Lawmaking for Nation Rebuilding

Indigenous Lawmaking in relation to the

Canadian Constitution and Common Law

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"Lawmaking for Nation Rebuilding" was a virtual thinktank hosted by the Rebuilding First Nations Governance Project and the Centre for First Nations Governance on May 10, 2022. It was held to inform the work of Upper Nicola First Nation as the people begin drafting laws to implement their inherent right to self-government. It was also attended by other project partner First Nations across Canada. The thinktank featured case studies on the lawmaking experiences of Listuguj and Nippissing First Nations as well as presentations from Canadian legal experts. The following is a written summary of one of those presentations.

Presentations by Kent McNeil, Emeritus Distinguished Research Professor at Osgoode Hall Law School, and Naiomi Metallic, Assistant Professor of Law; Chancellor's Chair in Aboriginal Law and Policy, Schulich School of Law, Dalhousie University

The Rebuilding First Nations Governance (RFNG) research project invited Dr. Kent McNeil, Emeritus Distinguished Research Professor at Osgoode Hall Law School, and Naiomi Metallic, Associate Professor of Law and Chancellor's Chair in Aboriginal Law and Policy with the Schulich School of Law at Dalhousie University, to speak about Indigenous lawmaking from the perspective of the Canadian Constitution and common law. After hearing about the experiences of Nipissing First Nation and Listuguj First Nation in the development and implementation of their own laws, both Kent and Naiomi addressed how the assertion of the right to self-government, the making of Indigenous laws and the application of them is supported through Canadian law. Together, they made a compelling case that gave Upper Nicola confidence to continue to move forward with its work in Indigenous lawmaking and nation rebuilding.

The think tank first welcomed Dr. Kent McNeil, long-time friend and colleague of RFNG Project Co-Director Satsan and an expert in constitutional law. He began his presentation by underlining

the undeniable fact that Indigenous nations were completely independent before European arrival, with their own cultures, economies, laws, and governments.

"So, how did the Crown get sovereignty over Indigenous peoples and their territories?" McNeil doesn't believe this question has ever been adequately answered.

There have been various expressions of assumed sovereignty over the centuries such as the doctrine of discovery, symbolic acts of possession, and royal charters (including the Hudson's Bay Royal Charter of 1670), but McNeil stressed that they would likely not stand up to scrutiny. The doctrine of discovery and the related concept of terra nullius were rejected by the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission (TRC) as racist doctrines that allowed Europeans to argue that the non-Christian peoples living in North America prior to European arrival lacked laws and jurisdiction over the territories they occupied. McNeil agreed with RCAP that these doctrines are invalid and argued that everyone knows it. He suggested that today's courts would likely not rely on them because the reality is that the French and the British who arrived in what is now Canada asserted jurisdiction without any real legal basis simply because they had the power to do so.

Although the Crown may have assumed jurisdiction over Canada and over Indigenous peoples and their territories, McNeil posed the question, "What about Indigenous governance and authority?" We know that Indigenous governance and authority is inherent, and that it has never been extinguished - not by colonization, Confederation, or the enactment of the *Indian Act*. He referred to the creation of the band council system through the *Indian* Act and the imposition of governance systems on Indigenous nations that were designed to replace traditional forms of governance. He acknowledged that while many Indigenous nations have continued to function under their traditional governance systems alongside the *Indian Act*, the negative impact the *Indian Act* has had on First Nations in Canada is one indication of why things need to change.

McNeil's presentation highlighted some historical developments such as the addition of section 35 to the Canadian Constitution recognizing existing Aboriginal and Treaty Rights in 1982. It wasn't until 1995 that the Canadian government acknowledged that these rights include the inherent right to self-government. Through its self-government policy, however, the government at the time maintained its view that the inherent right to self-government was limited and had to be negotiated through modern day treaties to be implemented.

The *R v Pamajewon* case that went before the Supreme Court of Canada in 1996 determined that Indigenous self-government rights had to pass the *Van der Peet* test to determine whether the rights were based on practices, customs or traditions that were integral to Indigenous cultures prior to colonization. This made it nearly impossible for First Nations to claim broad governance rights. However, the Nisga'a Treaty, ratified in 2000, is an example of a modern treaty that includes self-government provisions, and in the same year Justice Williamson determined in the *Campbell* case that the rights outlined in the Nisga'a Treaty are inherent and that the treaty itself only helps define them. Justice Williamson acknowledged that inherent rights existed before,

they continue to exist, they were never extinguished, and section 35 of the *Constitution Act, 1982* only recognizes and affirms what already exists in Canadian law.

McNeil underlined that the world has changed enormously since these developments, and he doesn't believe that the limits that were imposed on governance rights through these court decisions will survive. The *Pamajewon* case and *Van der Peet* test have been criticized by Indigenous nations and legal academics alike. Many argue that self-government isn't a specific right (like the *Van der Peet* fishing rights), but a generic right in existence before the Crown colonized Canada and that belong to all Indigenous peoples because it underlies their identity and cultural affirmation, continuance, and maintenance.

McNeil emphasized to Upper Nicola that section 35 of the *Constitution Act, 1982* provides the constitutional space within Canada for Indigenous governance as a third order of government. He argued that before this was brought into the Constitution, parliamentary supremacy allowed the Canadian government to override Aboriginal treaty rights, but now both parliament and provincial legislatures must respect them. And while section 35 is very important, it does not create any rights but rather affirms that these rights already exist and are inherent. These rights cannot be delegated by the Crown or any Canadian authority because they do not possess them. The inherent right belongs to Indigenous nations and the people themselves.

McNeil spoke with hope, as there have been two very important developments in recent years that support the inherent right to self-government. The first is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that acknowledges Indigenous peoples around the world have a right of self-determination and self-government within the nation states where they are located. The second was the February 2022 judgment from the Quebec Court of Appeal, which was a reference case that involved the constitutionality of a federal statute, *An Act Respecting First Nations, Inuit, and Metis Families*, that came into force in 2020. The decision was powerful because it affirmed that the Act itself only provides statutory recognition of the inherent right to self-government to provide mechanisms for Indigenous peoples to implement it.

"Indigenous peoples have said they have this right; however, it often takes a judgment from the Supreme Court for the federal and provincial governments to respect it", McNeil said. The Quebec Court of Appeal decision is on its way to the Supreme Court and legal experts are hopeful that the unanimous decision will be upheld.

As a final point in his presentation, McNeil reiterated what every other speaker at the think tank emphasized: Indigenous peoples have the inherent right to self-government, but it needs to be exercised for it to be realized. If Indigenous laws are not in place (in all areas of governance), federal and provincial laws will automatically apply. It is extremely important for Indigenous peoples to move ahead, to fill the space that they occupy with the jurisdiction they have, with their own laws. Indigenous laws should be paramount to federal and provincial laws and the only way the federal or provincial government can infringe Indigenous jurisdiction and laws is if the

Crown can prove that the infringement is justifiable. McNeil believes that may be impossible in most cases.

In her opening remarks, Naiomi Metallic, who is an RFNG Steering Committee Co-Lead for the Peace and Friendship Treaty cluster, emphasized the need to shift the focus from discussing Canadian law to Indigenous law. Listuguj and Nipissing have a lot to be proud of and Upper Nicola has a lot to look forward to, she noted.

“We talk about Canadian law a lot. But what do you want to hear [from us]?”

First Nations want to know if this work can be done. They want to be given the confidence that is needed to move Indigenous laws forward.

Metallic had several words of encouragement to offer those in attendance, acknowledging that the Canadian legal system is finally beginning to respect and create space for Indigenous laws. Metallic asserted that there is space for Indigenous legal orders and jurisdiction within Canadian Law and echoed the importance of filling that space. In the absence of Indigenous laws, Canadian law, including *the Indian Act*, applies by default.

Metallic also emphasized that while the Canadian legal system begins to come around to acknowledging Indigenous laws and jurisdiction, it is vital that First Nations remain diligent and continue to work on putting their own laws in place. “We can’t wait for them; we have to keep doing this work and moving on even though Canadian law still has some catching up to do.”

Regarding the doctrine of discovery and its continuing influence in Canadian law and policy, Metallic emphasized there have been many exciting new developments in Canadian law to repudiate it. For example, in a recent British Columbia Supreme Court case, *Thomas and Saik’uz First Nation v. Rio Tinto Alcan Inc.,* the court examined the doctrine of discovery and turned to the TRC final report and UNDRIP to support its findings. Both the final report and UNDRIP argue that the doctrine has motivated a lot of existing Canadian law on Aboriginal rights, despite being immoral. In his ruling Justice Nigel Kent said, “some argue, in my view correctly, that the whole construct of Crown sovereignty is simply legal fiction to justify the de facto seizure and control of the land and resources formally owned by the original inhabitants of what is now Canada”.

A Canadian judge acknowledging the doctrine of discovery as flimsy legal fiction is nothing short of amazing, Metallic said, while noting that the decision itself was not entirely in favor of Thomas and Saik’uz First Nation. Justice Kent stated that his hands were tied by legal precedent regarding the assertion of sovereignty, and Metallic argues this is where Canadian law needs to learn how to catch up. Despite this, having a Canadian judge acknowledge the problems that underlie the Canadian legal system and its relationship with Indigenous peoples has given a lot of hope to legal scholars and Indigenous lawmakers alike.

And Metallic doesn't think this will be the last of it. "This is the beginning of that door being pushed wide open to seeing Canadian legal professionals and judges having to grapple with this".

Metallic explained there has been a long-time fear within the legal system to address these truths. Fears that the house of cards will fall and the Canadian state as we know it will disintegrate. However, many understand that this is not the case. There are many people doing amazing work and thinking about how both Indigenous law and Canadian law can co-exist; how Indigenous laws can be reconciled with the Canadian legal system. She believes there are ways this can work, and the message is getting out there more than ever before.

She added there are tools that First Nations can use from UNDRIP and the federal Acts that recognize Indigenous peoples' inherent right to self-government. Metallic acknowledged that these are not perfect tools but do give First Nations what is needed to push back, forcing the legal profession to own up to the fact that much of the Canadian legal system is based on fragile, racist doctrines.

Metallic believes there are many hopeful and exciting things happening across the country that will make it easier for Indigenous lawmaking to grow and thrive. "The change from the TRC and the work stemming from having more Indigenous scholars working in Canadian universities and law schools are helping to change the mindset in really important ways".

Metallic noted that many law schools now have mandatory courses in Aboriginal and Indigenous law and highlighted the University of Victoria's first cohort of students who have graduated with a degree in common law and Indigenous legal orders. Other schools are developing curriculum while working with First Nations to help them in the work of revitalizing and developing Indigenous laws. More Indigenous students are graduating from law schools and more non-Indigenous students are paying attention to Aboriginal law and caring about the way this will impact their work.

Metallic concluded her presentation by reiterating that there is indeed space within Canada for the exercise of Indigenous lawmaking and affirming that there is going to be more. She believes First Nations won't have to face barriers, challenges, and pushback from the Canadian legal system as heavily as in the past. However, it certainly won't be a cakewalk; First Nations will have to continue to fight against authorities that have been very privileged and have maintained power throughout our colonial history. But Metallic offered a lot of hope because she believes we are seeing steps that suggest times are changing and it is so important for First Nations to continue to take up the space that is inherently theirs, to fill that space as Nipissing and Listuguj have done, and Upper Nicola is working towards doing now.