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Aboriginal Rights and the Honour of the Crown

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I. INTRODUCTION

When the Supreme Court first grasped the nettle of section 35[1] of the *Constitution Act, 1982* in the *Sparrow* case, it held that the constitutional affirmation of Aboriginal rights should be interpreted in the light of the fundamental principle of the honour of the Crown. This principle pointed simultaneously in two different but complementary directions: *negotiation* and *litigation*. With respect to the first, the Court noted that the section provided a solid constitutional base for negotiated treaties between Aboriginal peoples and the Crown that would represent a just settlement of their claims. With respect to litigation, the Court held that the section furnished Aboriginal rights with a judicial shield against legislative infringement and limitation, except where the latter could be justified under the "high standard of honourable dealing" demanded of the Crown.[2]

While the Supreme Court has continued to emphasize the need for negotiated settlements of Aboriginal claims, most of its efforts in subsequent cases have been directed at delineating the scope of section 35's judicial protection and identifying the legal criteria for recognizing Aboriginal rights. Over the past two decades, the Court has made great strides in the latter areas. However, until recently it has left largely unexplored the section's role as a basis for negotiated settlement.

This emphasis has tacitly encouraged the view that section 35 embodies a relatively *static* constitutional order, which mandates courts to identify a range of specific Aboriginal rights by applying general legal criteria to particular historical circumstances. However, this paradigm

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[1] Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "Charter"].

[2] *R. v. Sparrow*, [1990] S.C.J. No. 49, at paras. 52-63, [1990] 1 S.C.R. 1075, at 1105-09.

needs revision after the *Haida Nation*[3] and *Taku River*[4] decisions, both written by McLachlin C.J. for a unanimous Supreme Court. In these cases, the Court portrays the fundamental law governing Aboriginal rights as more *dynamic* than *static* — mandating a process that involves the active participation of indigenous peoples and the Crown in the identification of Aboriginal rights. In effect, the Court views section 35 as a *generative constitutional order*. Let me explain.

II. THE STANDARD PARADIGM

According to the dominant viewpoint, the Crown's acquisition of sovereignty over indigenous peoples and their territories gave rise to Aboriginal rights in the common law of Canada. These rights continue to exist in their original form unless or until extinguished by legislation, voluntary surrender or other valid process. As legal rights, Aboriginal rights are cognizable and enforceable in Canadian courts. However, Aboriginal peoples have to prove the existence of these rights on a case-by-case basis in order to gain judicial protection.

While this paradigm represents a clear advance over the paradigm of non-recognition that tended to dominate Canadian jurisprudence in earlier days, it has several drawbacks. These relate to three areas: (1) Crown sovereignty; (2) proof of Aboriginal rights; and (3) the potential for evolution. I will say a few words about each.

1. Crown Sovereignty

Prior to *Haida Nation*, the Supreme Court generally took the view that the existence of Crown sovereignty over indigenous peoples was legally unassailable. As the Court stated in the *Sparrow* case:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that

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[3] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511.

[4] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550.

> sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; ...[5]

Yet many indigenous people take the view that the Crown's acquisition of control over their territories was an illegitimate act, consummated without their consent. This illegitimacy was compounded by the ensuing acts of dispossession, segregation and disenfranchisement visited on many Aboriginal groups by the Crown. Some deny outright that the Crown ever gained lawful sovereignty over them, arguing that they were never conquered by the Crown and never voluntarily ceded their territories to the Crown or accepted its claims of authority. Others point to ancient treaties as the basis of their relationship with the Crown, as friends and allies rather than subjects. Still others say that the Crown stands as the protector of their rights rather than as a "sovereign" on the European model. In one way or another, then, Crown sovereignty has always been a sticking point for Aboriginal peoples — even when presented as part and parcel of the common law doctrine of Aboriginal rights.

2. Proof of Aboriginal Rights

Under the dominant paradigm, if the Crown disputes the existence of Aboriginal rights claimed by an indigenous group, the group bears the burden of proving the existence of these rights in court. This process is usually extremely time-consuming and costly and in the end may fail to yield an effective remedy. It also means that, absent a definitive court ruling, Aboriginal peoples are not in a strong position to protect their rights from invasion or impairment, so that the existence of Aboriginal rights is often more theoretical than real. To many indigenous peoples, it seems paradoxical that they should be put to the task of proving their rights in the courts, when they are the original inhabitants of this land.

3. The Potential for Evolution

The standard paradigm holds that, once Aboriginal rights are proven to have existed at the critical historical date (often centuries ago), they continue to exist more or less in their original form, with only a modest

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[5] *Supra*, note 2, at 1103, para. 49.

allowance for evolution and change. This approach does not allow courts to take proper account of the tremendous changes that have occurred in Canadian society in the interval. It mandates the recognition of Aboriginal rights in historical configurations that are often ill-adapted to contemporary conditions. At the same time, it does not permit courts to consider the interests of third parties and the larger society in moulding the modern contours of Aboriginal rights.

So courts are forced to make hard and somewhat unrealistic choices. Either they must hold that the asserted Aboriginal rights continue to exist in their original historical forms, which may satisfy neither the Aboriginal claimants nor third-party stakeholders. Or they must hold that the rights have been extinguished, which often compounds the injustices already experienced by the indigenous parties and fails to resolve the long-standing grievances that separate them from their neighbours. In other words, the paradigm does not lend itself to a flexible approach which permits Aboriginal rights to be recognized in a form that makes allowance for the current and future needs of Aboriginal peoples and the reasonable interests of the larger society.

III. THE NEW PARADIGM

In the *Haida Nation* and *Taku River* decisions, we witness the emergence of a new constitutional paradigm governing Aboriginal rights. This paradigm recognizes the potential of section 35 as a generative constitutional order — one that mandates the Crown to negotiate with Aboriginal peoples for the recognition of their rights in a contemporary form that balances their needs with the interests of the broader society.

According to this approach, when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples. The "honour of the Crown" obliges the Crown to respect Aboriginal rights, which in turn requires it to negotiate with Aboriginal peoples with a view to identifying those rights. It also obliges the Crown to consult with Aboriginal peoples in all cases where its activities affect

their asserted rights and, where appropriate, to accommodate these rights by adjusting the activities.[6]

The Court's overall approach is outlined by McLachlin C.J. in a pithy paragraph:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. 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 negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[7]

This new approach attempts to remedy some of the main drawbacks of the standard paradigm. Let us review the three areas of difficulty identified earlier.

1. Crown Sovereignty

In *Haida Nation* and *Taku River*, the Supreme Court is careful to avoid suggesting that the Crown gained sovereignty over Aboriginal peoples in a lawful or legitimate manner. The Court speaks of the Crown's *assertion* of sovereignty, as opposed to its *acquisition* of sovereignty, and it notes that this assertion effectively collided with the pre-existing sovereignty and territorial rights of indigenous peoples. The Court acknowledges that the Crown ultimately gained factual control of the territories claimed — what it describes as *de facto* sovereignty. But it pointedly refrains from concluding that this sovereignty is *de jure*. The term *de facto* characterizes a state of affairs that is illegal or illegitimate but accepted for practical purposes. It contrasts with the term *de jure*, which means rightful, legitimate, just, or constitutional, and generally describes a condition in which there has been full compliance

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6 *Haida Nation*, *supra*, note 3, at para. 32; *Taku River*, *supra*, note 4, at para. 24.

7 *Haida Nation*, *supra*, note 3, at para. 25.

with all legal requirements.[8] Overall, the Court's choice of language suggests that the Crown's claims of sovereignty over Aboriginal peoples will continue to be legally deficient until there has been a just settlement of their rights through negotiated treaties. As McLachlin C.J. says:

> 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 fulfil its promises" ... . This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.[9]

2. Proof of Aboriginal Rights

The judgment in *Haida Nation* opens by observing that the Queen Charlotte Islands are the "traditional homelands" of the Haida people and that from time immemorial the cedar forests of the Islands have played a central role in the culture and economy of the Haida people.[10] In a sense, the rest of the judgment represents a sustained deliberation on the significance of this observation. For it is the fundamental fact that indigenous peoples were the original inhabitants of Canada that puts Aboriginal claims on a different footing than the normal range of claims that come before the courts.

The Court holds that, where the Crown disputes the existence or scope of Aboriginal rights claimed by an indigenous group, the group does not have to prove the existence of the rights in court in order to protect them from invasion or impairment. The Crown has the duty to consult with indigenous peoples regarding their asserted rights, and in certain cases to accommodate them, even in the absence of definitive proof that the rights exist.

But when does the duty to consult arise, if not on proof of the asserted Aboriginal right? Is the mere *assertion* of the right enough to trigger the duty? Chief Justice McLachlin replies that the duty arises when two conditions are fulfilled: (1) the Crown has knowledge, real or

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8 *Black's Law Dictionary*, 5th ed. (St. Paul: West Publishing Co., 1979), at 375 and 382.

9 *Haida Nation*, *supra*, note 3, at para. 20.

10 *Id.*, at paras. 1-2.

constructive, of the potential existence of the Aboriginal right; and (2) it contemplates conduct that might adversely affect the right.[11]

Of course this pushes the question back a stage. For, as the Chief Justice acknowledges, it can fairly be asked how the Crown can be said to have knowledge of an Aboriginal right when the existence of the right has not been demonstrated. This question evidently taxed the Chief Justice somewhat, because she refers back to her dissenting opinion in the *Marshall* case, where she maintained that one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope."[12] While giving that argument its due, the Chief Justice points out that it is often possible to gain a sufficient idea of the asserted right and its strength to trigger an obligation to consult and accommodate, even in the absence of a final judicial determination. To facilitate this process, she urges Aboriginal claimants to outline their claims with clarity, focusing on the scope and nature of the asserted right and infringement.[13] She goes on to explain that the duty to consult and accommodate operates on a sliding scale, varying in scope and intensity depending on a preliminary assessment of the strength of the case supporting the existence of the right and the seriousness of the potential adverse effects on the right.[14]

How satisfactory is the answer that the Chief Justice gives to the objection she voiced in *Marshall*? I suggest that her approach makes sense in light of the view that the specific Aboriginal rights asserted by particular indigenous groups are instantiations of a panoply of *presumptive generic rights* arising from the great encounter between Aboriginal peoples and the Crown.[15] In other words, Aboriginal rights do not proceed *ex nihilo*, like rabbits out of hats, in which case we might rightly say that we believe it only when we see it. The honour of the Crown supports a range of generic rights presumptively held by all Aboriginal peoples. The specifics of these rights vary from group to group. But it can safely be assumed that all Aboriginal groups hold these rights in one form or another. For example, all Aboriginal peoples have a generic

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[11] *Id.*, at para. 35.

[12] *Id.*, at para. 36, quoting *R. v. Marshall*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, at para. 112.

[13] *Haida Nation*, *supra*, note 3, at para. 36.

[14] *Id.*, at para. 39.

[15] For more on the distinction between generic and specific rights, see Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196, at 211-18.

right to the exclusive use and occupation of an ancestral territory. Where that territory is located and how much remains under Aboriginal title are matters to be settled in each case. But it is the presumptive generic right to an ancestral territory that gives the concrete land claim of an Aboriginal group its distinctive legal heft and credibility.

3. The Potential for Evolution

The Court emphasizes that the Crown has the duty to achieve a just settlement of Aboriginal claims by negotiation and treaty. So doing, the Court attributes a *generative* role to section 35. In effect, it holds that the Crown, with the assistance of the courts, has the duty to bring into being a new legal order that accommodates Aboriginal rights, through negotiation and agreement with the indigenous peoples affected. This approach views section 35 as serving a dynamic and not simply static function — a function that does not come to an end even when treaties are successfully negotiated. As the Supreme Court states:

> The jurisprudence of this Court supports the view that 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*.[16]

In other words, section 35 does not simply recognize a static body of specific Aboriginal rights, whose contours may be ascertained by the application of general legal criteria to historical circumstances — *historical rights* for short. Rather, the section binds the Crown to take positive steps to identify Aboriginal rights in a contemporary form, with the consent of the indigenous parties concerned — what we may call *settlement rights.* Settlement rights have two distinctive characteristics, not shared by historical rights. First, they represent contemporary restatements of Aboriginal rights in a form that renders them useful and commodious for indigenous groups in modern conditions. Second, settlement rights perforce take account of the interests of the broader society, of which Aboriginal peoples are also members.

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[16] *Haida Nation*, *supra*, note 3, at para. 32 (emphasis added).

The Supreme Court evidently feels that the judicial branch should concern itself primarily with the task of recognizing and protecting *historical* rights and leave the task of identifying modern versions of these rights to the executive branch, through the processes of negotiation and agreement with indigenous peoples. But it must be remembered that, without the courts' ability to shield historical rights from governmental intrusion, the chances of reaching agreement on settlement rights would often be very slight indeed.

What then is the precise relationship between historical rights and settlement rights? To put the question another way, what is the link between: (1) Aboriginal rights identified by applying general legal criteria to particular historical circumstances (typically through litigation); and (2) Aboriginal rights identified by balancing the contemporary rights and interests of Aboriginal nations and those of the broader community (typically through negotiation)? The Court intimates that litigation and negotiation are both *modes of reconciliation*, while suggesting that negotiation is the preferable way of reconciling state and Aboriginal interests.[17] But it does not attempt to explain the fact that two processes are likely to yield quite different results in practice.

There are three ways of explaining the relationship between historical rights and settlement rights. The first argues that the two are actually quite different sorts of rights, with distinct origins and content. Historical rights alone merit the appellation of Aboriginal rights, since they alone are identified by reference to the ancestral customs and practices of indigenous peoples. Settlement rights are not true Aboriginal rights. In reality, they are simply consensual or contractual rights, grounded in agreement between the parties. So, according to this view, when treaties are negotiated, they typically *replace* the Aboriginal rights of the indigenous parties with settlement rights flowing from the agreement. We may call this the *contractual theory*, because it posits a clean break between historical rights and settlement rights.

This theory has some merits. It rightly points to the substantial differences that sometimes exist between historical rights and the rights recognized in modern agreements. And it rightly emphasizes the consensual — and in that sense contractual — nature of such agreements. However, it also has several difficulties. It does not correspond to the

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[17] *Id.*, at para. 14.

perspective of most indigenous peoples, who view treaties as modes of articulating and protecting their basic rights rather than as simply creative enterprises, much less as vehicles of extinguishment. The theory also ignores the fact that many treaties can hardly be understood without reference to the historical Aboriginal rights that form their backdrop.

The second theory argues, to the contrary, that settlement rights are modern incarnations of the historical rights held by Aboriginal peoples. They represent an attempt to give Aboriginal rights a contemporary form, one that adapts them to the current needs of Aboriginal peoples and the larger society. So settlement rights are in a sense the modern descendants of historical rights and bear a family resemblance to them. We may call this the *evolutionary theory*, because it holds that historical rights are the original prototypes and progenitors of settlement rights.

While closer to the truth than the first view, this position also has its difficulties. In emphasizing the link between historical and settlement rights, it downplays the often striking concrete differences between them. How can rights that are so different in the flesh actually be said to bear a family resemblance?

The third view represents an attempt to deal with this difficulty. It calls in aid the distinction between *generic* Aboriginal rights and *specific* Aboriginal rights (mentioned earlier) and argues that generic rights may take different concrete forms at different epochs. Historical rights represent the specific forms that generic rights assumed at certain critical dates in the past, be it the time of European contact, the date of asserted Crown sovereignty, or the period of effective Crown control.[18] But historical rights are not the only possible incarnations of generic Aboriginal rights, which are grounded in the honour of the Crown and remain, as it were, evergreen. Settlement rights represent the specific form that generic Aboriginal rights take at the time a particular treaty is concluded, as identified through a process of negotiation and agreement.[19] But even treaties and agreements do not exhaust the creative potential of generic rights, which remain a potent source of future generations of rights. We may call this the *generative theory*, because it

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[18] The Supreme Court has identified a variety of critical dates for different categories of historical rights; see *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 and *R. v. Powley*, [2003] S.C.J. No. 43, [2003] 2 S.C.R. 207.

[19] Of course, not all rights found in treaties are "settlement rights" in the sense used here; some are simply the product of agreement.

views Aboriginal rights as operating on two levels — the first, abstract and timeless; the second, concrete and time-bound — with the first level continuously regenerating and refreshing the second. This theory is the most appealing of the three, because of its capacity to explain both the underlying continuity of Aboriginal rights and their protean ability to assume different concrete forms.

IV. The Source of the Duty to Act Honourably

As we have seen, the Supreme Court holds that the Crown has a general duty to act honourably as regards indigenous peoples and their rights. The Court refers to this as "the Crown's duty of honourable dealing" or more briefly "the honour of the Crown."[20]

But how did the Crown's duty to act honourably arise? Here again there are three theories. The first argues that the Crown voluntarily assumed this duty when it asserted sovereignty over the indigenous peoples of Canada. In effect, the duty arose from a freely undertaken Crown Act. A plausible candidate is the *Royal Proclamation of 1763*, where the Crown states:

> ... whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; ... [21]

Advocates of this theory point to the Proclamation's declaration that Indian nations live under the Crown's protection and argue that the document's detailed provisions are only partial articulations of the basic responsibilities that the Crown assumed.

The second theory does not necessarily deny the far-reaching effects of the *Royal Proclamation of 1763*, but it argues that the document only gave voice to what was in reality a pre-existing legal duty or responsibility. This duty flowed from a general principle of imperial law that

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[20] *Haida Nation*, *supra*, note 3, at paras. 16 and 32; *Taku River*, *supra*, note 4, at para. 24.

[21] Royal Proclamation of 7 October 1763, in Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, Massachusetts: American Antiquarian Society, 1911), at 212.

governed the Crown's assertion of sovereignty over indigenous peoples and required the Crown to deal honourably with these peoples and respect their basic rights. So the Proclamation was, in this respect, not a pure "act of grace" on the part of the Crown, but rather an explicit recognition of what was in fact its bounden legal duty.

The third theory takes an altogether different tack. It suggests that the duty to act honourably stems from the explicit recognition and affirmation of Aboriginal rights in section 35 of the *Constitution Act, 1982*. As such the duty only came into existence at the time the section was enacted in 1982 and presumably only governs Crown dealings from that date onwards. Prior to this time, while specific fiduciary obligations bound the Crown in particular contexts, the general duty to act honourably did not exist beyond the purely moral and political sphere.

Which of these theories does the Supreme Court favour in *Haida Nation*? At least one thing is clear: the Court rejects the third theory. Time and again it insists that the duty to act honourably governs all the Crown's dealings with Aboriginal peoples "from the assertion of sovereignty to the resolution of claims and the implementation of treaties."[22]

The Court's clearest statement on the point comes in its response to the argument advanced by the Province of British Columbia that the Crown's duty to consult or accommodate rests solely with the federal government. The province invoked section 109 of the *Constitution Act, 1867*,[23] which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces." The province argued that this provision gave it exclusive rights to the lands at issue. This right, it maintained, could not be limited by the protection for Aboriginal rights found in section 35 of the *Constitution Act, 1982*, for to do so would undermine the balance of federalism.[24]

The Supreme Court rejects this argument. It points out that, under the terms of section 109, the provinces took their interest in lands subject to "any Interest other than that of the Province in the same." It goes on to hold that the duty to consult and accommodate "is grounded in the assertion of Crown sovereignty which pre-dated the Union." It follows that the province took the lands subject to this duty. It cannot therefore

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22 *Haida Nation*, *supra*, note 3, at para. 17; see also paras. 32, 53 and 59.

23 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 reprinted in R.S.C. 1985, App. II, No. 5.

24 *Haida Nation*, *supra*, note 3, at paras. 57-58.

argue that section 35 deprives it of powers it would otherwise have enjoyed.[25] So, the Court clearly rules out the view that the duty to act honourably only came into existence in 1982, with the enactment of section 35.

Elsewhere, the Court makes statements favouring the view that the honour of the Crown flows from general principles of law applying at the time of asserted sovereignty. In a passage noted earlier, Chief Justice McLachlin C.J. says that 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. She goes on to state:

> This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "*[w]ith this assertion [sovereignty]* arose an obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation."[26]

This passage suggests that the duty of honourable dealing arose automatically upon the Crown's assertion of sovereignty over indigenous nations. The Court does not invoke any specific Crown acts, such as the *Royal Proclamation of 1763*. Rather it portrays the duty as the inevitable by-product of the process itself. No doubt the Court would acknowledge that the Proclamation *bears witness* to the existence of the duty, but evidently it rejects the view that the Proclamation (or any other Crown Act) is its source.

What role, then, does section 35 play in implementing the honour of the Crown? According to *Haida Nation*, the section has a dual function. On the one hand, it serves as a basis for the judicial identification and protection of historical Aboriginal rights, through the application of general constitutional principles. On the other hand, it serves as a springboard for negotiations leading to just settlements, in which Aboriginal rights are recognized in a modern form and reconciled with the interests of the larger society. In both cases, the process is informed by the honour of the Crown.

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25 *Id.*, at para. 59.

26 *Id.*, at para. 32 (emphasis supplied in original).