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To What End the Dialogue?

E. Ria Tzimas

I. INTRODUCTION

The jurisprudence on Aboriginal-Crown relations, reconciliation and the operation of section 35 of the Constitution Act, 1982 remains in its early stages of development. In 2004 and 2005, the Supreme Court of Canada’s decisions on Aboriginal consultation set in motion some profound changes in Aboriginal-Crown interactions and relations. With Haida Nation v. British Columbia (Minister of Forests) figuring most prominently in the legal discourse, the legal cases that began to emerge across the country pushed out the limits of consultation on a range of questions: who, what, when, why and how to go about Aboriginal consultation. Underlying those questions were genuine concerns over what the Aboriginal-Crown relationship is to look like and how to achieve an efficient meaningful balance.

In 2010, the Supreme Court of Canada had three opportunities to clarify and enrich its vision of section 35 of the Constitution Act, 1982 to add greater texture to the duty to consult, and to position section 35 in the broader discourse of Crown-Aboriginal relations. Those three opportunities were offered in Quebec (Attorney General) v. Moses; Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council and Beckman v. Little Salmon/Carmacks First Nation. In the result, the Court confirmed that reconciliation and the honour of the Crown are the two operative and
guiding principles of Crown-Aboriginal relations. All three cases endorsed the proposition that, as Binnie J. stated in Little Salmon, the “grand purpose of s. 35 of the Constitution Act, 1982” is “[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship.” 7 By extension, the Court expressly confirmed the duty to consult as the primary legal and constitutional vehicle to be used to achieve reconciliation. On that articulation, the Crown has the obligation to engage in dialogue that will “foster a positive long-term relationship”. 8 Aboriginal claimants have the obligation to ensure that the claims and assertions they advance are credible. In other words, a claim must be one that “actually exists and stands to be affected by a proposed government action”. 9 These anchoring principles underscored the Court’s orientation as it relates to what it sees as the long-term objective of reconciliation, namely, to foster the ability of Aboriginal communities to participate within the mainstream legal system “with its advantages of continuity, transparency, and predictability”. 10

How reconciliation is to be effected and what the relationship between modern treaties, the existing division of powers and section 35 rights ought to look like, surfaced in these decisions as questions that will require further debate and consideration. Beginning in Moses and continuing in Little Salmon, the emerging dialogue between Binnie J. and Deschamps J. revealed some significant differences over how the outcomes of renewed relationships, as reflected in modern day agreements and treaties, might be interpreted, applied and understood within the context of the broader constitutional fabric.

Writing for the majority in both cases, Binnie J. explained that modern-day agreements exist within a special constitutional relationship. That symbiosis means that where the implementation of modern day agreements results in conflicting consultation practices or requirements, the Constitution holds the ultimate checks and balances and governs the resolution of such conflict. Consistent with that perspective, in Moses, Binnie J. framed the issue in dispute in terms of a federal/provincial jurisdictional divide and pursued his analysis on that basis. In doing so he discounted the consultation and participatory procedures in the James Bay and Northern Quebec Agreement, 1975, (“JBNQA”), in favour of what he saw as a better complementary section 35 consultation process.

7 Id., at para. 10.
8 Id.
9 Rio Tinto, supra, note 5, at para. 41.
10 Little Salmon, supra, note 6, at para. 12.
Similarly, in _Little Salmon_, where the issue related to the adequacy of consultation terms within a modern-day agreement, Binnie J. concluded that section 35 consultation obligations existing outside of the agreement would resolve the impasse. An acceptable resolution would be one that fell within a range of reasonable outcomes, without undermining the existing constitutional framework. Such an approach would also pave the way for reconciliation.

By contrast, Deschamps J.’s point of departure was that modern-day agreements are manifestations of renewed or reconciled relationships. As renewed relationships, they are intended to give expression to an Aboriginal community’s special constitutional rights and its autonomy of judgment. They are also the product of negotiations among Aboriginal communities, a province and the federal government. That negotiation process is infused with honour of the Crown principles. The new ways of the relationship, as mutually negotiated by the Crown and the subject Aboriginal community, ought to therefore serve as the primary source for a solution to an alleged impasse. With the exception of true gaps in such agreements, resorting to an additional layer of consultation, even if that is a section 35 process, as in the case of _Little Salmon_ or, shifting jurisdictions, as in the case of _Moses_, would run the serious risk of stifling the very reconciliation that the parties were trying to reach through such agreements. Justice Deschamps went so far as to suggest that the superimposition of parallel consultation processes would run the risk of “paternalistic legal contempt” of the treaty-making process and, by extension, the goal of reconciliation.

The contrast in approaches between Binnie J. and Deschamps J., combined with the comments by McLachlin C.J.C. in _Rio Tinto_, raised critical questions about what reconciliation is supposed to look like and what the consultation dialogue is supposed to accomplish. Is dialogue through consultations and modern treaty negotiations intended to make some room for Aboriginal participation in the overall socio-economic growth and well-being of the country? Or, is reconciliation intended to enable a more profound reshaping of the Crown-Aboriginal relationship? Stated differently, how is the grand purpose of section 35 to be actualized? Arguably, some clarity in the overall direction of the relationship is essential to answering the range of practical “who, what, where, when

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11 _Id._, at para. 48.
12 _Id._, at paras. 103-107.
and why” questions that are being canvassed and tested almost daily across the country in negotiations and litigation.

The discussion that follows seeks to analyze these questions with reference to the three latest decisions. To that end, the analysis is divided into three parts. The first part of the discussion is intended to acquaint the reader with the key facts and legal conclusions of each of the three cases. The section is fairly lengthy, as it seeks to uncover and illustrate the complexities and the depth of the issues that underpin the journey to reconciliation. The second part analyzes the implications that flow from the way that the Court describes the duty to consult and reconciliation. That discussion sets up the third part, which seeks to place the emerging debate in Moses and in Little Salmon in the broader discourse of what reconciliation is to look like.

II. THE 2010 CONSULTATION CASES

1. Rio Tinto

   It is useful to begin with a review of Rio Tinto because of the three cases, it is the one that most comprehensively picks up the consultation jurisprudence from Haida Nation and expands on the elements of the duty to consult, including its parameters and content. Since the Court unanimously views consultation as the primary vehicle for reconciliation it is crucial to understand the depth and the governing principles of consultation. Those governing principles anchor the dialogue in both Moses and Little Salmon.

   (a) Background Facts

   The Court’s consideration of the parameters of the duty to consult unfolded in the context of determining whether and to what extent the B.C. Utilities Commission had consultation obligations in connection with the approval of an Energy Purchase Agreement (“EPA”) between Rio Tinto Alcan and BC Hydro. The facts had their roots in the 1950s when Alcan (now Rio Tinto Alcan), constructed a dam on the Nechako River, in Northwestern British Columbia. The project diverted water from the Nechako River into the Nechako reservoir, where a powerhouse produced electricity to support the operation of Alcan’s Kitimat aluminum smelter. The water then flowed to the Kemano River and on to the Pacific Ocean. The Carrier Sekani Tribal Council First Nations
(“CSTC”) claim the Nechako Valley as their ancestral homeland and assert Aboriginal rights and title to that area. They also assert a right to harvest salmon from the Nechako River. CSTC First Nations were not consulted when the dam was built, even though the dam affected the exercise of their rights.

Since 1961, Alcan has been selling its surplus power to BC Hydro through a series of successive power sale agreements. The 2007 EPA, whose approval was the subject of this case, was the latest of those agreements. It had to be reviewed by the Utilities Commission to determine whether the terms of the agreement were in the public interest.

The CSTC took the position that BC Hydro had consultation obligations prior to entering into the 2007 EPA because that agreement had the effect of perpetuating the pre-existing negative effects of the Alcan dam on its Aboriginal rights. In response, the Commission concluded that no consultation obligations were triggered because the approval of the Agreement would not affect the water levels in the Nechako River. Whether Alcan were to sell the power to BC Hydro or not, Alcan would operate the dam in the same manner. The selling of the excess power would not result in any new adverse effects on the CSTC First Nations’ rights. The Commission, therefore approved the 2007 EPA.

The CSTC appealed the decision of the Commission to the B.C. Court of Appeal. The Court of Appeal concluded unanimously that the Commission ought to reconsider its decision to approve on the grounds that the Commission erred in two materials ways: (1) the Commission should not have dismissed the consultation issue at its preliminary stage of deliberations over the 2007 EPA; and (2) the Commission should not have concluded that there was no issue of consultation merely because there would be no new physical impact on the rights of the CSTC First Nations. Instead, the Court of Appeal concluded that the Commission ought to hold a full evidentiary hearing specifically on the matter of consultation. The Commission appealed the decision to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeal unanimously and restored the Commission’s decision. In doing so, the Court explored the subject of the duty to consult in terms of two broad themes: (1) the content and parameters of the duty to consult; and (2) the role of tribunals.

(b) Legal Analysis

(i) The Duty to Consult

Writing for the Court, McLachlin C.J.C. began the analysis by reiterating the stipulation in *Haida Nation*\(^{14}\) that the duty to consult arises when three elements exist: (1) the Crown’s knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.\(^{15}\)

With respect to the first test, “[a]ctual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right might be impacted.”\(^{16}\) By contrast, “[c]onstructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated.”\(^{17}\) From an Aboriginal claimant’s perspective, the claim or right must be one that “actually exists and stands to be affected by the proposed government action.”\(^{18}\)

On the subject of Crown conduct, the duty to consult is not limited to statutory obligations. Nor is it limited to decisions that go to immediate impacts on lands and resources but rather, extends to “strategic, higher-level decisions” in instances where such decisions “may set the stage for further decisions that will have a direct adverse impact on lands or resources.”\(^{19}\) The threshold is relatively low, in that the potential for adverse impact suffices for consultation obligations to be engaged.

The third component of the test, going to the issue of “adverse impact”, is perhaps the most important binding ingredient to consultation jurisprudence. Chief Justice McLachlin explained that an essential component of the duty to consult is the question of whether there is a causal relationship between the proposed government action and its potential of jeopardizing an asserted or an existing right. The overriding objective is to protect and preserve Aboriginal rights and claims pending their resolution. However, absent the jeopardy of asserted or existing rights, the duty to consult is not engaged. In the same vein, consultation is not triggered where there is an underlying or continuing breach from

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\(^{14}\) *Haida Nation*, supra, note 2, at para. 35.

\(^{15}\) *Rio Tinto*, supra, note 5, at para. 31.

\(^{16}\) *Id.*, at para. 40.

\(^{17}\) *Id.*.

\(^{18}\) *Id.*, at para. 41.

\(^{19}\) *Id.*, at paras. 44–47 (emphasis in original).
the past. If there has been damage to a section 35 right, such damage is done. The Court acknowledged that such instances could attract remedies but they would not operate to require retrospective consultation. The exception to that proposition would be instances in which the prior and continuing breach caused new adverse impact(s) on a present claim or an existing right.\textsuperscript{20}

Finally, the Court rejected an open-ended definition of an adverse impact. Chief Justice McLachlin explained that if the consultation were “cut off from its roots in the need to preserve Aboriginal interests”\textsuperscript{21} there would be a risk that one side would gain an advantage over the other. Similarly, although in other parts of the decision government strategic decision-making was identified as an example of a government action that could trigger consultation obligations, the Court seemed to limit the consideration of the adequacy of consultation to a “current decision”.\textsuperscript{22} It expressly rejected the notion that consultation obligations could be used as a “hook” to tie down the duty to consult over the entire resource.\textsuperscript{23} The adverse impacts would have to relate to a specific Crown proposal and not larger adverse impacts of the project. One example of a strategic decision that might raise a consultation obligation that was offered by the Court concerned the privatization of a Crown resource because such a decision would “affect the Crown’s future ability to deal honourably with Aboriginal interests”.\textsuperscript{24}

Taking these observations together, the Court concluded that the approval of the EPA 2007 did not trigger a duty to consult because nothing would change on the ground with respect to additional infringements of the CSTC First Nations’ section 35 rights.

(ii) The Role of Tribunals

Having explained the instances when consultation obligations would be triggered, the Court then considered the role of tribunals in the consultation jurisprudence. It concluded that the role of any particular tribunal as it concerns consultation obligations would depend on the duties and powers conferred upon it by the legislature.\textsuperscript{25} Building on

\begin{itemize}
\item\textsuperscript{20} Id., at para. 49.
\item\textsuperscript{21} Id., at para. 50.
\item\textsuperscript{22} Id., at para. 53.
\item\textsuperscript{23} Id., at paras. 52-54.
\item\textsuperscript{24} Id., at paras. 90, 47.
\item\textsuperscript{25} Id., at para. 55.
\end{itemize}
Haida Nation, McLachlin C.J.C. made the further observation that the legislature could choose to delegate to a tribunal the Crown’s duty to consult and that it would also be open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process concerning a resource. 26 Alternatively, the legislature could choose to confine a tribunal’s power to determinations over the adequacy of the consultation as a condition of its statutory decision-making process. In such an instance the tribunal would be evaluating the Crown’s conduct to determine whether the duty to consult was appropriately discharged. 27 The Court also drew a distinction between a tribunal’s power to engage in consultations and the jurisdiction to determine whether a duty to consult existed at all. Significantly, the Court observed that the act of consultation in and of itself is not a question of law. Rather, it is a distinct and often complex process involving the consideration of facts, law, policy and compromise. 28 A tribunal would have to be given express jurisdiction through its enabling statute to engage with facts, law, policy and also to facilitate a compromise. Similarly, even for specialized tribunals with the expertise and authority to decide questions of law, the relevant statutes governing their operation and jurisdiction would have to be examined to ensure that the legislature did not exclude the ability to consider such questions from the tribunal’s jurisdiction.

With these considerations in mind, the Court concluded that the Commission in this case lacked the jurisdiction to engage in consultations. Furthermore, it did not have the authority to rescope the order to address consultation. However, since the Administrative Tribunals Act 29 and the Constitutional Question Act 30 did not expressly exclude from the Commission’s jurisdiction the duty to consider the adequacy of Crown consultation, that issue was properly before it. 31

2. Moses

Moses is the first case in the Aboriginal jurisprudence to consider the relationship between a modern treaty and the jurisdictional divide

26 Id., at para. 56.
27 Id., at para. 57.
28 Id., at para. 60.
29 S.B.C. 2004, c. 45.
30 R.S.B.C. 1996, c. 47.
31 Rio Tinto, supra, note 5, at para. 72.
between federal and provincial powers as defined in sections 91 and 92 of the *Constitution Act, 1867* \(^{32}\) treaty obligations and the honour of the Crown. The project that became the subject of the appeal was a proposed vanadium mine at Lac Doré, near Chibougamau, Quebec. That area is within the territory covered by the JBNQA, which covers an area of 410,000 square miles of land and lakes.

(a) The Consultation Regime Within the JBNQA

The JBNQA, and in particular section 22, contains a complex governance scheme and a consultative framework for activities on the treaty lands \(^{33}\). To begin with, it provides for an Advisory Committee that is responsible for reviewing and overseeing the administration and management of the environmental and social regime provided for by the JBNQA. That Committee includes representatives from Canada, Quebec and the Cree.

A proponent of a project begins the review process by submitting preliminary information to an Administrator. The identity of the Administrator depends on which government has jurisdiction over the project. The Administrator then sends the information to an Evaluating Committee. That Committee studies the information and then makes recommendations over the proper scope of an environmental assessment. The Committee’s analysis returns to the Administrator, who may then give instructions or make recommendations to the proponent about the nature and content of the environmental assessment.

Next, the proponent must prepare an impact statement that specifically speaks to the anticipated impacts on the Cree communities. That statement moves from the Administrator, to a Review Body, and then to the Cree Regional Authority, which in turn may make its representations back to the Review Body. The Review Body then conducts the assess-


\(^{33}\) As a general observation, the JBNQA is very comprehensive in character and arguably was well ahead of its time in terms of the kind of relationship and interaction across governments and the Cree of Quebec on how to achieve reconciliation. Although there were a number of lawsuits that arose out of various aspects of the JBNQA, that does not diminish its pioneering dimensions. Justice Binnie discussed this briefly in Moses, supra, note 4, at para. 14, where he noted that the JBNQA “was an epic achievement in the ongoing effort to reconcile the rights and interests of Aboriginal peoples and those of non-Aboriginal peoples in Northern Quebec”. Similarly, Deschamps J. described it as a model for the many modern land treaties that have been signed since the 1982 constitutional amendments (ibid., at para. 82). In addition to the powers of self-government over large segments of the JBNQA territory, Deschamps J. also placed significant emphasis on the Agreement’s intergovernmental provisions as between Canada and Quebec (ibid., at para. 84).
ment and has the ultimate responsibility of determining whether the project may proceed and, if so, on what terms and conditions.\textsuperscript{34} The membership of the Review Body is determined on the basis of which government has jurisdiction over the project. In either instance there is participation by the Cree Regional Authority. Thus, if a project falls within provincial jurisdiction, the Review Body will consist of provincial representatives, and representatives of the Cree Regional Authority. If the project falls within federal jurisdiction, then the representatives on the Review Body will be from the federal government, together with representatives of the Cree Regional Authority.

Constitutional jurisdiction over the project also determines whether or not a proposed project must undergo more than one assessment. The JBNQA provides that a project ought not to be submitted to more than one assessment unless it falls within both provincial and federal jurisdiction. When the latter is the case, the parties, by mutual agreement, may conduct only one assessment. As for the determination of jurisdiction, the JBNQA provides for an Evaluating Committee to study the project and to make a recommendation to the provincial Treaty Administrator. The Treaty Administrator then submits the recommendation to the provincial cabinet, which has the discretion to either accept or reject the recommendation.

Apart from how the JBNQA is to operate, the other significant element of the JBNQA is the requirement that Canada and Quebec, in their adopting legislation of the JBNQA, expressly recognize that neither government “will impair the substance of the rights, undertakings and obligations provided for in the Agreement”.\textsuperscript{35} This commitment was further reinforced by the term in the JBNQA that recognized that inconsistencies between the legislation adopting the JBNQA and the provisions of “any other federal or provincial law” would be resolved in favour of the terms of the JBNQA.\textsuperscript{36}

\textit{(b) The Moses Project}

The proposed mine was said to contain 10 million tons of vanadium and would have an anticipated life of 40 years. In practical terms, the measurements were said to correspond to 12 per cent of the worldwide vanadium consumption, with the proposed project being the only one of

\textsuperscript{34} Moses, \textit{id.}, at paras. 127-129.
\textsuperscript{35} \textit{Id.}, at para. 88.
\textsuperscript{36} \textit{Id.}, at para. 89.
its kind in North America. From the perspective of impacts, the proposed project would involve disruptions to watercourses and lakes in the area and the construction of tailing ponds, all of which would have harmful effects on fish habitat. Apart from the anticipated impacts on the fish, all parties agreed that the proposed project fell under provincial jurisdiction. The potential impacts on fish and fish habitats, however, brought in federal jurisdiction and the question of whether or not a comprehensive assessment would be required by the Department of Fisheries and Oceans (“DFO”), in accordance with the requirements of the Canadian Environmental Assessment Act.

Before the process under the JBNQA was completed, the federal officials advised the Cree that the assessment of the project would be undertaken by a review panel under the CEAA and not through the federal assessment procedure anticipated by the JBNQA. In response, the Cree commenced an action in Quebec Superior Court, seeking a declaration that (1) the CEAA was inapplicable in the territory covered by the JBNQA because it was inconsistent with the JBNQA; and (2) federal and provincial environmental assessments should be conducted in accordance with the terms of the JBNQA, given the nature and impact of the project.

In response, Quebec argued that the project was essentially within provincial jurisdiction such that only its environmental assessment ought to be applied. Canada responded that the concern with the fish and fisheries resulted in a requirement for two environmental reviews, one under the terms of the JBNQA, and the other under the CEAA.

(c) The Decision of the Lower Courts

The Quebec Superior Court concluded that only the provincial process was applicable to the project. The Quebec Court of Appeal disagreed. It analyzed the problem in terms of three questions: (1) the validity of the CEAA; (2) inconsistencies between the CEAA and the JBNQA; and (3) whether there could be two assessments. The Court concluded that although the CEAA was valid, the JBNQA was paramount to the CEAA and its terms would prevail. The Court also concluded that in the event of any inconsistencies under the terms of the JBNQA’s review process, the federal Review Body would prevail. That conclusion left the Supreme Court of Canada with the formidable task of

37 Id., at para. 64.
38 S.C. 1992, c. 37 [hereinafter “CEAA”].
having to determine which of the environmental assessment paths would be most appropriate to the circumstances of the case, and which would respond to the protection and reconciliation of section 35 rights.

Perhaps not surprisingly, members of the Court had two distinct views of the complexity of the processes. The Court divided 5-4 in the outcome. At the heart of the difference between the majority and minority views was a fundamentally different methodology and approach to the relationship of modern-day agreements and the broader constitutional fabric.

(d) The Majority Decision

Writing for the majority, Binnie J. approached the analysis by focusing on the various pieces of the jurisdictional puzzle. The overriding concern appears to have been to preserve federal paramountcy in the assessment of the vanadium project. Justice Binnie acknowledged that the JBNQA reflected a lengthy and precise arrangement among parties of equal sophistication that ought to be interpreted in accordance with the principles of contract interpretation. He contrasted modern-day comprehensive treaties between the Crown and Aboriginal communities with historic treaties in which gaps in the relevant treaty texts and silence on a number of issues required a different approach to treaty interpretation.39 But when it came to interpreting those parts of the JBNQA that were relevant to the assessment of the vanadium project, the concern shifted to the federal-provincial divide. Even though the JBNQA had a system aimed at rationalizing questions of jurisdiction, Binnie J. drew a bright line between the division of powers defined by the Constitution Act, 1867 and any other arrangement that might be contained in an Agreement.40

To solve the problem in a way that both preserved the JBNQA process and maintained federal paramountcy, Binnie J. explained that the JBNQA could co-exist with the CEAA process in a complementary manner. Dismissing the implications that the project would be subject to two processes, Binnie J. concluded that the requirements of the CEAA would follow only if the proposed project passed JBNQA scrutiny. As such, the JBNQA was described as an “internal pre-approval treaty

40 Moses, id., at para. 8.
review process”, to be followed by the CEAA’s “external post-approval treaty process”. The further rationalization for this approach and distinction was anchored in the view that the provincial assessment contemplated by the JBNQA was much less comprehensive than the requirements of the CEAA. Finally, Binnie J. was of the further view that there could be no harm in having the project reviewed pursuant to the CEAA, because the CEAA would then be guided by the principles of the honour of the Crown in the consideration of Cree concerns. In Binnie J.’s words, “common sense as well as legal requirements suggest that the CEAA assessment will be structured to accommodate the special context of a project proposal in the James Bay Treaty territory, including participation of the Cree”.

(e) The Dissent

Unlike the majority, Deschamps J.’s point of departure reflected her attempt to preserve the integrity of the JBNQA and to locate an appropriate response to the assessment of the vanadium project within the JBNQA process. The description of the JBNQA as “both an intergovernmental agreement and an Aboriginal rights agreement” captured the core of Deschamps J.’s analysis. The JBNQA granted to the Cree powers of self-government over large segments of Cree territory. In that vein, unlike the CEAA process, where Cree participation would be limited to section 35 consultation input, under the terms of the JBNQA, the Cree had a defined participatory role in the consideration and assessment of projects. Justice Deschamps also took note of the express recognition in the JBNQA that the rights, undertakings and obligations contained therein were not to be read down by or impaired by conflicting legislation. To the contrary, Deschamps J. highlighted the practice of agreeing to one environmental assessment process for proposed undertakings and projects.

Overriding the particular features of the JBNQA and the enabling provincial and federal statutes was the concern that modern-day treaty agreements, while not nearly as obscure as the historic treaties so as to require specific rules of interpretation, still had to be interpreted with

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41 Id., at para. 48.
42 Id., at para. 82.
43 Id., at para. 89; see also the specific provision in s. 2.7 of the JBNQA. The authorizing legislation, both federal and provincial, also expressly recognized the supremacy of the JBNQA over other conflicting legislation. Id., at para. 91.
reference to and consideration of the intentions of all parties to the agreement. Beginning with the text of the JBNQA, Deschamps J. explained that the Court had to strive “for an interpretation that is reasonable, yet consistent with the parties’ intentions and the overall context, including the legal context of the negotiations” that resulted in the agreement.”\(^{44}\) Using that view as her guide, and taking the specific features of the JBNQA into account, Deschamps J. concluded that the assessment process under the JBNQA was sufficient to meet the goal of reconciliation. That meant that there was no need for a CEAA process. Should the project pass JBNQA scrutiny, the federal Fisheries Minister would be obliged to accept the results of the JBNQA assessment and issue the requisite permit.

3. *Little Salmon*

The treatment and interpretation of modern-day agreements that began in *Moses* continued in *Little Salmon*, though this time with reference to the relationship between consultation obligations contained within a modern-day treaty and section 35 consultation obligations. The specific question was whether or not a duty to consult existed *in addition to* the consultation provisions contained in the treaty between Little Salmon/Carmacks First Nation (“LSCFN”) and, if so, whether the Crown met its consultation obligations. The further question was whether, in the absence of consultation provisions in a modern-day agreement, section 35 consultation obligations existed or whether the silence in the modern-day agreement could be taken to mean that section 35 consultation obligations were deliberately being written out of the relationship.

The Court was unanimous in the conclusion that the Crown met its consultation obligations to LSCFN. However, the judges were divided in their perspectives over the locus of the consultation obligations and how that obligation was met. The difference in approaches reflected divisions similar to those that surfaced in *Moses*. The debate over the proper interpretation of modern-day treaties, the positioning of section 35 obligations and the overriding implications of the honour of the Crown continued between Binnie J. and Deschamps J., with Binnie J. writing for the majority and Deschamps J. writing for a reduced minority.

\(^{44}\) *Id.*, at paras. 117-118.
(a) The Background Facts

The modern-day treaty at issue was the Little Salmon/Carmacks First Nation Final Agreement ("LSCFN Treaty"), which was finalized in 1996 and ratified by LSCFN in 1997. That treaty was one of 11 pursuant to the terms of an umbrella agreement among all the Yukon First Nations and the federal and territorial governments that was signed in 1993, following 20 years of negotiation. The overall magnitude of the umbrella agreement covered an area of 484,000 square kilometres, or, in the words of Binnie J., an area “roughly the size of Spain”. The terms of the LSCFN Treaty were outlined in over 400 pages. The LSCFN surrendered 41,595 square kilometres. In exchange, key features of the LSCFN Treaty that were relevant to this appeal included:

- the retention of 2,589 square kilometres of “settlement land”;
- financial compensation of over $34 million;
- potential royalty sharing;
- rights of access to Crown land;
- special management areas;
- protection of access to settlement lands;
- rights to harvest and fish wildlife;
- rights to harvest forest resources; and
- rights to representation and involvement in land use planning and resource management.

The LSCFN Treaty also created self-government institutions as well as authorities such as the Yukon Environmental and Socioeconomic Assessment Board of Carmacks Renewable Resources Council. Members of that Board would include individuals who would be nominated jointly by the LSCFN and the Yukon government. Equally material to the unfolding of this case were two seemingly contradictory clauses in the treaty. The first was a fairly standard “entire agreement clause” that was intended to achieve certainty with respect to the relationship that was being created. The second was a non-derogation clause that recognized that nothing in the treaty arrangements would affect the ability of the Aboriginal people of the Yukon to exercise or benefit from “any existing or future constitutional rights for aboriginal people that may be applicable to them”.

45 *Little Salmon*, supra, note 6, at para. 9.
46 *Id.*, at para. 36.
Turning to the specific facts, in 2001, a Yukon resident, Larry Paulsen, submitted an application for an agricultural land grant of 65 hectares to the territorial government. Mr. Paulsen wished to grow hay, construct some buildings and raise livestock. The application went through four levels of review between 2001 and 2004. At the first level of review, the application was pre-screened for completeness and compliance with the relevant and then current government policies. The application was then reviewed by the Agriculture Land Application Review Committee, where in the result, Mr. Paulsen was asked to reconfigure his application to take into account concerns over the suitability of the soil and undefined environmental, wildlife and trapping issues.\footnote{Id., at para. 18.}

In 2004, the application reached the third level of review, the Land Application Review Committee (“LARC”). There, LARC organized a meeting to discuss the application. It specifically invited the LSCFN to participate in the discussion. The LSCFN opposed the application. At the heart of LSCFN’s opposition was a concern for a trapline that intersected the lands that were the subject of Mr. Paulsen’s application. LSCFN also raised concerns over the loss of animals to hunt in the area, as well as the potential impact on adjacent heritage sites. While the LARC took these concerns into consideration, it did so in light of the fact that the Paulsen application for 65 hectares represented approximately one-third of one per cent of the whole trapline, which covered an area of 21,435 hectares. LARC ultimately concluded that any impacts on the trapline would be minimal and recommended that the Paulsen application be approved. LARC also recommended an archeological survey to address potential heritage and cultural sites. That study was undertaken and no adverse impacts were identified. The Paulsen application was approved, although no notice of the approval was sent to the LSCFN.

Just over a year following the approval, LSCFN made inquiries into the status of the application. Upon being advised that the application had been approved, the LSCFN initiated an administrative appeal, followed by a judicial review application. In its application for judicial review, the LSCFN sought to have the approval quashed on the basis that the territorial government failed in its consultation obligations.

Both the judge at first instance and the Yukon Court of Appeal held that the LSCFN Treaty did not operate to exclude a section 35 duty to consult. They also agreed that the obligation lay at the lower end of the
consultation spectrum. Where the two lower courts parted company was on whether or not that duty was satisfied by the territorial government. The reviewing judge at first instance concluded that the duty to consult was not satisfied. The Yukon Court of Appeal held that it was.

(b) Decision of Justice Binnie

Writing for the majority, Binnie J. was guided in his analysis by the view that the duty to consult was a derivative of the honour of the Crown and therefore applied to this and all cases, independently of expressed or implied intentions of the parties. He expressly rejected the notion that a modern-day agreement could be a complete code of conduct. Characterizing “reconciliation” of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship as the “grand purpose of section 35 of the Constitution Act, 1982”,48 Binnie J. explained that modern treaties “attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities”.49 He also observed that modern agreements were “designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability”.50 He went on, “it is up to the parties, when treaty issues arise, to act diligently to advance their respective interests”.51 Justice Binnie also observed that such agreements were not about preserving the status quo. In other words, they could not be interpreted narrowly by territorial officials so as to eclipse the construction of that new relationship. The counterpoint to that assertion was that the LSCFN could not ignore the $34 million and other treaty benefits it received through the agreement. Bearing in mind the need to maintain a new balance in the Aboriginal-Crown relationship, the modern-day agreement was firmly positioned as only one, albeit significant step, “in the long journey of reconciliation”.52

Coming full circle, Binnie J. then explained that consultation is something that is imposed on the treaty as a matter of law, “irrespective
of the parties’ ‘agreement’”. He noted that the duty to consult is not a collateral agreement or condition, nor would the duty to consult upset the interpretation or operation of the entire agreement clause. Rather, the duty to consult “is simply part of the essential legal framework within which the treaty is to be interpreted and performed”.

In the result, when dealing with a modern-day treaty, the first step would be to review the treaty to determine the parties’ respective consultation obligations as articulated in the document. If the agreement contained a consultation process, then the scope of the obligation ought to be shaped by the provisions of that process. Consultation might not be required, if the agreement contained a different mechanism to “uphold the honour of the Crown”. By “mechanism” Binnie J. was really referring to the content of consultation and not to the existence of the obligation. In doing so, he expressly noted that territorial officials had to take fair and full consideration of the LSCFN’s views, they did not have to commit to minimize that concern. As between those two options, Binnie J. concluded that the review by the territorial officials had to be fair. Applying that principle to the particular facts, Binnie J. concluded that the notice that the LSCFN received through LARC, the opportunity that was offered to LSCFN to make its concerns known to the decision-maker, and the manner in which the decision-maker acted, were all consistent with the honour of the Crown.

(c) Decision of Justice Deschamps

As in Moses, Deschamps J.’s concern lay with the ability to preserve the integrity of the LSCFN agreement and to locate a solution to the consultation conundrum within confines of the agreement. In the result, many of her conclusions were similar to those reached by Binnie J. But her approach was very different. As she did in Moses, Deschamps J. began her analysis by taking a very close look at the LSCFN Treaty. She concluded that the LSCFN Treaty contained a consultation mechanism that was fully equipped to address the consultation concerns at hand. That mechanism was applied and its requirements were met.

53 Id., at para. 69.
54 Id.
55 Id., at para. 71.
56 Id., at para. 74.
In her broader analysis, Deschamps J. pointed to honour of the Crown principles and the expectation embedded within modern treaties that the treaty relationship would evolve as a function of its implementation. On the basis of that observation, she concluded that the primacy and integrity of the treaty had to be preserved when considering particular questions. She explained that both the honour of the Crown and the evolving requirement of the relationship were integral and operative dimensions of the negotiating process, such that the outcome of that process ought not, unless absolutely essential, to be modified or discounted.

Beginning with treaty-making, Deschamps J. noted that it was designed to establish a relationship that would have the capacity to evolve over time. In the negotiations of that relationship, the Aboriginal people engaged in that process would have to be able to “participate actively in defining their special constitutional rights and for their autonomy of judgment”.

The expectation that the treaty relationship would evolve imports with it the legal certainty of flexibility and therefore uncertainty, to enable the evolution to occur. Such an approach inevitably eclipses the concept of a finality clause. In the result, entire agreement clauses could not be equated with finality because that would pre-empt the capacity for evolution.

In light of that approach, the Crown was precluded from taking a narrow interpretive approach that would have the effect of denying consultation. The spirit of the agreement would have to operate to locate a resolution to the dispute within the treaty terms.

Complementing that analysis was the observation that the treaty-making process was infused with the honour of the Crown principles and the desired objective of reconciliation. The Crown’s very act of negotiating and seeking to reach modern-day agreements that would enable Aboriginal communities to exercise their special rights in their traditional territories, reflected honourable Crown conduct. By extension, the outcome of such conduct had to be honourable. That being the case, its implementation could not then be undermined by permitting any one of the parties to resort to an external process that could enable it to renege on the obligations contained in the treaty. Instead, the parties would have to work together to locate a solution within the agreement.

57 Id., at para. 106.
58 Id., at para. 108.
59 Id., at para. 112.
Embedded in Deschamps J.’s approach was in some respects a direction along the lines of: “you all reached the agreement, now make it work.”

Justice Deschamps was not oblivious to the fact that even the most thorough agreements might contain gaps. She acknowledged that treaties were not complete codes and that omissions might be identified after the agreement’s conclusion. Similarly, Deschamps J. acknowledged that when trying to give maximum credit and deference to the negotiating parties, the courts could not be oblivious to or “blinded” by the omissions. Where true gaps or omissions were discovered, whether procedurally or substantially, the honour of the Crown and the common law obligations could be resorted to so as to locate a solution to the problem. But that possibility ought not to undermine the legal certainty of the treaty. Such instances should also be truly exceptional and not the rule.

III. RECONCILIATION IN THE EYES OF THE COURT

There are two issues that emerge from the Court’s recent pronouncements that are essential to understanding the probable trajectory of Aboriginal jurisprudence. The first relates to the Court’s definition of reconciliation and its view of dialogue as the primary vehicle for reconciliation. The second issue concerns the relationship between the objectives of reconciliation, its constituent components and the grounding principles of the Constitution. The first issue underlies all three cases. The second is embedded in *Rio Tinto* but it lies at the heart of the debate between Binnie and Deschamps JJ. The two issues feed into each other and it is difficult to give priority to one over the other. Understanding the meaning and the objectives of reconciliation set up the discussion on how to fit those objectives into the Constitution. But clarifying the limits of the Constitution, or to be more precise, the limits within which the Constitution may be permitted to evolve to enable consultation, feeds into the question of which of the reconciliation objectives are feasible and which are not. That said, the discussion will proceed first with a review of the Court’s definition of reconciliation. It will then place that definition within the broader constitutional context to understand the possible future options in the direction of the relationship.

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60 Id., at para. 123.
1. What Does Reconciliation Mean and What Is it Intended to Accomplish?

In many respects, *Rio Tinto* crystallized the Court’s jurisprudential direction and conception of what it considers to constitute reconciliation. This is not to say that the components of reconciliation were previously obscure. Beginning with *R. v. Sparrow* and working through to *Delgamuukw v. British Columbia*, the question at issue was formulated in terms of “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. In *Haida Nation*, *Taku River* and *Mikisew Cree*, consultation and dialogue were presented as the primary tools to be used to achieve the proposed reconciliation.

In *Rio Tinto* the Court moved to a practical translation of the framework that it set up in the earlier cases to conclude that reconciliation, the honour of the Crown and consultation are about achieving a balance in the sharing and exploitation of the country’s resources. Behind those grand terms is the concern to “preserve the future use of the resources claimed by Aboriginal peoples while balancing the countervailing Crown interests”. The questions that are engaged by such a perspective and the balancing act that is contemplated are much less about *whether* the resources are to be exploited and significantly more about *how* they are to be exploited. Thus, the Court observed that consultation was not about shutting down development. Recognizing that consultation could cause delays in the ongoing development of the resources, that was accepted as a necessary outcome of a “complex constitutional process”. The further implication was that besides some minor delay, development would proceed. And as if anticipating some concerns with the proposed approach, the Court hastened to note that Aboriginal peoples are often involved in economic development and in the exploitation of resources.

64 *Rio Tinto*, supra, note 5, at para. 50.
65 *Id.*, at para. 50.
66 *Id.*, at para. 60.
67 *Id.*, at para. 34.
While a valid point, the further implication was that Aboriginal communities are just as interested in economic development.

Arguably, the nature of the balance reflected in Rio Tinto is not all that new. In R. v. Marshall, 68 for example, where access to the resources in the context of a treaty right to trade was at issue, the Court in effect alluded to a similar type of balance. In that instance, the underlying objective was to identify a way of striking a balance between the exercise of Aboriginal treaty rights to hunt, fish and trap and the rights acquired by the Crown to facilitate the settlement of the lands. The mechanism used in that case was to draw a distinction between commercial activities and activities for personal use. The promotion of economic development as the cornerstone of reconciliation in Rio Tinto may be reflecting a certain evolution in the Court’s reconciliation discourse. That implication raises a number of significant questions.

(a) Exploitation of the Resources as a Means to Reconciliation

The first concern with the Court’s conception of reconciliation lies with the faith that it places on the parties’ ability to reconcile their relationship by negotiating and reaching agreements over the sharing of the resources. There is no question that economic self-sufficiency and participation in the Canadian resource economy by Aboriginal communities is a critical, if not an essential component of reconciliation, however narrowly or broadly reconciliation might be defined. It is also possible that the resource-focus and orientation of the Court in these three recent cases is being driven by the subject matter of the consultations at issue, such that there is limited scope for a fuller consideration of the various facets of reconciliation. However, resource exploitation, as the point of departure for the ultimate balancing objective, runs a significant risk of eclipsing a deeper understanding of how economic development fits in with a community’s values and overall well-being.

To put this concern into a better perspective, it is essential to recognize that Aboriginal peoples across the country have diverse perspectives and visions. Chief Justice McLachlin is correct to observe that there are Aboriginal peoples who participate in resource exploitation. But that is not necessarily a universal primary objective. For some communities,

greater access to their lands for the purposes of generating economic opportunities can be vitally important to their well-being. However, many communities and individuals see their very identity as inextricably connected to their land. Access to their traditional lands and their resources is understood in cultural and spiritual terms. Although taking some of the resource for economic benefit may not be precluded from consideration, how that might be done and how much of the resource might be removed or exploited may result in some significant tensions within communities and between individuals.69

Such considerations can have a range of implications on the resource at issue depending on whether that is located on Aboriginal title lands or on treaty lands. For example, if the resource is located on Aboriginal title lands, the nature of the negotiation that the honour of the Crown and consultation obligations will require will necessarily be “deep”, with prospects in certain circumstances of a veto by the title-holding community. In treaty territory the notion that Aboriginal treaty rights holders maintain a right to engage as before in their usual avocations of hunting, fishing, harvesting and trapping, may very possibly import internal practices and ways of engaging with the resource, or access to the resource for long-term objectives. Thus in many customary practices, the internal limit on a resource is defined by the imperative that individuals take only as much as is absolutely needed for subsistence. Development practices and objectives that seek to remove resources for commercial purposes are very likely to exceed the quantum that would be accepted by traditional practices. In such an instance, the economics of the situation, coupled with negotiated agreements, makes reconciliation a very different task. Then, of course, there may well be the situation where an Aboriginal community decides that it would like to capitalize on its resources on its title lands for commercial purposes but such practices might otherwise be contrary to environmental and other related Crown concerns. The balancing in that instance will be of a different nature but the economic self-sufficiency that a community might be seeking to undertake may not be received in reconciliatory terms if it brings it into conflict with its neighbours.

69 For a full analysis of this perspective, see Gordon Christie, “Aboriginal Resource Rights After Delgamuukw and Marshall”, in Kerry Wilkins, ed., Advancing Aboriginal Claims: Strategies/Directions (Saskatoon: Purich Publishers, 2003). In her oral submissions in Haida Nation, Terri-Lynn Williams-Davidson gave a very compelling explanation as to how forestry activities and economic development had to be integrated with Haida spiritual and cultural values.
Overriding this dilemma is a question of whether the emphasis on economic participation, economic self-sufficiency and economic well-being on a Western economic platform does not risk the integration of Aboriginal practices into Western economic norms that eventually may result in the trivializing of traditional values and the reduction of customary practices to symbolic festivals and the eventual transformation of the landscape.\textsuperscript{70} This is not to say that negotiated agreements have to take that direction. However, in the context of difficult economic times and the increasing demands on Canada’s resources, challenges to practices and perspectives that have the effect of restricting access to the resources that are otherwise in demand might become quite pronounced and the desired balancing a difficult goal to achieve.

(b) Economic Self-sufficiency as a Proxy for All Other Elements of Reconciliation

Unless the significant deficits in the socio-cultural aspects of the Aboriginal-Crown relationship are addressed, placing economic development and the sharing and the exploitation of resources at the heart of reconciliation carries with it the significant risk that consultation, as the primary vehicle for reconciliation, will be used as a proxy for the settlement of all other social and jurisdictional dimensions of the Aboriginal-Crown relationship. That possibility is not theoretical. It is an issue that underlines many consultations that are taking place across the country. The net effect is to take parties down one of two or three paths. Where parties want to avoid legal disputes, the accommodation requirements may be amplified and the terms of an accommodation agreement might be richer than might otherwise be required by the legal consultation obligation. Where parties cannot agree on accommodation terms, alternative dispute resolution methods (“ADR”) and/or court proceedings may be needed to arbitrate a settlement. This approach may facilitate an eventual negotiation. But it might also result in a wider divide with difficult court orders and implications.

The reason for this dynamic is that as much as the grand purpose of the section 35 right might be about reconciliation, the individual communities, the individual government ministries, and the individual project

\textsuperscript{70} For a fuller consideration of this concern, see James Tully, Public Philosophy in a New Key: Volume I, Democracy and Civic Freedom (Cambridge: Cambridge University Press, 2008), in particular c. 8, “The struggles of Indigenous peoples for and of freedom”.
proponents, at the micro-level of the equation, have very defined objectives, requirements and perspectives. In addition, what is a strategic decision-point for an Aboriginal community will be different than what it might be for a government or a company. Though the decision-point at issue might, for example, be a licence renewal, for an Aboriginal community the cumulative effects of a proposed project underlying a very focused application may be a crucial component of the consultation. Viewed that way, the Aboriginal community may assess its strategic decisions from the perspective of maximizing its leverage in the consultations. In contrast, the requirements of an Aboriginal community on a particular company may exceed that company’s capacity to address anything more than the immediate impacts of a proposed project. The actual impacts of the particular activity, severed from longer-term or cumulative effects, may also be minimal, placing consultation at the low end of the spectrum. Such a reality makes it that much more difficult to justify demands for accommodations that would be more appropriate in the context of more pronounced impacts and deeper consultation requirements.

Adding government to the mix, the range of public interest considerations and the assessment of what are strategic decision-making points may vary significantly. Consultation and accommodation options may also be limited by the legislative parameters that are engaged. For example, if the real obstacle or community challenge concerns problems with education or health care, the accommodation options from the perspective of a resource ministry or even the government may be limited by jurisdictional limits. Accommodations at that level would necessarily transcend the demands of any one particular project or consultation.

The three cases reflect some appreciation of the noted dynamics and associated risks. Thus, McLachlin C.J.C. tried to contain consultation to the actual potential for impacts of current government conduct and to strategic decision-making. The latter referred to changes in the way that a resource might be managed that would set the stage for further decisions “that will have a direct adverse impact on land and resources”71. Although McLachlin C.J.C. promoted a generous and purposive approach to the subject of Crown conduct and its impact on Aboriginal claims or rights72, she also cautioned that adverse impacts would be limited to a current decision and do not “extend to adverse impacts on the negotiating

71 Rio Tinto, supra, note 5, at para. 47 (emphasis in original).
72 Id., at para. 46.
position of an Aboriginal group”. While that approach identifies some parameters to particular consultation interactions, from the perspective of paving the way to reconciliation, they do not necessarily assist with the broader socio-economic challenges facing Aboriginal communities across the country. Addressing the well-being of Aboriginal communities, and starting with basic aspects such as access to clean water, hazard-free housing, the availability of proper education and health facilities, and perhaps most significantly, the restoration of self-worth and confidence of Aboriginal people in the Constitution, are all foundational to the promotion of successful economic development. If these priorities are treated as secondary to economic priorities, the pressure on consultation and accommodation will be enormous. More significantly, consultation and accommodation as tools of reconciliation are unlikely to be able to respond to the broader socioeconomic needs.

(c) Upgrading the Status Quo

The third implication of the Court’s approach to consultation and reconciliation touches on the nature of the balance that is to be achieved between the resources claimed by Aboriginal peoples and the countervailing Crown interests. This concern is trickier to analyze in the context of the three decisions because in two of the three cases, even the Aboriginal parties acknowledged that their existing rights were not going to be affected by the particular decisions at issue. Furthermore, the results in both *Rio Tinto* and in *Little Salmon* were the appropriate outcomes. The balance to be achieved between the farming activities with a potential impact on one-third of one per cent of the whole trapline, especially when that trapline covered an area of 21,435 hectares, was obvious. Similarly, what might be achieved by imposing onerous consultation obligations in the context of *Rio Tinto* was not clear. The particular facts aside, the analysis of consultation and the Court’s approach on consultation suggests that the Court does not view that process as amounting to more than some inconvenience for the parties involved. In that sense, it is not clear that the Court is promoting more profound changes to the status quo.

The hope appears to be that consultation and accommodation will promote better relations, that economic development and gradual self-sufficiency will foster greater trust, and that working together will
eventually result in a meaningful paradigm shift that is acceptable to all and that does not amount to zero-sum propositions and outcomes.

The optimism for such a perspective grows out of a view of the Constitution as a living tree, supported by principles, including dialogue, that are intended to promote the evolution of constitutional relations. The Court in that respect has been very careful to set up the appropriate legal framework for future consultations interaction, but then to leave it to the parties to work within the proposed framework to achieve mutually satisfactory outcomes. That explains the Court’s application of a reasonable standard to the review of the actual consultation deliberations and Binnie J.’s indication that a satisfactory consultation outcome would be one that emerged from a reasonable range of options. But if the cumulative effect of consultations does not accomplish a meaningful rebalancing of the relationship, there is a risk that history might not judge reconciliation, consultation and accommodation in favourable terms.

(d) But What Does Reconciliation Really Mean?

If reconciliation is more than the economic sharing of resources, if it engages other aspects of the Aboriginal-Crown relationship and if the ultimate objective of reconciliation is to promote new but meaningful and respectful ways in that relationship, what does that really look like? As noted above, the legal concept of reconciliation in the Aboriginal jurisprudence has been evolving for some time. It is a notion that has also gained substantial prominence in international crises and the resolution of such impasses. Reconciliation initiatives have been pursued in Northern Ireland, Bosnia-Herzegovina, Uganda and, perhaps most prominently, South Africa. In the latter instance the Truth and Reconciliation Commission (“TRC”) was set up in the aftermath of South Africa’s political transition. Its overriding task was to manage a complex and delicate relationship between sensitive yet public concerns. Embedded in that dynamic was the need to address the relationships between accommodation of justice and peace, of human rights and reconciliation, of victims’ rights and perpetrator demands, and of legal processes and

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75 See Haida Nation, supra, note 2, at paras. 60-63; Rio Tinto, supra, note 5, at paras. 64-65.

76 Little Salmon, supra, note 6, at para. 38.
extrajudicial truth-seeking mechanisms. As the TRC proceeded with its task, it had to engage in a balancing of the rights of the apartheid victims in “acceptable ways while at the same time keeping perpetrators on board”. In the result, there was a widespread recognition that justice and reconciliation were complementary and that one without the other would be detrimental to both. Justice was required to promote equitable relations. Reconciliation was required to put an end to endless cycles of recrimination and punishment. Together, each of those concepts provided the parameters for the legitimate use of the other.

Speaking more broadly, what emerges out of the case studies of the various attempts at reconciliation are three critical components that have to be understood and settled before reconciliation can be set as an objective. The first component concerns the definition of reconciliation. The concept can mean different things to different people. However, at its core, reconciliation is about rebuilding relationships of trust and cohesion.

The second component of reconciliation relates to its process. This is perhaps the most challenging to define because the development of a process is likely to shape the outcomes. Generally speaking, the process of reconciliation may be understood as a series of steps that ought to be taken to achieve the desired goals. Practically, the experience to date with reconciliation processes has resulted in the identification of five interwoven and related strands:

1. **Accepting a vision of a shared future**: This imports the recognition of a common vision of an interdependent, just, equitable, open and diverse society as the ultimate objective of reconciliation.

2. **Acknowledging the past**: The losses, the indignities and the suffering of the past have to be recognized and healing processes have to be identified. Individuals and institutions have to acknowledge their own role in the past. But they also have to accept past conduct as the cause of the harm, learn from those experiences and seek constructive ways of avoiding the repetition of past mistakes. Similarly,
“victims” have to be receptive to the expressions of regret and healing. They must also have a significant role in giving expression to the ways of the future.81

(3) Re-building the relationship: This part of the process requires that the parties confront issues of trust, prejudice and intolerance. It also requires parties to recognize both their similarities and their differences. This part of the process requires time and place so that the redressing of the wrongs can be connected to the creation of a common and connected future.

(4) Changing cultural understandings and attitudes: This part of the process goes beyond the recognition of past wrongs to an understanding of why the relationship collapsed in the first place. Parties must work away from a culture of suspicion, mistrust and fear and move towards understanding and openness. To hear and to be heard as part of the reconciliation process becomes key.

(5) Substantial social, economic and political change: Ultimately, the aspects of social, economic and political structures that resulted in division and conflict must be identified, redefined and transformed in ways that avoid the repetition of past wrongs.

In sum, designing an appropriate process and identifying the interaction between its various components is not an easy task. More significantly, it requires time and transition.

The third component of reconciliation requires an understanding of where reconciliation is to take place and how it is to operate. Some position this part of the discourse at an institutional level. On that view, reconciliation: moral reflection, repentance, confession and rebirth. Confronting the wrong, expressing regret and seeking an apology requires significant moral fortitude. Nobody wants to do wrong. When wrong happens it requires tremendous courage to admit to that wrong. But that is only one dimension of the problem. The more difficult part of the exercise is to figure out how to avoid mistakes and wrongs in the future. Reconciliation, conceived as a rebirth, captures the essence of embarking on new ways.

81 At some point in the reconciliation exchange, the perpetrator, who genuinely regrets the injurious actions and seeks ways of moving forward, will experience the rebirth. In the face of genuine regret, the victim’s refusal to engage in the process perpetuates the hurt and prevents the healing. It is said that in South Africa, the TRC concluded it was the victims who had to “shape, ascribe, meaning to, and justify the choice for truth, amnesty and reconciliation above judicial justice. They had to support the call for an end to violence and measures to move forward”; Du Toit, supra, note 77, at 233. Similarly, in the Report of the Royal Commission on Aboriginal Peoples (Ottawa: Supply and Services Canada, 1996) (“RCAP”), the Commission concluded that it was essential that any steps toward self-government create the constitutional space “for aboriginal peoples to be aboriginal” and the negotiation of a treaty model. See in particular Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution (Ottawa: The Commission, 1993), at 41.
the collective conscience has to adapt and accept the way towards a transformed relationship. As agents of change, the institutions of government must strive to bring about reconciliation through truth commissions, justice and social reform. Others locate reconciliation at the level of individuals and the grass-roots. Advocates of that approach see individual practices and interactions as the better way of effecting change. Community-building, social cohesion, social processes and the nurturing of renewed relationships at the individual level stand a better chance of informing corporate processes and contributing to a political reconciliation. By extension, the building of momentum through many individual experiences can bring about a mutually acceptable paradigm shift.

Taken as a whole, where do these considerations take section 35’s grand purpose of reconciliation? The short answer is that as a vision, it identifies the imperative of defining and recapturing an honourable relationship between the Crown and Aboriginal communities. It also identifies some of the tools that are to effect reconciliation. Whether the process is institutionally or individually driven (or a bit of both), the Court is correct to observe that such changes will occur through dialogue. Insofar as the cases before the Court concern access to, sharing and extraction of resources, the Court’s focus on economic self-sufficiency is not wrong. Wealth creation has a significant role to play in the renewing of the relationship. In certain respects, it may be perceived as the easiest short-term solution to the tremendous inequities and it may help to promote a levelling of the playing field. However, on its own, economic self-sufficiency will limit the ability to speak of real socio-political change that would give Aboriginal communities a desired voice in shaping their future participation and place in the Constitution. The relationship of a socio-political transformation to the task of reconciliation, the type of changes that would effect the transformation and the congruence of such transformation with the Constitution is the harder issue to address. The tensions of that discourse are what emerge in the dialogue between Binnie J. and Deschamps J.

2. What About the Idea of One Canoe?

Will a mutually respectful relationship, the grand purpose of section 35, emerge through dialogue and recourse to section 35 consultation obligations, or will it emerge through the negotiation of modern treaties?

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82 See articles generally in Quinn, supra, note 77.
Will reconciliation be achieved through a myriad of individual interactions and consultations, or will it require more fundamental changes? If it is the latter, can such changes be accomplished within the existing constitutional framework or do they require a different approach?

These are the questions broadly speaking that underpin both the components of reconciliation discussed above and the “Binnie J. – Deschamps J.” dialogue. Both judges have faith in the Constitution and are confident in their views that reconciliation can occur within the parameters of the Constitution. Their differences lie in the way they conceive of the process of reconciliation and the locus of that transformation. In short, for Binnie J., dialogue and section 35 obligations at the individual level are the elements that will promote reconciliation. For Deschamps J., modern treaties where Aboriginal parties give expression to their autonomy of judgment is the key to reconciliation. This latter perspective engages the broader question of whether the autonomy of agreement-making improves the prospects of a more substantial constitutional transformation and reconciliation.

Beginning with the definition of reconciliation, Binnie J.’s definition grows out of a view that section 35 ushered in the concept of a merged sovereignty where “aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort”.

That concept was first introduced in the Aboriginal-Crown discourse in the *Report of the Royal Commission on Aboriginal Peoples*. Building on that idea and seeking to give it meaning, Binnie J. explained in *Mitchell* that as a new entity, the shared sovereignty had to have the capacity to reconcile the historical attributes of sovereignty with existing Aboriginal and treaty rights. Quoting RCAP’s view of shared sovereignty as a hallmark of the Canadian federation, and a central feature of the three-cornered relations linking Aboriginal governments, provincial governments and the federal government together, Binnie J. likened that relationship to the image of a single vessel. He explained that much like the three historic elements of wood, iron and canvas were pulled to form a harmonious whole, so too, the three historic elements of the Canadian federation — the Aboriginal governments, the provincial governments and the federal government — ought to be understood to form a harmonious partnership. Within that partnership each would retain

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83 *Mitchell, supra*, note 63, at para. 129 (emphasis in original).
84 *Supra*, note 81.
85 *Supra*, note 63.
its respective spheres and powers by virtue of its constitutional status. But together they could find ways to share their powers. In short, there was no need to look for a different vessel because as partners, the three entities forming the shared sovereignty would work together to find an appropriate balance, to build trust and to maintain a cohesive whole.

Justice Deschamps also expressed confidence in the Constitution and accepted that as the foundation for the definition of reconciliation. She came to that conclusion by pointing to the reconciliation that occurs among the compacts that are contained within the Constitution. Relying on the analysis contained in the *Reference re Secession of Quebec*,86 Deschamps J. drew attention to the four principles underlying the Constitution: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism. She then added a fifth principle to the Constitution: the honour of the Crown. Examining the original four principles, Deschamps J. noted that they contained three compacts: (1) between the Crown and individuals insofar as fundamental rights and freedoms are concerned; (2) between the non-Aboriginal and Aboriginal populations; and (3) among the provinces. Combined with the honour of the Crown, these principles and compacts, in Deschamps J.’s view created the space for a harmonious co-existence of the rights of Aboriginal peoples within the Constitution’s organizing principles.87 In reconciliation terms, the Constitution provides all the scope that would be needed to promote trust and cohesion.

The two judges part company on the second and the third components of reconciliation, that is, the process and the focus of reconciliation. Beginning with process, both judges accepted that the negotiation of a treaty offers the parties the optimal opportunity to work out a relationship that integrates and incorporates the special rights and perspectives of the negotiating parties. The very purpose of such a negotiation — to find a better way — carries with it the processes that are needed to overcome a culture of suspicion, mistrust and fear. Whether from the perspective of a robust Canadian federation, as reflected in the image of a canoe/vessel, or from the perspective of the Constitution’s compacts, the process of negotiating a new relationship embraces many of the principles of reconciliation. The place for Aboriginal peoples to participate in defining their special constitutional rights and to exercise their autonomy of judgment is in the negotiation of modern treaties.

86 Supra, note 74, at paras. 48-82.
87 *Little Salmon*, supra, note 6, at paras. 97-98.
Implicit in the faith that Deschamps J. placed in the negotiation process was the sense that the very act of negotiating captures four or five critical ingredients of reconciliation, namely: mutual recognition as equal, co-existing and self-governing peoples through their many relations together, mutual respect, mutual sharing and mutual responsibility.88 Thus in both Little Salmon and Moses, Deschamps J.’s focus was on preserving the integrity of those agreements and the processes underpinning the outcomes. Substantial transformation can occur and Aboriginal communities can exercise their autonomy in judgment within the existing principles of the Constitution through the negotiation and implementation of modern agreements. She concedes that where there are true gaps to an agreement the parties may seek recourse to honour of the Crown principles and section 35 obligations for a solution. However, such recourse should be the exception. Moreover, it would appear that Deschamps J. would not look favourably on agreements that compromised the constitutional pillars.

In contrast to Deschamps J., implicit in the caution with which Binnie J. approached the JBNQA and the LSCFNA was perhaps the concern that if the process of negotiating reconciliation were to go so far as to begin to reshape questions of jurisdiction and the division of powers, they would likely require formal constitutional amendments before their terms could be implemented.

That concern might explain how Binnie J. approached the reconciliation process. In both Moses and Little Salmon, Binnie J. placed significant emphasis on the need to create a legal basis for a long-term positive relationship. His reference to the canoeist looking forward to make progress resurrected the image of the vessel in Mitchell and with that the reminder that Aboriginal communities, the provinces and the federal government can share harmoniously in the relationship, but within their respective spheres of jurisdiction. References to the past and the future, with particular emphasis on the future, is consistent with the process features of reconciliation discussed above. The challenging part of Binnie J.’s approach lies with the limitation he places on the parties’ respective spheres of jurisdiction. While some might see that as the protection that is needed to prevent the erosion of fundamental constitutional values, others might question whether the net effect on reconciliation is to

88 These concepts were considered and analyzed in substantial detail in RCAP, supra, note 83. A comprehensive and efficient analysis of each of these elements as essential components of reconciliation is offered by James Tully in Public Philosophy in a New Key, supra, note 70, in c. 7, “The negotiation of reconciliation”, beginning at 223.
limit the scope for transformation in the Aboriginal-Crown relationship. This concern is compounded by Binnie J.’s downgrading, in effect, of the JBNQA assessment procedure. Although in context, the added layer of review through the CEAA might be accepted as an added layer of protection for the section 35 rights of the Cree, the implication of such downgrading carried with it a devaluation of Cree participation because the CEAA does not contemplate nearly the type of Cree participation in its process that is contained in the JBNQA.

Complementing the differences in approaches to the reconciliation process between Binnie J. and Deschamps J. are their different views on how and where reconciliation is to take place. Justice Binnie’s focus on dialogue as the primary reconciliation tool locates consultation at the local level of interaction. His conclusion that a significant part of reconciliation can be realized through the “thoughtful administration of the treaty” and the generous interpretation of the treaty terms by government officials, locates much of the responsibility for reconciliation at the local and individual level. The implication of that approach is that individual successes and experience will drive corporate or collective change and transformation. Stated in different terms, the trust will grow out of individual consultations and interactions.

By contrast, Deschamps J.’s treatment and consideration of the modern-day agreements as agents of reconciliation locates that process at the broader collective level of engagement. In Deschamps J.’s vision the modern-day treaties are about achieving collective change. While dialogue is a significant component of the process, the generosity in the interpretation of modern treaties is not seen to emanate merely from the administration of the treaty by individual officials. Rather, its implementation in a generous way grows out of the collective intention to create a new relationship through the modern agreement. Thus, individual conduct in the implementation of particular agreements is to be guided by the collective direction reflected in the agreement.

The locus of agency in the reconciliation process likely lies somewhere in the middle between individual experiences and implementation and the direction of the collective will. The pillars of the Constitution, as enumerated in the Secession Reference, and applied by Deschamps J., serve to ground the legal basis for the much sought after long-term relationship between non-Aboriginal and Aboriginal communities. However, this consideration, perhaps more so than the definitional and

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89 Little Salmon, supra, note 6, at para. 10.
process aspects of reconciliation, brings into focus the broader realization that some aspects of reconciliation are legal in nature and engage principles of justice in a fundamental way. Other aspects engage broader socio-political considerations and are arguably more challenging to address.

IV. CONCLUSION

Justice Binnie said in Little Salmon that “[a] canoeist who hopes to make progress faces forwards, not backwards.”90 Few would disagree with the proposition that the recognition of past wrongs, the accommodation of differences and the envisioning of a common and connected future is a desired way forward. Canada, unlike other conflict-ridden jurisdictions, can draw on its rich sources of plural government, federalism and mutual respect for cultural, legal and political diversity to achieve reconciliation. These experiences can operate to strengthen the Constitution and Confederation in ways that harmonize Aboriginal communities, provinces and the federal government. However, the resolve has to be there to give reconciliation its full expression and to appreciate its highly textured demands. In practical terms, that comes down to an analysis that transcends a strictly legal debate but goes back to some fundamental questions over what Aboriginal and non-Aboriginal Canadians alike would like to see in a future harmonized relationship. Without that resolve and that analysis there is a significant risk that reconciliation will become just another lofty term, discussed in terms of high generality and ambiguity, much in the way of the historic treaties. Surely, there has to be a better way forward.

90 Id.