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The Operation Was Successful, But the Patient Died

LEE MARACLE

On November 11, 2021, the inimitable Stó:lō writer Lee Maracle passed away. A true revolutionary and a trailblazer, it is hard to overstate Maracle's importance, both to Indigenous literature and to Indigenous liberation movements since the 1970s – particularly Indigenous women's liberation in Canada and beyond. Her simultaneous contribution to and feminist critique of the Red Power movement, alongside her steadfast solidarity with Third and Fourth World struggles provide inspiration and resonance with many of the themes expanded upon in this issue. In honour of Maracle's imprint on movements for Indigenous self-determination and on the editors of this issue, we are choosing to reprint here a short chapter she wrote about the struggle to make meaning of section 35 – or really, to make anything of it at all. It first appeared in Box of Treasures or Empty Box? Two Decades of Section 35, *edited by Ardith Walkem and Halie Bruce and published by Theytus Books in 2003. In her trademark piercing wit, she critiques Indigenous Peoples' inclusion in the Constitution at its core – a question that shot through the Constitution Express's two-year fight against patriation.*

– Emma Feltes and Glen Coulthard

I WROTE AND DISTRIBUTED an article called "The National Question, Land and Citizenship" in 1978 in which I called into question the whole business of "negotiating land claims and relying upon Canadian definitions of who is an Indian and what is self-government." I articulated a position on National Self-Determination, which included the right of secession in those territories where Indigenous Peoples are the majority. I argued that Self-Determination requires:

1. full access to resources within a specific territory;
2. control of citizenship based on original law and custom; and
3. governance that is connected to original law and custom and/or derived from within the nation.

I stated then, that in those areas where Indigenous people are a "minority population" (only in terms of the ratio of non-Indigenous to Indigenous Peoples and not in the sense of minorities with linguistic and limited cultural rights), these Indigenous Peoples would require "enough socially necessary land to become a viable, self-governing, trading partner of the former mother country known now as Canada is required. Further, shared jurisdiction over production, caretaking of the environment and the general well-being of the land is critical.

At the time, I distinguished between the cultural and self-governing rights of a minority and the full national rights of a colonized people. I concluded that we couldn't be nations without land, resources, control of citizenship and participation in the environmental, economic and political management of Canada generally. The paper shocked and terrified a number of people, including the political leadership of the day, and it was shortly after this that Indigenous people began the fight to be included in Canada's *Constitution*. In that operation, we were successful, but what has the impact been?

As long as Canada defines the boundaries and extent of nationhood and governance, we cannot be independent. As long as we are not independent trading partners, we cannot claim to be self-governing. Indigenous Nations differ based on various linguistic, cultural and territorial groupings. Wherever Indigenous Nations existed, they were self-defined and had unlimited access to wealth and political/national dominion over the entire territory of North America prior to British, French, and Spanish invasion. Jurisdiction over the land and resources was exercised by the Indigenous Nations who preceded the settler state, and legal systems developed which enabled Indigenous Nations to accrue and distribute wealth, engage in trade, enter into treaties and so forth. British, French, Spanish and now Canadian/American colonialism was the invasion and dismantling of original law, national systems, limiting of access to resources, foreign control of Indigenous land and curtailment of production, reception and distribution of wealth.

By including Aboriginal Rights and a limited self-government under the *Constitution*, s.35 has maintained this colonial history, and left Indigenous Nations unprotected. We already inherently have a right of Self-Determination, and the laws and governance structures to implement that right. Indigenous Nations already had territorial rights. None of these are new, none of these flow from s.35. Instead, in order to rely on s.35, Indigenous Peoples have to accept the Canadian *Constitution* as the "Supreme Law" through which our rights as Nations should be

decided. Constitutional inclusion has only served to maintain the colonial history and practice of dismantling Indigenous national governments by sanctioning colonial rule. By agreeing to "recognize and affirm" limited Aboriginal Rights under the Canadian *Constitution*, Canada took up the colonial standard where their British and French forebears had left off. Indigenous Nations must first agree "Britain won the war and stole the land fair and square and gave it to Canada" (Doug Collins, writing in the *North Van Citizen*) before any rights could be negotiated under the Canadian *Constitution*. Indigenous Nations then must acquiesce to the right and authority of Canada, its courts and the general Canadian population to sanctify limitations on s.35 Aboriginal Rights.

If s.35 was meant to reflect a true nation-to-nation relationship, instead of a continuance of colonial history, it would have read:

> Canada recognizes the right of Self-Determination of Indigenous Nations. The government of Canada agrees to enter into nation-to-nation relations with the National governments of the Indigenous people.

Canada would have reverted to origins – pre-colonial conditions – to declare:

> Canada hereby abrogates the right of Canadians to intervene in the determination and limitation of Indigenous national authority, and agrees to establish Nation-to-Nation relationships and joint jurisdiction with Indigenous Nations.

Section 35 does not say anything close to that. A true nation-to-nation relationship would require that Indigenous Nations adopt the articles of the *Constitution* in order for them to apply; or, alternatively to adopt our own constitutions outside of Canada's, as we decided. A true nation-to-nation relationship would not have resulted in entrenching Aboriginal Rights as a Canadian constitutional right. As Indigenous Nations, we cannot expect to come under the Canadian *Constitution* on the one hand, and then use it to be free of Canadian authority on the other.

The current Canadian *Constitution* assumes that the abrogation of Indigenous Law occurred by "right of discovery" (the "colonizer's magic foot"), conquest and continued domination. The colonizer's magic foot allowed Britain, France and Spain to obtain whole territories in nations all over the globe to which the kings and queens proclaimed unlimited access to the wealth of these nations for themselves. For half a millennium the colonizers have attacked Indigenous Nations by controlling

and re-writing laws; re-shaping economic production and distribution of wealth; re-mapping territorial boundaries; dictating citizenship; and outlawing entire cultures, medicines and social practices.

Despite s.35, there has been no expressed intent by Canada, as beneficiary of this colonial legacy, to redress the impact on Indigenous Nations of the global imprint of the colonizer's magic foot. Nor has Canada abrogated the force and authority of the Colonial state, its laws, practices and culture. Instead, s.35 has cemented the colonial magic footprint in the Canadian *Constitution*.

There have been a number of Indigenous advocates of self-government who have argued that self-government is a constitutional right, and that Aboriginal hunting, fishing and gathering rights are economic rights, and that the Canadian *Constitution* protects our rights to resources, original land, sub-soil, riparian rights and so forth. But the fact remains, if we are to be included in the *Constitution* as anything other than Nations recognized by Canada, together with an intent by Canada to abrogate all precious colonial relations, provide restitution for the plunder of our territories, and a commitment to recognize joint jurisdiction based on nation-to-nation relationships with Indigenous Nations, then we are not self-governing nations, we are minorities with special limited rights.

A number of Indigenous Nations have taken their claims to court arguing admirably, culturally and clearly their authority and jurisdiction over land, claiming entitlement and territoriality. The courts have ruled quite clearly that Indigenous "jurisdiction" is limited, even in those landmark cases such as *Sparrow* where a partial victory was achieved and the Court said that Aboriginal Peoples must be satisfied that Canadian law is necessary to supersede Aboriginal Fishing Rights.

Aboriginal Rights in cases interpreting s.35 have amounted to nothing more than the reduction of nationhood to anthropological definitions of the nature of Indigenous Peoples in pre-colonial times. The definition of Aboriginal Rights that the courts have offered up has little to do with the reality of modern Indigenous Nations capable of exercising jurisdiction over our national territories, and sharing jurisdiction with Canada. The colonial relationship, colonial perceptions and definitions of Indigenity are held in place. Aboriginal Rights translate into "hunting and gathering rights" restricted by the social, political and economic concerns of Canada. We are not, nor were the majority of Indigenous societies, "hunter/gatherers." The majority of Indigenous Peoples in the pre-colonial times were village based and governed by national systems. Today, we are all village-based, nationally governed modern societies

who ought to be seeking full participation in the existing economic life of the modern world, rather than quibbling over the breadth and extent of a 19th century non-Indigenous anthropologically driven definition of Indigenity.

Acceptance of s.35, and our continued reliance on it, entrenches colonial authority much more than it accords Aboriginal Peoples rights. Existing laws are colonial, anti-Indigenous and, in the end, anti-self-government. To accept that our rights should be defined under s.35 is to accept colonial authority. Existing s.35 Aboriginal Rights are dependent on the "goodwill" of Canada and Canadian courts toward Indigenous people, and this goodwill has not been forthcoming.

Few, if any, of our political leaders have ever addressed "National jurisdiction" over our territories, and the Canadian courts have not either. By accepting the authority of the Canadian state to define the extent and breadth of independence and jurisdiction that Indigenous Nations are entitled to, we remain colonized. Since early colonial times we moved from "death by disease" to "death by social malaise," and this death is only furthered when elected Chiefs insist on relying on s.35 to define our present and futures.

Politics is the struggle of one law versus another law. The struggle over benefits, which is what "Aboriginal Rights" as advanced by Canada is about, is not about law; it is essentially economic. A "Land Claim" in this context becomes a real estate deal, not connected to Indigenous national authority. Aboriginal Rights, under s.35 currently, are purely economic rights and benefits handed to Indigenous Peoples by the good will and good grace of Canada in exchange for subjugation and acquiescence to colonial law.

If the problem is colonial law, the political solution is Original Indigenous Law. Otherwise, although the operation will be successful, the patient will die. Nationhood is the only cure for the disease of colonialism that I am aware of. Any band-aid applied to this disease will result in the greater death – the death of the hopes of Self-Determination. In our Original nation-states, Indigenous Peoples, particularly women, had place, power and privilege. Today, Indigenous Peoples have a colonized place lacking in power and full of under-privilege.

We lack the authority to insist on environmental responsibility in our national territories. We lack the authority to determine the nature of health and wellbeing and the authority to plan its achievement. We lack the authority to prohibit certain types of dangerous economic practices such as uranium mining and we lack the authority to resolve the existing

social problems that are a direct result of the colonial condition. What is far worse is that many of our leaders and some of our citizens are prepared to capitulate to colonial authority, to accept limited Aboriginal Rights and the right of Canada, and its courts, to define these rights.

Section 35 has created the biggest and saddest sham in our history of having to endure plenty of shams perpetrated by colonial authority. Prior to the entrenchment of Aboriginal Rights in the *constitution*, we were fighting for the recognition of a nation-to-nation relationship, not fighting to cement the colonizer's magic footprint. Our fight was once a populist fight, and that cost so very little to wage. Today, the fight is a legal fight and is very expensive. The *constitution* stated the existence of Aboriginal Rights, but failed to define them and the Canadian courts have taken up the task of definition. Canadian courts serve Canada, and exist to protect, perpetuate and serve Canadian authority. Indigenous independence and nationhood cannot be gained through the courts in Canada. No nation's courts have the authority to relinquish the sovereignty of their government. In order for sovereignty to exist for Indigenous Nations, sovereignty by Canada must be partially relinquished.

Colonialism is more than a half-millennium old in our nations. Cultural, political, economic and educational prohibition over time has dismembered our original systems but not our desire for their reconstruction, has fractured our original societies but not destroyed our hopes for their restoration. Colonialism has lowered Indigenous Peoples' standards of "normal" and this lowered standard of normal has enjoyed a dangerous acceptance that precludes our struggling for the reconstruction and restoration of our original Nations. The internal tussle between our desire for restoration and reconstruction and what our colonial past has taught us to believe we deserve has resulted in a strange form of political and emotional paralysis which impedes our moving bravely and courageously in the direction of full participation in the modern world as distinct Nations.

The decisions leaders make today will affect the next generation immediately. Indigenous grandchildren may lose access to jurisdiction over their national territory and access to participation in Canada as well. Section 35 constitutes a re-invasion by the old colonial order. To have our Nations instate, accept or accommodate a foreign *constitution* is a long way from self-government, liberation, and the end of colonialism.

Therein lies the patient's death: the problem is colonial law; the solution offered by s.35 is an entrenchment of colonial law.