

**Reconciliation: A Framework for Living Together**  
**“Let’s face it, we are all here to stay”**

**The Process of Reconciliation: Principles Articulated by the Courts**

The body of constitutional law that has developed since 1982 provides significant guidance as to how reconciliation should be achieved in the Canadian constitutional context:

Reconciliation

- C “s. 35 (1) provides the constitutional framework through which aboriginal peoples, who lived on the land in distinctive societies with their own practices, traditions and cultures, are acknowledged and reconciled with the sovereignty of the Crown.” (*Van der Peet*)
- C “The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and promise of s. 35 with respect to Métis Aboriginal rights is to protect practices that are historically important features of distinctive communities and that persist in the present day as integral elements of Métis culture.” (*Powley*)

Negotiations

- C “The recognition and affirmation of aboriginal rights in section 35(1) of the *Constitution Act, 1982*, provides the solid constitutional basis upon which subsequent negotiations can proceed”.<sup>1</sup> (*Sparrow*)
- C Negotiations are the preferred means for achieving reconciliation. “Ultimately, it is through negotiated settlements, with good-faith and give-and-take on all sides, reinforced by the judgments of this court, that we will achieve ... the basic purpose of section 35(1) -- the reconciliation of the preexistence of aboriginal societies with the sovereignty of the Crown..... let’s face it we are all here to stay”.<sup>2</sup> (*Delgamuuxw*)
- C “Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises” (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.”<sup>3</sup> (*Haida*)

## Honour of the Crown/Fiduciary

- C “In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”: *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.”<sup>4</sup> (*Haida*)
- C “A general guiding principle for section 35 (1)” is that “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of its historic relationship”.<sup>5</sup> (*Sparrow*)
- C “The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term “fiduciary duty” does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:
- . . . “fiduciary duty” as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
- Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.”<sup>6</sup> (*Haida*)
- C “The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing” (*Badger*, at para. 41).”<sup>7</sup> (*Haida*)

## Recognising/Balancing

- C “At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the “occupation and use of the land” where the activity is taking

place is not “sufficient to support a claim of title to the land”...In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. ...At the other end of the spectrum, there is aboriginal title itself. ...What aboriginal title confers is the right to the land itself.”<sup>8</sup> (*Delgamuukw*)

- C Any infringement of Aboriginal rights must be justified: “...federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights”.<sup>9</sup> (*Sparrow*)
- C “The ability to exercise personal or group rights is necessarily limited by the rights of others...Absolute freedom in the exercise of even *Charter* or constitutionally guaranteed aboriginal rights has never been accepted, nor was it intended.”<sup>10</sup> (*Nikal*)
- C Aboriginal rights have to be given priority, but they have to be reconciled with other rights and interests: “...objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the types of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment”.<sup>11</sup> (*Gladstone*)
- C “The constitutional objective is reconciliation not mutual isolation.....Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it”.<sup>12</sup> (*Mitchell*)
- C “...Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims”<sup>13</sup>...“Balance and compromise are inherent in the notion of reconciliation.”<sup>14</sup>(*Haida*)

#### Consultation/Accommodation

- C “The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution..Consultation and accommodation...are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.”<sup>15</sup> (*Haida*)
- C “...The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet

unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But...the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim.”<sup>16</sup>(*Haida*)

- C “This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.”<sup>17</sup> (*Haida*)
- C “The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.”<sup>18</sup>“...the Provinces took their interest in land subject to "any Interest other than that of the Province in the same". The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed...”<sup>19</sup> (*Haida*)
- C “At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached...Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.”<sup>20</sup>(*Haida*)

#### Interpretation

- C “In approaching the terms of the treaty, the honour of the Crown is always involved and no appearance of sharp dealing will be countenanced.” (*Taylor*)
- C Historic treaties should be liberally construed and doubtful expressions resolved in favour of the Aboriginal parties. Further, “the onus of establishing strict proof of extinguishment of a treaty or aboriginal right lies upon the Crown”.<sup>21</sup>(*Badger*)

#### **Reconciliation: Principles for Renewing Relationships**

- C “Reconciliation is an ongoing process...The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country. We must instead continue to find ways in which

Aboriginal people can participate fully in the economic, political, cultural and social life of Canada in a manner which preserves and enhances the collective identities of Aboriginal communities, and allows them to evolve and flourish in the future.”<sup>22</sup> (*Gathering Strength*)

- “We cannot ignore the wrongs of the past or the rights flowing from the historical relationships between aboriginal and non-aboriginal people in Canada. But we are not prisoners of the past, and we can restore and renew that relationship on the basis of mutual recognition, and respect, sharing and responsibility.”<sup>23</sup> (*RCAP*)

### Mutual Recognition

- C Mutual recognition “calls on non-Aboriginal Canadians to recognize that Aboriginal people are the original inhabitants and caretakers of this land and have distinctive rights and responsibilities that flow from that status...More broadly, mutual recognition means that Aboriginal and non-Aboriginal people acknowledge and relate to one another as equals, co-existing side by side and governing themselves according to their own laws and institutions.”<sup>24</sup> (*RCAP*)
- C “The Government of Canada recognizes that Aboriginal people maintained self-sufficient governments with sustainable economies, distinctive languages, powerful spirituality, and rich, diverse cultures on this continent for thousands of years.”<sup>25</sup> (*Gathering Strength*)
- C “The Government of Canada affirms that treaties, both historic and modern, will continue to be a key basis for the future relationship.”<sup>26</sup> (*Gathering Strength*)
- C “Although women’s ability to exercise their rights was subject to extensive regulation under the *Indian Act*, there is no convincing argument that the rights were extinguished before 1982. They were therefore “existing” Aboriginal rights within the meaning of *Sparrow* and protected by the equality guarantee (Aboriginal and treaty rights “are guaranteed equally to male and female persons”) in section 35(4).”<sup>27</sup> (*RCAP*)

### Mutual Respect

- C Mutual respect – “a relationship in which people live side-by-side, retaining rights and cultural traditions inherited from the past and governing their own affairs in a confederation that values this form of political diversity.”<sup>28</sup> (*RCAP*)
- C “The Government is committed to the principle that the *Canadian Charter of Rights and Freedoms* should bind all government in Canada, so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the Charter...The Charter is...designed to ensure a

sensitive balance between individual rights and freedoms, and the unique values and traditions of Aboriginal peoples in Canada.”<sup>29</sup> (*Inherent Right Policy*)

- C “The Government recognizes that Indian, Inuit and Métis peoples have different needs, circumstances and aspirations, and want to exercise their inherent right in different ways...The Government is prepared to support various approaches, taking into account differing needs and circumstances, and to be flexible on the specific arrangements which may be negotiated.”<sup>30</sup> (*Inherent Right Policy*)
- C “The treaty relationship is one in which the parties expect to resolve differences through mutual discussion and decision.”<sup>31</sup> (*Statement of Treaty Issues*)

### Mutual Benefit (Sharing)

- C “...the Canadian economy is a shared enterprise, to which all contribute in various ways and from which all should benefit as a necessary condition of social harmony and balance.”<sup>32</sup> (*RCAP*)
- C “In moving forward, the federal government believes that treaties, and the relationship they represent, can guide the way to a shared future. The continuing treaty relationship provides a context of mutual rights and responsibilities which will ensure that Aboriginal and non-Aboriginal people can together enjoy the benefits of this great land.”<sup>33</sup> (*Gathering Strength*)
- C The treaties were foundational agreements that were entered into for the purpose of providing the parties with the means of achieving survival and stability, anchored on the principle of mutual benefit. Treaty-making established a basis for mutual benefit, and provided for the security, peace and good order of all citizens within the treaty territory.”<sup>34</sup> (*Statement of Treaty Issues*)

### Mutual Responsibility

- C “Aboriginal peoples have long shared with Canada the lands that were originally theirs alone. Since Aboriginal peoples and Canadian governments both have interests in these lands, both have the capacity to act in ways that affect the welfare of the other partners in the relationship and the well-being of the land itself...Aboriginal peoples and Canadian governments both have an obligation to act with the utmost good faith toward each other with respect to the lands in question.”<sup>35</sup> (*RCAP*)
- C “Treaty-making incorporated the customs of the respective parties and created a fundamental political relationship between Treaty First Nations and the Crown. Treaties gave shape to this relationship, creating obligations and expectations on both sides.”<sup>36</sup> (*Statement of Treaty Issues*)

1. *R. v. Sparrow* [1990] 1 S.C.R. 1077
2. *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, Lamer C.J. at para 186
3. *Haida Nation v. British Columbia (Minister of Forests)* [2004] S.C.C. 73 at para 20
4. *Ibid.* At para 17.
5. *R v. Sparrow* [1990] 1 S.C.R. 1108
6. *Ibid.* at para 18.
7. *Ibid.* at para 19.
8. *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 at para 138.
9. *R v. Sparrow* [1990] 1 S.C.R. 1109.
10. *R. v. Nikal* [1996] 1 S.C.R. XCII
11. *R v. Gladstone* [1996] 2 S.C.R. para 75
12. *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, paras 133 and 135
13. *Haida Nation v. British Columbia (Minister of Forests)* [2004] S.C.C. 73 at para 45.
14. *Ibid.* at 50.
15. *Ibid.* p. 2.
16. *Ibid.* at para 27.
17. *Ibid.* at 48.
18. *Ibid.* at para 57.
19. *Ibid.* at para 59.
20. *Ibid.* at para 42.
21. *R. v. Badger* [1996] 1 S.C.R. para 41
22. Government of Canada. (1997) *Gathering Strength - Canada's Aboriginal Action Plan*, Statement of Reconciliation.
23. RCAP, Volume 1, Chapter 16, 1.1

24.RCAP, Volume 1, p.678.

25.Government of Canada. (1997) *Gathering Strength - Canada's Aboriginal Action Plan*.

26.libd.

27.RCAP, Volume 2, p.94.

28. RCAP, Volume 1, Chapter 16, 1.1

29.Government of Canada. (1995) *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, p.4.

30.Ibid. p.17.

31.Office of the Treaty Commissioner. (1998) *Statement of Treaty Issues: Treaties as a Bridge to the Future*. p.88.

32. RCAP, volume 1, p.688.

33.Government of Canada (1997) *Gathering Strength - Canada's Aboriginal Action Plan*.

34. Office of the Treaty Commissioner. (1998) *Statement of Treaty Issues: Treaties as a Bridge to the Future*. p.67.

35.RCAP, volume 1, p.689.

36. Office of the Treaty Commissioner. (1998) *Statement of Treaty Issues: Treaties as a Bridge to the Future*. p.86.