Reconciliation and the Straitjacket: A Comparative Analysis of the Secession Reference and R v Sparrow

PRESENTED BY

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Nichols argues that the hypotheses used in *R. v. Sparrow* to interpret s. 35(1) of the Canadian Constitution reflect a problematic colonial heritage. He points out that a formalistic approach to the *Sparrow* test does not reveal the constitutional justification that gives it its meaning. The Supreme Court emphasizes the background to s. 35 to support its constitutional justification, while in Nichols' view we must go further if we are to interpret the importance of specific changes to the law or forecast future developments. If not, we will perpetuate the heritage of colonial imperialism in Canadian law—a heritage that the Court is still struggling with.

The Court states that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown" (*Sparrow,* p.1103). According to Nichols, the reliance on this interpretational background results in a reconciliation of ss. 35(1) and 91(24), which asserts the exclusive legislative power of the federal parliament with respect to the Indigenous peoples and their lands. However, this provides no legal explanation for the disappearance of Indigenous sovereignty, perpetuating tension with the rejection by the Court of the colonial doctrines that reduce the legal capacity of the Indigenous peoples. In addition, the attribution of this form of sovereign authority to the Crown (allowing it to declare its sovereignty over other peoples and to dissolve their character as nations in the absence of any judicial review) is contrary to the principles of the Glorious Revolution and the US War of Independence, and to the central principles of the constitutional tradition that Canada has inherited. A failure to attack the background to *Sparrow* is a failure to uphold the primacy of law.

To remedy the situation, we must first apply a historic and contextual approach to s. 91(24). Using a more balanced and detailed understanding of pre-Confederation history, this approach can explicitly address the racist presuppositions of the legislative history and force the revision of some judgments. Second, the "honour of the Crown" must be applied in a way that is based on principles and does not make it a paternalist concept. Although the principle clearly results from the assertion of Crown sovereignty over lands previously occupied by Indigenous societies, it must be seen as expressing a strong obligation for the Crown to reconcile its sovereignty with the sovereignties of the Indigenous peoples, considered as equals. This leads to an interpretation of "partnership without assimilation" (*Mitchell v. M.N.R.*) using the concept of "shared sovereignty". Third, we can use the *Reference re Secession of Quebec* as a model for "constitutional reconciliation". The *Reference* can help us move away from a "jurisdictional" understanding of s. 35(1): it shows that the Court can recognize the need for constitutional negotiations when disputes around exceptional issues involve some of the "initial members of Confederation" engaged in "nation-building" (*Reference*, §43). In Nichols' view, if the Indigenous peoples ceased to be considered, erroneously, as cultural minorities, then their disputes with the Crown could be addressed using the negotiation model. This would go a step beyond the "unilateral" reconciliation model expressed in *Sparrow*.