Keynote Speech by the Right Honourable Beverley McLachlin, P.C.

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"Four Eras of Aboriginal Law in Canada"

Taipei, Taiwan

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Former Chief Justice of Canada

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Thank you for the invitation to address you at this important conference. I have been asked to talk to you today on understanding the rights of Canada's Indigenous communities. There is no subject that is closer to my heart. I have had the privilege during the 28 years I served on the Supreme Court of participating in the most momentous period of development on Indigenous law in Canada's history. I consider myself very privileged to have had this opportunity.

Aboriginal law is a new study. When I went to law school, no one taught or even thought about Aboriginal Law. Not until the 1980's did scholars and lawyers begin to discuss Aboriginal Law as a discreet area of legal study.

But in fact, Aboriginal law is an old subject. Laws and models of law have always governed the relationship of European settlers with the Indigenous peoples they found in Canada. We had Aboriginal law; we just didn't recognize it. Too often, we look at Indigenous issues in a short timeframe. To understand where we are going and how to respond to current legal challenges, we need to understand where we have been — not just in the past few decades, but from the beginning.

Hence my topic today - an overview of the legal models that have defined the relationship between Canada's Indigenous peoples and the European explorers and settlers who came after. I have divided the story into four periods, that correspond to four legal eras: (1) Nation to nation; (2) State Protection; (3) State Paternalism; and (4) Aboriginal Rights. As always in history, there are exceptions and transitions in which features of a new model blend with those of the model it replaces. But that does not negate the reality of the four distinct legal approaches that have governed Indigenous relations.

1. <u>The Nation to Nation Legal Model</u>

The first period in the story of relations between Canada's Indigenous peoples and others was the time of early exploration in the 16th and 17th centuries, approximately from 1534 to 1763. Samuel de Champlain came to the shores of what are now the Atlantic Provinces and on numerous visits worked his way westward to the Great Lakes. He treated with the tribes who lived on the lands where the three rivers — the Ottawa, the Gatineau and the Rideau — meet and invited them to join with France in friendship. The legal relationship between Champlain and the Indigenous peoples he lived and treated with — and sometimes fought side by side with — may best be described as a relationship between independent equals. Nation to nation,

people to people. (See Champlain's Dream, a book by David Hackett Fischer on Samuel de Champlain.[1])

This century and a half was a time of war between the Algonquin nations and the Huron nations, and between the British and the French. The British allied with the Algonquin nations, the French with the Huron nations. Battles were won and lost. As was usual in wars, treaties were signed between victors and vanquished. For example, the Mi'kmaq in New Brunswick and Nova Scotia signed a treaty with the victorious British, wherein the British agreed to protect the Mi'kmaq and to provide "truckhouses" or trading centers, which the Supreme Court in Marshall 1 held constituted a guarantee of the right to fish and hunt.[2]

While settlements were beginning (Champlain founded Québec City in 1608), the dominant European activities during this period were exploration and the fur trade. The waves of settlement that would later threaten to oust Indigenous peoples from their lands had not yet washed ashore.

The relationship between the Indigenous peoples of eastern Canada and the Europeans during this epoch was nation to nation, as John Ralston Saul explains in his book A Fair Country: Telling Truths About Canada.[3] The Indigenous peoples governed themselves. The Europeans relied on them for advice and assistance, in learning how to traverse and live in the harsh and densely forested land.

We would be wrong to think that at this time – the time of first contact between the European and the Indigenous people in the East of Canada – was not governed by Law. The Law that governed was the International Law – the Law of Nations -, which oversaw the relations between independent nations.

The legal framework which governed this relationship was the framework that governs relations between independent nations, expressed in alliances and treaties entered into by independent bodies.

2. The State Protection Legal Model

The bookends for the second period in relations between Canada's Indigenous peoples and Europeans are the Royal Proclamation of 1763 and Confederation in 1867. Initially, as we have seen, Europeans treated indigenous peoples as independent nations. They lived and fought side by side and entered into treaties and alliances.

However, with increasing European settlement, the situation began to change. In the British colonies of North America, particularly those that later became the United States of America, settlers began buying Indian lands for trivial amounts or simply taking them over. Many regarded the land as Terra-Nullius-vacant land that was theirs for the taking. Indigenous peoples faced ouster from their traditional lands by encroaching European occupation. The former nation to nation relationship was quickly being replaced by a relationship grounded on a total denial of Aboriginal rights.

[1] David Hackett Fischer, *Champlain's Dream*. New York: Simon & Schuster, 2008.
[2] *R. v. Marshall*, [1999] 3 S.C.R. 456.
[3] John Ralston Saul, *A Fair Country: Telling Truths About Canada*. London, U.K.: Penguin Books, 2008.

The government of Great Britain decided that the wanton expropriation of Aboriginal lands by Europeans must be stopped. It moved to replace the encroaching legal model of Terra-Nullius with a new legal model – a model in which the government claimed title to all land (what we now call underlying Crown title) and would protect Indigenous peoples against the improvident expropriation of their lands.

The seminal document in establishing the new legal relationship was the *Royal Proclamation* of 1763. The Royal Proclamation stated that the only way settlers could acquire Indian lands was through the state. We thus see the emergence of the idea that the state holds underlying title to all the lands and is the protector of the Indigenous peoples who lived on the land. The British Government assumed the role of protector of the Indigenous peoples against the efforts of the non-Indigenous peoples to push them out of their ancestral lands.

The *Royal Proclamation* predated the American Revolution. Indeed, it was one of the causes of the revolution; wealthy men like Washington and Jefferson had surveyed and claimed huge tracts of land west of the Appalachians and were determined to take it, regardless of Indian claims. The *Royal Proclamation* stood in their way.

After the Revolution, the *Royal Proclamation* no longer was law in the United States. The lawless take-over of Indian land proceeded apace. We all know the sorry story. Indian war after Indian war was waged, as settlers moved in to take their lands. The Indian tribes of the eastern United States were pushed further and further west to new Indian Territories like Oklahoma. On occasion, the United-States Supreme Court sought to hold the bloody displacements of Aboriginal people, without much success. As President Jackson said: "The Chief Justice has made an order. Let him enforce it".

In Canada, however, the *Royal Proclamation* still was the law. Settlers could not simply take Indian land. The Crown held the land. The Crown treated, or negotiated, with the Indians, to obtain the right to allow European settlement, in exchange for reserve lands and guarantees of sustenance and support. In this way, former Indian lands were freed up for settlement. Indian tribes were still regarded as independent peoples. But systematized treaty making gradually replaced the nation to nation relationship with a nation to ward relationship.

The result was a legal regime that could be summarized by: "The State Protection of Indigenous peoples". The Crown, as the holder of underlying title, accepted the legal duty of protecting Indigenous people from wanton settlement, and ensuring they had sufficient lands and territories to sustain themselves, with supplementary aid from the state as provided by Treaty or needed. In other words, the government adopted the legal model of State Protection. Whether it in fact provided protection was another matter – a matter that continues to find its way into Canada's courtrooms.

3. <u>The State Paternalism Model</u>

The British North American colonies of New Brunswick, Nova Scotia and the Province of Canada formed Confederation in 1867. Central to the new nation was a new constitutional provision to deal with Indigenous peoples and the tide of oncoming settlement. The federal

Parliament was given power over matters relating to Indians. It promptly enacted the *Indian Act*.[4]

If the *Royal Proclamation* was the document that shaped the protective paternalism of pre-Confederation days, the *Indian Act* was the document that shaped state paternalism between the *Constitution Act* of 1867 and the *Constitution Act* of 1982. Treaty making assumed a furious pace and European settlers, encouraged by the Canadian government, pushed ever westward across the plains.

Prime Minister Sir John A. Macdonald had a dream — the dream of populating the Prairies with people of European descent and of building a railway to the Pacific that would unite the new country of Canada. That meant what was termed the "Indian Problem" must be solved. The short-term solution was treaties and the reserve system. The long-term solution, most people thought, was assimilation. But that would take time. In the meantime, Indians were regarded as wards of the state, which would look after them as a parent looks after her children. Thus the preceding era of state protection, where Indians were protected but still largely treated as independent nations, merged gradually into the era of state paternalism – the era of State Paternalism.

To say that state paternalism was an unhappy era for Indigenous peoples would be an understatement. Indians were settled on reserves. In some places, laws were passed forbidding them from leaving their reserves without government permission. Too often, treaty promises to provide food and medicine were not fulfilled.[5] Starvation and disease decimated Indigenous communities. They were denied the right to vote. They lived separate and apart from the burgeoning white population, out of sight, out of mind, except for the Indian agents Ottawa installed to look after them.

The overall goal, assimilation of Indigenous people with the European population, proved difficult to execute and in the end, impossible to accomplish. The vehicle for achieving assimilation, borrowed from the United States, was the residential school system. Indian children would be taken to residential schools where they would learn European languages, religion and culture. We now understand that to take children from their parents and community and culture and forcibly attempt to change them, was not only cruel, but a gross violation of human rights. The result was death, suffering and a legacy of intergenerational damage, as described in the 2015 report of the Truth and Reconciliation Commission. All this for a goal that was never – thankfully – realized – the goal of assimilation.

The law under the *Indian Act* and related statutes reflected the paternalistic attitude of this period. Status Indians were denied voting rights until 1960. They were denied economic independence. Their lands were by and large managed by the government. And sometimes they were denied the right to be who they were – an "Indian". Women who married white men lost their Indian status, along with their children.

Court decisions reflected the ethos of the era of paternalism. Cases decided under the Diefenbaker *Canadian Bill of Rights* of 1960 denied Indians the right to pass on their property

[4] *The Indian Act, 1876*, S.C. 1876, c. 18 (now *Indian Act*, R.S.C. 1985, c. I-5).
[5] James Rodger Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*. Toronto: University of Toronto Press, 2009.

by will and the right to hunt. In the *Drybones* case, the Supreme Court ruled that a provision of the Indian Act which prohibited Indians from being intoxicated off reserves was inoperative because it violated the equality under the law clause of the *Bill of Rights*.[6] However, this case did not establish an effective precedent. Four years later, the majority of the Supreme Court ruled in the *Lavell* case that the fact that the *Indian Act* deprived Indian women of their status if they married a non-Indian man, did not violate their right to equality based on sex.[7] Again, in the *Canard* case, the Supreme Court held that the federal legislation that disqualified Indians from acting as the administrators of their deceased spouse's estate did not offend the *Bill of Rights*.[8] Indians, in short, were wards of the state, which determined their rights and entitlements.

4. The Aboriginal Rights Model

In 1982, Canada adopted the *Canadian Charter of Rights and Freedoms*. Part of the package that brought in the *Charter* and repatriated the Constitution was s. 35, which recognized and affirmed Aboriginal rights. It ushered in the fourth legal era of relations with Canada's Indigenous peoples — the era of rights.

Constitutional recognition of Aboriginal rights was preceded by developments that pointed in this direction. In 1984, the Supreme Court held in the *Guerin* case that the federal government owed a fiduciary duty to the Musqueam Indian Band in administering their lands, and must compensate the band for an improvident golf course lease it had entered into.[9] Guerin involved a situation that preceded the Patriation of the Canadian Constitution, but with the adoption of s. 35 of the *Constitution Act* of 1982, rights litigation took flight.

In a series of landmark cases, the Supreme Court laid down the right to pursue Aboriginal practices, like hunting and fishing (*Van der Peet*[10]); the right to title in Aboriginal land (*Delgamuukw*[11]; *Tsilhqot'in Nation*[12]); and the right to be consulted on matters affecting Indian lands (*Haida Nation*[13]). It also confirmed that non-status Indians and Métis were included in what is meant by "Indians" under s. 91(24) of the Constitution Act, 1867, and that therefore they could turn to the federal government to assume legislative authority over them (*Daniels*[14]). The approach in these and other cases too numerous to mention was based on a broad conception of Aboriginal rights under s. 35.

The recognition and elaboration of Aboriginal rights was accompanied by recognition of the wrong-headed policies of the era of paternalism. In 2008, Prime Minister Stephen Harper formally apologized in Parliament for the abuses of the residential schools.[15] This was

[6] *R. v. Drybones*, [1970] S.C.R. 282.
[7] *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349.
[8] *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170.
[9] *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
[10] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
[11] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
[12] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256.
[13] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.
[14] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99.
[15] The Right Honourable Stephen Harper on behalf of the Government of Canada. "Statement of Apology to former students of Indian Residential Schools", Ottawa, June 11, 2008 (online: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rqpi_apo_pdf_1322167347706_eng.pdf).

followed by the work of the Truth and Reconciliation Commission and a process of compensation for persons injured during their time in residential schools.

This period has seen increasing independence and self-government in many First Nations. New models of economic independence have emerged. Increasingly, Indigenous peoples are playing a political role. A cadre of young university-educated Indigenous peoples is emerging and finding prominent places in every facet of Canadian life. At the same time, this period has seen a renewed insistence on rediscovery and preservation of unique Indigenous cultures and acknowledgement by non-Indigenous peoples of the rights and contributions of Indigenous peoples.

The goal of all these activities is reconciliation between Canada's Indigenous and non-Indigenous peoples. It is a grand project. And, essential, in my view.

5. Conclusion

I have traced four eras in the history of relations between Canada's Indigenous peoples and non-Indigenous peoples. Each has come with its own unique legal paradigm.

The first era was the era of equal nations. It was a time of equality. Indigenous nations governed themselves. Europeans joined them on the battlefields, and when battles ended, treaties were drawn up. In fact, this era was governed by the Law of Nations, the International Law.

The second era introduced state protection into the nation-to-nation model. Great Britain sought to protect Indigenous peoples from land-grabs by settlers by introducing a new legal order — an order which placed the state as the broker between Indigenous peoples and newcomers. The legal paradigm of this era was the *Royal Proclamation* of 1763.

The third era came with the creation of Canada and state assumption of increasing control over Indigenous peoples. However well intentioned, this quickly devolved into the full-blown era of paternalism. The legal documents of this era were land treaties by which Indigenous peoples agreed to allow settlement of land in exchange for reserves and benefits; and the *Indian Act*. Just as parents by law controlled children while caring for them, so the state through its laws controlled Indigenous peoples while purporting to care for them.

The fourth era — the era in which we now live — is the era of recognition of Aboriginal rights, accompanied by renewed independence, renewal of Aboriginal culture, and a push for self-governance. The legal paradigm of this era is rights. It is an era of legal transition. The *Indian Act* still governs the lives of many Indigenous peoples, and vestiges of the paternalistic care model still are present. But a new legal model — the model of rights — is taking hold. Alongside the rights model is a growing interest in Indigenous laws, both as part of broader Canadian law and as expressions of self-governance. Tentatively, the law that governs relations between Canada's Indigenous and non-Indigenous peoples is circling back to where it began — cooperation between independent peoples possessed of unique rights.

All this is happening under the umbrella of reconciliation. Reconciliation recognizes the injustices and grievances of the past, and seeks to make amends. But it also recognizes the

reality that Canada is home to non-Indigenous peoples, and that the only way forward is to work out our differences in a spirit of respect. As Chief Justice Lamer stated in *Delgamuukw*, "Let us face it, we are all here to stay."[16]

Will the era of Aboriginal Rights be the final legal era in Canadian history? I possess no crystal ball. But it is my hope that the next era – the era into which we are now moving – will be the era of reconciliation. As we move down the road of reconciliation, the next big legal challenge will be to reconcile Indigenous law and values with broader Canadian law. Reconciliation is not just a matter of recognizing the wrongs of the past and establishing new, more trusting, relationships – it will require reconciling Canadian law and Indigenous laws and values.

We have started to work on this. Law schools across the country are establishing programs devoted to the study of Aboriginal legal norms and models and methods of dispute resolution. The *Criminal Code* has been amended to require judges to take into account Indigenous factors in sentencing, and allow judges to use Aboriginal ideas like sentencing circles. We have recognized the need for Aboriginal participation in the jury process and the justice system more broadly.

By measures like this, we are taking tentative steps toward reconciling Indigenous justice with existing Canadian laws and legal structures. But we are only at the beginning; much work remains to be done if we are to achieve true reconciliation between Aboriginal and non-Aboriginal populations. Polls reveal a sad reality – many Indigenous people view the justice system, not as their justice system, but as an alien system imposed on them. So long as that is the case, the goal of reconciliation will elude us.

Thank you for allowing me to share these reflections with you.

[16] Para. 186.