

The Doctrine of Reconciliation in Chief Justice McLachlin's Court

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1. Introduction

Our current Chief Justice, Beverley McLachlin, was appointed to sit on the bench of the Supreme Court of Canada in 1989. At that time, s.35(1) of the *Constitution Act, 1982*, a provision which recognizes and affirms existing aboriginal and treaty rights, was fairly freshly minted. Although “born in the political arena, it was left to the judiciary to flesh out how these rights would be defined and protected.”¹ By 1989, the Court had heard arguments on s.35(1), but had not yet delivered its first set of reasons interpreting it.² The situation was considerably different by the time Beverley McLachlin was appointed Chief Justice, in 2000, as during those eleven years the Court released a number of foundational decisions which interpreted s.35(1) in terms of Aboriginal rights³, title

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¹ Gordon Christie, “Judicial Justification of Recent Developments in Aboriginal Law” (2002) 17 (2) *Can J.L. & Soc.* 41 at 41.

² The case of *R v Sparrow*, [1990] 1 SCR 1075 was argued in 1988.

³ *Eg R v Sparrow, ibid, R v Van der Peet*, [1996] SCJ 77, [1996] 2 SCR 507, *R v Gladstone*, [1996] 2 SCR 723, [1996] SCJ No. 79

rights⁴ and treaty rights⁵. Since 2000, Chief Justice McLachlin’s Court has rendered decisions addressing a broad scope of matters where s.35(1) has been squarely at issue. These have included decisions regarding what s.35(1) means for the rights of Metis people⁶ and for the Crown’s obligations to Aboriginal peoples, whether as a fiduciary or as a matter of Crown honour.⁷ The Court has also spoken to how s.35(1) interacts with the division of powers under the *Constitution Act, 1867*,⁸ as well as with how statutory rights or provisions engage with Constitutional and Charter rights.⁹

The issue that this paper focuses upon is one which runs through much of the jurisprudence over the last ten years, the idea of “reconciliation”. This term is evoked as a norm in Aboriginal rights cases.¹⁰ However, the way in which the term is deployed – the valances which inform it, the logics which drive it, the conclusions which it supports – have shifted and are continuing to shift. There are considerable differences between how this term figured under former Chief Justice Lamer’s bench, the role and meaning which it has come to carry for the bench under Chief Justice McLachlin, and the role which it has evolved to take on most recently. This paper does not analyze whether the Court’s understanding of reconciliation resonates with that of others, or addresses what others have argued ought to be included in trying to effect a reconciliation.¹¹ Rather, the paper

⁴ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010

⁵ Eg. *R v Marshall* [1999] 3 SCR 456, *R v Marshall* [1999] 3 SCR 533, *R v Sundown* [1999] 1 SCR 393, *R v Sioui*, [1990] SCJ 48, [1990] 1 SCR 1025

⁶ *R v Powley*, [2003] 2 SCR 207, 2003 SCC 43, *R v Blais* 2003 SCC 44

⁷ Eg. *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388.

⁸ Eg. *R v Morris* 2006 SCC 59

⁹ Eg. *Ermineskin Indian Band and Nations v Canada* 2009 SCC 9, [2009] SCJ 9, *R v Kapp* 2008 SCC 41, [2008] SCJ No. 42

¹⁰ Eg. See Dwight Newman and Danielle Schweitzer, “Between Reconciliation and the Rule(s) of Law: Tsilhqot’in Nation v British Columbia” (2008) 41 UBCL Rev. 249 at para 3.

¹¹ There is a large and thoughtful body of writing on this matter which offers a variety of perspectives. See, for example James Tully, *Public Philosophy in a New Key: Volume II: Democracy and Civic Freedom* (Cambridge: Cambridge U Press, 2008) at 223-256, Mark Walters, “Constitutionalism and Political Morality: A Tribute to John D Whyte, The Morality of Aboriginal Law”, (2006), 31 Queen’s LJ 470 esp at paras. 54-83, Newman and Schweitzer, *ibid*, Gordon Christie, “Judicial Justification of Recent Developments in

seeks to explore what the Court is signaling or intends when it draws upon the language of reconciliation. As such, the paper tracks a complex storyline which, with some regularity, is marked both with internal debate, contestations and revisionings, as well as with our current Chief Justice promoting a fairly consistent trajectory.

The flow of this paper is as follows. The substantive analysis begins in section two, which identifies the early deployments of the term “reconciliation” and in particular draws attention to distinctions between former Chief Justice Lamer’s understanding and use of “reconciliation” and those of current Chief Justice McLachlin while she sat on Chief Justice Lamer’s bench. These distinctions set a comparative baseline for much of the rest of the paper. Section three then turns to the decisions rendered since Beverley McLachlin was appointed Chief Justice. Section three is written in two sub-sections. The first sub-section considers whether former Chief Justice Lamer’s approach to reconciliation, as a state of compromise where Aboriginal rights may need to yield to the common good, appears to have been embraced by the current bench. It also identifies how elements of Chief Justice McLachlin’s formerly articulated approach to reconciliation, from when she sat on Chief Justice Lamer’s bench, surface in various forms. The second sub-section considers how McLachlin’s Court casts “reconciliation” as a dynamic process, as demanding the establishing of relationships that, like all relationships, must both be founded in mutual respect and be renewed if they are to flourish. The fourth section of the paper considers tensions that arise due to reconciliation interests being largely absent from judicial considerations of non s.35(1)

Aboriginal Law” (2002) 17 (2) Can J.L. & Soc. 41, John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v British Columbia*, (1997) 37 Osgoode Hall LJ 537, John Borrows “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001), 46 McGill LJ 615 at para 64 where Borrows writes: “Courts have read Aboriginal rights to land and resources as requiring a reconciliation that asks much more of Aboriginal peoples than it does of Canadians. Reconciliation should not be a front for assimilation.” Brian Slattery, “The Generative Structure of Aboriginal Rights”, (2007) SCLR (2d) 595, Dwight Newman, “Reconciliation: Legal Conception(s) and Faces of Justice” in *Moving toward justice: legal traditions and Aboriginal justice* John Whyte (ed) (Saskatoon: Purich Publishing, 2008) at 80-87, Kent McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin”, (2003) 2 Indigenous LJ 1-25.

matters (i.e. when legal claims primarily turn on statutory interpretation). The fifth section suggests that Chief Justice McLachlin's Court has created some room for reconciliation interests to generally infuse Aboriginal-Crown law, and considers how that infusion carefully negotiates the political/judicial divide.

2. Origin stories: Early differences regarding the meaning of reconciliation and the judicial role in enabling it.

It is appropriate to begin this analysis of "reconciliation" by briefly sketching out its judicial history. In 1990, then Chief Justice Dickson, writing with LaForest J, first drew upon the term "reconciliation" in the context of s.35(1) in *R v Sparrow*. Here the term was centrally mobilized to explain what s.35(1) called upon the federal government to do:

[Section 35(1) requires that] "federal power be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights."¹²

Thus s.35(1) mandated governmental restraint. Previously discretionary exercises of power now had to be reconciled with governmental duties or obligations.¹³ When Chief Justice Dickson's successor, Chief Justice Lamer, spoke to s.35(1) some six years later in 1996, he too identified s.35(1)'s purpose as being realized through a reconciliation. His interpretation, although adopted by the majority of the Court, developed the reconciliation doctrine in a fashion which sparked disagreement. As discussed below, then Justice McLachlin interpreted the directions in *Sparrow* quite differently in terms of what they authorized and required, and also identified a more clear division between the legitimate scope of judicial versus political decision-making.

¹² *Sparrow*, *supra* note 3 at para 62.

¹³ For a careful discussion of the *Sparrow* decision and its theoretical logic, see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*", (1991) 29 *Alta L Rev* 498. For a discussion of how the content of s.35(1) was originally intended to be determined, see Kent McNeil, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments" (1994) 7(1) *Western Legal History* 113.

To return to Chief Justice Lamer’s interpretation, in an oft cited passage in *R v. Van der Peet*, he wrote the following:

[W]hat s.35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.¹⁴

This passage tells us that s.35(1) is still interpreted to mandate reconciliation, but suggests a changed emphasis regarding who must undertake accommodations to enable that reconciliation. Chief Justice Lamer further clarified his interpretation when he wrote that when adjudicating claims, courts must “be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada.”¹⁵ That is, the majority position saw a clear hierarchy. Section 35(1)’s promise of reconciliation was interpreted to take place against the backdrop of the existing Canadian legal order.

Former Chief Justice Lamer’s position on what reconciliation requires of Aboriginal people was perhaps most clearly articulated when he delineated interests that the state could legitimately call upon to limit Aboriginal rights, so as to enable this “reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”¹⁶ He addressed this matter in one of the companion cases to *Van der Peet*, *R v Gladstone*.¹⁷ After first asserting that “limits” on Aboriginal rights in furtherance of objectives “of

¹⁴ *Van der Peet*, *supra* note 3 at para 31 per Lamer CJC

¹⁵ *Ibid* at para 49 per Lamer CJC.

¹⁶ *Ibid* at para 31 per Lamer CJC.

¹⁷ *R v Gladstone*, *supra* note 3. The reasons in *Gladstone* and *Van der Peet* were delivered on the same day, August 21, 1996.

sufficient importance to the broader community” are “a necessary part of reconciliation,”¹⁸ the Chief Justice elaborated as follows:

... with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard [for justified infringement]. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.¹⁹

As recently observed by Dwight Newman, “[i]nstead of reconciliation functioning as a concept that calls for limits on federal power in light of federal duties, it becomes a concept that limits the scope of section 35....”²⁰ Interpreting s.35(1)’s mandate of reconciliation as requiring Aboriginal people to accept the unilateral diminution of their rights has been subjected to considerable scholarly critique, which will not be repeated in this paper.²¹ Of relevance for this paper’s trajectory is the fact that then Justice

¹⁸ *Ibid.* at para 73.

¹⁹ *Ibid.* at para 75

²⁰ Dwight Newman, “Reconciliation: Legal Conception(s) and Faces of Justice” in John Whyte (ed), *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Pub., 2008) 80 at p82

²¹ The core critique relates to the fact that the non-Aboriginal reliance or interest is in some instances the direct consequence of Aboriginal rights having historically been denied or ignored. Conceptual and logical concerns are thus raised by historic denial being used to justify the lawfulness of contemporary erosion. See, for example, Asch and Mackem, *supra* note 13, Gordon Christie, “Judicial Justification of Recent Developments in Aboriginal Law” (2002) 17 (2) *Can J.L. & Soc.* 41, John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v British Columbia*, (1997) 37 *Osgoode Hall LJ* 537, John Borrows “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001), 46 *McGill LJ* 615 at para 64. See also Russell Barsh and James Sakej Youngblood Henderson, “The Supreme Court *Van der Peet* Trilogy: Native Imperialism and Ropes of Sand” (1997), 42 *McGill LJ* 993; and Kent McNeil, “How Can

McLachlin expressed disagreement with the approach to s.35(1) which her Chief Justice had articulated.²² In *R v Van der Peet*, she voiced an interpretation of s.35(1), and an understanding of what reconciliation means and requires of the Crown and Aboriginal peoples, which was quite different in several respects.

In particular she found that reconciliation did not require Aboriginal people to cede their rights without consent. She found such a demand – and the role Lamer CJ articulated for courts in approving such decisions in the name of societal reconciliation – were contrary to the goal of reconciliation. She wrote:

As *Sparrow* recognized, one of the two fundamental purposes of s.35(1) was the achievement of a just and lasting settlement of aboriginal claims. The Chief Justice ... correctly notes that such a settlement must be founded on the reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must...find their exercise. The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, *does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.*²³

Justice McLachlin argued that the only lawful limitations on s.35(1) rights were internal ones (ie as defined by the inherent scope or nature of the right), or were external ones that “any property owner or rights user would reasonably expect... if the resource is to be

Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” (1997) 8:2 Constitutional Forum 33.

²² For a detailed analysis of the contrasting approaches to reconciliation of former Chief Justice Lamer and current Chief Justice McLachlin, focusing upon cases prior to 2000, see Kent McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin”, (2003) 2 Indigenous LJ 1-25.

²³ *Van der Peet*, *supra* note 3 at para 310 per McLachlin J in dissent (emphasis added)

used now and in the future”²⁴. On this interpretation, aside from limitations that went to the one external exception of reasonable use, any unilateral act which diminished s.35(1) rights would violate the Constitution, and so of course could not be endorsed by a court.²⁵

Not only did McLachlin J. argue that Lamer CJ’s approach was constitutionally problematic, she also was very clear that the sort of concessions which Lamer CJ believed were necessary to effect reconciliation were not practically necessary:

[T]he right imposes its own internal limit...The government may impose additional limits under the rubric of justification to ensure that the right is exercised responsibly...There is no need to impose further limits on it to effect reconciliation between aboriginal and non-aboriginal peoples.²⁶

So, prior to being appointed Chief Justice, Justice McLachlin arguably held a clear theory of how section 35(1) operated to enable reconciliation. Justice McLachlin positioned the judiciary’s key contribution to reconciliation, as mandated by s.35(1), as that of “recognizing the aboriginal legal entitlement.” She wrote:

The second reason why it is unnecessary to adopt the broad doctrine of justification proposed by the Chief Justice is that other means, yet unexploited, exist for resolving the different legal perspectives of aboriginal and non-aboriginal people. In my view, a just calibration of the two perspectives starts from the premise that full value must be accorded to such aboriginal rights as may be established on the facts of the particular case. Only by fully recognizing the aboriginal legal entitlement can the aboriginal legal perspective be satisfied. At this stage of the process -- the stage of defining aboriginal rights -- the courts have an important role to play.

²⁴ *Ibid* at para 306 per McLachlin J in dissent. Then Justice McLachlin also noted that “future cases may endorse limitation of aboriginal rights on other bases”. (at para 306)

²⁵ *Ibid* at para 315 per McLachlin J in dissent.

²⁶ *Ibid* at para 312 per McLachlin J in dissent.

The manner in which these legal rights and two legal perspectives would then be reconciled with political and social interests was to be through treaty negotiations. To this end, Justice McLachlin wrote:

The process must go on to consider the non-aboriginal perspective -- how the aboriginal right can be legally accommodated within the framework of non-aboriginal law. Traditionally, this has been done through the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. *At this stage, the stage of reconciliation, the courts play a less important role. It is for the aboriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized aboriginal rights.* This process -- definition of the rights guaranteed by s. 35(1) followed by negotiated settlements -- is the means envisioned in Sparrow, as I perceive it, for reconciling the aboriginal and non-aboriginal legal perspectives.²⁷

To summarize these key passages, McLachlin J did not see the role of the Court as actually effecting or creating a state of reconciliation. Rather, the Court's powers under s.35(1) were to recognize the legal entitlements which would inform political negotiations about mutual accommodation, which would in turn support reconciliation through "a just and lasting settlement." Effectively, the judiciary would oversee the reconciliation process, while the substance of how interests and rights were reconciled was a matter of political negotiation and balancing²⁸. *Thus, from her perspective at this point in time, it would appear that the accommodation of non-aboriginal interests, of any recognition that reconciliation may require eroding aboriginal rights, was a political matter to be assessed in a negotiation process.* Aside from the reasonable use restraint described above, infringements could not be unilaterally imposed by the state.

²⁷ *Ibid* at para 313 per McLachlin J in dissent (emphasis added)

²⁸ I specifically thank John Borrows for engaging me in conversations on this point.

This theory, so strongly expressed in 1996, was arguably absent by 1997, when in *Delgamuukw v British Columbia* McLachlin J simply wrote that she concurred with the Chief Justice's set of reasons.²⁹ Chief Justice Lamer had found in *Delgamuukw* that the process of reconciliation could justify state infringement of aboriginal title for a vast array of activities, including the "settlement of foreign populations", the creation of infrastructure, and the exploitation of various resources,³⁰ a rather overwhelming list that suggested that s.35(1) supported a relationship of power and priorities which may be only modestly different than how it was when aboriginal rights were ignored.³¹ Justice McLachlin also participated in the decision from the Court in *Marshall (No 2)*³² which further extended Lamer CJ's approach to infringement as a route for reconciling Aboriginal and treaty rights and interests with those of the general Canadian public. Notably, in all these cases, including both Lamer CJ's and McLachlin's reasons in *Van der Peet*, the Court has been unanimous in stating that reconciliation will only come about through negotiations. For the purposes of this paper, the core distinction arising from *Van der Peet* was differing interpretation of what s.35(1) authorized or required the state to do.

3.Chief Justice McLachlin's court and reconciliation

The first subsection below considers whether former Chief Justice Lamer's approach to infringement, as a necessary corollary to reconciliation, has been endorsed or perpetuated by McLachlin's Court. It does so by examining cases where Aboriginal rights were proven, and so there was cause to consider if an infringing regulation or law was justified. This examination is effectively inconclusive on this point. The second

²⁹ *Delgamuukw*, *supra* note 4 at para 109.

³⁰ *Ibid* at para 161.

³¹ On this point, see James Tully, "The Struggles of Indigeneous Peoples for and of Freedom" in Ardith Walkem and Halie Bruce (eds) *Box of Treasures or Empty Box: Twenty Years of Section 35* (Penticton, B.C.: Theytus Publishing, 2003) 272 at 287. See also Gordon Christie, "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17 (2) *Can J.L. & Soc.* 41 at p. 51-52, where he questions "what constitutionalization has amounted to".

³² *R v Marshall*, [1999] 3 SCR 533, [1999] SCJ No. 66

subsection proposes that McLachlin's Court has developed a theory of reconciliation which essentially displaces the practical relevance of Lamer C.J.'s approach.

3a. Reconciliation and Infringement

Since Beverley McLachlin was appointed Chief Justice, there have only been three cases where Aboriginal or treaty rights were proven to exist, *R v Powley*³³, *R v Morris*³⁴, and *R v Sappier; R v Gray*³⁵, resulting in situations where the Court might have turned to a justification analysis. The Court also took the opportunity to speak to justification in *R v Mitchell*.³⁶ These cases reveal little about whether Chief Justice McLachlin's court will continue to adhere to former Chief Justice Lamer's interpretation of the reconciliation mandate as sometimes requiring and authorizing the erosion of Aboriginal rights for the general social good. As discussed in section 3b., the answer to this question may have come to bear rather reduced significance, given other developments in the reconciliation jurisprudence. Intriguingly, in several instances these decisions resonate in various ways with the interpretation of s.35(1) that Chief Justice McLachlin had proposed in her dissent in *Van der Peet*. These cases are discussed chronologically.

Mitchell involved a claimed right to be exempt from paying taxes when crossing international borders with goods intended for personal consumption or sale to other aboriginal people. In this case, both the majority and the minority decisions found the claimed right was not made out. This finding was a matter of evidence for the majority. However, the minority set of reasons, written by Binnie J., was founded on the claimed right not having survived the assertion of Crown sovereignty – that is, it was ousted pursuant to the rules of sovereign succession.³⁷ Justice Binnie found this conclusion was consistent with enabling reconciliation because:

³³ *R v Powley* [2003] 2 SCR 207, 2003 SCC

³⁴ *R v Morris*, [2006] SCJ No. 59, 2006 SCC 59

³⁵ *R v Sappier; R v Gray* 2006 SCC 54

³⁶ *Mitchell v Canada (Minister of National Revenue – MNR)* 2001 SCC 33, [2001] SCJ No. 33

³⁷ *Ibid* at para 172 per Binnie J for Major J.

[The claimed right] relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community. In my view, reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty.³⁸

This sense of what reconciliation requires, or looks like, resonates with that of former Chief Justice Lamer in *Van der Peet*, given its emphasis upon reconciliation through identifying and promoting what are assumed to be common interests (instead of by defining legal rights and leaving the reconciliation of those rights with various social and political interests to a negotiation process). As noted above, Chief Justice McLachlin, writing for the majority in *Mitchell*, found the claimed right was not made out, and so did not engage in a justification analysis. However, McLachlin CJ did respond briefly to Binnie J's deployment of the doctrine of sovereign succession.

Although stating that she was refraining from commenting upon whether the doctrine of sovereign succession was relevant for defining aboriginal rights, she pointed out that the jurisprudence of the Court had already “affirmed the doctrines of extinguishment, infringement, and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown sovereignty.”³⁹ This statement could be taken to endorse the jurisprudence of her predecessor, with which she had once so vigorously taken issue. Alternately it could be read as merely stating a fact – that the jurisprudence exists and so there is already a route for dealing with the sort of issues raised in the litigation, without bringing in another doctrine.

Two years after *Mitchell*, in *R v Powley*, the Crown attempted to justify legislation which infringed upon Metis Aboriginal rights on the basis of conservation⁴⁰ and administrative

³⁸ *Ibid* 33 at para 164 per Binnie J for Major J.

³⁹ *Ibid* at para 63 (emphasis added) per McLachlin CJ for Gonthier, Iacobucci, Arbour and LeBel JJ.

⁴⁰ *Powley*, *supra* note 6 at para 48.

complexity.⁴¹ However, the conservation argument was based upon a rather scanty factual foundation, and so merited little discussion by the Court, except the observation that if conservation was indeed an issue, that “the Metis would still be entitled to a priority allocation to satisfy their subsistence needs.”⁴² Although there is no suggestion here that the Court would moderate the right for the benefit of the Canadian public, no argument on this point was actually made, so it would be inappropriate to read much into this. The administrative burden argument was, not surprisingly, dismissed as an inappropriate “basis for defeating ... rights under the Constitution of Canada.”⁴³ Having found in this case that there was no lawful ground for denying Metis people the right to hunt, the Court gestured briefly to the work which lay ahead: “In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Metis right to hunt”⁴⁴ We see here something of an echo of McLachlin CJ’s earlier writing – that the court will identify the legal rights, but only negotiation will enable a full understanding of what that right means in the contemporary setting.

In *R v Morris*,⁴⁵ however, the question of whether public interests justify infringement in the name of reconciling Aboriginal rights with public safety concerns was aggressively argued. This case concerned whether a provincial prohibition on night hunting unlawfully infringed a treaty right to hunt “as formerly”, given that the Aboriginal party’s ancestors who had signed the treaty had engaged in night hunting. Unfortunately for the purposes of this paper, the majority judgment did not consider the arguments on justified infringement because they found that the provincial law in question was rendered jurisdictionally inoperative, pursuant to how the division of power engaged the facts of the case and statutory law.⁴⁶ The dissenting judgment, authored by McLachlin C.J. and Fish J, also did not go to the justification analysis. However, we do see the resurgence of some of then Justice McLachlin’s reasoning in dissent in *Van der Peet*.

⁴¹ *Ibid* at para 49

⁴² *Ibid* at para 48.

⁴³ *Ibid* at para 49

⁴⁴ *Ibid* at para 50.

⁴⁵ *Morris supra* note 8.

⁴⁶ *Ibid* at paras 53-55 per Deschamps and Abella JJ for Binnie and Charron JJ.

McLachlin CJ and Fish J found against the Aboriginal claimants not on the basis that a legislated infringement was justified in the name of reconciliation, but because they found that the constitutionally protected right did not extend to the practice at issue, which they had defined as hunting in an unsafe manner.⁴⁷ That is, they based their decision on an interpretation of the right's own internal limits, as defined by the understandings that both the Aboriginal and European signatories would have brought to the treaty table. This approach, of focusing foremost on defining legal entitlement, is the same approach which McLachlin CJ had said would clearly pass constitutional muster in her dissent in *Van der Peet*. It is not insignificant for the objective of reconciliation that this approach also implicitly supports a robust role for indigenous self-regulation and laws in defining the scope of Aboriginal and treaty rights.

The only other case in which a right was proven was *R v Sappier; R v Gray*.⁴⁸ As the Crown did not attempt to argue that its infringing legislation was justified, the Court does not discuss its approach to infringement,⁴⁹ although it does bring up the matter of reconciliation. In a situationally nuanced phrasing of the purpose of s.35(1), Bastarache J wrote that s.35(1)

...is to provide a constitutional framework for the protection of the distinctive cultures of aboriginal peoples, so that their prior occupation of North America can be recognized and reconciled with the sovereignty of the Crown.⁵⁰

So the purpose of s.35(1) is still about reconciliation, but here the manner in which it enables this purpose is framed in terms of granting protection, not sanctioning erosion. Once again, given the brevity of the comment in *Sappier*, it is important not to speculate

⁴⁷ *Ibid* at paras 110, 119, 132 per McLachlin CJ and Fish J for Bastarache J.

⁴⁸ *Sappier*, *supra* note 35

⁴⁹ *Ibid* at para 54-55 per Bastarache J for McLachlin C.J and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. Justice Binnie concurred except on one aspect of how the right in question ought to be defined (at para 74).

⁵⁰ *Ibid* at para 22

too much about what was intended here. However, further insight may arise through the fact that the Court was effectively unanimous in this case in finding that the proper interpretation of the *Van der Peet* test, for identifying Aboriginal rights, had evolved to more closely resemble the approach that had been advocated for by (then) McLachlin J and L'Heureaux-Dube J in their dissenting sets of reasons in *Van der Peet*.⁵¹ This could suggest that more is indeed at play here.

The case also stands out for the robust manner in which the Court defines the claimed right. The scope of the right – to harvest timber from Crown lands for domestic purposes such as home building – will almost definitely result in conflicts with existing Crown practices.⁵² Given the consequences of this definition for industry tree farm license holders and others, governments were effectively put on alert that they cannot let negotiations about the contemporary manifestations of Aboriginal legal entitlements languish.

There is little to be specifically gleaned from the rights cases discussed above regarding how the current Court links governmental authority to infringe Aboriginal rights to its vision of what is required to enable reconciliation, although it has cast considerable doubts on provincial authority to infringe Aboriginal rights.⁵³ We do, however, see considerable development of the concept of reconciliation in a series of other cases that were released in 2004 and 2005. These cases track along a different line and deploy the concept of reconciliation as signaling a dynamic process.⁵⁴

⁵¹ *Ibid* 2006 SCC 54 at paras 33-47.

⁵² Constance MacIntosh, “Developments in Aboriginal Law: The 2006-2007 Term”, (2007) 38 SCLR (2d) 1 at 36-37.

⁵³ See, for example, Kent McNeil, “Reconciliation and Third Party Interests: *Tsilhqot'in Nation v. British Columbia*” (forthcoming), Kent McNeil, “The Metis and the Doctrine of Interjurisdictional Immunity: A Commentary”, in Frederica Wilson and Melanie Mallet (eds) *Metis-Crown Relations: rights, Identity, Jurisdiction and Governance* (Toronto: Irwin Law, 2008) 289-322.

⁵⁴ Eg. Dwight Newman, “Reconciliation: Legal Conception(s) and Faces of Justice” in John Whyte (ed), *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Pub., 2008) 80 at p.85

3b. Foregrounding reconciliation as a process

Chief Justice McLachlin's contemporary theory of reconciliation, and the role of the judiciary in enabling reconciliation, emerges strongly in a pair of decisions which she authored in *Taku River Tlingit First Nation v British Columbia*⁵⁵, and *Haida Nation v British Columbia*⁵⁶. This theory then surfaces to guide the analysis in a set of reasons authored by Binnie J in *Mikisew Cree First Nation v Canada*⁵⁷. There is thematic unity regarding the notion of reconciliation in all three of these decisions. Notably, they are all also cases where one judge wrote for the entire Court. Given this level of unity, it becomes entirely appropriate to speak of Chief Justice McLachlin's court as sharing a theory of reconciliation. As discussed below, *the evolved notion of reconciliation moderates the centrality of the justified infringement analysis as the location for judicial oversight of whether the Crown has acted in a manner which is consistent with the reconciliation process.*

In *Haida Nation*, the Court was asked to speak to whether Crown obligations arose in the context of claimed rights which had not been recognized by the Canadian state or pursuant to a judicial process. (The Court gives such claimed rights the rather problematic label "unproven rights."⁵⁸) The specific question was whether in such situations the Crown was under any unique obligation to acknowledge or address those claims through a process of consultation and accommodation.⁵⁹ The Court's answer, in brief, was that sometimes such procedural and potentially substantive obligations *had* to arise, because, if they did not, reconciliation would not be possible.⁶⁰ Chief Justice

⁵⁵ *Taku River First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, 2004 SCC 74

⁵⁶ *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73

⁵⁷ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388, 2005 SCC 69.

⁵⁸ See discussion in Constance MacIntosh, "Obligations and Contamination" (2009) Sask. L. Rev. (forthcoming)

⁵⁹ *Haida Nation*, *supra* note 56 at para 6 per McLachlin CJ.

⁶⁰ *Ibid* para 33 per McLachlin CJ. Chief Justice McLachlin wrote that unless obligations arose prior to proof, then when "the distant goal of proof is finally reached, the

McLachlin observed that consultation was likely a necessary precondition for reconciliation, because it could “preserve[] the Aboriginal interest pending claims resolution and foster[] a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation.”⁶¹

This approach, to be adopted when claimed rights or “proven” rights⁶² may be at odds with actual or proposed state decisions or laws, has the effect of *displacing the practical relevance* of the justified infringement analysis. Whereas in the face of conflict the *Van der Peet* (and *Sparrow*) approach would ask whether a law is justified in infringing an Aboriginal right given competing public interests, this approach asks whether the law-making or decision-making process which makes infringement a possibility was lawful given the claimed Aboriginal interests. The Court thus interprets s.35(1)’s reconciliation mandate as requiring the state to engage in negotiation about the terms under which a right can potentially be impaired in the name of social, economic or other interests *before* it can expect any judicial endorsement that its ultimate assessment is constitutionally sound. *The significance of the state objective – as the litmus test for whether infringements are constitutional – consequently fades as the judicial focus on constitutionality shifts to scrutinizing the consistency of the process with what is necessary to foster respectful relations.* Presumably, where the process meets constitutional standards and is consistent with the honour of the Crown, then the ultimate Crown decision about how to balance interests will likely pass muster.⁶³ In this way, the Court robustly shifted the role which the state and Aboriginal parties can expect it to play in overseeing the reconciliation process.

Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.” (at para 33).

⁶¹ *Ibid* at para 38 per McLachlin CJ

⁶² In *Mikisew Cree*, *supra* note 7 at para 59, Binnie J observes that in the case of a proposed “taking up” under a treaty, that “it is not correct ... to move directly to a *Sparrow* analysis.” Rather the consultation process must be assessed. The Court will undoubtedly offer further clarification on this point when it hears the appeal in *Little Salmon/Carmacks First Nation v Yukon (Min. of Energy, Mines and Resources)*, 2008 YKCA 13, [2008] YJ No. 55, Leave to Appeal Granted [2008] SCCA 448 (January 29, 2009). This case considers the duty to consult in the context of a modern treaty.

⁶³ E.g. See *Mikisew Cree*, *supra* note 7.

Chief Justice McLachlin’s discussion of reconciliation in *Haida Nation* and *Taku River* resonates somewhat with her reasons in dissent in *Van der Peet*, where she stressed that Aboriginal people’s constitutionalized rights could (in most instances) only be lawfully abrogated by consent – that is, by treaty. In *Haida Nation*, she brings a consonant position forward, reminding the parties that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty.”⁶⁴ By implication, incident-specific judicial decisions about whether or not certain statutes or regulations can lawfully infringe upon a certain right are positioned as playing a marginal role in the reconciliation process. Writing on recent jurisprudence, Mark Walters made this point in a very simple fashion. He wrote: “By ‘reconciliation’, the Court does not mean a technical process of fitting disparate parts together – it is not like reconciling financial accounts.”⁶⁵

Having foregrounded negotiated and consensual agreements, not judicial findings, as the key routes to reconciliation, McLachlin CJ resurrected one of her objections to former Chief Justice Lamer’s approach to infringement in *Van der Peet*. As noted above, she had objected to his approach to infringement because it permitted the Crown to unilaterally erode s.35(1) rights in the name of reconciling those rights with public interests. In *Haida*, she wrote that consultation pending resolution of a claim may be required because “[t]o unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable”⁶⁶ Returning to this practical reading in *Mikisew Cree*, Binnie J described consultation as “key to [the] achievement of the overall objective of the modern law of treaty and aboriginal rights, namely, reconciliation.”⁶⁷ *Reconciliation is centrally achieved not by determining how Aboriginal rights may need to be infringed in the name*

⁶⁴ *Haida Nation*, *supra* note 56 at para 20 per McLachlin CJ.

⁶⁵ Mark Walters, “Constitutionalism and Political Morality: A Tribute to John D Whyte, The Morality of Aboriginal Law”, (2006), 31 *Queen’s LJ* 470 at para 54

⁶⁶ *Haida Nation*, *supra* note 56 at para 27 per McLachlin CJ

⁶⁷ *Mikisew Cree*, *supra* note 7 at para 63 per Binnie J (emphasis added)

of the public good, but by negotiating how to respect the various legal and social interests.

Although the McLachlin Court's vision of reconciliation would in some instances restrain the Crown from acting unilaterally in a way which affected "unproven" Aboriginal rights, this vision does not suggest that the Crown must yield to Aboriginal perspectives on what is the appropriate outcome of the consultation process. Instead, McLachlin CJ repeats at many points in *Haida Nation* and *Taku River* that the ultimate decision about how to proceed in situations of "unproven rights" rests with the Crown, and that the Crown is required to balance societal and Aboriginal interests, which may result in decisions which do not meet the approval of the Aboriginal parties.⁶⁸

Arguably, McLachlin's Court is exercising caution here, to carefully carve out the territory of judicial versus political roles in enabling reconciliation. Once again, this resonates with then Justice McLachlin's approach to the court's proper role in the reconciliation process as articulated in her dissent in *Van der Peet*. As discussed in *Haida Nation*, this approach preserves a robust role for treaties, and ensures that the consequences of the obligation to consult do not result in Aboriginal parties experiencing as fulsome an outcome as they potentially could through treaty negotiations. Such an outcome would be undesirable to McLachlin's Court, because it would be too close to enabling a situation where courts – and not consensual political process – impose terms

⁶⁸ Eg. *Haida Nation*, *supra* note 56 at paras 45, 48, and 50, *Taku River*, *supra* note 55 at para 42. This outcome has been critiqued, as has the pair of decisions for setting up a complicated task with inadequate guidance. For a critique that the cases assert an assimilative pressure upon Aboriginal peoples to accede to Canadian law's categories (and thus deny their own), see Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamukkw and Haida Nation" (2005) 23 Windsor YB Access Just. 17. For a general discussion of advantages and "pitfalls" of this jurisprudence, see Timothy Huyer, "Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation" (March 2006) 21 WRLSI 33. For a discussion of how the cases were applied in the first few years after they were rendered, see Gordon Christie "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBCL Rev 139 at paras 66-129.

for reconciliation (which, of course, would not be a reconciliation at all!)⁶⁹. Nonetheless, the judicial push to define rights through treaties has been critiqued as a form of neocolonial consensual entailment – as the outcome of treaties seems to be Aboriginal people ceding some rights so as to have other rights affirmed, instead of having all existing rights affirmed.⁷⁰ The newly conceptualized reconciliation process may modestly assuage this critique.

The McLachlin Court identifies the reconciliation process – which on a practical level is only marginally about resolving specific clashes, and centrally about enabling processes for finding ways to agree to live together – as perpetual or on-going. This aspect of the Court’s understanding of “reconciliation” is raised as part of a general discussion in *Haida*, and then explicitly applied in *Mikisew Cree*. In *Haida*, McLachlin CJ wrote:

...the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s.35(1) of the *Constitution Act, 1982*.⁷¹

The Court could not have been clearer in signaling that political energies will need to go into reconciling the consequences of how “pre-existing Aboriginal sovereignty” articulate with “assumed Crown sovereignty”⁷² for as long as there are Aboriginal peoples and a Crown in Canada. Writing on how the Court used “reconciliation” in its decisions in *Haida Nation* and *Taku River*, Dwight Newman describes the jurisprudence as transforming s.35(1) “from a static guarantee into a bulwark of a dynamic constitutional process” and “transform[ing] the conception of reconciliation from a

⁶⁹ See Kent McNeil, “Reconciliation and Third Party Interests: *Tsilhqot’in Nation v British Columbia*” (forthcoming), where he observes that such decisions have the effect of recognizing rights, but not reconciling them. On the importance of distinguishing between recognition and reconciliation, see Brian Slattery 2007, *supra* note 11.

⁷⁰ Eg James Tully 2008, *supra* note 11 at p.278

⁷¹ *Haida Nation*, *supra* note 55 at para 32.

⁷² This phrasing is drawn from *Haida Nation*, *supra* note 54 para 20.

description of an end state into a concept that ... shapes a creationary constitutional process.”⁷³ This approach is resonant with that which is advocated for by such political philosophers as James Tully, who writes:

[R]econciliation is neither a form of recognition handed down to Indigenous peoples from the state nor a final settlement of some kind. It is an on-going partnership negotiated by free peoples based on principles they can both endorse and open to modification *en passant*.⁷⁴

The interpretation of reconciliation which is articulated in *Haida Nation*, that reconciliation is a process, with certain tangible markers along the way (like treaties), is aggressively put into play in the reasons for judgment in *Mikisew Cree*. Here the litigation concerned a treaty term which precluded the exercise of certain rights on tracts of land “as may be required or taken up” by the Crown for various purposes.⁷⁵ The Crown decided to take up land for what the Court observed was likely an appropriate purpose given the terms of the treaty.⁷⁶ This was to build a winter road that would cross over treaty land, and join various communities. One group of treaty beneficiaries objected on the ground that they held rights to be consulted and accommodated, due to likely impacts upon their rights to hunt and trap under the Treaty, and that the consultation about these impacts had been inadequate. Among other arguments, the Minister took the position that consultation and accommodation had already taken place, prior to the treaty being signed in 1899, and were reflected in the terms of the treaty itself.⁷⁷ In short, the Crown argued that it had already fulfilled its obligations to honourably effect a reconciliation, and that it could act upon its Treaty right to take up land without further consultation. The Court disagreed.

⁷³ Newman 2008, *supra* note 11 at p85.

⁷⁴ James Tully, 2008, *supra* note 11 at 223. I thank John Borrows for introducing me to this volume.

⁷⁵ *Mikisew Cree*, *supra* note 7 at para 3 per Binnie J.

⁷⁶ *Ibid* at para 60 per Binnie J.

⁷⁷ *Ibid* at para 53 per Binnie J.

In response to the Crown's argument, Binnie J wrote:

[The Crown's position] is not correct... Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chileywan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon.⁷⁸

This decision represents a fine-tuning and clarification of the relationship between reconciliation and treaty-making, which will undoubtedly be further developed when the Court rules on consultation requirements in the context of a modern treaty in *Little Salmon/Carmacks First Nation*.⁷⁹ However, what can fairly be observed thus far is that in the early jurisprudence, as described above, the process of negotiating treaties was described as "the stage of reconciliation".⁸⁰ Here the process of negotiating a treaty is no longer recognized as "*the* stage." Instead, it is an "important stage...but it is only a stage." The consequences of this evolved understanding of the relationship between treaties and reconciliation are considerable. This shift illustrates, with respect, a close attentiveness on the part of the Court to what their prior formulations did or did not effectively signal or clearly enable.

The ability to add nuance, responsiveness and incremental change - in novel situations, or based upon the experience of how reasons have been applied and interpreted (and their practical outcomes) - is key for enabling the common law system to produce just outcomes. Such revisiting and revisioning is highly desirable in this area of law, "given the complexity and sensitivity of the task"⁸¹ required by s.35(1).

⁷⁸ *Ibid* at paras 54-55 per Binnie J.

⁷⁹ *Salmon/Carmacks First Nation*, *supra* note 62.

⁸⁰ *Van der Peet*, *supra* note 3 at para 313 per McLachlin J. in dissent.

⁸¹ Brian Slattery 2007, *supra* note 11 at p.628

In his recent writings about specific aspects of the *Van der Peet* test, and how the Court “has quietly initiated the process of reshaping the test’s basic tenets,”⁸² Brian Slattery makes the following observation:

This evolution in the jurisprudence should come as no surprise. It is a distinctive feature of common law systems to shun absolute principles conceived *a priori* in favour of flexible principles fleshed out in concrete cases. The *Van der Peet* decision was handed down at a time when there was a dearth of judicial authority on the Aboriginal rights recognized in section 35(1). ... While the test served its purpose at the time, inevitably it has needed revision and amendment.⁸³

So, just over a year after the reasons in *Haida Nation* and *Taku River* were released, with their emphasis upon reconciliation as an on-going process, we have a concrete example in *Mikisew Cree* of what the Court meant when it wrote that reconciliation is a process that continues “beyond formal claims resolution”. *A treaty is not a final accommodation of Aboriginal and Crown interests, but rather a rededication that the Crown will continue to reconcile conflicting interests when its activities or interests may impinge upon those of Aboriginal peoples* (moderated, of course, by the actual terms of the treaty). The promise of “reconciliation” of s.35(1) is a promise to engage in processes of attempting to come to consensual agreements about how to live together, where those agreements are not final but rather a template for managing good relations, which is to be revisited as circumstances change. However, jurisprudential findings do not always support the formation of such positive processes or relationships of respect.

4. Unreconciled tensions

Several of the decisions rendered by McLachlin’s Court have referred in various ways to the need to enable a “just and lasting settlement”, a phrase which, following *Mikisew*

⁸² *Ibid* at p. 598.

⁸³ *Ibid* at p. 628.

Cree, could fairly be re-cast as a “just and lasting process”. Decisions such as *Haida Nation*, *Taku River* and *Mikisew Cree* clearly indicate that the Court contemplates the formation of relationships of mutual respect, as well as processes for maintaining and refreshing those relationships, as pivotal for realizing this goal.⁸⁴ The jurisprudence discussed above supports this goal in several ways. One core route is by requiring the Crown and Aboriginal peoples to engage in political dialogue through the consultation and accommodation process. As a result, no party should take the other party by surprise, no party should experience a sense of their interests being denigrated or ignored. This is a very challenging goal that the Court has set out to achieve, given the history of relationships and power differentials between the parties.

The challenge is made all the harder by the fact that not every matter that impacts upon the Crown-Aboriginal relationship in a significant way is embraced by the scope of s.35(1). The filter for identifying what falls under s.35(1) – and so the content which Aboriginal people are deemed to *a priori* have the legal right to carry into negotiations, or be consulted about – is fairly narrow. For example, rights to the land (ie. what falls from Aboriginal title) only attract s.35(1)’s reconciliation imperative if Aboriginal claimants can show, or have a chance of showing pursuant to the *Haida* spectrum⁸⁵, exclusive occupation at the time of Crown sovereignty.⁸⁶ For other Aboriginal rights to be embraced within the reconciliation framework, the rights must be shown to be (or shown to be likely to be) “integral to the distinctive culture” of the Aboriginal people in question.⁸⁷

This creates a tension, as many matters of vital importance to fostering Aboriginal-Crown relations, to remedying past and on-going injustices, fall outside of this framework. This is not to suggest that the courts should be everywhere – their role is restrained to when they are asked to adjudicate, and even then the courts may determine that their powers do

⁸⁴ Reconciliation and practices of mutual respect are explicitly tied together by Binnie J in *Mikisew Cree*, *supra* note 7 at para 49.

⁸⁵ *Haida Nation*, *supra* note 56 at paras 35-38.

⁸⁶ *Delgamuukw*, *supra* note 4 at para 143

⁸⁷ *Van der Peet*, *supra* note 3

not extend to resolving the matter at issue. Reconciliation is ultimately a political relationship, and turns on governmental – not judicial – action.⁸⁸ However, *when these instances arise in the courtroom, and the court finds it has jurisdiction to adjudicate, the rule of law may in practice undermine and not facilitate the relationships of historically responsive mutual respect which logically must be co-constituted with relationships of reconciliation.*

This tension is illustrated in two recent decisions of the McLachlin Court, *Ermineskin Indian Band and Nation v Canada*⁸⁹ and *McDiarmid Lumber Ltd. v God's Lake First Nation*.⁹⁰ Both of these cases turned, in part, on the interpretation of the *Indian Act*. This statute controls many facets of Aboriginal peoples' lives, and dictates aspects of their relationship with the federal government, both in its executive and legislative capacity.⁹¹ However, its terms have largely been imposed unilaterally by the federal government. This creates considerable practical problems for relationship-building. These cases, and what they represent for enabling reconciliation, are described below. In the following section, the paper will turn to how the Court has identified sources of authority for the judiciary to legitimately extend reconciliation practices, without overstepping the judicial/political divide, to try to ensure that we are not left with an untenable situation.

In *God's Lake First Nation*, an Aboriginal community had entered into an agreement (known as a "CFA") with the federal government to be transferred the responsibility for administering and delivering some specific social services and community health programming. CFAs are a common element of the current federal initiative to enable self-government through devolution protocols. Under CFAs, the federal government

⁸⁸ I am particularly grateful to Michael Asch for conversations on the distinctions between the governmental and judicial role in reconciliation.

⁸⁹ *Ermineskin Indian Band*, *supra* note 9.

⁹⁰ *McDiarmid Lumber Ltd. v God's Lake First Nation* 2006 SCC 58, [2006] 2 SCR 846

⁹¹ For a careful discussion of the distinctions between the executive and legislative branches of the government, and how these branches are pulled into relationships with Aboriginal peoples in different ways, see Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) at 316-322.

continues to finance, to some degree, the devolved programming.⁹² God's Lake First Nation also had a large debt to a construction supply company. This company brought an action to seize most of the funds that Canada had provided to the First Nation for it to administer its programming.

The Crown and the First Nation together argued that the CFA funding was shielded from garnishing pursuant to section 90(1)(b) of the *Indian Act* which embraces "personal property" that is "given" to "a band under a treaty or an agreement between a band and Her Majesty."⁹³ Based upon her reading of s.90(1)(b), and the 1990 precedent of *Mitchell v Peguis Indian Band*,⁹⁴ the Chief Justice found the CFA funding was not shielded. Rather, writing for a 6-3 majority, she concluded that when these statutory provisions were drafted in 1951, Parliament had only intended to shield treaty property, and property rendered under an agreement which was ancillary to a treaty.⁹⁵ Justice Binnie, writing the dissenting judgment, would have interpreted s.90(1)(b)'s reference to "agreement" to embrace the property provided under any Crown-Aboriginal agreement which "reflects the responsibilities assumed by the Crown" under s.91(24).⁹⁶

The Chief Justice's interpretation was grounded in Parliamentary intention at the time the statutory terms were enacted in 1951 to promote "greater self-government and participation in economic enterprise"⁹⁷, and a close reading of statutory language as guided by the *ejusdem generis* rule. The dissenting interpretation was driven by a

⁹² For specific details on funding programming which has been devolved under a health transfer initiative, see Constance MacIntosh, "Envisioning the Future of Aboriginal Health under the Health Transfer Process" (2008) Health LJ 67. For details on funding capital projects, such as water treatment facilities, see Constance MacIntosh, "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nation Reserves" (2008) 39 R.D. Ottawa L.R. 63.

⁹³ *Indian Act*, RSC 1985, c.I-5, s 90(1)(b).

⁹⁴ [1990] 2 SCR 85

⁹⁵ *God's Lake First Nation*, *supra* note 88 at paras 26, 28, 46-68 per McLachlin CJ for Bastarache, LeBel, Deschamps, Charron and Rothstein JJ.

⁹⁶ *Ibid* at para 87 per Binnie J for Fish and Abella JJ.

⁹⁷ *Ibid* at para 51 per McLachlin CJC for Bastarache, LeBel, Deschamps, Charron and Rothstein JJ.

concern with what Justice Binnie described as “the realities of life on most reserves”.⁹⁸ In particular, Binnie J argued that any band facing debts “would be better off letting the government provide services directly to the reserve rather than attempting to provide the public services themselves through ... funding” to prevent the funds from being intercepted by creditors.⁹⁹ And so, Binnie J argued that in practical terms the Chief Justice’s interpretation may ironically result in only the bands that are already prosperous and solvent being able to participate. This division arguably continues the divergence in approaches between these two justices that was evidenced in their contrary sets of reasons in 1998 *Union of New Brunswick Indians v New Brunswick (Minister of Finance)*.¹⁰⁰ The split in that case could similarly be characterized as arising on the question of whether courts must interpret statutory terms according to original Parliamentary intention, or if courts are to interpret terms in accordance with what is practically required to currently enable the background Parliamentary purpose.

This case is not brought forward here to suggest that the matters under consideration ought to have fallen under s.35(1), or to offer an analysis about whether the case was properly decided.¹⁰¹ Rather, the case is raised because it may impact upon possibilities for reconciliation. This decision rendered funding arrangements highly vulnerable across the country, and resulted in the federal government paying off the private debt of God’s Lake First Nation and then likely having to provide the CFA funding a second time.

According to the majority, core principles of statutory interpretation – adhering to the rule of law – demands this outcome. However, this outcome effectively erodes the work that the federal government and First Nations had themselves done towards figuring out how to reconcile Aboriginal interests in self-governing given their various economic situations. The Court can tell the government and Aboriginal parties what the effect of

⁹⁸ *Ibid* at para 82 per Binnie J for Fish and Abella JJ.

⁹⁹ *Ibid* at para 94 per Binnie J for Fish and Abella JJ.

¹⁰⁰ *Union of New Brunswick Indians v New Brunswick (Minister of Finance)*, [1998] 1 SCR 1161, [1998] SCJ No 50.

¹⁰¹ For an analysis of this case, see Constance MacIntosh, “Developments in Aboriginal Law: The 2006-2007 Term” (2007), 38 SCLR (2d) 1 at 5-18.

the law is, but it (rightfully) does not have the power to enact the legislation to enable redress, to overcome adverse consequences to Crown-Aboriginal relationships.

The *Ermineskin* case is far more problematic in terms of eroding the relationships which are required between Aboriginal peoples and the Crown if the reconciliation process is to be supported. This decision, released in the spring of 2009, largely turned on the interpretation of the interplay of several statutes, both with themselves and with the common law. One question which the court had to address was what responsibilities the Crown had when accruing royalties on behalf of First Nations following the surrender of Treaty-based reserve lands for oil and gas production. Among other points, the First Nations argued that the Crown had a fiduciary duty to invest the royalties on their behalf. The Crown maintained that although it may be a fiduciary, its duties were restricted by legislation to protecting the funds from erosion and paying a reasonable rate of interest.¹⁰² The Court concluded that federal legislation (the *Financial Administrative Act* and the *Indian Act*) required the Crown to borrow against the royalties and invest them for its own benefit¹⁰³ while the *Indian Act* made it unlawful for the Crown to invest the funds for the First Nation's benefit.¹⁰⁴ The Court thus determined that the federal legislation in question exonerated the Crown, finding:

A fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty. The situation which the bands characterize as a conflict of interest is an inherent and inevitable consequences of the statutory scheme.¹⁰⁵

Although clearly not its intention, the outcome of this decision effectively undermines the development of conciliatory relationships through its finding that Parliament can legitimately and unilaterally set terms for Crown responsibilities to First Nations which are far below that of a fiduciary or trustee at common law, and that Parliament can create an explicit conflict of interest between the Crown and First Nations as long as it passes

¹⁰² *Ermineskin Indian Band*, *supra* note 9.

¹⁰³ *Ibid* at para 127

¹⁰⁴ *Ibid* at para 122.

¹⁰⁵ *Ibid* at para 128

laws that sanction that conflict. There is a striking contrast here between the nature of the relationship which Aboriginal people can expect to have with the Crown and the Crown in Parliament when s.35(1) is clearly at play, and the relationship when it is not. The legal justification for such a distinction can be easily laid out, but that is not the point. The point, rather, is that the separation between the executive and legislative branches of government may not be perceived as a legitimate by Aboriginal peoples who seek to be involved in a relationship with the government. One cannot realistically expect Aboriginal peoples to trust in a relationship when the other party is only expected to show respect or recognize that a relationship is at play when acting with one hat on, and not the other.

Most painfully in terms of the broader reconciliation agenda, although the *Indian Act* authorizes the expenditure of funds held on behalf of a band “for the benefit of the band”, there is no suggestion in this decision that the meaning of that legislated phrase would best be determined in consultation with a band. Certainly such consultation was not a norm in 1951 when it was assumed that the Crown best knew how to take care of its ward. But the ward relationship has long since been officially discarded.

In the opening passage of *Mikisew Cree First Nation*, Binnie J wrote the following about the relationship between reconciliation and the general context in which reconciliation must take place:

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect

inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.¹⁰⁶

The decisions in *God's Lake First Nation* and in *Ermineskin*, about the consequences of legislation for defining the terms of relationships and responsibilities – between the Crown and First Nations, between the Crown and First Nations and private parties – will likely increase the size of the shadow which Binnie J was referring to. Such decisions and relationships are part of the context which fuels grievances and which – to borrow Binnie J's phrasing - may be as destructive of the process of reconciliation as has been the denial of the obligations clearly arising out of s.35(1). Justice Binnie further observed that “unilateral Crown action ...is the antithesis of reconciliation and mutual respect.”¹⁰⁷ Although softened by rules of interpretation,¹⁰⁸ the *Indian Act*, as the product of unilateral Parliamentary action, is presumably open to the same critique.¹⁰⁹ Justice Binnie's comment, once again, conceptually resonates with one of the core principles that animated Chief Justice McLachlin's rejection of former Chief Justice Lamer's approach in her dissenting reasons in *Van der Peet*.¹¹⁰ Although Binnie J was writing in the context of a treaty claim, and (then) McLachlin J was writing about a claimed s.35(1) Aboriginal right, the conclusion about the impact of unilateral Crown action for the Crown-Aboriginal relationship – as a matter of fact – holds true in other contexts as well.

What is the judiciary's role in this? They cannot – and must not – do violence to statutory law, or otherwise appropriate legislative jurisdiction by reading statutes to say something which they do not. Writing about the limited role of courts in enabling reconciliation, Justice Vickers observed:

¹⁰⁶ *Mikisew Cree*, *supra* note 7 at para 1 per Binnie J.

¹⁰⁷ *Ibid* at para 49 per Binnie J (emphasis added)

¹⁰⁸ The *Indian Act*'s terms are to be “liberally construed and doubtful expressions resolved in favour of the Indians” *Nowegijick v The Queen*, [9183] 1 SCR 29 at p.36, affirmed in *Mitchell*, *supra* note 35 at p 142-43 (per La Forest J) and p 107-8 (per Dickson CJ).

¹⁰⁹ I thank Kent McNeil for his insights on thinking through the consequences of government's division into an executive and legislative branch for these matters. All errors remain, of course, my own.

¹¹⁰ *Van der Peet*, *supra* note 3 at para 310 per McLachlin J (in dissent).

In an ideal world, the process of reconciliation would take place outside the adversarial milieu of a courtroom. This case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process. Despite this fact, the question remains: how can this Court participate in the process of reconciliation between Tsilhqot'in people, Canada and British Columbia in these proceedings?¹¹¹

McLachlin's Court has signaled awareness of this complex situation, of the broader context in which the judiciary is being asked to make its decisions.

The next section shows how Chief Justice McLachlin's Court has drawn upon *reconciliation practices* – as practices that support relationship building – in cases where s.35(1) was not at play. Her Court has signaled that the reconciliation mandate is not contained by s.35(1), but exists more broadly. As a result, in some instances, the Court has identified room for legitimately allowing the judiciary to provide some relief to the tensions described above without transgressing the judicial/political divide.

5. Reconciliation practices outside of s.35(1) situations

In this section, this paper illustrates that the Court has, with respect, left the question of whether and how the goal of reconciliation is legally relevant in situations which do not directly engage s.35(1) somewhat open-ended. In the two cases discussed above, the fact that there is a relationship which needs advancing is simply not raised, and the outcome is arguably potentially destructive of the reconciliation process. However, in a few decisions, *the Court's reasons have indicated that reconciliation is a permeating practice, and is not contained by situations where s.35(1) rights are squarely at issue.* A

¹¹¹ *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700, [2008] 1 CNLR 112 at para 5. For a careful analysis of how Justice Vickers defines judicial versus political roles, and how they play out in addressing complex interests, see Kent McNeil, "Reconciliation and Third Party Interests: *Tsilhqot'in Nation v British Columbia*" (forthcoming).

level of open-endedness arises here because we do not yet know the extent of such situations.

A hint of this position arises in *Mitchell*, where in her set of reasons the Chief Justice observed that out of the Crown assertion that “sovereignty over the land, and ownership of its underlying title[] vested in the Crown... [there] arose an obligation to treat aboriginal peoples fairly and honourably...”¹¹² Although the context was the assessment of a s.35(1) claim, this statement does not suggest that the obligation to act honourably only arises when rights claims are at issue. Rather, it arises out of the fact that the Crown asserted it was sovereign. The Chief Justice is more explicit in *Haida Nation*. Here she invoked a principle that has been articulated in a number of decisions, going back to at least 1996.¹¹³ She wrote that “the honour of the Crown is always at stake in its dealings with Aboriginal peoples”.¹¹⁴ *She then describes how acting with honour is a precondition for reconciliation:*

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown"¹¹⁵

Once again, although these comments are made in a case about a s.35(1) based claim, *it is clear that this requirement to act with honour so as to enable reconciled and respectful relationships does not arise exclusively as a result of s.35(1) being enacted, nor is it contained by matters recognized by s.35(1)*. This is expressly indicated by the example which McLachlin CJ draws upon to elucidate her point. Making reference to a non s.35(1) case in her next paragraph, McLachlin CJ writes:

¹¹² *Mitchell*, *supra* note 35 at para 9

¹¹³ Chief Justice McLachlin specifically cites *R v Badger*, [1996] 1 SCR 771 at para 41 and *R v Marshall*, [1999] 3 SCR 456.

¹¹⁴ *Haida Nation*, *supra* note 56 at para 16.

¹¹⁵ *Ibid* at para. 17

The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v Canada*, 2002 SCC 79...¹¹⁶

Thus the requirement to act with honour clearly extends reconciliation practices beyond the ambit of s.35(1) cases. Sometimes these actions will take the form of duties which, although having nothing to do with defining or accommodating Aboriginal or treaty rights, are nonetheless part of ensuring that reconciliation does not become “a distant legalistic goal”¹¹⁷

Reflecting back upon the complex litigation and multiple issues that were brought up in *Ermineskin*, one is left wondering what this Court would have decided if it was squarely asked to contemplate the relationship between the obligations of honour and the legislation that drove the result. In particular, whether in enacting the series of laws that drove the Court’s findings (under the authority of s.91(24) and other federal heads of power), the Crown in Parliament’s unilateral exercise of control over the interests of Aboriginal people was sufficient to invoke fiduciary responsibilities regarding permissible terms¹¹⁸. Alternately, whether the unilateral exercise of legislative power was sufficient to raise concerns about Parliamentary enactments eroding the possibility of the Crown being able to act with honour. The Court may be expressly pressed to speak to such questions in the future, *about what normative doctrines may restrain or guide Parliamentary authority when acting pursuant to the powers recognized by s.91(24). It would not be inconsistent with existing jurisprudence to find that the constitutional imperative to strive toward reconciliation practices permeates and guides most aspects of*

¹¹⁶ *Ibid* at para 18

¹¹⁷ *Ibid* at para 33.

¹¹⁸ Eg. Under the terms of *Wewaykum Indian Band v Canada* [2002] 4 SCR 245, 2002 SCC 79. For an analysis of when Parliament became subject to fiduciary obligations, see Kent McNeil, 2001, *supra* note 91 at 316-322.

Crown-Aboriginal relationships, and so introduces, at the least, elements of restraint into how this power is legitimately exercised whenever it is exercised.

There is one clear example of what it could mean to broadly infuse the reconciliation mandate into Crown-Aboriginal relations in the minority decision in *R v Kapp*¹¹⁹, written by Bastarache J. His set of reasons radiate with concern about how the judiciary can support the broader reconciliation project, and particularly reflect the fact that, at the end of the day, reconciliation depends upon a negotiated political relationship that is supported by Canadian and Aboriginal governments. Although concurring in the result with the majority that the federal government could issue commercial fishing permits to First Nation organizations to engage in exclusive fishing openings without offending the Charter rights of non-Aboriginal fishers, Bastarache J.'s path of reasoning was a novel one.¹²⁰ He resolved the claim by mobilizing s.25 of the *Charter*. His reasons were not endorsed by the majority, who signaled that they may have interpreted s.25 quite differently.¹²¹

Nonetheless, Bastarache J's decision provides the first fulsome treatment of s.25 by a justice of the Supreme Court of Canada – and so will be an important touchstone for subsequent decisions.¹²² This provision states that Charter rights guarantees “shall not be construed to abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal people of Canada” including those recognized by the Royal Proclamation of 1763 and those that exist or may be acquired by way of land claims agreements. Justice Bastarache concluded that this provision “protects federal, provincial and aboriginal initiatives that seek to further interests associated with indigenous difference from Charter scrutiny.”¹²³ These sorts of initiatives include “[l]egislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests

¹¹⁹ *Kapp*, *supra* note 9

¹²⁰ *Ibid* at paras 76-77 per Bastarache J.

¹²¹ *Ibid* at paras 62-65 per McLachlin CJ and Abella J

¹²² For commentary on *Kapp*, see Constance MacIntosh, “Developments in Aboriginal Law, The 2008-2009 Term” in (2009) SCLR (forthcoming)

¹²³ *Kapp*, *supra* note 9 at para 103 per Bastarache J.

associated with aboriginal culture, territory, sovereignty, or the treaty process.”¹²⁴ That is, legislation which would most likely be enacted pursuant to the authority of s.91(24).

Justice Bastarache’s conclusion bears repeating. He found the constitutional intention was that legislation that protected aboriginal interests (not just matters which fit through s.35(1)’s filter) was shielded from Charter scrutiny. There is an intriguing resonance here with Binnie J’s dissent in *God’s Lake*, where he would have found that all agreements that reflected s.91(24) responsibilities would have been shielded from garnishment and taxation.¹²⁵

Justice Bastarache’s interpretation of s.25 arose from his reading of the Court’s unanimous reconciliation jurisprudence, of *Haida Nation* and *Taku River*. It also follows from the reasons which Bastarache J wrote in *Sappier*, for the Court on this point, that s.35(1) requires aboriginal cultures to be protected if reconciliation is to be achieved. Justice Bastarache also found support for this outcome in the admonitions in *Delgamuukw* and *Sparrow* that the Crown must negotiate in good faith.¹²⁶ On a practical level, *Haida Nation* and *Taku River* require the Crown to accommodate Aboriginal claims prior to rights being proven. Logically, if such accommodation agreements are subject to private challenges on Charter grounds, then the Aboriginal party would be forced to formally prove their right, after all, for the accommodation to remain in place, and the reconciliation which the negotiated accommodation represents would likely be undermined.

Importantly, Bastarache J’s approach would shield not just agreements that address matters that could be proven to be aboriginal rights under s.35(1), *but would embrace other, broader issues, ones which need to be addressed in agreements which are not just preliminary to a treaty, but are part of forming a treaty relationship*. In Bastarache J’s words, “s.25 reflects this imperative need to accommodate and reconcile aboriginal

¹²⁴ *Ibid* at para 103 per Bastarache J.

¹²⁵ *God’s Lake First Nation*, supra note 88 at para 87 per Binnie J for Fish and Abella JJ (in dissent)

¹²⁶ *Ibid* at para 106 per Bastarache J.

interests”.¹²⁷ In finding that s.25 operates not unlike the “notwithstanding clause”, Bastarache J is arguing for judicial deference to negotiated political decisions in this complex arena of working through political, legal, social and economic interests.

It is in Bastarache J’s third last paragraph that he most explicitly ties all the threads together. He writes that “Section 25 is a necessary partner to s.35(1); it protects s.35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation.”¹²⁸

It is this final argument which may prove most persuasive to his colleagues on Chief Justice McLachlin’s bench. McLachlin’s Court has demanded that parties adopt a practical and meaningful approach to s.35(1)’s manifestations, because without an eye on practicalities one can only achieve reconciliation in legal theory, not in lived relationships.¹²⁹ This approach was perhaps most strongly articulated in *R v Sappier; R v Gray*¹³⁰, but was also present in *Marshall*¹³¹ and *Haida*¹³², as well as in Chief Justice Lamer’s Court in *Delgamuukw*¹³³. Justice Bastarache’s observations in *Kapp* are immensely practical ones, given the complexities involved in enabling a consensual and treaty-based relationship between Aboriginal peoples and the Crown. In an set of reasons which are not unlike those of then Justice McLachlin in *Van der Peet*, in terms of their passion, clarity, and emphasis upon legal principle, Bastarache J has pointed to another key route for the judiciary enabling and supporting the process of reconciliation and the political development of relationships of mutual respect.

¹²⁷ *Ibid* at para 106 per Bastarache J.

¹²⁸ *Ibid* at para 121 per Bastarache J.

¹²⁹ For a discussion of the Court’s emphasis upon interpreting rights to be meaningful in their contemporary form, and to approaching the adjudication process with an eye to practicalities, see Constance MacIntosh, “On Obligations and Contamination: The Crown-Aboriginal Relationship in the Context of Internationally-Sourced Infringements” (2009) Sask. L Rev (forthcoming)

¹³⁰ *Sappier*, *supra* note 35 at para 49

¹³¹ *Marshall*, *supra* note 5 at para 52

¹³² *Haida Nation*, *supra* note 56 at para 31 and 63

¹³³ *Delgamuukw*, *supra* note 4 at paras 90 – 108.

7. Concluding Comments

McLachlin's Court has drawn upon the purpose of s.35(1) – reconciliation – to transform many aspects of Crown-Aboriginal relations, bringing in changes and challenges which have brought the parties into conversation in a manner which has likely not been experienced for centuries in some parts of the country. Holding true to Chief Justice McLachlin's basic premises in *Van der Peet*, her Court has re-emphasized that the reconciliation process is one that largely takes place outside of the courtroom, and that judicial decisions cannot be expected to create the terms of reconciliation for the parties, although courts will marshal this creationary constitutional process to some degree when asked to do so.¹³⁴

Although the purpose of 35(1) “is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty,”¹³⁵ given the broader context in which Crown-Aboriginal relations take place, this purpose likely needs bolstering from outside the spectrum of s.35(1) rights considerations if it is to be realistically attainable. The Court has signaled a certain level of sensitivity to this matter, and the Court has – unanimously – identified somewhat open-ended conceptual points that potentially grant the judiciary considerable room to bring in the norm of reconciliation, while simultaneously taking care not to overstep the political/judicial divide. Undoubtedly, the Court will continue to develop its reconciliation jurisprudence in response to changing situations, experience, and practical imperatives.

¹³⁴ These conclusions are clearly present in the recent decision of Justice Vickers, in *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700, [2008] 1 CNLR 112. See, in particular, paras 1357-1368.

¹³⁵ *Taku River*, *supra* note 55 at para 42 per McLachlin CJ.