.