S4E6 – S.35 of the Constitution and the Bill C-92 Reference

Transcripts are auto-generated

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John Borrows (pull quote):

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If this legislation stays in place and it doesn't get diligently implemented in accordance with the purposes that are set out there, that would be a violation of the honour of the Crown. And the court said as much in the reference. So as long as the legislation is there, the Parliament has bound itself to act as if Section 351 includes the inherent right to self-governance dealing with...

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child and family issues. And so within the contours of the legislation, there is power there. But as I said before, another government could repeal this and there's nothing that would stop that in section 35 at this point.

Intro Music:

Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, southeast, west and north.

00:58

And along the way we may find justice. Charter a course, I will charter a course. If we can just get the country to trust us. Charter a course, southeast west and north. And along the way we may find justice.

Cheryl Milne:

Hello and welcome to the fourth season of Charter of Course, a podcast created by the David Asper Centre for Constitutional Rights at the University of Toronto. I'm Cheryl Milne, your host.

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and the Executive Director of the Asper Centre. We focus on current Canadian constitutional law issues, highlighting aspects of constitutional litigation and exploring the meaning of our rights under the Canadian Charter of Rights and Freedoms. Whether you are a law student, a lawyer, or a curious person, we hope you'll learn about an aspect of Canadian constitutional law and litigation that interests you. Before we begin, I would like to acknowledge the land from which our podcast is recorded.

01:55

For thousands of years, it has been the traditional land of the Huron-Wendat, the Seneca, and the Mississaugas of the Credit. Today, this meeting place is still home to many Indigenous peoples from across Turtle Island, and we are grateful to have the opportunity to work here. As you listeners are all from different locations across Canada with their own Indigenous ties and origins, I suggest you take a moment to reflect on where you are situated and the peoples that have lived there and continue to do so. And maybe at the end of this podcast, look it up if you don't know.

02:24

This episode marks the first of a two-part series on Indigenous self-determination and its intersections with the Canadian Charter of Rights and Freedoms. Our conversation today focuses on Section 35 of the Constitution Act, 1982, and what the recent Supreme Court reference on Bill C-92, an act respecting the First Nations, Inuit, and Métis children, youth, and families means for Indigenous self-government and control over child welfare in Canada.

02:52

In the first part of this episode, I'll be speaking with Professor John Borrows on Bill C-92 and recent advancements on Indigenous self-government. Later in the practice corner, I'll chat with Jessica Orkin on the practical realities of putting forth a claim under Section 35. Professor John Borrows is the Loveland Chair in Indigenous Law at the University of Toronto Faculty of Law. Professor Borrows received his Bachelor of Arts and Master's of Arts.

03:19

at the University of Toronto in Politics and History, and went on to earn his JD and LLM at the University of Toronto Faculty of Law. He has won numerous book awards for his publications and in 2020 was appointed an Officer of the Order of Canada. Professor Borrows is a member of the Chippewas of Nawash, unceded First Nation in Ontario, Canada. He is a leading authority on Canadian Indigenous law and constitutional law, and has been cited by the Supreme Court of Canada. Thank you so much for joining us for this conversation.

03:49

I have to admit that Tal Schreier, our producer and I have been scheming for quite some time to try and get you on the show.

John Borrows:

Well, it's great to be here. Thank you.

Cheryl Milne:

Would you mind starting off with some background information about Section 35 and why it was included in the Constitution Act of 1982?

John Borrows:

Section 35's inclusion in the Constitution Act is complicated. There were a lot of hesitancies that Indigenous peoples had about domesticating their rights in Canada's framework.

04:19

They thought their relationship was nation to nation with the Crown and right of Great Britain. And so there were challenges when there was domestication through this appeal to the English Court of Appeal. And they eventually lost there. And so, when the negotiation of Aboriginal and treaty rights was occurring in Canada, the hesitancy on the part of First Nations left many to not be a part of that conversation.

04:48

And so they were left with people gathering and trying to introduce Aboriginal and treaty rights from perspectives that weren't always coming from the mainstream of First Nations, Métis and Inuit people as they were hoping to see how their rights would be more internationally recognized as opposed to domesticated within a Canadian instrument.

Cheryl Milne:

Section 35 talks about existing Aboriginal and treaty rights.

05:17

What are they referring to, and what does recognize and affirm the language in that section mean?

John Borrows:

Well, existing was put in at the insistence of some Western premiers who thought there were no Aboriginal treaty rights in place in 1982, and so they thought that this word existing would mean there was nothing because they were already extinguished. And so, the courts were left to interpret what existing means, and they said it was un-extinguished...

05:46

as of 1982, and the court came to the conclusion that in order to have something extinguished, it had to be clear and plain and intent. And so far, there's not been a lot of rights that have found to have been extinguished in the Constitution, because there's not been a clear and plain intent on the part of the Crown to do that. So existing kind of crept in there through the back doors, a way of minimizing those rights and now the courts have interpreted them...

06:15

fairly strongly asking the Crown to meet a high standard around extinguishment. And then the word Aboriginal has come to mean those things that are integral to the distinctive culture of aboriginal peoples prior to the arrival of Europeans, if you're dealing with rights, or integral to the distinctive culture of Indigenous peoples at sovereignty, if you're dealing with title. And the idea of treaty rights are those agreements that best reconcile the interests of the parties...

06:44

at the time the agreement was entered into. So, you can see all of these three words, existing, aboriginal, treaty, are fairly technically defined, and they're not really defined in accordance with indigenous understandings of these concepts, and they don't really have, I guess, self-determination as a part of how we interpret these rights, because what's left out from our interpretive categories is peoples. It's the existing aboriginal and treaty rights of the aboriginal...

07:13

peoples of Canada that are recognized and affirmed. And that word peoples has been the one that's been studiously avoided by the court. And so that's why we don't have a wider understanding of these rights.

Cheryl Milne:

So, what kinds of rights do they provide?

John Borrows:

So we're left with harvesting rights around aboriginal and tree rights, hunting and fishing rights for food, social and ceremonial purposes, some rights to deal with the land in a title context.

07:42

Now that seems to be the universe of what's been recognized so far, but you can imagine just even following the very constrained and challenging tests that the court has set out, and thinking about what's integral to distinctive culture to Aboriginal peoples prior to the wrath of Europeans, it could be that things like education are that, or our health care, or social services, or governance even, but we've not had much scope or range in these rights.

08:11

For the most part, it's harvesting rights and rights related to land.

Cheryl Milne:

Why are they constitutional?

John Borrows:

These rights are constitutional because they pre-existed the arrival of Europeans and others in Canada. And the court said that what the constitution does is to reconcile the prior existence of Indigenous sovereignty with the assertion of sovereignty by the Crown. And the constitutionalization is an attempt to recognize the...

08:40

continuity of Aboriginal peoples' practices, customs and traditions that were integral to their distinctive culture prior to the arrival of Europeans and that hadn't been extinguished and that continue to exist today.

Cheryl Milne:

Can you explain what the test is that the courts use to recognize Aboriginal rights in litigation or in these claims?

John Borrows:

Yeah, I'd say this test is what I would often label originalism. So, you're looking to what

09:08

was once upon a time integral to the culture of peoples prior to the arrival of Europeans, not necessarily what is integral to their cultures today. And so, the test is one that throws up some filters that requires indigenous peoples to show that what they're doing wasn't a result of European influence. It can't be exclusive because other peoples have arrived that we've allowed for these....

09:38

things to occur. It really is rooted in once upon a time, what we were doing and can we establish a continuity with the once upon a time to today. And that's not a living Constitution, that's not a living tree way of thinking about these rights. It really is at the moment of contact or sovereignty or the moment of treaty that gives rise to these rights and they don't really have that contemporary possibility like most other constitutional rights do.

Cheryl Milne:

10:08

Sounds like they'd be difficult to prove because of history. How does a First Nation or an Indigenous person prove these kinds of rights?

John Borrows:

Yes, you are able to introduce oral evidence about the existence of these practice customs and traditions prior to the arrival of Europeans, and elders and knowledge keepers can give that testimony. It's often backed up by...

10:33

anthropologists and archaeologists and historians and sociologists and other people. And it's been estimated that back in the 1990s that those terms cost $25 million to litigate what's called the Delgamuukw case, which is the first Aboriginal title case that recognized the concept of Aboriginal title in Canadian law. Now that $25 million is for all parties, not just Indigenous parties. And it's estimated the 2014 case called Tsilhqot'in....

11:03

which deals with Aboriginal title coming into British Columbia, cost $40 million, $40 million. And so, the costs of these cases are tremendous. And it makes it again, very difficult to establish these rights. So not only do you have a challenging test that's domesticated in the Canadian context, you also have a huge access to justice issue in bringing these forward because of the cost of litigation.

Cheryl Milne:

What is Aboriginal title and what makes it unique compared to other Aboriginal rights?

John Borrows:

11:33

The Aboriginal title from the court's perspective is that the group is able to show a sufficiency of occupation prior to the arrival of Europeans, a continuity of that occupation, sorry, of the assertion of sovereignty, a continuity of that occupation from the assertion of sovereignty to today, and an exclusivity of that occupation in the historic and contemporary period. And so, the court's looking for evidence of use and possession.

12:03

And they're testing that by both the common law perspective and the Indigenous legal perspective, which is a good thing. The court's saying that a morally and politically defensible conception of Aboriginal title will incorporate both Indigenous law alongside the common law. And so, this is the test, but because it's focused on property law type connotations, you lose the jurisdictional dimension. You lose the...

12:31

decision-making dimension, which is governmental. And so, we've tended to have an Aboriginal title test that really is strong on the title part. And again, not so much on the peoples' dimension of how peoples might relate to their land in that decision-making and governance context.

Cheryl Milne:

How does Indigenous law work in that context? How is it incorporated?

John Borrows:

Yeah, so the court has said that this area of law...

13:01

inter-societal, meaning that there's a bridge between the legal systems. The courts used a particular word called sui generis, which is a Latin term meaning unique or of its own kind, because you can't just draw on the Western legal tradition nor the Indigenous legal tradition alone. You're kind of comparing and contrasting them all along the way. This is a multi-juridical approach, a trans-systemic approach to trying to understand the interests, the rights involved here.

13:31

But as I said, unfortunately, there's a narrow range of factors that are brought into this test that don't think about the peoples' dimension again and don't really consider the nation-to-nation relationship that's a part of the longer-term histories that we have.

Cheryl Milne:

What would it look like if you brought in the people's dimension? What does that mean?

John Borrows:

So there are international legal standards, definitions,

14:01

peoples are. It's something that's in the International Declaration on Human Rights and there is a lot of information even in our courts and in Quebec's secession reference. Quebec was arguing that they were a people that required recognition under international law and therefore the constitution could not be unilaterally amended. And the court made all sorts of pronouncements about what peoples requires there.

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And we could draw on that if we wanted to, if the courts were seeing Indigenous peoples as peoples in light of the Quebec secession understanding, in light of the international understandings. And our Charter of Rights and Freedoms, our part two of the Constitution Act 1982, which includes Aboriginal and Treaty rights, is a response to international developments. So, the fact that we haven't had that interpretive lens on what Aboriginal peoples means,

14:57

is a failure to really connect with the purposes of the Charter and the purposes of Part 2 of the Constitution Act 1982, which recognizes and affirms Aboriginal peoples' rights in this context.

Cheryl Milne:

Do you see that happening in future litigation? Is that being argued or is it being theorized at the very least?

John Borrows:

15:19

So that's been argued in a number of cases through intervenors over the last five to seven years, perhaps even longer. And so, it's loud and clear that First Nations, Métis and Inuit groups are raising that point. The court has not touched that yet, with one exception, in the Bill C-92 case, which deals with child well-being. There's now a statutory provision, the United Nations Declaration on the Rights of Indigenous Peoples.

15:46

And so, the court drew upon that as one of the three strands for upholding the jurisdiction that the federal government has in relationship to Indigenous peoples as they see that as being a part of section 91 24 of the Constitution Act 1867, which says that the federal government has the responsibility jurisdictionally for Indians and lands reserved for Indians.

16:16

And so the court is starting to see 91 24 of the Constitution as a people's provision because of the statutory instrument, but they've just sort of landed on the beach. They've not really done much to explore that further.

Cheryl Milne:

Well, it's a perfect segue to my next question, which was to switch over to talk about the Bill C-92, an act respecting First Nations, Inuit, and Métis children, youth and families. And can you start by telling us about what motivated the federal government to pass Bill C-92?

John Borrows:

16:44

Bill C-92 was a response to the removal of Indigenous peoples from their homes in the residential era for hundreds of years, and then the removal of children from their homes in what's called the 60's scoop, which continued through the 80's and 90's. Till today, you have more people, more Indigenous children outside of their home than you had during the...

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residential school era. And so, the fact that children were being removed from their families has caused all sorts of social, economic, and political, and legal dislocations and alienations for Indigenous peoples. And so, the Truth and Reconciliation Commission, which studied the removal of children through the residential school process and through the child welfare process, recommended that legislation be passed...

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that would start to turn that tide and address the removals such that it would stem that flow. And so that the act is motivated by responding to the Truth and Reconciliation Commission's Calls to Action, which are themselves a product of decades of Indigenous activism and persuasion to say that Indigenous peoples need to be intact as peoples, and that includes our families...

18:11

having the opportunity and obligation and duty to ensure that we can be responsible for one another within our own structures.

Cheryl Milne:

And we will make a link available in the show notes to those calls to action, because they're very important, although I don't believe that many of them have actually been fulfilled, despite all the promises.

John Borrows:

18:39

Those calls to action were given to government, but they were also given to civil society. And so, there's lots of room for hospitals and the judicial system and universities and businesses and arts organizations to implement these calls to action. And I think that's really important, not to see it just

as a government responsibility, but a responsibility for all of society to pick these things up. And yes, there's still work to do.

Cheryl Milne:

19:07

So, going back to the case, the reference on Bill C-92, why did the Quebec Attorney General refer the bill to court with respect to its constitutional validity?

John Borrows:

So the provincial government has responsibilities under Section 92 13 and 16 of the Constitution for property and civil rights in the province and all matters that are of a local concern. And historically, child welfare, child wellbeing,

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family laws that were, has been regarded as a provincial responsibility under sections 92-13 and 92-16. And so, the province felt that the federal government was trenching on their exclusive authority to deal with family law matters. And so, they initiated this reference so that there could be clarity around what they hoped would be expressed as a recognition of...

20:03

their exclusive authority in that field. And they were also worried that if they were pulled into the federal scheme, that their own civil servants would be pressed into service, operationalizing a law that they hadn't passed and that they would be asked to administer something that wasn't of their making.

Cheryl Milne:

20:28

So as you say, there are federalist system, powers divided between the provinces, territories and the federal government, but the courts have yet to recognize that indigenous peoples also possess this legislative power. Do you see a tension between the independence that the provincial governments like Quebec seek in terms of its constitutional heads of power vis-a-vis the federal government and the independence sought by indigenous nations? Is there a framework in place in Canada to facilitate that recognition?

John Borrows:

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Yeah, so there is a tension between the federal authority of 91-24, with responsibility for Indians and lands reserved for Indians, and the provincial powers under 92-13, property and civil rights, and there has not been up until Bill C-92 effective harmonization of those federalism principles. And of course, we have section 35 of the constitution we started talking about, which also potentially...

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recognizes that Aboriginal peoples could have a role dealing with their own family law issues. And so, the tensions there are not only with 91 and 92, but also with section 35. And what the legislation tried to do was harmonize those three jurisdictions where there could be created a coordination agreement, where there would be a recognition of the provincial role and the federal role and the first nation's role.

21:52

That's the way that legislation was designed. And so that is one way, I think, of getting at that tension. Of course, there's other ways that you could deal with this through a contemporary treaty that would recognize that Indigenous peoples have rights in this field. You could also find perhaps a recognition under Section 35 of the Constitution that there's an inherent right to have responsibility for children that is recognized and affirmed, because that's always been...

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as you could argue, integral to the distinctive culture of Aboriginal peoples prior to the arrival of Europeans, has not been extinguished and is therefore something that can be exercised today.

Cheryl Milne:

So could you contrast the Quebec Court of Appeal and the Supreme Court of Canada decisions with respect to Bill C-92? Just what kinds of theories of constitutional change did each decision articulate?

John Borrows:

22:47

The Quebec Court of Appeal recognized that Indigenous peoples have an inherent right to self-governance in relationship to children under Section 35.1 of the Constitution. And they said that's

because that power existed prior to European contact. It survived that contact and wasn't extinguished and is exercisable today. So, the Quebec Court of Appeal found there was an inherent right. But they also found that the conflict between the federal and provincial law...

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that was in the legislation couldn't be resolved through paramountcy provisions, which would give the federal government the final word if there's a conflict between the two jurisdictions' legislation. They said that was contrary to the architecture of our federalist regime, and they would rather have seen if there was an infringement of the Aboriginal right to self-government dealing with child welfare, that the provincial or the federal government would have to justify that infringement.

23:46

So, we'd work out the conflict between the different jurisdictions being there through a justification analysis. What the Supreme Court of Canada did is it did not comment on Section 35-1 and the right to self-government. It said it leaves that matter to another day. And so, it dealt with the question on federalism grounds, and it held that...

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Indians and lands reserved for Indians is an exclusive federal responsibility. And if the federal government acts with its sphere in its pith and substance with its dominant purpose in that regard, legislation like Bill 92 could be supported under that umbrella. And if provincial law was inconsistent with that law, it would then have to give way. But this is a reference case, and so we don't have...

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a sense as to whether or not paramountcy, in a particular instance, would ever kick in. But we're using a federalism lens with the Supreme Court of Canada, whereas in the Quebec Court of Appeal, it was more a rights framework.

Cheryl Milne:

The Supreme Court's approach has been sort of described as sort of a legislative affirmation of rather than a constitutional recognition approach to Indigenous rights. What does that mean, and what is the impact of that?

John Borrows:

25:10

Because this is legislation that's being upheld by the Supreme Court of Canada through the reference, it also means that that legislation could be repealed, because a parliament now cannot bind a subsequent parliament. And so, nothing in the law is necessary to implement and recognize or affirm any rights or title that Indigenous peoples might have. And so, the...

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The consequence of this decision is that it could be ephemeral if there's another party that comes along and chooses to, as I said, repeal this piece of legislation. This court has not, in the reference, recognized anything that's inherent regarding child and family services, child well-being, in Section 35 of the Constitution.

Cheryl Milne:

26:09

I think we should take a moment and think what difference it would have made to recognize that inherent right prior to residential schools, prior to the 60s scoop, we would be looking at a very different landscape.

John Borrows:

Yes, because what constitutional law does is it restrains these authorities of the governments and how they're exercised. It holds them to a standard as Aboriginal and treaty rights are the highest law of the land. Legislation or...

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executive action or other kinds of government action would have to comply with or give way in the face of that broader, higher constitutional power. But we don't have that. And so therefore, governments could do what they wanted in this field that could further erode Indigenous peoples' children's responsibility, just as they did in the historic era with residential schools. And just as they're actually doing today...

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as 80, 90 percent of the kids in care in Manitoba are still Indigenous. Sixty percent of the kids in care in British Columbia right now are still Indigenous, despite this legislation and in the face of non-

recognition of constitutional rights that Aboriginal peoples hold in this field, or could hold in this field.

Cheryl Milne:

So, after this decision, now acknowledging that it really is about recognizing the legislative authority of the government,

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Although in this legislation, they essentially recognize the sovereignty or the rights, legislatively, as you say. How could it still be used, or how can Section 35 still be used to advance Indigenous self-government in the wake of this decision, and this legislation in particular?

John Borrows:

Yeah, so I think the court would have to go back to what peoples means in Section 35, one as we talked about earlier.

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And if there was a recognition and information of what peoples possess by virtue of that social, political, legal organization, then implications would flow from a people's rights as to how you would have responsibilities for family law matters. And that's the path not taken so far.

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It's possible though that the court could go down that route, but to do that, they would have to overrule a case from 1996 called the Queen versus Pomajewon that said Aboriginal rights cannot be framed in excessively general terms. The court said when you frame Aboriginal rights, you have to do that in a very granular way, in a very specific way, looking for the smallest building block of what...

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those rights might be. And so, in order to have people's rights to self-government be recognized and affirmed when it comes to child and family services, the court's going to have to do something about Pomajewon, and I think the path of doing something about Pomajewon is saying we didn't properly consider the peoples' dimension of the right. All we focused on in that decision was what aboriginal means. And if you don't modify aboriginal by peoples,

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then you're not textually doing the work that's necessary to give effect to the right as it's articulated in that section.

Cheryl Milne:

So how does the affirmation legislatively of sovereignty over this area impact what the federal government can do going forward? And I'm thinking about the concept of the honor of the crown and whether or not the government can be held, even though that it's just a piece of legislation, they could repeal it, I guess.

30:00

Can they do that in good faith?

John Borrows:

So they could repeal the legislation, and I don't think that there would be a constitutional consequence for that as the case rests on section 91-24. Having said that, if this legislation stays in place and it doesn't get diligently implemented in accordance with the purposes that are set out there,

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that would be a violation of the honor of the Crown. And the court said as much in the reference. So as long as the legislation is there, the parliament has bound itself to act as if Section 35.1 includes the inherent right to self-governance dealing with child and family issues. And as long as they've made that pronouncement and they've bolstered that by the United Nations Declaration.

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and they forwarded the best interest of the child in that setting, then they have to act honorably to implement that promise and to diligently implement that promise. And so, within the contours of the legislation, there is power there. But as I said before, another government could repeal this, and there's nothing that would stop that in Section 35 at this point.

Cheryl Milne:

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Considering the outcome of this decision and what you've said about, I mean, using the peoples argument going forward, what other strategies could Indigenous nations take in continuing to practice their rights around child welfare and self-government more broadly?

John Borrows:

Yeah, so before this legislation came along, Indigenous peoples were drafting their own laws, dealing with child well-being. They were also taking steps to do more to revitalize.

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their legal traditions of responsibilities for one another in family law settings, feasting settings, potlatching settings. They were taking steps to actualize their own responsibilities in that field. And these have been accelerated as a result of Bill C-92. And so, First Nations are putting out on paper what those responsibilities are. So, moving beyond the implicit custom...

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to the explicit positivistic or declarative law. And that's occurring through multiple year studies that are going on within communities about what are their values, principles, processes, standards, criteria, authorities, signposts, guideposts, indicia, principles and processes is around making decisions, regulating our affairs, resolving our disputes in relationship to children. And that will...

32:53

continue despite that legislation, although the legislation has certainly helped in that regard. And so that is very encouraging to me that Indigenous peoples themselves are turning to international standards, domestic standards, and their own standards to try to harmonize, reconcile, and bolster the revitalization or the resurgence of Indigenous law in very contemporary and transparent...

33:22

and accountable and practical ways.

Cheryl Milne:

So, lots to think about and clearly lots more to advocate for, whether it's through litigation, which, as you've already described, is extremely expensive and I've also heard can take many, many, many,

many, many years to resolve, especially around title land title issues, that sort of thing. But do you have any last thoughts or anything in particular that you want our listeners to know about?

John Borrows:

33:53

I think we just re-emphasize those calls to action being given to civil society as a whole, and that there's places where we stand now in addition to litigation that could be used and empowered and facilitated to help children, help families have better lives through the justice system, the healthcare system, the universities, the public schools, the art sectors, the business sectors, etc. So...

34:23

We don't have to wait, it's at hand, but litigation has to be a part of this as well. And I'm hoping that as we get experience across all these different sectors of society, that that will feed into peoples being more comfortable and having more confidence in the idea that peoples, parents should have responsibility for their kids and they shouldn't be taken away by the state if it is all possible in the best interest of the child to ensure that those kids can remain.

34:53

with those that they love and they're protected in that setting.

Cheryl Milne:

Thank you, John. Really, really important message. I want to say that the Asper Center takes seriously the calls to action and that it's placed upon universities and that we do education such as this podcast in order to fulfill our obligations under the calls to action. So, thanks for that reminder and thank you so much for explaining that case and the rights under section 35 of the Constitution.

John Borrows:

35:21

Thank you. And let me also thank the Asper Centre because during the course of the last three years, the students have worked tremendously on this issue in producing memos, in lecturing in my class, in bringing public presentations to this field. And it's just terrific that we have such a good student group here at U of T that's working on these issues alongside the support and aid and enthusiasm that the Asper Centre brings to that.

Cheryl Milne:

35:51

and helping to produce this podcast. So we will be giving a shout out to those students as well. Thank you.

John Borrows:

Excellent, excellent.

Cheryl Milne:

36:02

Welcome back to today's Practice Corner. I'm speaking with Jessica Orkin on the practical realities of putting forth a claim under Section 35. Jessica is a lawyer for Goldblatt Partners and the head of its Aboriginal Law and Indigenous Practice group. She has a broad litigation practice, including criminal, civil and administrative law matters, with an emphasis on constitutional human rights, Aboriginal rights and access to information. She was the Asper Centre's...

36:29

constitutional litigator in residence in 2022, where she co-taught the clinic with me and actually represented us in an intervention. So welcome, Jessica.

Jessica Orkin:

Thank you.

Cheryl Milne:

Can you start off by telling us a little about your practice?

Jessica Orkin:

Sure. I have a practice that is mainly working with Indigenous governments and Indigenous collective rights. That's evolved from a practice where I started...

36:55

doing criminal defense, but over the years have increasingly worked in section 35 rights and in representing Indigenous governments. The practice involves a range representation for Indigenous people and governments relating to their collective rights, working with proponents, with governments, working on consultation issues and on constitutional litigation relating to...

37:23

protection and advancement of Section 35 rights. I also have a particular interest in the systemic impacts of the criminal justice system on Indigenous people and on the role of equality rights in relation to Indigenous people and in relation to the criminal justice system. And that's an area that I also have some background in practicing.

Cheryl Milne:

Well, I think the first time that we worked on a case together was the case of Kokopenace where...

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There was an element of equality rights in jury representation. But the Asper Center intervened and you were counsel for Mr. Kokopenace, as I recall.

Jessica Orkin:

Yes, that was a case where we had some fleeting success and unfortunately, some constitutional interpretation of the Supreme Court, which did not continue that success. But it's led to other things.

Cheryl Milne:

So today we're talking about Section 35 claims.

38:19

And I want to get your perspective on the practical realities of putting forward a claim under Section 35.

Jessica Orkin:

So, when thinking about a Section 35 claim that is about actually establishing the underlying Section 35 right, you need to think about the tests that the courts have set and the incredibly stringent and detailed and weighty requirements...

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that have been set out in those tests. They require that you go back to contact in your evidentiary exercise or, in the case of title, back to the assertion of sovereignty. And that means that you are seeking to prove something, how the practices were at a time, hundreds, if not 500 years ago. And as a result of those tests, the nature of the litigation...

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has incredible scope and requirements in terms of the weight of evidence that is needed to meet that test. And that starts you off on an exercise that cannot but be extremely time intensive and expensive. And the other thing I would say about claims under Section 35 is that they invariably involve translation.

39:47

The test that is set up under Section 35 is not a test that says, how do we recognize the aspirations that Indigenous people put forward? It is a test about how Indigenous people put forward their rights in a way that corresponds to what the common law says are cognizable rights, or what our Section 35 says are cognizable rights. And that involves an exercise of...

40:17

Attempting to take those aspirations that are put forward by your clients and to find ways to match them with boxes that are often less than responsive to what is the true reason that you are bringing a litigation before the court.

Cheryl Milne:

So my understanding is these cases can take a very long time to litigate. So what's the time frame that we're looking at for some of this litigation?

Jessica Orkin:

40:50

Decades. A quick case happen only in decades. And when you think about it, when you're dealing with train loads of evidence and trials that require hundreds of days, for it to take merely decades, even though that is astounding that it takes so long, but for it to take merely decades, quite quick.

Cheryl Milne:

And for it to take so long, is that because of the evidentiary record or is it because of the way that the litigation is conducted? Is it because it's an uphill battle?

41:19

why would it take so long?

Jessica Orkin:

So I think there's many factors. Often there isn't the resources to put towards the litigation and there are many priorities of Indigenous nations as they go about determining how to spend their limited resources. And so, the litigation is not always the key priority. If there are no limits to resources, and that's a world that doesn't actually exist, but if there were to be no limits to resources, it would still take...

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a long time to bring these cases forward because of their, because of the tests that are set, because of the amount of research that's required, and because of their inherent complexity. So those processes take significant time. But then the other thing is that the complexity and importance of the issues mean that the parties and the courts are often looking for alternative ways to resolve them. And...

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Those important detours, which are in some cases successful, also take time. And so there are the parties rightly often take detours into looking for ways of resolving the issues between them, narrowing the issues between them, negotiating about their resolution. And then the last thing that I would say is that because these cases take so long, there is often an effort, and the courts have developed various doctrines around this...

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to talk about what we do in the interim. And those interim measures, consultation, negotiation obligations, take on lives of their own. And when we come back to the limited resources, that is another reason for the delay, because the parties are figuring out on interim measures, which can become cases and litigation all of their own.

Cheryl Milne:

Sounds expensive.

Jessica Orkin:

Absolutely.

Cheryl Milne:

So how do First Nations cover these kinds of

43:17

costs?

Jessica Orkin:

Through hard choices, through loans in some cases, through expenditure of funds that could be spent on other things, including basic needs, and then in some cases, through advanced cost awards.

Cheryl Milne:

Which we know are difficult to actually get.

Jessica Orkin:

Yes. They're not. They certainly aren't an answer.

43:47

are difficult to get and are restrained in their scope and introduce other challenges into the litigation. They are available in some circumstances. It's not enough generally for the wide range of needs of these kinds of cases.

Cheryl Milne:

So the costs involve obviously lawyer time, hundreds of days of hearing. So that's for the First Nations cost is related to paying their...

44:13

There are lawyers for all of that time, but also there are government costs associated with, and just general court time that is associated with that. But also you talked about the evidentiary burden and what are the costs associated with that?

Jessica Orkin:

So, you need experts, absolutely required, in section 35 cases. And there's a wide range of the kinds of experts that are needed, but anthropological...

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and historical experts are almost always required for these kinds of cases. The finding of bits of evidence to take you as far back as you can involves extensive archival work. So working through Hudson's Bay Company records, working through old records of the government, whatever has been written down, Jesuit records...

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church records. Whatever has been written down along the way, never from the perspective of the people who are making the rights assertion but trying to find traces of the use and occupation that you are putting forward and seeking to prove in archival and historical sources. And those sources are never written for the purpose you're using them for, and generally they're written in very old handwriting, and they are stored in...

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out of the way places and they require people to spend time in front of microfiche and other machines to read them and to collect all of that information and then to store all of that information, so document management systems are another important aspect of this and of the

cost that you think about when bringing cases forward like that. Increasingly there are also mapping experts that are used...

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Wo when you think about the extensive information that it goes into showing use and occupation of the land, where different people were at different points and what their relationships were. It can become hundreds of thousands of data points that you need to be able to figure out a way to both analyze, keep track of, and present to a court eventually. Those electronic systems now exist, GIS systems. They are not self-executing. And they...

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also have experts who have the capacity to collect the information, to store the information, to analyze it. So that's another form of expert that is often used in these cases. And then if you are starting to deal with particular climate questions or scientific questions, you may have experts in those areas.

Cheryl Milne:

And this is all generally litigation by a single First Nation around their own sovereign rights or...

47:09

rights under Section 35 so that we're not talking about general rights for all First Nations, we're talking about sort of almost piecemeal or incremental rights that are being sort of argued. So what are some of the issues associated with those kind of incremental recognition of rights under Section 35?

Jessica Orkin:

So, Section 35 jurisprudence has been very clear that the rights are people-based and...

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That doesn't mean it's always a First Nation. It can be a nation that has multiple First Nation members. It all depends on what the history is of the indigenous people. But they are single rights holder based, and they are often particular geographic location based, and also particular activity based. And they are tied to a particular history, a particular cultural context...

48:03

the distinctive culture of the people that is what is being protected by Section 35. And so, what that means is that you can have some general principles that you reason from one case to another, but in the end what is recognized is a right to do a particular thing in a particular place on the part of a particular people. And that's the end of the very complex litigation exercise that I spoke about. And so...

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If the people next door wish to equally show their rights, they have perhaps some advantage of the finding of their neighbors, but it is not a precedent that means that is self-executing for them. And that is in some ways quite different than what other, the way other constitutional rights have been interpreted.

Cheryl Milne:

48:58

So, we were talking earlier in this episode with Professor John Borrows and talking about the Bill C-92 case, where the concept of self-governance and the rights around First Nations to achieve self-government. Do you think that Section 35 will help communities achieve this? Do you think that there's some promise in the litigation in this area?

Jessica Orkin:

I think that Section 35, if we think of it as a...

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historical and socio-legal phenomenon has absolutely helped with the advancement of self-government. Section 35 was a response to persistent advocacy by Indigenous people about the failure of our constitutional documents to reflect their presence and their aspirations. It was an imperfect response and a belated response, but it was nevertheless one that creates a foundation...

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for a continued growth of the law's recognition of those aspirations and that presence. So as a historical and socio-legal element of our social framework, it has absolutely helped in shifting recognition of self-government as a reality and as a just reality, something that...

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Ought to be recognized. If we turn to what the law has done with Section 30, under Section 35 in relation to recognition of self-government. It has been a complete disappointment. And you know, we are at 40 some years since Section 35 was adopted. And the case law has generally focused, as we talked about, on recognition of particular...

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rooted in historical presence in a very essentializing way and freezing way. And Professor Borrows is the foremost expert on that kind of critique of the freezing nature of Section 35 jurisprudence. That aspect of Section 35 really creates a problem for recognizing living societies with...

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Aspirations for cultural continuity and recognizing their just demands in the law because it requires us to take a practice and root it in pre-contact. And so, if we think about the needs of a society to regulate itself, to manage its members, and to do so in a vibrant dynamic living way, this is very freezing. And you know, the C-92 case really highlights that because...

51:57

If cultural continuity is the purpose of Section 35, if recognition of the continuity of peoples as peoples is the core of why all of this exists, which seems fairly self-evident, but is actually not in our structure of the legal tests. But if it is as a foundation of why we have Section 35, then the idea that a people should be able to manage and look after its children...

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seems a proposition that should be falling off a log, easy to establish. But the case law does not give us a test that makes that easy. It requires that you find a practice that goes back before contact. And societies before contact did not run child and family services. So, you have to move up a level of generality that the Section 35 test really has not adapted to...

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and is designed in the way that the courts have structured it to focus very narrowly on particular practices. I think there was an opportunity with the C-92 reference for the court to reassess that, and it quite vociferously declined to do so. It's sidestepped the issue, and I personally find that disappointing.

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It did not foreclose the issue, which I suppose we can see a silver lining there, in that it did not take the invitation that came from the attorney general of Quebec to reaffirm that this was the only way of looking at Section 35 rights. It left that question for a future day and strongly encouraged the government to continue presuming that it's possible that this right exists, which is an interesting sleight of hand,

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Both not giving the judicial imprimatur to what had been done by the government and its affirmation that Section 35 does include self-government, not saying that that is correct, but also not rejecting it entirely. I feel like I've gotten off topic, Cheryl, so I want to...

Cheryl Milne:

No, essentially, no, you haven't, because I think what's happened is the decision, and we heard this from Professor Borrows as well, is that the court basically said...

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Well, you government have acknowledged this right in the legislation, and maybe honor of the crown requires you to continue to do that, but we're not going to look at it as an inherent right at all, and it's really just based on the anachronistic now or archaic view of the Indian Act and the powers over Indians as it's phrased in the, our,

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Constitution Act of 1867. So, the language doesn't fit, but the court kind of embedded its decision in that historical document as opposed to looking at Section 35. And you've kind of anticipated my question about whether it forecloses any potential for litigation. So, the court kind of left it open. So, what do you think that future litigation might look like?

Jessica Orkin:

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Well there’s an interesting dynamic that we’re now seeing in this case and in a case that came out very recently out of Quebec relating to funding for policing, where the court is declining to actually

make findings on the existence of rights and is instead finding obligations or enough to give effect to and decide an issue based on assertions of rights...

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or based on the credible nature of those assertions. And we see that this has been the jurisprudence of consultation for the last 20 years. They're extending it out into other areas. They seem to be doubling down, or at least unwilling to upset the rigor of the tests that they have set for section 35. And when I say rigor, I mean also narrowness. Don't mean that in a positive way entirely. Narrowness, essentialism,

56:14

frozen rights perspectives, the failure of those doctrines to really deal with contemporary aspirations and demands for justice of Indigenous people. It's not that they're rejecting entirely those claims. We're going up a level. It's a kind of meta-recognition of those claims, and we call it reconciliation. We don't actually find the claims to have grounding. We encourage discussion around them.

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recognize some legal obligations on the Crown in relation to those assertions, but they lack the rigor of rights because there is no actual finding ever that the right exists. And perhaps, you know, that I suppose that has in some way can match one view of what reconciliation is, which is that it is an unstable state of compromise and working together at every turn. It does also mean, though, that there is never a finding...

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of principles that ground us, of what the rights are, or whether there was a wrong committed. It's all this meta-level up from that. But the court seems more comfortable doing that than really working with the rights themselves.

Cheryl Milne:

And do you think there's some hesitation in just recognizing this inherent right to self-government and just sort of declaring that because of what that might mean?

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to a whole bundle of rights and not just rights, but just powers. Do you think that's part of that hesitation?

Jessica Orkin:

Absolutely. I think that when they recognize a right, what are pulled back to wanting a fact pattern, a people, a space, clear parameters of what it is, all of which is the Section 35 test and its inherent problems.

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And so, they're more comfortable recognizing, or at least not discounting and rejecting, but recognizing in the non-recognition these more expansive concepts by encouraging the space for that recognition to happen through negotiations and policing the boundaries of those negotiations, but not creating the enforceable rights...

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as a foundation for those negotiations. And you can see a lot of dialogic encouragement in this. And if reconciliation is about that kind of dialogic instability, the court is certainly setting that up. I am just not prepared to accept that reconciliation is only intended to be this endless process of negotiation and instability.

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There is also an affirmation in Section 35 that I think should have some more foundation to it than merely encouraging that instability to continue.

Cheryl Milne:

So, it certainly makes litigation in this area difficult, costly, time consuming, and very uncertain.

Jessica Orkin:

Lots of creativity as well, and endless intellectual pursuits. I don't want to make it sound like it's only a challenge.

59:39

Cheryl Milne:

Exactly. I wanted to ask you, like, so what is the, you know, the positive so that we can leave off on a positive note for this kind of litigation?

Jessica Orkin:

You know, I think that the instability that we see in Section 35 has to do with, is foundational to it. It's the fact that the law in this area is responding to its own failings. And it's responding imperfectly, but this whole area of law exists because the pre-existing law...

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of conquest, of discovery, of colonialism, fails so desperately and so unjustly to provide for the kind of society we want, but also to respond to the aspirations of Indigenous people and their presence in these lands. And that allows for immense creativity and possibility in what the law can do and in what you can find in the law in pushing it forward. Because it's uncertain.

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You cannot rely on what the law was last week in terms of what it might be next year. But that also means you can't rely on what the law was last week in terms of what it might be next year. And that allows for enormous possibility in what can be brought forward. And then there's the incredible privilege of being able to work across a breadth of disciplines and historical time and exploration of the history,

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of our country and of the peoples who were here before our country became this country. That is incredibly enriching. You learn so much about how the law came to be the way it is, what it misunderstands, and the deep history of what is now Canada. And also, of how much is missed in that deep history. So that's an incredible privilege.

01:01:34

Even as it is sometimes frustrating to try to figure out a way to get it before a court.

Cheryl Milne:

Well, thank you very much, Jessica. We've been talking with Jessica Orkin about her challenging, creative, and fascinating practice asserting rights under Section 35 on behalf of a number of First Nations peoples and clients of hers. This has been a really, really interesting discussion. And that wraps up this episode...

01:02:00

of Charter a Course. Thanks again to Professor Borrows for speaking with me in the first part of the episode. Be sure to tune in for the conclusion of this two-part mini-series on Indigenous child welfare, self-government, and charter jurisprudence. In the next and last episode of the season, I'll be chatting with Professor Kerry Wilkins and lawyer Kris Statnyk about the current state of Section 25 jurisprudence in light of the Dickson v Vuntut Gwitchin Supreme Court decision.

01:02:27

Thank you to law students, Joshua Schwartz, Meg Zhang, and Emma Blanchfield for greatly assisting in the research and production of this episode. And thanks again always to Tal Schreier, our intrepid producer. You'll be able to find all our episodes on your favorite listening platform, as well as on the Asper Centre website. Until next time.

Outro Music:

Charter a course, I will charter a course. If we can just get the country to trust us.

01:02:54

Charter a course, southeast, west and north, and along the way we may find justice. Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, southeast, west and north, and *along the way we may find justice*.

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