Foreword

JAMES TULLY

A Reconciliation without Recollection? is the most thorough and scholarly study of the project of reconciliation in Canadian jurisprudence and beyond. Nichols argues that the project as currently conceived cannot reconcile the relations between Indigenous peoples and the Canadian government (Crown) because it rests on a colonial presupposition that cannot be brought into the space of questions from within the framework of reconciliation the courts set out in section 35 of the Charter. This presupposition is that section 91(24) of the Constitution gives the federal government sovereign power over Indigenous peoples and their lands. Yet the plain meaning of “reconciliation,” in contrast to “resignation,” is that reconciliation examines and transforms the problematic relationship between the contestants. In cases of illegitimate master–subject relationships, reconciliation consists of transforming the relationship into democratic ones in which the contestants recognize each other as equal partners, neither masters nor subjects, and learn how to exercise power-with each other. As Abraham Lincoln famously put it, “As I would not be a slave, so I would not be a master. This expresses my idea of democracy.”

The courts have abandoned the legal fictions used to legitimate this power-over interpretation of 91(24) and have accepted that Crown sovereignty is only *de facto*. However, the procedures of litigation and negotiation initiated under section 35 since 1990 to render it *de jure* continue to take place on the basis of this unquestionable foundation, and thus prevent the participants from transforming the unjust relationship they bear as masters and subjects. Nichols is not the first to point this out. However, his detailed and exhaustive analysis and synopsis of the jurisprudence since 1867, the theories and legal fictions that legitimate the master–subject relationship in its various forms, the machinery of the *Indian Act* that enforces the relationship, and the secondary literature that has come before him is unparalleled.

In addition, unlike many critical scholars, Nichols does not stop there. His most important contribution, in my opinion, is to show how the background,

power-over interpretation of 91(24) can be called into question and shown to be contingent and changeable. He goes on to present a de-colonial interpretation of 91(24) as the power of the federal government to relate to and with, not over, Indigenous peoples as equals, and to enter into nation-with-nation negotiations and relationships. If both parties were to interact in this way, they would bring into being a multinational, democratic federation. There is no way to reconciliation. Reconciliation is the way.

Nichols's modest proposal is neither a grand theory that solves everything in a revolution "to come" nor an inward turn of the unhappy consciousness. It is akin to the slow but sure, experimental way of his Indigenous ancestors; of finding a good path forward through attending to the dense, entangled, and interdependent ecology of the here-and-now and its history. He shows that "power-with" accords better with both the actual wording of 91(24) and the concept of just reconciliation itself. More importantly, he grounds it in a careful "recollection" of the 255-year-old history of nation-with-nation treaty-making and Indigenous peoples' demands to honour it. Furthermore, he argues that it accords with the recommendation of the Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission, the *United Nations Declaration of the Rights of Indigenous Peoples*, as well as recent statements by the federal government. Finally, he turns to justices and common lawyers and suggests that this proposal accords with the way the Supreme Court has said it should relate to a people or peoples with the right of self-determination in the *Quebec Reference* case.

If I am not mistaken, this sort of proposal is what many Indigenous and non-Indigenous people of goodwill have been looking for: a step-by-step and potentially transformative way forward that grows out of each other's best traditions and practices and requires what he calls the "mutual labour" of all affected. The question mark in the title asks us to consider it and respond from our diverse positions and perspectives within the world we share.

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He had bought a large map representing the sea,
Without the least vestige of land:
And the crew were much pleased when they found it to be
A map they could all understand.

“What’s the good of Mercator’s North Poles and Equators,
Tropics, Zones, and Meridian Lines?”
So the Bellman would cry: and the crew would reply
“They are merely conventional signs!

“Other maps are such shapes, with their islands and capes!
But we’ve got our brave Captain to thank
(So the crew would protest) “that he’s bought us the best –
A perfect and absolute blank!”

This was charming, no doubt; but they shortly found out
That the Captain they trusted so well
Had only one notion for crossing the ocean,
And that was to tingle his bell.

He was thoughtful and grave – but the orders he gave
Were enough to bewilder a crew.
When he cried “Steer to starboard, but keep her head larboard!”
What on earth was the helmsman to do?

Then the bowsprit got mixed with the rudder sometimes:
A thing, as the Bellman remarked,
That frequently happens in tropical climes,
When a vessel is, so to speak, “snarked.”

Lewis Carroll, *The Hunting of the Snark* (1876)

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