

Lawyered – Episode 82
Indigenous Law ft. Jeff Nicholls

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[00:01] HUSEIN: This is Episode 82 of Lawyered. I'm Husein Panju. And on this episode, we're speaking with Jeff Nicholls about reconciliation, self-governance, and many more issues about the area of Indigenous Law. First step we'll speak about an upcoming Supreme Court decision about the role of the Charter. The case called Dickson, will address the contentious issue of how the Charter of rights and freedoms applies to indigenous governments with an inherent self-governing authority.

Next, we'll speak about it first nations landmark legal challenge against British Columbia's Free Entry mineral tenure regime. This proposed policy strikes at the core of reconciliation, and be one of the first Canadian cases to engage the UN Declaration on the rights of Indigenous Peoples.

[00:52] And later on, we speak about a recent positive trend of contemporary reconciliation agreements, and have the recent recognition of the Haida Nation might shift things in a more constructive direction. And in our Ask-Me-Anything segment, we will cover a bunch of questions submitted by our listeners about a range of topics from the Duty to Consult, to residential schools, and the true meaning of the Latin phrase, 'sui generis.' All this and a lot more is coming up in just a bit. This is lawyered.

[01:30] Hey, everybody, welcome to another episode of Lawyered. And thanks for tuning in. Just one thing we want to mention quickly, before we get started, I believe this episode is coming out midway through the summer of 2023. And a little peek behind the curtain, I often record the episodes a little bit in advance, just to make sure that they have enough time to be edited and cleaned up properly. And at the time of this recording, I had just had the opportunity to attend one of the Called to Bar ceremonies for the Law Society of Ontario.

[02:07] For those unfamiliar, this is the annual, essentially graduation, where people officially become lawyers after completing the bar exam and the other requirements. And I want to just say congrats to all the new grads, new calls all across not just this Province, but across Canada. This is a huge accomplishment and you should all be very proud of yourselves and your family and friends too. And also, if you ever have the chance to go to one of these ceremonies, whether as a friend or family member, or special guests or whatever, I strongly encourage you to go, because if you ever feel cynical about our profession – which is easy to do – going to one of these will change that immediately.

[02:53] I got to speak with and meet a whole bunch of exciting people, new grads, Deans of Law Schools, benchers, and so on. And it really changes your outlook and reminds you about all the good things about the profession. So, if you ever have chance to go, please do it and say congrats to a new grad and take me under your wing if you're able to.

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[03:17] On the podcast front, our last episode that we published was our Season 9 premiere. And I was really lucky to speak to a friend of mine, Raphael Tachie, on that episode. And we explored some pretty neat issues in the area of Wealth Management Law.

[03:30] The topics we spoke about were about electronic wills and beneficiary designations, and consumer protection issues in the big news space in particular. And even if you have no interest, or subject matter knowledge about these areas, there's a lot to be gained. We talked about these in a pretty plain language format. And to be candid, it gave me plenty to think about, regarding how lawyers meaningfully impact the use of people's wealth. Not just corporations, which many lawyers do, but for individual people as well.

[04:08] And we had some really interesting dialogue about the cultural component, and how there's not just value but necessity for lawyers to understand the cultural nuances of how people use their money, because that varies between individuals. And it makes you better lawyer if you're able to understand that. And then that's a relevant factor in any area of law, but this one in particular came up. So, take a listen, that's Episode 81 in our archives.

[04:38] And on this episode, we're speaking about an issue that is very important, and one that has been also requested by a number of people and one that I've been looking to learn about for quite a while throughout the area of Indigenous Law and we had a very insightful guest who knows a lot about this area and has a real pulse on what some of the issues are that are impacting not just Indigenous peoples, but people across the country in this ever-changing area of law. So without further ado, please enjoy this episode with our guest, Jeff Nicholls.

[05:12] Jeff is an associate at Ratcliff LLP, which has a 70-year history of advocacy in support of First Nations in British Columbia, Yukon and beyond. Jeff's practice focuses on litigation, negotiation, and law and policy development. And he advises First Nations governments on various matters, including land and resource issues, Aboriginal rights and title and governance issues. And Jeff has a particular focus and interest in supporting the development and implementation of indigenous legal traditions. And in addition to being a proud member of the Lax Kw'alaams First Nation, Jeff is also the president of RAVEN Trust, which is a charitable nonprofit organization that provides financial resources to assist First Nations and exercising their legal rights in court. So, Jeff, thanks for joining us on the show today.

[06:02] JEFF: Thank you so much, Husein. It's a real pleasure to be on the podcast.

[06:07] HUSEIN: It's a pleasure to have you as well. Before getting into the topic, I was hoping to learn a bit more about RAVEN Trust. I know you've been part of this organization for several years and does some meaningful work. So, tell us more about what it is and your role in this as well?

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[00:06:21] JEFF: Yeah, absolutely. RAVEN Trust is very unique in Canada. It raises basically, legal defense funds for First Nations to advocate their rights in court. All of it was in fundraising campaigns around various court cases. So, as you're aware, First Nations have undertaken litigation to largely great success, to shape both environmental law, the law about Aboriginal peoples in this country. And so, RAVEN exists as a charity to support First Nations in that effort.

[06:57] And we run fundraising campaigns to basically support their court case. And we also have a public education component as well, that we've recently launched, Home on Native Land. And it's a free, very comprehensive education course where people can learn about the history of Aboriginal law, what some of the key topics are. So, perhaps, if your listeners are interested in that, it's an additional resource that RAVEN offers, that we're very excited about.

[07:24] HUSEIN: So, how did you get involved with this organization?

[07:27] JEFF: Well, I followed their work, they're quite well known, they run these campaigns around, usually the court cases attract a lot of attention. They did a lot of advocacy and fundraising to support the Nations in their effort in the Trans Mountain pipeline litigation, and that kind of thing. So, that was an issue that RAVEN was able to support.

[07:58] And then it's particularly interesting, being a lawyer and being involved with RAVEN, because, of course, many members of the profession, we look for ways to give our time and volunteer and, and offer our expertise. And so, volunteering with a legal-focused charity is a great way to support the community. And, obviously, my background and where I'm from, it was just a very good fit.

[08:28] Yeah, so I sit on the board of directors, and I happen to be the Board President right now. So, it's a really, really great organization, that raises millions of dollars to assist with access to justice for First Nations. We really need to be doing a lot to support our planet and support the integrity of our ecosystems and that kind of thing. And so, all of RAVEN's campaigns have that as a component to it. There's an environmental justice component to it. And so it just feels really good to be kind of getting my time and giving my energy towards a really, really good cause.

[09:00] HUSEIN: Sounds like a great fit both for them and for you as well.

[09:03] JEFF: Yeah, absolutely.

[09:05] HUSEIN: So, we've got a bunch of interesting topics to speak about in this area of indigenous law. And the first is a recent Supreme Court case called *Dickson v. Vuntut Gwitchin First Nation*. And this is an upcoming and consequential case in this area, which arises from an appeal out of the Yukon Court of Appeal. Supreme Court of Canada has heard this appeal in February this year, but has not yet released their decision.

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[09:30] And Dickson engages the intersection of the Charter of individual rights with the collective rights recognized under the Constitution Act of 1982. And in particular, this case raises fundamental questions about how the Charter applies to indigenous governments with self-governing agreements, and inherent self-government authority.

[09:45] So, I just want to speak about in here and before we get to the case itself, I know that this appeal relies heavily on their interpretation of two sections of the Charter, Section 25 and Section 32. Some people may not be familiar with it. So, why don't you just start by giving you a summary of what these provisions mean and why they're important?

[10:07] HUSEIN: Yeah, thanks for Husein. The Charter itself is obviously part of Canada's constitution. And that's relevant, because, of course, at issue in this case is the provisions of a First Nation's constitution and a claim being made under Canada's Charter. And so in the Canadian Charter, as you say, there's two main provisions that are at issue in this case. Section 32 of the Charter deals with the applicability of the Charter. That's the section heading.

[10:44] And in summary, Section 32, states that the Charter applies to Parliament and the Government of Canada and the legislatures of each Province. It's obviously really important because it outlines where the charter applies and where it doesn't. And so at issue in the case is the interpretation of that section. Section 25 is a provision that shields Aboriginal treaty and other rights and freedoms that pertained to Aboriginal peoples from abrogation or derogation by the Charter and rights and freedoms itself, that kind of enumerated rights in there.

[11:26] HUSEIN: Fantastic. And then there's another key principle, I think we want to outline before we get into the facts here. And this the concept of self-government.

[11:32] JEFF: Self-government agreement is an agreement between Vuntut Gwitchin First Nation and the Crown that outlines various aspects of self-government for that First Nation. For example, in this case, there's a self-governing agreement between Vuntut Gwitchin First Nation and the Crown, that outlines aspects of their self-government, including their jurisdiction, the powers that they have, and that kind of thing. It basically constitutes their authorities as a government, vice-v the Crown.

[12:06] HUSEIN: Okay, great. So, why don't we get to the case itself? So, again, this case is called *Dickson v. Vuntut Gwitchin*. And again, we are still recording this in mid-June of 2023. So, at the time of this recording court's decision has not yet been released. But you might be able to start by giving our listeners a sense of what the relevant facts are. So, what's this case all about?

[12:26] JEFF: So, the basic facts of this case is Cindy Dickson, who is a member of Vuntut Gwitchin First Nation, is looking to run for political office in her community, the Constitution and various laws of Vuntut Gwitchin First Nation, stipulate that if you are elected to a

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leadership position in the government, you have to move within a certain period of time to Old Crow. So, it would require Ms. Dickson to move from Whitehorse to Old Crow.

[13:03] And part of Ms. Dickson's situation is that she has certain obligations, as I understand, to be in Whitehorse, some of which involve care for her son and access to medical services and that kind of thing that. So, she's challenging a provision in the Vuntut Gwitchin constitution, the residency requirement, using Canada's constitution, Section 15 of the Charter, saying, "This residency requirement, which exists in Vuntut Gwitchin constitution, violates a provision of Canada's constitution, which is Section 15 of the Charter."

[13:45] And so in order for that to happen, the Charter would need to apply to Vuntut Gwitchin's constitution. It would need to apply to their government. And as we've discussed a little earlier, it's not exactly clear. And that's what this case will resolve potentially, it's not exactly self-evident that the Charter applies to the government of Vuntut Gwitchin. For example, the Charter does not apply to, for example, businesses. It doesn't apply in a lot of different areas of life. It's just a question of whether or not it extends to a self-governing Yukon First Nation.

[14:28] And so the reason this kind of engages the whole kind of like a rich dialogue about the relationship between the Charter, the constitution of a First Nation, the practices of Aboriginal peoples, because of course, in this case, Vuntut Gwitchin First Nation, the selection of leaders, for them, they've made the position in this case is that, that's fundamental, that's a fundamental practice of who they are as a people, the ability to select leaders, constitute their government.

[15:05] When you get into a situation where Vuntut Gwitchin is operating according to their self-government agreement, they're operating according to their own constitution, it's not... well, their position is that they did not agree to the application of the Charter, their treaties and their self-government agreement. There's no express application of the Charter, there's nowhere where it says, the Charter rights and freedoms applies.

[15:30] HUSEIN: So, as a practical matter, why does it matter really, whether the Charter applies to not First Nations' group or not?

[15:40] JEFF: There's a lot of practical considerations that come to mind in looking at the application to the Charter. So, the first is, it actually takes a lot of resources to evaluate and make sure that your laws are consistent with the jurisprudence of the Charter. There's also a broader issue where for First Nations... I think it's fair to say that this is a widely held view among First Nations is that First Nations laws and governance needs to be adjudicated and measured against First Nations values and principles, as they're expressed in their own constitutions, their own laws, their own governments and that kind of thing.

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[16:25] The very first paragraph of the Yukon Court of Appeals ruling, it speaks to ending paternalism, right, you know, we want to move away from the acknowledged paternalism of the past. And so, there's a question of if you have to, without consent, if the Charter applies, basically, without consent or without agreement, and then you have to now basically govern in a way that is limited by the Charter and may not be consistent with your own values or principles. It can be very difficult. And in some cases, that leads to very paternalistic outcomes, because, essentially, you're trying to exercise your own inherent right of self-government, and then you're bound by basically a promise that exists within another Constitution. That is, I think it's fair to say, based on its own set of norms and values.

[17:21] HUSEIN: Depending on the outcome of the Supreme Court case, do you think this case will have implications in terms of how indigenous laws will be recognized and how governance practices will be viewed as well?

[17:34] JEFF: Yeah, I think that there's a real opportunity here for making space for indigenous laws making space for indigenous constitutions, making space as well, to negotiate the application of the Charter. I should just say, for transparency, I represented an intervener in this case, and that was part of testimony to counsels submissions, is, we want to make space for negotiation of the Charter, these agreements are meticulously negotiated. It took 20 years of negotiation to reach the umbrella final agreement, and it's taken a further 20 years to build the kind of governance that exists in the Yukon. And so, we want to make sure that we're respecting the fact that Canada's constitutional relationship with First Nations can be negotiated. So, that's something that's very important, in my view.

[18:32] HUSEIN: But is it really possible to make space for both? We have one constitution that reflects one set of values and there is the Charter itself? I imagine there might be situations in which these provisions if not conflict, at least, might come up against each other?

[18:46] JEFF: Yeah, I absolutely think that there's space for both. And I think that's part of the ongoing process of reconciliation, that's ongoing in our country. First Nations have their own ways of protecting human rights, they have their own ways of articulating the fundamental freedoms and values of their societies. And I think that part of the premise of self-determination, part of the premise of inherent right of self-government is making sure that the laws and decisions and legal orders of First Nations are adjudicated or measured.

[19:29] And this has a particular significance to lawyers, because we're tasked with thinking about this. We're thinking about the legal fabric. And I think that it's really important that when the kinds of tools and advocacy and legal reasoning and thinking, when we're engaging with indigenous legal traditions, and that kind of thing is informed by indigenous values and expectations. The Yukon Court of Appeal was clear that the application of the Charter and the application of First Nations' constitutions isn't necessarily a balancing exercise. It's about

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protecting and making space for First Nations self-government in Canada. And so that helps shape what Section 25 is, it's a shield.

[20:10] So, when we have to balance things, so when we have to weigh things against each other, that's where you have potential for abrogating or derogating on First Nations' own legal order and the chance to be able to measure and evaluate the laws, according to First Nations values. And I think that thinking about that context, in First Nations context really highlights the kinds of issues that are at play in this case, and how we need to protect First Nations values and constitutions in the context of reconciliation and Canada's constitutional order.

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[20:53] HUSEIN: In the spring of 2023, the British Columbia Supreme Court heard a landmark challenge, which involved a First Nations community taking a stand against the Provincial government's mining laws and policy. And the policy in question would grant mineral claims without consultation or consent of indigenous communities. And although the Court decision has not yet been released, this outcome will have important implications for reconciliation across the province.

[21:20] And in particular, this case will be the first to interpret the province's legal obligations under the Declaration on the Rights of Indigenous Peoples Act. So, Jeff, as I mentioned in the introduction, this case relates to a proposed government mining policy called Free Entry. So, why don't you start by telling us more about what this policy means and why it's significant.

[21:43] JEFF: Free Entry is a method of distributing mineral rights. And so the province manages mineral mining in British Columbia pursuant to the Mineral Tenure Act. And Free Entry is basically the structure on which they allocate these mineral rights. So, under the mineral tenure system, any person, basically any adult person can obtain a free mining certificate, and then participate in staking of claims. So, that's where the Free Entry comes in, is that anyone can go in, you and I could go in, get a license, and then start staking mineral claims.

[22:26] It used to be the case that you had to physically go out and stake the land. But now, you can just do it online. And it's significant for this case, because as you mentioned, the initial registration of a claim or basically, throughout the claims process, doesn't require any consultation with First Nations who assert Aboriginal rights or title or interests with the land.

[22:52] HUSEIN: I know that it's the Gitxaala Group that filed the legal challenge about this policy. Tell us more about what their basis is for challenging these policy.

[23:02] JEFF: The legal basis for Gitxaala's claim in this case is the law of Aboriginal rights. Gitxaala, of course, asserts and holds various Aboriginal rights, which they claim are infringed by the mineral tenure system. So, for example, an asserted right of aboriginal title, maybe it's

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obvious or self-evident, you know, when you just basically open up their territory to anyone and everyone to come in and without notification, without consent, without consultation, receive mineral rights, that in Gitxaala's view, infringes on their Aboriginal title interest.

[23:45] And then, of course, there's the Duty to Consult. I'm sure many of your listeners will be familiar, but the Crown has a Duty to Consult and accommodate Aboriginal people where the Crown has knowledge of a potential conduct that may adversely affect those rights. And in this case, of course, it's Gitxaala's position that that duty ought to be triggered by this right, like a mineral claim, or actual activity, for that matter, actual mining activity ought to trigger the Duty to Consult in this case. However, the current regime, doesn't provide for that as well.

[24:23] HUSEIN: Like you said, I'm sure a lot of our listeners are familiar, at least at a high level about this Duty to Consult. But what's especially interesting about this matter is the case has taken place against the backdrop of the Declaration of the Rights of Indigenous Peoples Act, also known as DRIPA. Can you tell us more about this Act and how that is engaged by this proposed policy?

[24:45:] JEFF: So, the UN has the UN Declaration of the Rights of Indigenous Peoples. It's an international instrument that provides various international rights and recognition to indigenous groups UNDRIP recognizes various rights such as the self determination of indigenous peoples, the right of indigenous peoples to have a say in the management and use of their territories to maintain a certain way of life and connection to their territories.

[25:18] And a lot of the adverse impacts of mining activities, in the view of First Nations, infringe on those rights in the use of land, extraction of resources, negative impacts on the environment. UNDRIP is a basic human rights instrument that applies existing human rights that exist in international law, specifically to indigenous peoples. And for a number of years, Indigenous peoples have advocated for that to be recognized by Canada and the Provinces and that kind of thing. And so after a very long period of advocacy, the Provincial Crown, in this case, BC has passed a piece of legislation that recognizes UNDRIP as provincial law, and has committed to making the laws of the province consistent with UNDRIP.

[26:13:] HUSEIN: Right. And so how does that get engaged with this Free Entry mining policy?

[26:17:] JEFF: Yeah, so in particular, for example, Section 7 of the DRIPA Act provides that the province may enter into agreements with First Nations in respect to decision making about their territories and about various aspects of governance. And in this case, there's no such agreements with Nations about how these kinds of mineral claims are adjudicated. UNDRIP provides for free prior and informed consent as it relates to indigenous peoples' territories.

[26:50] So, if you want to build a mine on Indigenous peoples' land, you need to seek free prior and informed consent from that Nation in order for that to occur. And so you can see how

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mineral tenure regime that provides for no consultation, no consent, no notification, even. I mean, yes, there's a base level of notification, because some of these claims are searchable through various databases or portals, but it's inconsistent with free prior and informed consent.

[27:23] HUSEIN: This particular case about the Free Entry mining, obviously has impacts with respect to reconciliation, as well. So, tell us more about how that might come about in terms of the impact of this decision on reconciliation generally.

[27:40] JEFF: This is a really important test case for how much teeth the DRIPA Act has. Because to speak very frankly, I think the mineral tenure system is low hanging fruit as far as being inconsistent with DRIPA, being inconsistent with the Duty to Consult in the existing framework of Aboriginal rights in this country. This is really a litmus test for how much teeth the DRIPA Act will have, as far as making the laws of the province consistent with DRIPA, which is, of course, the stated purpose and of the legislation.

[28:21] And I should mention, the province has committed in their DRIPA action plan to modernizing the mineral tenure legislation. I can assume that there's processes may be happening behind closed doors, but as of the time of writing and the time of litigation, there has been no changes to tenure actively as it stands as it is.

[28:45:] HUSEIN: Legally speaking, what impact this decision will have on this area of indigenous law? We know this area of law is not new, but it is evolving. So, we want to get a sense of what impact this case will have on this broader area of the law, and Indigenous People as well.

[29:00] JEFF: I think an important aspect to focus on is how the Judiciary will interpret the Provincial Crown's commitment to implementing UNDRIP. You know, this has been pushed for a really long time, for the longest time and there's case law on this that says, before it was legislatively enacted, the Judges defaulted to the fact that, in order for UNDRIP to have force, it needed to be passed through the legislature, as international instruments need to do. And so, now it's passed through the legislature. It exists as a statute in our province, and indeed, it exists as a statute in the federal government as well, because there's a federal DRIPA Act as well. So, I think that there's just tremendous opportunity to make the laws of this country consistent with the promise that exists within UNDRIP and this case has an opportunity to do that.

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[30:10] HUSEIN: In May of 2023, the British Columbia government marked a historic occasion by officially adopting the Haida Nation Recognition Act, which formally supports the Haida Nation's inherent right of governance. And this Act boasts a decade's long exercise of working towards both governs reconciliation, and represents an important development in

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contemporary reconciliation agreements as well. So, Jeff, I know that this Haida Nation Recognition Act, is a pretty historic moment, in the context of reconciliations. Can we start by you telling us a bit more about what this Act does at a practical level?

[30:45] JEFF: Yeah, as you mentioned, it recognizes the Council of the Haida Nation as the governing body of the Haida Nation. And so that facilitates movement away from the Indian Act, and it is a more respectful relationship between the Crown and in this case, the Haida Nation, and recognizing that through legislation, in my view, is very powerful recognition of the role and place of the Haida Nation as the government of the Haida people.

[31:21] HUSEIN: Is it purely symbolic? Or does it have any practical implications?

[31:26] JEFF: Yeah, I think that this Act speaks to a broader question of how Indigenous Peoples are reflected in the laws of this country. And so right now, of course, we have the Indian Act, which is a much criticized and First Nations generally speaking, they want to be moving away from the Indian Act, and towards self-government, towards their own ways of constituting their government. There's been a decade's long process of legal reconciliation, between, in this case the Haida Nation and the Crown.

[32:01] And this mirrors, many journeys of other First Nations. We've talked about, for example, Vuntut Gwitchin First Nation in the Yukon context. And indeed, there's a whole wide varied experience of First Nations in their relationship with Canada. But in the Haida Nation's case, they're looking for legal recognition of the Council of the Haida Nation, as their governing body. And that was a key component of their journey of reconciliation with Canada and the province is making sure that their government is recognized on their own terms.

[32:36:] HUSEIN: And what what's the benefit of having this formal recognition of this group has been the governing body?

[32:42] JEFF: I mean, it's so, kind of new and novel as a concept, that it's difficult to say with certainty what some of the benefits are. However, I think that this really paves the way for further concrete reconciliation between the province and the Haida Nation, which includes, for example, negotiation of self-government, negotiation of respective jurisdictions, co-management and that kind of thing.

[33:15] To give you a perspective, the Haida Nation, prior to this, legislative recognition, the recognition occurred under the Societies Act of BC. So, like charities and civic groups can incorporate a society into the Societies Act. And in my view, that kind of is not the appropriate mechanism. It's a necessary one, I don't want to criticize it. But I don't think it's fully appropriate or fully fitting of a First Nations government to be, basically have legal recognition in the Societies Act. I think that this is a much clearer and more appropriate mechanism to acknowledge the government of a First Nation. And that's indeed what's occurred here.

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[33:57] HUSEIN: Right. So, a lot of people are saying, this a historic Act. And I was wondering if you see this Act of setting any precedent for indigenous self-determination, and the development of laws based on First Nations values or systems?

[34:14] JEFF: Yeah, absolutely. So, I think that this represents a very important shift away from the Indian Act, which is the current statutory recognition of First Nations bands, towards other more respectful, more fruitful, more appropriate forms of recognition for First Nations governments. First and foremost, the Haida Nation exists as an indigenous people within Canada, separate and apart from any of the laws of Canada.

[34:48] But of course, in the context of reconciliation, in the context of having a relationship between the Haida Nation and Canada, and there is a certain legal framework that exists and that legal framework has undergone decades or centuries-long evolution as Indigenous peoples have negotiated and advocated their relationship with Canada. And this latest legislative recognition of the Haida Nation as the rightful government at the Haida people, does a lot to move beyond some of the challenges that have existed within Canada's legislation law and policy as it relates to Indigenous people.

[35:29] And so the Haida Nation has always existed for about 40 years, they've operated according to a constitution that has birth the Council of the Haida Nation. And it's basically, is their governing body. And what I understand this Act does – certainly on the part of Canada— is, it gives effect in recognition of the fact that this governing body, the Council of the Haida Nation, is the government of the Haida people and it streamlines things. Because, of course, there's potentially a mismatch of societies, Indian Act bands, companies, corporations, things like that. And it just kind of makes it I think, a little bit more neat, tidy and appropriate and respectful.

[36:20:] HUSEIN: So, there's this trend up in tempo reconciliation agreements, what role do lawyers play in this?

[36:25] JEFF: Yeah, so certainly, lawyers and the legal system in Canada has played an outsized role in moving reconciliation forward in this country. Reconciliation has taken a number of forms, we'll talk a little bit about some residential school reconciliation, and that kind of thing a bit later. But legal reconciliation is actually much more focused and arises out of the court cases and legal advocacy as it relates to the constitution of Canada.

[37:00] And so, really, when we're thinking about contemporary reconciliation agreements, today, it's about recognition of those Aboriginal rights, which includes title and self-government

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of Indigenous peoples, and brings them into a contemporary context. And this is the result of legal advocacy, political advocacy, to articulate these contemporary institutions of law and governance, that give effect to First Nation self-government.

[37:36] As a lawyer, I see my role, as advancing the rights and interests of my clients, Indigenous Nations, and making sure that they have all of the tools to exercise their inherent right of self-government. And I'm very fortunate that we've moved away from a situation where rights are seemed to be extinguished or abrogated in favor of treaty rights. Now, we're in a situation where these kinds of reconciliation agreements, they don't require surrender, they don't require extinguishment, it's on the basis of recognition. And that's what we see with this legislative recognition of the Haida Nation is that you don't have to surrender anything, you don't have to give up anything.

[38:19] It's much more respectful to move forward in the basis of rights recognition, where we're saying, yes, you know, the Haida Nation, you are the government of the Haida people and this territory. So, I think that's a much more respectful way to move things forward.

[38:35:] HUSEIN: Do you foresee these reconciliation agreements triggering any other new legal issues for either government or the First Nations who are the subjects of these Acts?

[38:48] JEFF: I really do believe in the opportunity that exists. I'm very hopeful, I think we've seen the decades-long trend that has improved the relationship between the Crown and Indigenous peoples. And I look towards the next decades, and I try to imagine the opportunity and moving that forward. And so, absolutely, it comes with... well, maybe, to loop back to our earlier conversation, thinking about the Yukon context. They've negotiated these kinds of self-government agreements, and then now they're in a situation where they're dealing with very concrete constitutional questions and the actual implementation of their agreements.

[39:32] And that's, for all the challenge that brings, I really see that as an opportunity, because you're really giving effect to these agreements. And if you're in this space of, rolling up your sleeves, getting your hands dirty, and implementing them. I think that that's really, really important. And in many ways, recognition... that's just the first step, we actually need to build out these systems. And I think that there's a unique world for lawyers in that, providing that framework or the lattices of actually making a lot of these things work.

[Music]

[40:12] HUSEIN: And lastly, we'll do our Ask-Me-Anything segment with Jeff to speak about some of the questions that have been submitted by members of our Lawyered patron's community. And as our listeners know, we put out calls for these questions a couple of weeks before the episode. They can submit any questions they want answered on the show. And if you want to find out how you can become a patron of our show, and submit your own question

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to our upcoming guests, you can check out our crowdfunding website, which is www.lawyeredpodcast.com/patreon. There's a bunch of other rewards, including the opportunity to participate in this part of the show.

[40:48] Okay, so Jeff, a bunch of interesting questions, as always. This week, the first question we have is this. It's been a few years since the Federal government has implemented the United Nations Declaration of the Rights of Indigenous People Act, also known as UNDRIP. And we spoke about this a bit earlier in the episode. The question is, how is the implementation of UNDRIP, influence indigenous law in Canada?

[41:11] JEFF: Yeah, it's a really fascinating question. And I figured that given that we've discussed UNDRIP, a fair amount so far, I'll take the opportunity to discuss one thing that I find really interesting and fascinating about this aspect of UNDRIP, that maybe doesn't receive as much coverage, at least that I've seen and that is the federalism aspect of UNDRIP. So, we have the Federal government passing UNDRIP, as legislation, we have now the province of BC, passing UNDRIP, as provincial legislation. And, of course, First Nations, of course, embrace UNDRIP and the rights that it ensues.

[41:51] And I think that it will really engage some interesting federalism questions, because of course, UNDRIP engages all aspects of civic life. And of course, in Canada, we have a division of powers and the province can do some things, the Federal government can do other things. And, of course, in my view, First Nations are part of Canada's federal fabric. And we're actively, as we've discussed prior, figuring out the jurisdiction and powers of First Nations.

[42:20] And so I think it's going to be very interesting to see from a federalism perspective, how UNDRIP shakes along jurisdictional lines, what's the role of the province? What's the role of the Federal government? What's the role of First Nations? And I think that in regard to the guest's question around Indigenous Laws, I think, fundamentally, we need to be looking at making space for those legal orders. And I think that's the promise of UNDRIP, through self-determination is making sure that it's actually First Nations jurisdiction as well, that comes into play.

[42:50] HUSEIN: We talked about mineral rights earlier on the episode. Have you been in any situations in which there's been a dispute about whether UNDRIP principles apply in the Federal context, as opposed to in the provincial context?

[43:05] JEFF: I think that's, in part, what makes it interesting is that I'm not aware yet of any kind of disputes of that nature. But I think that, given our federal system and given the fact that in both pieces of legislation, just how they're structured, UNDRIP is applied in full. Of course, there may be aspects of UNDRIP that are Federal, and they exist within provincial legislation, and that just affects how it may be interpreted and implemented.

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[43:35] And then, as a lawyer who advocates for First Nations, of course, we need to make space for First Nations. There's a case in British Columbia that interprets the Nisga'a Final Agreement—when the Nisga'a Final Agreement was passed, a few ministers challenged the case in BC Supreme Court. It's called the Campbell case. And in that case, it's held that Section 91 and 92, don't fully exhaust the jurisdiction and there's space within Canada's Federal system for First Nations jurisdiction. And so that is proof that there's this space within our constitutional fabric for First Nations to exercise their jurisdiction. And I think layering on UNDRIP, only enhances the fact that, many of the UNDRIP powers, I believe, must be exercised by First Nations.

[44:34] HUSEIN: Okay. The next question we have is, there's been a well-documented series of cases regarding the Duty to Consult and accommodate Indigenous peoples, are there any remaining outstanding issue that you expect Courts will be grappling with in the near future?

[44:46] HUSEIN: So, of course, UNDRIP is going to loom large in consultation cases, now and into the immediate future. But given we've kind of canvass that issue, in a lot of detail, another aspect of consultation that I think will really be interesting moving forward is the fact that there's now many processes that give more jurisdiction to First Nations in decision making contexts. And I think that we're going to see those potentially be the subject of litigation.

[45:20] Many First Nations, at this stage in the game, they have very sophisticated and very professional lands and stewardship departments that assess major referrals. And there's now more and more impetus for those bodies to be actually making decisions, taking on aspects of the environmental assessment process. And I think that, First Nations may come to a decision, and that decision may be subject of litigation. So, I think that it's part of the ongoing evolution of the Duty to Consult and decision making. But I'm excited to see that process move forward, because it means that, more and more First Nations are exercising more and more powers. And inevitably, that's going to get litigated. So, I think that that's what we're going to see.

[46:00] HUSEIN: Have there been any hints of this type of litigation coming up today?

[46:06:] JEFF: Not that I'm aware of yet. However, BC recently overhauled their environmental assessment legislation. And there's numerous areas now where consent is required, where there's fairly intensive dispute resolution processes that are occurring in that context. And then there's also provision, as I mentioned, for First Nations to actually take on decision making in certain contexts. And I think that it's very new, I'm not yet aware of an instance where we've reached a litigation stage at this point. But I think that it's only a matter of time before those things are tested.

[46:44:] HUSEIN: Yeah, absolutely. The last question that's been submitted, says, there's been some recent noteworthy settlements in recent months related to the indigenous residential

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school litigation. So, the question is, what role if any, do you think these outcomes will have on the broader theme of reconciliation?

[47:02] JEFF: Well, first and foremost, just acknowledging the importance of these settlements. Obviously, I think that many, if not all of your listeners will be familiar with the context of residential schools and the history about that, and if they're not, I encouraged them to learn about that. The recent major settlements, address loss of language and culture in residential schools, and in particular, the recent settlements, compensate Nations as collectives.

[47:38] And I think that's significant, because, when we look at the harm that has resulted from residential schools, you know, a lot of these, in addition to, of course, the very egregious and well documented individual harms, we need to recognize the collective harm that has resulted from residential schools. And so the recent wave of underlying litigation and then resulting in settlements, address, in particular loss of language and culture, which it's worth saying this is very novel as far as recognition in tort as being compensable.

[48:16] And we have compensation for loss of culture or loss of language. That's very, very interesting from a legal perspective. And I think that we'll see that bleed over in other areas. You know, for example, we may see an environmental case where, let's say there's environmental contamination, and loss of culture occurs as a result of that. Well, this will help as a legal basis for establishing compensation for loss of culture.

[48:43] HUSEIN: So, as you mentioned, this loss of language and culture is so significant, and it has generational impacts as well. And I think that's some skeptics might be concerned about the government making payments or settlements, and then as well, feeling like they've done enough, I was wondering if you think that these settlements will meaningfully impact reconciliation going beyond the incident settlements?

[49:10] JEFF: Yeah, I think that absolutely, these settlements will affect reconciliation, they will contribute meaningfully towards the reparation and healing from the harm of residential school. One of the aspects of the settlement will be that Nations get to decide how that settlement money is allocated. So, for example, on cultural centers on, language teachers, on counseling programs in their community or this kind of thing. And so, absolutely, the harms that have resulted from residential schools have included collective loss of language and culture and these need to be compensated and have been through these settlements. And I think that's so important to the process of healing and reconciliation.

[50:08] HUSEIN: Okay. And last question is related to the concept of Indigenous Aboriginal rights in general. The question is, Indigenous Aboriginal rights are often referred to as being a Latin phrase of 'sui generis, which means, 'of its own kind of clause.' The question is, what does this mean to you, both as a lawyer and on a practical level as well?

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[50:31] JEFF: I think sui generis, really represents an opportunity to articulate indigenous laws, practices, traditions, things of that nature, separate and apart from their relationship to Canadian laws, and Canada's legal orders. How I've understood this term to be used in Canada's legal tradition, is for exactly that purpose. It's an acknowledgement that Indigenous peoples have existed in distinct societies, living by their own legal traditions, prior to the assertion of sovereignty as it's kind of been very classically articulated.

[51:14] And so, that sui generis, is a very important recognition that, this legal order, they stand on their own merit, they don't need recognition by Canada in order to exist. And as someone who's committed to implementing indigenous laws, it's a really important recognition.

[51:35] HUSEIN: So, can you give an example of what you mean by this, about how they stand on their own, like, separate apart from other types of laws?

[51:43] JEFF: So, a practical example of this is the ongoing effort to build out indigenous legal orders, institutions of government governing laws. And this effort should be focused on the unique values, practices, principles, worldviews perspectives of First Nations. And it's not contingent on anything else like Canadian law, for example. So, I'm involved in a number of projects of articulating indigenous laws, I have the great fortune of helping First Nations craft their own constitutions and that kind of thing.

[52:25] And so this concept of sui generis, really represents an aspect of Canadian law that recognizes that indigenous laws. Yeah, they stand on their own merit. They are unique, and they have their source within the indigenous communities themselves, they don't exist because of Canadian law.

[52:48] HUSEIN: So, Jeff, I want to thank you for your insights during this episode, it's been a very eye-opening discussion. Candidly, I knew very little about this subject matter beforehand. But I think you really brought to light some of the important issues that this area of law plays, not just for people who are indigenous, but for settlers as well and the role that this is having in shaping this broader area of law. You mentioned that this area of law is sui generis, and that we're getting a lot of important clarity, through the courts, and through other statutes as well. So, it'll be exciting to see what comes to this afterwards, as well. So, thanks so much for your time. I look forward to speaking to you in the future.

[53:26] JEFF: Yeah, thank you so much for having me on. I really believe that Canada is in a very important time in our journey of reconciliation. And I really appreciate the opportunity to speak about some interesting aspects of what's going on. And I'll be very excited to see how this all shakes out, especially considering that some of the stuff we've discussed today is the subject of some upcoming decisions from our Courts.

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[53:59] HUSEIN: And that's going to do it for this week's episode of Lawyered. Thanks for listening. On today's episode, our guest was JEFF:. And you can learn more about him and his day job at his law firm website, which is www.ratcliff.com. And you can learn more about his organization where he volunteers, it is called RAVEN Trust at their website, which is www.RAVENtrust.com. And for more about today's show, and for links to all the cases that we spoke about today, you can find those on our website, which is www.lawyeredpodcast.com.

[54:30] And on our next episode, we'll be speaking about the area of Brand Protection law with our guest May Chang. And as many of our listeners will likely know, May is an absolute force in the IP world and has worked with many top brands in North America. It is going to be really exciting episode to speak to her about these topics. On the agenda we have Quebec's controversial Bill 96, about the use of French language in business. We are going to talk about issues involving that case and registration of trademarks. And also do a deep dive about the tension between artificial intelligence and artistic writing. So, keep an eye out for that one.

[55:10] And if you want help to improve the show and get some neat and affordable legal rewards, monthly opportunity to submit questions on our show, it would really mean a lot if you could become a patron of our show. You can find out more about how to do this on our crowdfunding website, which is www.lawyeredpodcast.com/patreon. This helps us to keep the proverbial lights on at the podcast. So, please consider this if you are enjoying this show and getting value out of it.

[55:40] I want to give a shout out to a bunch of our existing and former patrons including, Carolyn Poutiainen and Conner Coles, Donald Bourgeois, Ethan Marx and Flynn Paquin. Thanks so much for all your support, we really appreciate it. And to make sure that you never miss another episode of Lawyered, subscribe to this podcast, it is free on iTunes or in pretty much anywhere else you get podcasts. You can also follow the show on Facebook, LinkedIn, and on Twitter. Our Twitter handle is @lawyeredpodcast.

[56:10] Sound editing work was done by Solomon Krause-Imlach, our theme was provided by Ben Swirsky and our website was maintained by Steve DeMelo. And, of course, please be advised while the show is aimed to be helpful and informative, it does not intend to be a legal advice. If you do want legal advice, please reach out to our lawyer directly to help you with your particular situation. And with that, we'll see you again in two weeks. And until then, keep it legal.