

## Commentary on Aboriginal Rights

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I propose to make a few brief observations about the recent rather startling and encouraging growth and evolution in the area of aboriginal law and rights, almost entirely the result of the work of the Dickson Court and Chief Justice Dickson in particular.

Professor Nepon has already provided you with a legal perspective on the impact and significance of recent decisions of the Dickson Court in the area of aboriginal law. My comments will deal with some aspects of the historical and political perspective.

Although the foundation, concepts, and basic principles of aboriginal law are at least as old as much of the common law which helped shape Canadian society, it is clear that it was only the Dickson Court which has had the courage and wisdom to recognize that Canada's legal system has been flawed to the extent that it has failed to reflect the true historical, political, and legal relationship between Canada, a new nation founded in 1867, and the First Nations of Canada, the people of which have lived in organized societies in this country for as long as approximately 8-10,000 years. The Dickson Court affirmed for all of us the reality that much of Canadian aboriginal law and custom is still disregarded today by both the political and legal systems because of the continuing influence of historical misconceptions and colonialist prejudices, traceable in the main to the late 1800s and 1900s.

What is the nature of that original and now again newly emerging relationship, this new touchstone against which judicial and government thinking must be tested? It was not placed squarely before the Dickson Court, but nevertheless had to be at least alluded to in certain of its decisions; for example, *Guerin*,<sup>1</sup> *Simon*,<sup>2</sup> *Sioui*,<sup>3</sup> and *Sparrow*.<sup>4</sup> Let me touch on it briefly. It might best be understood by

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<sup>1</sup> *Guerin v. R.*, [1984] 2 S.C.R. 335.

<sup>2</sup> *Simon v. R.*, [1985] 2 S.C.R. 387.

<sup>3</sup> *Sioui v. A.G. Quebec*, [1990] 1 S.C.R. 1025.

<sup>4</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

reference to a concept restated and referred to in most of what I refer to as the "current" aboriginal law cases, but which originated in the U.S. Supreme Court decision of *Worcester v. The State of Georgia*.<sup>5</sup>

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

It was, I would argue, historically a fact that First Nations in the northern part of the continent agreed to co-operate and share the wealth of Canada with the European settlers. The integrity and viability of this accommodation is known in international law; in fact, it was first espoused in the 1600s by the so-called Father of International Law, Francisco de Vittoria. It is reflected in the system of "domestic dependent nations" which has evolved in the United States, and is the historical and ought to be the juridical basis of the underlying relationship between First Nations and Canada; but which, nevertheless, was virtually ignored until the very recent *Sioui* and *Sparrow* decisions of the Dickson Court. Why? It is difficult for most Canadians to answer, largely, I suspect, because the answer threatens the idealistic view we, as Canadians, have of ourselves and our legal system, which nevertheless preserves non-aboriginal power and non-aboriginal economic advantage over Canada's first people.

The Dickson Court, it seems to me, perceived the need for a fundamental reconciliation. In the strength and breadth of its recent decisions (such as *Simon*, *Sioui*, and *Sparrow*), Chief Justice Dickson's Court sent an unmistakable and, ultimately, unavoidable message to the people and governments of Canada — that aboriginal Canadians in their capacity as the First Nations of this land have substantial, enforceable, legal rights which preceded Canadian law, are constitutionally protected today, and must be positively considered and reflected in the law of this land. Indeed, for the first time in the history of this country, one of the first principles of the First Nations/Canadian relationship was enunciated by Chief Justice Dickson in the *Guerin* and *Sparrow* decisions — namely that the federal government has a fiduciary or trust type obligation to

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<sup>5</sup> 31 U.S. 515 (1832).

aboriginal Canadians in its conduct of aboriginal affairs and in the design of legislation impacting upon aboriginal and treaty rights. Although this general fiduciary or trust type obligation is couched in a conventional language familiar to lawyers, Chief Justice Dickson has clearly challenged us to be creative in defining the nature and scope of the obligation as it relates to and governs the conduct of government. He has characterized both aboriginal title and rights as being "*sui generis*," something with a unique character. These legal principles are truly revolutionary. In many respects, they constitute a current-day affirmation of the true spirit and intent around which the relationship between First Nations and Canada originally developed. They mark a watershed in aboriginal law, the ramifications of which I suspect will become obvious to us in the decades ahead.

As a lawyer practicing aboriginal law, as a Canadian, and as a member of the Ojibway nation, it is difficult to express the extent of the personal gratitude I feel for the humanity, foresight, and keen sensitivity of the judgments of Chief Justice Dickson and his Court. He has given all of us, Aboriginals and non-Aboriginals, hope for a better future and has done much to set the stage for a lasting reconciliation between First Nations and Canada. This may yet turn out to be the most significant and far-reaching aspect of the Dickson legacy.

Thank you, Chief Justice Dickson, "Kechi Meegwetch."