

Neither Infringement nor Justification: The Supreme Court of Canada's Mistaken Approach to Reconciliation

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"Once, long ago, we believed in the power of your law. But then we saw that you didn't believe in it. It was only for you and it really was only to help you get what you want or to keep others from getting what you have. It never applied to people like us."

- Kent Nerburn, *Neither Wolf nor Dog: On Forgotten Roads With An Indian Elder*

Many of us struggle to understand and define reconciliation. Some Indigenous (and to a certain extent, non-Indigenous) scholars have rejected the term, preferring to speak of resurgence, resilience, resistance and decolonization.² Others reject the idea of reconciliation altogether and embrace an Indigenous sovereignty that excludes relationships with non-Indigenous settlers.³

Synonyms of "reconciliation"⁴ illustrate a broad spectrum of what one might consider to be reconciliation, ranging from "harmony" to "compatibility" to "compromise". While some might seek etymological descriptions or dictionary definitions to understand reconciliation, most of these invoke French or Latin roots that speak to bringing things back together as they once were, or the re-establishment of relations or peace.⁵ Courts have invoked reconciliation as a key concept and principle, often without defining what constitutes reconciliation. What we can all agree on is that multiple definitions of reconciliation exist.

1 Miigwech to the Elders (particularly Elder Harry Bone), friends and colleagues who reviewed drafts of this chapter; to law students Paul Kathler, Brendan Bachand and Rayanna Hourie for their research assistance; and to the Legal Research Institute at the Faculty of Law, University of Manitoba and the Social Sciences and Humanities Research Council.

2 See e.g. the works of Leanne Simpson, Jeff Cornsattel, Audra Simpson, Hayden King and others.

3 See e.g. the works of Audra Simpson, Glen Coulthard, Taiaiake Alfred, Pam Palmater and others.

4 Accord, agreement, compatibility, compromise, rapprochement, settlement, harmony, bringing together, reassembling.

5 The *Merriam-Webster* dictionary defines reconciliation as "the action of reconciling" and as "the act of becoming friendly again (as after a disagreement)": *Merriam-Webster*, 2018, *sub verbo* "reconciliation", online: <www.merriam-webster.com/dictionary/reconciliation>. The *English Oxford Living Dictionaries* points to the "restoration of friendly relations": *English Oxford Living Dictionaries*, 2018, *sub verbo* "reconciliation", online: <<https://en.oxforddictionaries.com/definition/reconciliation>>.

The Truth and Reconciliation Commission of Canada (TRC) defines reconciliation as “an ongoing process of establishing and maintaining respectful relationships.”⁶ In its *Final Report*, the TRC explained these conflicting views and the chasm that exists between Crown perspectives and Indigenous understandings of reconciliation:

What is clear to this Commission is that Aboriginal peoples and the Crown have very different and conflicting views on what reconciliation is and how it is best achieved. The Government of Canada appears to believe that reconciliation entails Aboriginal peoples’ accepting the reality and validity of Crown sovereignty and parliamentary supremacy in order to allow the government to get on with business. Aboriginal people, on the other hand, see reconciliation as an opportunity to affirm their own sovereignty and return to the ‘partnership’ ambitions they held after Confederation.⁷

This chapter will consider the meaning of reconciliation as defined in three particular contexts: first, the TRC’s conceptions of reconciliation, which reflect a broad framework that grounds reconciliation in ongoing respectful relationships and Indigenous conceptions of reconciliation; second, *Anishinaabe inaakonigewin* (law), particularly the legal principle of *aagooiidiwin*; and third, reconciliation within Canadian law, including the recurrent use of the term “reconciliation” in the Canadian legal context. These three very different contexts in which the concept of reconciliation is invoked show that the concept itself is far from universal. The Supreme Court of Canada (SCC) jurisprudence has approached and defined (or failed to define) reconciliation. In its current usage, reconciliation is arguably an “arbitrary creation of the court.”⁸ In this chapter, I argue that the SCC’s characterization of reconciliation arises out of the jurisprudence on treaty and Aboriginal title and rights claims, and more particularly in the context of justifying the infringement of those rights. The doctrine of justification balances Indigenous rights against broader societal interests, and Indigenous interests are often seen as less important than their stated or potential interference with Crown sovereignty. This approach is problematic because it continuously subjects Indigenous peoples to “Canada’s ongoing exercise of achieving reconciliation between its Aboriginal peoples and the broader population”⁹ to the detriment of long-term collective Indigenous interests. In fact, it allows for a continual doctrinal slippage away from the recognition of rights, and betrays a judicial orientation against Indigenous sovereignty in Canada.

6 Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2015) vol 6 at 11–12 [TRC, *Final Report*].

7 *Ibid* at 25.

8 D’Arcy Vermette, “Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples” (2011) 29:1 Windsor YB Access Just 55 at 57.

9 *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 86.

Canadian jurisprudence offers an impoverished understanding of reconciliation which must be set aside.¹⁰ The SCC in particular has strayed from the noble intentions of reconciliation¹¹ in order to systematically benefit settler society by clawing back Indigenous peoples’ rights, sovereignties, and legal systems. Constitutionally protected Indigenous rights are balanced against other societal (and non-Indigenous) interests (which are generally not the subject of constitutional protection). As D’Arcy Vermette has explained, “Aboriginal systems must do all the reconciling.”¹² Instead, I suggest a framework of reconciliation that builds on Indigenous laws and treaties, through which a framework of relationships flow, based on principles of respect, responsibility, reciprocity, and sharing.¹³

The TRC’s Understanding of Reconciliation

The TRC was established as part of a class action lawsuit settlement agreement, and was mandated to “guide and inspire” reconciliation in the context of a truth finding process relating to residential schools.¹⁴ It was meant to build upon the “Statement of Reconciliation” and be “forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians.”¹⁵ While the TRC drew on Indigenous practices and approaches as part of its mandate, it was not inherently an Indigenous process.¹⁶ Rather it was based on restorative justice principles that are congruent with Indigenous conceptions of justice.¹⁷ Much of the Commission’s structure and process

10 For an earlier review of the SCC case law, see Kent McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin” (2003) 2:1 Indigenous LJ 1. See also Mark Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (New York: Oxford University Press, 2008) 165.

11 Such noble intentions include honour and justice: see Kirsten Manley Kasimir, *Reconciling the Duty to Consult and Accommodate Aboriginal Peoples: A Relational Approach* (PhD Dissertation, University of British Columbia, Faculty of Law, 2016) [unpublished].

12 Vermette, *supra* note 8 at 61.

13 See *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996) vol 1 at 643. See also, Aimee Craft, *Breathing Life Into the Stone Fort Treaty: An Anishinaabe Understanding of Treaty One* (Saskatoon: Purich, 2013) [Craft, “Breathing Life”].

14 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015) at 23.

15 Schedule “N” of the Indian Residential Schools Settlement Agreement, online: Truth and Reconciliation Commission, Mandate <trc.ca/websites/trcinstitution/index.php?p=7>.

16 *Ibid* at ss 1 (c), 4 (d).

17 *Ibid* at “Principles”. See also Jennifer Llewellyn, “Bridging the Gap Between Truth and Reconciliation: Restorative Justice and the Indian Residential Schools Truth and Reconciliation Commission” in Marlene Brant Castellano, Linda Archibald & Mike Degagne, eds, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) at 188.

was adapted from other international examples of truth and reconciliation commissions based on western models of transitional justice.

The TRC interpreted its mandate broadly to challenge the colonial underpinnings that allowed for the creation of residential schools, as well as the laws, policies and institutions that impacted Indigenous peoples' land and resources, created social inequalities, promoted cultural and linguistic loss, and were rooted in racism and the desire to assimilate Indigenous people. The Commissioners grounded their vision of reconciliation in respectful relationships, which in their view requires that an understanding of Indigenous laws inform the reconciliation process:

A critical part of this process involves repairing damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change. Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions. It is important that all Canadians understand how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process.¹⁸

During its mandate, the TRC elaborated ten principles of reconciliation that it viewed as essential for Canada to "flourish in the twenty-first century." These principles informed the TRC's work and shaped the TRC's calls to action:¹⁹

1. The *United Nations Declaration on the Rights of Indigenous Peoples* is the framework for reconciliation at all levels and across all sectors of Canadian society.
2. First Nations, Inuit, and Métis peoples, as the original peoples of this country and as self-determining peoples, have Treaty, constitutional, and human rights that must be recognized and respected.
3. Reconciliation is a process of healing of relationships that requires public truth sharing, apology, and commemoration that acknowledge and redress past harms.
4. Reconciliation requires constructive action on addressing the ongoing legacies of colonialism that have had destructive impacts on Aboriginal peoples' education, cultures and languages, health, child welfare, the administration of justice, and economic opportunities and prosperity.
5. Reconciliation must create a more equitable and inclusive society by closing the gaps in social, health, and economic outcomes that exist between Aboriginal and non-Aboriginal Canadians.
6. All Canadians, as Treaty peoples, share responsibility for establishing and maintaining mutually respectful relationships.
7. The perspectives and understandings of Aboriginal Elders and Traditional Knowledge Keepers of the ethics, concepts, and practices of reconciliation are vital to long-term reconciliation.

18 TRC, *Final Report*, *supra* note 6 at 11–12.

19 Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 3–4, online: <http://nctr.ca/assets/reports/Final%20Reports/Principles_English_Web.pdf>.

8. Supporting Aboriginal peoples' cultural revitalization and integrating Indigenous knowledge systems, oral histories, laws, protocols, and connections to the land into the reconciliation process are essential.
9. Reconciliation requires political will, joint leadership, trust building, accountability, and transparency, as well as a substantial investment of resources.
10. Reconciliation requires sustained public education and dialogue, including youth engagement, about the history and legacy of residential schools, Treaties, and Aboriginal rights, as well as the historical and contemporary contributions of Aboriginal peoples to Canadian society.²⁰

Building on principles seven and eight in particular, the TRC assembled Elders and Knowledge Keepers from across Canada to share their teachings on reconciliation. At this TRC Forum on Reconciliation, Indigenous Elders and Knowledge Keepers explained to the Commissioners that there are no specific or exact words for reconciliation in their respective Indigenous languages: "[T]here are many words, stories, and songs, as well as sacred objects such as wampum belts, peace pipes, eagle down, cedar boughs, drums, and regalia that are used to establish relationships, repair conflicts, restore harmony, and make peace. The ceremonies and protocols of Indigenous law are still remembered and practiced in many Aboriginal communities."²¹

Elder Mary Deleary explained that creating balance is the objective: "[R]econciliation must continue in ways that honour the ancestors, respect the land, and rebalance relationships."²² She explained that responsibilities do not begin and end with the human relationships, and that balance needs to be restored with the land and all other beings in creation with whom we are related:

When we are talking about our relationship, our relationship to one another and our responsibilities as Anishinaabe people first because that's our first responsibility is to ourselves, our nations of people. And then we have another responsibility because we are responsible too for this land, our land and all of our relatives on this land.²³

Certain people were designated to fulfill the role of a "reconciler" when it came to human relationships, according to Elder Jim Dumont. Historically, this was a particular role for an individual in Anishinaabe societies:

That was a very important person in our community. In every community there was a person who was known as the reconciler. So when peoples' relationship broke down or there were problems in the family, they would call on that person,

20 *Ibid* at 3–4.

21 *Ibid* at 122.

22 *Ibid* at 115.

23 Elder Mary Deleary, Statement (delivered at the Truth and Reconciliation Commission of Canada Forum on Reconciliation, Elders and Knowledge Keepers, Winnipeg, Manitoba, June 2014).

he would come and speak to that couple or come and talk to that family and he would make things right again and that was his or her gift, that was his or her specialty. The gift that they had was to be able to make peace in a family or to resolve the difficulties and restore the balance of a relationship.... That's how you say *reconciler* which actually means the one who puts things back in order, who arranges things in order.... Reconciliation is a way of putting things back together in a good way, so if there's difficulty between two people, that's what a reconciler does. Bringing it all back into balance or bringing it all back to the centre again so that things are in balance again, in harmony again and everything is good order.²⁴

Elder Charlie Nelson explained a similar concept of the warriors who would assist with family trauma or dysfunction:

Different kinds of structures like *ogiichidaa*, the warrior, the one that would bring peace to a dysfunctional family. If children needed a place of safety, it was the *Ogiichidaa*, the big hearted people who would answer. That's my auntie's words. When there's dysfunction and abuse, that there was a gathering.... So there was structure in our community.²⁵

What Elder Nelson is describing is a long standing practice and application of Anishinaabe law. Despite Canada's best efforts to colonize through western law, Indigenous laws have continued to be applied, implemented and called upon.²⁶ Indigenous laws have and continue to serve us in governing our relationships with other beings (spirited beings that are human and non-human). These laws help us navigate and right our relationships and our conflicts. They work in balance to create peace from war, harmony through discord, and humility through understanding our place in relation to all other beings that are part of creation.

The TRC found that "Aboriginal peoples need to become the law's architects and interpreters where it applies to their collective rights and interests."²⁷ There is rebuilding that needs to take place. It starts with understanding what Indigenous laws can tell us about how we might embark upon reconciliation. The TRC call to action number 45 (iv) calls for a Royal Proclamation on reconciliation that commits to:

iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.²⁸

24 Elder Jim Dumont, Statement (delivered at the Truth and Reconciliation Commission of Canada Forum on Reconciliation, Elders and Knowledge Keepers, Winnipeg, Manitoba, June 2014).

25 Elder Charlie Nelson, Statement (delivered at the Truth and Reconciliation Commission of Canada Forum on Reconciliation, Elders and Knowledge Keepers, Winnipeg, Manitoba, June 2014).

26 See e.g. TRC, *Final Report*, *supra* note 6 at 45–79.

27 *Ibid* at 51.

28 *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and

The views of the Elders who participated in the TRC's forum on reconciliation are only the beginning of the richness that is offered through Indigenous laws and languages. For example, the concept of *dehwewin* (truth) in Anishinaabe law is equated with ideas of justice and equality. It is less about an objective "truth" than it is about doing what is right, based on just relations. Elder Jim Dumont explained that to seek truth is actually an act of speaking from the heart: "It's the sound of your voice as you speak from the heart."²⁹

Continued discussions, deliberation, resurgence, and revitalization are taking place in Indigenous communities and Indigenous scholarship and activism across Turtle Island. There is room for all of these approaches—Indigenous reconciliation creates space for multiple Indigenous views and practices. However, for the purposes of this chapter, I will focus narrowly on an Anishinaabe understanding of reconciliation, as reflected through *inaakonigewin* (law) and the principle of *aagooiidiwin*.

Anishinaabe Understanding of Reconciliation

Anishinaabe *inaakonigewin* is different from western systems of law (such as the common law) in its foundational principles. Most western legal systems generally privilege individual rights (over the collective) and are grounded in liberal values, including the protection of private property. Anishinaabe *inaakonigewin* is rooted in relationships and founded on a concept of *mino-biimaadiiziwin*,³⁰ a generalized value of responsibility and reciprocity rooted in the collective well-being of a family, group, nation (or all of creation).

In Anishinaabe *inaakonigewin*, complex webs of relationship persist across generations and engage each part of creation. These relationships exist in a variety of combinations over time and space. They are reciprocal, not only in the sense of balanced reciprocity as defined by cultural anthropologists, but in a deeper sense of generalized reciprocity that engages multiple beings over extended periods of time. For example, the relationship we have with *nibi* (water) and our willingness to engage with the responsibilities that flow from that relationship will have an impact or a ripple effect in a variety of contexts and over a potentially extended period of time. This impact is not limited to humans, but rather engages the fish and animal beings that are part of the web of relationships that reflect creation (and of which humans are but one small part).

Reconciliation Commission of Canada, 2015) at 5.

29 Dumont, *supra* note 24.

30 Loosely translated to the concept of a collective good life or good way of living: see Aimée Craft, "Giving and Receiving Life from Anishinaabe Nibi Inaakonigewin (Our Water Law) Research" in Jocelyn Thorpe, Stephanie Rutherford & L. Anders Sandberg, eds, *Methodological Challenges in Nature-Culture and Environmental History Research* (New York: Routledge, 2016) at 109 [Craft, "Giving and Receiving"].



Illustration 3.1 Anishinaabe Legal Relationships
(with thanks to Sherry Copenace for review of spelling and translation)

Both Indigenous laws and other forms of law (including Canadian common law) are similar in the sense that stories—facts and outcomes that create precedents—build upon one another to help us make decisions on important matters, take action and live in relationships with all other beings in creation. However, a fundamental difference between Anishinaabe law and Canadian law is that state-centered law tells us what to do while Anishinaabe *inaakonigewin* tells us what is there.³¹ Anishinaabe law is not a full code of laws but a body of principles for living a good life. The constitutional principles attached to that law are found in our drums, songs, stories and our pipes.³²

The Legal Concept of *Aagooiidiwin*

Anishinaabe *inaakonigewin* is the foundational understanding of our law and governance. *Aagooiidiwin* is an important legal principle that derives from *inaakonigewin* and compels the bringing together of things, with the purpose of building relationships. “*Aagooiidiwin* is that we agree to work

together.”³³ It is a building of relationship or “bringing people together.”³⁴ Other literal translations of the concept of *aagooiidiwin* include “to nail things together,”³⁵ “to put the blanket over the foundation”³⁶ or “to add to something that is already there,”³⁷ some of which were described at length in treaty negotiations.

In addition to bringing things together in space, the law of *aagooiidiwin* reminds us that things are brought together in relationship over time. The responsibility of *aagooiidiwin* is ongoing and takes into consideration the past, present, and future, without privileging one over the other. There is a spiritual dimension to *aagooiidiwin* also, dating back to the time of creation.

Anishinaabe *inaakonigewin* was an essential part of treaty-making and informs the understanding and legal meaning of the treaties.³⁸ *Aagooiidiwin* was (and is) one of the words used for treaty. The deeper meaning of *aagooiidiwin* in the treaty context is that what was being offered at the time of forging the treaty relationship was on top of what we already had: adding to something already there. What the treaty built upon was the foundation or the framework of Indigenous laws and governance that was already in place for the Anishinaabe, or in other words, “the principles and foundations of who we are as Anishinaabe.”³⁹ This includes territorial and cultural sovereignty.

Nationhood and sovereignty⁴⁰ were not extinguished by the Treaty 1 negotiations. What was to be “added onto what we already had” was given effect through the application of *aagooiidiwin* and the negotiation of a relationship of kinship that would be in addition to existing sovereignty. This was an important example of how reconciliation was given effect through the making of the treaty, in accordance with Anishinaabe law. Anishinaabe *inaakonigewin* confirmed the principles of non-interference (not deciding for the other) and equality (true equality amongst all children of the Queen—both red and white). The treaty aimed at the building of a long lasting and renewable relationship. The Anishinaabe entered into a relationship with the Queen for the benefit of all her children, for the purpose of equal sharing amongst the children of the Queen.⁴¹

If we think of treaties as being foundational to the relationships between Indigenous and non-Indigenous Canadians and the potential for reconciliation as suggested by the Royal Commission on Aboriginal Peoples (RCAP) and the TRC, we must better understand the intention of

33 Interview of Elder Harry Bone (July 2013).

34 Interview of Elder Harry Bone (May 2017).

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 See Craft, “Breathing Life”, *supra* note 13; Aimée Craft, “Living Treaties, Breathing Research” (2014) 26:1 CJWL 1.

39 Interview of Elder Harry Bone (November 2017).

40 Anishinaabe nationhood and sovereignty are contained within the principles that are associated with the seven directions of the pipe.

41 Craft, “Breathing Life”, *supra* note 13.

31 See Aimée Craft, *Anishinaabe Nibi Inaakonigewin Report* (Winnipeg: University of Manitoba Centre for Human Rights Research, 2014).

32 See e.g. Craft, “Giving and Receiving,” *supra* note 30 at 116, 118.

the treaty and the legal obligations that were confirmed through the making of the treaties. This requires an Anishinaabe understanding of reconciliation through Anishinaabe understandings of treaties and the development of kinship relationships, as they are told by Indigenous knowledge keepers and scholars.⁴² Further, if we are to reconcile relationships, we must look to key Indigenous legal principles that engage the recognition of the territorial and cultural sovereignty of Indigenous peoples, such as the law of *aagooiidiwin*.

Elder Bone suggests that reconciliation itself should be defined internally within Indigenous nations as a resurgence of our teachings and a reconciliation with the Creator, our Mother the Earth and with the people, as illustrated by the prayer in the pipe ceremony.⁴³

Supreme Court of Canada and Reconciliation

The SCC does not explicitly define reconciliation in any of its decisions. In fact, the Court has taken many approaches to reconciliation over time, without providing much substance to the understanding or application of reconciliation.

Perhaps the most robust attempt at defining reconciliation is in the *Haida Nation* decision where Chief Justice McLachlin states for the court: "Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*."⁴⁴ However, one might critically consider why the process is not described more fully. The process of reconciliation is presumptively a call to engagement, without defining the terms or substance of engagement. In addition to proposing that reconciliation is a process,⁴⁵ the SCC has

42 See e.g. Heidi Kitwetineshiik Stark, "Respect, Responsibility and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 *American Indian Culture and Research Journal* 145 at 156; Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich, 2007). See also Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant* (Saskatoon: Office of the Treaty Commissioner, 2007); John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) at 155; Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) at 173; Robert A Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Routledge, 1999) at 12.

43 *Supra* note 39.

44 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32 [*Haida Nation*].

45 *Haida Nation*, *ibid* at paras 32, 38, 51; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 207 [*Delgamuukw*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at paras 2, 24, 25 [*Taku River*]; *Mikisew Cree Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 1, 4, 54 [*Mikisew*]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 38 [*Rio Tinto*]; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 55 [*Beckman*]; *Tsilhqot'in v British Columbia*, 2014 SCC 44 at paras 82, 87 [*Tsilhqot'in*].

characterized reconciliation as a project,⁴⁶ goal,⁴⁷ objective,⁴⁸ principle,⁴⁹ promise,⁵⁰ and something to be "achieved"⁵¹ between Indigenous people and non-Indigenous communities.

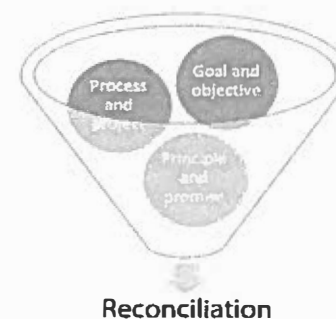


Illustration 3.2 Multiple SCC Characterizations of Reconciliation

Primarily, SCC cases refer to reconciliation as a goal. There is very little guidance as to how this goal of reconciliation should be achieved. Reconciliation is described as a goal in *Manitoba Metis Federation v Canada (MMF)* along with the goals of the "resolution of historical injustice" (described as an "admirable goal"), and the unachieved goal of "constitutional harmony" and the historical goal of giving "the Métis children a real advantage."⁵² In two of the more recent decisions by the SCC, the Court describes reconciliation as a *project*.⁵³ Again, in failing to define reconciliation, it is not evident how a project and a goal should be distinguished, or why it is employed differently within the same case.⁵⁴

There are contexts in which the SCC, without defining reconciliation, has found it to be more in the nature of a principle or promise. In *MMF* the Court indicates that reconciliation is a principle. In *Kapp*, it refers to reconciliation as a promise.⁵⁵ To describe reconciliation as a promise

46 *Tsilhqot'in*, *ibid* at para 23; *Manitoba Metis Federation v Canada (AG)*, 2013 SCC 14 at para 99 [*MMF*]; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 89 [*Ktunaxa*].

47 *MMF*, *ibid* at paras 137, 140; *R v Van der Peet*, [1996] 2 SCR 507 at para 310 [*Van der Peet*]; *Haida Nation*, *supra* note 44 at para 35; *Mikisew*, *supra* note 45 at para 33; *Rio Tinto*, *supra* note 45 at para 34; *Tsilhqot'in*, *supra* note 45 at para 82.

48 *Mikisew*, *supra* note 45 at para 50; *Beckman*, *supra* note 45 at paras 91, 103, 107, 203.

49 *MMF*, *supra* note 46 at para 143.

50 *R v Kapp*, 2008 SCC 41 at para 121 [*Kapp*].

51 *Ktunaxa*, *supra* note 46 at para 80.

52 *MMF*, *supra* note 46 at paras 265, 140, 102.

53 *Ibid* at para 99; *Tsilhqot'in*, *supra* note 45 at para 23.

54 See *MMF*, *supra* note 46.

55 I would note that *Kapp*, *supra* note 50, engages the *Charter*, and particularly section 25, rather than the section 35 treaty and Aboriginal rights framework.

suggests a moral obligation. On the other hand, a principle may suggest a level of legal obligation, doctrine, or tenet. However, each of these unique characterizations of reconciliation appears only in one case. This leaves us to wonder how these characterizations are helpful to the understanding of what “legal” reconciliation is.

The SCC has also made some pronouncements on the *raison d'être* or purpose of reconciliation. It is the purpose of the *Constitution Act, 1982* (section 35),⁵⁶ the objective of modern treaty law,⁵⁷ and the purpose of the honour of the Crown.⁵⁸ Reconciliation has also been used to characterize the historic context of treaty making. For example, the SCC has found that the “subtext of the Mi’kmaq treaties was reconciliation and mutual advantage.”⁵⁹ In the earlier section 35 jurisprudence, the Supreme Court clearly and repeatedly emphasized the link between section 35 and the process (or goal) of reconciliation, creating a constitutional imperative for reconciliation:

In order to fulfill the purpose underlying s. 35(1)—i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions—the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.⁶⁰

Further, the SCC has found that the honour of the Crown is required in order to achieve reconciliation,⁶¹ and that the “ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.”⁶² In the Court’s view, the honour of the Crown is an essential element of reconciliation and the honour of the Crown is “best reflected by a requirement for consultation with a view to reconciliation.”⁶³ Consultation, which flows from the honour of the Crown, has been found to be “key to the achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.”⁶⁴

56 *Van der Peet*, *supra* note 47 at paras 44, 49, 310; *R v Gladstone*, [1996] 2 SCR 723 at para 73 [*Gladstone*]; *Haida Nation*, *supra* note 44 at para 35; *Taku River*, *supra* note 45 at paras 24, 42; *Beckman*, *supra* note 45 at para 10; *MMF*, *supra* note 46 at paras 76, 137; *Tsilhqot’in*, *supra* note 45 at para 119.

57 *Mikisew*, *supra* note 45 at paras 1, 63.

58 *MMF*, *supra* note 46 at para 66.

59 *R v Marshall*, [1999] 3 SCR 456 at para 3.

60 *Van der Peet*, *supra* note 47 at para 44.

61 *Haida Nation*, *supra* note 44 at para 17.

62 *MMF*, *supra* note 46 at para 66.

63 *Rio Tinto*, *supra* note 45 at para 34.

64 *Mikisew*, *supra* note 45 at para 63.

There is a circularity to the SCC’s concepts relating to the *sui generis* field of Canadian constitutional Aboriginal law. For example, the honour of the Crown is an essential element required for reconciliation, while reconciliation is also an element required to demonstrate that the honour of the Crown has been achieved.

In the 2014 *Tsilhqot’in* decision, the SCC reminded us that section 35 “protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.”⁶⁵ More recent decisions have found that the “grand purpose” of section 35 is mutually respectful long-term relationships.⁶⁶ This idea (or ideal) of relationships arises in the context of consultation and negotiation about what might potentially impact the exercise of Aboriginal rights.

However, in the recent 2014 case of *Grassy Narrows*,⁶⁷ the SCC did not invoke the concept of reconciliation at all, even in its attempt to grapple with fundamental questions that invoke the nature of the treaty relationship and the continuing relationship between the Anishinaabe of Treaty 3 and the federal and provincial Crowns. Why is it that reconciliation is excluded from this decision entirely?

Perhaps one of the more profound attempts to define reconciliation comes from outside of the SCC jurisprudence. It flows from the reasons of the Federal Court in *Kakfwi*, later affirmed by the Manitoba Court of Appeal in *McDiarmid Lumber*.⁶⁸ This explanation of reconciliation draws an analogy between the idea of reconciliation and the definition of an “accord.” The reasoning has a clear emphasis on relationships, equality, and mutual understanding. It evokes ideas of a treaty between parties:

While the word “accord” is in the family of those French words that may be grouped under the English concept expressed by the word “agreement”, such as “*contrat*”, “*arrangement*”, “*convention*”, “*entente*”, it has a clear connotation to the idea of a reconciliation, of a pact arrived at by the giving and taking of both parties, of a mutual understanding worked out through concessions and compromise, and is therefore a word closely related to treaty.⁶⁹

While the SCC has attempted to illustrate the purpose of reconciliation and build it up as a purpose, objective, goal, process, project, and promise, the fact remains that there is very little clarity in what the court intends to be the substantive realization of the acts of reconciliation that would achieve or promote reconciliation in a legal context.

65 *Tsilhqot’in*, *supra* note 45 at para 118.

66 *Beckman*, *supra* note 45 at para 10; *Daniels v Canada*, 2016 SCC 12 at para 34 [*Daniels*].

67 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*].

68 *McDiarmid Lumber Ltd v God’s Lake First Nation*, 2005 MIBC 22.

69 *Canada v Kakfwi*, [2000] 2 FC 241 at para 10.

These multiple and differing characterizations of reconciliation are not demonstrative of any clear approach to reconciliation. One must wonder if these unique characterizations are helpful in understanding the application of the principle of reconciliation in a legal context. Or does this lack of clarity create further uncertainty for those who should participate in reconciliation in a variety of contexts, including political, social and legal contexts? One might also inquire as to whether the colonial ideologies of *terra nullius* and the doctrine of discovery are further perpetuated by the application of the reconciliation framework in the context of justifying infringements of treaty and Aboriginal rights, as will be discussed below. As D'Arcy Vermette has stated, "courts adopt language and propose concepts that appear enlightened on their face but that actually are limited to formalizing the process of colonization."⁷⁰ If the inability of the state to resolve the many existing conflicts over lands and natural resources is coupled with the failure to define the substance and form of reconciliation, one might also wonder whose interests are served by the general application of a concept of reconciliation that gives priority to broadly defined public interests over the interests of Indigenous peoples.

Reconciliation in the Context of Justification

While the varied characterizations of reconciliation by the SCC may obfuscate what reconciliation means, if one considers the context in which the word reconciliation is used in the case law, a clearer picture emerges. We see that Indigenous interests are weighted against a variety of non-Indigenous interests as a means of justifiably infringing Indigenous rights, as illustrated in the chart below.

Unpacked, the SCC's approach to reconciliation is centred on the things that Indigenous peoples must compromise, in favour of non-Indigenous societal, political, economic, and legal interests. Using colonial legal concepts and values, this narrow interpretation of reconciliation positions Indigenous peoples and their "cultural rights" (the lens through which the SCC has defined aboriginal rights) at a significant disadvantage, and without a constitutional grounding or an explicit limitation clause.⁷¹

⁷⁰ Vermette, *supra* note 8 at 56.

⁷¹ *Ibid* at 59.

TABLE 3: Phrasing Permutations of SCC Use of Term "Reconciliation"

Reconciliation of Aboriginal	Culture Peoples Entitlements Interests Territorial claims Rights Perspectives Societies Prior occupation of North America	with	The assertion of Crown sovereignty Crown sovereignty over (Canadian) territory Crown interests Other interests Non-Aboriginal interests Non-Aboriginal peoples The common law perspective The arrival of Europeans The broader political community Broader society The larger Canadian society of which they are a part The rest of Canadian society Broader social, political, and economic community Other societal rights The interests of all Canadians Canadian sovereignty

The implicit definition of reconciliation that the SCC adopts is, in my view, a balancing of rights approach that is inherently subjective and problematic for the robust recognition of Aboriginal rights, title and treaty rights in Canada. From the SCC's perspective, reconciliation depends on whether there is a right at stake and whether there can be a justified infringement of that right.

The jurisprudence on justification of infringements of treaty and Aboriginal rights has spanned the time of three SCC Chief Justices: Chief Justice Dickson, Chief Justice Lamer, and Chief Justice McLachlin. While the justification test arose out of the 1990 *Sparrow* decision (the first to engage with potential infringements of Aboriginal rights), it is worth noting that the term "reconciliation" appears only once in that decision. While we can see that the idea of inherent compromise is present in *Sparrow*, Chief Justice Dickson did not position Indigenous interests against "broader" interests. Rather the court situated reconciliation between the federal government power (in this case, over fisheries) and its constitutional duty (to recognize and affirm Aboriginal rights):⁷²

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).⁷³

⁷² See *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁷³ *R v Sparrow*, [1990] 1 SCR 1075 at 1110 [*Sparrow*].

In *Gladstone*—a subsequent SCC decision applying the *Sparrow* justification test—Chief Justice Lamer introduced the concept of weighting Indigenous peoples' interests against those of the rest of Canadian society:

Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, 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 type 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.*⁷⁴

A year later, in the *Delgamuukw* decision, Chief Justice Lamer went on to list a variety of broader societal interests that would justify the infringement of Aboriginal title. The list of justifiable infringements is comprehensive and significant in its potential impact:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community” (at para 73). *In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.* Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.⁷⁵

Under the leadership of Chief Justice McLachlin, the Court was explicit in the *Haida Nation* and *Taku River* decisions that “compromise is inherent to the reconciliation process.”⁷⁶ For example, the Court in *Haida Nation* stated:

Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.⁷⁷

Similarly, the Court in *Taku River* stated:

The accommodation that may result from pre-proof consultation is just this—seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation.⁷⁸

However, the lion's share of compromise in the context of modern reconciliation is the compromise of the Indigenous interests at stake. As recently as 2014, when the Tsilhqot'in Nation was able to prove Aboriginal title to the land, the court continues to speak of reconciliation in the justification context. This reinforces the idea that reconciliation involves only the balancing and compromising of interests, in which Indigenous rights are necessarily overshadowed by the “broader public objective”:

As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are “all here to stay” and must of necessity move forward in a process of reconciliation (para 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.⁷⁹

While the words of reconciliation have been applied throughout the jurisprudence, the effect has been to privilege the interests of the broader Canadian society over those of Indigenous peoples. It arguably creates an unequal division of the reconciliation burden, disproportionately privileging the Canadian public over Indigenous peoples within their own lands and territories. For example, broader societal interests related to energy production and transport (such as hydro-electric development, fracking, pipelines) as well as other industrial and commercial development, often outweigh the local and collective interests of Indigenous peoples, including rights to harvest, hunt, and fish in their territories.

Even prior to infringement taking place, the law of consultation and accommodation requires that Indigenous interests be considered, as part of reconciliation. This approach might be characterized as an advance infringement and justification analysis or a mechanism of compromise itself. It is one of unbalanced compromise.

The Crown has a duty to consult and accommodate when its conduct may adversely affect the exercise of an Aboriginal or treaty right. In this context, the focus is again placed on the idea of divergent interests that need to be weighed against each other. “Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and *do whatever is necessary* to achieve reconciliation of divergent Crown and Aboriginal interests.”⁸⁰

74 *Gladstone*, *supra* note 56 at para 75 [emphasis in original].

75 *Delgamuukw*, *supra* note 45 at para 165 [emphasis added; emphasis in original omitted].

76 *Taku River*, *supra* note 45 at para 2.

77 *Haida Nation*, *supra* note 44 at para 50.

78 *Ibid* at para 49.

79 *Tsilhqot'in*, *supra* note 45 at para 82.

80 *Rio Tinto*, *supra* note 45 at para 74 [emphasis added].

When the *United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)* was adopted at the United Nations, the Government of Canada put forward the justification framework as the reason for not supporting the *UN Declaration*. More particularly, in relation to Indigenous self-determination and the right to exercise free, prior and informed consent, Canada explained that the SCC cases allowed for infringement while attempting to reconcile Indigenous interests with those of the broader public:

Canada cannot support paragraph 4, in particular, given that Canadian law, recently reaffirmed in a Supreme Court of Canada decision, states the Crown may justify the infringement of an Aboriginal or Treaty right if it meets a stringent test to reconcile Aboriginal rights with a broader public interest.⁸¹

Canada's position on the *UN Declaration* denies the constitutional imperative that requires it to recognize and affirm treaty and Aboriginal rights. It should be noted that the Government of Canada subsequently endorsed the *UN Declaration* without qualification and takes a policy position that it now fully endorses its implementation. However, strategies for implementation are not clear.

While saying in one breath that Indigenous peoples are part of the foundations of Canada, the Canadian government fails to provide uncompromised effect to the recognition and affirmation of treaty and Aboriginal rights which continue to be subjected to settler interests. Indigenous interests are allowed to take shape only when they do not directly compete with overarching settler objectives.

For example, the *Grassy Narrows* decision (also released in the summer of 2014) makes no mention of reconciliation in its discussion of the nature of the treaty relationship. Reconciliation is not invoked in the discussion about how the Crown must reasonably justify the infringement of treaty and Aboriginal rights in exercising its right to take up land in the Treaty 3 territory.

Reconciliation and Sovereignty

In the *Reconciliation* volume of its *Final Report*,⁸² the TRC affirmed that Indigenous sovereignty must be respected in order to establish and maintain mutually respectful relationships. The question of Indigenous sovereignty and self-determination is generally absent from the recent decisions of the SCC, while reference continues to be made to Crown or European sovereignty.

81 Canada, Permanent Mission of Canada to the United Nations, "Canada's Statement on the World Conference", online: <canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/>.

82 TRC, *Final Report*, *supra* note 6.

The TRC rejected Canada's unilateral Crown-based approach to sovereignty in its *Final Report* and called for a shared sovereignty based on the recognition of Indigenous sovereignty to give effect to reconciliation. It also found that "Aboriginal peoples' right to self-determination must be integrated into Canada's constitutional and legal framework and into its civic institutions in a manner consistent with the principles, norms, and standards of [the *UN Declaration*]."⁸³

In what is often cited as the most important case in Canadian constitutional law, the *Québec Secession Reference*, the court refers to legitimate majorities in the context of reconciliation and negotiation:

The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole....The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations.⁸⁴

The constitutional approach of "give and take" has characterized the relationship between the French and English traditions in Canada, including the adoption of both civil and common law in the Canadian legal context. Contrasted with the unequal balancing of rights that results from the application of colonial interests under the guise of "principled reconciliation of Aboriginal rights with the interests of all Canadians",⁸⁵ we can observe that the nation-to-nation compromise that exists between former European nations, does not equally apply to Indigenous nations in Canada. Indigenous sovereignty is deliberately devalued in the application of the reconciliation framework put forward by the SCC.

In 1996, the Royal Commission on Aboriginal Peoples introduced the idea of shared or merged sovereignty:

Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.⁸⁶

In the *Mitchell* decision, Justices Major and Binnie attempted to grapple with this idea of shared or merged sovereignty put forward in RCAP. They concluded that the constitutional objective was reconciliation, rather than mutual isolation.⁸⁷

83 *Ibid* at 28.

84 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 152–53.

85 *Tsilghot'in*, *supra* note 45 at para 125.

86 *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996) vol 2 at 240–41.

87 *Mitchell v MNR*, 2001 SCC 33 at para 133 [*Mitchell*].

The modern embodiment of the "two-row" wampum concept, modified to reflect some of the realities of a modern state, is the idea of a "merged" or "shared" sovereignty. "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners. The final Report of the Royal Commission on Aboriginal Peoples, vol 2 (*Restructuring the Relationship* (1996)), at p 214, says that "Aboriginal governments give the constitution [of Canada] its deepest and most resilient roots in the Canadian soil." This updated concept of Crown sovereignty is of importance. Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s. 35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders. If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.⁸⁸

Whether one believes in shared sovereignty, shared interests or peaceful relationships of co-existence, we know that the SCC is far from recognizing Indigenous sovereignty as equal to Canadian sovereignty. The Court continues to articulate the reconciliation framework through a lens of justification of infringements (and advance consultation and accommodation) in a context of historical and ongoing colonial dispossession and oppression. The SCC has taken a genuine ideal of reconciliation and transformed it into a mechanism which compromises Indigenous interests until they are void of substance.⁸⁹ The Court has displaced discourse of Indigenous sovereignty through a reconciliation framework that infringes on the very foundations of that sovereignty and the exercise of cultural, political, and land based rights.

Reconciliation through Negotiation And/Or Relationship?

Many of the more recent decisions that address reconciliation (particularly in the justification or consultation context) have been penned by Chief Justice McLachlin. However, in the *Daniels* decision, Justice Abella wrote that the case itself "represents another chapter in the pursuit of reconciliation and redress in that relationship."⁹⁰ Justice Abella defined the relationship in the context of the "history of Canada's relationship with its Indigenous peoples" and recalled that "the 'grand purpose' of section 35 is '[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."⁹¹ Affirming the trial judge's finding that the jurisdictional wasteland in the

88 *Ibid* at para 129.

89 See e.g. *Grassy Narrows*, *supra* note 67; *Ktunaxa*, *supra* note 46.

90 *Daniels*, *supra* note 66 at para 1.

91 *Ibid* at paras 34, 1.

context of the Métis relationship with the Crown has "significant and obvious disadvantaging consequences."⁹² Justice Abella noted Parliament's goal of reconciliation with Indigenous peoples in Canada:

The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the Report of the Royal Commission on Aboriginal Peoples, and the Final Report of the Truth and Reconciliation Commission of Canada, all indicate that reconciliation with all of Canada's Aboriginal peoples is Parliament's goal.⁹³

To a certain extent, one might read the SCC to be saying in the *Daniels* decision that reconciliation is not a legal principle, but rather a political concept applied to legal reasoning. While the SCC does not venture very far into the definition or comprehensive understandings of a reconciliation prescription, it does suggest a variety of approaches that one might build upon to decipher what reconciliation might be in the context of Indigenous peoples' relationship with the Canadian state or Canadian legal system. The SCC and other courts have asked repeatedly for decades for political resolution of Indigenous claims in Canada,⁹⁴ arguably without much success to date. Digging deeply into the SCC's judicial treatment of reconciliation, one could argue that reconciliation as employed in SCC decisions is devoid of legal content, or that it is a mechanism by which to apply outdated colonial legal assumptions such as the doctrines of discovery and *terra nullius*. However, that is the topic for another paper.

Conclusion

From the discussion above and from an extensive read of the SCC jurisprudence on reconciliation, it is clear that the substance of reconciliation is not in how the SCC has approached it. The court has evolved a doctrine of reconciliation mired in colonial underpinnings, aimed at an imbalanced assessment of Indigenous peoples' interests against the broader colonial agenda that has systematically attempted to dismantle Indigenous societies.

We know that "the concept of reconciliation means different things to different people, communities, institutions, and organizations."⁹⁵ In *Mikisew*, Justice Binnie, for the court, pointed out that the relationship between the Crown and Indigenous nations has been poisoned over time and this has been destructive of any hope of reconciliation. Justice Binnie observed that the "multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack

92 *Ibid* at para 14.

93 *Ibid* at para 37.

94 See e.g. *Delgamuikw*, *supra* note 45 at para 186.

95 TRC, *Final Report*, *supra* note 6 at 11.

of respect inherent in that indifference has been as destructive to the process of reconciliation as some of the larger and more explosive controversies.⁹⁶ Similarly, the TRC observed that

[u]nfortunately, Canadian law has discriminatorily constrained the healthy growth of Indigenous law contrary to its highest principles. Nevertheless, many Indigenous people continue to shape their lives by reference to their customs and legal principles. These legal traditions are important in their own right. They can also be applied towards reconciliation for Canada, particularly when considering apologies, restitution, and reconciliation.⁹⁷

According to the TRC, the key to reconciliation is the reparation of damaged relationships:

The most significant damage is to the trust that has been broken between the Crown and Aboriginal peoples. This broken trust must be repaired. The vision that led to this breach in trust must be replaced with a new vision for Canada—one that fully embraces Aboriginal peoples' right to self-determination within, and in partnership with, a viable Canadian sovereignty.⁹⁸

However, the question remains: If the relationship is to be repaired, on whose terms will that reparation take place? And what degree of compromise will be required by the parties? Should Indigenous peoples trust a framework of reconciliation that is based on a political and legal system that allows for legal infringement of their interests and a system that reduces their rights in favour of non-Indigenous interests? This unequal balancing of rights sets a shaky foundation for mutually respectful relationships.

A potentially more balanced, reciprocal and relational approach to reconciliation is found in the opening sentence of the *Mikisew* decision, where Justice Binnie finds that government conduct undermined reconciliation, rather than advancing the process:

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.⁹⁹

If we accept that our historical treaty relationship is not one of surrender but rather one by which our sovereignty is retained and enhanced by our long-standing relationships based on kinship, we see that the current approach to justification of infringements of the treaty are reprehensible attempts to dismantle the treaties themselves. The reparation of what is currently a broken treaty relationship cannot take place without the recognition of Indigenous ways of being, values, languages and culture.

Reconciliation must make space for Indigenous resurgence outside of the parameters of the relationship with non-Indigenous Canada. One mechanism for that resurgence is the revitalization of Indigenous legal principles that were part of forging the original relationships between Indigenous people and settlers to this territory. This resurgence must also allow for the dismantling of colonial systems of oppression and the rebuilding of Indigenous nations' legal systems:

I don't believe that it should be about them anymore. Every single time we get together it's always about them, we have to figure out how we are going to forgive them, how we are going to reconcile with them, how are we going to do all of these things with them? If they care about where we are at, they will help support and nurture the work that we are doing.¹⁰⁰

In the TRC's view, reconciliation is an ongoing relationship that must take into account future generations:

Reconciliation must support Aboriginal peoples as they heal from the destructive legacies of colonization that have wreaked such havoc in their lives. But it must do even more. Reconciliation must inspire Aboriginal and non-Aboriginal peoples to transform Canadian society so that our children and grandchildren can live together in dignity, peace and prosperity on these lands we now share.¹⁰¹

This chapter has contrasted colonial constructions of reconciliation and suggests casting them aside in favour of Indigenous conceptions of reconciliation which are at the heart of good relationships. Many Indigenous legal traditions speak of balance. What the justification test implies is not balance, but rather a weighting of one thing over another, in accordance with value judgments that are absent from Indigenous epistemologies and ontologies that ground the concept of balance. When Indigenous rights are balanced against pressing economic needs of the monolithic whole of "broader Canadian society," the Indigenous interest will almost necessarily be outweighed by colonial societal accounting. What is required is for the Crown to reconcile its relationship with the land through partnerships that build on existing treaty relationships and the respect of Aboriginal title and rights. The TRC found that

sustainable reconciliation on the land involves realizing the economic potential of Indigenous communities in a fair, just, and equitable manner that respects their right to self-determination. Economic reconciliation involves working in partnership with Indigenous peoples to ensure that lands and resources within their traditional territories are developed in culturally respectful ways that fully recognize Treaty and Aboriginal rights and title.¹⁰²

96 *Mikisew*, *supra* note 45 at para 1.

97 TRC, *Final Report*, *supra* note 6 at 78.

98 *Ibid* at 20.

99 *Mikisew*, *supra* note 45 at para 1.

100 Maria Campbell, Statement (delivered to the Truth and Reconciliation Commission of Canada Forum on Reconciliation, Elders and Knowledge Keepers, Winnipeg, Manitoba, June 2014).

101 *Ibid*.

102 TRC, *Final Report*, *supra* note 6 at 207.

Many of the Elders shared that reconciliation has to take place with Mother Earth before it can happen between people. We find guidance for this within Indigenous legal systems,¹⁰³ and we must foster and revitalize these laws so that we can work towards our collective well-being and our relationships.

At the TRC reconciliation gathering, Elder Charlie Nelson shared and explained a horse song. The song has many layers and potential understandings to it, but my simple understanding is that it speaks of those who help us forgive, and those who help us heal and carry on. Most importantly, it speaks to the fact that we can receive help but that the work of healing, forgiving or reconciling is always on our behalf, as sovereign people. Elder Charlie Nelson went on to explain the relationship between the horse and the rider:

[W]hen you had just buried all of your family, you are in shock at what had just happened. And then to know that the horse sang you a song...It speaks to you "don't cry my relative, look where you're going." We wanted to see something... that there is a life in front of us.¹⁰⁴

Elders tell us that we are put to work because our ancestors love us. I am ready to do the work. My hope lies with the Indigenous legal institutions that the TRC has called for to be revitalized. Maybe there we will find the justice that allows us to be reconciled with land and the places we hold sacred.

103 Doris Pratt, Harry Bone & the Treaty and Dakota Elders of Manitoba with contributions by the Assembly of Manitoba Chiefs Council of Elders, *Untunwe Pi Kin He—Who We Are: Treaty Elders' Teachings*, vol 1 (Winnipeg: Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs, 2014); D'Arcy Linklater, Harry Bone & the Treaty and Dakota Elders of Manitoba, with contributions by the Assembly of Manitoba Chiefs Council of Elders, *Ka'esi Wahkotumahk Aski: Our Relations With the Land, Treaty Elders' Teachings*, vol 2 (Winnipeg: Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs, 2014); Joe Hyslop, Harry Bone & the Treaty & Dakota Elders of Manitoba, with contributions by the Assembly of Manitoba Chiefs Council of Elders, *Dtantu Balai Bett Nahidei: Our Relations To The Newcomers, Treaty Elders' Teachings*, vol 3 (Winnipeg: Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs, 2015).

104 *Supra* note 25.