

# Reconsidering Reconciliation: The Long Game

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# Reconsidering Reconciliation: The Long Game

Jeffery G. Hewitt\*

## I. INTRODUCTION

Chief Justice McLachlin has identified reconciliation of the relationship between Canada and Aboriginal people as among the Court's top priorities in the coming years,<sup>1</sup> but has the Court prepared the way? Since the meaning of section 35, *Constitution Act, 1982*,<sup>2</sup> continues to take shape and is central to reconciling the relationship between Canada and Aboriginal people, what do we mean by reconciliation?<sup>3</sup> This paper explores some of the ways that Indigenous legal orders may offer assistance to the priority of reconciliation, not only in terms of potentially resolving issues within Aboriginal communities but also in terms of regulating relationships between Aboriginal and non-Aboriginal

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\* This paper was prepared for the 17th Annual Constitution Cases Conference held at Osgoode Hall Law School, York University, Toronto, on April 11, 2014 and relates to broader questions relating to the legal relationship between Canada and Aboriginal people that I have been exploring since my arrival at law school in 1993. Conceptualizing reconciliation as founded on "equality of all peoples" as set out in the abstract and echoed throughout this paper, is based on Professor Patrick Macklem's thesis in *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001). There are many people to thank for their review of early drafts of this paper and for their wise counsel. They are Professors Sonia Lawrence, Amar Bhatia, Dayna Scott, Bruce Ryder, John Borrows and the anonymous peer reviewers. I am also grateful for time spent as a McMurtry Fellow at Osgoode Hall Law School in 2013-2014 and being able to spend time with a faculty who has been so intellectually generous with me.

<sup>1</sup> See Joseph Brean, "'Reconciliation' with First Nations, not the Charter of Rights & Freedoms, will define the Supreme Court in coming years, Chief Justice says" *National Post* (March 13, 2014), online: <<http://news.nationalpost.com/2014/03/13/reconciliation-with-first-nations-not-the-charter-of-rights-freedoms-will-define-the-supreme-court-in-coming-years-chief-justice-says/>>.

<sup>2</sup> Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Constitution"].

<sup>3</sup> Both D. Newman, in "Reconciliation: Legal Conception(s) and Faces of Justice" in J.D. Whyte, ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008) [hereinafter "Newman"]; and T. Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas & McIntyre, 2006) offer further insight into the question of reconciliation of Aboriginal people and the settler population within a Canadian legal framework.

communities. This paper also seeks to draw links between section 35(1) jurisprudence and Indigenous legal traditions based on a collection of scholarship reflecting on both the former and the latter.

Though the word “reconciliation” is possessed of various definitions, uses and meanings,<sup>4</sup> this paper considers Professor Mark Walters’ reconciliation as a relationship, which “involves sincere acts of mutual respect, tolerance and goodwill that serve to heal rifts and create the foundations for a harmonious relationship”,<sup>5</sup> as the most hopeful vision of possibilities for Canada and Aboriginal people. Walters’ description of reconciliation as relationship<sup>6</sup> assists in nuancing the broadly accepted technical legal definition of reconciliation “as the renewal of amicable relations between two persons who had been at enmity or variance; usually implying forgiveness of injuries on one or both sides”.<sup>7</sup> In other words, reconciliation goes beyond reconciling Aboriginal title or Aboriginal economic interests with those of Canada and private enterprise.<sup>8</sup> Reconciliation is a means to bring balance to the relationship between Canada and Aboriginal people, which is too one-sided and has been tense for centuries.<sup>9</sup> Given this, the road to reconciliation is a delicate one and must go beyond the merely symbolic.

At the heart of the tension is the Crown’s insistence that it is sovereign over Aboriginal people.<sup>10</sup> Indeed, since the passing of the *Constitution Act, 1982*, while the Court has made room for an “unprecedented degree of protection for certain ‘cultural’ practices within the state, it has nonetheless repeatedly and steadfastly refused to challenge the racist origin of Canada’s assumed sovereign authority over Indigenous peoples

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<sup>4</sup> V. Napoleon, “Who Gets to Say What Happened: Reconciliation Issues for the Gitksan” in C. Bell & D. Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004).

<sup>5</sup> M. Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in W. Kymlicka & B. Bashir, eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008), Ch. 8, 165, at 170 [hereinafter “Walters”].

<sup>6</sup> *Id.*

<sup>7</sup> *Black’s Law Dictionary*, 9th ed. (St. Paul, MN: Thomson Reuters, 2009).

<sup>8</sup> E. Ria Tzimas, “To What End the Dialogue?” in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 493, at 514 [hereinafter “Tzimas”], sets out concerns relating to the Crown’s framing of “reconciliation” as discussions merely addressing the negotiations of resource sharing or impact benefit agreement.

<sup>9</sup> For a discussion on the tension in the relationship between the Constitution and Aboriginal people, see J. Borrows, “(Ab)Originalism and Canada’s Constitution” in J. Cameron & S. Lawrence, eds. (2012) 58 S.C.L.R. (2d) 351 [hereinafter “Borrows, ‘(Ab)Originalism’”].

<sup>10</sup> K. McNeil, “The Meaning of Aboriginal Title” in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 135, at 137 [hereinafter “Asch”].

and their territories”.<sup>11</sup> Yet, the mere introduction of European-based laws did not supersede Aboriginal laws.<sup>12</sup> Aboriginal people neither lost nor surrendered their right to continue to develop and maintain their own laws.<sup>13</sup> Put another way, Aboriginal people have never been conquered.<sup>14</sup> Nonetheless, the Crown has assumed sovereign authority over Aboriginal people by means of historical fiction,<sup>15</sup> which in some instances has been propped up by the Court.<sup>16</sup> Given this difference of opinion between the Crown and Aboriginal people, is the Court able to utilize section 35 to achieve reconciliation? How is reconciliation to be guided by a Court that relies on laws that belong only to one party, and that are based on a colonial construct?

<sup>11</sup> G.S. Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition in Canada” (2007) 6:4 Contemporary Political Theory 437, at 451.

<sup>12</sup> *Connolly v. Woolrich*, [1867] C.C.S. No. 32, 17 R.J.R.Q 75; *Casimel v. Insurance Corp. of British Columbia*, [1993] B.C.J. No. 1834, 106 D.L.R. (4th) 720 (B.C.C.A.); *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at paras. 38-40 (S.C.C.) [hereinafter “*Van der Peet*”]; *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at paras. 146-148 (S.C.C.) [hereinafter “*Delgamuukw*”]; *Mitchell v. Canada (M.N.R.)*, [2001] S.C.J. No. 33, [2001] 1 S.C.R. 911, at paras. 9-10, 61-64, 141-154 (S.C.C.) [hereinafter “*Mitchell*”]. In addition, by “Aboriginal laws” I refer to the body of laws developed and maintained by Aboriginal peoples themselves not the body of law that is too frequently referred to as “Aboriginal law” meaning Canadian law as it applies to Aboriginal people.

<sup>13</sup> B. Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 S.C.L.R (2d) 595 [hereinafter “*Slattery, ‘Generative Structure’*”].

<sup>14</sup> For an in-depth discussion on the meaning of sovereignty and Indigenous conceptualizations, see T. Alfred, “Sovereignty” in Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln, NE: University of Nebraska Press, 2006) 33.

<sup>15</sup> J. Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-government” [hereinafter “*Borrows, ‘Wampum’*”] in Asch, *supra*, note 10, 155, at 157:

A First Nations perspective reflecting the view that they were not conquered was made by Minavavana, an Ojibwa chief from west of Manitoulin at Michilimackinac. Minavavana declared:

Englishman, although you have conquered the French you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none.

<sup>16</sup> B. Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 S.C.L.R. (2d) 433, at 434 and 437 [hereinafter “*Slattery, ‘Honour of the Crown’*”] wherein Slattery sets out the Court’s careful wording in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.) [hereinafter “*Haida Nation*”] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.) [hereinafter “*Taku River*”] to “avoid suggesting that the Crown gained sovereignty over Aboriginal peoples in a lawful or legitimate manner”. However, though the Court is cautious in its language, the decisions were careful to set out that Aboriginal people do not have a veto power to object to Crown action, which is not a relationship of equals but one that perpetuates Crown sovereign authority.

Interestingly, the way toward reconciliation does not lie solely within section 35 or within Aboriginal laws because “the law of aboriginal rights is neither entirely English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities together”.<sup>17</sup> An intersocietal approach to reconciliation then,<sup>18</sup> is about creating an inclusive foundation for the “harmonious relationship” Walters refers to. The framework is something that is neither wholly of one or the other but which both parties are reflected in. This paper presents one Aboriginal model of reconciliation alongside section 35 jurisprudence as a means of “linking the various communities together” in a more inclusive approach toward reconciliation. Consider One Dish.<sup>19</sup>

## II. ONE DISH

One Dish<sup>20</sup> is an agreement between the Anishinabe and Haudenosaunee Confederacy<sup>21</sup> who together, have something to teach about sharing. A boundary of fertile land between the two Nations, in

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<sup>17</sup> Slattery, “Generative Structure”, *supra*, note 13, at 595-97.

<sup>18</sup> For a further discussion on “intersocietal law” and the relationship between the Crown and Aboriginal people, see Slattery, *id.*; M.D. Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 McGill L.J. 711; J. Borrows & L.I. Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?” (1997) 36 Alta. L. Rev. 9 [hereinafter “Borrows & Rotman”]; B. Slattery, “The Legal Basis of Aboriginal Title” in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books, 1992), at 120-21.

<sup>19</sup> L. Simpson, “Precolonial Nishnaabeg Diplomatic & Treaty Relationships” (2008) 23 Wicazo SA Rev. 29, at 31-32.

<sup>20</sup> One Dish is one approach to reconciliation. This model was developed between the Haudenosaunee and the Anishinabe. Thus, it forms part of the legal traditions of those groups but not of all Indigenous nations, nor should it be taken as such. The Crown has the responsibility of dealing with all Indigenous groups and cannot simply take a singular pan-Aboriginal approach, which while easier and more convenient for the Crown is neither possible nor appropriate given the wide range of rich cultures, languages, laws and traditions of Indigenous peoples. This is part of the awesome responsibility the Crown took on by occupying the land and issuing the *Royal Proclamation, 1763*. Though reconciliation will be incredibly complicated, that is not a reason to continue to ignore it. That stated, I have been fortunate enough to have been given some teachings related to One Dish, so I speak to what I have been taught. I do not speak to all examples of Aboriginal approaches to reconciliation, though they continue to exist all around us. One Dish then, is illustrative of a structural approach different from the current colonial, hierarchical model and emphasizes a relationship between parties more than the particular rules.

<sup>21</sup> S.M. Hill, “Traveling Down the River of Life Together in Peace and Friendship. Forever: Haudenosaunee Land Ethics and Treaty Agreements as the Basis for Restructuring the Relationship with the British Crown” in L. Simpson, ed., *Lighting the Eighth Fire: The Liberation, Resurgence and Protection of Indigenous Nations* (Winnipeg, MB: Arbeiter Ring, 2008).

what is now southwestern Ontario, was shared by both Nations long before European contact.<sup>22</sup> The Anishinabe and Haudenosaunee Confederacy are not possessed of a common language, culture or laws. However, after over 50 years of a widespread and brutal war, they reconciled their differences for the benefit of both parties and restored peace to a region that suffered from disharmony in disagreements over lands and resources.<sup>23</sup> Similarly, lands and resources form the basis of many disputes between Aboriginal people and Canada. How did the parties to One Dish find resolution? Laws were established defining the ways by which resources would be shared and the land was managed together. Known to the Anishinabe as “One Dish”,<sup>24</sup> a wampum belt<sup>25</sup> was created as a means to transmit these laws to the people living on the land. It was understood that the relationship would continue in perpetuity — and it is still recognized today.<sup>26</sup> The Dish in the wampum belt symbolized the understanding that both Nations would share the bounty of the land without interference in the other’s sovereignty. Further, for the Haudenosaunee, the spoon in the bowl in contrast to a knife, represented peace.<sup>27</sup> Adherence to the One Dish agreement required ongoing diplomatic relations through the exchange of gifts and ceremony as a means of regular renewal and to ensure peaceful co-existence.<sup>28</sup> One Dish is demonstrative of respect and offers the basis of a workable model

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<sup>22</sup> Victor P. Lytwyn, “A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region” in David H. Pentland, ed., *Papers of the 28th Algonquian Conference* (Winnipeg, MB: University of Manitoba, 1997) 210 [hereinafter “Lytwyn”].

<sup>23</sup> For more on the severe nature of the conflict between these two nations that led to the One Dish agreement, see P.S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991).

<sup>24</sup> Alan Corbiere, Project Coordinator of Kinoomaadoog at M’Chigeeng First Nation, as presented in Rama First Nation, October 2013 [hereinafter “Corbiere”]. In his presentation, Alan notes this treaty is called “Gdoo-naaganinaa” by the Anishinabe, meaning “Our Dish”. To the Haudenosaunee this treaty is known as the “Dish with One Spoon”. Alan Corbiere used a replica in his presentation and advised that the original wampum belt for the treaty is housed in the Royal Ontario Museum in Toronto.

<sup>25</sup> Like a document or written record, wampum belts are read and used for the transmission of knowledge. For more on wampum belts, see K.V. Muller, “The Two ‘Mystery’ Belts of Grand River: A Biography of the Two Row Wampum and the Friendship Belt” (2007) 31:1 *The American Indian Quarterly* 129; M.J. Becker & J. Lainey, “Wampum Belts With Initials and/or Dates as Design Elements: A Preliminary Review of One Subcategory of Political Belts” (2004) 28:2 *American Indian Culture and Research Journal* 25.

<sup>26</sup> J. Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 133 [hereinafter “Borrows, *Indigenous Constitution*”].

<sup>27</sup> Corbiere, *supra*, note 24. I offer here only a summary of Alan Corbiere’s reading of the One Dish wampum. Given the sacred nature of the story, it is not being shared in its entirety.

<sup>28</sup> *Id.*

for sharing territory and resources while maintaining an agreement of non-interference in the sovereignty of others. It was a singular law that was not purely Anishinabe or Haudenosaunee, yet it belonged to and was maintained by both.<sup>29</sup>

The formation of One Dish required careful attention to creating the best conditions for reconciliation. The negotiations between two very different peoples required what most successful negotiations require: mutual respect, sharing and responsibility.<sup>30</sup> This stands in stark contrast to the unilateral and hierarchical Crown assertion of sovereignty that is too often taken for granted and which continues to form the basis for most Crown/Aboriginal negotiations. One Dish illustrates what these two Nations<sup>31</sup> thought a nation-to-nation relationship should be<sup>32</sup> even as discussions ensued with the Crown leading to the *Royal Proclamation, 1763*.<sup>33</sup> The relationships created between the Crown and Aboriginal people in this period diverged completely from the One Dish model, ushering in an ongoing era of imbalance, tension and conflict still seeking reconciliation.

### III. DIVERGENCE

#### 1. But That Was Then ...

In order to move forward and close the distance between Canada and Aboriginal people, consider how we arrived here. As the French and the English fought for control over lands in North America, both European powers sought, and were given, alliances with Aboriginal people. Later,

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<sup>29</sup> For an in-depth chronicle of Aboriginal power and identity, see M. Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* (Philadelphia, PA: University of Pennsylvania Press, 2011), Ch. 2.

<sup>30</sup> *Report of the Royal Commission on Aboriginal Peoples in Looking Forward, Looking Back*, Vol. 1 (Ottawa: Supply and Services Canada, 1996), “The Basic Principles”, Ch. 16 [hereinafter “Royal Commission on Aboriginal Peoples”]; also see J. Tully, *Public Philosophy in a New Key: Volume I, Democracy and Freedom* (Cambridge: Cambridge University Press, 2008), Ch. 7, “The Negotiation of Reconciliation”, at 223.

<sup>31</sup> One Dish was agreed to between the Haudenosaunee and Anishinabek in Sault Ste. Marie in 1701: Lytwyn, *supra*, note 22. To that end, it would have been maintained and within the cultural and legal construction of both Nations when considering the means by which to create a new relationship with the Crown.

<sup>32</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, at 170.

<sup>33</sup> Reprinted in R.S.C. 1985, App. II, No. 1 [hereinafter “*Proclamation*”].

the Treaty of Paris formalized the English victory over the French,<sup>34</sup> though not over Aboriginal people, and gave the English control over some of the lands now forming Canada without considering the pre-existing relationship of Aboriginal people to these same lands.<sup>35</sup> Moreover, the post-war era quickly gave way to a growing settler population, predictably leading to land-based conflicts with Aboriginal people. This created a complication for the Crown. Aboriginal peoples' military prowess in response to settler encroachment threatened the Crown's expansion further into North America.<sup>36</sup> The Crown subsequently concluded that Aboriginal rights must be formally acknowledged.<sup>37</sup> The result was a royal decree, which sprouted the colonial seed from which the relationship between Canada and Aboriginal people struggles to grow.<sup>38</sup> The Crown's colonial-based superiority was imbedded in Canada centuries ago<sup>39</sup> with the words of the *Royal Proclamation, 1763*:<sup>40</sup>

And 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. ...

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent. ...<sup>41</sup>

In order to "remove all reasonable Cause of Discontent" of the "Nations or Tribes of Indians", the Crown proclaims that it alone is in charge of the relationship with Aboriginal people, a position which

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<sup>34</sup> M. Asch, *On Being Here To Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), at 153 [hereinafter "Asch, *Here to Stay*"].

<sup>35</sup> Borrows, "Wampum", *supra*, note 15, at 157.

<sup>36</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, at 133.

<sup>37</sup> *Id.*

<sup>38</sup> J. Borrows, "With or Without You: First Nations Laws (in Canada)" (1996) 41 McGill L.J. 629.

<sup>39</sup> B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727.

<sup>40</sup> *Proclamation*, *supra*, note 33.

<sup>41</sup> *Id.*

continues to be reflected in subsequent jurisprudence and a barrier to achieving reconciliation. At its best the language of the *Royal Proclamation* illustrates a relationship of close proximity with Aboriginal people and acknowledges Aboriginal title by stating that land must either have been purchased from Aboriginal people through sale to the Crown or for such lands not purchased, remain available for Aboriginal people.<sup>42</sup> Conversely, it also categorizes Aboriginal people as dependent<sup>43</sup> and living under Crown protection from the Crown's own citizenry<sup>44</sup> — all neatly accomplished with a few choice words.

Still, opportunity for the Crown to maintain honest relations presented itself a year later in 1764, when 24 Aboriginal Nations gathered with the Crown at Niagara.<sup>45</sup> Runners were sent to all the Aboriginal people living in the region.<sup>46</sup> No Nation in the area was left out because the gathering was foundationally important to everyone living on the land. Here, “a nation-to-nation relationship between settler and First Nation peoples was renewed and extended ... The Royal Proclamation became a treaty at Niagara because it was presented by colonialists for affirmation, and was accepted by First Nations.”<sup>47</sup>

The Aboriginal perspective on nation-to-nation relationships, including the implication of respect, meant that each party came to the agreement with its own customs, traditions and laws, as would be expected of and respected by any other nation. Note too, that like the *Royal Proclamation*, the Treaty of Niagara acknowledged the renewal and extension of alliances<sup>48</sup> already in existence prior to this treaty-making event.<sup>49</sup> The parties were known to each other. There was an expectation of ongoing maintenance. In these ways, the Treaty of Niagara was reflective of the inclusive spirit of the relationship

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<sup>42</sup> J. Borrows “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28 U.B.C.L. Rev. 1-47.

<sup>43</sup> *Id.*

<sup>44</sup> Borrows, “Wampum”, *supra*, note 15.

<sup>45</sup> For a more in-depth relating of events surrounding the Treaty of Paris and its subsequent implementation in Canada, as well as an accounting of the Treaty of Niagara, see C.G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (Oxford University Press, 2006).

<sup>46</sup> Borrows, “Wampum”, *supra*, note 15, at 162.

<sup>47</sup> *Id.*, at 161.

<sup>48</sup> *Id.*

<sup>49</sup> Over the years, treaty-making has continued as a Crown practice in Canada since 1764 with varying degrees of activity and has resulted in hundreds of agreements, many of which, as Borrows notes in *Indigenous Constitution*, *supra*, note 26, at 133, “draw on some form of Indigenous legal tradition”, demonstrating in the historical record a practice of taking an intersocietal approach in the relationship between the Crown and Aboriginal people.

Aboriginal people believed was described in the *Royal Proclamation*.<sup>50</sup> The Crown did not see the *Royal Proclamation* in the same way. But context and perspective matters.

With respect to the *Proclamation*, “using the written words of the document alone [t]o interpret the principles of the Proclamation ... would conceal First Nations perspectives and inappropriately privilege one culture’s practice over another”.<sup>51</sup> This is precisely what has happened. The *Royal Proclamation* became the Crown’s justification for its assertion of sovereignty over Aboriginal people and the Crown’s taking of lands in order to make room for the settler population. Thus, settlement and Confederation transpired by ignoring the Aboriginal understanding of the relationship and subverting both the rights and title of Aboriginal people. This sleight of hand is reinforced in jurisprudence insofar as “Aboriginal title is a burden on the Crown’s underlying title”.<sup>52</sup> Therein, history holds the invention of Crown sovereignty, which both ran roughshod over the perspective of Aboriginal people and has been supported by the Courts. Moreover, the subsequent failure of the law to place the *Proclamation* in context has germinated centuries of broken promises and mistrust. Unsurprisingly, reconciling the vast distance between Canada and Aboriginal people is complicated.<sup>53</sup>

## 2. And This Is Now ...

Land disputes between Aboriginal people and the settler population continue still. Contemporary law regarding Aboriginal title continues to refer to the *Proclamation*. For instance, in *Calder v. British Columbia (Attorney General)*<sup>54</sup> — a title case about lands historically occupied by the Nisga’a people in British Columbia — elements of the *Proclamation* are echoed in law over two centuries later. In response to years of Crown denial of the existence of Aboriginal title,<sup>55</sup> the Supreme Court

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<sup>50</sup> Borrows, “Wampum”, *supra*, note 15, at 162.

<sup>51</sup> Borrows, *Indigenous Constitution*, *supra*, note 26.

<sup>52</sup> *Delgamuukw*, *supra*, note 12.

<sup>53</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, Ch. 1.

<sup>54</sup> [1973] S.C.J. No. 56, [1973] S.C.R. 313 (S.C.C.) [hereinafter “*Calder*”].

<sup>55</sup> *Tsilhqot’in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44 (S.C.C.) [hereinafter “*Tsilhqot’in*”] has recently been decided by the Supreme Court of Canada. This case involved questions of Aboriginal title and challenged the Crown’s position that if the Tsilhqot’in people hold Aboriginal title then it is limited to small plots of land that the people have inhabited consistently (this is known as the “postage-stamp” theory of Aboriginal title and is a continued attempt to limit Aboriginal title). The Tsilhqot’in on the other hand, claimed title over a much larger

determined that there is such a thing after all.<sup>56</sup> In response to *Calder*, the Crown revived its treaty-making practice through a comprehensive land-claims policy as a means to achieve settlement with respect to Aboriginal title.<sup>57</sup> This shift in law and subsequent Crown policy<sup>58</sup> illustrates the same duality in the Crown's agenda as we saw in the simultaneous desire to both protect and dominate Aboriginal people via the wording of the *Royal Proclamation*. On one hand, the policy puts negotiation, not protracted litigation, at the forefront of the Crown/Aboriginal relationship and led to the James Bay and Northern Quebec Agreement.<sup>59</sup> To this extent, a negotiated resolution is preferred because it at least allows for the possibility that both parties will learn something from each other and share a commonly owned resolution. On the other, Crown policy requires an exchange of Aboriginal peoples' surrender of any claims to Aboriginal title (both current and future), for the settler population's certainty about their own land rights. This modern-day practice is hardly demonstrative of the Aboriginal understanding of the "nation-to-nation" relationship entered into at Niagara in 1764 as equals.

The Crown's colonialist scheme can also be felt in *R. v. Sparrow*<sup>60</sup> — a challenge to a *Fisheries Act* prosecution based on an Aboriginal right to fish — which offered the Court its first opportunity to interpret section 35(1). The Court declared that Aboriginal rights not extinguished prior to 1982 were protected from subsequent Crown extinguishment, which was merely

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area, namely, their traditional territory, and were successful on their arguments both at trial and in the Supreme Court of Canada. Though *Tsilhqot'in* was not decided at the time this paper was originally written, the Court's decision is consistent with the author's premise that reconciliation requires more than mere capitulation on the part of Aboriginal peoples in favour of the settler population. The recalibration set out in *Tsilhqot'in* holds the potential to be both a considerable and positive shift toward reconciliation by creating opportunity for federal and provincial Crowns, private enterprise and Aboriginal people to come together in agreement on land and resource development in more cooperative ways or risk future protracted litigation.

<sup>56</sup> Newman, *supra*, note 3.

<sup>57</sup> K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon, 1989).

<sup>58</sup> K. McNeil, "Aboriginal Title and the Supreme Court: What's Happening" (2006) 69 Sask. L. Rev. 282.

<sup>59</sup> The James Bay and Northern Quebec Agreement ("JBQNA") was the first treaty in Canada since the 1920s, when the Crown stopped its practice of treaty-making. For a considered example relating to the effectiveness of co-management and joint decision-making elements between the Crown and the James Bay Cree based on the terms of the JBQNA, see J. Webber & C.H. Scott, "Conflicts Between Cree Hunting and Sporting Hunting: Co-Management Decision Making at James Bay" in C. Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2011); and E.J. Peters, "Native People and the Environmental Regime in the James Bay and Northern Quebec Agreement" (1999) 52:4 Arctic 395.

<sup>60</sup> [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) [hereinafter "*Sparrow*"].

an affirmation of the wording already contained within section 35.<sup>61</sup> Further, the Court took a restrictive approach and ruled that the exercise of those rights could be subject to regulatory infringement in certain circumstances.<sup>62</sup> This is inconsistent with both the 1764 Aboriginal perspective at Niagara, which envisaged as a relationship of equals, and the wording of the *Royal Proclamation* that acknowledged Aboriginal title long before 1982. The *Proclamation* has never been overturned. The Treaty of Niagara has never been revoked. Yet, the Court in *Sparrow* propped up the long-refuted position by Aboriginal people that the Crown acquired sovereignty by legitimate or lawful means.<sup>63</sup> Canadian Courts have affirmed this principle explicitly and implicitly, over and over again,<sup>64</sup> as though the more it is repeated the more true it becomes.<sup>65</sup> Adopting a narrow view in *Sparrow*, the Court missed an opportunity<sup>66</sup> to investigate the meaning of the *Royal Proclamation* and offer a more fully contextualized account of its meaning, which recognizes both the Crown and Aboriginal peoples' perspectives.

*Sparrow* cleared the way for another decision promoting colonial hierarchy, *R. v. Van der Peet*.<sup>67</sup> Here, by characterizing Aboriginal rights as historical,<sup>68</sup> the Court charted a course towards constraining Aboriginal rights<sup>69</sup> by recognizing only those rights that were "integral to

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<sup>61</sup> K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 S.C.L.R. 255, at 257 [hereinafter "McNeil, 'Constitutional Rights'"].

<sup>62</sup> K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1996) 8:2 Const. Forum Const. 33.

<sup>63</sup> J. Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L.J. 615.

<sup>64</sup> As set out in note 55, *supra*, the most recent articulation of this by the Crown is found in the postage-stamp theory of Aboriginal title argued in *Tsilhqot'in*, which was rejected in the trial decision and again by the Supreme Court of Canada. The Supreme Court ultimately found that the Tsilhqot'in proved Aboriginal title to their traditional lands. This movement by the Supreme Court further away from a wholesale acceptance of Crown sovereignty (as Slattery points out in "Honour of the Crown", *supra*, note 16, in *Haida Nation*, *supra*, note 16, the Court shifts its language of "acquisition" of Crown sovereignty toward "assertion"), may be indicative of the Court's efforts to calibrate the relationship in contemplation of reconciliation. *Tsilhqot'in* and *Haida Nation*, however, against repeated interpretations of Crown sovereignty relating to the *Royal Proclamation* and again in *Calder*, *supra*, note 54; *Sparrow*, *supra*, note 60; *Van der Peet*, *supra*, note 12, *Gladstone*, *infra*, note 71, and others, does not necessarily mean that the shift needed to achieve reconciliation is complete.

<sup>65</sup> J. Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L.J. 537.

<sup>66</sup> M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 9 Alta. L. Rev. 498.

<sup>67</sup> *Van der Peet*, *supra*, note 12. This case was about an Aboriginal commercial right to sell fish.

<sup>68</sup> Slattery, "Honour of the Crown", *supra*, note 16, at 595.

<sup>69</sup> R.L. Barsh & J. (Sa'ke'j) Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 [hereinafter "Barsh & Youngblood Henderson"].

the distinctive cultures” of Aboriginal people — meaning the Aboriginal right must be central to the culture, have existed pre-contact and be continuous in order to be legitimated in Canadian law.<sup>70</sup> Put a different way, no matter how long or consistently an Aboriginal group has been hunting and fishing, these activities may not necessarily be deemed an Aboriginal constitutional right since all societies have a need to feed themselves, not just Aboriginal ones.

*R. v. Gladstone*<sup>71</sup> — released alongside *Van der Peet* — further constricts Aboriginal rights.<sup>72</sup> In this case, “reconciliation became a vehicle for infringement in the name of non-aboriginal appeasement”.<sup>73</sup> Thus, in *Van der Peet* and *Gladstone* we see that section 35(1) is a constitutional effort to hierarchically organize Aboriginal rights underneath Crown sovereignty rather than engage with the ways that Aboriginal rights could be reconciled with the existence and needs of the settlers.<sup>74</sup> If there was any doubt, the Court made the point clear by stating that section 35(1) “provides the constitutional framework for reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty”.<sup>75</sup> Given the Crown’s long-standing position on sovereignty, the tests in *Van der Peet* and *Gladstone* should not have come as a surprise, nor should the Court’s view of section 35(1) as part of the colonial apparatus to disrupt Aboriginal rights and title. Such an approach renders the Constitution a tool of subversion of Aboriginal rights.<sup>76</sup> Taken together, the decisions assist in solidifying the Crown’s sense of its legitimacy and do not lend themselves to hope of reconciliation so long as this fundamental flaw persists.

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<sup>70</sup> Slattery, “Honour of the Crown”, *supra*, note 16.

<sup>71</sup> [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723 (S.C.C.) [hereinafter “*Gladstone*”], regarding a modification of the test in *Sparrow*, which gives increased deference to the Crown in protecting the Crown’s commercial fishing rights.

<sup>72</sup> Barsh & Youngblood Henderson, *supra*, note 69.

<sup>73</sup> D. Johnston, Preface, in C. Bell & R.K. Patterson, eds., *Protection of First Nation Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009).

<sup>74</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, Ch. 5.

<sup>75</sup> *Van der Peet*, *supra*, note 12, at para. 42.

<sup>76</sup> *Id.*, at para. 31:

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

If *Sparrow* sweeps aside recognition of Aboriginal rights and title in the *Royal Proclamation* yet supports the acquisition of Crown sovereignty,<sup>77</sup> and *Van der Peet* limits Aboriginal rights in favour of non-Aboriginal interests,<sup>78</sup> why should Aboriginal people seek to reconcile? The relationship is so fraught with fundamental power imbalances.<sup>79</sup> Why should Aboriginal people expend resources pursuing agreements with the Crown when the outcomes are so heavily stacked in the Crown's favour?<sup>80</sup> This set-up is not reflective of Walters' "reconciliation as relationship" paradigm. With the Crown's power advantage, why should reconciliation matter to anyone? Part of the answer may be found in *Delgamuukw*.<sup>81</sup>

In this decision, then Chief Justice Lamer described in wider terms the same relationship his Court had restrained a year earlier in *Van der Peet* and *Gladstone* when he concluded:

... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of section 35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." *Let us face it, we are all here to stay.*<sup>82</sup>

And therein lies the rub. No one is going anywhere. Aboriginal people and the settler population are all here to stay.<sup>83</sup> Is it not preferable to smooth things out so our time together is less discordant? This is something greater than a quaint notion because "the culture of law is weakened in the country as a whole if Indigenous peoples' legal

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<sup>77</sup> Asch, *Here to Stay, supra*, note 34.

<sup>78</sup> J. Rudin, "One Step Forward, Two Steps Back – The Political and Institutional Dynamics Behind the Supreme Court of Canada's Decisions in *R. v. Sparrow*, *R. v. Van der Peet* and *Delgamuukw v. British Columbia*" (1998) 13 J. L. & Soc. Pol'y 67.

<sup>79</sup> For discussion on balancing Aboriginal people's right to govern as a third order of government in Canada, see the Royal Commission on Aboriginal Peoples, *supra*, note 30, Vol. 2 at 163-244.

<sup>80</sup> S. Lawrence & P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252; S. Imai, "Sound Science, Careful Policy Analysis and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes" (2003) 31 Osgoode Hall L.J. 587; Slattery, "Generative Structure", *supra*, note 13.

<sup>81</sup> *Delgamuukw, supra*, note 12. Though the Court did not make a decision on Aboriginal title, this case does, however, set out the test for title — which was found to be a "burden on the Crown". The Court also found the important value of oral history of Aboriginal peoples as being on par with written history.

<sup>82</sup> *Id.*, at para. 186 (emphasis added).

<sup>83</sup> Asch, *Here to Stay, supra*, note 34, at 152-55.

traditions are excluded from its matrix ... [n]ot only do we lose the wisdom they could provide about how to organize relationships ... but we also fail to attend to the underlying injustice of Canada's creation and development."<sup>84</sup> Thus, quality relationships matter to the well-being of the country. Yet, how can there be a reasonable expectation of reconciliation "through negotiated settlements with good faith", if good faith comes in limited doses<sup>85</sup> and both parties often see themselves as oppositional?<sup>86</sup> How does that conversation even start?<sup>87</sup> It begins with letting go of imperialism and snipping the root of colonial supremacy. It begins by creating something uniquely Canadian, something intersocietal.<sup>88</sup> It is seen with the Court's own shift away from its reasoning in *Van der Peet* to *Delgamuukw* and when it subsequently and more expressly rearticulated the purpose of section 35 as a broader "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship".<sup>89</sup>

#### IV. A MADE IN "CANADA" APPROACH

One Dish, in my view, required four elements for success, which when taken together offer an Aboriginal contribution<sup>90</sup> to what is either

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<sup>84</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, at 122.

<sup>85</sup> For a justification of the Crown's limited investment in negotiations, see T. Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press 2000); for more on Crown self-imposed limited interest in resolution of specific claims with Aboriginal people (*i.e.*, lands admittedly wrongfully taken by the Crown for which compensation will be negotiated only with the Crown under terms established by the Crown in its own policy), see <<http://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506>>.

<sup>86</sup> For critiques of oppositional positioning between the Crown and Aboriginal people, see M. Sinclair, "Aboriginal People and Euro-Canadians: Two World Views" in J.H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing, 1994) 19; M.E. Turpel, "Home/Land" (1991-1992) 10 Can. J. Fam. L. 17.

<sup>87</sup> Slatery, "Generative Structure", *supra*, note 13, suggests "the essence of aboriginal rights lies in their bridging of aboriginal and non-aboriginal cultures, so that the law of aboriginal rights is neither entirely English nor aboriginal in origin". This is significant in that perhaps a conversation starts between two seemingly disparate parties by finding resolution that is something new; somewhat familiar and meaningful to both, yet formed neither wholly of one nor of the other.

<sup>88</sup> J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623 [hereinafter "Webber"].

<sup>89</sup> *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10 (S.C.C.) [hereinafter "*Little Salmon/Carmacks*"].

<sup>90</sup> There are many Aboriginal contributions to reconciliation, which vary by region and Nation. One Dish is one example, although it is not the only one even among the Anishinabe or Haudenosaunee. It is the one that these two Nations created together in 1701.

already present in or arising from section 35 jurisprudence, thereby creating a basis for giving meaning to intersocietal law as a vehicle for reconciliation.

## 1. Honour

Enter the doctrine of honour.<sup>91</sup> In order for there to be a working relationship and adherence to any agreement — as demonstrated by the vast boundary and resource sharing between the Anishinabe and the Haudenosaunee — following the terms of the agreement itself requires good conduct and at its deepest base, honour. Applying the *Van der Peet* test in a broader sense, it may be said that “honour” is an integral part of all human societies, not a particular or distinct custom of either Aboriginal people or the Crown, and thereby an intersocietal value. Further, as set out as recently as *Manitoba Metis Federation Inc. v. Canada (Attorney General)*,<sup>92</sup> the doctrine of honour of the Crown is both substantive and inclusive for the Crown’s dealings with Aboriginal peoples.<sup>93</sup> The Court’s recognition of the importance and weight of this doctrine is helpful when considering a One Dish approach. Yet the continued unilateral assumption of sovereignty in the Court’s jurisprudence, whether acquired or asserted,<sup>94</sup> and the ongoing Court-sanctioned subversion of Aboriginal rights and title in favour of those of the settler population imports a one-sided superiority that One Dish rejects. In order to move toward Walters’ conceptualization of reconciliation, the current inequality between the rights and title of Aboriginal people and the rights of the settler population must be levelled off.

In *Delgamuukw*,<sup>95</sup> the Court further entrenched colonial order by stating that Aboriginal title is a burden on the Crown’s underlying title.<sup>96</sup> Continued acceptance of Crown sovereignty subordinates Aboriginal title<sup>97</sup> and

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<sup>91</sup> Slattery, “Generative Structure”, *supra*, note 13; Newman, *supra*, note 3.

<sup>92</sup> [2013] S.C.J. No. 14, 2013 SCC 14, [2013] 1 S.C.R. 623 (S.C.C.) [hereinafter “*Manitoba Metis*”]; for another recent case on the doctrine of honour, see also *Mohawks of the Bay of Quinte v. Canada*, [2013] F.C.J. No. 741, 2013 FC 669 (F.C.).

<sup>93</sup> *Manitoba Metis*, *id.*, at paras. 70 and 94.

<sup>94</sup> Slattery, “Generative Structure”, *supra*, note 13.

<sup>95</sup> *Delgamuukw*, *supra*, note 12.

<sup>96</sup> *Id.*, at 1098, *per* Lamer C.J.C.

<sup>97</sup> B. Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85 Can. Bar Rev. 255; Webber, *supra*, note 88; Borrows & Rotman, *supra*, note 18.

understandably riles Aboriginal people.<sup>98</sup> Such a fundamental imbalance<sup>99</sup> does not beget a fair and principled relationship that is sustainable.<sup>100</sup> In an effort to smooth out the rough edges, the Court offers up the doctrine of honour as a starting point.<sup>101</sup> While the Court establishes honour as a feature of how the Crown must conduct itself in all of its dealings with Aboriginal people,<sup>102</sup> the doctrine only proves meaningful toward reconciliation if it brings about something more than using good manners to extinguish Aboriginal rights with a legislated “please” and “thank you”.<sup>103</sup> Unless, of course, reconciliation means the wholesale capitulation by Aboriginal people in favour of the Crown and the settler population. One Dish required both Nations to approach each other not only with honour but as equals. That stated, the doctrine of honour offers some movement forward,<sup>104</sup> and carries the potential to bring about change.

In *Haida Nation*<sup>105</sup> and *Taku River*<sup>106</sup> the Court expanded the doctrine by moving it beyond merely a guidepost of conduct into substantive obligations through the duty to consult:<sup>107</sup>

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<sup>98</sup> P. Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 McGill L.J. 382 [hereinafter “Macklem, ‘First Nations Self-Government’”]; Slattery, “Generative Structure”, *supra*, note 13.

<sup>99</sup> P. Macklem, “What’s Law Got to Do With It? The Protection of Aboriginal Title in Canada” (1997) 35 Osgoode Hall L.J. 125.

<sup>100</sup> For more on the unsustainability of the relationship between Canada and Aboriginal people, see McNeil, “Constitutional Rights”, *supra*, note 61; W. Pentney, “The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II — Section 35: The Substantive Guarantee” (1988) 22 U.B.C. L. Rev. 207; and B. Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1982) 8 Queen’s L.J. 232.

<sup>101</sup> *Haida Nation*, *supra*, note 16, at para. 17, quoting *Van der Peet*, *supra*, note 12, at para. 31: The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect underlying realities from which it stems. In all its dealing with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”.

<sup>102</sup> *Haida Nation*, *supra*, note 16.

<sup>103</sup> B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983); and Asch, *supra*, note 34.

<sup>104</sup> B. Slattery, “A Taxonomy of Aboriginal Rights” in H. Foster, H. Raven & J. Webber, eds., *Let Right Be Done: Calder, Aboriginal Title and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2011) Ch. 7 [hereinafter “*Let Right Be Done*”]; and Slattery, “Generative Structure”, *supra*, note 13.

<sup>105</sup> *Haida Nation*, *supra*, note 16.

<sup>106</sup> *Taku River*, *supra*, note 16.

<sup>107</sup> Slattery, “Generative Structure”, *supra*, note 13.

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.<sup>108</sup>

However, in *Haida Nation*, the Court offered no analysis of how it arrived at its bold "never any doubt"<sup>109</sup> acceptance of Crown sovereignty in *Sparrow* but rather quietly shifted its language, thereby again leaving reconciliation prospects slim.<sup>110</sup> More explicitly, reconciliation premised on such colonial assumptions is not achievable.<sup>111</sup> On a more positive side, in *Taku River*, the Court established that the doctrine of honour is neither a historical relic nor about good manners. It is the foundation of the relationship between the Crown and Aboriginal people in terms of both the treaties of the past and the agreements of the future.<sup>112</sup> In addition to establishing section 35(1) as constitutional protection for Aboriginal rights and title, the Court also spent some time setting out a basis for negotiated resolution. In so doing, the Court furthered its thinking in *Delgamuukw*. With these cases there is acceptance that honour is necessary for not only building but maintaining relationships, and is fundamentally valuable for both the Crown and Aboriginal people.<sup>113</sup>

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<sup>108</sup> *Haida Nation*, *supra*, note 16, at para. 25 (emphasis added).

<sup>109</sup> In *Sparrow*, *supra*, note 60, the Court neatly sums up 15 years of s. 35(1) jurisprudence of accepting the acquisition of Crown sovereignty at para. 49:

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 sovereignty and legislative power, and indeed the underlying title, to such lands vested with the Crown ...

The Court had opportunity to more actively step away from the acceptance of Crown sovereignty.

<sup>110</sup> For more on the impact of the Crown's assertion of sovereignty on Aboriginal people, see, Royal Commission on Aboriginal Peoples, *supra*, note 30.

<sup>111</sup> P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stan. L. Rev.* 1311.

<sup>112</sup> *Taku River*, *supra*, note 16, at para. 24: "In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question."

<sup>113</sup> S. Imai, "Creating Disincentives to Negotiate: *Mitchell v. M.N.R.*'s Potential effect on Dispute Resolution" (2003) 22 *Windsor Y.B. Access Just.* 309.

In both *Haida Nation* and *Taku River* then, the Court is urging negotiated resolve of differences, which offers both the Crown and Aboriginal people opportunity so long as the negotiations are not reflective of past Crown policy on land claims, which would start from the premise that Aboriginal people must give something else up while the Crown counts further gains in its favour. If the element of honour is the starting place for the parties to approach each other, the Crown will also have to “recognize and respect” Aboriginal context and determine what the Crown is prepared to contribute to reconciliation. Such an action would be similar to what the Haudenosaunee and Anishinabe would have done to bring about One Dish.<sup>114</sup>

Moreover, to achieve reconciliation the Crown must be prepared to sit at an inclusive nation-to-nation table that includes the Métis,<sup>115</sup> who, “after having lived in the shadows for generations ... slowly began to come out of hiding”.<sup>116</sup> Section 35(2) of the *Constitution Act, 1982* defines “aboriginal peoples” as including Métis people,<sup>117</sup> yet they have historically fallen in between<sup>118</sup> — not Indian for the purposes of the *Indian Act* but not settlers either. There cannot be any denying that their history and relationship with the Crown is also one fraught with frustration,<sup>119</sup> though so few constitutional cases have considered the Métis.<sup>120</sup> *Manitoba Metis*<sup>121</sup> expands the inclusivity of honour of the

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<sup>114</sup> Corbiere, *supra*, note 24.

<sup>115</sup> For a historical background and government structures relating to Metis in Canada, see D. Purich, *The Metis* (Toronto: James Lorimer, 1988), and J. Madden, “The Metis Nations’ Self-Government Agenda: Issues and Options for the Future” in F. Wilson & M. Mallet, eds., *Metis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Law, 2008).

<sup>116</sup> J. Teillet, “The Métis and Thirty Years of Section 35: How Constitutional Protection for Métis Rights Has Led to the Loss of the Rule of Law” in J. Cameron & S. Lawrence, eds. (2012) 58 S.C.L.R. (2d) 333, at 341 [hereinafter “Teillet”].

<sup>117</sup> Constitution, *supra*, note 2; C. Bell, “Who Are the Metis People in Section 35(2)” (1991) 29 Alta. L. Rev. 351. The courts have likewise found that the word “Indian” in s. 91(24) includes the Metis: see *Daniels v. Canada*, [2013] F.C.J. No. 4, [2013] 2 F.C.R. 268 (F.C.), *var*d [2014] F.C.J. No. 383, 2014 FCA 101 (F.C.A.).

<sup>118</sup> See M.L. Stevenson, “Metis Aboriginal Rights and the ‘Core of Indianness’” (2004) 67 Sask. L. Rev. 301; P. Chartrand, “Aboriginal Rights: The Dispossession of the Metis” (1991) 20 Osgoode Hall L.J. 457; L.N. Chartrand, “Are We Metis or Are We Indians? A Commentary on *R. v. Grumbo*” (1999-2000) 13 Ottawa L. Rev. 267.

<sup>119</sup> For further discussion, see P. Chartrand & J. Goikas, “Defining ‘The Metis People’: The Hard Case of Canadian Aboriginal Law” in P. Chartrand, ed., *Canada’s Aboriginal People* (Saskatoon: Purich Publishing Ltd., 2002); and D. McMahon & F. Martin, “The Metis and 91(24): Is Inclusion the Issue?” in P. Macklem *et al.*, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Department of Supply and Services Canada, 1995).

<sup>120</sup> Teillet, *supra*, note 116.

<sup>121</sup> *Manitoba Metis*, *supra*, note 92.

Crown.<sup>122</sup> This decision is significant in that with Métis included in the application of the doctrine of honour, it “gives rise to a duty of diligent, purposive fulfillment”,<sup>123</sup> of Crown conduct, which the Court will not be hesitant to determine.<sup>124</sup>

The Crown’s argument was essentially that if there ever was a duty toward the Métis in Manitoba to provide lands, the claim is statute-barred or, alternatively, barred by the doctrine of laches.<sup>125</sup> The Court rejected the Crown’s submission on the basis that it was inconsistent with reconciling the relationship between the Métis people and the Crown. By holding that the honour of the Crown was owed and continuing but not present in its dealings with the Métis, the Court demonstrated that it is prepared to be critical of constitutive moments in the formation of the country. Ultimately, *Manitoba Metis* scolds the Crown on its ethics while still not providing the Métis with a long-promised land base. In this way, the decision does not fully serve to uphold the “acts of mutual respect,

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<sup>122</sup> *Id.*, at para. 94. The Court states, at paras. 70 and 94:

The application of these precedents to this case indicates that the honour of the Crown is also engaged by an explicit obligation to an Aboriginal group that is enshrined in the Constitution. The Constitution is not a mere statute; it is the very document by which the ‘Crow[n] assert[ed its] sovereignty in the face of prior Aboriginal occupation’: *Taku River*, at para. 24. See also *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9. It is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group placed therein engages the honour of the Crown at its core. As stated in *Haida Nation*, ‘[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably’: para. 17 (emphasis added).

...  
 ... In accordance with the principles outlined above, the honour of the Crown is engaged by s. 31 and gives rise to a duty of diligent, purposive fulfillment.

<sup>123</sup> *Id.*, at para. 94.

<sup>124</sup> In dealing with the Crown’s position that it did not owe any obligations to the Métis of Manitoba under the terms of the *Manitoba Act*, the Court found, *id.*, at para. 133: “We have concluded that Canada did not act diligently to fulfill the specific obligation to the Métis contained in s. 31 of the *Manitoba Act*, as required by the honour of the Crown.”

<sup>125</sup> The majority of the Court — to the vehement objection of the dissent — did not accept this position (*Manitoba Metis, id.*, at paras. 135 and 139):

Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown’s conduct.

...  
 However, at this point we are not concerned with an action for breach of fiduciary duty, but with a claim for a declaration that the Crown did not act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*. Limitations acts cannot bar claims of this nature.

tolerance and goodwill that serve to heal rifts and create the foundations for a harmonious relationship”<sup>126</sup>.

The Court has already stated that the relationship between the Crown and Aboriginal people is ongoing and not limited to the times and dates of treaties or agreements.<sup>127</sup> Recall too that the *Royal Proclamation* and subsequent cases reflect the Crown’s commitment to act honourably so as to “remove all reasonable Cause of Discontent” of the “Nations or Tribes of Indians with whom We are connected”.<sup>128</sup> In *Manitoba Metis*, the Court has ensured that Métis people are part of those Nations or Tribes to which the Crown’s duty of honour is owed and that such a duty is fundamental to reconciliation. If Métis can meet the test for Aboriginal rights and title set out in *Powley*,<sup>129</sup> which modified the tests in *Sparrow* and *Van der Peet* — and indeed the Métis have been doing so through a slowly growing body of jurisprudence<sup>130</sup> — they should also be part of a reconciliation process.

*Manitoba Metis* is about old relationships, broken promises and the substantive role honour plays in “negotiated settlements with good faith and a give and take on all sides”.<sup>131</sup> The doctrine of honour is a legally enforceable obligation, not merely a notion of best practices when available in order to avoid sharp dealing by the Crown,<sup>132</sup> meaning the Court has placed an importance on trust in the relationship, which is repeated in *Mitchell*<sup>133</sup> and *Little Salmon/Carmacks*.<sup>134</sup> As such, there is no reason to doubt the sincerity of the Chief Justice in prioritizing reconciliation. With both One Dish and section 35 jurisprudence agreeing that honour is required in order to establish trust, there is a mutual

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<sup>126</sup> Walters, *supra*, note 5.

<sup>127</sup> *Manitoba Metis*, *supra*, note 92.

<sup>128</sup> *Proclamation*, *supra*, note 33.

<sup>129</sup> *R. v. Powley*, [2003] S.C.J. No. 43, [2003] 2 S.C.R. 207, 2003 SCC 43 (S.C.C.) modified the tests in *Sparrow*, *supra*, note 60 and *Van der Peet*, *supra*, note 12, by defining a 10-step test for Métis rights, including the right to hunt as an Aboriginal right.

<sup>130</sup> Teillet, *supra*, note 116; see also C. Bell, “Metis Constitutional Rights in Section 35(1)” (1997) 36 *Alta. L. Rev.* 180.

<sup>131</sup> *Delgamuukw*, *supra*, note 12, at para. 186.

<sup>132</sup> For more on “sharp dealing”, see *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771, at para. 41 (S.C.C.); *R. v. Marshall*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, at para. 4 (S.C.C.); *Haida Nation*, *supra*, note 16, at para. 19; *Manitoba Métis*, *supra*, note 92, at para. 73.

<sup>133</sup> *Supra*, note 12, at para. 129, wherein the Court encourages Aboriginal and non-Aboriginal Canadians to work together for common purpose.

<sup>134</sup> *Little Salmon/Carmacks*, *supra*, note 89; and *Manitoba Metis*, *supra*, note 93, at paras. 97-98, where the Court encourages a harmonious co-existence of Aboriginal and non-Aboriginal Canadians based on trust.

opening toward reconciliation and fertile ground to negotiate a new relationship.

## 2. Consultation

Effectively reconciling a relationship “carries with it the processes that are needed to overcome a culture of suspicion, mistrust and fear”.<sup>135</sup> Thus, it is also the process<sup>136</sup> and the building of principles<sup>137</sup> necessary to bring about resolution that are also vitally important. The parties to One Dish had neither a common culture nor a common language. Still they managed to engage in diplomatic discussions with each other in order to come to terms. It would have taken rounds of consultation with the parties both internal to each Nation and with each other prior to coming to agreement.<sup>138</sup> *Haida Nation* declares that “[t]he government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown”,<sup>139</sup> which is echoed in *Taku River*.<sup>140</sup> In the end though, in *Haida Nation*, the Court determined that the duty was met on the facts<sup>141</sup> and again fell short of offering a more

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<sup>135</sup> Tzimas, *supra*, note 8, at 524.

<sup>136</sup> For a more in-depth discussion on possible steps of process, see S.F. Du Toit, “Tensions Between Human Rights and the Politics of Reconciliation: A South African Case Study” in Joanna R. Quinn, ed., *Reconciliation(s): Transitional Justice in Postconflict Societies* (Montreal and Kingston: McGill-Queen’s University Press, 2009).

<sup>137</sup> Slattery, “Generative Structure”, *supra*, note 13, sets out six Principles of Reconciliation, which “must have the following basic features”:

- (1) They should acknowledge the historical rights of aboriginal peoples, as determined by Principles of Recognition, as the essential starting point for any modern settlement.
- (2) They should take account of how historical aboriginal rights have been affected by changes in the circumstances of indigenous peoples and the rise of third-party and other social interests.
- (3) Where appropriate, they should distinguish between the “inner core” of aboriginal rights, which may be implemented by the courts without need for negotiation, and a “penumbra” or “outer range” that needs to be defined in treaties negotiated between the aboriginal people concerned and the Crown.
- (4) They should provide guidelines governing the accommodation of rights and interests held by other affected groups, both aboriginal and non-aboriginal.
- (5) Where appropriate, they should create strong incentives for negotiated settlements to be reached within a reasonable period of time.
- (6) They should provide for judicial remedies where negotiations fail to yield a settlement.

<sup>138</sup> Corbiere, *supra*, note 24.

<sup>139</sup> *Haida Nation*, *supra*, note 16, at para.16.

<sup>140</sup> *Taku River*, *supra*, note 16.

<sup>141</sup> Newman, *supra*, note 3, at 475-91.

level playing field suitable for equals.<sup>142</sup> Declaring that the Crown's duty to consult with Aboriginal people continues beyond what was written in a treaty and that the duty is ongoing helps in establishing the enduring nature of the relationship between Aboriginal people and the Crown. In short, through consultation comes the context which was so important in the subsequent interpretation of the *Royal Proclamation*, but which has been ignored.

Moreover, these cases confirm that the Crown has a constitutionally entrenched duty to consult with Aboriginal people.<sup>143</sup> If we are to share the bounty and reconcile long-standing disputes, consultation is the means by which this process will happen. Consultation must be engaged in by the Crown for the benefit of the long-term life of the relationship and consider the way that practices and material conditions will shift during the life of the parties and agreements. The interpretation of the Aboriginal perspective must be done in a generative way that ultimately allows for Aboriginal rights to operate "on two levels – the first, abstract and timeless; the second concrete and timebound".<sup>144</sup> In this way, the Crown's consultative approach must be inclusive of Aboriginal perspectives, eschew hierarchy and establish trust. With trust comes the possibility of a reordered relationship of equals, a nation-to-nation relationship.

Though the case was dismissed on procedural grounds, the Court signalled in *obiter* in *Behn v. Moulton Contracting Ltd.*<sup>145</sup> its interest in defining Aboriginal collective and individual rights — such as who has

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<sup>142</sup> In *Haida Nation*, *supra*, note 16, the Court was not prepared to rebalance the power between Aboriginal people and the Crown. Further by finding Little Salmon/Carmacks First Nation held no veto power and in *Taku River*, the Court was expressly clear that the duty to consult does not carry a veto power for Aboriginal people. Unfortunately, this leaves the relationship very one-sided in favour of the Crown who may in the end proceed at will with at best a delay by Aboriginal concerns.

<sup>143</sup> Slattery, "Generative Structure", *supra*, note 13, at 437.

<sup>144</sup> *Id.*, at 443.

<sup>145</sup> *Behn v. Moulton Contracting Ltd.*, [2013] S.C.J. No. 26, 2013 SCC 26 (S.C.C.) sends out an invitation that the doctrine of honour and the duty to consult as it relates to Aboriginal peoples' collective rights may be tightly intertwined. Writing for a unanimous Court, LeBel J. stated (at paras. 32 and 33):

The Behns also challenge the legality of the Authorizations on the basis that they breach their rights to hunt and trap under Treaty No. 8. This is an important issue, but a definitive pronouncement in this regard cannot be made in the circumstances of this case. I would caution against doing so at this stage of the proceedings and of the development of the law.

... It is true that Aboriginal and treaty rights are collective in nature ... However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights. ...

the legal right to bring a claim on behalf of an Aboriginal community or who may assert an Aboriginal right. In the context of reconciliation, this invitation should be well heeded by all concerned. Based on the Court's leanings, there is a real risk of future restrictions — exclusion even — as to whom the Court views as having the right to determine the rules of any One Dish-style agreement.<sup>146</sup> Reconciliation will be elusive if not all Aboriginal groups are able to participate in a consultative process meant to draw everyone in.<sup>147</sup> How collective and individual rights may be held and who may assert them is a sensitive issue for Aboriginal people, who continuously reject the limitations already imposed by Crown sovereignty, whether acquired or *de facto* or *de jure*,<sup>148</sup> and may be best answered generously, if at all, to avoid additional potential to splinter relations.

Both “honour” and “consultation” have been used as a justification for diminishing Aboriginal and treaty rights in favour of Crown sovereignty. If reconciliation really matters, then manipulating honour and consultation to subvert Aboriginal rights in favour of the settler population cannot continue. Instead, these elements should be recast in keeping with the example the Haudenosaunee and Anishinabe offer with One Dish and should be used not as a vehicle to uphold a colonial myth of sovereignty, but rather as a means to equalize the parties and set the relationship right.

### 3. Restraint

Another key principle of One Dish revolves around the question of restraint. Had either the Anishinabe or Haudenosaunee opted to take more than their share, the bowl would have tipped and equilibrium would have been lost. This may pose a greater challenge to the Crown, which continues to rely on a hierarchical ordering of rights, with Crown supremacy to be the basis for legal argument as we have seen in *Sparrow* and reflected throughout section 35(1) jurisprudence. Again, the *Manitoba Metis* decision, wherein the Crown is called out for

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<sup>146</sup> The use of a common bowl metaphor is also used in other ways relating to sharing by the Nisga'a. For more on this, see H. Foster, H. Raven & J. Webber, eds., *Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2011), at 220.

<sup>147</sup> M. Walters, *supra*, note 5, at 180.

<sup>148</sup> For more on *de facto* versus *de jure* Crown sovereignty, see Slattery, “Generative Structure”, *supra*, note 13.

failing to uphold the doctrine of honour, indicates that the passage of time will not bar future claims, meaning that there should be interest by the Crown in finding new ways forward. It is more effective for the Crown to manage its own restraint<sup>149</sup> and not to take too much from already strained relationships, rather than waiting for legal claims, which may be brought at any time, to challenge the Crown taking more than it should.

Aboriginal laws are instructive in achieving restraint “through intersocietal activities between First Nations to bridge division and discord”.<sup>150</sup> Take the Haudenosaunee, for example, who pre-contact had laws and protocols in place in the event of a threat to resources or lands.<sup>151</sup> Such means included “wider systems of diplomacy”<sup>152</sup> and intersocietal norms<sup>153</sup> that functioned as preventative measures meant to demonstrate restraint and avoid harm. The Anishinabe made use of “peace-keeping warriors, or *Ogijidah* ... to patrol and monitor such sites of conflict, and perhaps even occupy a contested site. ... These tools were embedded in a wider framework of law.”<sup>154</sup> In this way, the parties to One Dish teach us about achieving restraint through proactive means rather than waiting for conflict to erupt and accessing a colonial legal system for post-conflict redress.

#### 4. Maintenance

Finally, the regular renewal of One Dish between the Anishinabe and the Haudenosaunee contributed considerably to its ongoing success. By gathering together regularly and sharing the very bounty subject to One Dish, the two Nations were able to reaffirm the preceding three elements along with the solemnity of One Dish<sup>155</sup> and transmit One Dish’s importance to younger generations. The Court understands this in

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<sup>149</sup> J. Borrows, “Indian Agency and Taking What’s Not Yours” (2003) 22 Windsor Y.B. Access Just. 253.

<sup>150</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, at 130.

<sup>151</sup> Y. Richmond, D. Richter & J.H. Merrell, *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600-1800* (University Park, PA: Penn State University Press, 2003) [hereinafter “*Beyond the Covenant Chain*”].

<sup>152</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, at 130.

<sup>153</sup> Webber, *supra*, note 88.

<sup>154</sup> Borrows, *Indigenous Constitution*, *supra*, note 26.

<sup>155</sup> O. Lyons, “Spirituality, Equality, and Natural Law” in L. Little Bear, M. Boldt & J.A. Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984), at 5-6 [hereinafter “Lyons”].

identifying ongoing maintenance as a requirement for successful relationships. In *Little Salmon/Carmacks* and *Quebec (Attorney General) v. Moses*, the Court held that treaties — including so-called modern ones — require ongoing maintenance to avoid disagreement.<sup>156</sup> In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,<sup>157</sup> the Court tells us that even the pre-Confederation treaties must be continuously renewed:

... Treaty making is an important stage in the long process of reconciliation, but is it only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown but a rededication of it.

...

In summary, the 1899 negotiations [for Treaty 8] were the first step in a long journey that is unlikely to end any time soon. ...<sup>158</sup>

The element of maintenance was vitally important from an Aboriginal perspective at the Treaty of Niagara insofar as spirituality is infused into sacred agreements.<sup>159</sup> In particular, “the primary law of Indian government is the spiritual law ... our spirituality is directly involved in government ... [s]o we are told first to conduct the ceremonies on time, in the proper manner, and then sit in council.”<sup>160</sup> The British Crown committed to “entering into treaties with Indigenous peoples if their lands were to be occupied by non-Aboriginal people. Indigenous peoples’ actions and perspectives were important to this policy formulation.”<sup>161</sup> Subsequently, treaty negotiations were complex, involved and accompanied by diplomatic rules established by Aboriginal people. The Crown had to follow the rules or risk further fighting.<sup>162</sup> At the formulation of the Covenant Chain of Friendship,<sup>163</sup> responsibilities were assigned, rules established and “a multinational

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<sup>156</sup> *Little Salmon/Carmacks*, *supra*, note 89, at para. 46, and *Quebec (Attorney General) v. Moses*, [2010] S.C.J. No. 17, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 61 (S.C.C.).

<sup>157</sup> [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388 (S.C.C.).

<sup>158</sup> *Id.*, at paras. 54 and 56.

<sup>159</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, at 161.

<sup>160</sup> Lyons, *supra*, note 155, at 5-6.

<sup>161</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, at 133.

<sup>162</sup> *Id.*, at 158, wherein he notes that the Crown’s failure to follow diplomatic protocol and exchange gifts during treaty negotiations resulted in Pontiac resuming fighting in 1764.

<sup>163</sup> R.L. Haan, “Covenant and Consensus, Iroquois and English, 1676-1760” in *Beyond the Covenant Chain*, *supra*, note 151, at 41. Also note that the Covenant Chain of Friendship formed part of the Treaty of Niagara.

alliance in which no member gave up their sovereignty, was affirmed. The Royal Proclamation became a treaty.<sup>164</sup> Through the Covenant Chain of Friendship, wampum was given,<sup>165</sup> just as it was with One Dish. Moreover, the Anishinabe and Haudenosaunee gathered together at timed intervals to participate in ceremony and transmit the laws of One Dish to all in attendance so that the treaty would continue to be respected and peace would continue to reign.<sup>166</sup> Maintenance then, is the means by which the relationship continues to thrive in the long term. For the Crown and Aboriginal people this may possibly take the form of annual meetings that involve ceremony, the exchange of gifts and discussions that seek to reaffirm the relationship and address concerns arising in a modern context.<sup>167</sup>

#### V. FINDING A WAY ... TOGETHER

“[W]e are all here to stay.”<sup>168</sup> The relationship between the Crown and Aboriginal people can only be reconciled by also taking Indigenous approaches to law<sup>169</sup> into account.<sup>170</sup> The Royal Commission on Aboriginal Peoples<sup>171</sup> considered this question in an intersocietal law paradigm and suggested a new Royal Proclamation, one that creates a path forward to a new relationship and corrects the historical record — one that is more in keeping with both Crown and Aboriginal perspectives originally folded into the Treaty of Niagara. The Treaty included both an

<sup>164</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, at 161.

<sup>165</sup> *Id.*

<sup>166</sup> Corbiere, *supra*, note 24.

<sup>167</sup> Royal Commission on Aboriginal Peoples, *supra*, note 30, *Laying the Foundations of a New Relationship*, Vol. 5, makes a number of recommendations toward restructuring the relationship for the long term.

<sup>168</sup> *Delgamuukw*, *supra*, note 12, at para. 186.

<sup>169</sup> For more on Indigenous approaches to law as sacred, see H. Cardinal & W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

<sup>170</sup> R. Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006). Dworkin suggests that both existing jurisprudence and its moral soundness are two fundamental elements of a decision's fit within an overall legal landscape. With the Court's reliance on a colonialist structure — and thereby morally suspect — considering Dworkin's approach, reconciliation may not be achieved without a considerable change in law and a more morally sound approach, such as respecting Aboriginal people's own laws (which was also at issue in the *Tsilhqot'in* case, *supra*, note 55).

<sup>171</sup> Royal Commission on Aboriginal Peoples, *supra*, note 30, Vol. 5, *Renewal: A Twenty-Year Commitment*.

English written text of the *Royal Proclamation, 1763* and a wampum belt that were intended to be read together. For this new venture to succeed, there must be a “rejection of the doctrine of discovery”<sup>172</sup> on the grounds that it is “legally, morally and factually wrong”<sup>173</sup>.

If One Dish is a worthy means of recasting the relationship and a model of how to go about achieving reconciliation, the courts and the ideology of One Dish are not entirely oppositional. Jointly, they offer a common starting point with honour and a consultative process, if used effectively and fully in negotiations, that takes both sides into account to create something new. One Dish offers one option to reconcile the relationship by reshaping it from vertical to horizontal, unbalanced to equal, acrimonious to harmonized, hierarchical to circular. In other words, One Dish, and its ongoing maintenance, may make the relationships flexible enough to accommodate everyone for the long term. It asks us to expand our legal imagination to make room<sup>174</sup> as we gather together at one table, share one bounty and take what we need, no more, no less. One Dish’s elements are in keeping with Court doctrine and are broad enough to allow for a more cohesive view of reconciliation that may replace frustration with assumed Crown sovereign authority with trust. One Dish does not require either the Crown or Aboriginal people to entirely reinvent themselves; but rather, recasts what is meant by reconciliation, and allows for a drawing together to build an agreement that will govern a relationship where the parties are not separate but equal, but rather, equal and together.

Reconciliation is more than just a notional idea. What the Chief Justice is stating, through defining reconciliation as a key objective of section 35, is a principle also fundamental to One Dish. The relationship between Canada and Aboriginal people is ongoing and must be tended. There should not ever be a time when the relationship closes.<sup>175</sup> One Dish supports the definition of “reconciliation as relationship” approach offered by Walters. It is about cooperation, balance, equality and respect.

Much has happened in the Court to define Aboriginal constitutional rights as the Court cuts a wide, seemingly meandering path, towards

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<sup>172</sup> Borrows, “(Ab)Originalism”, *supra*, note 9, at 370.

<sup>173</sup> *Id.*; see also Royal Commission on Aboriginal Peoples, *supra*, note 30, Vol. 1, at 696.

<sup>174</sup> Macklem, “First Nations Self-Government”, *supra*, note 98. The author argues for the need to reconceptualize Anglo-Canadian norms, legal principles and assumptions that have colluded to create a structure that limits the legal imagination with respect to the relationship between the Crown and Aboriginal People. I posit that One Dish presents such a reconceptualization.

<sup>175</sup> *Haida Nation*, *supra*, note 16, at para 54.

(as the Court claims), reconciliation.<sup>176</sup> The jurisprudence indicates that the Court has done some lifting, but is it enough? The enduring acceptance of Crown sovereign authority in section 35 jurisprudence to date will continue to destabilize efforts<sup>177</sup> to negotiate agreements intended to pave the way to reconciliation. Similarly, as we have seen, the Court has not developed a clear process that operationalizes the reconciliation purpose of section 35(1), and can be relied upon for smoothing out relations.<sup>178</sup> Yet, constitutions are supposed to assist people in making sound decisions about how they will live together within a shared territory.<sup>179</sup> For the relationship to work, a new approach is required,<sup>180</sup> one that allows constitutional space for “aboriginal people to be aboriginal”.<sup>181</sup> Presently, the law is decided by judges at a nine-sided table without a single Aboriginal jurist in sight. Can such a court be ready to consider alternatives and broaden the meaning of reconciliation so that it works for Aboriginal and non-Aboriginal Canadians alike?<sup>182</sup> Given the state of the relationship and the Chief Justice’s priority for the Court, a different approach should be welcomed.

In the end, when it comes to reconciliation, it is helpful to recall that the relationship has been going on for centuries and is a long game. Through discussion, negotiation and even arguments, we will find our way to reconciliation so long as we come together to share with purpose. If we do anything less, the original dispossession of Aboriginal people through the simple acceptance of Crown sovereignty and a lopsided approach to section 35, is something everyone should be afraid of. Through open, level and fair negotiations, as the Court suggests, Canada has a chance to come into its own. In all of these pursuits, some hope can

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<sup>176</sup> K. McNeil, “Judicial Approaches in Self-Government since *Calder*: Searching for Doctrinal Coherence” in *Let Right Be Done*, *supra*, note 104, Ch. 8.

<sup>177</sup> M. Asch, “From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-96” in P. Havemann, ed., *Indigenous Peoples’ Rights in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999).

<sup>178</sup> R. MacDonald, *Lessons for Everyday Law* (Montreal: McGill University Press, 2002), offers an excellent discussion with respect to considering ways to discern patterns and roles in the law. He posits that such a grand view is achieved through the examination of conflicts and legal interactions over time, in other words, a long game.

<sup>179</sup> Borrows, *Indigenous Constitution*, *supra*, note 26, Ch. 7.

<sup>180</sup> V. Napoleon, “Thinking About Indigenous Legal Orders” (2007), National Centre for First Nations Governance.

<sup>181</sup> Royal Commission on Aboriginal Peoples, *supra*, note 30, in *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Supply and Services Canada, 1993), at 41.

<sup>182</sup> W. Alford, “On the Limits of ‘Grand Theory’ in Comparative Law” (1986) 61 Wash. L. Rev. 945.

be found in the jurisprudence, which when combined with One Dish, has much to offer to intersocietal law that at its best will endure.

Living in Anishinabe territory, I have been taught not only to give thanks for the food we eat, but also to end thanksgiving with the words “all my relations”. This phrase serves as a gentle reminder of our place in the world and how we are inextricably linked to all life around us. It is meant to confirm, whether we care to admit it or not, that we all sit at one table, share one bowl and eat together with one spoon. It is beneficial for all concerned that sooner, not later, we find a way to reconcile the relationship between Canada and Aboriginal people in a way that is meaningful to all parties and to make it work. After all, we are bound up in a long game and have to get through this together. Let us face it, we are all here to stay. All my relations.

