

**RECONCILIATION IN CANADIAN LAW:
THE THREE FACES OF RECONCILIATION?**

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A. Introduction

This paper is not intended to be an exhaustive study of the law relating to reconciliation in Canada. It is heuristic, aimed at promoting thought. It asks if there are (i) different kinds of reconciliation, (ii) if there are, are there principles that connect such different kinds of reconciliation and (iii) can those principles be a guide to what is and is not productive of reconciliation? It deals with the Canadian experience of reconciling Aboriginal and non-Aboriginal existences and draws, with gratitude, upon the wisdom gained from the reconciliation process of post-*apartheid* South Africa.

I propose that there are at least three, closely related, forms of reconciliation; namely, reconciliation between human being and human being (“individual reconciliation”), reconciliation between legal systems (“legal reconciliation”) and reconciliation between peoples (“social reconciliation”). Recognizing the differences and commonalities of these three forms of reconciliation may be important to guiding successful reconciliation.

I also propose there may be lessons to be gained from the process of agreement upon a mutually agreeable version of the truth and the resulting process of remorse, forgiveness and restored mutual dignity effected at the one-on-one level of individual reconciliation that have application, at least, to social reconciliation.

Finally, I propose that we need to seek one or more legal touchstones of the success or adequacy of, particularly, social reconciliation processes. As a proposed example of such a touchstone, I suggest that the restoration of the human dignity of the parties is something against which social reconciliation processes must be judged and that the touchstone question of “does this enhance the dignity of the parties” is an important means of testing what is truly reconciliatory and what is not.

B. Recognition Legislation and Reconciliation

Early in March, 2009, the Government of British Columbia (the “Province”) published a discussion paper (the “*Discussion Paper*”) entitled, “*Discussion Paper on Instructions for Implementing the New Relationship*”¹. It discussed, in broad terms, the possible contents of proposed legislation intended further to implement the Provinces’ new relationship with the

¹ *Discussion Paper on Instructions for Implementing the New Relationship*, Confidential document dated February 19, 2009 and published in March 2009 at http://www.gov.bc.ca/arr/attachments/implementing_the_new_relationship_0309.pdf.

Aboriginal peoples of British Columbia². It states that implementation of such legislation, "...is intended to foster reconciliation, cooperation and partnership and contribute to certainty for Indigenous Nations and third parties (emphasis added)."³ Subsequent events have resulted in a delay in the appearance before the provincial legislature of a bill setting out the exact terms of such proposed legislation. Based upon the victory speech of Premier Gordon Campbell on the night of May 12, 2009, such legislation will be forthcoming.⁴

The legislation discussed in the *Discussion Paper*, will be the subject of more discussion and consultation and, if enacted, may or may not effect a material change in the relations of Aboriginal and non-Aboriginal governments and peoples in British Columbia. However, it seems important to note that its first-named purpose is "reconciliation", a word which has come to have important formal meaning in Canadian law but has been inadequately analyzed from a legal point of view.

It has been said that "reconciliation" has as many definitions as there are those who comment on it⁵. A considerable amount of thinking has gone into the study of reconciliation in the context of clashes of societies in Canada and around the world. As noted above and as will be discussed below, I believe that "reconciliation" has at least three closely inter-related but also reasonably distinct meanings, two of which have been considered, without being named as such, in the context of Canadian Aboriginal law.

Those two meanings relate, respectively, to the processes of (i) the detailed integration of formal Canadian law with Aboriginal law ("legal reconciliation") and (ii) doing all those economic, social, moral and psychological things necessary to change the minds of Aboriginal and non-Aboriginal Canadians about themselves and their relationship within Canadian society ("social reconciliation").

Understanding of legal reconciliation requires a reasonably cut and dried study of a limited number of judgements of the Supreme Court of Canada (the "Court").

Understanding social reconciliation requires some historical understanding of the Canadian experience in attempted social reconciliation which is not at all cut and dried. It is a profound and complex process, expensive of money, time and effort. If successful, it can effect fundamental changes in how groups think about themselves and each other.

² See *The New Relationship* published by the Province in 2005 which is available at http://www.gov.bc.ca/themes/new_relationship.html.

³ *Discussion Paper*, p. 1.

⁴ See Statement by the Province dated March 14, 2009 at http://www2.news.gov.bc.ca/news_releases_2005-2009OTP0049-000366.htm and the Rod Mickleburgh *Globe and Mail Update*, March 16, 2009 "B.C. puts Aboriginal recognition on hold" at <http://www.theglobeandmail.com/servlet/story/RTGAM.20090316.wbcreconciliation16/...>

⁵ Thomas Isaac, *Aboriginal and Treaty Rights in the Maritimes; The Marshall Decision and Beyond*, Purich Publishing Ltd., Saskatoon, 2001, p 166. Brian Rice and Anna Snyder, "Reconciliation in the Context of a Settler Society: Healing the Legacy of Colonialism in Canada" ("Rice and Snyder") in *From Truth to Reconciliation: Transforming the Legacy of the Residential Schools*, Dollco Printing, Ottawa, 2008, p. 45.

It seems reasonable to argue that insights into social reconciliation may be found in the third category of reconciliation, that between individuals dealing with wrongs done by one to the other (“individual reconciliation”).

A clearer understanding of reconciliation both as a legal and a social concept may assist in the framing of legislation and government policy which has reconciliation in the Aboriginal context as its aim. Lessons for Canadians may also be lessons for others with similar problems and opportunities before them.

C. *Two Themes of Reconciliation in Canadian Law*

In 1982, with the enactment of Section 35(1) of the *Constitution Act, 1982* (“Section 35(1)”) ⁶, there was added to the Canadian constitution recognition of existing Aboriginal rights and title. It was a unique constitutional step among nations with substantial Aboriginal populations and it was far from clear in 1982 what it meant or where it would lead.

It was eight years after enactment of Section 35(1), in 1990, that the Court, in the *Sparrow* decision, brought the concept of “reconciliation” into Canadian Aboriginal law ⁷. Faced with the argument that constitutional recognition of Aboriginal rights meant that any law affecting such Aboriginal rights would automatically have no force or effect, the Court found that, “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 (emphasis added)” ⁸. It is notable that in Canadian law before the Australian High Court decision in *Mabo* ⁹ in 1992, such reconciliation was seen in terms of a reconciliation of federal *duty* with federal *powers*.

In the Court’s 1993 decision in *Van der Peet* ¹⁰, the Court’s thinking about the connection between Section 35(1) and reconciliation became much more sophisticated in its combining the early nineteenth century findings of the U.S. Supreme Court, in which it was accepted that some Aboriginal rights had survived for Aboriginal people in the United States ¹¹, with *Mabo*, in which it was held that it was possible to “reconcile” customary rights (Aboriginal law) and the “legal ideas of civilized society” (Australian common law) ¹². The Court’s application of these principles to the Canadian situation was to conclude, in effect, that Section 35(1) mandated reconciliation of Aboriginal claims to land based on Aboriginal occupation in Canada which predated Crown sovereignty over the Canadian landmass. In effect, Section 35(1) mandated integrating concepts of pre-existing *Aboriginal law* with the *formal laws of Canada*. The doctrine of justification in the context of consultation remains fundamental to resolution of

⁶ *Constitution Act, 1982*, R.S.C. 1985, App.II, No. 44, being Sched. B to the *Canada Act 1982* (U.K.), c. 11, as am. by the *Constitution Amendment Proclamation 1983*, R.S.C. 1985, App. I, No. 46.

⁷ *R.v.Sparrow* [1990] 1 S.C.R. 1075. (“*Sparrow*”)

⁸ *Sparrow* para. 62.

⁹ *Mabo v. Queensland*, [1992] 5 C.N.L.R. 1. (“*Mabo*”)

¹⁰ *R.v.Van der Peet*, [1996] 2 S.C.R. 507. (“*Van der Peet*”)

¹¹ *Van der Peet*, paras. 35 to 43, quoting *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

¹² *Van der Peet*, para. 40.

infringements of Aboriginal rights. However, the legal basis for the doctrine was clarified by stating what was actually being reconciled in the justification process¹³.

The next fundamental judicial development in Canadian reconciliation law came in the 1996 decision of the Court in *Gladstone*¹⁴ in which the problem of allocation of a scarce resource among Canadians led to the conclusion that Aboriginal Canadians do form part of the larger Canadian population and that some objectives of government, such as conservation, are important enough to limit Aboriginal rights within the necessary rights of the broader Canadian society which includes Aboriginal and non-Aboriginal Canadians. Such limitation was noted to be, “a necessary part of reconciliation”¹⁵. Reconciliation is also referred to not in terms of reconciliation of concepts of Aboriginal law with formal Canadian law but of “reconciliation of Aboriginal societies with the larger Canadian society of which they are a part... (emphasis added).”¹⁶ Therefore, by 1996, in *Van der Peet* and *Gladstone*, the two closely related but different faces of reconciliation in Canadian law, legal and social, were described although not named separately, in the jurisprudence of the Court.

D. *The Mechanics of Legal Reconciliation*

In 2004, in the *Haida*¹⁷ decision, the Court dealt in great detail with the source of the reconciliation process in Canadian Aboriginal law, the nature of that process, and, in particular, the actual and what were suggested to be desirable additional mechanics of legal reconciliation.

The Court traced the historic origin of the process of reconciliation as flowing from the Crown’s duty of honourable dealing toward Aboriginal peoples which, in turn, arose from the Crown’s assertion of sovereignty over such peoples and *de facto* control of land and resources formerly solely occupied by such peoples¹⁸. The process, therefore, began with the assertion of Crown sovereignty and continues even when formal claims to Aboriginal rights have been resolved. It is not a legal remedy but an ongoing process which the Court has determined is mandated by the guarantees inherent in Section 35(1)¹⁹. The Court integrated the Crown’s duty of honourable dealing into the historic process of reconciliation in order to recognize its roots that run back long before 1982 to the origins of Crown sovereignty in Canada.

This explanation of reconciliation may not be limited to what I call “legal reconciliation” and may also describe the origins of Canadian social reconciliation. But a material theme in the long history of Canada down to the last decades of the twentieth century was one of transgressions requiring social reconciliation which outweighed actual social reconciliation during that history. Faced with the issue of legal reconciliation, the Court’s detailed commentary on reconciliation in *Haida* deals with the legal mechanics of reconciling the traditional, individually unique, *sui generis* laws of Canadian Aboriginal peoples with formal Canadian law. The Court did not attempt to advise on social reconciliation. Rather, it concentrated on how the

¹³ *Van der Peet*, paras. 49 to 61.

¹⁴ *R.v. Gladstone*, [1996] 2 S.C.R. 723. (“*Gladstone*”)

¹⁵ *Gladstone*, para. 73.

¹⁶ *Gladstone*, para. 74.

¹⁷ *Haida Nation v. British Columbia (Ministry of Forests)*, [2004] 3 S.C.R. 511. (“*Haida*”)

¹⁸ *Haida*, paras. 17 to 25.

¹⁹ *Haida*, para. 32.

Crown and all its limbs, including the courts, progressively fashion a fair and coherent legal system out of Canada's existing formal legal system and an almost numberless body of *sui generis* rights based on Aboriginal legal concepts. It is a discussion carried on in terms of a constitutionally mandated duty of the Crown to reconcile law and law²⁰.

The Court makes express reference in *Haida* to five classes of Crown acts that are part of the legal reconciliation process; namely:

- (a) negotiation of treaties²¹;
- (b) consultation and accommodation²²;
- (c) establishment of specialized regulatory schemes for determining the adequacy of consultation to which the courts can defer;
- (d) government guidelines for dealing with Aboriginal claims that fall short of such a regulatory scheme²³; and
- (e) of course, Section 35(1)²⁴.

Experience teaches that all of these aspects of the legal reconciliation process may and sometimes are engaged at the same time. There is no final reconciliation between Crown and a treaty-making Aboriginal people in making effective a treaty with such people. Infringement of a treaty right would engage the Crown's reconciliatory duty to consult and, if appropriate, accommodate the beneficiaries of such treaty. Equally, regulatory schemes and guidelines may be adopted by the Crown to strengthen any aspect of the legal reconciliation process²⁵. When the process seems to have broken down, ultimate recourse is to the courts as the judge of what does or does not effect the advancement of the process of legal reconciliation in any particular case.

The Court has not closed the categories of mechanisms for achieving reconciliation in Canada. The obvious omission is the enactment, amendment and repeal of legislation affecting the rights and obligations of Aboriginal Canadians. That can perhaps be explained as not relating to the reconciliation of law and law under review in *Haida* but the process of social reconciliation in which the Crown has a relatively free hand to do what is best to achieve social reconciliation. However, the legislation contemplated in the *Discussion Paper*, if ever passed, would presumably extend the categories of legal reconciliation to legislation and regulations made thereunder. In addition, where in this analysis does federal legislation fall which seeks to provide more rational legal approaches to Aboriginal commercial and industrial development, fiscal and statistical management, education in British Columbia, land management and

²⁰ *Haida*, paras. 25, 50, 51 and 60.

²¹ *Haida*, para. 25.

²² *Haida*, para. 32.

²³ *Haida*, para. 51.

²⁴ *Haida*, para. 31.

²⁵ It is not impossible that such schemes and guidelines can also assist in social reconciliation and, of course, the Court has never subdivided reconciliation as it is in this paper. However, as discussed in *Haida*, it is fairly clear that the Court contemplated such schemes and guidelines as aids to the legal reconciliation process – clarifying how consultation should be carried out and diverting complaints about consultation conclusions from the courts.

administration of Aboriginal oil and gas resources?²⁶ Such legislation does not generally reconcile Aboriginal Law with Canadian Law as it does not deal in any obvious way with reconciliation of Canadian Law with any Aboriginal rights of the sort protected by Section 35(1). As such, it can probably be best seen as social reconciliation provided in the context of federal statutes.

Treaty-Making

The process of treaty-making has a long history in Canada. That history is the hardest evidence supporting the Court's doctrine that the process of reconciliation dates from the assertion of Crown sovereignty. The *Royal Proclamation of 1763*, which mandated Crown-made treaties with Aboriginal peoples would seem to be an early example of a regulatory scheme or, more likely, initial government guidelines for legal reconciliation²⁷. It is the nature of treaties consensually to extinguish some Aboriginal rights while seeking to make the surviving Aboriginal rights comprehensible in English, or later, Canadian law by giving them a formally acknowledged place in that law. Since 1982 and the advent of Section 35(1), such rights are not only part of Canadian law, they are constitutionally protected and cannot be infringed without justification by Crown consultation and, if appropriate, accommodation. Thus, treaties are capable of an enormous amount of reconciliatory "translation" of surviving elements of pre-sovereignty Aboriginal law into a mixture of oblivion, defined packages of Canadian law and, in British Columbia, a category of surviving Aboriginal rights that have not been expressly dealt with in treaty.²⁸

Canada's treaties with Aboriginal peoples are not all of the same quality. That variability is based mostly on when in our history they were made. However, all of them translate certain Aboriginal rights into treaty rights and accept the termination of other Aboriginal rights and give some form of consideration for the bargain. Legal reconciliation by treaty, therefore, is a negotiated process of creating some new legal rights as the *quid pro quo* for an Aboriginal people entering into a treaty and rendering their surviving *sui generis* rights and their new "consideration" rights into constitutionally protected legal rights while consensually extinguishing some or all of their *sui generis* Aboriginal rights.

Consultation

As a legal concept, justification of infringement of Aboriginal rights by the Crown's exercise of its duty to consult and, if appropriate, accommodate (collectively, "Consultation") dates from the Court's decision in *Sparrow* in 1990 in which the Crown's duty of Consultation as part of the process of justification was first systematically identified. Consultation differs from treaty-making as a route to legal reconciliation as it deals not systematically with most or all of an Aboriginal peoples' Aboriginal rights but *ad hoc* with individual infringements of one or

²⁶ *First Nations Commercial and Industrial Property Act*, S.C. 2005, c.53, *First Nations Fiscal and Statistical Management Act*, S.C. 2005, c.9, *First Nations Jurisdiction over Education in British Columbia Act*, S.C. 2006, c.10., *First Nations Land Management Act*, S.C. 1999, c. 24, *First Nations Oil and Gas and Moneys Management Act*, S.C. 2005, c.48.

²⁷ *The Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1.

²⁸ *The Report of the British Columbia Claims Task Force, June 28, 1991*, http://www.bctreaty.net/files/pdf_documents/bc_claims_task_force_report.pdf.

more of such rights. It seeks to identify competing interests in a balanced approach to the proposed infringement that will minimize or even remove the infringement while, in most cases, allowing the actions that would have resulted in the infringement to proceed with as little impact as possible upon the infringed right. Consideration may be imported into Consultation through impact and benefits agreements typically made between the infringing proponent of resource development and its Aboriginal neighbours. Consultation also does not change the nature of an existing Aboriginal right that is not already subject to a treaty nor incorporated into Canadian law. It relates only to dealing with one or more proposed infringements of such right.

In *Haida*, the Court accepted that Consultation is a process closely analogous to consultation in general administrative law²⁹. The Court suggested to the Province that it adopt a regulatory scheme that would allow for provincially established extra-judicial review to determine whether appropriate Consultation is effected in the case of any particular infringement of an Aboriginal or treaty right³⁰. The Court hoped to spare the courts from being involved in this ongoing task. Implying that the Crown's dealing with its Aboriginal subjects is a specialized aspect of administrative law, the Court found that general principles of administrative law suggest that the proposed regulatory scheme *that the Court could defer to* establish that:

- (f) the decision-maker in Consultation must be correct on questions of law;
- (g) such decision-maker may be owed a degree of deference on questions of fact or mixed law and fact;
- (h) the degree of such deference depends on the nature of the question addressed and the expertise of the decision-maker;
- (i) with respect to issues of fact and inextricably mixed fact and law, the standard of review would likely be that of reasonableness;
- (j) the appropriateness of any particular Consultation process would likely fall to be examined on a standard of reasonableness; and
- (k) the process should not be focused on outcome but on the Consultation process³¹.

Administrative Schemes and Guidelines

The Court identified the 2002 British Columbia Provincial Policy for Consultation as a government guideline falling short of a regulatory scheme³². It appears that some aspects of the proposed legislation under discussion in the *Discussion Paper* may fall into the category of a regulatory scheme aimed at both legal and social reconciliation while seeking to minimize the role of the courts in such processes. However, while the Court in *Haida* suggested creation of a specialized tribunal for judging the appropriateness of individual Consultation processes to which the courts may defer, the legislative scheme outlined in the *Discussion Paper* appears to

²⁹ *Haida*, paras. 60 to 63.

³⁰ *Haida*, para. 51.

³¹ *Haida*, paras. 60 to 63.

³² *Haida*, para. 51.

be a more comprehensive program of legislative reform of many aspects of the relationship between the Province and British Columbia's Aboriginal peoples that would carry out the Crown's legal duty of Consultation in the context of what it calls "shared decision making". Guidance as to what that means perhaps may be found in the new relationship policy of the Province as exercised since 2005³³.

The scheme of the legislation contemplated by the *Discussion Paper* may include the kind of institution for the extra-judicial review of contested instances of Consultation according to the administrative law principles suggested by the Court that is described above³⁴. This may be part of what is called "comprehensive" engagement between the Province and the Aboriginal peoples of British Columbia in the *Discussion Paper*. Given the current state of Canadian law and the ability in it for Aboriginal people to challenge the sufficiency of any particular Consultation, it would seem to complete the scheme of the *Discussion Paper* to create such an institution if, as has been asserted³⁵, (i) "shared decision making" generally leaves the final power to govern British Columbia to the Crown so that there is only a limited Aboriginal veto of the sort contemplated by the Court in *Delgamuukh*³⁶ and (ii) the Consultation of "shared decision-making" encounters, from time to time, the same problems of dissatisfied Aboriginal parties as in Consultation as practised to date.

The Province, pursuant to its "New Relationship" with the Aboriginal peoples of British Columbia has much extended the ambit of the "administrative schemes and guidelines" to a point at which such schemes and guidelines become not easily distinguishable from a form of pre-emptive Consultation. The Province has done so in a substantial number of memoranda of agreement, protocols and agreements made with Aboriginal communities in respect of both legal and social reconciliation matters.³⁷ These include forest & range opportunity agreements, aboriginal fishery strategy agreements, economic benefit agreements, reconciliation protocols, strategic and stewardship/use planning agreements, consultation protocols, compensation agreements and other accommodation agreements. While the treaty process continues, such agreements seem to attempt to fill the gap in the processes of legal reconciliation necessarily existing in respect of Aboriginal communities that are not subject to a treaty and may or may not even be negotiating one while also touching on many subjects of social reconciliation³⁸.

Pending a treaty with each Aboriginal community or in the likely non-existence of one at any foreseeable time for some such communities, both Province and Aboriginal communities have sought to advance legal and social reconciliation with the mutually respectful negotiation of memoranda of understanding, protocols and agreements that are not treaties. Nor do they seem to constitute Consultation in the classic sense of sharing information in order to obtain mutually satisfactory understanding of respective interests in respect of *ad hoc* infringements of

³³ Geoff Plant, "Certainty and Fairness for All", *The Vancouver Sun*, May 11, 2009, p. A7 ("Plant").

³⁴ *Supra*, p. 5.

³⁵ *Supra*, n. 30.

³⁶ *Delgamuukh v. British Columbia*, [1997] 3 S.C.R. 1010. ("*Delgamuukh*"), para. 168

³⁷ Cynthia Callison, "Negotiating Agreements with the Crown Outside the Treaty Process" pp.4 ff. *CLE/BC Aboriginal Law Conference 2007*.

³⁸ It would take a fairly substantial schedule to this paper to set out all the initiatives of the Province's Ministry of Aboriginal Relations and Reconciliation since the advent of The New Relationship but some insight can be gained from the Ministry website at http://www.news.gov.bc.ca/Default.aspx?topic_obj_id=0800921e80010c4c.

Aboriginal rights although some may contain elements of Consultation and they may represent an expression of the more normal *ad hoc* process of Consultation. Mostly, unsurprisingly, they resemble the non- treaty documents of international diplomacy, finding common ground, offering financial inducements, establishing protocols for ongoing relationships and agreeing on procedures for further diplomatic work. In them, the Province has exhibited a flexibility in dealing with different groups differently that is sometimes lacking in the negotiations of the treaty process and may or may not be reflected in the proposed legislation contemplated in the *Discussion Paper*.

The *Discussion Paper* does suggest that legal concessions to British Columbia's Aboriginal peoples have been discussed which go beyond the more limited theory of legal reconciliation announced by the Court. It discusses Crown recognition of what the Aboriginal peoples determine to be, "their own laws, governments, political structures, territories and rights inherited from their ancestors" as well as Aboriginal title to the territory of British Columbia in all cases without proof of claim³⁹. It is not clear how these provisions will appear in any eventual legislation. It is clear from the commentary of Geoff Plant, assumed to be speaking for the Province, that any such legislation is or has been difficult to draft.⁴⁰

Not having seen more than the *Discussion Paper*, it would be premature to judge any legislation that may eventually result from the discussion inspired by the *Discussion Paper*. The very diversity of interests of all parties which may be affected by such legislation suggests that, in a Canadian law context, established reconciliatory principles relating to legal reconciliation as noted above⁴¹, will be part of such legislation if it is to be truly reconciliatory in its effect. If it is to be a compromise worked out in a negotiated contest between Provincial government power and the power of Aboriginal organizations without due attention to all interests, the result may be less reconciliatory in the social reconciliation sense and may attempt to establish new categories of legal reconciliation. However, note both that (i) the *Discussion Paper* is what it is named, a basis for discussion of a way forward, not a blueprint and (ii) the Province is clearly labouring bravely at the frontiers of legal and social reconciliation theory and practice. It would not be surprising if there is material overlap of legal and social reconciliation in the result. Recognizing that it is dealing with two legally mandated faces of reconciliation may assist in the "hard work" of drafting legislation.

E. *Social Reconciliation in Canadian Law*

As stated at the outset, "social reconciliation" is closely related to the "legal reconciliation" which is the kind of reconciliation most discussed in Canadian case law. Certainly, it is impossible to imagine effecting social reconciliation without ongoing legal reconciliation. The legal authority for social reconciliation lies in *Gladstone*⁴² and the acceptance of *Gladstone* in *Marshall #2*⁴³. In *Gladstone*, the narrow issue was if conservation measures could justifiably infringe an Aboriginal right. The Court, while admitting the

³⁹ *Discussion Paper*, p.1.

⁴⁰ *Supra*, n. 30, "It will be hard work to translate this proposal into legislation that meets these objectives . But it is worth doing."

⁴¹ *Supra*, p. 5.

⁴² *Supra*, n. 16.

⁴³ *R. v. Marshall*, [1999] 3 S.C.R. 533 para. 41. ("*Marshall #2*")

importance of Aboriginal rights determined that Aboriginal peoples are part of the wider Canadian people and, as such, are subject to compelling and important objectives such as conservation of a natural resource. Thus, limits imposed on Aboriginal rights for the good of the “broader political community of which they [the Aboriginal peoples] are a part is a necessary part of reconciliation.”⁴⁴ The Court went on to hold, “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” (emphasis added)⁴⁵. This sentence was quoted in *Marshall #2*⁴⁶, a case of allocation of another limited natural resource shared between Aboriginal beneficiaries of a treaty and non-Aboriginal fishermen and has been interpreted as a call for the Crown, “to take a leading role in reconciling and balancing the interests of Aboriginal and non-Aboriginal people.”⁴⁷

The quotation from *Gladstone* above and its subsequent re-affirmation by the Court is evidence of the existence of a constitutional responsibility cast upon Canadian governments to effect social reconciliation which goes beyond the integration of pre-existing Aboriginal law with Canadian law in the ways enumerated in respect of legal reconciliation above. Probably wisely, the Court offers no advice on how such social reconciliation is to be achieved outside the narrow facts of the two appeals noted above. Certainly the indicia of “social reconciliation” as found by the Court amount only to saying that, in appropriate circumstances, infringement of an Aboriginal right is justified for the greater good of all Canadians – which is, after all, fundamental to the concept of legal reconciliation. However, the words, “*more importantly*” must have meaning. Their most obvious meaning is that the Court views the constitution of Canada to mandate more than mere legal reconciliation and that a broader social reconciliation of Aboriginal and non-Aboriginal societies within Canada is, as between legal and social reconciliation, the *more important* aim of our constitution.

It is axiomatic that courts deal with the circumstances of real conflicts, not with hypothetical ones. In *Haida*, the Court arguably went about as far as it could go in dictating the outline of a regulatory scheme to assist in keeping challenges to the appropriateness of any particular Consultation process out of the courts⁴⁸. In *Gladstone* and *Marshall #2*, the Court arguably went as far as it could go in showing that it was aware that social reconciliation is a constitutionally mandated aim of Canadian governments.

F. *Individual and Social Reconciliation in South Africa*

Development of the interlocking legal doctrines integral to legal reconciliation in Canada⁴⁹ has been a long and very costly process worked out over decades of litigation. The development of social reconciliation in Canada has been played out, apparently with inspiration from, but otherwise outside, the courts, as a parallel development over the same decades as those in which the doctrines of legal reconciliation evolved. In common with foreign social reconciliation processes, such as that continuing in South Africa and New Zealand or developing

⁴⁴ *Gladstone*, para. 73.

⁴⁵ *Gladstone*, para. 74.

⁴⁶ *Marshall #2*, para. 41.

⁴⁷ *Ibid*, Isaac, p. 167,

⁴⁸ *Supra*, n. 21 to n. 23.

⁴⁹ For instance, “reconciliation”, “justification”, “the honour of the Crown”, “consultation” and “accommodation”.

in Australia, Canadian social reconciliation has strong ongoing associations with politics at the federal, provincial and Aboriginal political levels.

A review of social reconciliation processes elsewhere suggests that, unsurprisingly, they relate to the existence of frictions between what conceive of themselves to be separate populations occupying the same territory. It also indicates that they fall into two broad, sometimes overlapping categories; namely, (i) post-war reconciliation⁵⁰ and (ii) post-colonial reconciliation⁵¹. Further, it is clear that, even within those broad categories, the processes of social reconciliation vary to fit the different circumstances of each nation's social reconciliation process. It is far beyond the scope of this short paper to review worldwide social reconciliation processes in detail. However, it is useful to look at some experience of others in order to seek to identify principles of what really works to effect social reconciliation.

In this connection, we will look briefly at the South African experience. I have chosen the South African experience because it contains elements of both post-war and post-colonial reconciliation processes and also because it has been reported in great detail, its processes were carefully drafted as part of the new constitution of South Africa and its subsidiary legislation and it has been the subject of wise legal and moral commentary from which there are some useful lessons to be learned.

So much has been heard of the South African process of reconciliation that it is easy mistakenly to conclude that worldwide social reconciliation theory began with the ending of the *apartheid* regime in South Africa between 1992 and 1994. In fact, there had been established reconciliation movements, including truth commissions and a truth and reconciliation commission in a number of countries prior to 1992⁵². As we have seen, as early as 1990, the Court was using the term "reconciliation" in *Sparrow* in the context of the development of the doctrine of justification and by 1993, in *Van der Peet*, the Court had clearly enunciated the principles of legal reconciliation of Aboriginal and Canadian legal systems⁵³.

However, in South Africa, the danger of fundamental social breakdown added a pressure to development of reconciliation theory that would actually work if not to reconcile all to all, at least to change the minds of many so as ease the risk of social cataclysm. In the eyes of the drafters of the new South African constitution, the past had to be dealt with and it had to be dealt with quickly and efficiently if the worst predictions of civil disturbance were to be avoided. It was recognized that the process adopted must match the facts of the emergency⁵⁴. Justice was required but criminal trials would have been expensive and were recognized as unpredictable and subject to huge evidentiary difficulties resulting from loss of documents, the death or

⁵⁰ For example, in Chile, El Salvador, Iraq, Liberia, Nicaragua, Northern Ireland, Palestine/Israel, Peru, Ruanda, Sierra Leone, Solomon Islands South Africa and East Timor.

⁵¹ For example, in Australia, Canada and New Zealand as well as, bridging post-war and post-colonial reconciliation, South Africa. See also, *Ibid.* Rice and Snyder, p. 45 where an analysis of the some elements of post-colonial reconciliation in Canada is attempted.

⁵² For instance, the El Salvador Truth Commission which rendered its report in 1993, see http://www.uisp.org/library/tc/doc/reports/el_salvador/tc_es_03151993_toc.html as well as the Argentine and Chilean truth and reconciliation processes noted in *The Azanian Peoples Organization et. al. v. The President of the Republic of South Africa et. al.* 1993 (8) B.C.L.R. 1015 (S.A.C.C.) ("Azanian").

⁵³ *Supra*, n. 7 and n. 10.

⁵⁴ Desmond Tutu, *No Future Without Forgiveness*, Doubleday, Toronto, 1999, pp. 4 and 20 ("Tutu").

disappearance or unwillingness of witnesses, wounded memories and fear that telling the truth would bring forth further criminal prosecutions⁵⁵. There was also a great personal appetite for information as to what had happened to victims on both sides of the struggle just ended as well as a national appetite for a mutually acceptable history of the *apartheid* era in which both sides were portrayed, accurately, as neither all good nor all bad⁵⁶. It was recognized that amnesty was a valuable tool that could be traded for information but that amnesty provided without the truth behind closed doors as it was in post-Pinochet Chile effects no reconciliation⁵⁷. Equally, it was recognized that an apology cannot be the basis of amnesty as it is too easy simply to apologize if the apology is not in the context of a full disclosure of the facts that justify the apology⁵⁸.

The South African reconciliation process was materially affected by the thinking, among many others, of Archbishop Desmond Tutu, the Chairman of the South African Truth and Reconciliation Commission (the “SATRC”). Archbishop Tutu relied on what he has named “*ubuntu* theology” to explain the human processes leading to reconciliation which were experienced in the context of the hearings of the SATRC. *Ubuntu* is an indigenous African philosophical concept summed up by Tutu in the words, “a person is a person through other persons.” This is perhaps more easily understood as meaning that, in human relations, actions which rob another person of his or her dignity also take away the dignity of the transgressor or, in Archbishop Tutu’s words, “what dehumanizes me dehumanizes you”. Equally, what restores human dignity to transgressor and transgressed is the common human experience of mutual understanding of mutually acceptable truth, remorse, apology and forgiveness that allows reconciliation to happen and the reconciled parties to move on⁵⁹.

While the indigenous African philosophical insights of *ubuntu* theology are deeply interesting, equally interesting is that *ubuntu* theology absorbs the fundamentals of Christian theology relating to reconciliation, forgiveness and redemption. In this way, *ubuntu* theology also became a route by which religious Afrikaners, long imbued with their being a “chosen people” in their own “promised land” could mentally move towards mutual understanding, apology and forgiveness⁶⁰ – it being necessary to understand that transgressions of human dignity happened on both sides of the racial divide in *apartheid* South Africa⁶¹.

Archbishop Tutu’s insights are wrapped in an ingenious philosophical amalgam of different human traditions but they are worthy of notice in any discussion of social reconciliation for their being tested in the crucible of the SATRC and that of South African public opinion as, arguably, insights of universal applicability to reconciliation processes elsewhere. The fact that he could reconcile basic African village values with Anglicanism that could, in turn, be embraced by Dutch Reform Afrikaners is really only a demonstration that, in their most basic form, all respectable philosophers and theologians accept the fundamental concept of universal

⁵⁵ *Ibid.* Tutu, pp. 21 to 26 and *Ibid.* *Azanian* para. 17.

⁵⁶ *Ibid.* Tutu, pp 27 to 28.

⁵⁷ *Ibid.* Tutu, p 27.

⁵⁸ *Ibid.* Tutu, p. 50.

⁵⁹ *Ibid.* Tutu, pp. 31 to 32.

⁶⁰ *Ibid.* Tutu, pp. 275 to 277.

⁶¹ *Ibid.* Tutu, pp. 51 to 54.

human dignity although the intellectual justifications of it may vary tremendously⁶². To seek to achieve social reconciliation, which is so essentially a process of the mutual changing of minds, in a philosophical vacuum is more likely to prove fruitless, and, in disappointed hopes, counterproductive.

At the same time, however, it must be recognized that the inspiring scenes of personal reconciliation drawn from the record of the SATRC are just that, personal or individual epiphanies achieved in face to face confrontations between transgressor and transgressed guided by one of the great thinkers of our time⁶³. In effect, what Archbishop Tutu and the SATRC were achieving were individual acts of mutual healing. I submit that in order fully to understand the processes of social reconciliation that it must be understood that there is also “individual reconciliation” – a process carried on at the individual human level of transgressed and transgressor but when multiplied in the consciousness of whole societies becomes at least a part of social reconciliation.⁶⁴ Too much could be made of this concept but, on the other hand, it would be lacking in caution to dismiss it altogether. If whole societies do not rise to the dignity restoring heights of individual encounters in the SATRC, there would seem to be some ability to reduce unforgiveness across populations using commonly accepted historical truth, apology and the other tools of individual reconciliation.

The following list attempts to set out what, in Archbishop Tutu’s theory and practice, may be considered to be the essential elements of such “individual reconciliation” – the changing of the minds of individuals related through transgression, which, of their nature, are also principles to be considered in analysis of “social reconciliation” – the changing of the minds of populations in respect of a history of personal experiences involving most, if not all, society:

- (a) one part of individual reconciliation is that both parties recognize or come to recognize that each participant is of equal value as a human being;
- (b) a second part of any process leading to individual reconciliation is achieving a mutually acceptable version of the truth about the events that are the subject matter of the reconciliation process;
- (c) if both parties can accept a common version of such subject matter, the parties have an increased ability to understand why each party acted as it did and the transgressor is led to regret and to apologise and the transgressor is led to forgive;

⁶² For an interesting review of the concept of human dignity from Cicero to the *1948 Declaration of Human Rights* see, *passim*, Mette Lebeck, *What is Human Dignity?* <http://eprints.nuim.ie/393/>

⁶³ For the *Truth and Reconciliation Commission of South Africa Report* in full, see www.info.gov.za/otherdocs/2003/trc/-21k

⁶⁴ My conclusion here is that of a person trained as a historian and a lawyer and not that of a social psychologist or other branch of social or moral science. I do not discount those fields of study and for those with an interest in the relationship between individual and social reconciliation seen through other eyes, I strongly recommend Everett L. Worthington Jr. “Unforgiveness, Forgiveness, and Reconciliation and their Implications for Societal Intervention”, John Paul Lederach, “Five Qualities of Practice in Support of Reconciliation Processes” and Ervin Staub and Laurie Anne Pearlman, “Healing, Reconciliation, and Forgiving after Genocide and other Collective Violence”, which are, respectively, chapters 9, 10 and 11 of Raymond G. Helmick S.J. and Rodney L. Peterson eds. *Forgiveness and Reconciliation: Religion, Public Policy and Conflict Transformation*, Templeton Foundation Press, Radnor, Pa. 2001.

- (d) sincere apology and forgiveness usually has a profound effect on human relations which allow transgressor and transgressed to leave the past behind and move on with restored respect for one another as dignified human beings;
- (e) compensation may need to be a part of the reconciliation process but not usually as full compensatory damages, rather as something to mark that remorse is real and that will assist the transgressed to move into forgiveness of the transgressor;
- (f) compensation of any sort is inadequate to deal with the problems that generations yet unborn will suffer as a result of bad historical events not forgotten but forgiven; and
- (g) providing reconciliation in the context of a philosophical background acceptable to both parties allows each party more easily to proceed into the process of reconciliation⁶⁵.

To categorize ought not, however, to effect separation. The record of individual reconciliation with its mutually accepted truths and profound healing process can inspire or perhaps be multiplied in broader, social reconciliation. Given the entirely human nature of the reconciliatory healing process, it is difficult to believe that elements of the foregoing principles of individual reconciliation are not integral to some aspects of successful social reconciliation. The workings of the SATRC were at a very personal level involving astonishingly moving scenes of individual remorse and forgiveness in respect of crimes of extraordinary brutality. However, the publication (including radio broadcasting), of those deeply stirring personal examples of the power of the reconciliation process in action have had a wider reconciliatory effect in South African society and other societies in conflict and that seek social reconciliation.

Impressive as the work and thinking behind the SATRC has been, it must not be forgotten that it existed in the context of a complete legislative dismantling of the *apartheid* system and the implementation of a legislative programs for the benefit of South Africa's previously disadvantaged peoples – in effect, a totally *new relationship* between the Government of South Africa and the people of South Africa. It should also be noted that establishment of equal civil rights and reduction of inter-racial tension through the reconciliation processes of the SATRC have been supported by very large, if perhaps insufficient, amounts of money spent on trying to reverse the social inheritance of *apartheid*. However, that inheritance lives on, without the brutal and degrading attributes of the *apartheid* era but with many attributes of the disadvantaged post-colonial inheritance of many Canadian Aboriginal people⁶⁶.

⁶⁵ *Passim*, Tutu, also *Ibid.* Rice and Snyder pp. 46 to 48, where essentially the same principles are enunciated as acknowledgement of suffering and a common understanding of history (accurate history), acknowledgement of wrongdoing (regret) and revalidating oneself in recognition that what was done was wrong (at least part of what results from forgiveness). Interestingly, however, the healing nature of forgiveness, in Archbishop Tutu's view, the thing without which there is "no future", is not mentioned. It is possible that forgiveness is just too remote an aim in Canada at the social reconciliation level or it may be that something is being missed in the concentration of resources upon "healing". In any event, as we shall see, Canada has never asked for forgiveness as a *quid pro quo* of reconciliation. It perhaps seeks a reduction in "unforgiveness".

⁶⁶ *Ibid.* Rice and Snyder, p. 49 which suggest three aspects of the Canadian Aboriginal experience which they claim are unique to Canada but actually seem applicable to most if not all post-colonial Aboriginal cultures; namely,

G. *A Brief History of Canadian Social Reconciliation*

While arguably the *Royal Proclamation of 1763* may also have been the first step of social reconciliation between Aboriginal North Americans and the British Crown, I am somewhat arbitrarily making 1960 the start of my brief history of Canadian social reconciliation. In that year, all Aboriginal people with “status” under the *Indian Act* (Canada) living on reserves in Canada were allowed to vote in Canadian elections for the first time⁶⁷. Enfranchisement was at least partly a reaction to the excesses of the *apartheid* regime in South Africa leading to South Africa’s expulsion from the Commonwealth. Enfranchisement was an essential first step in restoring the human dignity of Canada’s Aboriginal peoples. I would choose 1982 and Section 35(1) as the next very significant landmark in this history being the year that the Canadian body politic was willing to amend its constitution to accept the possibility that legal and social reconciliation should become principles of our country’s fundamental law. However, Section 35(1) spoke in the veiled tongue of the Delphic Oracle. Thus, it took roughly a decade for the Court to recognize that Section 35(1) effected a constitutional imperative to achieve both legal and social reconciliation and more than two decades before the clear statement of legal reconciliation principles enunciated in *Haida*⁶⁸.

During all the time that litigation in our courts carried on the long and largely non-reconciliatory history of “victories” and “defeats” between Aboriginal peoples, governments and industry, there were themes of social reconciliation developing in Canada. There are more, but in my brief history I will deal with only three of these themes; namely, (i) the Royal Commission on Aboriginal Peoples (the “RCAP”) and its results, (ii) the Indian residential schools (“IRS”) litigation and its results and (iii) British Columbia’s “New Relationship” (the “BCNR”) and its results.

The Royal Commission on Aboriginal Peoples 1991-1996 and Canada’s “New Relationship” 1998 to the Present

The Oka crisis in 1990 led the federal government to establish the RCAP in 1991. Its mandate was to study the evolution of the relationship between Aboriginal peoples, the Government of Canada and Canadians as a whole⁶⁹. The Oka crisis was a matter of concern for the Government of Canada but it was certainly not a warning of the impending cataclysm that threatened South Africa in 1994. By 1993, the year in which the decision in *Gladstone* “more importantly” called for reconciliation between Aboriginal and non-Aboriginal Canadians, the RCAP developed a complex research agenda relating to governance, land and economy, social and cultural issues and the North. Public hearings were held all over Canada, more than 2,000

continuing social disadvantage, continuing myths of inferiority and continuing self-destructive psychological impacts. This is not a long list and may not be complete but it is good enough to demonstrate that social reconciliation in Canada is not going to be easy or cheap.

⁶⁷ *Canada Elections Act*, S.C. 1960, c. 39.

⁶⁸ *Supra*, p. 5.

⁶⁹ *The Canadian Encyclopedia*, “Aboriginal Peoples, Royal Commission on”
<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=a1ARTA001...> (“TCE”)

briefs from interested persons and 350 research studies were assembled. Three years later, in 1996, the RCAP published a five-volume, 4,000-page report (the “Report”)⁷⁰.

The Report proposed that there was a need for a complete restructuring of the relationship between Aboriginal and non-Aboriginal peoples in Canada proposing, (i) respect for Aboriginal cultures and values, the historical origins of Aboriginal nationhood and the inherent right of Aboriginal self-determination to be enshrined in a new Royal Proclamation stating Canada’s commitment to a “new relationship” (ii) focusing Aboriginal government on nations rather than individual communities and the establishment of an Aboriginal parliament with an advisory role to Parliament on issues relating to Aboriginal people (iii) providing more land to Aboriginal peoples and for economic institutions reflective of cultural values but independent of political interference (iv) adoption of Aboriginal health and healing strategies, increased educational initiatives as well as initiatives to promote cultural sensitivity and understanding among non-Aboriginal Canadians, and (v) in the North, ensuring that Aboriginal peoples participate in its political and economic development. The Report also called for much increased spending on Aboriginal issues and a prime ministers’ conference within six months of the Report’s publication.

The federal government responded to the Report with a lengthy information document dealing with federal government progress in the Aboriginal area from 1993 to 1996. In 1997 the Assembly of First Nations held a day of protest to express frustration with government inaction and failure of federal leaders to meet with Aboriginal leaders to discuss the Report. United Nations agencies complained that the Government of Canada was slow in responding to the findings in the Report⁷¹.

In 1998, the federal government responded with a document entitled *Gathering Strength: Canada’s Aboriginal Action Plan* (“*Gathering Strength*”)⁷². It set out a blueprint for future federal government action to create what it described as a “new relationship” based on four broad objectives entitled, “Renewing the Partnership”, “Strengthening Aboriginal Governance”, “Developing a New Fiscal Relationship” and “Supporting Strong Communities, People and Economics”. The document included a “Statement of Reconciliation” which generally acknowledged historic injustices to Aboriginal peoples with principle emphasis upon the IRS issue and establishing a \$350,000,000 “healing fund” to address the legacy of the IRSs.

Gathering Strength and its Statement of Reconciliation has its critics but it did mark a very substantial and self-conscious step in the process of social reconciliation in Canada. It combined an acknowledgement of the dignity of Aboriginal life in the territory that is now Canada before European contact and a strongly worded apology in respect of the IRS abuses as well as a substantial fund to deal with the human legacy of such abuses in terms of the Aboriginal concept of “healing” – all elements clearly recognizable from the individual reconciliation principles noted, above⁷³. Given the psychological damage suffered by many Canadian Aboriginal people not only from the IRSs but also from their race experience over centuries, the emphasis upon individual “healing” in Canadian literature on reconciliation is not

⁷⁰ <http://www.parl.gc.ca/information/library/PRBpubs/prb9924-e.htm>

⁷¹ *Supra*, n. 62.

⁷² [Dsp-psd.pwgs.gc.ca/collection/RS2-192-2000E.pdf](http://dsp-psd.pwgs.gc.ca/collection/RS2-192-2000E.pdf)

⁷³ *Supra*, pp. 12 to 13.

surprising. Further research and analysis may be able to link what I have called “individual reconciliation” and Archbishop Tutu’s indicia of such reconciliation with the “healing” processes sponsored by the Aboriginal Healing Foundation.

Gathering Strength remains Canada’s blueprint for long term and large scale social reconciliation at the federal level which is based on a more positive new relationship between the federal government and Aboriginal Canadians dealing with almost every aspect of Canadian Aboriginal life. *Gathering Strength* recognizes what is called here “social reconciliation” is an ongoing process of great complexity and expense. The emphasis upon remorse for IRS abuses and healing of the IRS legacy reacted to a recently closed chapter in the history of federal/Aboriginal relations that was, in 1998, becoming the focal point for potentially extremely costly litigation against the federal government and the churches that had managed the IRSs for the federal government. This latter approach may reflect the individual reconciliation model of remorse and forgiveness appropriate to individual reconciliation as noted above although, interestingly, *Gathering Strength* does not contemplate forgiveness.

In terms of analysing modern Canadian processes of social reconciliation, therefore, it appears that by 1998, Canada had adopted an approach not terribly different from that in South Africa, (i) seeking to heal gross violations of human dignity with a general apology and personal “healing” therapy and (ii) establishing a “new relationship” based on respect for Aboriginal nations and their cultures (iii) expending huge sums of money on programs seeking to narrow the measurable social gap between Aboriginal and non-Aboriginal populations in Canada: and (iv) being willing to consider legislation aimed at dealing with fundamental development issues relating to Aboriginal people⁷⁴.

The Indian Residential Schools Settlement 1998-Present

If the Government of Canada had thought that the apology in the Statement of Reconciliation and \$350,000,000 for healing would somehow effect reconciliation in respect of IRS abuses, it would have been disappointed. While expressly connected to the attempted reconciliation proposed by the Statement of Reconciliation, private litigation in respect of IRS abuses became its own ongoing theme in the Canadian reconciliation process. The Statement of Reconciliation and the work of the Aboriginal Healing Foundation funded with the \$350,000,000 paid under *Gathering Strength* brought Canada no individual reconciliation with IRS victims and no release from IRS claims which continued to multiply as class action cases until 2006 when Canada and its co-defendant churches settled with most of the IRS claimants in a litigation settlement agreement. That agreement mandated a solemn apology by the Prime Minister of Canada in the House of Commons, a modest “Common Experience Payments” to former IRS students with a total value of \$1,900,000,000, an independent assessment process for IRS victims who suffered sexual or severe physical abuse that can award damages of between \$5,000 and \$275,000, an IRS Truth and Reconciliation Commission to create a historical record of the IRS experience funded with \$60,000,000, a further \$125,000,000 of funding for the Aboriginal Healing Foundation and \$20,000,000 for commemoration initiatives⁷⁵.

⁷⁴ *Supra* n. 26.

⁷⁵ <http://www.residentialschoolsettlement.ca/settlement.html> (“IRS Settlement”)

The IRS Settlement is not, of itself, primarily a reconciliation document. It is a formal settlement of law suits with a reconciliatory process mandated in it. As such, it is part of the history of social reconciliation in Canada. The IRS Truth and Reconciliation Commission, although recently provided with a Chief Commissioner, has yet to meet. Its mandate is stated to be:

“There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The trust of our common experiences will help set our spirits free and pave the way to reconciliation.”⁷⁶

Note especially the emphasis upon establishing mutual recognition of the truth about what happened in the IRSs. In doing so, such mandate recalls the second principle of individual reconciliation noted above.

The mandated procedure of the IRC Truth and Reconciliation Commission is not the sometimes confrontational approach of the SATRC in which transgressor and transgressed met, shared information in a truthful manner and, in some cases, achieved individual reconciliation. In Canada, individual transgressors obtained no amnesty and some have been tried and convicted of crimes committed in the IRS context. The IRS procedures aim to create and publish “as complete a historical record as possible of the IRS system and its legacy” although the proceedings may be held *in camera*, attendance at them is entirely voluntary and much of the record will be anonymous⁷⁷.

When completed, the report of the IRS Truth and Reconciliation Commission will contain a detailed history of cultural deprivation as well as sexual and physical abuse which happened to Aboriginal children at the IRSs which should assist Canadians generally to understand the experience of their Aboriginal fellow Canadians and perhaps have them examine their own views about their fellow Canadians. As we learned in looking at individual reconciliation, achieving a mutually accepted truth is fundamental to the changing of minds that happens in both the individual and the social reconciliation processes. It is to be hoped that the procedures mandated for it can include the employment of eminent professional historians who can generate a history that is mutually acceptable across Canadian populations as demonstrably true and balanced. If non-Aboriginal Canada can shrug off the history of deprivation and abuse as something perhaps affecting only a minority of IRS students for which huge sums have been paid as compensation and be set against unmentioned and unquantified educational results of the

⁷⁶ IRS Settlement, Schedule N.

⁷⁷ *Supra*, n. 51.

IRS system whether good or bad, the social reconciliatory effects on Canadian society of the IRS Truth and Reconciliation Commission may be substantially reduced.

British Columbia's New Relationship 2004 to the Present

The Province of British Columbia is unique in Canada as, until very recently, largely standing outside the process of treaty-making that the Court has described as a fundamental part of legal reconciliation. The reasons for that state of affairs were the rugged geography of British Columbia and the poverty of British Columbia's colonial government. The colonial governors of British Columbia had insufficient funds to purchase treaties with all the colony's Aboriginal population and useable flat land was too scarce to follow the treaty-making process followed in the flatter lands of Canada east of the Rocky Mountains and in the Peace River country which allocated some land to reserves for Aboriginal people and the rest of the land to the Crown. Instead, following the instructions of the Colonial Office in London, the colonial government adopted the policy for Aboriginal land settlement developed in the Cape Colony of what is now part of South Africa. That policy consisted of allocating areas to Aboriginal communities as reserves and legislating in respect of the balance of the land as though it were empty Crown land with the implication that, as the sovereign authority, the colonial government had the power to extinguish Aboriginal titles⁷⁸.

The policy of the colonial government in respect of the unilateral extinguishment of Aboriginal title over most of British Columbia remained the policy of the Province until 1990, the year of the Oka crisis and civil disobedience action taken by Aboriginal people in British Columbia. Such action led to meetings between the Province and Aboriginal leaders which led in December 1990 to the creation of the B.C. Claims Task Force. The B.C. Claims Task Force Report in 1991 set out a procedure for the negotiation of treaties in British Columbia which was incorporated in the British Columbia Treaty Commission Agreement of 1992 between The First Nations Summit, Canada and the Province⁷⁹.

The aim of the BCTC was and remains that of making material progress with legal reconciliation in British Columbia by making treaties with all the Aboriginal peoples of British Columbia. Interestingly, the Province maintained a somewhat unclear position in respect of the possible existence of Aboriginal title in British Columbia by arguing in the lower courts in

⁷⁸ *Delgamuukw v. Canada*, 104 D.L.R. (4th) 470 (B.C.C.A.). It is notable that in its decision, the British Columbia Court of Appeal faced with the arguments put forward for colonial extinguishment of all Aboriginal title in British Columbia was willing to accept the colonial extinguishment argument as well as the concomitant argument that *The Royal Proclamation of 1763* had never applied to British Columbia because the contemporary map deposited with that document, which is referred to but not published in the statutes of Canada but does remain deposited in The National Archives of the United Kingdom, shows that, in 1763, the drafters of *The Royal Proclamation of 1763* understood the Mississippi River to rise in the Arctic so as to bisect North America on a North-South axis. Thus, based upon the dictum of statutory construction, *contemporanea expositio est optima et fortissima in lege*, interpretation of the geographical references in *The Royal Proclamation of 1763* using the contemporary geographical understanding of the Lords of Trade who did the drafting in 1763, demonstrate that it could not apply to British Columbia. It thereby limited the proclaimed Royal policy contemplated in *The Royal Proclamation of 1763* to eastern North America. Thus there was a legally credible argument accepted by the British Columbia Court of Appeal as recently as 1991 that Royal policy in respect of British Columbia, that adopted from the Colonial Office treatment of Aboriginal land in the Cape Colony, allowed for blanket extinguishment of Aboriginal rights in colonial legislation.

⁷⁹ www.bctreaty.net/files/bctcagreement.php.

*Delgamuukh*⁸⁰ the old position of unilateral extinguishment in colonial times, a position abandoned in the course of the appeal to the Court. Legislation establishing the BCTC became effective in 1996⁸¹. The work of the BCTC has been slow and some Aboriginal peoples are not taking part in the process at all, although some progress has been made⁸².

It is notable that the Province really effected recognition of potential aboriginal rights in British Columbia gradually between 1990 and 1996. In doing so, the Province gave up its traditional position that its land base had been swept clean of aboriginal titles by colonial legislation under colonial policies completely different from those applied in the rest of Canada. By doing so, the Province recognized that British Columbia lands are subject to the same law relating to aboriginal title as applies in the rest of Canada; no more and no less. Abandonment by the Province of the doctrine of the extinguishment of Aboriginal title in British Columbia by colonial legislation was probably the most important step in the Province's history toward both legal and social reconciliation in British Columbia.

It illustrates the close inter-relationship of the two faces of reconciliation suggested by the Court. Legal reconciliation is impossible if there be no aboriginal rights or titles that survive to be legally reconciled with the common law. It seems fair to deduce from the history of social reconciliation in British Columbia that social reconciliation could make little progress if legal reconciliation were impossible.

In 2005, the Province met with leaders of the principle groups representing the Aboriginal peoples of British Columbia. Those meetings led to the publication of a document entitled, "*The New Relationship*" (the "*The New Relationship*")⁸³. It is worthy of note that when faced with dealing with a multiplicity of issues that must be faced over many years to achieve social reconciliation in British Columbia that the Province adopted the same "new relationship" concept as Canada in its 1998 Statement of Reconciliation. Accepting that *legal* reconciliation was progressing as contemplated by the means set out, above⁸⁴, the Province then acknowledged that if any progress were to be made towards *social* reconciliation in British Columbia, it would have to be made in a completely new and different way involving material reallocation of resources and an aggressive strategy of evening up the living standards of Aboriginal with non-Aboriginal British Columbians.⁸⁵

The "Statement of Vision" in *The New Relationship* is illustrative of how far the Province would go to reassure Aboriginal British Columbians of the existence of a genuinely socially reconciliatory new relationship. As several of the paragraphs that follow consider that statement, it is worth quoting in full:

"We are all here to stay. We agree to a new government-to-government relationship based on respect, recognition and

⁸⁰ *Supra*, n. 32.

⁸¹ *British Columbia Treaty Commission Act* S.C. 1996 c. 45.

⁸² See current status at <http://www.bctreaty.net/files/updates.php>.

⁸³ <http://www.fns.bc.ca/pdf/GtoGVision/30405.pdf>.

⁸⁴ *Supra*, p. 5.

⁸⁵ Interestingly, the disparity in living standards and life expectancies between Aboriginal and non-Aboriginal Australians is a fundamental issue driving the social reconciliation movement in Australia.

accommodation of Aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.

We agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to Aboriginal title “in its full form”, including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35. These inherent rights flow from First Nations’ historical and sacred relationship with their territories.

The historical Aboriginal-Crown relationship in British Columbia has given rise to the present socio-economic disparity between First Nations and other British Columbians. We agree to work together in this new relationship to achieve strong governments, social justice and economic self-sufficiency for First Nations which will be of benefit to all British Columbians and will lead to long-term economic viability.”⁸⁶

This Statement of Vision reflects, in suitably diplomatic language, a sophisticated understanding of the case law of the Court relating to reconciliation. Without saying so expressly, it acknowledges the developments in legal reconciliation theory enunciated by the Court.

The first paragraph of *The New Relationship* states a vision of legal reconciliation that includes (i) Consultation, “...respect, recognition and accommodation of Aboriginal title and rights, (ii) pre-existing Aboriginal law...”, and reconciliation of Canadian law with that of the pre-existing Aboriginal peoples, “and (iii) its reconciliation with Provincial laws, “...respect for our respective laws and responsibilities...”, and “...reconciliation of Aboriginal and Crown titles and jurisdictions.”

The second paragraph of *The New Relationship* echoes the *Haida* decision’s reference to governments creating institutions to assist in Consultation relating to land and resources referring to this process, somewhat vaguely as “shared decision-making”. It then goes on to attribute to Section 35(1) and the decisions of the court’s acceptance of an inherent right to self-government over Aboriginal peoples’ historic territories and over lands subject to Aboriginal title “in its full form” (quotes in original). This language is ambiguous and presumably reflects negotiation of the wording of *The New Relationship*. On the Province’s side, it could be argued to mean, “we will live up to the law interpreting Section 35(1) as interpreted by the courts”. On the Aboriginal side, it could be argued to mean, “we have full Aboriginal title to all the lands we claim and we will govern them only subject to “shared decision making” with the Province”. The key

⁸⁶ *Supra*, n. 72.

elements that are not mentioned are (i) what is “shared decision-making”? and (ii) would *proof* of Aboriginal title be required? The Province would presumably answer in 2005, in effect, “of course it will be according to the constitutional division of power and the law as determined by the courts and the Province’s actions in succeeding years will provide the answer to the second question”. As indeed, to date, they have.

The third paragraph and the rest of *The New Relationship* sets out the social reconciliatory theory of the Province’s new relationship with British Columbia’s Aboriginal peoples. It blamed the old relationship for the fact that Aboriginal British Columbians are, socio-economically, among the worst off British Columbians. The Province’s strategic vision for the whole Province is stated to be to achieve a series of superlatives in education, health, social responsibility, environmental sustainability and job creation and these are emphatically stated to be for *all* British Columbians; not for non-Aboriginals and such few Aboriginals as may be lucky enough to share in it. In this, the Province emphasized two of Archbishop Tutu’s principles of any reconciliation which are that all people are (i) of equal value, and (ii) must be treated as such in their society in order to maintain or regain their full dignity as human beings.

Interestingly, *The New Relationship* does not deal in terms of apology and forgiveness although it is express in stating a mutually acceptable truth, that the old relationship was not a good one for Aboriginal British Columbians and needs changing. In that, it comes closer to the view of the framers of the legislation establishing SATRC - that true regret is best established in the recognition of mutually accepted truth about the past and not necessarily in an express apology which may cost the transgressor little and, at worst, may be self-serving⁸⁷.

It is not in the scope of this paper to make a detailed study of the effect of the new relationship described in *The New Relationship*. It is perhaps sufficient to note that some think the Province has gone too far or too fast in living up to the principles of *The New Relationship* while others are frustrated that the Province has not gone nearly far or fast enough.

By October 2008, the Union of B.C. Indian Chiefs (“UBCIC”) may have judged the time was strategically correct to bring renewed pressure on the Province to clarify in legislation the meaning of *The New Relationship*. In October 2008, the Union of B.C. Indian Chiefs (“UBCIC”) are alleged by one periodical to have sent a letter to Premier Campbell saying, *inter alia* that unless there were provincial legislation to back up the promises in *The New Relationship* that there would be:

“...a series of on-ground actions, which have immediate economic consequences, such as a province-wide series of road blocks in order to demonstrate our serious concerns...”⁸⁸

While too recent in history for an entirely accurate historical reporting of events, it seems that from late in 2008, the Province and Aboriginal representatives entered into *in camera* negotiations, possibly between only “high-level” political leaders of the Province and UBCIC and possibly without the involvement of legal counsel. The result was the *Discussion Paper*

⁸⁷ *Ibid.* Tutu, p. 50.

⁸⁸ *Business in Vancouver*, “Alarmist legal view put Aboriginal bill on hold”, April 13, 2009, p. 18.

which was distributed for confidential discussion in February, 2009 and published in March, 2009.

The *Discussion Paper*, to some extent, builds upon the contents of *The New Relationship* but in some respects appears to be different from it. *The New Relationship* clearly mapped out a broad reconciliatory program which, at least arguably, would fit Provincial policy within the bounds of the decisions of the Court with respect to key issues such as legal reconciliation and the establishment of Aboriginal title and self-government. However, the *Discussion Paper* raises for discussion a more extreme interpretation of what might have been meant by *The New Relationship*. Thus, it is proposed that all Aboriginal communities in British Columbia are to be reorganized into a number of “Indigenous Nations” under the authority of an “Indigenous Nations Commission”. Such Indigenous Nations are suggested to be as generally set out in the map appended to the *Discussion Paper*. The territories assigned to the Indigenous Nations appear to cover all of British Columbia although it is well to note that the *Discussion Paper* is only a discussion paper and actual assignment of territories to Indigenous Nations would be done under the auspices of the proposed commission. It seems entirely possible that the Indigenous Nations concept will not be welcomed by many existing Aboriginal communities in British Columbia which have long histories which have led to their current existences⁸⁹. It goes on to set out for discussion that the proposed legislation will:

“recognize that Aboriginal rights and titles exist in British Columbia throughout the territory of each Indigenous Nation that is the proper title and rights holder, without requirement of proof or strength of claim;...”⁹⁰

It also proposes for discussion, *inter alia*, that the legislation, in effect, will (i) establish “shared decision making” with regard to planning, management and tenuring decisions over lands and resources (ii) enable and guide revenue and benefit sharing agreements, and (iii) establish a new institution to assist in resolving disputes arising out of the proposed legislation or agreement concluded under it.

The Province originally wished to bring in legislation to enact concepts derived from the *Discussion Paper* before the May 12, 2009 provincial election. However, the combination of the

⁸⁹ Joint Commentary (the “Joint Commentary”) attached to the letter dated May 27, 2009 addressed to The Recognition Working Group signed by Allan Donovan, Peter Grant, Micha Menczer, Greg McDade, Jack Woodward, Mike MacDonald, Robert Janes, Murray Browne, John Rich, James Tate, Robert Morales, Renee Racette, Darwin Hanna and Michelle Good stated in detail the concerns of such British Columbia lawyers representing Aboriginal clients about the *Discussion Paper* and such letter was reported on by Justine Hunter, “Title law would undermine native rights, lawyers say”, *The Globe and Mail*, January 9, 2009.

⁹⁰ *Supra*, n. 1 and note that the writers of the Joint Commentary fear that the rights and titles to be recognized may be less than what those rights have been found to be in the jurisprudence. It might be drawn from the discussion of the mechanisms for achieving legal reconciliation in this paper and the central role in reconciliation played by the Province’s abandonment of the theory of colonial extinguishment, that the most productive thing that the Province could do in its proposed legislation in respect of Aboriginal title would be to create an institution that could make determinations acceptable to Aboriginal and non-aboriginal British Columbians with respect to claims for such title according to the tests for Aboriginal title established by the Court. Such an institution might dispose of such claims more economically than in the processes of the courts. It would have to be an institution constituted so as to allow for judicial deference to its decisions as its decisions would finally be subject to the review of the Court. Creation of such an institution might be difficult to reconcile with the negotiation of treaties. but would provide additional certainty in respect of Aboriginal communities not following that process.

unclear nature of some of the issues under discussion (granting universal Aboriginal title to British Columbia without proof of claim can have hugely different results depending on how the Province defines “aboriginal title”), and the vagueness of other concepts (is shared decision-making exactly the same process as employed by the Province under *The New Relationship* since 2005?), led to public concerns being expressed about what could be, on a literal interpretation, a fundamental change in the governance of British Columbia and the nature of aboriginal rights and title as hitherto established in the common law. The proposed legislation was postponed until after the May 12, 2009 election and some clarifications of the meaning of the *Discussion Paper* have been published by what it is fair to assume is an unofficial representative of the Province⁹¹. Some consultation with Aboriginal communities has occurred although none has been undertaken with non-aboriginal communities.

While the current public interest in the *Discussion Paper* may add some immediate interest to the topic of this paper, it is not intended that the *Discussion Paper* be other than an illustration of what can happen in a social reconciliation process. As such it seems a fit topic for discussion as to what has happened to the 2005 vision of *The New Relationship* as a broad based experiment in legal and social reconciliation.

Let us return to the principles of individual reconciliation found in Archbishop Tutu’s writings as perhaps a guide to the effect on the reconciliatory aim of *The New Relationship*.

Governments are not human beings but in Canada they represent human beings and it seems reasonable to propose that if populations are to achieve social reconciliation that respect ought to be shown by each side for the other. Proposing civil disobedience tends to contradict the existence of such respect. As exercises of power, such a proposition may represent an inspired strategy to gain advantage in negotiation but as part of a reconciliatory process, its immediate effect would seem to be mixed. That said, political history guides social reconciliation and, like social reconciliation itself, is a long process and has many twists and turns from which exertion of political pressure cannot be excluded. Geoff Plant’s vision of “certainty and fairness for all” while requiring “hard work” to render it into statutory language appears to mean that, at present, conflicting political pressures will have to be borne in mind as drafting of legislation is done. Presumably, established law relating to legal reconciliation must also be borne in mind. In that mix, no doubt, will reside the “hard work”.

If every Aboriginal person in Canada led a rich, happy and dignified life, would anyone in Canada be worse off? The question is rhetorical but I submit that legal and social reconciliation, as contemplated in this paper, advancing arm in arm to achieve a revolution in the relationship between Aboriginal and non-Aboriginal peoples in Canada should be a fundamental goal of Canadians so that the dignity of all populations in Canada is restored.

The example of the minor disturbance caused by the circumstances and contents of the *Discussion Paper* shows how fragile a social reconciliation process can be. It also shows that it is relevant to apply the human measures of what has been called “individual reconciliation” in this paper to the social issues faced by what called here “social reconciliation” in designing social reconciliation processes and judging their effectiveness. Finally, it suggests that to forget

⁹¹ *Supra*, n. 30.

that legal and social reconciliation are related but different may lead to confusion in preparation of policy and legislation. Legal reconciliation and the mechanisms to achieve it, as so clearly enunciated in *Haida*, should be treated as one of the precious jewels of the Canadian common law and legislatively recast potentially at the peril of all interested parties.

What has been defined as “Consultation” in this paper is a fair process derived from fair processes in other areas of the common law adapted to the extraordinary circumstances of the Aboriginal legal existence. As the Court has advised us, it could be made even better if provincial governments did as is discussed, above⁹². It is to be hoped that the Province will follow the Court’s advice in respect of the legal reconciliation part of its proposed legislation. Uncertainty, the diametrically opposed result to that sought in such legislation, would be the predictable result of trying to legislate the justification process, including Consultation into something different from what the Court has found it to be or advised that it could become. What the Court has found and advised is complex, seeks to be fair and effects a balancing act that has already allowed and yet promises steady progress in the area of legal reconciliation.

Social reconciliation offers broader scope to the Province. However, it seems fair to caution that seeking to force social reconciliation through provincial legislation that may not recognize the separate though closely related nature of legal and social reconciliation so as to use the broad policy discretion of social reconciliation in order to modify the finely tuned structure of legal reconciliation needs to be approached with caution.

H. Seeking a Useful Touchstone of True Reconciliation

Can the foregoing attempt at analyzing the various faces of reconciliation provide any lessons for those attempting to make progress in that process? The route to legal reconciliation lies along a fairly straightforward track laid down by the Court. Deviation from that route would presumably eventually end in a challenge in the courts and either a re-confirmation of legal reconciliation as we know it or some variation of such *status quo* which wisely adapts that *status quo* to the circumstances of the new case.

However, the road of social reconciliation is broader and resides in the good faith efforts of governments to bring into effect a “new relationship” in law and policy which, in its entirety, will “reconcile” Aboriginal and Non-Aboriginal Canada. Such process is historic and will be subject to all the historical cross-winds of more or less wise political behaviour, philosophical development and scholarly and popular comment. It is also open to familiar dangers including (i) the creation of elites who do well from a new “recognition and reconciliation” industry while legal reconciliation may be advanced not at all and little actual social reconciliation is achieved and (ii) augmenting a culture of dependence from well-meant government generosity unwisely distributed. Unfortunately, the courts are not often called to concern themselves with government policy or its results so that it may not be too realistic to look to the courts to tell at any time soon what is or is not socially reconciliatory.

Much more thought needs to be dedicated to what can act as a true compass to governments in the mechanisms of “new relationships” aimed at effecting both legal and social

⁹² *Supra*, p. 5.

but primarily social reconciliation. Based on the discussion in this paper, I would suggest that the simple question of “will this action increase or decrease the dignity of the parties” casts light on what actions will or will not be reconciliatory.

Such a touchstone question or perhaps that and other questions, need to be applied to every aspect of the relationships of Canada, its provinces and territories with Aboriginal Canadians. For instance, how does each provision of the *Indian Act* (Canada) stand up to such a touchstone question? Equally, how much will any new relationship doctrine or program enhance the dignity of Aboriginal people generally as well as the rest of the Canadian population? The penalty for not applying the right touchstone questions will be punctuating the history of the social reconciliation process, over time, with having to say “sorry” again and again and again while social reconciliation takes two steps forward and then one back. While legal reconciliation must, of its nature, go on forever it is not clear why social reconciliation should not, at some point, be complete. Our constitution appears to mandate that destination and it is in the interests of all to develop the appropriate compass to reckon the most direct course there.