

# Reconciling Aboriginal and non-Aboriginal perspectives through modern treaty negotiations <sup>1</sup>

## Introduction

“Aboriginal peoples have long shared with Canada the lands that were originally theirs alone. Since Aboriginal peoples and Canadian governments both have interests in these lands, both have the capacity to act in ways that affect the welfare of the other partners in the relationship and the well-being of the land itself...Aboriginal peoples and Canadian governments both have an obligation to act with the utmost good faith toward each other with respect to the lands in question.”<sup>2</sup>

These high-minded sentiments of the Royal Commission on Aboriginal Peoples were restated even more succinctly by Chief Justice Lamer of the Supreme Court of Canada when he observed, “Let us face it, we are all here to stay.”<sup>3</sup>

Even with the best of intentions, simply stating the reality of Aboriginal and non-Aboriginal neighborliness does not immediately provide the formula or the tools on how our two communities should live together. More importantly, how we not only co-exist, but ideally, can benefit from each other’s unique historical experience and work together to build a cohesive, humane and prosperous Canada in which every citizen can be proud to call ourselves Canadian.

The term “reconciliation” stems from “to reconcile” which in turn means “to bring persons again into friendly relations after an estrangement; to bring back into concord; to reunite persons in harmony”.<sup>4</sup> The history of Aboriginal/non-Aboriginal relations in Canada certainly qualifies as a relationship which began in harmony with friendly and equal exchanges, moved through some of the darkest days of Canadian history for Aboriginal people and now finds the two communities groping towards a better shared future based on mutual respect. While there can be quibbles about the precise nature of reconciliation, the term has assumed considerable currency in both legal and policy circles in Canada in recent years.

The following paper will examine in general terms the legal framework that the Canadian Courts have used to pursue and to advance reconciliation between the Crown and

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<sup>2</sup> Royal Commission on Aboriginal Peoples, Final Report, 1996, Volume 1, p. 689

<sup>3</sup> *Delgamuukw v. British Columbia and Canada*, [1997] 3 S.C.R. 1010 at para. 186.

<sup>4</sup> The New Shorter Oxford English Dictionary, 1993,, s.v. “reconcile”.

Aboriginals, and more broadly, between Aboriginal and non-Aboriginal Canadians. It will then consider how that legal framework, and more particularly the goal of reconciliation, can be advanced through modern treaty making.

## **Legal Framework of Reconciliation**

Aboriginal peoples have been a defining feature of both Canadian law and society since earliest colonial times. Over the past 20 years, however, the body of constitutional law on their place in Canada has both grown and evolved exponentially. In that context, the Supreme Court of Canada has spoken repeatedly of reconciliation as a major organizational principle in Canadian law relating to Crown/Aboriginal relations.

While the Constitution of Canada had always had a special place for Aboriginal peoples and their historic rights, the patriation of the Constitution in 1982 was a defining moment in the relations of Aboriginal and non-Aboriginal Canadians. Earlier constitutional documents from the *Royal Proclamation of 1763* through to the *Constitution Acts, 1930* had recognized special rights for Aboriginal peoples.

Starting in 1982, however, section 35 in the *Constitution Act, 1982* provided a broad and forward-looking recognition and reaffirmation of the historic rights of Canada's Aboriginal citizens. It "recognized and affirmed" the Aboriginal and treaty rights of the Aboriginal peoples of Canada, including the Indians, Métis and Inuit. Equally important, section 35 came to be seen as a significant restriction on the ability of the Crown, both federal and provincial, to interfere with the continued enjoyment of those rights.

The importance of section 35 has been repeatedly underscored by the highest levels of the Canadian judiciary. The Supreme Court of Canada characterized its fundamental importance as follows:

"...what s. 35 (1) does is provides 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."<sup>5</sup>

Most of the court decisions dealing with section 35 through the 1980's and 1990's focused on the limited ability of the Crown to interfere with Aboriginal and treaty rights, and ancillary questions such as the proof required of such rights and their scope and content.

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<sup>5</sup> R. v. *Van der Peet*, [1996] 2 S.C.R. 507 at para. 31.

Much of this jurisprudence relied on the concept of section 35 as a fulcrum designed to balance the historically derived rights of Aboriginal peoples, with the realities of the modern and pluralistic Canadian society and economy. The Supreme Court of Canada spoke repeatedly about reconciliation as the lens through which an appropriate balance would be achieved, and therefore, how section 35 would be interpreted.

The hallmark decision of *R. v. Sparrow* was the first major entree of the Courts into the interpretation of section 35, and already, the concept of reconciliation was being introduced and relied upon. In concluding that section 35 rights cannot be unilaterally extinguished, and that any infringement of Aboriginal rights must be justified, the Court commented,

“...federal power must 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.”<sup>6</sup>

The theme of reconciliation in the pursuit of a balance between rights and obligations, and between different categories of constitutionally-based or recognized rights, continued throughout the ensuing two decades. The Courts have stated repeatedly that section 35 rights are not absolute,

“The ability to exercise personal or group rights is necessarily limited by the rights of others...Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal rights has never been accepted, nor was it intended.”<sup>7</sup>

Accordingly, while Aboriginal rights have to be given priority, they must also be reconciled with other rights and interests,

“...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 types of objectives which can (at least in the right circumstances) satisfy this standard. 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.”<sup>8</sup>

The power of section 35 to circumscribe Crown discretion was recognized in

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<sup>6</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 10757 at para. 62.

<sup>7</sup> *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 92.

<sup>8</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 75.

cases like *Mitchell v. Minister of National Revenue*, though in that instance, tempered by the practical need to respect the fundamentals of Canadian sovereignty, and thereby, the very constitutional foundation for reconciliation between Aboriginal and non-Aboriginal Canadians.

“The constitutional objective is reconciliation not mutual isolation...Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.”<sup>9</sup>

Most recently, the Court in *Haida Nation*<sup>10</sup> and its companion case, *Taku River*<sup>11</sup> elaborated upon these earlier judicial expressions of reconciliation when it clarified Crown duties when faced with credible claims to Aboriginal rights.

“...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 honorably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”<sup>12</sup>

In a decision providing much fodder for future academic and legal debates, the Court focused repeatedly on the role of section 35 as a balance, and how reconciliation must be achieved through a spirit of compromise on both sides.

“Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light...Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims.”<sup>13</sup>

“...Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance

<sup>9</sup> *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911 at paras. 133 and 135.

<sup>10</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (hereinafter "*Haida Nation*").

<sup>11</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (hereinafter "*Taku River*").

<sup>12</sup> *Haida Nation*, *supra*, note 10 at para. 17, quoting *Delgamuukw*, *supra* note 3 at para. 186, quoting *Van der Peet*, *supra*, note 5 at para. 31

<sup>13</sup> *Haida Nation*, *supra*, note 10 at para. 45.

Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.”<sup>14</sup>

## **Reconciliation and modern treaty negotiations**

Given that the Canadian Courts have woven the goal of reconciliation through much of their jurisprudence on section 35, it is not surprising that they have also commented on its role in the making of modern treaties.

In doing so, the Courts have built upon a foundation of nearly two decades of decisions which have favoured negotiation over litigation as the preferred route to resolve conflicts over the respective rights and obligations of the Crown and Aboriginal peoples, and thereby achieve reconciliation.

“Ultimately, it is through negotiated settlements, with good- faith and give -and- take on all sides, reinforced by the judgments of this Court, that we will achieve ... [the] basic purpose of section 35(1) – “the reconciliation of the preexistence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.”<sup>15</sup>

In light of its more recent comments in *Haida Nation* on the process of treaty making, these earlier comments of the Supreme Court of Canada have taken on an even greater sense of urgency,

“Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfill its promises” (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.”<sup>16</sup>

The goal of reconciliation should therefore play a prominent role in shaping the resolution of claims to land and governance rights through the negotiation of modern treaties in Canada. It is not therefore an overstatement that

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<sup>14</sup> *Haida Nation*, *supra*, note 10 at para. 50.

<sup>15</sup> *Delgamuukw*, *supra*, note 3 at para. 186.

<sup>16</sup> *Haida Nation*, *supra*, note 10 at para. 20.

reconciliation must be an organizing principle in the design and implementation of modern treaty negotiation processes.

At a general level, the modern treaty making process in Canada is fundamentally an exercise in reconciliation.<sup>17</sup> In regions like British Columbia and the Maritimes, processes to resolve long-standing disputes about Aboriginal rights, both with respect to lands and governance, will go a long way towards rebuilding respect and trust between Aboriginals and non-Aboriginals. More than simply the reconciliation of competing claims to legal rights, the process and results of treaty negotiation are also key to building durable and respectful links among Canadians as both individuals and communities.

Reconciliation is, however, more than the overarching goal of treaty negotiations. As discussed below, it must be manifested throughout the design and implementation of negotiation processes. The following sections will consider how reconciliation can be expressed in five major aspects of treaty negotiation:

- (1) identification of the Aboriginal party to negotiations, including criteria for determining which groups have *prima facie* claims to section 35 rights and measures to address overlapping claims by Aboriginal groups;
- (2) interim measures in anticipation of, or during negotiations of modern treaties in order to uphold the honour of the Crown through protection of the integrity of lands and resources claimed by Aboriginal groups;
- (3) processes of negotiations designed to permit fair and honourable balancing of interests within Canadian society with respect for Aboriginal claims on one hand, while recognizing that Aboriginal and non-Aboriginal Canadians live in a shared society with a common economic space with shared citizenship and public institutions;

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<sup>17</sup> This theme has been elaborated upon in a policy context by both the federal government and the Assembly of First Nations. See Background Paper Department of Indian Affairs and Northern Development, December 2004, *Renewal of Policies and Processes for Addressing Aboriginal and Treaty Rights*. [http://www.aboriginalroundtable.ca/sect/ngot/bckpr/GOC\\_BgPaper\\_e.pdf](http://www.aboriginalroundtable.ca/sect/ngot/bckpr/GOC_BgPaper_e.pdf) (accessed April 15, 2005) and “Our Nations, Our Governments: Choosing our Own Paths”, Report of the Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nation Governments, Assembly of First Nations, March 23, 2005. In a sense, both papers reflect the same issues which have lain at the heart of debates about the Comprehensive Claims and Inherent Rights Policies of Canada since the early 1980s starting with the Penner Report (Canada, Report of the Special Committee on Indian Self Government, Keith Penner, Chair, October 20, 1983) through to the Royal Commission on Aboriginal Peoples Final Report in 1996 and to the modern day.

(4) substantive negotiation mandates that the parties bring to the treaty making table, particularly as they deal with the issues fundamental to their historical and future relationships;

(5) measures to ensure fulfillment of modern treaty duties and expectations of the parties for their new relationship.

### **(1) Parties to treaty negotiations**

A threshold question for any negotiation is identifying the appropriate parties necessary to resolve a dispute. While the premise may seem obvious to the point of being simplistic, the practical reality can be much less obvious.

Although Canada may be relatively young as a political entity by European standards, our existence as a nation State was preceded by a large number of other political entities representing long-established Aboriginal societies. As with any other part of the world, these historical societies, some nomadic and others settled to varying degrees had their own political institutions, which evolved over time.

Their long history was then overlain with the centuries of change that followed contact with European colonial powers and then increasingly active interference in their affairs by colonial and then Canadian authorities.

It should not therefore be surprising that the candidates for the modern expression of those historical Aboriginal political institutions can sometimes offer a wide range of possible candidates. Some historical Aboriginal communities have retained virtually intact much of their historical cultural, religious and political institutions, and even more rarely, continue to occupy effectively most of their traditional territories.

Most communities, however, have been displaced from traditional lands, and their members dispersed among several political units such as Indian Bands or even completely disenfranchised from their legal identity as Aboriginal persons. As a result, in some parts of Canada, even though there may not be major doubts about the existence of Aboriginal rights holders, there can be a very legitimate question about which modern political body legitimately speaks for their interests in negotiations.

Even where a single organization steps forward as the spokesperson for the modern descendants of a historical community, the organization may have been created primarily for the purpose of negotiation. In such instances, it is not uncommon to find that the often lengthy process of negotiation can undermine the sometimes tenuous connection between such an organization and its constituent members, which may be individuals living in often widely

separated communities bound together only by a shared linguistic or cultural heritage.

These questions can be further complicated by the existence of overlapping claims between adjacent Aboriginal communities to the same lands and resources. For example, two groups may be derived from the historical community, which claimed those lands, or potentially, their modern dispute may reflect a historical pattern of rivalry. The task of identifying the appropriate party to negotiate a modern treaty can therefore be fraught with difficulties, and has led to litigation involving the Crown on more than one occasion.<sup>18</sup> The challenge is further compounded by the requirement by Canada that negotiated treaties be ratified by the individuals comprising the Aboriginal collectivity, including ensuring that rights of membership in Indian Bands under the *Indian Act*<sup>19</sup> be respected by the collectivity.

Faced with these practical difficulties, have the Courts provided any guidance on the criteria for determining which Aboriginal community holds section 35 rights, and how their representatives in negotiations should be identified and mandated? To the chagrin of many, the answer is very little.

The Courts have clearly been hesitant to seriously question the validity of Aboriginal claimants bringing cases based on section 35 rights for adjudication. In many, but not all, cases, the claimants are the modern *Indian Act* Bands with genealogical links to the historic Aboriginal inhabitants of their surrounding areas. Legitimately, in most cases, there will be a direct blood linkage between those historical societies and their modern manifestations, albeit the society may now have several Indian Bands as its descendants.

The issue becomes more complex when dealing with individuals or even communities in some cases that can trace their lineage back to historical Aboriginal societies, but who lack status as Indians or as Indian Bands under the federal *Indian Act*.<sup>20</sup> In those instances, such individuals and communities face a heavier burden to prove their entitlement to aboriginal rights, though the challenge is not insurmountable.

Finally, the situation of individuals living outside of their ancestral territorial

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<sup>18</sup> See, for example, unsuccessful challenges to the 1998 treaty between Canada, British Columbia and the Nisga'a Nation from dissident members of the Nation (*House of Sga'nisim, Nisbilada v. Canada*, 2000 BCSC 659, leave to appeal to the B.C.C.A. refused), (also referred to as "*Chief Mountain*") and by neighbouring First Nations (*Gitanyow First Nation v. Canada et al.*, 2000 BCSC 1332 (hereinafter referred to as "*Luuxhon*").

<sup>19</sup> *Indian Act*, R.S.C. 1985, c. I-5.

<sup>20</sup> *Indian Act*, *supra*, note 16.



lands, and most likely part of the growing urban Aboriginal population<sup>21</sup>, is already posing challenges to both Aboriginal and non-Aboriginal negotiators with the majority of Aboriginals now living outside of Indian reserves. Solutions are available, as seen by the example of the Nisga'a Nation which has gone to considerable lengths to ensure that its citizens living outside of their traditional territories in major cities have a voice in the affairs of their Nation and its government.<sup>22</sup> For other communities, the challenges remain to be resolved.

In the absence of any greater guidance from the Courts, the issues of identifying rights holders, both as communities and as individuals, without being overly inclusive or under-inclusive is a challenge shared by both the Crown and Aboriginal communities themselves.

Without more judicial direction, the parties will be forced to rely on their own ingenuity and sense of fairness to design the criteria for negotiations, ratification of the negotiated outcomes and the citizenship of newly formed Aboriginal nations. Failure to come to a fair and mutual understanding on these issues would otherwise risk undermining the very reconciliation that the parties seek to achieve through their negotiations.

In the case of First Nations, the Assembly of First Nations ("AFN") appears to advocate reliance on the modern Indian Bands as the vehicles for popular will of the descendants of historical Aboriginal nations.<sup>23</sup> They see this as an alternative to the Crown making unilateral decisions on the matter.

Their proposition has many attractions, given both the Courts' tendency to

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<sup>21</sup> Statistic Canada: Aboriginal population statistics November 2004:

A profile of Canada's North American Indian population with Legal Indian Status  
[http://www.aboriginalroundtable.ca/sect/stscan/naistus\\_e.html](http://www.aboriginalroundtable.ca/sect/stscan/naistus_e.html) (accessed 15 April 2005)

A profile of Canada's North American Indian population without Legal Indian Status  
[http://www.aboriginalroundtable.ca/sect/stscan/nainstus\\_e.html](http://www.aboriginalroundtable.ca/sect/stscan/nainstus_e.html) (accessed 15 April 2005)

A profile of Canada's Métis population  
[http://www.aboriginalroundtable.ca/sect/stscan/mtis\\_e.html](http://www.aboriginalroundtable.ca/sect/stscan/mtis_e.html) (accessed 15 April 2005)

The Inuit population in Canada  
[http://www.aboriginalroundtable.ca/sect/stscan/inu\\_e.html](http://www.aboriginalroundtable.ca/sect/stscan/inu_e.html) (accessed 15 April 2005)

<sup>22</sup> A copy of Nisga'a annual reports are available for reading at [http://www.ainc-inca.gc.ca/bc/ftno/nisla/toc\\_e.html](http://www.ainc-inca.gc.ca/bc/ftno/nisla/toc_e.html)

<sup>23</sup> See "Our Nations, Our Governments: Choosing our Own Paths", Report of the Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nation Governments, Assembly of First Nations, March 23, 2005

accept that Bands are *prima facie* appropriate vehicles for Aboriginal claims and the practicalities of negotiation with legally constituted entities. Even the AFN's position, however, is tempered by requiring that Bands provide off-reserve Indians with a voice in negotiations.

The AFN has further suggested that negotiation parties adopt some kind of the neutral mechanism, either jointly chosen by existing First Nations with the Crown or controlled exclusively by First Nations, to recognize the existence of modern First Nations. The idea could be a practical solution to the often contentious issues around citizenship in First Nations and identifying which modern entity is entitled to speak for those individuals, and therefore, merits further examination.

## **(2) Interim measures during negotiations**

Modern treaty negotiations are complex and lengthy, sometimes requiring decades to reach resolution. The length of time is also not necessarily a reflection of *mala fides* by one or another party, but rather speaks to the challenges of finding an appropriate balance between rebuilding historically-based Aboriginal societies and economies within a modern and pluralistic Canada.

The length of negotiations demands interim measures to build confidence between the parties and to generate a sense of shared purpose. In addition, such measures are frequently needed to preserve the matter over which the parties are in conflict without necessarily favouring one side over the other and in order not to render the negotiation process moot.

Against this practical need for interim arrangements, the Supreme Court of Canada observed in *Haida Nation* that,

A...The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances.... the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To 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 the benefit of the resource. That is not honourable.... Pending settlement, Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may

affect Aboriginal claims...”<sup>24</sup>

Recently, the British Columbia Court of Appeal reflected those sentiments when it granted an injunction to the Musqueam First Nation against a proposed transfer of a long-standing public golf course from the management of one public institution to another. The Court concluded that the British Columbia Crown agency managing the land had failed to consult adequately with the Musqueam and to accommodate their claim to Aboriginal title on the lands when the transfer to a university was imminent.<sup>25</sup>

While Aboriginal claimants are not universally successful when seeking court orders to restraint the Crown<sup>26</sup>, statements from the Courts about the use of interim remedies will undoubtedly encourage Aboriginal groups to insist that the Crown refrain from any decisions on public lands or resources before the resolution of their claims.

Certainly, such an approach would represent a powerful incentive on government to resolve land claims as quickly as possible. However, it ignores the fact that negotiations on complex issues like land rights or governance take time. It is also legitimate to ask whether that approach is truly reflective of reconciliation as a balancing of equally legitimate though competing interests.

Modern treaty making in Canada has developed a wide range of approaches and tools to deal with the practical and now increasingly legal need for interim arrangements prior to the final resolution of Aboriginal claims. Such arrangements commonly are designed to advance the broader negotiations leading to a final resolution of disputes. In this sense, they constitute an incremental approach to reconciliation.

Commonly, if the parties to a negotiation table choose to adopt such an incremental approach, they will also recognize the importance of providing predictability regarding the parties’ respective rights and obligations during the negotiation process. This helps lay the foundation for stable and lasting relationships and more generally encourages social and economic development.

Such arrangements typically include:

- Measures to provide predictability about the rights and obligations of the parties to an agreement with respect to the matters covered by the agreement for as long as it remains in effect;

<sup>24</sup> *Haida Nation*, *supra*, note 10 at paras. 27 and 45.

<sup>25</sup> *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 (Decision of March 7, 2005).

<sup>26</sup> *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 345.

- Proportional and reciprocal commitments to provide a stable foundation on which to build and maintain the relationship reflected in the agreement;
- An articulation of how the agreement will contribute to the successful completion of a comprehensive resolution of their differences; and
- Other ways to contribute to the stability of the relationship, such as establishing effective communication and dispute resolution processes.

Aboriginal communities across Canada have entered into a wide range of such interim arrangements with both provincial and federal governments, as well as an increasing number of bilateral arrangements with private companies.<sup>27</sup> While not all of these arrangements are expressly linked to modern treaty processes, they are inspired by the same legal and policy framework. In providing interim stability for the parties and contributing to the process of reconciliation, such arrangements are and will continue to be important tools for both Aboriginal and non-Aboriginal policy makers.

With its decision in *Haida Nation* clarifying the Crown's duty to consult and accommodate, the Supreme Court of Canada has enlarged the tool chest for both Aboriginals and the Crown. As seen with decisions like *Musqueam*, the Crown now bears a heavy onus to justify interference with lands and resources subject to credible Aboriginal claims to section 35 rights. As Aboriginals and

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<sup>27</sup> On the use of interim arrangements to manage disputes over section 35 rights, see for example British Columbia's policy on the use of interim measures to protect lands and resources claimed by First Nations or to provide them with legally recognized access to land and forestry resources: Land and Water British Columbia Inc., *First Nations' Interests: Economic/Treaty Related Measures* (2002), online: [http://www.lwbc.bc.ca/04community/fn/econ\\_development.html](http://www.lwbc.bc.ca/04community/fn/econ_development.html) (accessed 15 April);

B.C. Ministry of Forests: Aboriginal Affairs Branch, *Ministry of Forests' Policy and Interim Measures Section*, (2001), online:

<http://srmwww.gov.bc.ca/dss/initiatives/treaty> (accessed 15 April 2005) For information on recent examples of interim measures in British Columbia see: BC Ministry of Forests, *News Releases*. Online:  
[http://www2.news.gov.bc.ca/nrm\\_news\\_releases/2002FOR0076-000825.pdf](http://www2.news.gov.bc.ca/nrm_news_releases/2002FOR0076-000825.pdf)  
[http://www2.news.gov.bc.ca/nrm\\_news\\_releases/2003FOR0015-000107.htm](http://www2.news.gov.bc.ca/nrm_news_releases/2003FOR0015-000107.htm),  
[http://www2.news.gov.bc.ca/nrm\\_news\\_releases/2003FOR0014-000106.htm](http://www2.news.gov.bc.ca/nrm_news_releases/2003FOR0014-000106.htm)  
[http://www2.news.gov.bc.ca/nrm\\_news\\_releases/2002FOR0058-000657.pdf](http://www2.news.gov.bc.ca/nrm_news_releases/2002FOR0058-000657.pdf)

See also Indian and Northern Affairs Canada, *Progress in Interim Measures Agreements*, online: [www.ainc-inac.gc.ca/bc/ftno/bctc/pima\\_e.html](http://www.ainc-inac.gc.ca/bc/ftno/bctc/pima_e.html) (accessed 15 April 2005)

governments explore together the relatively new world of consultation and accommodation, they will be able to draw upon several decades of experience with arrangements to achieve an interim reconciliation on claims to section 35 rights, including a growing body of policies on consultation.<sup>28</sup>

### (3) Negotiation processes

While the Canadian Courts have given tantalizing hints in the past about their thoughts on land claim negotiation processes, the Supreme Court of Canada was relatively forthright in its comments on the matter in *Haida Nation*. It stated,

A...The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing"...Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims...<sup>29</sup>

Although the Court was very clear about the Crown's duties to consult and accommodate in the face of even *prima facie* claims to Aboriginal rights, it was less forthcoming with its guidance on what an appropriate negotiation process would entail.

Clearly, the Court is leaving the matter to the ingenuity of the parties working in a spirit of compromise with give and take on all sides. It has however provided some signposts to guide them on the way:

#### a) Rights-recognition as basis for negotiations

The unifying theme of the *Haida Nation* and *Taku River* decisions is clearly the

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<sup>28</sup> See for example the federal government policy to consult with First Nations before it disposes of surplus public lands: Treasury Board of Canada, *Treasury Board Policy on the Disposal of Surplus Real Property*, (2001), online: [http://www.tbs-sct.gc.ca/pubs\\_pol/dcgpubs/realproperty/dsrp-abie\\_e.asp](http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/realproperty/dsrp-abie_e.asp) (date accessed: 15 April 2005). See also, for example, British Columbia has adopted extensive policies on consultation with First Nations in the management of its public lands and resources: B.C. Ministry of Forests, *Ministry Policy Manual: Policy 15.1 B Aboriginal Rights and Title*, (1999), Online: <http://www.for.gov.bc.ca/tasb/manuals/policy/resmngmt/rm15-1.htm> (last modified: 14 May 2003); Land and Water British Columbia Inc. *First Nations' Interests*, (2002), online: [http://www.lwbc.bc.ca/for\\_first\\_nations](http://www.lwbc.bc.ca/for_first_nations) (last modified: 14 January 2003). Land and Water British Columbia Inc., *Aboriginal Interest Assessment Procedures*, (2002), online: [www.lwbc.bc.ca/for\\_first\\_nations/assessment\\_procedures.htm](http://www.lwbc.bc.ca/for_first_nations/assessment_procedures.htm) (last modified: 30 May 2003).

<sup>29</sup> *Haida Nation*, *supra*, note 10 paras. 19 and 20.

need for the Crown to give greater heed to the claims of Aboriginal communities that they hold

constitutionally protected rights. Against the backdrop of decades and in some cases a century of denial of such rights by governments, it is not surprising that the Court has attempted to right what it sees to be a power imbalance and historical wrong.

Given the realities of a pluralistic Canadian society and a complex economy with many stakeholders, we must presume that the Court did not intend for the Crown to simply acquiesce in the demands of every Aboriginal community that steps forward. Otherwise, there would be a potential for both social and economic disruption on a national scale. Having seen the speed with which the Supreme Court "clarified" its first decision in the *Marshall* cases<sup>30</sup>, we can assume that the Court does not intend that this is the practical outcome of their cases. At a minimum, it would not seem to be true to the spirit of balance that imbues their call for reconciliation.

What then are the options for designing processes which incorporate respect for the genuinely felt claims of Aboriginal communities, while tempering that respect with the need for governments to continue to govern for the benefit all Canadians?

There is probably no single perfect answer on how best to design negotiation processes, since the balance can be struck in many ways appropriate to the specific circumstances of the parties. We can predict with some confidence however that there is likely a range of options between the extreme of complete denial of rights as the basis for negotiations to the other extreme where claimed rights are simply recognized by the Crown with little room for negotiations.

While not an exhaustive list, some logical stops along the spectrum of rights recognition would be as follows:

- **rights neutrality**

Negotiations can be predicated on rights neutrality where the party agree as a matter of policy to enter into discussions about their relationship. Such talks would be essentially political in nature, rather than operating within a legal framework. Concurrently, process issues such as confidentiality, the without prejudice nature of the talks, any interim measures offered by the Crown despite its lack of any recognition of section 35 rights would be solely at the discretion of the parties.

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<sup>30</sup> *R. v. Marshall*, [1999] 3 S.C.R. 465 (also referred to as "*Marshall I*"); *R. v. Marshall*, [1999] 3 S.C.R. 533 (also referred to as "*Marshall II*").

- **generic recognition of generic rights**

Parties to negotiations could agree at the outset that they would give a general recognition that Aboriginal parties hold a generic set of rights protected by section 35. Such recognition would not be specific, however, in the sense of linking recognition of a particular right to a particular geographic location or a particular Aboriginal community or individual. Process issues would accordingly still remain largely a matter of discretion for the parties, since the consequences of such recognition would be largely neutral to the conduct of the parties' litigation positions on the topics under negotiation.

- **specific recognition of *prima facie* rights**

The parties could agree to conduct their negotiations on the basis that the Aboriginal party can make a credible claim for section 35 rights. Accordingly, the Crown could accept that the Aboriginal group is able to marshal sufficient evidence to make a *prima facie* case for such rights if the matter proceeded to court. Such recognition would not be determinative if the matter ever left negotiation and went to court, but it would establish a threshold for subsequent talks.

Such *prima facie* recognition could be accompanied by a protocol between the Crown and an Aboriginal groups on how interim arrangements, such as Crown duties to consult and accommodate would be addressed during negotiations of an overall settlement.

Process issues about confidentiality, without prejudice and interim measures would still remain partly in the hands of the parties, but the Courts would have a role to play given that some rights have been given some degree of recognition.

- **specific recognition of generic rights**

Parties to negotiation could go further than the options above, and agree to recognize that the Aboriginal party has a set of generic rights protected by section 35, even if there may still remain disputes about the precise scope and content of those rights and their location in the case of land and resource-based rights. Given the rights-based nature of the talks, the Courts would likely become major players in overseeing the negotiations.

It is perhaps an oxymoron to state, but recognition of rights can not easily be withdrawn once it is made. As a result, rules of court as they relate to settlement discussions, including privilege, confidentiality and recourse to the courts, would become major considerations, though the parties could still agree to abide by a separate tailor-made set of rules in this regard.

- **specific recognition of specific rights**

The parties could go even further and agree at the outset of their talks that the Aboriginal party has the rights that it claims and does not need to prove them in court or elsewhere. In such a scenario, negotiations would be largely focusing on reaching a common understanding about the scope, content and location of such rights and establishing a jointly-supported framework for the relationship of the rights with Crown-granted property rights and laws.

While the spirit of reconciliation will encourage the Crown and Aboriginal parties to review their current or planned negotiations processes with a rights-recognition lens, the options outlined above demonstrate that they will have many variations to work with. Some may be helpful in advancing negotiations of Aboriginal claims, while others may be neutral or at worse unhelpful in assisting the parties to reach a consensus on the best way to achieve reconciliation.

### **b) Good faith negotiations**

In *Haida Nation*, the Supreme Court of Canada observed that "where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims."<sup>31</sup> Further, the Court commented,

"Put simply, Canada's Aboriginal peoples were here when European came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others...have yet to do so. The potential rights embedded in these claims are protected by section 35...The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiations. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests."<sup>32</sup>

Although there have been earlier decisions touching on the issue of good faith negotiations,<sup>33</sup> the *Haida Nation* decision is the clearest statement by the Courts that the Crown bears a legal duty when it engages in negotiations with Aboriginal peoples about their historic rights. In this sense, the Court has taken the concept of reconciliation further than earlier cases, and imbued the negotiation process with the need for the Crown to keep the final goal in mind when conducting itself during the negotiation process.<sup>34</sup>

<sup>31</sup> *Haida Nation*, *supra*, note 10 at para. 20.

<sup>32</sup> *Haida Nation*, *supra*, note 10 at para. 25.

<sup>33</sup> *Luuxhon v. British Columbia and Canada*, *supra*, note 18.



### c) Role of neutral third parties

As noted above, the Courts have signaled that they will expect the Crown to conduct itself appropriately before and during negotiations. The Courts have always left the door open to Aboriginal claimants to seek redress for perceived failures of government to deal appropriately with their claims to rights.<sup>35</sup> Given the expansion of the Crown's duties to consult and accommodate, early signals since *Haida Nation* confirm the Courts' readiness to intervene and remedy perceived injustices or unfairness.

This suggests that the Courts will not leave their role as the guardians of reconciliation at the door to the negotiation room, but will regard the matters as constantly *sub judicia*. Parties to negotiations must accept, therefore, that they are not alone at the negotiation table, and the Courts will be ready to intervene to encourage the reconciliation of the parties.

Parties to negotiation may be satisfied to leave such matters to the discretion of the Courts. Alternatively, they may wish to consider greater use of neutral third parties to facilitate their negotiations<sup>36</sup>. Experience to date with such neutral third parties has been limited, and not entirely satisfactory to either the Crown or Aboriginal participants. There is nevertheless a growing awareness both within and outside government of the utility of such institutions to help the parties to negotiation along the long and sometimes contentious road to reconciliation.

## (4) Negotiation mandates

To date, the Courts have focused their attention on Crown duties related to process requirements, such as good faith in negotiations, or to ensuring that the Crown does not preempt negotiations through its actions particularly in the disposition and management of public lands and reserves. It is not beyond the realm of the possible, however, that the Courts will start to examine more closely what the parties bring to the treaty making table, particularly the issues

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Warren of the *British Columbia Supreme Court* in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 506 (Decision of April 16, 2004) at paras. 82 and 83, that the Crown's duty to consult and accommodate can converge or overlap with the duty to negotiate in utmost good faith in the treaty process. As a result, if the Crown seeks to dispose of lands that are the subject of treaty negotiations, it breaches its duty to negotiate in good faith if it breaches its duty to consult and seek accommodation before such dispositions. (paras. 82-83)

<sup>35</sup> See comments in *Delgamuukw* about the value of negotiations "with recourse" to the Courts where necessary for the parties to move forward with reconciliation.

<sup>36</sup> See for example the British Columbia Treaty Commission. <http://www.bctreaty.net> (accessed 15 April 2005)

deemed fundamental to their historical and future relationships.

### **a) Resolving past grievances**

Rebuilding relationships between Aboriginal peoples, the federal government, and the Canadian public requires more than simply mutual recognition and building a framework for co-existence. Reconciliation must necessarily require the parties to deal with their sometimes painful common history.

A commonly heard message from Aboriginal groups is that the two dimensions cannot be dealt with in isolation: the Crown and the Canadian public cannot build and promote a better relationship with Aboriginal people without dealing with the legacy of the past.

Reconciliation in a negotiation context should therefore be taken to have two broad elements:

(1) Reconciliation for past events bringing closure to past harms and losses suffered by Aboriginal peoples. The process of reconciliation should therefore ideally combine

elements commonly found in transformative justice, including acknowledgement of past events and the harms suffered by Aboriginal peoples, apologies for such harms by those responsible through their acts or omissions and compensation or other reparatory measures for past harms.

Through such measures, parties can reconcile their past differences and work together to rebuild their relationship. Examples already exist in the context of Indian Residential Schools through efforts to heal the harms suffered by individuals, including the provision of compensation, and measures to bridge the rift between many Aboriginal communities, the federal government, and the Canadian public for what is still regarded as an unresolved legacy in Crown-Aboriginal relations.

Other areas worth closer examination would be acts of reconciliation in response to past infringements of Aboriginal and historic treaty rights by government, including the loss of traditional territories by Crown action without prior Aboriginal consent.

(2) Reconciliation for the future can therefore concentrate on processes to build and sustain a renewed and harmonious relationship between Aboriginal peoples and the Crown, and between Aboriginal and non-Aboriginal Canadians. In the modern treaty process, it commonly involves both a recognition of the modern existence of Aboriginals with distinct legal rights, and actions to promote their full participation and enjoyment in the economic, political, social, and cultural life of Canada.

With respect to reconciliation for past grievances, the Royal Commission on Aboriginal Peoples elaborated fundamental principles for achieving reconciliation through renewed relationships. It concluded that we cannot ignore the wrongs of the past or the rights flowing from the historical relationships between Aboriginal and non-Aboriginal people in Canada. But it also stressed that we are not prisoners of the past, and we can restore and renew that relationship on the basis of mutual recognition and respect, sharing and responsibility.

In response to the RCAP report, the federal government made a number of efforts at reconciliation through *Gathering Strength*<sup>37</sup>, the *Statement of Reconciliation (1998)*<sup>38</sup>, the establishment of the Aboriginal Healing Foundation (1998)<sup>39</sup>, the *Statement of Aboriginal and Crown Title (1999)*,<sup>40</sup> the *Apology to the Nuu-chah-Nulth regarding Residential Schools (2000)*<sup>41</sup>, and ongoing efforts to address claims for past grievances including revisions of its *Specific Claims Process*<sup>42</sup> and measures associated with Indian Residential Schools.

In the context of modern treaty negotiations, there is a case to be made that these types of past grievances are best addressed in separate processes, and modern treaties should be solely future-oriented. However, an equally compelling argument is that Aboriginal and non-Aboriginal reconciliation through treaty making must necessarily bring closure to the past, before the parties can hope to build a durable and respectful relationship into the future.

## **b) Lands/Resources and Governance Rights**

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<sup>37</sup> Minister of Indian Affairs and Northern Development Ottawa, *Gathering Strength, Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services Canada, 1997)

<sup>38</sup> Minister of Indian Affairs and Northern Development, Ottawa, *Gathering Strength* (Ottawa: Minister of Public Works and Government Services Canada, 1997) Pages 4-5.

<sup>39</sup> Aboriginal Healing Foundation (1998): <http://www.ahf.ca/newsite> (accessed April 15, 2005).

<sup>40</sup> First Nations Summit, Government of Canada, Provincial Government of British Columbia and British Columbia Treaty Commission, 1999. *Statement of Aboriginal and Crown Title*.

<sup>41</sup> Apology to the Nuu-chah-Nulth concerning Indian Residential Schools by the Government of Canada, <http://turtleisland.org/news/apology.htm> (accessed 15 April 2005).

<sup>42</sup> Minister of Indian Affairs and Northern Development, Ottawa, *Outstanding Business: A Native Claims Policy* (1982).

In their examination of section 35 and Aboriginal rights, the Courts have emphasized the importance of preserving and protecting those elements of Aboriginal societies which make them distinct from the Canadian mainstream. While the nature of litigation tends to frame issues in particular ways, the Courts have started to provide details and shades of interpretation to their foundational decisions like *Calder* and *Sparrow* on the scope and content of Aboriginal rights.

A major theme of these decisions has been the dual nature of Aboriginal rights: first, they reflect the legal traditions of historical societies with their distinct social, economic and cultural norms and their associated institutions, and second, they underpin the modern distinctiveness of Aboriginal societies within the broader Canadian society.

To date, the Courts' focus has been on the specific proof of aboriginal rights required for a particular group in a particular location (so-called "site and fact specific test" reflected in the *Van der Peet* decision). Such an approach leads to legal theories and negotiation mandates tailored to the specificity of an Aboriginal community.

However, academic observers are starting to argue that there is a body of generic rights common to all Aboriginal communities reflecting the fundamentals of their distinctiveness.<sup>43</sup> While not obviously drawn from current case law, such an approach offers some practical benefits in the context of negotiations, since it can ensure that both Aboriginal and non-Aboriginal parties start from a basic common understanding that the talks are based on reaching a common understanding of each parties' rights, rather than purely the discretion of the Crown to resolve Aboriginal claims.

Coincidentally, the United Nations and the Organization of American States are working on international declarations of the rights of all indigenous peoples which draw upon fundamental human rights and freedoms, but express those rights to respond to the particular circumstances facing these peoples.<sup>44</sup> In addition, both declarations deal in detail with collective rights issues related to lands and resources, as well as governance and other measures to preserve distinct indigenous societies.

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<sup>43</sup> See for example Brian Slattery, Osgoode Hall Law School, York University, "Making Sense of Aboriginal and Treaty Rights", (2000) 79 Canadian Bar Review 196 and subsequent papers and speeches.

<sup>44</sup> On United Nations draft declaration on the rights of indigenous peoples see website of UN Permanent Forum on Indigenous Issues: [www.un.org/esa/socdev/unpfi](http://www.un.org/esa/socdev/unpfi) (accessed 12 April 2005).  
On the OAS declaration see website of OAS Committee on Judicial and Political Affairs: [www.oas.org/consejo/CAJP/indigenous.asp](http://www.oas.org/consejo/CAJP/indigenous.asp) (accessed 12 April 2005)

Both these threads of analysis merit further exploration. In the context of negotiations, we can anticipate that the concept of a generic set of rights common to all Aboriginal peoples will have some attractiveness to the Courts as they continue to apply the lens of reconciliation.

While not adopting the terminology of generic rights, Chief Justice McLachlin of the Supreme Court of Canada (as she then was), in her dissenting opinion appeared to reflect the concept when she spoke as follows,

“... aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding - the *Grundnorm* of settlement in Canada- was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them.”<sup>45</sup>

This suggests that reconciliation should have an impact upon the substantive mandates of the parties to negotiations. Although the Courts have not gone so far as to dictate what each party should bring to their negotiations, they are establishing some markers in the sand about the nature of Aboriginal distinctiveness that could give guidance as to the elements of a fair and just settlement.

While any set of rights can be rendered generic simply by reducing them to broad abstractions, two broad categories of rights make the most sense in a negotiation setting: (i) interests reflecting the links of Aboriginal communities to their traditional lands and resources, and (ii) measures to preserve and promote the distinctiveness of Aboriginal societies.

In examining section 35 and Aboriginal rights, the Courts have dealt in some detail with the first category of rights dealing with traditional lands and resources. Decisions such as *Sparrow*, *Van der Peet*, *Delgamuukw*, *Marshall I* and *II*<sup>46</sup> and now *Haida Nation* have all given a sense of what those rights entail. Fundamentally, they represent the continuation of pre-colonial property regimes founded on long-standing legal and social traditions. As noted by Chief Justice McLachlin, those rights represented a complex interaction between social, cultural and economic aspects of those pre-contact societies pre-contact societies which survived the assumption of sovereignty by European colonial powers.

<sup>45</sup> *R. v. Van der Peet*, *supra*, note 5 at para. 272.

<sup>46</sup> *Marshall I and II supra* note 30

Aboriginal peoples repeatedly make the link among the respect for their traditional land and resource rights, the continuation of their distinct ways of life and the preservation of their distinct identity within modern Canada. It would therefore be unusual for lands and resources to be absent from any comprehensive reconciliation between Aboriginals and the Crown. In reality, modern treaties in Canada spend the majority of their considerable length to deal exhaustively with the respective rights and obligations of the parties with respect to lands and resources. To that extent, there has been little need for the Courts to intervene to ensure that such matters are resolved.

The second broad category, measures to respect and promote the distinctive nature of Aboriginal societies, has been less developed by the Courts. Cases give a sense that the Supreme Court of Canada sees this respect as an important part of reconciliation. However, in the absence of extensive case law on Aboriginal claims to governance powers, or rights to culture and language, it is difficult to do more than speculate on where the Courts may take this topic.

It can be safely assumed, however, that modern treaties benefit from dealing with non-land and resource rights. Commonly, lands and resource rights will be exercised by the collective, which necessarily requires that governance and associated institutions have to be dealt with in modern agreements. Modern norms of effective governance give further guidance on issues such as citizenship, criteria for leadership selection, public accountability and transparency in decision-making.<sup>47</sup>

Similarly, the continued integrity of an Aboriginal society will depend on the health and well-being of its individuals and the transmission its distinct culture and language to future generations. As a result, it is not uncommon to find extensive provisions on matters such as education, health, and social welfare in modern treaties.

Further, reflective of 21<sup>st</sup> century norms about modern governance, it is also not surprising that the fiscal underpinning of both Aboriginal institutions and the social programmes that they deliver, including their fiscal relationship with other levels of government, are again a common feature of modern treaties in Canada.

As noted above, the Courts have not yet had to enter into these non-land related topics in any significant way; partly due to the inherently political nature of these topics, but also due to the openness of both Aboriginal and non-Aboriginal parties to resolve these issues through negotiation rather than litigation. However, it cannot be discounted that the Courts would be prepared

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<sup>47</sup> See Human Development Report 2000: Human Development and Human Rights, United Nations Development Programme, Oxford University Press. See more generally [www.undp.org](http://www.undp.org)

to intervene into these matters if the Crown chose not to address them in its efforts to deal with reconciliation through treaty negotiation.

### **(5) Implementation of negotiated outcomes**

Given the relatively long history of treaty making in Canada, there is a wealth of jurisprudence on the manner in which treaties should be interpreted and implemented. Many of these cases deal with treaties dating back to the earliest colonial times, often where there is relatively little extant written text of the Crown/Aboriginal agreement or where there is controversy between the Crown and Aboriginal community on their common understanding of more recent historical agreements.

While modern treaty making draws upon literally armies of lawyers and other professionals to all sides of the negotiating tables, disputes about interpretation and the sufficiency of implementation remain contemporary challenges for both the Crown and Aboriginals.

For example, the Courts have been called upon repeatedly to deal with disputes among the signatories of the *James Bay and Northern Quebec Agreement*. Reflecting the jurisprudence on adopting a broad and liberal interpretation of historic treaties, the Quebec Courts have tended to apply a similarly generous interpretation to construe the modern treaty promises in the Agreement in favour of the Aboriginal signatories.<sup>48</sup>

While these decisions predate the Supreme Court's comments in *Haida Nation*, we can already start to see that the process of reconciliation will be as ongoing as the existence of Aboriginal Canadians as distinct legal and social entities. Given that the parties will need to work on both achieving and maintaining reconciliation for the foreseeable future, we can also anticipate that the Courts will not hesitate to intervene if they perceive that the Crown has failed to fulfill its honour in the manner in which it fulfills its modern treaty commitments.

Accordingly, the Crown will be well-served to keep in mind the overriding goal of reconciliation when considering how best to implement its legal promises under modern treaties, and more broadly, how to ensure that the reconciliation continues to form the basis for a new relationship. This suggests that great care and sensitivity should be brought to bear on issues such as:

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<sup>48</sup> See *Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501 (C.A. Federal Court of Appeal) (leave to appeal to the Supreme Court of Canada denied October 14, 1993); *Cree School Board v. Quebec and Canada* (Quebec Court of Appeal) [2001] J.Q. no 3881 (leave to appeal denied by Supreme Court of Canada on October 24, 2002); *Grand Chief Matthew Coon Come v. Canada*, Quebec Superior Court no: 500-05-004330-906 (also referred to as "*Coon Come I*"); and *Grand Chief Matthew Coon Come v. Quebec Hydro*, Quebec Superior Court no: 500-05-027984-960 (also referred to as "*Coon Come II*").

- the critical importance of clearly articulating legal duties in the texts of modern treaties;
- ensuring clarity among government about the internal government players about their respective implementation duties, including coordination of those duties to ensure a government-wide commitment to implementation; and
- the need for both Aboriginal and non-Aboriginal parties to recognize that the modern treaty manifests their mutual commitment to ongoing reconciliation, and that sustaining their relationship will require much more than strictly fulfilling the specific legal obligations in the treaty.



## Conclusion

The goal of reconciliation is a unifying theme of Canadian constitutional law, and more generally, a foundational principle for the relationship between Aboriginal and non-Aboriginal Canadians. The Courts have woven the concept through much of their modern jurisprudence dealing with Aboriginal people and their distinct legal, social and cultural presence in Canada. Increasingly, it has become the touchstone for policy work by both government and Aboriginal political leaders.

In the context of treaty making, both Aboriginal and non-Aboriginal must re-examine traditional models patterned on European traditions of contract making or even the broader international experience with State/State treaty making. Instead, both sides have to view negotiations of modern treaties and ancillary interim arrangements through the lens of reconciliation.

This paper has offered some general thoughts on how reconciliation is and can be expressed through treaty making. The future will bring many more opportunities for Aboriginal and non-Aboriginal Canadians to bring jointly their creativity and goodwill to bear on these challenging issues.

In the pursuit of a fair and lasting reconciliation, the challenge that lies ahead for all sides of the negotiation table was eloquently stated by the Royal Commission on Aboriginal Peoples,

"Canada is a test case for a grand notion - the notion that dissimilar peoples can share lands, resources, power and dreams while respecting and sustaining their differences. The story of Canada is the story of many such peoples, trying and failing and trying again to live together in peace and harmony."<sup>49</sup>

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<sup>49</sup> *Royal Commission on Aboriginal Peoples, 1996.*