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The Reconciliation Doctrine in the McLachlin Court: From a "Final Legal Remedy" to a "Just and Lasting" Process

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A. 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, section 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 section 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 section 35(1) in terms of Aboriginal rights,[3] title rights,[4] and treaty rights[5]. Since 2000,

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1 Gordon Christie, "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17:2 C.J.L.S. 41 at 41 [Christie, "Judicial Justification"].

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

3 See *ibid.*; *R. v. Van der Peet*, [1996] S.C.J. 77, [1996] 2 S.C.R. 507 [*Van der Peet*]; and *R. v. Gladstone*, [1996] 2 S.C.R. 723, [1996] S.C.J. No. 79 [*Gladstone*].

4 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

5 See *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall (No. 2)*]; *R. v. Sundown*, [1999] 1 S.C.R. 393; and *R. v. Sioui*, [1990] S.C.J. 48, [1990] 1 S.C.R. 1025.

McLachlin's Court has rendered decisions addressing a broad scope of matters where section 35(1) has been squarely at issue. These have included decisions regarding what section 35(1) means for the rights of Metis people[6] 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 section 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 upon which this paper focuses is one that runs through much of the Aboriginal rights jurisprudence over the last ten years: the idea of "reconciliation."[10] However, the way in which the term is deployed, the values that inform it, the logic that drives it, and the conclusions that it supports have shifted and are continuing to shift. There are considerable differences between how this term was used at the time of Lamer C.J., its meaning for the bench under McLachlin C.J., and the new role it has evolved to take on most recently. In particular, reconciliation has come to be understood as requiring dynamic processes of negotiation, instead of just serving as a normative justification for infringing Aboriginal rights. This article does not analyze whether the Court's understanding of reconciliation resonates with that of others nor address what others have argued ought to be included in trying to affect reconciliation.[11] Rather, the paper seeks to explore what the

6 *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 [*Powley*], and *R. v. Blais* 2003 SCC 44.

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

8 See *R. v. Morris* 2006 SCC 59 [*Morris*].

9 See *Ermineskin Indian Band and Nations v. Canada* 2009 SCC 9, [2009] S.C.J. 9 [*Ermineskin*], and *R. v. Kapp* 2008 SCC 41, [2008] S.C.J. No. 42 [*Kapp*].

10 See Dwight Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v British Columbia*" (2008) 41 U.B.C.L. 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 223–56 [Tully]; Mark Walters, "Constitutionalism and Political Morality: A Tribute to John D. Whyte, The Morality of Aboriginal Law" (2006) 31 Queen's L.J. 470, esp. at paras. 54–83 [Walters, "Constitutionalism"]; Newman & Schweitzer, *ibid.*; Christie, "Judicial Justification," above note 1; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1997) 37 Osgoode Hall L.J. 537 [Borrows, "Sovereignty's Alchemy"]; and John Borrows "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L.J. 615 at para. 64 [Borrows, "Domesticating"], 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

RÉSUMÉ

On réfère constamment à la « doctrine de la réconciliation » lorsqu'il est question de décisions relatives à des revendications de droits ancestraux autochtones. Cependant, la manière dont cette doctrine est appliquée a considérablement évolué, en particulier depuis la nomination de Beverley McLachlin en qualité de juge en chef. Dans cet article, on fait le recensement de ces transformations en illustrant la manière dont cette doctrine est de moins en moins invoquée à titre de justification normative pour violer les droits ancestraux. À l'heure actuelle, elle joue plutôt le rôle de processus dynamique pour négocier des relations empreintes de respect, et a démontré son bien-fondé lorsqu'il s'agit d'étayer ce type de relations en tant que relations continues. Par conséquent, la doctrine de réconciliation remaniée modifie la centralité de l'analyse de la violation justifiée à titre de lieu de la surveillance judiciaire du pouvoir discrétionnaire de la Couronne. Dans ce chapitre, on analyse en outre les tensions entre la doctrine et le principe de la primauté du droit, de même que la manière dont la Cour de madame le juge McLachlin a laissé entendre que la doctrine de la réconciliation constitue une pratique qui s'infiltre dans une vaste gamme d'interactions entre la Couronne et les Autochtones, et pas seulement celles qui sont visées par le paragraphe 35(1).

Court is signalling or intends when it draws upon the language of reconciliation. As such, the article tracks a complex storyline which is marked with both internal debate and change, 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 the second section, which identifies the early deployments of the term "reconciliation" and in particular draws attention to distinctions between Lamer C.J.'s understanding and use of "reconciliation," and those of McLachlin C.J. in the years before she was named chief justice. These distinctions

a front for assimilation." See also Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) S.C.L.R. (2d) 595 [Slattery, "Generative Structure"]; Dwight Newman, "Reconciliation: Legal Conception(s) and Faces of Justice" in John Whyte, ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008) at 80–87 [Newman, "Reconciliation"]; and Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous L.J. 1–25 [McNeil, "Reconciliation"].

set a comparative baseline for the rest of the paper. The third section then turns to the decisions rendered by the Court since Beverley McLachlin was appointed chief justice. The third section is divided into two subsections. The first subsection considers whether Lamer C.J.'s approach to reconciliation, as a state of compromise where Aboriginal rights may need to yield to the common good, has been embraced by the current bench. It also identifies how elements of McLachlin C.J.'s approach to reconciliation during the 1990s, surface in various forms, either in her reasons or those of other members of the Court. The second subsection considers how McLachlin's Court casts "reconciliation" as a dynamic process, demanding the establishing of relationships that 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-section 35(1) matters (such as when legal claims turn on statutory interpretation). The fifth section suggests that McLachlin's Court has created some room for reconciliation interests to infuse Aboriginal-Crown law more generally.

B. ORIGIN STORIES: EARLY DIFFERENCES REGARDING THE MEANING OF RECONCILIATION AND THE JUDICIAL ROLE IN ENABLING IT

I begin this analysis of "reconciliation" by briefly sketching out its judicial history. In 1990, Dickson C.J., writing with LaForest J., first drew upon the term "reconciliation" in the context of section 35(1) in *Sparrow*. Here the term was mobilized to explain what section 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 section 35(1) mandated governmental restraint. Previously discretionary exercises of power now had to be reconciled with governmental duties or obligations.[13] When Lamer C.J. addressed section 35(1) some six

12 *Sparrow*, above note 2 at para. 62.

13 For a careful discussion of the *Sparrow* decision and its theoretical logic, see Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498 [Asch & Macklem]. For a discussion of how the content

years later in 1996,[14] he too identified its purpose as being realized through reconciliation. His interpretation, although adopted by the majority of the Court, developed the reconciliation doctrine in a fashion that sparked disagreement. As discussed below, McLachlin J. (as she then was) 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.

In an oft-cited passage in *R v. Van der Peet*, Lamer C.J. 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.[15]

This passage affirms that section 35(1) is interpreted to mandate reconciliation, but suggests a changed emphasis on 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."[16] 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."[17] He addressed this matter

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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.

14 *Van der Peet* and *Gladstone*, above note 3.

15 *Van der Peet*, *ibid.* at para. 31, Lamer C.J.C.

16 *Ibid.* at para. 49, Lamer C.J.C.

17 *Ibid.* at para. 31, Lamer C.J.C.

in one of the companion cases to *Van der Peet—R v Gladstone*.[18] After first asserting that "limits" on Aboriginal rights in furtherance of objectives "of sufficient importance to the broader community" are "a necessary part of reconciliation,"[19] 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.[20]

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."[21] Interpreting section 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.[22] Of relevance for this paper is the fact that McLachlin J. (as she then was) expressed disagreement with the approach to section 35(1) which her chief justice had articulated.[23] In *Van der Peet*, she voiced an interpretation of section 35(1), and an understand-

18 *Gladstone*, above note 3. The reasons in *Gladstone* and *Van der Peet* were delivered on the same day, 21 August 1996.

19 *Ibid.* at para. 73.

20 *Ibid.* at para. 75.

21 Newman, "Reconciliation," above note 11 at 82.

22 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 & Macklem, above note 13; Christie, "Judicial Justification," above note 1; Borrows, "Sovereignty's Alchemy," above note 11; and Borrows, "Domesticating," above note 11 at para. 64. See also Russell Barsh & James Sakej Youngblood Henderson, "The Supreme Court *Van der Peet* Trilogy: Native Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993, and Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8:2 Const. Forum Const. 33.

23 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 McNeil, "Reconciliation," above note 11.

ing 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 that both this demand, and the role Lamer C.J. 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.*[24]

Justice McLachlin argued that the only lawful limitations on section 35(1) rights were internal (for example, as defined by the inherent scope or nature of the right) or external ones that "any property owner or rights user would reasonably expect . . . if the resource is to be used now and in the future."[25] She then asked, "[h]ow, without amending the Constitution, can the Crown cut down the aboriginal right? . . . [Rights] can be diminished only through treaty and constitutional amendment." [26] On this interpretation, aside from limitations that went to the one external exception of reasonable use, any unilateral act which diminished section 35(1) rights would violate the Constitution, and so could not be endorsed by a court.

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

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24 *Van der Peet*, above note 3 at para. 310, McLachlin J. in dissent [emphasis added].

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

26 *Ibid.* at para. 315, McLachlin J. in dissent.

> [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.[27]

Therefore, prior to being appointed chief justice, McLachlin J. arguably held a clear theory of how section 35(1) operated to enable reconciliation. She positioned the judiciary's key contribution to reconciliation, as mandated by section 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.

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, McLachlin J. 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.[28]

27 *Ibid.* at para. 312, McLachlin J. in dissent.

28 *Ibid.* at para. 313, McLachlin J. in dissent [emphasis added].

To summarize these key passages, McLachlin J. did not see the role of the Court as actually affecting or creating a state of reconciliation. Rather, the Court's powers under section 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 balancing.[29] Her perspective at this time was that the accommodation of non-Aboriginal interests and any recognition that reconciliation may require eroding Aboriginal rights were to be assessed in a negotiation process. Aside from the reasonable use restraint described above, infringements could not be unilaterally imposed by the state.

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.[30] 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,[31] a rather overwhelming list that suggested that section 35(1) supported a relationship of power and priorities only modestly different than completely ignoring Aboriginal rights.[32] The whole bench appeared to have endorsed the same approach. There was also a unanimous decision from the Court in *Marshall (No. 2)*[33] that further extended Lamer C.J.'s approach narrowing Aboriginal rights through the concept of reconciliation. Notably, in all these cases, including both Lamer C.J. and McLachlin's reasons in *Van der Peet*, the Court has been unanimous in stating that reconciliation will only come about through negotiations. The core distinction arising from *Van der Peet* was differing interpretations of what section 35(1) authorized or required the state to do.

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

30 *Delgamuukw*, above note 4 at para. 109.

31 *Ibid.* at para. 161.

32 On this point, see James Tully, "The Struggles of Indigneous Peoples for and of Freedom" in Ardith Walkem & Halie Bruce, eds., *Box of Treasures or Empty Box: Twenty Years of Section 35* (Penticton, BC: Theytus Publishing, 2003) 272 at 287. See also Christie, "Judicial Justification," above note 1 at 51–52, where he questions "what constitutionalization has amounted to."

33 *Marshall (No. 2)*, above note 5.

C. THE COURT UNDER CHIEF JUSTICE McLACHLIN 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, therefore there was cause to consider if an infringing regulation or law was justified. This examination is effectively inconclusive on this point. The second subsection proposes that McLachlin's Court has developed a theory of reconciliation which essentially displaces the practical relevance of Lamer C.J.'s approach.

1) Reconciliation and Infringement

Since Beverley McLachlin was appointed chief justice, there have only been three cases in which Aboriginal or treaty rights were found to exist—*R. v. Powley*,[34] *R. v. Morris*,[35] and *R. v. Sappier; R. v. Gray*,[36]—resulting in situations where the Court turned to a justification analysis. Some members of the Court also took the opportunity to speak to justification in *R. v. Mitchell*.[37] These cases reveal little about whether the Court under McLachlin C.J. will continue to adhere to the approach endorsed by Chief Justice Lamer's Court of interpreting the reconciliation mandate as sometimes requiring and authorizing the erosion of Aboriginal rights for the general social good. As will be discussed in subsection 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 section 35(1) that McLachlin C.J. 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 that 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

34 *Powley*, above note 6.

35 *Morris*, above note 8.

36 *R. v. Sappier; R. v. Gray* 2006 SCC 54 [*Sappier*].

37 *Mitchell v. Canada (Minister of National Revenue – MNR)* 2001 SCC 33, [2001] S.C.J. No. 33 [*Mitchell*].

having survived the assertion of Crown sovereignty, because it was ousted pursuant to the rules of sovereign succession.[38] Justice Binnie found that this conclusion was consistent with enabling reconciliation because:

> [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.[39]

This sense of reconciliation 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. As noted above, McLachlin C.J., writing for the majority in *Mitchell*, found that the claimed right was not made out, and so did not engage in a justification analysis. However, McLachlin C.J. 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."[40] 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 Metis Aboriginal rights on the basis of conservation [41] and administrative complexity.[42] 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

38 *Ibid.* at para. 172, Binnie J. for Major J.

39 *Ibid.* at para. 164, Binnie J. for Major J.

40 *Ibid.* at para. 63 [emphasis added], McLachlin CJ for Gonthier, Iacobucci, Arbour, and LeBel JJ.

41 *Powley*, above note 6 at para. 48.

42 *Ibid.* at para. 49.

allocation to satisfy their subsistence needs."[43] 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."[44] 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."[45] We see here something of an echo of McLachlin C.J.'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*,[46] 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 the division of powers.[47] The dissenting judgment, authored by McLachlin C.J. and Fish J., also did not address the justification analysis. However, we do see the resurgence of some of McLachlin J.'s (as she then was) reasoning in dissent in *Van der Peet*.

Chief Justice McLachlin 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.[48] 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

43 *Ibid.* at para. 48.
44 *Ibid.* at para. 49.
45 *Ibid.* at para. 50.
46 *Morris*, above note 8.
47 *Ibid.* at paras. 53–55, Deschamps and Abella JJ. for Binnie and Charron JJ.
48 *Ibid.* at paras. 110, 119, and 132, McLachlin C.J. and Fish J. for Bastarache J.

treaty table. This approach, of focusing foremost on defining legal entitlement, is the same approach that McLachlin C.J. 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*.[49] As the Crown did not attempt to argue that its infringing legislation was justified, the Court does not discuss its approach to infringement,[50] although it does bring up the matter of reconciliation. In a situationally nuanced phrasing of the purpose of section 35(1), Bastarache J. wrote that that section:

> 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.[51]

Under this approach, the purpose of section 35(1) is still about reconciliation, but 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 too much about what was intended. 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 McLachlin J. and L'Heureux-Dubé J. in in *Van der Peet*.[52] 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.[53] Given the

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49 *Sappier*, above note 36.

50 *Ibid.* at paras. 54–55, 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).

51 *Ibid.* at para. 22.

52 *Ibid.* at paras. 33–47.

53 Constance MacIntosh, "Developments in Aboriginal Law: The 2006–2007 Term" (2007) 38 S.C.L.R. (2d) 1 at 36–37 [MacIntosh, "2006–2007"].

consequences of this definition for industry tree farm licence 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 upon Aboriginal rights to its vision of what is required to enable reconciliation, although it has cast considerable doubts on provincial authority to infringe upon Aboriginal rights.[54] 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 follow a different line and deploy the concept of reconciliation to signal a dynamic process.[55]

2) Placing Reconciliation as a Process at the Foreground

The theory of reconciliation to which the members of McLachlin's Court subscribe, and the role of the judiciary in enabling reconciliation, emerge strongly in a pair of decisions made by McLachlin C.J.: *Taku River Tlingit First Nation v. British Columbia*,[56] and *Haida Nation v. British Columbia*.[57] The theory also guides the analysis in the reasons of Binnie J. in *Mikisew Cree First Nation v Canada*.[58] There is thematic unity regarding the notion of reconciliation in all three of these decisions. Notably, they are all unanimous decisions. Given this level of unity, it becomes appropriate to speak of 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 consistent with the reconciliation process.

In *Haida Nation*, the Court was asked to decide whether Crown obligations arose in the context of claimed rights which had not been recognized

54 See, for example, Kent McNeil, "Reconciliation and Third Party Interests: *Tsilhqot'in Nation v. British Columbia*" (2010) 8 Indigeous L.J. 7 [McNeil, "Third Party Interests"], Kent McNeil, "The Metis and the Doctrine of Interjurisdictional Immunity: A Commentary" in Frederica Wilson & Melanie Mallet, eds., *Metis-Crown Relations: Rights, Identity, Jurisdiction and Governance* (Toronto: Irwin Law, 2008) 289–322.

55 See Newman, "Reconciliation," above note 11 at 85.

56 *Taku River First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74 [*Taku River*].

57 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 [*Haida Nation*].

58 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.

by the Canadian state or pursuant to a judicial process. (The Court gives such claimed rights the rather problematic label "unproven rights."[59]) 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.[60] 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.[61] Writing for the Court, Chief Justice 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."[62]

This approach, to be adopted when claimed rights or "proven" rights[63] 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 section 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 in-

59 See discussion in Constance MacIntosh, "On Obligations and Contamination: The Crown-Aboriginal Relationship in the Context of Internationally-sourced Infringements" (2009) 72:2 Sask. L. Rev. 187 [MacIntosh, "On Obligations"].

60 *Haida Nation*, above note 57 at para. 6, McLachlin C.J.

61 *Ibid.* at para. 33, McLachlin C.J. Chief Justice McLachlin wrote that unless obligations arose prior to proof, then when "the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable" (at para. 33).

62 *Ibid.* at para. 38, McLachlin C.J.

63 In *Mikisew Cree*, above 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 (Minister of Energy, Mines and Resources)*, 2008 YKCA 13, [2008] Y.J. No. 55, leave to appeal to S.C.C. granted, [2008] SCCA 448 (29 January 2009) [*Little Salmon*]. This case considers the duty to consult in the context of a modern treaty.

fringements 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, when 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.[64] In this way, the Court robustly shifted the role that the state and Aboriginal parties can expect it to play in overseeing the reconciliation process.

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."[65] 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."[66]

Having negotiated and consensual agreements, as opposed to judicial findings, at the foreground as the key routes to reconciliation, McLachlin C.J. 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 section 35(1) rights in the name of reconciling those rights with public interests. In *Haida*, the Court unanimously endorsed the conclusion 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."[67] Returning to this practical reading in *Mikisew Cree*, Binnie J. described consultation as "key to [the] achievement of the overall objective

64 See *Mikisew Cree*, above note 7.

65 *Haida Nation*, above note 57 at para. 20, McLachlin C.J.

66 Walters, "Constitutionalism," above note 11 at para. 54.

67 *Haida Nation*, above note 57 at para. 27, McLachlin C.J.

of the modern law of treaty and aboriginal rights, namely, reconciliation."[68] Reconciliation is centrally achieved not by determining how Aboriginal rights may need to be infringed in the name 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 that affected "unproven" Aboriginal rights, this vision does not suggest that the Crown must yield to Aboriginal perspectives on the appropriate outcome of the consultation process. Instead, the Court indicates 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 that do not meet the approval of the Aboriginal parties.[69]

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 obligation to consult does 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 processes—impose terms for reconciliation (which, of course, would not be a reconciliation at all!).[70] Nonetheless, the judicial push to define rights through treaties has

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68 *Mikisew Cree*, above note 7 at para. 63, Binnie J. [emphasis added].

69 *Haida Nation*, above note 57 at paras. 45, 48, and 50, *Taku River*, above note 56 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*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor Y.B. 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 Windsor Rev. Legal Soc. Issues 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 U.B.C.L. Rev. 139 at paras. 66–129.

70 See McNeil, "Third Party Interests," above note 54, 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 Slattery, "Generative Structure," above note 11.

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.[71] 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 ongoing. 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 C.J. 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*.[72]

The Court could not have been clearer in signalling that political energies will need to go into reconciling the consequences of how "pre-existing Aboriginal sovereignty" coexists with "assumed Crown sovereignty"[73] 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 section 35(1) "from a static guarantee into a bulwark of a dynamic constitutional process" and "transform[ing] the conception of reconciliation from a description of an end state into a concept that . . . shapes a creationary constitutional process."[74] This approach is resonant with that advocated 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*."[75]

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71 See Tully, above note 11 at 278.

72 *Haida Nation*, above note 57 at para. 32.

73 This phrasing is drawn from *ibid.* at para. 20.

74 Newman, "Reconciliation," above note 11 at 85.

75 Tully, above note 11 at 223. I thank John Borrows for introducing me to this volume.

The interpretation of reconciliation which is articulated in *Haida Nation*, that it 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.[76] The Crown decided to take up land for what the Court observed was likely an appropriate purpose given the terms of the treaty.[77] 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.[78] 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.

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 Chilewyan 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.[79]

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*.[80] 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."[81] Here the process of negotiating a treaty is

76 *Mikisew Cree*, above note 7 at para. 3, Binnie J.
77 *Ibid.* at para. 60, Binnie J.
78 *Ibid.* at para. 53, Binnie J.
79 *Ibid.* at paras. 54–55, Binnie J.
80 *Little Salmon*, above note 63.
81 *Van der Peet*, above note 3 at para. 313, McLachlin J. in dissent.

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 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 revisionism is highly desirable in this area of law, "given the complexity and sensitivity of the task"[82] required by section 35(1).

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,"[83] 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.[84]

So, just over a year after the reasons in *Haida Nation* and *Taku River* were released, with their emphasis upon reconciliation as an ongoing 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 section 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

82 Slattery, "Generative Structure," above note 11 at 628.
83 *Ibid.* at 598.
84 *Ibid.* at 628.

change. However, jurisprudential findings do not always support the formation of such positive processes or relationships of respect.

D. UNRECONCILED TENSIONS

Several of the decisions rendered by McLachlin's Court have, in various ways, referred to the need to enable a "just and lasting settlement," a phrase which, following *Mikisew Cree*, could fairly be recast 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 to realizing this goal.[85] The jurisprudence discussed above supports this goal in several ways. One core means is by requiring the Crown and Aboriginal peoples to engage in political dialogue through the consultation and accommodation process. As a result, neither party should take the other party by surprise, and neither party should experience a sense of its interests being denigrated or ignored. This is a very challenging objective 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 section 35(1). The filter for identifying what falls under section 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 (for example, what falls from Aboriginal title) only attract section 35(1)'s reconciliation imperative if Aboriginal claimants can show, or have a chance of showing pursuant to the *Haida* spectrum,[86] exclusive occupation at the time of Crown sovereignty.[87] 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.[88]

This creates tension, as many matters of vital importance to fostering Aboriginal-Crown relations and remedying past and ongoing injustices, fall

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

86 *Haida Nation*, above note 57 at paras. 35–38.

87 *Delgamuukw*, above note 4 at para. 143.

88 *Van der Peet*, above note 3.

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 not extend to resolving the matter at issue. Reconciliation is ultimately a political relationship, and turns on governmental, not judicial action.[89] 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 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*[90] and *McDiarmid Lumber Ltd. v God's Lake First Nation*.[91] Both 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 capacities.[92] 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 address 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 transfer 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 continues to finance, to some degree, the devolved programming.[93] God's Lake First Nation also

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

90 *Ermineskin*, above note 9.

91 *McDiarmid Lumber Ltd. v. God's Lake First Nation* 2006 SCC 58, [2006] 2 S.C.R. 846.

92 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 316–22 [McNeil, "Emerging Justice"].

93 For specific details on funding programming which has been devolved under a health transfer initiative, see Constance MacIntosh, "Envisioning the Future of Aboriginal

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 garnishment 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."[94] Based upon her reading of section 90(1)(b), and the 1990 precedent of *Mitchell v. Peguis Indian Band*,[95] 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.[96] Justice Binnie, writing the dissenting judgment, would have interpreted section 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 section 91(24).[97] That is, he interpreted the statute with close attention to the role it plays, and responsibilities it recognizes, in the Crown-Aboriginal relationship.

The chief justice's interpretation was based on Parliamentary intention at the time the statutory terms were enacted in 1951 to promote "greater self-government and participation in economic enterprise,"[98] and a close reading of statutory language as guided by the *ejusdem generis* rule. The dissenting interpretation was driven by a concern with what Binnie J. described as "the realities of life on most reserves."[99] 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

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Health under the Health Transfer Process" (2008) Health L.J. 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 Ottawa L.R. 63.

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

95 [1990] 2 S.C.R. 85.

96 *God's Lake*, above note 91 at paras. 26, 28, and 46–68, McLachlin C.J. for Bastarache, LeBel, Deschamps, Charron, and Rothstein JJ.

97 *Ibid.* at para. 87, Binnie J. for Fish and Abella JJ.

98 *Ibid.* at para. 51, McLachlin C.J.C. for Bastarache, LeBel, Deschamps, Charron, and Rothstein JJ.

99 *Ibid.* at para. 82, Binnie J. for Fish and Abella JJ.

intercepted by creditors.[100] 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 in *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*.[101] The split in that case could similarly be characterized as focusing on the question of whether courts must interpret statutory terms according to original Parliamentary intent, 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 discussed here to suggest that the matters under consideration ought to have fallen under section 35(1), or to offer an analysis about whether the case was properly decided.[102] Rather, it 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 done themselves 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 the effect of the law, but it (rightfully) does not have the power to enact the legislation to enable redress or to overcome adverse consequences to Crown-Aboriginal relationships.

The *Ermineskin* case is far more problematic in terms of eroding the relationships which required between Aboriginal peoples and the Crown if the reconciliation process is to be supported.[103] 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 the Court had to address was what responsibilities the Crown had

100 *Ibid.* at para. 94, Binnie J. for Fish and Abella JJ.

101 *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161, [1998] S.C.J. No 50.

102 For an analysis of this case, see MacIntosh, "2006–2007," above note 53 at 5–18.

103 For a more fulsome discussion of *Ermineskin*, above note 9, see Constance MacIntosh, "Developments in Aboriginal Law: The 2008–2009 Term" (2009) 48 Sup. Ct. L. Rev. (2d) 1 [MacIntosh, "2008–2009"].

when accruing and holding 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.[104] 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 benefit,[105] while the *Indian Act* made it unlawful for the Crown to invest the funds for the First Nation's benefit.[106] 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.[107]

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 what would otherwise be an explicit conflict of interest between the Crown and First Nations as long as it passes laws that sanction that conflict.[108] 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 section 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

104 *Ermineskin ibid*.
105 *Ibid.* at para. 127.
106 *Ibid.* at para. 122.
107 *Ibid.* at para. 128.
108 I thank Kent McNeil for his insights on thinking through the consequences for these matters of the government being divided into an executive and legislative branch. All erroneous comments remain, of course, my own.

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 the 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.[109]

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 the denial of the obligations clearly arising out of section 35(1). Justice Binnie further observed that "unilateral Crown action . . . is the antithesis of reconciliation and mutual respect."[110] Although softened by rules of interpretation,[111] the *Indian Act*, as the product of unilateral Parliamentary action, is presumably open to the same critique. Justice Binnie's comment,

109 *Mikisew Cree*, above note 7 at para. 1, Binnie J.

110 *Ibid.* at para. 49, Binnie J. [emphasis added].

111 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 S.C.R. 29 at 36, affirmed in *Mitchell*, above note 37 at 142–43, La Forest J. and 107–8, per Dickson C.J.

once again, conceptually resonates with one of the core principles that animated McLachlin C.J.'s rejection of former Chief Justice Lamer's approach in her dissenting reasons in *Van der Peet*.[112] Although Binnie J. was writing in the context of a treaty claim, and then Justice McLachlin was writing about a claimed section 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? It 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:

> 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?[113]

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

The next section shows how McLachlin's Court has drawn upon reconciliation practices as practices that support relationship building in cases where section 35(1) was not at play. Her Court has signalled that the reconciliation mandate is not contained by section 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.

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112 *Van der Peet*, above note 3 at para. 310, McLachlin J. (in dissent).

113 *Tsilhqot'in Nation v. British Columbia* 2007 BCSC 1700, [2008] 1 CNLR 112 at para. 5 [*Tsilhqot'in Nation*]. For a careful analysis of how Vickers J. defines judicial versus political roles and how they play out in addressing complex interests, see McNeil, "Third Party Interests," above note 54.

E. RECONCILIATION PRACTICES OUTSIDE OF SECTION 35(1) SITUATIONS

This section will illustrate that the Court has left somewhat open-ended the question of whether and how the goal of reconciliation is legally relevant in situations which do not directly engage section 35(1). In the two cases discussed above, the fact that there is a relationship which needs to be advanced is simply not raised (except in Binnie J.'s dissenting reasons in *God's Lake*), 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 more general requirement, and is not contained by situations where section 35(1) rights are squarely at issue. A level of open-endedness is evident 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 . . ."[114] Although the context was the assessment of a section 35(1) claim, this statement does not suggest that the obligation to act honourably only arises when rights claims are at issue. Rather, it comes 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.[115] She wrote that "the honour of the Crown is always at stake in its dealings with Aboriginal peoples."[116] 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."[117]

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114 *Mitchell*, above note 37 at para. 9.

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

116 *Haida Nation*, above note 57 at para. 16.

117 *Ibid.* at para. 17.

Once again, although these comments are made in a case about a claim based on section 35(1), 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 section 35(1) being enacted, nor is it contained by matters recognized by section 35(1). This is expressly indicated by the example McLachlin C.J. draws upon to elucidate her point. Making reference to a non-section 35(1) case in her next paragraph, McLachlin C.J. writes:

> 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: *Weywaykum Indian Band v Canada*, 2002 SCC 79 . . .[118]

Thus the requirement to act with honour clearly extends reconciliation practices beyond the ambit of section 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."[119] What we do not know is the scope of "different circumstances" in which "duties" will arise, nor what those "different duties" may look like.

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, was Parliament's unilateral exercise of control over the interests of Aboriginal people sufficient to invoke fiduciary responsibilities regarding permissible terms.[120] Alternately, was the unilateral exercise of legislative power sufficient to raise concerns about Parliamentary enactments eroding the possibility of the Crown being able, on a practical level, to act with honour. The Court may be 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 section 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 Crown-Aboriginal relationships, and so intro-

118 *Ibid.* at para. 18.

119 *Ibid.* at para. 33.

120 For example, under the terms of *Wewaykum*, above note 7. For an analysis of when Parliament became subject to fiduciary obligations, see McNeil, "Emerging Justice," above note 92 at 316–22.

duces, 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*,[121] written by Bastarache J. His 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 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 novel.[122] He resolved the claim by mobilizing section 25 of the *Charter*. His reasons were not endorsed by the majority, which signalled that it may have interpreted section 25 quite differently,[123] and so we see a potential split of the Court on the reconciliation mandate.

Nonetheless, Bastarache J.'s decision provides the first fulsome treatment of section 25 by a justice of the Supreme Court of Canada—and so will be an important touchstone for subsequent decisions.[124] 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."[125] These sorts of initiatives include "[l]egislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty, or the treaty process,"[126] that is, legislation which would most likely be enacted pursuant to the authority of section 91(24).

Justice Bastarache's conclusion bears repeating. He found the constitutional intention was that legislation that protected Aboriginal interests (not

121 *Kapp*, above note 9.
122 *Ibid.* at paras. 76–77, Bastarache J.
123 *Ibid.* at paras. 62–65, McLachlin C.J. and Abella J.
124 For commentary on *Kapp*, see MacIntosh, "2008-2009," above note 103.
125 *Kapp*, above note 9 at para. 103, Bastarache J.
126 *Ibid.* at para. 103, Bastarache J.

just matters which fit through section 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 section 91(24) responsibilities would have been shielded from garnishment and taxation.[127]

Justice Bastarache's interpretation of section 25 came from his reading of the Court's unanimous reconciliation jurisprudence: *Haida Nation* and *Taku River*. It also follows from Bastarache J.'s reasons in *Sappier*, writing for the Court on this point, that section 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.[128] His reasoning is persuasive on a variety of levels. 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 its right for the accommodation to remain in place, and the reconciliation that 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 section 35(1), but would embrace other, broader issues 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, "[section] 25 reflects this imperative need to accommodate and reconcile aboriginal interests."[129] In finding that section 25 operates not unlike a "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)['s] purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation."[130]

It is this final argument, with its call to practical necessity, which may prove to be the most persuasive to his colleagues on McLachlin C.J.'s bench,

127 *God's Lake*, above note 91 at para. 87, Binnie J. for Fish and Abella JJ. (in dissent).
128 *Ibid.* at para. 106, Bastarache J.
129 *Ibid.* at para. 106, Bastarache J.
130 *Ibid.* at para. 121, Bastarache J.

and so may enable his position to come to be endorsed by McLachlin's Court. The Court has demanded that parties adopt a practical and meaningful approach to section 35(1)'s manifestations. It has taken the position that if one fails to contemplate practical outcomes, then reconciliation will only arise in theory, not in lived relationships, and that this outcome is not an acceptable one.[131] This approach was perhaps most strongly articulated in *Sappier*,[132] but was also present in *Marshall*[133] and *Haida*,[134] as well as in Lamer C.J.'s Court in *Delgamuukw*.[135] 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 reasons that 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 to enable and support the process of reconciliation and the political development of relationships of mutual respect.

F. CONCLUSION

The current Court, under the guidance of McLachlin C.J., has drawn upon the purpose of section 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 county. Reviving McLachin C.J.'s basic premises in *Van der Peet*, her Court has uniformly endorsed the position that the reconciliation process 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.[136]

Although the purpose of 35(1) "is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty,"[137] given

131 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 MacIntosh, "On Obligations," above note 59.

132 *Sappier*, above note 36 at para. 49.

133 *Marshall (No. 2)*, above note 5 at para. 52.

134 *Haida Nation*, above note 57 at paras. 31 and 63.

135 *Delgamuukw*, above note 4 at paras. 90–108.

136 These conclusions are clearly present in the recent decision of Vickers J. in *Tsilhqot'in Nation*, above note 113. See, in particular, paras. 1357–368.

137 *Taku River*, above note 56 at para. 42, McLachlin C.J.

the broader context in which Crown-Aboriginal relations take place, this purpose likely needs bolstering from outside the spectrum of section 35(1) rights considerations if it is to be realistically attainable. The Court has signalled a certain level of sensitivity to this matter, and it 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, experiences, and practical imperatives.