

“The Dimensions of Reconciliation: *Gladstone* and the Great Lakes”

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The idea that the law is a living, organic institution is central to understanding the claims that law makes upon us. Law without a story behind it, without a narrative that people can relate to and identify with, is not “law” properly so called, but is simply force or power.¹ Who would have thought that the medieval Latin of *Magna Carta*—the great charter signed by King John and the barons of England on the fields of Runnymede in the year 1215—could have meaning for us here today. The text of chapter 16 of *Magna Carta*—*nullae ripariae defenduntur decaetero nisi illae quae feurunt in defenso tempore Henrici Regis avi nostri*—means nothing to me. Read it in English—“no banks shall be defended from henceforth but such as were in defence in the time of King Henry our Grandfather”—and I’m not much better off.² What did they have against banks in 1215? Why not defend them?

The genius of law, however, is that it ensures that texts—whether written or oral in character—are constantly read and re-read, interpreted and re-interpreted, so that the moral implications of our past commitments to each other are properly appreciated in today’s light. Woven in and out of legal commentaries by the sages of the law and the decisions of judges over the centuries, chapter 16 has become part of a story or narrative which *is* capable of claiming our attention and our fidelity, a story about how kings, or

¹ Robert M. Cover, “The Supreme Court 1982 Term Forward: Nomos and Narrative”, 97 Harv. L. Rev. 4 (1982).

² On the meaning of this phrase, see Mark D. Walters, “Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada” (1998), 23 Queen's L.J. 301, at 315-316.

governments, should not take from us, the public, rights of access to natural goods that rightfully belong to us all—rights to water, to the sea, and to the riches found therein.

This narrative evolved in the fashion of the common law, incrementally over time, and it has attracted the allegiance of different peoples for different reasons. The legal story that clothed this old Latin text with normative force in England distinguished sharply between tidal and fresh waters: *Magna Carta* protected a public right of fishing in the sea, but a different story was told about inland rivers and lakes where the ethic of private interest and private property prevailed. According to the common law, land beneath fresh water rivers and lakes, and the exclusive right to fish in those waters, was presumed to be owned privately by the owners of adjacent lands. Chapter 16 of *Magna Carta* had no role to play in this story.

But, in the judicial narratives of early Canada, the English common law gained a local root and a local meaning. One lawyer referred to *Magna Carta* before the Court of Queen’s Bench in Upper Canada in 1861 as “our *Magna Carta*”³—a local story clothed this old text with a legal meaning that fit better the circumstances of the time and place. And according to that local narrative, the great bodies of fresh water in British North America, in particular the Great Lakes, although fresh not tidal, were not to be treated like the little privately-owned rivers and streams of England. Rather, they were like the sea itself: they were public waters and they contained public fisheries; the Great Lakes were public natural goods that, with the protection of chapter 16 of *Magna Carta*, could not easily be taken and vested in private hands. One is tempted to suggest that if only this communitarian spirit had shaped more parts of the law perhaps we would have a healthier nation.

But I must stop here and explain my presumptuous language. My references to “us” and “our”—and indeed to the very idea of “public”—are open to

³ *Re Anderson* (1861), 11 U.C.C.P. 9 at para. 22.

misunderstanding. These expressions are meant to apply in relation to—if I can put it this way—members of the interpretive community for whom the narrative about *Magna Carta* and the common law that I’ve just re-counted has normative or binding force. It is absolutely critical to emphasize that this narrative—the narrative that makes these rules “law” as opposed to mere force or power for the people who are subjected to them—was designed by a particular interpretive community to address the internal rights, duties, expectations and aspirations of its members. The principles arising from *Magna Carta* and the common law on fishing, as they evolved in Canada, evolved for a community of settlers and their descendants; and it was uniquely crafted by them to meet their needs in colonizing what was, for them, a new world.

But this legal narrative was never designed or meant to address the rights and duties of members of other communities. For the peoples already present in North America especially, not only did the medieval Latin text of *Magna Carta* and its English translation mean nothing, but the centuries-long narrative that vested those texts with deep normative meaning for the settler community also meant nothing. How could it? It was not a story to which they had contributed. For the Heiltsuk people on the west coast, and the Chippewas or Anishnabeg peoples on Georgian Bay in Lake Huron, and for other First Nations, the “public” in the narrative about *Magna Carta* and fishing rights is the “public” of another community. The Heiltsuk and the Chippewas and other Aboriginal communities have their own stories, narratives, customs and laws for their internal governance on matters relating to fisheries, seas, rivers and lakes, and rights of access to them. These Aboriginal laws were not designed to address the internal governance of other communities, especially settler communities, anymore than the internal laws of settler communities were designed to address Aboriginal internal governance. Nor were the internal laws of either set of communities equipped to

regulate the complex and troubling relationship between Aboriginal and non-Aboriginal peoples.

In that classic case on Indian rights from the early nineteenth century, *Johnson v. M'Intosh*, the Chief Justice of the United States, John Marshall, confirmed this very point.⁴ He examined Crown-Aboriginal relations in colonial America and observed that Indians had laws of their own on land use, laws which they might change if they so desired, and within their territories disputes about that law were something for them to address; interpreting and applying the internal land laws of Aboriginal communities was simply not a matter for the courts of settler communities. But from the long history of Crown-Aboriginal treaty relations, Marshall was able to infer a rough set of rules capable of governing matters relating to land and territory that arose between Aboriginal and non-Aboriginal communities. Whatever their internal laws, externally Indians had a sort of national capacity and held territorial rights, not just property rights but territorial rights, in that capacity; and they could therefore enter into treaties with the Crown concerning that territory. In the meantime, the collective or national right to territories held by Indians was to be respected by non-Aboriginal courts in times of peace.

The title that Aboriginal nations enjoyed as nations as against the settler community would later be described by the Supreme Court of Canada in the *Guerin* case as a *sui generis* right—a right in its own class.⁵ It was a title that was defined not by the internal laws of Aboriginal communities nor by the internal laws of the settler community, but by a unique set of principles arising from the inter-relationship between the two sets of communities and capable of addressing that inter-relationship; a set of principles that emerged in eastern North America, and around the Great Lakes, through custom and usage and active engagement between Crown and Aboriginal nations over

⁴ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

⁵ *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

the course of centuries; a set of principles which Professor Brian Slattery aptly calls an “intersocietal law”.⁶ This, I think (or at least I thought) was what Chief Justice Lamer meant when, in the *Delgamuukw* case of 1997, he observed that Aboriginal title is *sui generis* because its source arises from pre-existing Aboriginal occupation and from the “relationship between the common law and pre-existing systems of aboriginal law.”⁷

In its decisions of 1996 on Aboriginal rights—which include the *Gladstone* case—the Supreme Court of Canada held that the purpose behind the constitutional provisions that protect Aboriginal and treaty rights in Canada is to provide a constitutional framework for reconciliation—a framework, that is, within which distinctive Aboriginal societies may be reconciled with the common law and with Crown sovereignty.⁸ In *Van der Peet*, Chief Justice Lamer went so far as to quote Brian Slattery: Canadian Aboriginal rights law, he said, is an “intersocietal law”—it draws from both Aboriginal and non-Aboriginal legal traditions.⁹ One can see in these statements the ingredients for a rational approach to a reconciliation process that is more than a mere technical or formal fitting together of disparate parts—after all reconciliation here is presumably not like reconciling financial accounts, but is a deeply moral exercise designed to achieve, as the Court said in *Sparrow* as “just settlement” for Aboriginal peoples.¹⁰ There are two sets of radically different legal traditions, and like old Apple and IBM computers they cannot talk to each other directly; what is needed is an intermediary body of legal principles through which the reconciliation process might be conducted, a software system (to carry the computer analogy further) compatible with both computers that permits them to

⁶ Brian Slattery, “The Legal Basis of Aboriginal Title” in Frank Cassidy (ed.), *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992), 120-121. See also Brian Slattery, “Aboriginal Sovereignty and Imperial Claims” (1992), 29 O.H.L.J. 681 at 700-703, and John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), 8, 10-12.

⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 45.

⁸ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 42

⁹ *Ibid.* at paras. 42, 49.

¹⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, per Dickson C.J.C. and LaForest J. at 1106 (quoting Noel Lyon, “An Essay on Constitutional Interpretation” (1988), 26 O.H.L.J. 95 at 100).

engage with each other. What is needed, in Slattery's words, is an intersocietal law. This was, after all, the approach that Chief Justice Marshall set out long ago.

The tragedy of Canadian aboriginal rights law is, in my view, the Court's neglect of the idea of an intersocietal law—the neglect, in other words, to be careful about the legal dimensions within which reconciliation takes place. Many good things can be said about the *Gladstone* case. It was, in many respects, a victory for the Heiltsuk nation. But the manner in which Aboriginal and non-Aboriginal legal traditions were 'reconciled' is troubling. On the Aboriginal side, the evidence disclosed a Heiltsuk right to engage, as they always had done, in a commercial fishery for herring spawn on kelp. This right was derived by the Court from evidence of pre-European contact practices and customs. On the non-Aboriginal side, Chief Justice Lamer found a common law right in the public to fish in tidal waters that has been protected since the time of *Magna Carta*. Instead of reconciling these two competing legal realities through the medium of an intersocietal law that was capable of governing the interaction between them, Chief Justice Lamer took the two legal realities and he in effect (for lack of better expression) squashed them together directly. The result was that what was an exclusive Heiltsuk fishery became limited, in undefined ways, by the public right of fishing, and the public right of fishing was, in equally undefined ways, limited by the Heiltsuk fishing right. The Court left the scope of these respective rights to be determined by the non-Aboriginal legislature.

What would an intersocietal law have provided in this case? To be 'law' as opposed to mere force or power, an intersocietal law would have to claim the allegiance of both sets of peoples—both Aboriginal and non-Aboriginal communities. Together, these two sets of communities would have to form, if only for the purposes of constituting this one area of the law, a single interpretive community for whom there exists a narrative that founds legal meaning in a set of principles governing inter-cultural and inter-national engagement between them. I'm not sure that judges alone can ever

articulate this narrative fully. But scholars like Jeremy Webber and Brian Slattery say that there was a time when such a normative community embracing both sets of peoples existed—the period in eastern North America and the Great Lakes region when power was, for a time, evenly balanced and Europeans treated native peoples like sovereign powers with territorial rights (a point that the Court in the *Sioni* case appeared to acknowledge).¹¹ This practice, it is said, constituted a constitutional middle ground, a form of intersocietal law—from which it may be inferred that no settlers had any right of access to Aboriginal territories until the Crown had purchased those territories from the appropriate Indian nation in public council (a point confirmed in the Royal Proclamation of 1763). In other words, the intersocietal law would have provided that the rules about *Magna Carta* and public fishing that the non-Aboriginal community recognized internally would not have applied to unceded Aboriginal territories. And, like any national territory, these Aboriginal territories would presumably have included rivers, lakes and parts of the adjacent sea that formed part of their own juridical notions of national territories. Through such principles, reconciliation of a different sort would, one might hope and imagine, emerge: not just a formalistic fitting of disparate parts together, but a moral reconciliation that brings two diverse sets of peoples and traditions together on terms of justice and equality.

The neglect of the Court to take seriously the need for an intermediary body of legal principles to govern the relationship between Aboriginal and non-Aboriginal legal systems has reached a crisis point. In the recent *Bernard* and *Marshall* cases, the Court decided that the internal approach of Aboriginal peoples to landholding must be

¹¹ Jeremy Webber, “Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples” (1995), 33 O.H.L.J. 623; Brian Slattery, “Aboriginal Sovereignty and Imperial Claims” (1992), 29 O.H.L.J. 681; *R. v. Sioni*, [1990] 1 S.C.R. 1025, per Lamer C.J.C. at 1052-1053.

translated directly into the internal laws of non-Aboriginal peoples.¹² Gone is the idea that Aboriginal title is a *sui generis* intersocietal law governing the relationship between legal traditions. Gone is the idea that Aboriginal title is a territorial right rather than a property right. Instead, the process of translation is direct and immediate. The *internal* Aboriginal perspective is fitted directly into the content of the *internal* laws of the settler community. Aboriginal title only exists, then, if internal Aboriginal laws embrace the very same concepts of exclusive possession that the common law does. Chief Justice Marshall, as seen, rejected this approach: internal Aboriginal laws on landholding were their business and did not directly govern the relationship between Aboriginal and non-Aboriginal peoples. Indeed, this only makes sense: why should Aboriginal laws designed to deal with the internal affairs of an Aboriginal community be taken from their unique cultural context—from the narratives that gave them meaning for the interpretive community they served—and forced to perform a wholly different task, the task of determining the relationship between Aboriginal and non-Aboriginal peoples? The internal laws of neither set of communities can perform this sensitive and complex function. Aboriginal and non-aboriginal laws cannot be directly translated one into the other; nor can they be directly squashed together to produce reconciliation.

I appreciate that *Gladstone* was not argued as an Aboriginal title case, and so talk of a territorial right here may sound odd. But I think Doug Harris's point—that a territorial limits could have been placed on the Heiltsuk fishery, and on the public right of fishing, so that they did not overlap and need squashing together—is a good one.¹³ It may be that to escape the problems of squashing public and aboriginal rights together in relation to the same fishery it may now be necessary to make out a claim to aboriginal

¹² *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 [hereafter *Marshall; Bernard*], per McLachlin C.J.C. at paras. 48, 51 (the Court must “translate” aboriginal practice into “a modern legal right”, a process that seeks “a corresponding common law right” that gives effect to the aboriginal practice).

¹³ Douglas C. Harris, “Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery” (2000), 34 U.B.C. L. Rev. 195.

title to the sea or lake bed below the fishery in question—for according to *Delgamuukw*, aboriginal title gives exclusive rights. One wonders, however, whether Canadian courts will be swayed by the recent decision of the Australian High Court in *Yarmirr*, which held that because of *Magna Carta* and the common law public right of fishing, Aboriginal peoples cannot have exclusive native title to the seabed, but only non-exclusive rights of access to fisheries for traditional purposes—which sounds a bit like *Gladstone*.¹⁴ Indeed in *Yarmirr* one finds a very clear example of the direct application of common law principles to aboriginal legal concepts, the former trumping the latter.

There is, I think, something deeply compelling about the idea that the public should have free access to natural goods—to the open seas and to open lands—but I also think that the relevant goods must really belong to the relevant public for this principle to operate.

¹⁴ *The Commonwealth v. Yarmirr* (2001), 75 A.L.J.R. 1582, 184 A.L.R. 113 (H.C.A.).