Canada's Accommodating Judiciary: How The Supreme Court of Canada Can Actively Encourage Negotiations in Aboriginal Rights and Treaty Claims

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ABSTRACT

The Crown's duty to consult and accommodate Canadian Aboriginal peoples is the newest face of Canadian trust-like common law. This thesis is an exploration of this concept; from theoretical justification, to an examination of implications, to suggestions for the future. This exploration has been completed in order to highlight the potential capacity of consultation and accommodation to facilitate the movement of Canadian Crown / Canadian Aboriginal Peoples' disputes from court rooms to negotiation tables.

Acknowledgements

As I began this M.A Legal Studies program I thumbed through several completed theses to get some idea what I was in store for. As I read 'acknowledgement' pages at the beginning of nearly every one I scoffed and thought 'Just like an acceptance speech at the Oscars, how corny can you get', vowing I would not include one in my own completed thesis. Looking back on the process however, I realize why this section is included and how ungrateful it would be to not include it. That being said....

My most sincere 'thank you' to David Elliott, my thesis supervisor; without whom I am convinced I would *still* be formulating a coherent topic. Those of you reading this, looking for inspiration for your thesis, my advice to you is this: Make one-hundred percent sure you work with a supervisor who shares not only your interests but your values and work ethic. Search long and hard for your supervisor. It made all the difference for me and it will for you too.

More generally, I would also like to thank Carleton University's Law department for supporting me throughout my law degrees at Carleton; especially, Peter Swan, Lynn Campbell, Amy Bartholomew, and Barb Higgins. It is a lucky student who can come back each semester to not only teachers and mentors but great friends. If my Carleton career ends here, I know our friendships will not.

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Chapter I Introduction

We have all seen them, and the statistics regarding Canadian Aboriginal quality of life are staggering. Suicide rates, substance abuse, unemployment, social assistance dependence, infant mortality rates, education levels, income profiles: the list goes on and the numbers are consistently worse in First Nations communities than in the rest of Canada[1]. The historical situation is just as bleak. Since the 16th century, newcomers have taken over the land of the first inhabitants, helped themselves to the resources, and undermined their cultures.[2] In the not so distant past, Canadians have beaten Aboriginal languages out of children in residential schools[3], the Canadian government has banned the potlatch, the sun dance, and other traditional ceremonies[4], relegated Aboriginal peoples to tiny tracts of low value land for reserves[5], limited their freedoms[6] and their

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[1] Although this thesis does not go into detail regarding the many socio-economic hardships associated with contemporary, or historical, Canadian Aboriginal life, the following texts are useful: J. Silman, ed., *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women's Press, 1987); P. Comeau and A. Santin, *The First Canadians: A Profile of Canada's Native People Today* (Toronto: James Lorimer & Company, 1990); M. Boldt, Surviving as Indians: The Challenge of Self-Government (Toronto: University of Toronto Pres, 1993). Another vastly useful source in this regard is the Royal Commission on Aboriginal Peoples report (hereafter referred to as 'the Report'; Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group Publishing, 1996). The Report contains five volumes relating to the socio-economic conditions faced by Canadian Aboriginal peoples such as: Vol 2, chapter 5, s. 1.2, 800-801, regarding high levels of dependence on social assistance; Vol 3, chapter 3, s.1.2, 108, regarding 'poor living conditions and housing'; Vol 3, chapter 4, s.1.2 at 175-98, regarding high levels of infectious diseases; Vol 3, chapter 3, s.1.2 at 153-65, regarding high crime, violence, and self-destructive behavior.

[2] For some historical accounts of the 'European' domination of Canada's First Peoples, see, for example: O.P. Dickason, *A Concise History of Canada's first nations* (Toronto.: Oxford University Press, 2006); J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press Incorporated, 2000); A.J. Ray, *I Have Lived Here Since the World Began: An Illustrated History of Canada's Native Peoples* (Toronto: Lester Publishing, 1996);

[3] See J.R. Miller *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996).

[4] See W. Moss and E. Gardner-O'Toole for Research Branch, Library of Parliament, *Aboriginal People: History of Discriminatory Laws*, rev ed. (Ottawa: Supply and Services Canada, 1992).

[5] See J. Leslie and R. Macguire for Treaties and Historical Research Branch, Department of Indian Affairs and Northern Development, *The Historical Development of the Indian Act*, 2d ed. (Ottawa: D.I.A.N.D., 1979).

[6] See the Report, Vol 1, chapter 9, s.9 which speaks of the 'prairie travel pass' which was required for off-reserve travel in the late 19th century.

governments[7], and isolated them from larger society[8]. If you are reading this, you have likely heard it all before; better yet, you probably care.

So, what is the answer? How can Canada and Canadians contribute to a solution that will allow this culture to flourish in its evolving form? The Canadian government currently pours billions a year into Aboriginal programs, subsidizing a system that is fundamentally flawed. An autonomous Aboriginal economy that will allow for real choice regarding living location and lifestyle is, at least, a first step. How then, will this be achieved?

Canadian Aboriginal peoples have always lived in conjunction with their land and its resources[9]; changing times should be no reason to abandon this concept. An Aboriginal economy will find its fundamental base in harvest rights to land and resources. Each year in Canada, there are dozens of instances of litigation in which Aboriginal litigants attempt to prove their rights and title claims, vying for a feasible economy. The success of Aboriginal litigants is becoming more common as years pass. Witness such cases as *R. v. Sparrow* and *R. v. Marshall* in which Aboriginal claimants successfully defended their harvest rights, or *R. v. Delgamuukw* where Canada's highest court affirmed Aboriginal title rights to use traditional title land. Judicial proceedings do have a place in Aboriginal title and rights disputes and they do yield results. However, there is much room for improvement, and Aboriginal / Crown disputes concerning Aboriginal rights and title land are not going anywhere.

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[7] See O.P. Dickason, *A Concise History of Canada's first nations* (Toronto.: Oxford University Press, 2006) at pp 263-65.

[8] An example of this was the Canadian denial of the franchise for Aboriginal groups prior to the 1960s and the denial of participation in federal election before the 1950s. See J. Leslie and R. Macguire for the Treaties and Historical Research Branch, Department of Indian Affairs and Northern Development, *The Historical Development of the Indian Act*, 2d ed. (Ottawa: D.I.A.N.D., 1979).

[9] See the Report, Vol 2, chapter 4, s. 3.1, "Lands and Resources: Background".

"Let us face it, we are all here to stay."[10] These were words spoken by Chief Justice Lamer at the end of *R. v. Delgamuukw*, a thirteen-year trial process involving monumental economic as well as human cost. Although it established a valuable precedent, if there was ever an example of the need for Aboriginal rights and title litigation to move from the courts to the negotiation tables, *Delgamuukw* was it. Seventeen years ago, in *R. v. Sparrow*[11], Dickson C.J pointed out that with the constitutional amendment in 1982 should have come increased negotiations; "section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place."[12] Lamer C.J. made this remark in closing a plea for negotiations, in which he used this quote from *Sparrow* to point the re-hearing of *Delgamuukw*, as well as future cases of this nature, towards negotiations. Simply, the Supreme Court has long recognized and called for this shift in dispute resolution in its most important and influential Aboriginal rights and treaty decisions. Not only could negotiated rights and title claims be potentially faster and cheaper, but they can also provide diverse solutions to often dynamic problems.

The Canadian government has formally recognized the Aboriginal right to 'self-government' since 1951[13] and Canada's highest court has affirmed this general principle in common law as recently as 2006[14]. Although some construe this term to mean a completely autonomous, third order of Canadian government, many more use the term 'self-government' to express the desire of Aboriginal peoples to dictate Aboriginal affairs within larger Canada. In addition to being slow and expensive, litigation necessarily

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[10] *R v. Delgamuukw*, [1997] 3 S.C.R. 1010, at 186.
[11] *R v. Sparrow*, [1990] 1 S.C.R. 1075.
[12] *Ibid* at 53
[13] Canada, House of Commons Debates, vol. 11, 4th Sess., 21st Parl., March 16, 1951 at 1352.
[14] *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] S.C.J. No. 58.

results in a top-down imposition on Aboriginal litigants. Negotiations, with Canadian Aboriginal peoples at the table, necessitate a 'self-governing' solution.

For this and other reasons that will be expounded in later pages, the negotiation process surrounding Aboriginal rights and title has gained momentum in recent years, as witnessed in such final agreements as those reached with the Yukon First Nations, the Nisga'a and the Inuit[15]. Despite some successes, the process is often noted as being slow, expensive, and ultimately inefficient[16]. For an illustration of this, look to the success record of such negotiation agencies as the 'British Columbia Treaty Commission', who in 2003, despite having been operating for thirteen years and hearing 120 disputes, had yet to conclude a single treaty.[17] [18] This being the case, we are left with two problems that appear to be fundamentally at odds.

First, the negotiation process that can result in multilateral, self-government oriented, treaty settlements - that can produce viable, self-governing, First Nations economic growth via treaty and rights claims – is being abandoned for judicially imposed litigation all too often. Second, as noted, when the negotiations process is used it can be amazingly slow, costly and inefficient. Although both litigation and negotiation have their virtues, when used autonomously of one another they also have significant drawbacks. The solution, then, is the need for compromise between the two dispute resolution processes.

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[15] Shin Imai, "Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and negotiation in Aboriginal Lands and Resources Disputes" (2003) 41 Osgoode Hall L.J. 587-67.
[16] David W. Elliott, "Delgamuukw: Back to Court?"(1998) 26 Man. L. J. 97, footnote #4.
[17] *Supra* note 15 at 25.
[18] Current negotiations, funding resources, and the negotiation process of the B.C.T.C can be found at http://www.bctreaty.net/index.html.

The goal of this project is to evaluate the potential of several judicial tools in facilitating negotiated settlement of Aboriginal rights and treaty claims. It will be suggested here that the recently emerging common law concepts of interim consultation and accommodation could play a significant role in advancing this goal if they are implemented with clarity and broad scope. The virtues of consultation and accommodation and their current practical implementation will be explained before this project examines their potential to encourage negotiated settlements.

The first task will be to undertake a theoretical review of the relevant literature. This will be done in order to orient the project within current theoretical writing on the subject and to give the reader a foundation from which to assess the project. The principal theory that will inform this project will be broken into two main categories. First, is what I will term 'general' theory and will encompass liberal and multicultural citizenship theory from authors such as Durkheim, Rawls, Kymlicka and Porter. The second main body of theory will be described as 'specific' theory. It will include authors who write specifically on Canadian Aboriginal peoples. This section will include the arguments and positions of theorists such as Flanagan, Cairns and Young. It will assess specific arguments for and against Aboriginal group-differentiated rights in the face of citizenship. At the end of this theoretical analysis, by combining both 'general' and 'specific' theory, the project should be able to gain a 'superior theoretical position', one that can be used in assessing various solutions throughout the remainder of the text.

One of the substantive foci of this paper, pre-infringement consultation and accommodation[19], is a common law phenomenon that has emerged only in the previous two years. However, more than twenty years of evolving trust-like relationships in common law, as well as hundreds of years of Canadian, and pre-'Canadian', history resulted in the formulation of this duty. From the fiduciary relationship that emerged in *R. v. Guerin*[20] and proliferated in *R. v. Sparrow*[21] and *R. v. Delgamuukw*[22], all the way to the positive duty of consultation and accommodation that emerged in *Haida Nation v. British Columbia*[23], it has been a long road, one that has now taken a potentially monumental step towards the encouragement of negotiated settlements of Aboriginal / Crown disputes.

This project will add to current literature in this field in several main areas. First, this text will compile a package of common law decisions that illustrate the evolution of the Crown's trust-like relationship with Canadian Aboriginal peoples; from how it began to what it constitutes in its most recent form. Second, the study will examine the utility of the common law concept of consultation and accommodation for facilitating balanced, negotiated, settlements. This work focuses on how the judiciary can contribute to negotiations by way of social governance, a new concept to this field. The study will also illustrate how the clarification of common law concepts relating to consultation and accommodation have the potential to improve negotiations in general. The final chapter will suggest that the consultation and accommodation concept be applied in several areas

[19] See discussion in Chapters III and IV.
[20] *R.. v. Guerin*, 2 S.C.R. 335.
[21] *Supra* note 11.
[22] *Supra* note 10.
[23] *Haida Nation v. British Columbia*, 3 S.C.R. 511.

of Aboriginal / Crown disputes that have yet to be fully explored by the Supreme Court or other authors in this field.

It is the author's hope that by the end of this text the reader will be as excited about the potential of consultation and accommodation to facilitate negotiations in Crown / Aboriginal disputes as I am. Canada and Canadian Aboriginal peoples are facing a contemporary crisis and whenever a partial solution emerges it is up to us to understand, embrace, and encourage it. Let us, then, begin.

Chapter II Theoretically Speaking:

Group Differentiated Rights for Aboriginal Peoples in a Liberal Democracy

Although it is the ultimate goal of this project to examine the capacity of several judicial tools to facilitate negotiated and equitable settlements of Aboriginal rights and treaty claims in Canada, it will first be necessary to consider the theoretical questions that surround the issue. This section has four main theoretical objectives. First, this section will identify the two main theoretical underpinnings of Crown / Aboriginal relations in Canada: 'general' and 'specific' theory. 'General theory' comprises the philosophical questions that are necessarily implicated in a discussion about the allocation of minority rights in a liberal democracy; questions of liberalism, equality, group-differentiated rights, common citizenship and the interrelation of these concepts. The 'specific' theory considered in this project will be the contemporary thought on Crown / Aboriginal relations in Canada. Thus the specific theory includes the same themes as the general theory, but relates specifically to Canadian Aboriginal peoples.

This theoretical discussion will provide the basis for the second major theoretical objective of this section: to evaluate both the general and specific theory, and to develop from it the most appropriate theoretical context in which to examine judicial tools.

The third theoretical task is to evaluate the general potential of the negotiation process itself. This will be accomplished by examining the characteristics of negotiation in the context of the theoretical position developed above.

The final theoretical goal is to compare the negotiation process with the alternative to Aboriginal / Crown dispute resolution, litigation. This comparison will be made to determine which forum for Aboriginal / Crown dispute resolution has greater

potential to facilitate the equitable settlement of Aboriginal rights and treaty claims. This will set the stage for continued evaluation of the superior forum, and its most effective form, in later pages.

General Theory- Common Citizenship in a Liberal Democracy

Many liberal theorists stress the importance of nationalism and a common citizenship in a liberal democracy. In a liberal democracy there are two fundamental tenets that must be upheld. First, autonomy and individual liberal rights must be respected in order to maintain the concept of liberalism. Second, there must exist a willingness to sacrifice at least an element of this personal liberty for the good of the majority, a basic function of a democracy. How, then, does this give rise to the need for a common citizenship? Because a democratic nation expresses the will of the majority, not the whole, some of its members have to sacrifice some of their liberal rights in order to accommodate the democratic will. However, the minority must have a reason to do this, a common goal that is seen as paramount to individual rights.

The early twentieth century sociologist Emile Durkheim's work concerning common citizenship concerned the division of labour (and nearly everything else) into component and more efficient parts. "To perfect oneself," said Secretan, "is to learn one's role, to become capable of fulfilling one's function".[24] The modern conception of Durkheim's model of the division of labour is the theory of functionalism. In *The Division of Labour in Society*, Durkheim warned that with an increasingly efficient industrial society comes the division of labour, and with this comes a compartmentalized

[24] Emile Durkheim, *The Division of Labour in Society* (New York: The Free Press of Glencoe, 1933) at 42.

society in which common values and goals give way to singular, autonomous, individuality. Although Durkheim recognized the inevitability of the division of labour, he cautioned against the individuality it promotes. To combat this tendency, Durkheim claimed that society develops a 'conscious collective' or common conscience. He explained the common conscious as a big picture idea that society shares; a common paradigm; a common goal.

Durkheim claimed that "in order for a thing to be the object of common conscience, the first condition is that it must be common."[25] Further, Durkheim contended that for there to be a common conscious there must exist 'social solidarity'. He said that "there exists a social solidarity which comes from a certain number of states of conscience which are common to all the members of the same society."[26] "[Solidarity] can be strong only if the ideas and tendencies common to all the members of the society are greater in number and intensity than those which pertain personally to each member."[27]

The reason Durkheim promoted the necessity of a common conscious was his belief that "society...is not a simple juxtaposition of individuals who bring an intrinsic morality with them, but rather man is a moral being only because he lives in society, since morality consists in being solidary with a group and varying with this solidarity...to be sure, society cannot exist if its parts are not solidary." [28]

Durkheim introduced these concepts to come to grasp with the implications of the fragmentation of society as a result of the industrial revolution. However, the concepts of

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[25] *Ibid* at 127.
[26] *Ibid* at 109.
[27] *Ibid* at 129.
[28] *Ibid* at 399.

common conscious and social solidarity are important to contemporary Canadian society as well. Those who hold a minority opinion in a liberal democracy must sacrifice some liberal rights in the interest of the majority and a societal common conscious. For any member of a liberal state to willingly concede their autonomous liberal rights and thereby participate in a democratic government there must exist this conception of social solidarity.

To further illustrate this idea of the need for common citizenship I will turn to the liberal thinker John Rawls. Rawls said that when commonality is absent, a given society "may not have a conception of citizenship at all."[29] Rawls most concisely articulates the importance of a common citizenship with his conception of 'overlapping consensus'. Rawls, a staunch liberal, is a clear advocate of liberal rights but also recognizes the cultural pluralism of contemporary society. "The idea of an overlapping consensus enables us to understand how a constitutional regime characterized by the fact of pluralism might, despite its deep divisions, achieve stability and the public unity by the recognition of a reasonable political conception of justice."[30] Rawls recognizes the inevitability of diversity and claims that there must exist an 'overlapping consensus' to deal with this and maintain a common national identity.

The need for solidarity has long been recognized in political philosophy, as illustrated by the sixteenth century's Thomas Hobbes. The basis of Hobbes' accession to commonality was liberal self-interest: As Rawls notes "on this basis [Hobbes] sought obedience to an existing effective sovereign."[31] Hobbes recognized that self-interest in

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[29] John Rawls, "The Domain of the Political and Overlapping Consensus" (1989)64 (2) NYL Rev. 233-55.
[30] John Rawls, "The Idea of Overlapping Consensus" (Spring, 1987) 7 (1) Oxford Journal for Legal Studies 1.
[31] *Ibid* at 2.

the ultimate liberal state (the state of nature) must, in order to develop into a productive state, cede to a common consensus (the Leviathan).

The general social issue with which this project is concerned is the common citizenship of the Canadian state. I will contend (with further support in the 'specific' theory section) that to achieve an effective liberal democracy in Canada there is a need for a common citizenship between Canadian Aboriginal and non-Aboriginal peoples, in addition to a respect for the individuality of Canadians.

Having briefly illustrated the need for a common citizenship in a liberal democracy such as Canada, we are free to examine the complications that can arise with this concept upon the introduction of demands for the recognition of group-differentiated rights. For example, if a common citizenship is based on commonality among its members, how can this common citizenship survive when some groups demand rights based not on their commonality but their difference?

National Minorities, Self-Government and Citizenship[32]

Here emerges the apparent problem of 'differentiated citizenship'[33], that occurs when a national minority such as Canadian Aboriginal peoples, demand 'self-government' rights. As noted above, Durkheim said that "in order for a thing to be the object of common conscience, the first condition is that it must be common."[34] If national minorities 'self-govern', these rights are clearly not common. What, then, does this do to the common

[32] This section is meant to deal specifically with Canadian Aboriginals so 'minority rights' in this section will be contextualized not by immigrant minority rights but 'national minority' rights. Many liberal thinkers, Kymlicka at the forefront, feel 'national minorities' (such as Aboriginal peoples) are due more that immigrant minorities, as explained in later pages.
[33] Will Kymlicka, *Multicultural Citizenship* (Toronto: Queens University Press, 2005).
[34] *Supra* note 24 at 54.

citizenship that is so important in a liberal democracy? "Can we still talk about 'citizenship' in a society where rights are distributed on the basis of group membership?"[35]

Many liberal theorists, such as Canadian thinker John Porter, contend that we cannot. Porter claims that "the organization of society on the basis of rights or claims that derive from group membership is sharply opposed to the concept of society based on citizenship."[36] For strict liberals, like Porter, the equality that creates a common citizenship is precluded by the allocation of group rights. Will Kymlicka paraphrases the liberal political thinker Chandran Kukathas when he explains that allowing group-differentiated rights will result in citizenship becoming "yet another force of disunity, rather than a way of cultivating unity in the face of increased social diversity."[37]

Kymlicka contends that "since claims to self-government are here to stay we have no choice but to try to accommodate them. Rejecting these claims in the name of common citizenship will simply promote alienation and secessionist movements."[38] Canadian Aboriginal peoples have fought long, hard battles for group-differentiated rights and Canada, as well as the international community, is finally recognizing these rights.[39]

Canada is left facing two totalities. First, national minorities demand, and deserve, recognition as 'self-governing' nations. Second, group-differentiated rights that recognize

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[35] Will Kymlicka, *Multicultural Citizenship* (Toronto: Queens University Press, 2005) at 174.
[36] John Porter, *The Measure of Canadian Society: Education, Equality, and Opportunity* (Ottawa: Carleton University Press, 1987) at 128.
[37] *Supra* note 35 at 175.
[38] *Ibid* at 185.
[39] Measures such as the constitutional entrenchment of existing Aboriginal treaties and rights in s. 35 (1), the *Constitution Act*, 1982 being a good example of this recognition.

differentiated, autonomous, 'self-government' are in clear conflict with the importance of common citizenship in a liberal democracy. Indeed, quite a dilemma![40]

For an answer to this situation, I will turn to Will Kymlicka, an authority on multicultural citizenship, and author of *Multicultural Citizenship.*[41] Unfortunately, far from providing a definitive answer, Kymlicka concludes *Multicultural Citizenship* with the statement that "self-government rights do pose a threat to social unity. The sense of being a distinct nation within a larger country is potentially destabilizing. On the other hand, the denial of self-government rights is also destabilizing, since it encourages resentment and even secession. Concerns about unity will arise however we respond to self-government claims."[42] Kymlicka concludes that both conferring self-government rights and not conferring these rights has the potential to de-stabilize the multinational state.

It would seem that from this section's discussion of 'general' theory surrounding national minority rights and their relationship to common citizenship that the reader is left with two very opposite options on the path to finding a solution to the multinational citizenship problem. First, national minorities could change their identity in order to

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[40] One may point to welfare rights such as those proposed by T.H Marshall in order to rectify the inequalities faced by national minorities. Marshall argued for these social benefits because he saw the working class of England being separated from the main of English culture due to lack of material possessions. To avoid this harm and allow for a common citizenship Marshall suggested group-differentiated rights to allow for a conception of belonging that would bring about greater actual equality (T.H Marshall *Citizenship and Social Class* (London: Pluto Press, 1950) at 1-15.)

Although Marshall's social rights are successful in effecting equality in some circumstances, they do not apply to the situation of national minorities (such as Canadian Aboriginal peoples). This is so because Canadian Aboriginal inequality does not stem solely from, as Kymlicka explains "their socio-economic status, but because of their socio-cultural identity- their difference." Although Canadian Aboriginal peoples disadvantage is manifested in economic and material inequality, this inequality has emerged from years of discrimination and governmental attempts at assimilation. Hence, the solution cannot be solely material, as would be welfare rights as those advocated by such as Marshall, but must attempt to rectify the intrinsic disadvantage that national minority cultures face.

[41] *Supra* note 35.

[42] *Ibid* at 192.

accommodate the possibility of a common national identity. This would amount to assimilation; not a popular option for many. Another extreme option is group-differentiated rights that would allow for unqualified self-government. This would satisfy minority demands but would have devastating consequences on common citizenship and thus the liberal democratic society.

I will seek a more appropriate solution to this dilemma in the 'specific' Aboriginal political theory section. Although these extreme options are promoted by many 'specific' Aboriginal theorists, they are not the only positions available. The next section will illustrate why these extreme positions fail, and will look for a more balanced answer to the question of how to equitably effect multinational citizenship.

'Specific' Canadian Aboriginal Political Theory

It was concluded in the general theory section that there are two clear options for addressing the conflict that inevitably rises between the need for a common citizenship in a liberal democracy and the 'self-government' or group-differentiated rights essential to national minorities: assimilation of one of the cultures to allow for common citizenship or autonomous self-government to allow for unencumbered national minority rights. These solutions take only one or the other value into account, but both common citizenship and respect for minority rights have to be considered for a just solution to emerge.

It will be suggested here that although much specific theory is devoted to one or the other of these extreme options, there is an alternative: a middle road that will allow for both the need of common citizenship and group differentiated national minority rights. To accomplish this, I will first introduce three political perspectives: liberal

individualism; conservative communitarianism; and cultural pluralism. The positions of 'specific' Aboriginal theorists will then be matched with these political perspectives in an attempt to determine which Aboriginal theorist (and their corresponding political perspective) best aligns with a viable approach to the multinational citizenship problem. This analysis will reveal which 'specific' theorists coincide with the more extreme solutions to the multinational citizenship problem and which take a more moderate perspective, ultimately revealing the best 'specific' theoretical and political perspective, on which to base the project.

Liberal individualism is the classic liberal position. It is typified by the thought that 'group-differentiated citizenship' is a contradiction in terms. For a common citizenship, there must be lack of difference. John Porter, a classic liberal theorist, says "the organization of society on the basis of rights or claims that derive from group membership is sharply opposed to the concept of a society based on citizenship"[43] This 'classic liberal' position does promotes citizenship, but what do staunch liberals pose as a solution to social inequities?

It is not that liberal individualists choose to completely disregard the fact that there is inequality in society; they just believe the conferring of group rights is not the way to level the playing field. Instead, liberal thinkers, such as Michael Walzer, suggest that a level playing field can be effected with "proper public policy to stamp out discrimination and inferior status...apart from the fight against racism, however, the state

[43] John Porter, *The Measure of Canadian Society: Education, Equality, and Opportunity* (Ottawa: Carleton University Press, 1987) at 128.

should neither support nor hinder the maintenance of group differences."[44] Walzer promotes formal equality, from which autonomous liberal rights, and public policy, will effect equality between minorities and the majority.

One of the foremost 'specific' political theorists who addresses Aboriginal issues and aligns with the classic liberal position is Thomas Flanagan, a political scientist form the University of Calgary. In his 2000, *First Nations? Second Thoughts*[45], Flanagan terms himself a "classic liberal". He will be used in this work to typify the position of the liberal individualist. Many academics were quick to dismiss this book as an updated version of the 1969 white paper[46], and it does contain the familiar concept of assimilation[47]. However, Flanagan offers a well argued, congruent position that is worthy of consideration.

The thrust of Flanagan's position in *First Nations? Second Thoughts* is his critique of what he terms the 'Aboriginal orthodoxy'. Flanagan claims this orthodoxy to be the dominant sentiment in Canadian government, and of Aboriginal leaders and scholarship since (and indeed perhaps before) the 1996 release of the Royal Commission on Aboriginal Peoples (hereafter referred to as 'RCAP') report[48]. Flanagan begins this work generally warning against the orthodoxy:

> Canada will be redefined as a multinational state embracing an archipelago of aboriginal nations that own a third of Canada's land mass, are immune from federal and provincial taxation, are supported by transfer payments from citizens

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[44] Micheal Walzer, *Pluralism in Political Perspective. The Politics of Ethnicity* (Boston: Harvard University Press, 1982) at 27.
[45] Tom Flanagan, *First Nations? Second Thoughts* (McGill: Queens University Press, 2000).
[46] Canada, *Statement of the Government of Canada on Indian Policy*, presented to the First Session of the Twenty-eighth Parliament by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development (Ottawa: Department of Indian Affairs and Northern Development, 1969).
[47] Supra note 45 at 195.
[48] Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group Publishing, 1996).

> who do not pay taxes, are able to opt out of federal and provincial legislation, and engage in "nation to nation" diplomacy with whatever is left of Canada. [This is] what we may get if we don't open the debate on the aboriginal orthodoxy.[49]

Highlights of Flanagan's critique of this orthodoxy include his argument against the central 'we were here first' position that gives Canadian Aboriginal peoples important 'national minority' status. His argument illustrates Flanagan's place as a traditional liberal; that is, "Indians did not do anything to achieve their status except to be born"[50] and the fact that they were here before Europeans should have little to do with conferring rights.

Flanagan's liberal individualist solution to the multinational citizenship dilemma is to change one of the cultures so as the result is a common citizenship. "Call it assimilation, call it integration, call it adaptation, call it whatever you want: it has to happen."[51] Flanagan eloquently illustrates this argument when he claims that although a civilized society follows rules of priority, "passing in traffic is allowed if conditions are safe."[52] That is, why not allow Canadian dominant culture to have a Darwinian effect on Canadian Aboriginal culture, as it is clearly not evolving as fast as Canadian culture is?

Although this solution to the multinational citizenship problem fulfills the citizenship portion, it completely ignores the fact there exists in Canada a national minority with inherent liberal rights of its own. For this reason, we need to continue our search for an adequate political perspective and for a corresponding 'specific' Aboriginal theorist.

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[49] *Supra* note 45 at 5.
[50] *Ibid* at 22.
[51] *Ibid* at 195.
[52] *Ibid* at 47.

Iris Young, the twenty first century American philosopher, represents the other side of the spectrum in this debate. Young notes that cultural pluralism is sometimes also referred to as 'differentiated citizenship' and claims that:

> in a society where some groups are privileged while others are oppressed, insisting that as citizens person should leave behind their particular affiliations and experiences to adopt a general point of view serves only to reinforce the privilege; for the perspectives and interests of the privileged will tend to dominate this unified public, marginalizing or silencing those of other groups[53]

Cultural pluralists believe that the most productive multinational society is one in which different cultural groups are allowed to exist side by side while maintaining their respective autonomy.

The cultural pluralist perspective in 'specific' Aboriginal political theory is sometimes represented by extreme proponents of Aboriginal autonomy such as Dr. Taiaiake Alfred. However, it might be going too far to call Alfreds's viewpoint pluralist. Instead, it seems to border on the monolithic in its focus on the illegitimacy of the Canadian state. Consider for example, Alfred's comments regarding British Columbia treaties: "there is no legitimate basis for British Columbia's existence outside of racist arguments rooted in colonial mentalities, which allow for a claim of legitimate authority based on the inherent right of white people to impose their order on brown people."[54] The 'specific' pluralist position this paper will refer to is not of an individual theorist but that of the *Royal Commission on Aboriginal Peoples*, a compilation of work mainly by academic legal authorities on Aboriginal issues.

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[53] Iris Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" (1989) 99 Ethics 250.

[54] Alfred Taiaiake, "The Same Old Lies" (February, 2001) The University of Victoria Viewpoint 1. This position seems inconsistent, in that Dr. Alfred seems to deny to others the same legitimacy that he says they denied to Aboriginal peoples.

The thirty-five hundred page report issued by the RCAP in 1996 well illustrates the cultural pluralist perspective. The RCAP's report essentially suggested what many pluralist Aboriginal theorists refer to as the 'two row wampum' approach. The 'two row wampum' was a belt exchanged between the Iroquois and the first Dutch settlers upon the signing of the first Canadian treaty. This belt consisted of two violet rows of beads (representing the Iroquois' canoe and the Dutch's ship) with white beads on either side of the two rows of violet (representing the water of a river). The belt symbolized the parallel paths the two cultures would take down the river of life, never intersecting and never interfering with one another[55].

This 'two row wampum' approach is also sometimes described as parallelism as by Alan Cairns in his 2000 work, *Citizens Plus*. "The two row wampum model so frequently proposed as the arrangement that will fit our needs, stresses the permanence of difference...It postulates parallel paths that never converge. The image of coexistence with little traffic between the solitudes."[56] The two row wampum is the perfect illustration of the ideal cultural pluralist approach; two distinct cultures; two autonomous spheres of nationhood; equal respect for different cultures.

In regard to the problem of multinational citizenship, it is clear that this position takes account of the need for national minority rights. However, not only does it ignore the need for common citizenship but it detracts from any limited sense of common citizenship that non-Aboriginal / Aboriginal Canadians now share. If we are to give weight to a common citizenship in a liberal democracy it follows that we must continue

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[55] Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 92. For further information on the 'two row wampum belt' see Wikipedia Foundation Inc. (Feb. 20th, 2007) Guswhenta (Two Row Wampum Treaty) Online: http://en.wikipedia.org/wiki/Two_Row_Wampum.

[56] Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 92.

our search for an appropriate theory, as shown by a specific theorist, to guide our answer to the problems of a multinational citizenship.

Will Kymlicka is especially helpful in regard to the question of citizenship and Canadian Aboriginal peoples because not only does he write on general problems of citizenship and group rights, as noted above, but he also writes on what I have termed 'specific' Aboriginal theory. Kymlicka's position in this specific theory is not too different from that in his general theory, which left us with two extreme- and indeed very opposite- options.

Like many other liberal thinkers, Kymlicka recognizes the need for common citizenship in the Canadian state. "Without citizens who possess communitarian qualities, the ability of societies to function successfully progressively diminishes".[57] One helpful departure that Kymlicka's 'specific' theory makes from his general position is the difference he stresses between minorities and Canadian Aboriginal peoples (national minorities). Kymlicka claims that minorities should be accorded polyethnic rights where this causes no significant discord with common citizenship, while national minorities have an inherent right to self-government, as a result of the distinctive feature of 'being here first'. He claims that immigrant minority cultures recognize the authority of the majority to bestow upon them rights that will help them while national minorities do not recognize the authority of the majority whatsoever because they represent their own authority. "The basic claim underlying self-government rights is not simply that some groups are disadvantaged within the political community (representation rights), or that the political community is culturally diverse (polyethnic rights). Instead, the claim is that

[57] William Galston, *Liberal Purposes: Goods, Virtues, and Duties in the Liberal State* (Cambridge: Cambridge University Press, 1991) at 220.

there is more than one political community, and that the authority of the larger state cannot be assumed to take precedence over the authority of the constituent national communities."[58]

In addition, Kymlicka claims that group-differentiated rights will not solve the problem of exclusion from full participation of national minorities because it is more than lack of rights that keeps these groups excluded from the common sense of civilization, it is lack of their own cultural identity. Therefore, something else is needed; something in the form of self-government. Kymlicka illustrates this contention with criticism of the classic liberal position. "Rawls suggest that a strong sense of common citizenship is needed to deal with the danger that majorities will treat minorities unfairly. But common citizenship in a multination state helps create that danger in the first place (with dominant language, schools, courts, holidays, etc...)"[59] Kymlicka illustrates the problem with common citizenship when he claims that "self-government rights lead to a distinctive citizenship identity for each self-governing group" because "citizenship is in large part, a matter of membership in a political community."[60]

The reason this paper will not promote Kymlicka's position is that at the end of his discussion of the multinational citizenship problem Kymlicka leaves us with nothing in the way of a solution. He suggests two possibilities. First, he claims that "since claims to self-government are here to stay, we have no choice but to try to accommodate them. Rejecting these demands in the name of common citizenship will simply promote

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[58] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 182.
[59] *Ibid* at 183.
[60] Will Kymlicka and Wayne Norman, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) at 33.

alienation and secessionist movements."[61] Here, it would appear as if Kymlicka is taking the cultural pluralist perspective but then, several pages later, he claims that "accepting self-government demands is likely to lead to a desire for ever-increasing autonomy, even independence"[62], hence finding a fundamental problem with his own position. Kymlicka's model, then, seems to show that both the acceptance of self-government, and likewise its rejection, are likely to end in the same result; alienation and secession, whether this be caused by the promotion of self-government or liberal rights. I do not mean to suggest that Kymlicka unknowingly contradicts himself. Simply, Kymlicka sees inherent problems with any theoretically definitive position in this debate. Perhaps, then, what is needed is something less definitive.

Kymlicka is not the only theorist to grapple with this problem, as evidenced by political philosopher Charles Taylor. I will stray from Taylor's usual description as a liberal and describe him as a conservative communitarian. The reason for this label is Taylor's promotion of a non-traditional, non-Rawlsian, conception of liberalism. Although Taylor has not devoted much time to dealing specifically with the situation of Canadian Aboriginal peoples, his work has been included in the 'specific' theory section because it is constantly embedded in the work of Cairns and Kymlicka, and may shed further light on their positions.

Throughout *The Politics of Recognition*[63] Taylor tosses back and fourth between the virtues of what have been described as "Taylor's liberalism 1 and 2."[64] Liberalism 1 can be classified as more traditional, individualist liberalism which "is committed in the

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[61] *Ibid* at 187.
[62] *Ibid* at 189.
[63] Amy Gutmann, et al., *Multiculturalism: Examining the Politics of Recognition* (New Jersey: Princeton, University Press, 1994).
[64] *Ibid* at 99.

strongest possible way to individual rights and... a state without cultural projects"[65]. Liberalism 2 "allows a state committed to the survival and flourishing of a particular nation, culture, and religion or of a (limited) *set* of nations [emphasis added]."[66] Taylor illustrates the respective failures of these conceptions of liberalism by looking at the application of *The Canadian Charter of Rights and Freedoms*, 1982, and its interaction with Canadian Quebecois[67].

Taylor notes the stark contrast between the liberal individualist rights accorded by the *Charter*, such as freedom of speech, religion, and association, with the protection of group rights as per Quebecois legislation, such as French signage law; he also notes the necessary place of both. Taylor explains that protectionist Quebec laws are in place to ensure future collective goals, and are therefore not necessarily dependent on the goals of the citizens, but on the goals of the 'Nation'. Equally, the protections afforded under the *Charter* can certainly not be ignored as *Charter* rights are "fundamental and crucial ones that have been recognized as such from the very beginning of the liberal tradition."[68] The task in creating a hybrid between liberalism 1 and 2, therefore, is to distinguish between those rights that should never be infringed and those that can be infringed in the name of public policy.

A fundamentally important tenet that allows for these theories to work together is that they do so in a democratic state. Members of a democracy have the ability to choose which of their rights are of the fundamental liberal sort, and which can be infringed in the

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[65] Micheal Walzer, *"Comment" in Multiculturalism: Examining the Politics of Recognition* (Princeton, New Jersey: Princeton University Press, 1994).
[66] *Ibid* at 99.
[67] Although Taylor chose the Canadian Quebecois to illustrate the failures of 'liberalism 1' and 'liberalism 2', the same concepts expounded in this argument can be quite readily transferred to the situation of Canadian Aboriginal peoples and their desire to 'self-govern' their people within larger Canada.
[68] *Supra* note 63 at 59.

name of public policy. As a result, it is possible to adhere to one conception of liberalism while, when necessary, supplementing it with the other.

Taylor ultimately chooses the second conception of liberalism, explaining that "the rigidities of procedural liberalism may rapidly become impractical in tomorrow's world"[69]; that is, due to the reality of increasing multiculturalism. How, then, does he describe the need for balance with the liberalism of individual rights? In *The Politics of Recognition*, Taylor explains that a society that actively endorses collective goals can still be liberal (in the traditional individualist sense) as long as that society respects the fundamental individual rights of those who do not share those common goals: if "they are willing to weigh the importance of certain forms of uniform treatment against the importance of cultural survival, and opt sometimes in favour of the latter."[70] Taylor says that judgments about the appropriate application of 'liberalism' are contingent on conceptions of the good life- as the proper application of the good life maintains the importance of cultural diversity when the members of the society value and choose this protection.[71]

This hybrid perspective shares a traditional communitarian conception of citizenship. It maintains that government is a necessity as it maintains the importance of citizenship and membership (liberalism 2). However, I will argue, it can be taken out of the traditional 'communitarian' realm and classified as 'conservative'[72] communitarianism because of its belief that government is most effective when it treats its citizens as liberal, autonomous, rights bearing, individuals with free choice (liberalism

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[69] *Supra* 63 at 61.
[70] *Ibid* at 61.
[71] *Ibid* at 62.
[72] 'Conservative' in the sense that traditional communitarianism is modified in a conservative direction because it can only operate effectively on the basis of liberal rights and choice.

1). Arguably, the principle of choice enshrined in the liberal democratic state, allows for a proper combination of liberalism 1 and 2 and results in an ideal political philosophy to govern Canada's liberal, multinational democracy: 'conservative communitarianism'. This philosophy provides an answer to the need for group-differentiated rights while at the same time maintaining the importance of a common citizenship. A solution to the problem of multinational citizenship is beginning to emerge. To contextualize the hybrid approach that is conservative communitarianism, let us turn to a 'specific' theorist who has devoted time to this concept, Alan Cairns.

Cairns believes, as illustrated time and again in *Citizens Plus: Aboriginal Peoples and the Canadian State*[73], that common citizenship is fundamentally important to a liberal democratic, multinational state such as Canada. "There is general agreement that our willingness to share with others is broadly dependent on our joint membership in a common community."[74] At the same time, Cairn recognizes the inherent right for Canadian Aboriginal peoples to self-govern (a pluralistic conception of group differentiated rights).

The importance of Cairns' position lies in neither of these views but, as with conservative communitarianism and Taylor's liberalism 1 and 2, in a combination of the two. Throughout his writing, Cairns advocates a hybrid that both respects equal rights where possible among liberal citizens, thereby promoting a common conscience, while at the same time recognizing group rights and difference that make cultural preservation possible. "Both our separateness and our togetherness need to be institutionally supported

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[73] *Supra* note 56.
[74] *Ibid* at 209.

if the overall Canadian community is to survive."[75]Cairns criticizes Aboriginal scholarship at large. He notes that

> it verges on monolithic in its focus on support for maximum autonomy for self-governing Aboriginal nations. It displays minimal interest in Canadian citizenship, or in the more general question of what kind of overall Canadian community will coexist with Aboriginal self-government. What holds us together –why we should feel obligations to each other-is not on the agenda. What is also overlooked are terribly important practical problems of what is possible for small populations to achieve.[76]

Throughout his writing Cairns maintains the importance of Canadian Aboriginal self-government, but not in the autonomous 'third order' way promoted by cultural pluralists, as seen in the RCAP's report in 1996. Cairns closes his 2000 *Citizens Plus* by saying that "our practical task (as Canadians) is to enhance the compatibility between Aboriginal nationhood and Canadian citizenship."[77] Cairns appropriately stresses the need for both 'Aboriginal nationhood' (group-differentiated rights) and 'Canadian citizenship' (common conscious) in bringing about the resolution of the multinational citizenship problem which Canada currently faces.[78]

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[75] *Ibid* at 212.
[76] *Ibid* 39 at 187.
[77] *Ibid* at 213.
[78] John Borrows makes an argument similar to that of Cairns. Borrows argues for a "notion of citizenship that encourages autonomy, and at the same time unifies and connects us to one another and the lands we rely on." (Borrows, John. *Landed Citizenship: Narratives of Aboriginal Political Participation* (Oxford: Oxford University Press, 2000) at 336) Borrows also claims that "Aboriginal control through Canadian affairs is an important way to influence and participate in our lands. Without this power we are left outside significant decision-making structures that have the potential to destroy our lands. This is a flawed notion of citizenship. Canadians must participate with us." (Borrows, 2000 at 330) In this way, Borrows speaks of Aboriginal and non-Aboriginal inclusion in a common citizenship as a necessary evil of sorts. Although autonomous self-government would be the ideal, inclusion with the rest of Canadian citizenship is a necessary means to reach desired Aboriginal ends. For this reason, although Borrows represents a hybrid between extremes, I chose Cairns to highlight this conception.

Citizens Plus was widely, and erroneously, criticized by Aboriginal scholarship for promoting an assimilative perspective[79]. In 2005, Cairns published a follow-up to *Citizens Plus* entitled *First Nations and the Canadian State*[80] which many of these critics viewed as a qualification of *Citizens Plus*. This second work is nothing of the sort. In fact, it takes a position that is close to identical to that in *Citizens Plus*, although in his follow-up, Cairns relies on Charles Taylor's 'liberalism 1 and 2' (as noted above) to substantiate his position. "I continue to believe that in deciding what to do, thinking of a blend of Taylor I and Taylor II helps to keep us on track."[81] Cairns praises liberalism 1 because 'it recognizes the supremacy of the nation-state (and its invariable sovereign identity) on a global base, and liberalism 2 because it reminds us that we must respond positively to Aboriginal self-government'[82].

As shown at the beginning of this theoretical examination there are two fundamental components to a successful liberal democracy that contains a national minority such as Aboriginal peoples in Canada. First, the state must recognize group-differentiated rights. Canada's Aboriginal policy has evolved so that Aboriginal self-government rights will be a fixture in Canadian politics for the years to come. As Lamer C.J. said in *Delgamuukw*, "let us face it, we are all here to stay"[83]. In order for this national minority group to maintain a meaningful culture in the face of the North American melting pot, the right to group-differentiated rights is essential. Second, as illustrated above, there has to exist a

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[79] Thomas Flanagan, "Flanagan and Cairns on Aboriginal Policy" (2002) 10 (5) Inroads 5. This note illustrates the view that *Citizens Plus* promoted assimilation, and as such was subject to wide criticism.
[80] Alan Cairns, *First Nations and the Canadian State: In Search of Coexistence* (Kingston, Ont.: The Institution of Intergovernmental Relations, School of Policy Studies, Queen's University, 2005). Originally a lecture from 2002.
[81] *Ibid* at 59.
[82] *Ibid* at 59.
[83] *Supra* note 11 at. 186.

common conscious, to which all groups can feel they belong. On one hand, this calls for a functioning liberal democracy in which liberal rights bearing individuals are willing to sacrifice some of their rights in the interest of this greater good. On the other hand, it calls for reduced alienation and discrimination against minority groups that group differentiated rights will inevitably create.

The problem that this creates has been being referred to in this section as the 'multinational citizenship' problem; that is, common citizenship seems to be directly at odds with group differentiated rights for, as Durkheim explains, "in order for a thing to be the object of common conscience, the first condition is that it must be common."[84] Since this dilemma emerged at the end of the 'general' theory section we have been examining 'specific' Aboriginal political theorists in search of a solution. First, we saw the liberal individualist perspective, as illustrated by Tom Flanagan, fail due to its emphasis on the common conscious at the expense of group differentiated rights. Next, we saw the cultural pluralist perspective, as illustrated by Alfred and the RCAP, fail due to its emphasis on group rights and its neglect of any sense of common citizenship or federalism. Finally, conservative communitarianism, as illustrated by Taylor and Cairns, emerged as the best approach to the multinational citizenship problem. It provides a mean between extremes allowing for the recognition of group-differentiated rights in a capacity limited enough to allow for a common citizenship, thereby fulfilling the necessary criteria of a stable liberal democracy. It will serve as the general theoretical foundation of the examination of judicial tools in this thesis.

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[84] *Supra* note 24 at 43.

Negotiations and Litigation: Their Respective Places

In this final theory section I hope to illustrate three remaining theoretical proposition. First, that the principles enshrined in the negotiation process accord with the theoretical position taken in previous pages. Second, that negotiations not only accord with the concepts of balance and compromise enshrined in conservative communitarianism but have additional characteristics that make this forum superior to the alternative in Aboriginal / Crown dispute resolution, litigation. Third, and most importantly to this project, that although negotiations appear to be more desirable than litigation, it is not one process or the other that will yield a solution to Crown / Aboriginal disputes. Negotiations have to use judicially articulated tools in order to become more efficient and effective in Aboriginal dispute resolution. If litigation can provide a definitive framework from which negotiations can operate, then although current litigation will face the same pitfalls it always has, it can help point future negotiations to success. In order to accomplish this goal I must first discuss the general principles behind negotiations, in comparison to litigation, in order to illustrate how a balanced approach between negotiations and litigation is needed to accomplish effective resolution of Aboriginal claims.

The *Canadian Oxford Dictionary* defines the verb 'to negotiate' in the following terms; "(1) confer with others in order to reach a compromise or agreement; (2) arrange or settle a matter or bring about a result by negotiation; (3) find a way over, through an obstacle, difficulty."[85] If we are to accept this common definition we will notice the emphasis on the principles of agreement and compromise, two overarching principles that

[85] Katherine Barber, *Canadian Oxford Dictionary, 1st ed.*, (Oxford: Oxford University Press, 2004) "negotiate".

are vital to this project. When two parties enter a negotiation they do so with the hope of settling somewhere between the two positions. Just as with the general theoretical position of 'conservative communitarianism' adopted earlier, the goal is to achieve a mean between extremes.

While the principles of balance and compromise make negotiations consistent with conservative communitarianism, litigation lacks these principles and therefore this consistency. Litigation is a win / lose oriented process that necessarily supports the position of one party over the other. In the context of Aboriginal / Crown litigation, the judge will necessarily ascribe to citizenship (siding with the Crown) or minority rights (siding with the Aboriginal party). As shown above, these perspectives cannot be considered autonomously if a just solution for a liberal, multinational democracy such as Canada is to be achieved.

Having illustrated that negotiations do accord with the theoretical position ascribed to in this chapter, and do so better than litigation, my next goal is to compare the principles of negotiated settlements to those of litigation in order to illustrate the general superiority of negotiations. Contemporary literature on Aboriginal / Crown negotiations, such as that by Shin Imai[86], focuses on three necessary components for successful negotiations that cannot be achieved in litigation; 'sound science', 'careful policy analysis', and 'ongoing relationships'. Sound science, Imai claims, cannot be achieved in litigation because each party will attempt to exaggerate their position leaving the ultimate decision regarding accuracy to the judge. Another point that follows from this one, is that an adversarial fact finding process is expensive. The competitive gathering of evidence

[86] Shin Imai, "Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and negotiation in Aboriginal Lands and Resources Disputes" (2003) 41 Osgood Hall L.J.587.

and expert witnesses to attest to each side's claims often brings legal fees to astronomical amounts, a trait that is beneficial to neither party.

Imai also contends that negotiation can take account of the complex interests of large numbers of parties, whereas litigation can accommodate only a minimal number of parties. "Negotiators are able to facilitate the input of a large number of interests into the development of such regulatory schemes by creating chains or networks for those who are not at the negotiation table."[87] As Imai suggests, the two parties involved in the dispute are rarely the only interests; for example, third party private interests, businesses, other government agencies, or Aboriginal Elders could have concerns. In negotiations, this myriad of positions is more easily considered, whereas litigation is often a bi-party system.

Third, Imai claims that since ongoing relationships between the government and Aboriginal peoples are necessary, the most amicable solution to disputes is necessary. That is, "there are many points of contact between each First Nation and the provincial and federal governments"[88] and negotiations can ensure that these future contacts are not soured by adversarial litigation.

In addition to the virtues of negotiations suggested by Imai, the following strengths can be noted. First, the desire for Aboriginal self-government has long been on the Canadian Aboriginal agenda. Aboriginal self-government is inherent in negotiations and next to impossible in litigation. That is, input from an Aboriginal party in negotiated treaty rights or land claims is necessary in negotiations, while in litigation the final say is always up to a judge, who was appointed by a government with very little Aboriginal

[87] *Ibid* at 21.
[88] *Ibid* at 23.

representation and is unlikely to be an Aboriginal person. The 'top-down' effect of litigation can be eliminated by the negotiations process.

Negotiations also provide a forum in which substantive equality can be achieved in a dispute where a power imbalance is inherent. As this section suggested in previous pages[89], strict liberal equality will not produce substantive equality for a people who were disadvantaged to begin with. Negotiations can provide Aboriginal peoples with a forum in which special considerations can be taken into account in order to reach a solution that considers years of unjust treatment, the imbalance of power between the disputing parties, and ultimately allows for the achievement of substantive equality.

The benefits of negotiations over litigation aside, the Aboriginal / Crown negotiation process has proven to be a monumentally slow and ineffective endeavor in recent years[90]. Negotiations alone, then, despite their numerous virtues, cannot be the answer to resolving disputes over Aboriginal claims.

Although litigation lacks all the virtues of negotiations mentioned above, litigation has one characteristic that this section will contend is invaluable. Litigation in Canada operates in a common law system which produces relatively consistent, precedent-setting, definitive decisions. In contrast to the often dismal success record of negotiations, litigation will yield a concrete result. Litigation may not be fast, easy, or conducive to future relationships, but it will yield an authoritative answer. This capacity to generate firm and guiding precedent is why negotiations need litigation. Despite its many drawbacks, then, litigation regarding Aboriginal / Crown disputes has a potential role in providing a framework for negotiations.

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[89] *Supra* at 15-17.
[90] *Supra* note 87 at 25.

In recent years, courts themselves have been urging that Aboriginal / Crown disputes be taken out of court rooms and into negotiation forums. In *Delgamuukw* MacFarlane J.A and Lamer C.J, respectively, said that "negotiations are to be encouraged, and ultimately may be the preferred way to finally resolve aboriginal issues", and that "ultimately, it is through negotiated settlements, that we will achieve the basic purpose of s. 35 (1)--the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[91] These statements are not only accurate, but contextually relevant as courts themselves can play a major role in improving negotiations.

Negotiations are more consistent with conservative communitarianism and are far better suited to the resolution of Aboriginal / Crown claims disputes than is litigation. However, the Aboriginal / Crown treaty negotiation process has had a dismal record in the past. The answer, as with the theoretical position discussed above, is compromise and balance: take the common law rules that litigation establishes and apply them to facilitate negotiations. This way, the negotiation process can maintain its virtues while gaining judicially imposed guidelines that will give the process structure and help negotiating parties towards solutions. Let us turn, then, to one judicial tool with considerable capacity to improve the negotiation process, consultation and accommodation.

[91] *Supra* note 11 at 35 & 186.

Chapter III Consultation and Accommodation

The focus of this chapter is the recent common law concept of 'consultation and accommodation'. Though 'consultation and accommodation' has the potential to be a revolutionary step for the advancement for Aboriginal / Crown relations, this concept did not arise from a vacuum. The judicial origins of this concept can be traced back to the first trust-like duty to be imposed by the courts on the Crown, the Crown's fiduciary obligation to Canadian Aboriginal peoples[92]. This duty, however, has recently fallen from its former place as the catch-all duty it once was. The Crown's duty to consult and accommodate Aboriginal peoples finds its origins in the newly-formulated 'honour of the Crown', which recent precedent has been shown to be the modern 'umbrella' duty from which all Crown obligations to Canadian Aboriginal peoples follow. To understand why various trust-like duties arise it is necessary to understand the case law that created them. For this reason, the first task of this chapter is to trace the birth of these various common law trust-like relationships from when they first emerged to where they are today.

This section has three main goals: First, I will examine several benchmark Aboriginal / Crown common law decisions that have yielded precedent regarding various judicially imposed duties the Crown owes to Canadian Aboriginal peoples. From a review of these decisions it is the author's hope that the reader will gain a sense of what these duties are, the process by which they were created, and how they have evolved over the past several decades in an attempt to satisfy the desires of both non-Aboriginal and Aboriginal Canadians.

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[92] *R v Guerin*, [1984] 2 S.C.R. 335 at para 1. The legal origins of this concept originate here but the historical origins go back at least as far the Royal Proclamation in 1763.

The second task of this section is to explain the concept of consultation and accommodation itself. To do this, again, it will be helpful to examine the case law from which this term emerged and how each of the cases dealing with consultation and accommodation has shaped this concept. As a necessary component of understanding the case law which yielded consultation and accommodation we must also understand the new interpretation of 'Crown honour'. For this reason the second section of this chapter will include several pages devoted to an explanation of this concept.

The third and final task of this chapter is to draw a list of terms and principles associated with 'consultation and accommodation' out of the common law decisions that shaped this concept. This will be done in order to clarify how this concept applies, to which situations it applies, and in what circumstances it can (and will) be applied.

Generally, then, the chapter aims to describe simply, what consultation and accommodation is and how this newly created duty applies to Crown / Aboriginal dispute resolution. This should provide a solid backing for understanding the implications and potential of this concept, the subject of chapter four.

The Common Law History of the Crown's Trust-Like Relationships with Canadian Aboriginal Peoples

To examine all the case law regarding the evolutionary process of the duties associated with the Crown's trust-like relationship with Canadian Aboriginal peoples would take dozens of cases and hundreds of pages. For this reason, this section will focus on several major Supreme Court of Canada cases that are widely regarded as milestones in the Canadian Aboriginal fight for equitable dealings with the Crown. This will illustrate the

different precedents that Canada's highest court has set to regulate the trust-like relationship between the Canadian Crown and Aboriginal peoples. After mentioning each common law decision the section will summarize the contributions that each respective case made to the evolution of the Crown's relationship with Aboriginal peoples. This will be done by referring to three characteristics present in each instance; the *legal relationship* between the Crown and the Aboriginal peoples; the *triggering circumstances* for this relationship; and the *potential legal consequences* derived from these consequences.

R. v. Guerin[93]

When the Supreme Court decided *Guerin*, it handed down one of the most influential decisions in the history of Crown / Aboriginal relations: the precedent creating the Crown's 'fiduciary obligation' to Aboriginal peoples. A key question in this case was what kind of obligation, if any, s.18 (1) of the *Indian Act*[94] imposes on the Crown. Section 18 (1) of the *Indian Act* provides that

> subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.[95]

Guerin, the Chief of the Musqueam band, gave the Crown authority to negotiate on his behalf regarding a lease of over four hundred acres of very valuable reserve land located within the city of Vancouver. This land was held by the Crown for the Musqueam

[93] *R v Guerin*, [1984] 2 S.C.R. 335.
[94] *Indian Act* (R.S.,1985, c.1-5).
[95] *Ibid* at s. 18(1).

band; the Musqueam's interest in the land being title, not 'fee simple'[96]. The Musqueam people were under the impression that the Crown would do their best to strike a reasonable deal with the lessor. The Crown proceeded to agree to a lease with a group that wanted to turn the land into a golf course. This lease unfairly represented the interests of the Musqueam people[97]. Guerin, as head of the Musqueam, sued the Crown for misrepresenting their interests, claiming that although s. 18 of the *Indian Act* gave the Crown control over the use of the land, the Crown held that control in a trust-like relationship.

The first decision the court had to make concerned the type of obligation s.18 (1) of the *Indian Act* conferred on the Crown. The majority of the court in *Guerin* held that "[w]hen, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf."[98] Because the Crown owed the Musqueam band this fiduciary obligation, and it was clear that the terms of the lease agreed upon between the Crown and the golf course were not reflective of the real value

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[96] The concept of 'title' regarding land (Aboriginal title in this instance) "is a concept well embedded in English law" as per Judson J. in *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R 313. The concept of 'title' to land is essentially, that without formal ownership of the land in question (as in the western legal system) circumstances of quasi-ownership associated with the land can exist when long term occupancy of the land can likewise be established. Judson J clearly expressed this concept in the judgment of the landmark Canadian Aboriginal title decision, *Calder*; "It is not correct to say that the Indians did not "own" the land but only roamed over the face of it and "used" it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected."

[97] Throughout negotiations for the lease for this land, the members of the Band (as well as advisors thereto) were continually left uninformed as to terms and conditions of the lease. The golf course primarily dealt with the Department of Indian Affairs and not the Band itself. The Band therefore, voted for the lease with the golf course without being aware of some of the more prejudicial terms. Examples of such terms include: "a) Before the Band members voted, those present assumed or understood there would be no 15% limitation on rental increases" when there in fact was; b) "the meeting was not told that future rent on renewal periods was to be determined as if the land were still in an uncleared and unimproved condition and used as a golf club", which it was. (*R. v. Guerin* at 19.)

[98] *R v Guerin*, [1984] 2 S.C.R. 335, at 1.

of the land, the court held that a decision of breach of this duty necessarily followed. "The Crown acted in breach of its fiduciary duty when it "barrelled ahead" with a lease unacceptable to its cestui que trust."[99]

Guerin, then, was the first case in which the legal relationship imposed on the Crown was a 'fiduciary' relationship; that is, a relationship which strives to create equality in a relationship that is fundamentally unequal. The court in *Guerin* explained that the triggering circumstances for this 'fiduciary duty' were when that one party has an obligation to act for another, and that obligation carries with it a 'discretionary power', the empowered party thus becomes a fiduciary obligator[100]. The legal consequence that the fiduciary duty established in *Guerin* carries with it is a positive legal duty to restore equity to the relationship; in this case, the Musqueam gained financial compensation for the inequitable deal made for their land.

The concept of the Crown's fiduciary obligation was to expand and dominate Aboriginal / Crown relations for years to come. Eventually this concept would be significantly qualified, but not before several major cases relied on the 'fiduciary' precedent set in *Guerin*.

R. v. Sparrow[101]

One of the most influential cases to rely on the Crown's trust-like relationships with Canadian Aboriginal peoples was the 1990 Supreme Court decision *R. v. Sparrow*. The litigation in this case focused on a member of the Musqueam Nation who was fishing with a net nearly double the length of that allowed under the Nation's food fishing license

[99] *Ibid* at 2.
[100] *Supra* note 20.
[101] *R v. Sparrow*, [1990] 1 S.C.R. 1075.

allocated by the British Columbia Minister of Fisheries. Sparrow, the fisherman, had two claims; first, that he had an Aboriginal right to fish without a licence and second, that the restriction on net size violated his rights enshrined in s. 35(1) of the *Constitution Act*, 1982 and was thus invalid. First then, the Supreme Court had to decide if Sparrow held an Aboriginal right under s. 35 which allowed him to fish without a license, or if that right was extinguished with the passing of the Canadian *Fisheries Act*. Second, if Sparrow did possess such an Aboriginal right, Canada's highest court had to decide whether the restriction on the net length constituted a justifiable infringement on this right. This case then, involved two issues that would inevitably alter the Canadian legal landscape one way other the other; first, was the 'recognition and affirmation' of Aboriginal rights in s.35 (1) *Constitution Act, 1982* to be interpreted in accord with the Crown's fiduciary obligation? That is, were the Aboriginal rights that were thought to be extinguished with the enactment of Canadian fisheries legislation to be considered to be subject to this 'fiduciary relationship'? Second, if these rights did indeed exist how were limits on them to be decided?

In deciding on the existence of this Aboriginal right to fish, Dickson C.J. and La Forest J.J. referenced the similarity between this case and *Guerin*. The Court said that *Guerin* established a principle that should guide the interpretation of s. 35, the fiduciary obligation. "That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[102] Further, the majority in this decision said that the words 'recognizing and affirming' used

[102] *Ibid* at 59.

in s.35 (1) *Constitution Act,* 1982 "incorporate this fiduciary relationship referred to above."[103]

In accord with this fiduciary obligation, the Court found that Sparrow's right to fish for food had not been extinguished and that he therefore still held this Aboriginal right pursuant to s.35(1) *Constitution Act*, 1982. This was the first time the Supreme Court decided that s.35 Aboriginal rights are constitutionally entrenched pursuant to the Crown's fiduciary duty. As in *Guerin*, the reason this case was decided with reference to the Crown's fiduciary obligation was the 'historic power and responsibility' the Crown assumed over Canadian resources, a power similar to the 'discretionary control' the Crown assumed in *Guerin.*

It is interesting to note that although the term 'honour of the Crown' was never used in *Guerin*, in *Sparrow*, Dickson C.J. relied on "the guiding interpretive principle derived from *Guerin.* That is, the honour of the Crown is at stake when dealing with Aboriginal people."[104] Although *Sparrow* was decided primarily on the Crown's fiduciary obligation, Dickson C.J. did refer to 'the honour of the Crown' as a broad interpretive duty surrounding s.35 consistent with the Crown's fiduciary obligation from *Guerin.* This duty, then, appears to have been waiting in the wings for some time.

Having found the positive existence of Sparrow's s. 35(1), *Constitution Act,* 1982, right to fish without a license (on the basis of an interpretation of s.35 consistent with 'Crown honour and the Crown's fiduciary obligation), the Court could proceed to the second question; whether or not the restriction on net length constituted a justifiable infringement of this right. Counsel for Sparrow suggested that enshrined in the s. 35

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[103] *Ibid* at 62.
[104] *Ibid* at 75.

Aboriginal fishing rights is the right to regulate the resource. Hence, Sparrow's counsel argued that s. 1 of the *Charter of Rights and Freedoms* could not be used to infringe his fishing rights as this would be inconsistent with s. 52 (1) of the *Constitution Act,* 1982 (the doctrine of constitutional supremacy). As well, application of s. 1 of the *Charter* would violate the principles of resource management enshrined in s.35, pursuant to the Crown's fiduciary interpretation of this section, as witnessed in *Guerin*[105]. Counsel for the appellant did submit that the use of s. 1 of the *Charter* could be justified in exceptional circumstances of resource management[106]. The Courts, however, wanted to set a more definitive test, specific to limitations on s.35 Aboriginal rights.

This test for justifying infringements on s.35 (1) rights, articulated by Dickson C.J. and La Forest J.J, was the other major precedent to emerge from *Sparrow*. Canada's highest court proposed a two-part justification test to be met by government when it attempts to justify an infringement on a s.35 (1) right, a test hereafter referred to as the *Sparrow* test.[107] The first question is, has the legislation in question provided for a "valid legislative objective?"[108] (For example, does the fishery that is being infringed need a controlled harvest to maintain sustainability?) If there is a valid legislative objective, the test proceeds to ask if the "special trust relationship and the responsibility of the

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[105] *Supra* note 20 at 47-48.
[106] *Ibid* at 47.
[107] In order to proceed to the justification test the legislation in question must be shown to infringe on an existing Aboriginal right in a *prima facie* manner. The *prima facie* test laid out in *Sparrow* essentially asks three questions. 'First, is the limitation unreasonable? Does the regulation impose undue hardship? Does the regulation deny the holders of the right their preferred means of exercising that right?' (*Sparrow*, 1996). "We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to [page1113] the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met." (*Sparrow*, 1996)
[108] *Supra* note 89 at 71.

government vis-à-vis aboriginals is [being] consider(ed) in determining whether the legislation or action in question can be justified."[109] The second part of this test, then, relies on Crown's fulfillment of their fiduciary obligation[110].

To summarize the principles that emerged from *Sparrow*: the general legal relationship is a fiduciary relationship, as in *Guerin*, although this one focuses on Aboriginal rights pursuant to s. 35. As with *Guerin*, this relationship is triggered due to the Crown's position of power; in this case, the historic power the Crown exercised over Canadian fisheries. The potential legal consequence of *Sparrow* was the unconstitutionality of any regulation that infringes a s. 35 right, interpreted in a fiduciary light, unless the regulation can be justified by the *Sparrow* test, which also operates pursuant to the Crown's fiduciary duty.

R. v. Marshall[111]

In this case, Donald Marshall did not contest the fact that he was found selling eels without a licence, nor that he had fished for the eel during a closed season, nor that he had used illegal nets. What Marshall contested was the fact that he was charged for doing so, arguing that he possessed a treaty right to carry out all of the above mentioned activities.

Marshall relied on a 'Peace and Friendship Treaty' of 1760-61. This treaty was signed "in a period when the British were trying to expand and secure their control over their Northern possessions."[112] The provision of this treaty at question in this case read:

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[109] *Ibid* at 75.
[110] The *Sparrow* test also includes the doctrine of 'priority'. This concept, simply illustrated, is that if there are only enough fish for Aboriginal purposes, non-Aboriginal interests can be excluded.
[111] *R. v. Marshall*, [1999] 3 S.C.R. 456.

> I [Paul Laurent, chief of the LaHave tribe of Indians at Halifax in the Province of N.S. or Accadia] do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any ill designs which may be formed or contrived against His Majesty's subjects. And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.[113]

This case involved a very clear division between the majority and dissent. The two judgments agreed on the relevant place of the fiduciary relationship but took opposite positions on 'the honour of the Crown'. The dissent in this case, voiced by McLachlin J. agreed with the trial judge in that they both read the above clause as a 'negative trade clause'. Both judges agreed that it meant to exclude people with whom the Mi'kmaq could trade rather than giving them exhaustive rights to trade with the British, McLachlin J. concluded that the trade clause obligated the Mi'kmaq to trade exclusively with the British and in exchange the British would provide the Mi'kmaq an outlet to conduct the trading. Neither the British nor the Mi'kmaq intended the trade clause to confer a general right to trade but rather, when the British mechanism for trade fell from use (the 'truckhouses') so too did the trade clause. McLachlin J. recognized that both ambiguities within a treaty, as well as misunderstandings that could have surrounded the signing of a

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[112] *Ibid* at 4.
[113] *Ibid* at 5.

treaty were to be interpreted in favour of the Aboriginal party, pursuant with *Badger*[114]. However, McLachlin J. agreed with the trial judge that no such ambiguity existed.

The majority in this case, however, expressed a quite different view on the issue of ambiguity in and surrounding the signing of the treaty. Binnie J., expressing the majority opinion, said that the trial judge's "narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. Had the trial judge not given undue weight to the March 10, 1760 document, his conclusions might have been very different."[115] The majority of the Court agreed that the text of the 'Peace and Friendship Treaty' did not support Marshall's argument. However, contrary to the trial judge who heard forty days of evidence on the matter[116], the majority of the Supreme Court decided that there were likely additional terms implied surrounding the signing of the treaty. The major difference between majority and dissent can be accounted for by the different weight the respective judges gave to 'the honour of the Crown'.

Although McLachlin J. recognized the applicability of this concept to treaty interpretations in general[117], she did not think this concept dictated an alteration of the content of the treaty in this case. Binnie J., on the other hand, felt that in order for 'Crown honour' to be upheld a liberal reconstruction of the treaty was essential. "This appeal puts to the test that Crown honour is always at stake when dealing with aboriginal people."[118]

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[114] *R v. Badger*, [1994], 1 S.C.R. 771, at 52.
[115] *Supra* note 111 at 20.
[116] *Ibid* at 84.
[117] *Ibid* at 78, 110.
[118] *Ibid* at 49.

The majority's use of 'Crown honour' in *Marshall* was attributed to *R. v. Taylor and Williams*[119]; in turn, this case attributed the use of 'the honour of the Crown' to a dissent in *R. v. George*[120]. In *George* Cartwright J. said that ambiguity in treaties should be construed "in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty."[121] Although the conception of 'Crown honour' in treaty interpretation has been traced as far back as 1895 in *Province of Ontario v. Dominion of Canada*[122], this case did little to expound on the application of this term. *Marshall*, via *Taylor and Williams,* and *George* was the first case to depend primarily on 'the honour of the Crown' in treaty interpretations and as such, not only to construe ambiguity in favour of Aboriginal peoples, but to alter the literal content of a treaty in order to uphold 'the honour of the Crown'.

Hence, the legal relationship to emerge from *Marshall* is two-fold. First, 'the honour of the Crown' is used as a method of liberal treaty interpretation. Second, the Crown's fiduciary obligation is also depended on to justify the re-creation of a treaty. The triggering circumstances for the Crown's fiduciary obligation can only be assumed to be similar to those in *Guerin*, 'assertion of discretionary control', as this was the case that Dickson J. referred to in applying this duty. The triggering circumstances for 'the honour of the Crown' were not articulated in *Marshall*, or in the common law that *Marshall* relied on; we had to wait until 2004 for a clear articulation of this concept. Finally, the

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[119] *R v. Taylor and Williams*, (1981) 62 C.C.C. (2d) 227.
[120] *R v. George*, [1966] 3 C.C.C. 137.
[121] *Ibid* at 279.
[122] *Province of Ontario v. Dominion of Canada*, (1895), 25 S.C.R. 434.

legal consequences of this decision were liberal treaty interpretation due to the two (relevant) duties imposed on the Crown.

R. v. Delgamuukw[123]

This case concerned a dispute about Aboriginal title[124] over 58,000 square kilometers of British Columbia claimed by the Gitksan and Wet'suwet'en people. In this case Lamer C.J. arguably broadened the Crown's fiduciary duty, saying that this duty will vary with the varying circumstances of different cases. *Delgamuukw* provides a good illustration of this wider scope and the increased burden the courts placed on the Crown with this decision.

Delgamuukw called into question the justification of infringements on Aboriginal title. The court in *Delgamuukw* decided that 'Aboriginal title' included three propositions;

> First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.[125]

Within the second principle we see this case's most important contribution to Aboriginal / Crown, trust-like common law; the inclusion of necessary consultation. This second principle tells us that for the Crown's fiduciary obligation to be satisfied the group that asserts title must be consulted before any action is taken; "in the same way that the

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[123] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R 1010.
[124] Originally the appellants in *Delgamuukw* claimed ownership and jurisdiction over the 58,000 square kilometers of land but these claims were amended to title claims at the Supreme Court.
[125] *Ibid* at 166. At paragraph 168 of this case, Lamer C.J. noted that "consultation is always required" in cases on justified infringement of Aboriginal title.

Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law"[126] as seen in *Guerin*. This was the first case in which the concept of 'necessary consultation' was introduced. Although it was based on a fiduciary duty, it proved to be an important precedent for future cases as the Supreme Court reformed this concept.

It was also decided in *Delgamuukw* that the constitutionality of title infringements, under s.35, were to be considered using the *Sparrow* test, the second part of which necessarily incorporates the Crown's fiduciary obligation.

The general legal relationship to emerge from *Delgamuukw*, then, is a Crown fiduciary obligation and a Crown / Aboriginal fiduciary relationship that includes necessary consultation when determining if there is an infringement of Aboriginal title. The triggering circumstance for this relationship is the manner in which the s. 35 treaty title right is interpreted. The legal obligation that emerged is the Crown's need to satisfy the *Sparrow* test as well as to consult with Aboriginal people concerning their title.

Before we consider 'consultation and accommodation', it will be helpful to look at what the Crown's duties, emerging from its fiduciary relationships with Canadian Aboriginal peoples, had evolved into thus far. First, in 1984, *Guerin* gave common law birth to the concept of the Crown's fiduciary obligation. In 1990, *Sparrow* told Canadians that the Supreme Court would interpret s.35 Aboriginal rights in accordance with this fiduciary duty and take into consideration 'the honour of the Crown'. *Sparrow* also said that any infringement of an Aboriginal treaty right had to be justified under the second part of the '*Sparrow* test' in concurrence with the Crown's fiduciary obligation. In *Delgamuukw* in 1997 the Supreme Court reasserted that the Crown's fiduciary obligation

[126] *Ibid* at 168.

in regard to Aboriginal title claims obliged the Crown to consult Aboriginal peoples when interfering with Aboriginal title land. In 1999, the *Marshall* decision affirmed the Supreme Court's willingness to reinterpret written treaties in favour of Aboriginal peoples pursuant to the Crown's fiduciary relationship as well as the 'honour of the Crown', a general doctrine derived from *George* that governed the general relationship between 'the sovereign and the Indians'.

Although the Crown's fiduciary obligation has been historically paramount for Canadian Aboriginal rights, the trend in recent Supreme Court of Canada decisions has been to rein this concept in and make it less than the all-encompassing duty on Aboriginal / Crown relations suggested in *Sparrow*. The recent Supreme Court trend, the beginnings of which were illustrated in *Sparrow* and *Marshall*, has been to establish 'the honour of the Crown' as the general guiding relationship and to have the 'fiduciary duty' apply only to a limited set of circumstances. 'The honour of the Crown', however, had some significant changes in store in the twenty-first century as well.

'The honour of the Crown' and the 'Fiduciary Relationship'

Although the concept of 'the honour of the Crown' is not itself new, being referred to as long ago as 1895 in *Province of Ontario v Dominion of Canada*[127] [128], and briefly expounded in cases such as *Sparrow* and *Marshall*, Canada's highest court has significantly revamped the meaning of this concept in recent decisions. Originally, 'the honour of the Crown' was used as a mechanism of the courts to ensure fair dealings in

[127] *Province of Ontario v. Dominion of Canada*, (1895), 25 S.C.R. 434, at 511-12.
[128] Additional judicial articulation of the 'honour of the Crown' in its original interpretive capacity, before *Haida* came from such decisions as those delivered by Idington J. in *Ontario v. Dominion of Canada* (1909), 42 S.C.R. 1 at 103-104; LaForest J. in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 87; and Cory J. in *R v Sundown*, [1999] 1 S.C.R. 393 at 46.

whichever context it happened to be used; predominately being used in treaty interpretations. For example, in *Badger*[129]and *Marshall*[130], this phrase was used not as something that would confer a duty upon the Crown but as a principle of interpretation to be *applied* to the interpretation of a treaty. These cases were primarily concerned with the interpretation of treaties and in them the courts demanded that the Crown interpret these treaties in accord with 'the honour of the Crown'. This meant that integrity and fair dealing were expected from the Crown during the interpretation, and not that a specific positive obligation was conferred upon the Crown.

The first clear common law articulation of 'the honour of the Crown', as a duty in and of itself, came in the 2002 Supreme Court case *Wewaykum Indian Band v. Canada*[131]. This case made clear not only the differences between a fiduciary obligation and 'the honour of the Crown' but also as to when each respective concept was to apply and why, or more appropriately, why not.

In *Wewaykum*, Binnie J. said that not all situations concerning Aboriginal / Crown dealings could be assumed to be governed by the Crown's fiduciary duty (as was largely the case until this time); "this overshoots the mark."[132] Binnie J. said that since the fiduciary concept was articulated in *Guerin* there has been a desire in Aboriginal litigation to attempt to govern far too many Crown / Aboriginal relationships with this concept. The burden created by a fiduciary relationship is very high and thus it is in the interest of Canadian Aboriginal peoples to attempt to prove the Crown owes this duty in as many instances as possible. The correct application of the Crown's fiduciary duty

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[129] *R v. Badger*, [1996] 1 S.C.R. 771.
[130] *R v. Marshall*, [1999] 3 S.C.R. 456.
[131] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245.
[132] *Ibid* at 81.

however, applies to a smaller percentage of these relationships in which the Crown has 'assumed discretionary control over the lives of Aboriginal peoples in the form of economic, social, and proprietary control' of "specific Indian Interests".[133] When the Crown has taken control of a specific, cognizable Aboriginal interest, such as the reserve land in question in *Guerin* (the case that defined the Crown's 'fiduciary obligation') it owes a fiduciary duty to the Aboriginal owners of that interest. When, on the other hand, the Crown has not exercised 'discretionary control' over a specific Aboriginal interest (as the Crown did in *Guerin* when the Crown was put in charge selling Aboriginal reserve land) there is no fiduciary duty owed. This is when the principle of 'the honour of the Crown' may apply.

Haida Nation v. B.C[134] was the first case to require a positive duty from the Crown, emerging from 'the honour of the Crown'. In *Haida*, McLachlin C.J. used this term not to interpret a Crown obligation but to confer one. The *Haida* decision yielded two truths about this alternative trust-like duty owed to Aboriginal peoples by the Crown. First, "the honour of the Crown is always at stake in its dealings with Indian people."[135] Second, "the honour of the Crown gives rise to different duties in different circumstances."[136] Simply, the honour of the Crown has emerged as a principle that, although governing all Aboriginal / Crown relations, can give rise to duties in and of itself.

Although the decision in *Haida Nation* did make use of the concept of 'the honour of the Crown' and as such provided good contextualization of the concept, it was not

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[133] *Ibid* at 80 and 81, respectively.
[134] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R 511.
[135] *Ibid* at 41.
[136] *Ibid* at 18.

until November, 2006 in *Dene Tha' First Nation v. Canada (Minister of Environment)*[137] that a judge spoke directly of 'the honour of the Crown' to further clarify this concept. This case reminded us that the ultimate goal of s. 35 (1) of the *Constitution Act,* 1982, is the reconciliation of Crown and Aboriginal interests and that the achievement of this goal cannot be contingent on the existence of specific circumstances in which the Crown has asserted 'discretionary control', which would require a fiduciary duty. Since reconciliation has to be achieved, regardless of specific circumstances and the duty they confer, 'the honour of the Crown' will fill this void should a fiduciary duty not be appropriate. Phelan J. explained that 'the honour of the Crown' is extraneous to the Crown's fiduciary relationship. As such, it "does not require a specific Aboriginal interest to trigger a fiduciary relationship for it to be so engaged"[138], and will be engaged regardless. Whether engaged in its general or specific capacity, 'the honour of the Crown' is enforced by the courts to ensure the Crown's obligation to negotiate, conclude and respect Aboriginal treaties.

To further flesh out the implications of 'the honour of the Crown' let us turn to a broader analysis of *Haida* where we see that the positive duty that 'the honour of the Crown' confers is consultation and accommodation.

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[137] *Dene Tha' First Nation v. Canada (Minister of Environment)*, [2006] F.C.J. No. 1677.
[138] *Ibid* at 80.

The Emergence of 'Consultation and Accommodation'

Haida Nation v British Columbia (Project Assessment Director)[139]

This case concerned the Haida First Nation and their Aboriginal title claim to the Queen Charlotte (or Haida Gwaii) Islands, an ecologically and historically rich archipelago off the central coast of British Columbia. This area consists of two main islands and nearly 150 smaller islands. For more than 100 years the Haida people have claimed Aboriginal title to the islands and the surrounding waters while the province of British Columbia maintains legal title. The Province of British Columbia (Minister of forests) had, since the 1960s granted timber harvest licenses to forestry companies on the Queen Charlotte Islands. Such a license was the cause of this litigation. In 1961 the British Columbia ministry of forests granted a timber license to a company, which in 1994 requested this license be transferred to 'Weyerhaeuser Company Limited'. This transfer was granted by the British Columbia government despite Haida objections and certainly without their consent. The B.C government legally owns the Queen Charlotte Islands and sold the timber harvest rights to this area to a private company.[140] The Haida people, however, claimed Aboriginal title to this land, proof of which was yet to be determined.

The question for the courts, then, was whether or not the Crown owed the Haida people protection, in the form of consultation and accommodation, when dealing with land over which Aboriginal title had been asserted but not proven. At stake for the Haida people were their old growth cedar forests on which their economy and culture depended. The Haida claimed that without consultation and accommodation before formal proof of their title, they would win their fight for Aboriginal title but by the time the courts had

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[139] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R 511.
[140] *Ibid.*

conferred this title the irreplaceable old growth would have been taken, along with their economy and culture. The Crown argued that until such time the Haida could formally prove their claim the B.C government owed a duty, not to the Haida, but to the people of British Columbia and their forest management needs.

Although this case would eventually yield new a precedent concerning both 'consultation and accommodation' and 'the honour of the Crown', the trial judge saw it differently. Halfyard J. saw this as a case of a traditional 'fiduciary obligation' as discussed above, and used the 'honour of the Crown' concept in its traditional sense of interpreting a fiduciary obligation owed by the Crown. Halfyard J. concluded that "the authorities (citing precedent such as *Sparrow* and *Delgamuukw*) do establish, as a matter of law, that the federal Crown stands in a fiduciary relationship with all Aboriginal peoples of Canada, and the provincial Crown stands in a similar relationship to the Aboriginal peoples of British Columbia. [Parenthesis added]"[141] The *Prima facie* assessment[142] led Halfyard J. to conclude that the Crown owed the Haida a moral, not legal, duty to consult with the Haida, due to an interpretation of the Crown's fiduciary obligation in accord with 'the honour the Crown'. The use of this concept at trial implied that the 'honour of the Crown' is simply a moral doctrine, merely dictating how a fiduciary relationship be carried out.

When the British Columbia Appeal Court heard the Haida's case[143] Lambert J.A., relied almost exclusively on the judgment of Rowles J.A in the British Columbia Appeal

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[141] *Haida Nation v. British Columbia (minister of forests)*, [2000] B.C.J. No. 2427, at 23.
[142] A *prima facie* case is the initial finding of fact and legality at trial. See later pages for more detail surrounding this concept.
[143] *Haida Nation v. British Columbian (Minister of Forests)*, [2002] B.C.J. No. 378.

Court's judgment *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*[144], decided only weeks before this appeal. In this case Rowles J.A. got closer to the decision that would eventually emerge from the Supreme Court regarding consultation and accommodation when he decided that the Tlingit people did not have to definitively prove title before the Crown owes them a duty. Rowles J.A.'s reason for this decision (and the reason Lambert J.A relied on in the Haida appeal) was that the Crown owed the Tlingit a fiduciary obligation to consult that was not contingent on established Aboriginal rights or title established in the courts[145].

Lambert J.A said that it would be contrary to the 'guiding principle of the Crown's fiduciary obligation'[146] to regard s. 35 (1) *Constitution Act,* 1982, as requiring an arduous burden of proof before taking effect on Aboriginal title. Lambert J.A. was adamant throughout the decision that consultation has to take place before an infringement has a chance to occur and that the Crown's fiduciary obligation, as in *Sparrow* and *Delgamuukw* create a "free standing enforceable legal and equitable duty."[147] Thus, Lambert J.A decided there is a legal duty to consult prior to proof of title. He grounded the legal relationship in the Crown's fiduciary obligation, and he based much of his analysis of the duty to consult in the reasons given in *Delgamuukw*. Although this decision resembled the precedent to emerge from *Haida* with regard to consultation and accommodation, it made no contribution to the reformulation of 'the honour of the Crown'. For the evolution of the 'honour of the Crown', then, we must turn to the *Haida* decision of the Supreme Court.

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[144] *Taku River Tlingit First Nation v. Tulsequah Chief Mine*, [2002] B.C.J. No. 155.
[145] *Ibid at para 90.*
[146] *Supra* note 142 at para 37.
[147] *Ibid* at 55.

In 2004 the *Haida* case reached Canada's final court of appeal, to create definitive common law concerning consultation and accommodation prior to proof of Aboriginal title and, just as importantly, to explain why this duty arises. The issue before the Supreme Court was the same, that is, whether or not the Crown could assert control over land, based on its claim to sovereignty, in the face of an Aboriginal title claim based on prior occupation that was yet to be formally proven. The main divergence of this decision from its appellate counterpart was not in the decision but in the *ratio*. McLachlin C.J. grounded her decision that the Crown owed the *Haida* a pre-proof duty to consult not on the 'fiduciary obligation' grounded in s. 35 pursuant to *Sparrow* and *Delgamuukw*, but on the newly interpreted 'honour of the Crown', as referred to above in *Wewaykum Indian Band*. This was done in order to encourage the negotiation and formation of this fragile treaty.

As we saw in *Wewaykum*, for the Crown to owe an Aboriginal group a fiduciary duty, among other requirements, the Crown has to have exerted discretionary control over *Aboriginal* land[148]. In *Haida*, although the Crown is exercising discretionary control over the Haida Gwaii islands, in the form of unilaterally asserted sovereignty, this land was not proven to be Aboriginal land. Hence, the Supreme Court found that Aboriginal land ownership or a similar interest had not been conclusively established and therefore both criteria were not met and a fiduciary obligation should not be imposed. Although the court decided that a fiduciary duty would not be appropriate, it was clearly a situation over which 'the honour of the Crown' applied, as we can see from our analysis of *Dene Tha'*.

[148] As noted in the section dealing with *Wewaykum*, fiduciary obligations are properly imposed when 'economic, social, *or* proprietary control' is exerted by the Crown.

McLachlin C.J said that "the answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests."[149] With this, McLachlin C.J explicitly stated that the duty that requires the Crown's pre-proof consultation and accommodation is 'the honour of the Crown'. No longer only used as a reference to 'morals' or as an interpretive guide to a fiduciary obligation (as in *Sparrow* and *Marshall*), 'the honour of the Crown' has been transformed into an obligation forming duty.

The final decision in the *Haida* appeal process was that the Crown did indeed have a duty to consult the Haida people regarding the allocation of a timber license on the land over which the Haida people asserted title. This duty was found, not according to a fiduciary obligation as it was in the trial and appeal decisions, but in the 'umbrella' doctrine 'the honour of the Crown', which *Haida* introduced as a positive obligation-forming duty as well. This positive duty stemming from 'the honour of the Crown' was imposed to ensure the negotiation, and encourage the formulation, of this treaty and to set similar precedent for future treaty negotiations.

The Supreme Court justified this decision by reference to two main pieces of jurisprudence. The first was the fact that the Crown unilaterally asserted sovereignty over the land in question. Because of this, the positive duty of consultation was required to uphold Crown honour. This principle is illustrated in *Mitchell v MNR*[150] when McLachlin C.J. notes that "with this assertion [self-asserted sovereignty] arose an obligation to treat

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[149] *Ibid* at 27.
[150] *Mitchell v. Canada (Minister of Natural Revenue)*, [2001] 1 S.C.R. 911.

aboriginal peoples fairly and honourably, and to protect them from exploitation."[151] McLachlin C.J in *Haida* held that since the Crown's ownership of the land in question was based on nothing but a self-asserted claim, the 'honour of the Crown' demands recognition of Aboriginal title to the same land.[152] Crown honour, then, was used to ensure equitable negotiations and encourage the settlement of this title claim.

The honour of the Crown has been established through case law for years as a guiding principle of Crown action.[153] McLachlin C.J. decided that because the Crown unilaterally asserted sovereignty over Canadian land a positive requirement should arise from this principle to uphold the Crown's honour[154]. Hence, the evolution of 'the honour of the Crown' from an interpretive standard to a principle requiring a duty from the Crown; in this case, the duty of consultation and accommodation.

As well, the court relied upon cases such as *Sparrow, Gladstone*[155],[156], *and Nikal*[157],[158] in order to ground its decision in *Haida* on a pre-established common law

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[151] *Ibid* at 9.
[152] *Supra* note 133 at 25.
[153] As noted in previous pages of this chapter dealing with *Badger* and *Marshall.*
[154] *Supra* note 133.
[155] *R. v. Gladstone*, [1996] 2 S.C.R. 723.
[156] In *Gladstone* the appellant was claimed to have been selling herring spawn on kelp. He took the position that first, what he was doing did not constitute selling; second, if what he did constituted selling the selling of herring spawn on kelp was a s. 35(1) right. Hence, this case was used in *Haida* because the court had to decided as to the legitimacy of a s.35 (1) right in order to justify an offence that was not yet proven to have taken place. The court decided that Gladstone did 'sell' the herring spawn on kelp but this was a right protected by s.35 (1).
[157] *R. v. Nikal*, [1996] 1 S.C.R. 1013.
[158] In *Nikal* the appellant was fishing for salmon on his reserve without a licence. He took the position that the licensing scheme infringed his s.35 (1) right to fish. He also contended that since the point in the river in question is surrounded by reserve land it is therefore only subject to reserve law. The court decided that although the river was not part of the reserve, and therefore the appellant could be subject to licensing restrictions, the restrictions in these circumstances were not justified under the *Sparrow* test. "The government adduced no evidence to justify the conditions of the licence and accordingly did not meet its onus to do so." (Intro, para 12) In *Nikal*, as in *Haida*, the Aboriginal party sought to prove the existence of a right at the same trial as they sought to prove a limitation on that right was not justified. *Nikal* asked the questions, 'Was the limitation on Nikal's s.35(1) right justified?' at the same time as 'should the licensing system apply to Nikal?'; just as *Haida* asked 'Does the Crown owe a duty to consultation?' while asking 'Do the Haida have title?'

practice. In these cases there was a question of both the existence of an Aboriginal right and the legitimacy of a limitation imposed on that right. Although in two of these three cases (*Sparrow* and *Gladstone*) the decision regarding the justification of infringement was sent back to the trial judge to be re-heard, the Supreme Court had decided nonetheless that there was a decision to be made regarding the justification of an infringement on a right when at the same trial it decided on the existence of that right. "This [citing of precedent] negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification."[159] To further articulate this principle, Phelan J. in *Dene Tha'* noted that "a specific infringement of an Aboriginal right is no longer necessary for the Government's duty to consult to be engaged."[160]

The court said in *Haida* that when the Crown has knowledge "real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it"[161] the duty to consultation arises. The decision in *Haida* went on to reiterate that when the duty to accommodate may arise. As in *Delgamuukw* "a dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties."[162]

To summarize, McLachlin C.J., and the majority of the Supreme Court in *Haida*, said that the general legal relationship to emerge from this case was the newly formulated 'honour of the Crown'. The triggering circumstance for this duty was the Crown's unilateral assertion of sovereignty over Canadian land. The legal consequences of this

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[159] *Supra* 134 at 34.
[160] *Supra* note 136 at 80.
[161] *Supra* note 134 at 35.
[162] *Supra* note 12 at 37.

decision were that the Crown had to consult and accommodate to such an extent as to uphold the Crown's honour prior to trial. This legal duty arises *when* the Crown suspects a potential infringement (real or constructive) on Aboriginal title *because* nothing else would uphold the Crown's honour or encourage negotiations and settlement of treaty claims.

Although secondary, another important precedent from this case related to whether the duty to consult could apply to the third party interest to whom the Crown sold the timber license, Weyerhaeuser. The reason McLachlin C.J. stated that the Crown owed the Haida people a duty to consult before title to the land was proven was that the Crown's actions had to be consistent with the always present 'honour of the Crown'. The positive duty to follow, consultation and accommodation, was imposed because the Crown unilaterally asserted sovereignty and will therefore be held to a higher level of responsibility than it otherwise would be. This higher level obligation simply cannot be transferred to a third party who did not set in motion the triggering circumstance. McLachlin C.J said that although the Crown may transfer land to third parties, 'the honour of the Crown' owed to the Aboriginal peoples by the Crown cannot be transferred[163].

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)[164]

Although *Taku River* followed the reasoning in *Haida Nation*, and was therefore not as significant a precedent as its predecessor, it helped clarify where consultation and accommodation would apply. As in *Haida*, in *Taku River* McLachlin C.J said that the

[163] *Supra* 134 at 56.
[164] *Taku River Tlingit First Nation v. British Columbia (Project assessment director)*, [2004] 3 S.C.R. 550.

honour of the Crown is enshrined in s.35 (1) *Constitution Act,* 1982 and is a principle founded in the Crown's unilateral assertion of sovereignty in Canada. This case did illustrate the practical lengths the Crown had to go to in order to satisfy consultation and accommodation. Another major contribution of this case was the clear articulation of what the 'scale of consultation', used in *Delgamuukw* and *Haida*, meant and how it was to be used.

This case concerned the logistics of a reopening mine in Northern British Columbia. In order to access this mine the mining company proposed a road that would run near a section of the Taku River Tlingit First Nation reserve (hereafter TRTFN). The TRTFN objected to the construction of the road because it would disturb a section of their traditional hunting grounds.[165] The TRTFN was party to a three and half year environmental assessment of the mine, road and surrounding area engaged in by the mining company, the ultimate result of which did not satisfy the TRTFN.

There was little question that the Crown owed the TRTFN people a duty to act honourably. As in *Haida*, the Crown had unilaterally asserted sovereignty over the land which it was proposing to use for the road. The Crown's duty to consult, then, was engaged by the fact that there was a *prima facie* possibility of interference with Aboriginal hunting grounds. The next question was how much consultation did the Crown have to provide the TRTFN in order to uphold their honour, that is, where did this case fall on the 'spectrum of consultation'?

[165] Hunting rights are of the utmost importance because when many treaties, notably the enormous Treaty 8 which was concluded in 1899, were agreed upon they were done so under the understanding that Aboriginals would continue to enjoy hunting, fishing, and harvesting rights from the land which they were surrendering.

As affirmed in *Delgamuukw* and reiterated in *Haida*, the Court said "the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[166] Depending, then, on the strength of the claimants' *prima facie* case, the situation could attract a mere duty of notice or, in cases where there was a greater potential for interference with Aboriginal rights or title, it could require full fledged accommodation of Aboriginal interests.

The *prima facie* case at the trial level yielded the conclusion that "the Tlingits emphasized their reliance on their system of land use to support their domestic economy, and their social and cultural life. That reliance was recognized by all of the experts who prepared reports for the environmental assessment."[167] In light of this, McLachlin C.J. determined that the level of the potential infringement of road drew more than mere consultation and would require accommodation on the part of the Crown.

Although the *prima facie* case, combined with the positive duty of the honour of the Crown, held the Crown to a heightened position on the scale of consultation, the numerous good faith meetings and thorough environmental assessment completed by the Crown satisfied this burden[168]. The decision in *Taku River* then, yielded an important illustration of how to satisfy the honour of the Crown by meeting the required place on the scale of consultation. Although the courts use 'the honour of the Crown' to oblige the Crown to negotiate and settle treaty claims, these negotiations are conducted with equity in mind; following, there are inherent limits on the Crown's duty to consult and accommodate.

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[166] *Supra* note 134 at para 29.
[167] *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, [2000] B.C.J. No. 1301 at 70.
[168] *Supra* note 162 at 47.

Mikisew Cree First Nation v. Canada (Minister of Natural Heritage)[169]

This case involved Canada's second largest geographical treaty with Canadian Aboriginal peoples, Treaty 8, which encompasses 840,000 square kilometers and encompasses land in Alberta, British Columbia, Saskatchewan, and the North West Territories. In 2000 the Federal government approved a winter road running through Wood Buffalo National park and the Mikisew reserve without consultation with the Mikisew people. When the Mikisew objected the government altered the plans for the road to skirt the edge of the Mikisew reserve, again, without Mikisew consultation. Treaty 8 surrendered land occupied by Aboriginal peoples in exchange for reservation land as well as the Aboriginal treaty right

> to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[170]

The Mikisew claimed that this road interfered with hunting and fishing rights as guaranteed in Treaty 8 as well as their traditional lifestyle. The Crown relied on the same treaty in that it allows for, as noted above, the 'occasional taking up of land'.

At issue in the Federal Court Division was first, whether or not the Mikisew had the right to hunt, fish, and trap in Wood Buffalo National Park (hereafter WBNP); second, if these rights did exist, did the winter road on the outskirts of the Mikisew's reserve constitute an infringement on these rights; third, if there was an infringement on

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[169] *Mikisew First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.
[170] Canada, *Treaty 8* (January 8th, 2007) Online: http://www.ainc-inac.gc.ca/pr/trts/trty8/trty_e.html.

these rights was that infringement justified under the *Sparrow* test? Hansen J. decided that the Mikisew did have hunting, fishing and trapping rights in WBNP, these rights stood to be infringed by the proposed road, and the infringement of these rights was not justified. Hansen J. focused on the fiduciary duty of the Crown and on how inadequate consultation resulted in a failure to satisfy this duty. Because the Crown's fiduciary duty was not satisfied, the infringement on the Mikisew's hunting, fishing, and trapping rights could not be justified.[171] This case was heard in the Trial Division in 2001, before *Wewaykum, Haida,* or *Taku River*, which explains the court's reliance on the Crown's 'fiduciary obligation' in a context where this concept is now outdated.

Perhaps because the appeal of this case was heard in 2004, well after *Wewaykum* said that the Crown's fiduciary duty is not absolute, explains why the appellate judge, Rothstein J.A., focused instead on the Crown's submission that the road constituted a 'taking up' of land pursuant to the above mentioned text of Treaty 8. He concluded that since Treaty 8 provided for continued Aboriginal hunting, fishing and trapping rights subject to the Crown's 'taking up' of land and because the land used for the road constituted a 'taking up' of land, these rights ceased to exist.[172] Rothstein J.A. said that although Aboriginal treaties are supposed to be construed in favour of the Aboriginal litigants, both parties understood Treaty 8 to not allow for unlimited hunting, fishing and trapping rights but rather be subject to the occasional use of this 'taking up' provision. Rothstein J.A. grounded this decision in *Badger* (which also concerned Treaty 8), where two of the three defendants were hunting on land that was being 'visibly used' and not allowed under the Treaty. Rothstein J.A. contended that this case is of the same nature in

[171] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2002] 1 C.N.L.R. 169, at 163.
[172] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (F.C.A.)*, [2004] 3 F.C.R. 436, at 19.

that the defendants wish to exercise rights on land that was visibly being used.[173] Accordingly, Rothstein J.A. concluded that since there was no infringement on the Mikisew's Treaty 8 rights, the trial need not proceed to a *Sparrow* analysis or, for that matter, consider the lack of consultation by the Crown[174].

Likely, the difference between the appellate decision and the Supreme Court decision in *Mikisew* can also be accounted for with the respective dates of the decisions. That is, the appellate judgment did not have the benefit of *Haida* and *Taku River*, whereas the Supreme Court decision relied heavily on the precedent from these cases. Thus accounting for the massive difference in weight that 'the honour of the Crown' and the duty of the Crown to consult and accommodate received in these two decisions.

Binnie J. rejected the trial judge's use of *Halfway River First Nation*[175] to show that any 'taking up' of land constitutes a *prima facie* infringement on Aboriginal rights, showing that he agreed in this respect with Rothstein J.A. that the 'taking up' provision contained in Treaty 8 did allow for Crown acquisition of land.[176] Binnie J. also opposed Rothstein J.A.'s contention that land could be 'taken up' without consultation with the Mikisew people. Binnie J. concluded that although land can be 'taken up', it must be done so in accord with 'the honour of the Crown', pursuant to *Haida Nation,* via *Marshall* (liberal treaty interpretation) and *Badger* (no appearance of sharp dealings).[177]

As we saw in *Haida* and *Taku River*, once the Supreme Court requires 'the honour of the Crown', a *prima facie* case will lead the court to decide on an appropriate position on the 'scale of consultation'. Because Binnie J. agreed that the 'taking up'

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[173] *Ibid* at 22.
[174] *Ibid* at 23.
[175] *Halfway River v. British Columbia (Minister of Forests),* [1999] B.C.J 1880.
[176] *Supra* note 167 at 31.
[177] *Ibid* at 33.

clause in Treaty 8 was legitimate, but was subject to the honour of the Crown (as established as both a general duty and specific, positive duty on the Crown in *Haida* and *Taku River*), the only question left for Binnie J. was whether or not the Crown consulted with the Mikisew during this process enough to satisfy the honour of the Crown and hence to complete the 'taking up' process legitimately.

Binnie J. cited *Delgamuukw* and *Haida,* as support for the 'spectrum of consultation'. He concluded that the situation here required a lower end duty of consultation on this spectrum. He noted that this case involved the building of a 'minor winter road on *surrendered* land where Aboriginal rights are specifically subject to 'taking up' provisions'.[178] *Delgamuukw* suggested that this low end burden was a mere "duty to discuss important decisions".[179] In this case, however, the Crown failed to have these good faith discussions. For this reason Binnie J. found that this case's low place on the spectrum of consultation was not satisfied, the honour of the Crown was not restored through the consultation process, and therefore the winter road project should be halted. Again, 'the honour of the Crown', and the positive duty of consultation and accommodation that follows, was used to ensure the Crown upheld its obligation to negotiate and conclude this treaty dispute.

[178] *Supra* note 167 at 64.
[179] *Supra* note 12 at 168.

Where Does Consultation and Accommodation Stand?

The final pages of this chapter will briefly reiterate the conclusions that have been drawn thus far regarding consultation and accommodation and its ancillary components.

The Fiduciary Obligation of the Crown to Canadian Aboriginal Peoples

This is a concept that, after its origins in *Guerin*, in 1984, was relied on by Canadian Aboriginal litigants as a kind of 'catch-all' obligation on the Crown[180]. Dickson C.J conferred the generality of this duty in *Sparrow*, when he said "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples."[181] Both lower courts (trial and appellate judges) in *Haida Nation* relied on this concept to require a duty to consult and accommodate. It was not until *Haida* reached the Supreme Court that this concept was discarded as justification for the duty to consult and accommodate, being replaced by 'the honour of the Crown'. The decision relied on to make this change was the 2002 Supreme Court *Wewaykum* decision, in which Binnie J. said the test for a fiduciary duty is to ask if there is a particular obligation or interest that is the subject matter of the particular dispute and whether or not "the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation."[182] If the Crown did not exercise this control, there can be no fiduciary obligation.

'The Honour of the Crown'

Historically this has been an instrument of interpretation for the courts. *Badger* and *Marshall* were two of the most illustrative cases of this concept. In these cases 'the

[180] This is articulated by Binnie J. in *Wewaykum, supra 131 at para 80.*
[181] *Supra* note 11 at 59.
[182] *Supra* note 130 at 83.

honour of the Crown' was described as 'an approach to treaty making'[183], and it was explained that 'when interpreting Indian treaties the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned.'[184]

The 2004 Supreme Court case that defined a new of consultation and accommodation duty was *Haida Nation*. In this decision McLachlin C.J. did two things with 'the honour of the Crown'. First, she described it as a duty which in some circumstances gives rise to other duties, as where the Crown's assertion of 'discretionary control' would give rise to the fiduciary duty. In saying this McLachlin C.J. replaced the broad role of the fiduciary obligation, as articulated in *Sparrow*, with a much broader conception of 'the honour of the Crown'. This duty, then, is an umbrella duty under which other duties operate. Second, she turned 'the honour of the Crown' into a principle that required a positive duty of the Crown. This was no longer only a blanket principle that would be used to govern Crown / Aboriginal relationships but a positive duty that would give rise to specific legal obligations, such as consultation and accommodation. McLachlin C.J. said that because the Crown asserted unilateral sovereignty over Canadian land, a positive duty must stem from 'the honour of the Crown' to uphold the Crown's honour[185]. Since then, *Taku River* and *Mikisew Cree*, have used the 'honour of the Crown' to require consultation and accommodation from the Crown in various capacities.

One can see commonality in these different applications of this concept. This commonality is the Court's desire to increase Crown accountability with regard to Aboriginal treaties. That is, consultation and accommodation is being used to ensure that

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[183] *Supra* note 111 at 14.
[184] *Supra* note 114 at 58.
[185] *Supra* note 134 at 32.

the Crown upholds its obligation to negotiate, conclude and respect Aboriginal treaties pursuant to 'the honour of the Crown' and the principle of reconciliation enshrined in s.35.

Prima Facie Case

McLachlin C.J. tells us in *Haida* that when the Crown has knowledge "real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it", 'the honour of the Crown' is engaged which necessarily brings with it the Crown's duty to consult. Hence, the importance of the *prima facie* case; all that claimants must show to begin the process of necessary consultation is a convincing argument about the *possibility* of an infringement. A *prima facie* case can also determine, as in *Taku River*, the case's position on the 'spectrum of consultation' and the amount of consultation the Crown must provide to meet the relevant standard on the 'spectrum of consultation' in accordance with 'good faith'.

Spectrum of Consultation

Although not termed the 'spectrum of consultation', this concept was introduced in *Delgamuukw*, when Lamer C.J. talked about different levels of consultation that would be engaged depending on different circumstances. The term itself was not used in the Supreme Court until seventeen years later in *Haida Nation*, but the principle has remained unchanged. The degree and nature of the possible infringement according to the *prima facie* case determines where the case falls on this 'spectrum of consultation'. This, in turn, is the level of consultation (or accommodation) the Crown must provide in order

to satisfy the positive duty of consultation created by the honour of the Crown. The Court said in *Haida* that although a degree of deference was to be given to the "finding of fact of the initial adjudicator"[186] the ultimate standard in assessing a case's position on the spectrum of consultation was "likely to be reasonableness."[187]

How Consultation and Accommodation Affect the Interim Protection of Claimed (but not proven) Title Land

The first, and presumably foremost, reason for pre-proof consultation and accommodation is the protection and conservation of land which is involved in an Aboriginal title claim but has yet to be proven. This goal of the courts is illustrated in *Haida*, with the Court's protection of the old growth forests on the Haida Gwaii islands from being logged until such time as the Haida's title claim has been settled. The Court was not necessarily saying that the Haida would win their claim, only that there is enough *prima facie* evidence to warrant the protection of the contested land in the interim.

How 'consultation and accommodation' affects 'taking up' provisions in treaties

When a provision in a treaty allows for the Crown to 'take up' land (as that contained in the massive Treaty 8), *Mikisew Cree*, shows that consultation and accommodation demand a process must be followed. First, the land in question has to be a proposed 'taking up' in accord with 'the honour of the Crown', as with any dealing between the Crown and Aboriginal peoples. In order to satisfy this first criteria a *prima facie* assessment must be done, the case must be assigned an according place on the 'spectrum

[186] *Supra* note 134 at 61.
[187] *Ibid.*

of consultation', and the necessary consultation and accommodation must be provided in order to uphold 'the honour of the Crown'. Once this process is completed the Crown can move to a *Sparrow* justification test of any infringements the 'taking up' creates on the Aboriginal peoples concerned and further, to the question of the justification of this infringement.

Protection of Aboriginal Rights

This is an issue yet to be tackled by the Supreme Court although, this text will argue, consultation and accommodation could be appropriately applied to Aboriginal rights other than those directly concerning Aboriginal land claim disputes. Although *Mikisew Cree* dealt with Aboriginal treaty rights, it did so in a capacity necessarily and intrinsically tied to a land dispute. That is, the Mikisew in this case were not making a claim for Aboriginal rights at large (in the *Sparrow* sense) but instead, to rights contingent on specific land (the land surrendered in Treaty 8); a different issue. Although the Supreme Court has only applied consultation and accommodation to land-based claims, the next chapter will contend that general rights disputes are among the legitimate areas for the expansion of this duty.

How Consultation and accommodation affect Government/ Third Party relations

Legal certainty is one of the main factors that allows for a successful capitalist business enterprise. Until the Supreme Court decision in *Haida Nation* this certainty was lacking with regard to third parties that dealt with the Canadian Crown. The final appeal in *Haida Nation* however, made it clear that the Crown's duty to consult and accommodate cannot

be delegated to the third party to whom the Crown transfers the land in question. The reason for this follows the reason that the Crown *does* owe Canadian Aboriginal peoples this duty: the honour of the Crown. Because the Crown asserted sovereignty in a unilateral manner a positive duty must ensue to maintain the Crown's honour. Since no relation between a third party and Canadian Aboriginal peoples began with this unilateral assertion of sovereignty there is no positive duty required to uphold their honour. Hence, pursuant to *Haida*, third parties cannot be held liable for failing to discharge the Crown's duty to accommodate even if the land in question is in the current possession of the third party.[188]

Consultation and Accommodation's Effects on the Interpretation of Treaty Rights

Consultation and accommodation, and the terms and obligations that arise from it, have the potential to not only move many Aboriginal and treaty rights disputes from litigation to negotiation but to vastly improve the negotiation process itself. How consultation and accommodation, as a judicially imposed tool to encourage and improve negotiations, can re-shape Crown / Aboriginal dispute resolution, is the focus of the next chapter.

[188] *Supra* note 134 at 52.

Chapter IV The Judiciary's Role

It was decided at the end of chapter two that the most constructive and promising method for Crown / Aboriginal dispute resolution was one that supported compromise and a mean between extremes. Canada's highest court has long held a similar position, articulating in numerous decisions its desire to see Crown / Aboriginal disputes move from the courts to non-judicial forums while considering common law. The aim of this chapter is twofold. First, it will show that the newly introduced common law concept of consultation and accommodation will likely be used by the courts not only to encourage the negotiation process in Crown / Aboriginal disputes, but also improve the speed, feasibility, and effectiveness of the negotiation process. Second, the chapter will attempt to show that the scope of the consultation and accommodation process can and should be broadened beyond Aboriginal title and land-based claims to other kinds of Aboriginal / Crown s. 35 treaty and rights disputes which have traditionally been litigated. The traditionally held view[189] that litigation and negotiations are two entirely separate entities will be questioned. It will be suggested that litigation can itself ultimately promote and provide guidelines to improve the efficiency and effectiveness of negotiations.

These goals will be addressed in three sections. The first section will explain how the courts will likely go about the encouragement of negotiations with consultation and accommodation. The focus of this section will be on the court's role as a 'pre-emptive' actor in the Crown / Aboriginal dispute resolution process. Since the Canadian judiciary seeks to have Crown / Aboriginal disputes resolved before they reach litigation, the

[189] Shin Imai, "Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes", (2003) 41 Osgoode Hall L.J. 587.

courts must exert influence on the parties extraneous to the courts. The courts working in this 'pre-emptive' capacity is a phenomenon this chapter will term 'judicial governance'.

The second section of this chapter will examine individual aspects of consultation and accommodation that have the potential to encourage and improve the Aboriginal / Crown negotiation process. Current Crown / Aboriginal negotiations are criticized for being too slow, costly, and ineffective[190] [191]. This section will examine how specific aspects of consultation and accommodation have the potential to make the negotiation process faster, cheaper, easier, and more effective. Given that the courts are encouraging negotiations, they have to accept the role of establishing standards and frameworks from which negotiations can proceed.

The third section of this chapter will contain some suggestions for broadening of the area in which consultation and accommodation are used. The need to encourage negotiations is not limited to Aboriginal title and land claim settlements, and this section will propose that the new *Haida Nation* duty should not be limited to this realm either. Mandatory pre-proof consultation has the potential to enhance many aspects of the Aboriginal / Crown dispute settlement process.

Consultation and Accommodation and 'Judicial Governance'

It has been argued in previous chapters that negotiated, compromise - oriented settlements are the superior method for dealing with Crown / Aboriginal disputes. If, indeed, they are, and they are also supported by the Supreme Court, why do so many Aboriginal / Crown disputes continue to be litigated? One reason may be that until the

[190] David W Elliott, "Delgamuukw: Back to Court?" (1998) 26 Man. L. J.1 97, at footnote #4.
[191] *Supra* note 186.

introduction of consultation and accommodation the courts have not taken enough positive action to encourage this alternative. Although the Supreme Court has clarified some common law terms, such as what constitutes 'Aboriginal title' in *Delgamuukw* (which could simplify negotiations), it did not set a broad precedent encouraging negotiations until *Haida Nation*, and the development of consultation and accommodation. Once this concept has been used by the courts enough to establish clear precedent on its various aspects, the courts, via this concept, are likely to emerge as an active proponent of negotiations.

Thus far this text has only spoken of consultation and accommodation in its current and immediate capacity. Until now the Supreme Court of Canada has used the concept of consultation and accommodation to accomplish several practical, immediate objectives: to uphold 'the honour of the Crown' and to protect land-based resources thereon, to which Aboriginal Nations have legitimate claim. This section will illustrate how the Supreme Court is using consultation and accommodation to further a broader objective: encouraging the negotiation of Aboriginal / Crown disputes.

Land that is subject to Crown / Aboriginal land disputes is often vulnerable, as seen in cases such as *Haida*[192]. Because of this, the Supreme Court has taken action before Aboriginal title is definitively proven, in order to preserve the integrity of the land and its resources. Although the justification for this pre-proof consultation and accommodation is to uphold the honour of the Crown - by way of giving Canadian Aboriginal land claims the 'benefit the doubt' - this casts the courts into an atypical role. Generally, courts are reactive. A party that has been wronged, or can prove it will be wronged, comes before the court for remedy. In this case, however, the courts are asked

[192] *Supra* note 134.

to play a proactive role. Before a wrong has been proven, the courts are asked to step in and prescribe guidelines for future conduct.

As seen in the previous chapter, when a *prima facie* case of a 'real or constructive infringement' is made, the Crown must initiate consultation and usually negotiations[193] with the Aboriginal party claiming title. In requiring consultation and accommodation prior to definitive proof of an infringement, the courts are essentially requiring the Crown to initiate good faith negotiations in situations which, before this precedent, would likely not have merited good faith negotiations on the part of the Crown. Thus, cases that would have formerly gone to litigation will now enter negotiations. If the Crown does not concede this and forces litigation instead of satisfying its duty to consult, prior to proof, it is bound for failure at trial.

To illustrate this contention, consider how the Crown's lack of consultation prior to proof affected the outcome of *Mikisew Cree*[194]. Although Binnie J. observed in this case, that the Crown's duty was on the lower end of the 'spectrum', the fact that the Crown engaged in no consultation at all prior to the trial led to the Crown's loss in Court. This decision suggests that any Crown land proposal that is met with reasonable contestation by an Aboriginal party will necessarily fail in litigation should the Crown have failed to fulfill its obligations on the spectrum of consultation prior to the litigation; regardless of the extent of those obligations. Hence, by requiring pre-proof consultation and accommodation the courts essentially force the Crown to negotiate before it litigates. Since the Crown knows that its case will necessarily fail should it fail to consult, it will

[193] Although consultation requirements do not always or necessarily require negotiations, in practice it will be difficult to engage in meaningful 'consultation' without at least some give and take on both sides – in other words, negotiations, occouring.
[194] *Supra* note 168.

be encouraged to discuss proposed initiatives with Aboriginal claimants before it resorts to unilateral action or litigation. The Crown must conduct these court-necessitated exchanges in *good faith* because 'good faith' is a necessary component of consultation, regardless of a case's position on the spectrum of consultation. If even a fraction, and likely many more, of Crown / Aboriginal disputes are solved in this court-necessitated pre-proof negotiation process, the Supreme Court's policy of 'judicial governance' to encourage negotiations will have been a success.

The term 'governance' is often understood to mean the way by which an entity exerts an amount of guidance over the direction in which society proceeds. Not the direct effects of an institution on society, such as the actions of police, but the way by which an institution shapes society, such as the doctrine of the church. When this text uses the term 'judicial governance' it is used to describe just this; the way by which the judiciary controls social relations, not by direct action but by indirect coercive force resulting from parties knowledge of judicial precedent. 'Judicial governance', then, forces the Crown to negotiate with Aboriginal parties in good faith and provides general guidelines for these negotiations, as the first step of a Aboriginal title or rights claim dispute, often before the judiciary is even aware that particular dispute is happening.

Consultation and accommodation, then, has the potential to facilitate two main objectives beyond those mentioned in earlier pages. First, in accord with the often-voiced desire of the Supreme Court, the 'judicial governance' of the Supreme Court is likely to increasingly move Crown / Aboriginal disputes from litigation to negotiations. Secondly, not only can consultation and accommodation move disputes from litigation to

negotiations, but the principles behind consultation and accommodation have the potential to greatly reduce the shortcomings of the negotiation process itself.

Consultation and Accommodation and Improvement to Crown / Aboriginal Negotiations

Having suggested that the consultation and accommodation process has the potential to encourage negotiations, by way of judicial governance, we can turn to how this process can strengthen the negotiation process itself.

The court's encouragement of negotiations will no doubt be seen as a victory for the Supreme Court. However, as noted above[195], the negotiation process is far from perfect, and has been criticized for being slow, expensive, and inefficient. For this reason, it is not enough that judicial governance, imposed by the Supreme Court, is taking an active role in facilitating negotiations between Aboriginal peoples and the Crown. In addition to this encouragement, it must continue to develop the various elements of the consultation and accommodation process in order to provide a coherent and flexible framework from which independent negotiations can proceed. At the end of the previous chapter the various principles that operate within consultation and accommodation were explained. The section below will further explore the common law principles discussed at the end of chapter three, and illustrate how these principles can be used to improve the negotiation process.

[195] *Supra* note 188.

The Crown's Fiduciary Obligation'

The most important thing to remember about the Crown's fiduciary obligation when entering into negotiations that have been facilitated by the Crown's duty to consult and accommodate, is that it is not a factor. A fiduciary obligation is a very high burden, imposed by the courts when, and only when, the Crown has 'assumed discretionary control'[196], in a significant capacity, over the lives of Aboriginal peoples. When the courts mandate Crown consultation and accommodation they are doing so to uphold 'the honour of the Crown', not a fiduciary relationship.

'The honour of the Crown'

Parties to a negotiation have to remember two things about 'the honour of the Crown' in order to properly apply this concept and quicken negotiations. First, because the Crown owes this duty as a result of its unilateral assertion of sovereignty, consultation and accommodation must be engaged as soon as an Aboriginal party can show a 'real or constructive' infringement. That is, this concept demands negotiations prior to a formal trial. Secondly, all Crown actions are governed by this principle. In its original interpretive capacity, 'the honour of the Crown' demanded 'no sharp dealings' with Canadian Aboriginal peoples. Although the application of this concept has expanded, its original motivation remains. In its current application to negotiations, Crown honour demands 'good faith' and the recognition of the principle of reconciliation enshrined in s.35 (1) of the *Constitution Act*, 1982. In order for the consultation process to fulfill its 'good faith' requirement on the 'spectrum of consultation', these principles must be

[196] *Supra* note 131 at 79- 80.

upheld in all Aboriginal / Crown dealings. This is an important concept to keep in mind when we examine 'the spectrum of consultation'.

'*Prima facie* cases'

This concept, in my estimation, is both the most potentially revolutionary concept in the consultation and accommodation process, as well as the one that holds the most potential for the improvement of Crown /Aboriginal negotiations. As noted above, the negotiation process has been criticized for various reasons; this concept has the potential to extensively address nearly all of these criticisms.

This Latin term, literally translated, means "on first appearance"[197] and is generally used in law to determine if a case has enough merit to warrant a trial. If the plaintiffs fail to show that their case has '*prima facie*' merit, the judge can dismiss the case due to lack of initial evidence.

In the consultation process, however, this term takes on a different role. Akin to a typical trial, a *prima facie* case is the starting point for the consultation and accommodation process. In the latter, however, the *prima facie* case is relied upon as the burden of proof that triggers the consultation and accommodation process. The courts' reliance on a *prima facie* case as the only necessary evidence means that the courts no longer require definitive proof of an infringement in order to proceed to a remedy.

It was argued by the Crown in *Haida* that depending on a mere *prima facie* case to determine eligibility for consultation and accommodation was 'impractical and unfair'

[197] Andrews, E.A. *A Latin dictionary founded on Andrews' edition of Freund's Latin Dictionary* (Claredon Press, 1951).

because it amounts to giving a remedy prior to proof of an infringement[198]. The Supreme Court in *Haida* justified this role of the *prima facie* case in two ways. First, the Court explained that it was necessary to uphold the principles of 'fair dealing and reconciliation', an ongoing goal that is guaranteed by s. 35 of the *Constitution Act*, 1982. For this reason, they explained, the *prima facie* case cannot be relegated to post-proof forums[199]. Second, the Court said, "addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim."[200] In *Haida* McLachlin C.J. warned that relying on anything but a *prima facie* case would result in the trial process taking too long to offer the Haida's land practical protection[201]. Expediency is a necessary goal.

This articulation by the Supreme Court is likely to speed negotiations as well as to reduce the cost associated with definitively proving the merit of a claim. In post-*Haida* negotiations, then, there is to be no trial at which mountains of evidence are forwarded, expert witnesses are called, or land surveys determine boundaries. The principles of 'good faith' and fair dealing and reconciliation, enshrined in s.35 of the *Constitution Act*, 1982, will dictate that the facts are those forwarded in the *prima facie* case.

The weight that the Supreme Court has given to *prima facie* cases has significant potential to improve Crown / Aboriginal negotiations. In many cases, save permanent settlement and territory disputes which would at times necessitate negotiations over territory and rights, negotiations will be able to avoid the long process of definitively proving occupation or use. In many cases, 'good faith' stemming from 'the honour of the

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[198] *Supra* note 134 at 30.
[199] *Ibid* at 33.
[200] *Ibid* at 47.
[201] *Ibid* at 33.

Crown' and 'the goal of reconciliation enshrined in s.35', negotiations will begin from the Crown's acceptance of the *prima facie* case presented to them.

The 'Spectrum of Consultation'

The Supreme Court has told us that cases are to be positioned on this 'spectrum' according to the seriousness of the possible infringement according to the *prima facie* case. Some will no doubt criticize the potential of consultation and accommodation to avoid litigation on this point. That is, if a case's position on this 'spectrum' is established solely by the circumstances of the case (the *prima facie* case), how will the negotiating parties know precisely how much consultation (or accommodation) will be required without going to court? The Crown in *Haida* pointed to this problem when it said, "if the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how are the parties to agree which level is appropriate in the face of contested claims and rights?"[202]

Although in *Haida*, McLachlin C.J conceded the difficulty inherent in this situation, she did not think it too much to overcome. "Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty."[203] McLachlin C.J. is suggesting that answers will emerge as more precedent regarding a duty's place on the spectrum is set and this concept matures in the courts. As more cases concerning a case's place on the

[202] *Ibid* at 30.
[203] *Ibid* at 37.

spectrum are litigated in the coming months and years, precedent will develop and will be applied in negotiations.

Although McLachlin C.J.'s suggestion is likely true, this study will contend that the Supreme Court has already posed a more immediate solution. In *Haida*, when McLachlin C.J. concluded the section entitled 'when the duty to consult and accommodate arises'[204], she said "precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, *it must be consistent with the honour of the Crown.* [emphasis added]"[205] Several presumptions can be drawn from this statement when combined with recent precedent on the subject. Before these presumptions are examined let us recall that 'good faith' necessarily coincides with 'Crown honour'.

After *Haida* established mandatory pre-proof consultation the possibility for Crown 'lip service', as the satisfaction of this duty, emerged. The danger being that the Crown could enter consultation with no intent to settle but only to satisfy their duty to consult, so this duty is satisfied should the case proceed to litigation. *Delgamuukw*, the case that introduced 'the spectrum of consultation' (although at the time not 'termed' this), told us that even at the lowest end of the spectrum, the honour of the Crown requires 'good faith'.[206] By defining this aspect of the spectrum the court made clear that 'lip service' negotiations would not fulfill the burden of consultation, regardless of position on the spectrum. *Mikisew Cree* provides us with evidence of this claim.

As we know, the Crown's duty in this case was found to deserve a position on the spectrum of consultation as a result of a *prima facie* case. The Crown tried to alleviate

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[204] *Ibid* at 26.
[205] *Ibid* at 38.
[206] *Supra* note 13 at 168.

this burden with 'public open houses'. The Supreme Court in *Mikisew* decided that these 'open houses' were not sufficient to uphold Crown honour or the goal of reconciliation. The court in this case said that the Crown failed to discharge its duty to substantially address the concerns of the Aboriginal peoples[207] and thereby failed to satisfy the 'good faith' criteria inherent in *any* position on the 'spectrum of consultation'. Thus, judicial governance, emerging from *Haida* and illustrated in the Crown's loss in *Mikisew Cree* (due to its lack of pre-trial consultation), dictates that the Crown must negotiate in 'good faith' prior to litigation. Conversely, *Taku River* illustrated that if the Crown does undertake 'good faith' efforts to negotiate and accommodate, and these efforts are not considered adequate by the Aboriginal claimant, it will be the Aboriginal claimant that will fail at trial.

So, in requiring that the honour of the Crown be upheld (at a minimum) when assessing the strength of a claim's position on the spectrum of consultation, in combination with recent precedent, the Supreme Court (and corresponding judicial governance), requires 'good faith' efforts at consultation and accommodation prior to litigation by the Crown and the 'good faith' acceptance of these efforts by the Aboriginal claimant. Hence, a case's position on the 'spectrum' will be determined by judicial governance's requirement of 'good faith' by both parties. Although circumstances will vary from case to case, the 'good faith' requirement will remain constant. The judicial governance associated with the 'good faith' requirement will call for the Crown to err on the side of caution in conducting 'good faith' assessments of a case's place on the spectrum and likewise, call for Aboriginal claimants to accept good faith efforts when they have been made by the Crown. It is true that in some cases the determination of what

[207] *Supra* note 168 at 61.

constitutes 'good faith' will still be contentious, but as McLachlin C.J. said, these questions can be addressed by "assigning appropriate content to the duty"[208] in future precedent.

Of course, regardless of 'good faith' efforts on both sides, there will be cases in which the parties cannot agree on the appropriate amount of consultation. In these cases, "if they cannot agree, tribunals and courts can assist."[209] The pre-trial consultation and accommodation process cannot provide a formula that will avoid litigation in all Aboriginal / Crown disputes. However, with 'good faith' requirements springing from the honour of the Crown, in combination with strong precedent, it has the potential to assist in many of these disputes. By providing clear common law, on which 'judicial governance' requires mandatory negotiations be based, the courts can both dissuade the use of litigation and, at the same time, provide clear guidelines from which negotiations can proceed quickly, inexpensively, and effectively.

Individual Consultation Frameworks

The general guidelines provided by the courts, alluded to above, will not prescribe specific terms of individual consultations or consultation processes; the parties are left to do this on their own. In answer to this, many jurisdictions have established governmental 'consultation frameworks'. In Ontario for instance, this takes the form of "Guidelines for Ministries on Consultation with Aboriginal Peoples related to Aboriginal Rights and

[208] *Ibid* at 37.
[209] *Ibid* at 37.

Treaty Rights"[210], a 2006 draft copy of Ontario's consultation policy. This document requires criteria such as "good faith efforts to address the concerns raised by the Aboriginal communities"[211], "informing the Aboriginal community"[212], and in determining levels of consultation the government must assess the "strength of a claim to an asserted Aboriginal or treaty right"[213].

As illustrated by these passages, the makeup of many of these 'provincial frameworks'[214] essentially summarizes the principles that emerged from the *Haida* decision. The importance of these 'frameworks' does not lie in their basic structure, this having already been judicially established. That is, *Haida* has already told the governments that the honour of the Crown is at stake in all dealings with Aboriginal peoples; as such, these individual guidelines must adhere to the *Haida* decision and uphold the honour of Crown. The importance of these individual frameworks lies in the operational autonomy that these frameworks provide for the negotiating parties. Although the process of 'judicial governance' is one of the most important aspects of the court's involvement in the negotiation process, it is also one of the most dangerous. That is, as noted throughout this text, one of the main virtues of the negotiation process is its avoidance of top-down impositions; the parties are free to make their own, self-

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[210] Government of Ontario, *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples related to Aboriginal Rights and Treaty Rights* (Ottawa: Government of Ontario, February, 14th, 2007) Online: www.aboriginalaffairs.osaa.gov.on.ca/english/news/draftconsultjune2006.pdf.
[211] *Ibid* at 19.
[212] *Ibid* at 18.
[213] *Ibid* at 15.
[214] Other governmental frameworks include "Provincial Policy for Consultation with First Nations", the British Columbia 'framework', and "The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development", the Alberta 'framework'. Both of these 'provincial frameworks' include guidelines to the consultation process in close accord with those expounded in the *Haida* decision, as noted above. These documents can be found at faculty.law.ubc.ca/mccue/pdf/2002%20**consultation_policy**_fn.pdf and www.aand.gov.ab.ca/AANDFlash/Files/Policy_APROVED_-_May_16.pdf, respectively.

governing agreements. These 'governmental frameworks'[215] then, although based directly on common law, allow 'judicial governance' to operate in the background, providing the benefit of guidelines for negotiations but not overpowering the process, and freeing the parties to adapt the guidelines to the special needs of the contexts at hand.

Broadening the Scope of Consultation and Accommodation

Currently, Canada's highest court has only made use of consultation and accommodation to govern disputes surrounding one of the two main areas of Aboriginal rights recognized by s.35 of the *Constitution Act,* 1982. Consultation and accommodation was a positive step with regard to Aboriginal title and treaty land-based claims, as well as the ultimate goal of increasing negotiations in these areas. The scope of this concept however, would be properly advanced to the other main area of Crown / Aboriginal dispute resolution: Aboriginal rights that are not directly based on Aboriginal title, and treaty rights that are not directly based on treaty land. This section will focus on the potential expansion of consultation and accommodation to areas surrounding these s. 35 rights. The principles that the Supreme Court has relied on to apply consultation and accommodation to Aboriginal title and land claims, namely the honour of the Crown and the goal of reconciliation, could readily be applied to these additional areas. This would significantly expand the positive impacts of this concept, and take Aboriginal / Crown disputes that much closer to where they should be; out of the court rooms and into negotiations.

[215]Although Aboriginal consultation in the construction of these 'governmental consultation frameworks' would be wise (and this paper later claims that this type of legislation should be subject to 'consultation and accommodation'), judicial governance dictates that these frameworks are constructed in 'good faith' regardless of Aboriginal consultation in the process. That is, for consultation that has been conducted in accord with one of these 'frameworks' to meet the courts 'good faith' requirement pertaining to any consultation process, the framework itself must have been made with this criteria in mind. Again, this will require the Crown to err on the side of caution and 'good faith' in instating these 'governmental consultation frameworks'.

The current application of consultation and accommodation, as in *Haida*, has essentially been for the courts to review prospective Crown action in order to protect Aboriginal land and resources thereon. As this process moves from the courts to negotiations the goals of the parties will remain the same (due to judicial governance). That is, if an Aboriginal party can show a 'real or constructive' potential violation of an Aboriginal title or land claim, the Crown must engage in good faith negotiations in order to avoid this potential violation. As explained in *Mitchell*, because the Crown unilaterally asserted sovereignty over Canadian land, it has to uphold 'the honour of the Crown'. *Haida* told us that Crown honour was to be upheld by way of the positive duty of consultation and accommodation, in addition to the principle of reconciliation enshrined in s.35, *Constitution Act*, 1982.

Consultation and accommodation prior to proof with regard to Aboriginal and treaty right violations could effectively operate in the same form and find justification in the same duties. Canadian Aboriginal peoples were harvesting natural resources from the land long before the Crown unilaterally asserted sovereignty and declared rules surrounding the harvesting of these natural resources. Both of these situations are triggered by the unilateral assertion of Crown sovereignty, dictating that 'Crown honour' must be upheld, so the application of the same remedy logically follows; consultation and accommodation.

Nowhere has the Supreme Court said that the *Haida Nation* duty is limited to Aboriginal title or land claim disputes. This section, therefore, is not recommending a substantive modification of this concept itself, but merely an extension of its application.

Further, as noted in a recent article by Timothy Huyer[216], the duty of consultation and accommodation has been applied by a lower court to an Aboriginal rights case, *R v Lefthand*[217]. In this case, the Alberta appeal court judge, Phillips J., noted that "the duty to inform is the least onerous duty of consultation on the spectrum of consultation identified by the Court in Haida Nation."[218] Phillips J. used the *Haida* decision, albeit out of the *Haida* context, as a justification to find that the honour of the Crown had not been upheld when imposing a restriction on an Aboriginal right. Perhaps this case will open the door for a Supreme Court decision, entrenching this further application of consultation and accommodation in common law.

Now that justification for the general expansion of consultation and accommodation has been shown, we can look at how this concept could be applied in various instances of Crown / Aboriginal rights disputes.

This section will identify five specific areas to which the concept of consultation and accommodation could expand while remaining consistent with the principles that the Supreme Court has used to justify this duty. As has been shown throughout the previous pages, consultation and accommodation can accomplish two broad tasks under which the following five potential areas of expansion fall. First, Aboriginal parties can use this concept to pause the use of resources on land in the interim, while land claims are being disputed. Second, consultation and accommodation can be used to facilitate the permanent settlement of rights or title negotiations. Keeping these two broad categories

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[216] Timothy Huyer, "Honour of the Crown: The New Approach to Crown-aboriginal Reconciliation"(2006) 21 W.R.L.S.I. 33.
[217] *R v. Lefthand*, [2005] A.J. No. 1370.
[218] *Ibid* at para 78.

in mind, let us turn to the five specific instances of feasible expansion for the use of consultation and accommodation in Aboriginal / Crown disputes.

These areas are: First, when an Aboriginal group can show a real or constructive infringement on an Aboriginal or treaty right stemming from enacted legislation. This use of the consultation process would allow an Aboriginal party to challenge existing legislation to review its consistency with the right in question. Second, consultation and accommodation would rightly be used to review proposed legislation which can be shown to constitute a 'real or constructive' infringement on an Aboriginal or treaty right. Third, consultation and accommodation could be applied to interpret unproven s.35 rights. Fourth, consultation and accommodation could be used as a first step to pre-empt some instances of Aboriginal and treaty rights litigation. In this form, the consultation process would be used to review appropriate cases before the case moved to a *Sparrow* justification test in litigation. Fifth, the courts could instate necessary consultation and accommodation after a *Sparrow* justification analysis. Currently, when the *Sparrow* test yields a solution it results in an imposition from the Crown on Aboriginal people. This type of unilateral imposition is the very reason the courts initially required the honour of the Crown and the positive duty of consultation and accommodation.

Consultation and Accommodation as a Mechanism to Review Existing Legislation

In a pro-active capacity, that is prior to a legislative violation, consultation and accommodation could act as a mechanism to review existing legislation. If an Aboriginal party could show a 'real or constructive' possibility of legislative infringement of an Aboriginal or treaty right, the Crown's honour would demand consultation regarding that

legislation. A failure to consult could lead to a determination of legislative inconsistency with s.35 of the *Constitution Act*, 1982. In theory, much (and hopefully all) governmental legislation is enacted with both s. 35 Aboriginal rights and resource sustainability in mind. A mechanism for Aboriginal claimants to challenge legislation without litigating it would help match theory with reality.

Consider the current system; if Aboriginal claimants believe they have an Aboriginal or treaty right to a particular s.35 interest, they have the option of committing a crime and waiting for the judiciary to determine the scope of their right[219]. Alternatively, they must ask for a court declaration that the legislation is invalid[220]. In both situations the Aboriginal claimants are at the mercy of the judiciary. With consultation and accommodation as a mechanism to review existing legislation, these processes could be avoided. If an Aboriginal claimant could show a real or constructive Aboriginal right infringement by a piece of legislation, the honour of the Crown would demand a positive duty to consult and accommodate. The consultation process that followed would be directed at measures to reconcile that right and the corresponding legislation. Unless the Crown failed to consult in good faith, the Crown could continue to prosecute under the existing legislation until the accommodating measures were implemented.

This application of consultation and accommodation has potential to accomplish two objectives. First, judicial intervention in this area could be avoided. Aboriginal claimants would not have to resort to unilateral exploitation of a resource and a corresponding charge, or bear the cost of a legal challenge, in order to gain access to

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[219] As in *R v Marshall*, supra note 111.
[220] As in *R v Sparrow*, supra note 101 .

consultation and possible negotiated accommodation. Nor would Aboriginal claimants have to bring their claim of infringing legislation to court for an answer; the answer could be arrived at through negotiation with the Crown.

This application of consultation and accommodation could also result in the interim protection of resources from unilateral Crown *or* Aboriginal exploitation. This mechanism for the review of legislation would provide Aboriginal peoples an alternative to unilateral resource exploitation. It would also provide Aboriginal peoples with a mechanism to ensure that existing legislation did not allow for unilateral Crown exploitation of resources. This application of the *Haida* duty allows for the balanced protection of resources and the avoidance of litigation, goals which accord with the conservative communitarianism approach of this study.

When the Crown unilaterally asserted sovereignty it unilaterally asserted legislative power as well. Just as the positive duty coming from the honour of the Crown demands consultation and accommodation regarding unilaterally asserted sovereign land, it should demand the same of unilaterally asserted sovereign legislation. The general principle of Crown honour and the principle of reconciliation demand that Canadian Aboriginal people have certainty with regard to their s.35 rights and the opportunity of meaningful input without unilaterally exploiting the resource and waiting to be charged with an offence. Instating the consultation and accommodation process as a mechanism to review existing legislation could accomplish this.

Consultation and Accommodation to Review Proposed Legislation

As with the justification for the use of reviewing existing legislation, consultation and accommodation would be rightly used as a tool to review new legislation. If an Aboriginal party could show that proposed legislation posed a real or constructive threat to a s.35 Aboriginal or treaty right, that legislation would be subject to the consultation and accommodation process before it was enacted. Phillips J. in *R v. Lefthand,* anticipated this extension of the *Haida* duty when he found the Crown to not have upheld 'Crown honour' because it did not consult the Aboriginal party in question prior to passing new regulations that affected their rights.[221]

Again, because the Crown unilaterally asserted sovereignty which led to the legislation, the honour of the Crown demands this process. Another benefit of allowing negotiations regarding proposed legislation which potentially infringed s. 35 rights would be to accord a measure of self-government to Canadian Aboriginal peoples. Avoiding more unilaterally imposed legislation and giving Aboriginal peoples a chance at legislative input can only be seen as recognizing the goal of reconciliation enshrined in s.35.

Consultation and Accommodation to Determine the Scope of Unproven s. 35 Rights

Section 35 (1) of the *Constitution Act*, 1982 does not define the content or scope of Aboriginal or treaty rights, but simply confirms their existence. Although since 1986 the formal Canadian policy of Aboriginal rights interpretation has been the federal comprehensive claims process, many Aboriginal rights claims are clearly still left to the courts. For example, the Supreme Court has recently articulated the desire to see the

[221] *Supra* note 235 at para 80.

scope of s. 35 Métis rights defined in "negotiations and judicial settlement" in *R v. Powley*[222]. This section will claim that the *Haida* duty has a place in defining s.35 rights, as well as the interim rights pending a final negotiated settlement.

Due to the Crown's unilateral assertion of sovereignty over the land, to which s. 35 rights apply, Crown honour is at stake when defining these rights. Similarly, the positive duty of consultation and accommodation can provide a basis for interim solutions pending these eventual rights. The Alberta government and Alberta Métis, following the precedent in *Haida*, entered into the consultation process in order to uphold "the honour of the Crown" and satisfy "the constitutional obligations flowing from s.35 of the *Constitution Act*, 1982."[223] The result of these negotiations was the 'IMHA' or "Interim Métis Harvesting Agreement"; a working piece of legislation that defined interim harvest rights of the Alberta Métis while more permanent s.35 rights were negotiated.

This case is a prototype example of how (and why) consultation and accommodation could apply, autonomously of litigation, to interpret interim s.35 rights. The honour of the Crown was upheld in this case by the initiation of consultation and accommodation. The principle of reconciliation was achieved because the Métis were not forced to determine the scope of their interim rights in court. Although the 'IMHA' was merely an interim rights agreement, this case illustrates the potential of the *Haida* duty to produce the negotiated settlement of both interim and actual s.35 rights.

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[222] *R v. Powley*, [2003] 2 S.C.R. 207 at 50.
[223] *R v. Kelly*, [2007] A.J. No. 67 at 5.

The *Sparrow* Test and The *Haida* Duty

The goal of this section will be to illustrate how the *Haida* duty can supplement the use of the *Sparrow*[224] test in determining the justification of infringements on Aboriginal rights. Although the *Sparrow* justification analysis has many strengths, it also has inherent weaknesses.

Situations will remain in which the parties will agree on using the *Sparrow* test, independent of consultation and accommodation. For example, where the Crown has conceded a s.35 right, and an infringement thereon and the parties both want guidance as to an appropriate level of priority. Or, Aboriginal peoples are seeking higher rights protection than consultation and accommodation surrounding an individual situation can offer, such as constitutional veto rights. There are times when impositions from the courts are not only called for but necessary. However, there are also times when consultation and accommodation could address the weaknesses inherent in a *Sparrow* analysis.

In order to illustrate how the *Haida* duty could potentially address the pitfalls of the *Sparrow* test, let us examine the differences of these respective processes. Because the *Sparrow* test is applied by the judiciary, it can result in definitive and authoritative answers to questions surrounding the justification of infringements of Aboriginal and treaty rights. The *Sparrow* test also provides for objectives such as Aboriginal priority for resource use, and the criteria of minimal infringement of Aboriginal rights. However, the *Sparrow* test can also demand a high (and therefore expensive) evidentiary burden regarding traditional use or occupancy, extinguishment or lack thereof, and justification or lack thereof. The *Sparrow* test can also result in specific accommodation as part of its justification requirements, requirements which may be inequitable for one or both parties.

[224] Further discussion in this study of *Sparrow* and the *Sparrow* test, *Supra* at 39-42.

The nature of a *Sparrow* analysis is also judicial, which presupposes that it is both reactive (therefore providing no preemptive protection of resources) and it encompasses the pitfalls of litigation mentioned in earlier pages[225].

The *Haida* duty, in contrast, is proactive in that it protects claimed resources from exploitation prior to their formal determination. The accommodation accorded by the *Haida* duty is also flexible and negotiated instead of judicially imposed. The *Haida* duty also only requires a *prima facie* case as a trigger, mitigating much of the expense associated with the rigorous evidentiary burden of a *Sparrow* analysis.

In some cases, then, the use of the *Haida* duty in place of the Sparrow test could prove beneficial. This application of *Haida* would lessen both the time and money needed to prove a) a s.35 does exist, b) that right has not been extinguished, and c) there was an infringement of that right. The Supreme Court has been seen to move in this direction in *Mikisew Cree* when it refused to require a full *Sparrow* analysis (as the lower courts had) before the honour of the Crown could be upheld by way of consultation and accommodation. In *Mikisew Cree*, Binnie J. justified consultation and accommodation before *Sparrow* when he said that *Sparrow* rights are not absolute, whereas the honour of the Crown is.[226]

Consultation and Accommodation Post- *Sparrow* test

In cases that do use a *Sparrow* justification analysis instead of the *Haida* duty to decide justification, consultation and accommodation could still have a place. The reason for this is the need for legitimacy of the solution accorded by the *Haida* duty and the *Sparrow*

[225] *Supra* at 28-35.
[226] *Supra* note 168 at 58-59.

test, respectively. Under the current *Sparrow* test, if an infringement of a right is found to be justified that result is *given* by the judiciary to Aboriginal peoples. Similarly, if an infringement of a right is found not to be justified, the Aboriginal claimant wins, but still has this 'victory' *imposed* on them. This imposition necessarily precludes the fulfillment of the honour of the Crown. The court-imposed decision resulting from a *Sparrow* analysis , regardless of whether it favours plaintiff or defendant, is unilaterally imposed by the Crown; re-enforcing the unilateral assertion of Crown sovereignty that the courts claim to be the reason for the rise of Crown honour in the first place. For Crown honour to legitimately be upheld in the justification process then, the positive duty flowing from the honour of the Crown, consultation and accommodation, should be imposed post-*Sparrow* decisions.

If the courts were to use the consultation and accommodation process after a *Sparrow* analysis, to supplement the solution arrived at by the court, the decision emerging from the justification process could at least be discussed by the Aboriginal parties which it will affect. Of course an infringement that had already been justified (or not) in litigation would warrant a low position on the scale of consultation; probably requiring only a 'duty to discuss important decisions'. Consultation of this nature, however, would nonetheless allow an Aboriginal voice in the discussion of Aboriginal rights, rather than having sovereign rules, again, unilaterally imposed on them. Engaging in the consultation process after a *Sparrow* analysis would likely not change the substantive outcome of a justification decision. It would, however, uphold the honour of the Crown by lessening the unilateral nature of a *Sparrow* imposition[227].

[227] This same principle could be applied to any Aboriginal / Crown litigation surrounding an entity over which the Crown has unilaterally asserted sovereignty. Although this may open the flood-gates for

'The Judiciary's Role' Conclusion

The first section of this chapter showed that consultation and accommodation has much deeper implications than its use in litigation. The preemptive capacity in which the judiciary has applied this concept in such cases as *Haida* has created a pro-active judiciary with regard to Aboriginal / Crown disputes. This, in turn, has led Crown / Aboriginal interaction to be governed by judicial governance. This concept demands that the consultation and accommodation process be initiated before unilateral Crown action and before litigation, and it is likely to result in a significantly greater role for negotiations in regard to Aboriginal / Crown disputes.

The next section illustrated that common law clarity surrounding the principles enshrined in consultation and accommodation has the potential to improve Crown / Aboriginal negotiations. Common law clarity surrounding the principles inherent in consultation and accommodation has (and will increasingly with increased precedent) provided negotiating parties with a set of guidelines that can steer them to fast, inexpensive, and effective negotiations.

Finally, in accord with the above contentions, this chapter points to a number of additional fields to which the consultation and accommodation process could legitimately be applied. The honour of the Crown and the goal of reconciliation are not duties exclusive to Aboriginal land and title claims; similarly, the positive duty of consultation

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consultation and accommodation, is this not the goal of the Crown and Canadian Aboriginals; negotiations, bilateral input, self-government, and upholding the honour of the Crown and the principle of reconciliation enshrined in s.35? Again, this application of consultation and accommodation would certainly require an increased burden on the Crown. The question then, is how big a burden is the Crown willing to accept in striving to achieve its apparent goal of 'Crown honour' and 'reconciliation'? I raise this point in hopes of facilitating further research in this field as, indeed, a separate thesis could be dedicated to the further potential application of consultation and accommodation in non-*Haida* type matters, such as *Indian Act* disputes.

and accommodation should not be restricted to these fields. It is up to the courts to apply consultation and accommodation to an increasing array of Aboriginal / Crown litigation. Once this precedent begins, judicial governance will dictate the expansion of this concept to negotiations in these additional fields.

Although much of this study has provided evidence of the superiority of negotiations over litigation, this chapter has been devoted to showing the potential harmony of these respective processes. This chapter has outlined numerous 'judicial tools', and the ways in which they can be implemented in order to facilitate and improve Aboriginal / Crown negotiations. Apart, negotiations and litigation have many weaknesses; together, espousing the principles of compromise and balance, they represent a promising future for the negotiated settlement of Aboriginal / Crown disputes.

Chapter V The Future: Concluding Thoughts

At the outset of this project the goal was to evaluate the potential of 'judicial tools' to facilitate and improve negotiated settlements surrounding Aboriginal rights and title claims. This research project was meant to suggest a path for the Canadian government, Canadian Aboriginal peoples, and the Canadian judiciary; a path to a solution that these parties, and a united Canadian citizenship, have long been seeking.

This solution is to ensure that Canadian Aboriginal culture not only survives but flourishes in a changing world; a capitalist world. It was suggested at the beginning of this study that a major step towards achieving this result was to work with Canadian Aboriginal peoples to find a feasible source for an independent Aboriginal economy. An independent economy would increase Aboriginal autonomy and contribute to giving Canadian Aboriginal peoples the ability to flourish in a self-defined conception of their culture in the twenty-first century. The traditional Aboriginal way of life indicates one element of the solution to this problem: Canadian land and its resources.

Acknowledging this reality, this study has not been an argument for unfettered Aboriginal access to Canadian resources. Quite the contrary, the study has meant to put forward an argument for equitable and shared use of Canadian land and resources for both Aboriginal and non-Aboriginal Canadians. Throughout this study, the ideal of compromise has been continually stressed and, indeed, is the answer. The adversarial properties of litigation have forced both Aboriginal and non-Aboriginal Canadians to attempt to forward separate agendas without consideration for the other side. The self-government and ability to compromise inherent in Crown / Aboriginal negotiations

would be ideal, but lack of structure and guidelines has contributed to the slowness and ineffectiveness of this process.

When the judiciary enacted the *Haida* duty to consult before litigation, they constructed a potential bridge between these two seemingly opposite forums of dispute resolution. Canadian courts will remain essential to Crown / Aboriginal disputes, but mostly for their ability to provide infrastructure for future negotiations. Litigation, the necessary evil, has the potential to facilitate negotiations and provide them with structure.

The stakes riding on this new system of Aboriginal / Crown dispute resolution are high: Canadian citizenship lies in the balance. Not a monolithic conception of citizenship but a multicultural citizenship governed by individual *and* culturally differentiated liberalism.

This thesis is pointing the role of the Canadian judiciary in a new direction regarding Aboriginal / Crown dispute resolution. This new role is certainly of no less importance than the old, and indeed perhaps more; it is the role of the puppeteer, hiding in the rafters. In turn, judicial governance represents the strings which a puppeteer gently persuades. The actors of course, are the Canadian government and Canadian Aboriginal peoples. The act is the negotiated settlement of Aboriginal claims, a process so important to the future of Canada, and all Canadians, that it can only be described as the most important production of the twenty-first century. Without a puppeteer to ensure that the production moves forward, the actors will lie motionless, and the production will remain silent. With careful guidance however, the production can proceed in a timely, efficient, and effective fashion, and the actors can take center stage, until the production comes to a

successful completion and Aboriginal culture can once again flourish. What better stage for this production than conservative communitarianism, balance, and consensus.

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