A CLOSER LOOK AT LEGAL RECONCILIATION

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A. Apology and Introduction

I must apologize for changing my paper from that advertised in the conference brochure. At the time I agreed to participate, as now, I was engaged in ongoing research into what the Supreme Court of Canada (the "Court") has meant when it has used the word "reconciliation" in the context of explaining the central message of section 35(1) of the *Constitution Act 1982*[2] ("35(1)").

My interest in "reconciliation" as a fundamental concept of Canadian constitutional law arose some years ago. Initially, that interest was in the dynamics of the law engaging the profound human process of reconciling human group to human group.

British Columbia's failed proposed reconciliation legislation a few years ago[3] led to my seeking to get to grips with the practical details of working reconciliation – how pragmatic law making could actually effect the profound and fundamentally important process of reconciliation. That led me to the conclusion that the new common law doctrine of reconciliation was a complex thing with at least two intimately interdependent but distinct processes, legal reconciliation and social reconciliation[4].

It would appear that achieving the reconciliation that the Court has told us is the message of S.35(1), depends on both processes being successfully carried on. This is hardly surprising. Legal rules exist in and are integral to all human societies and our doctrine of reconciliation deals with the coming together of a multitude of indigenous Canadian communities, including their customary laws, and non-indigenous Canadian society and its laws.

The process of legal reconciliation is that by which the law of non-indigenous Canada is reconciled with the surviving customary laws of indigenous Canada in a way that can be generally viewed as legitimate[5] by most Canadians. The common law proceeds from case to case. It cannot direct who chooses to sue whom.

The process of social reconciliation, which, it seems, cannot be effected without legal reconciliation, is that by which indigenous and non-indigenous societies in Canada can be brought to an ongoing relationship which, once again, is generally viewed as legitimate by most Canadians. Not being the realm

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[2] R.S.C. 1985, App. II, No. 44, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

[3] http://www.canada.com/vancouversun/news/westcoastnews/story.html?id=ba55283a-d5eb-4252-ad48-ea4085a82e4e

[4] Knox, Tony, "Peeling the Reconciliation Onion", *The Advocate,* Vol.68, Part 2, March 2010, pp.207ff.

[5] I am arbitrarily using the word "legitimate" to describe a fundamental attribute of reconciliation in both its aspects, that the persons and groups subject to the processes of reconciliation feel generally comfortable with the result and can move on together leaving behind the discomfort of the former unreconciled relationship.

of the courts, where painfully exact thought is applied to an adversarial process ending in the writing of a judgement, organised social reconciliation is the child of government policy, non-indigenous and indigenous and the construction of new relationships.

Pondering these two intimately related processes of reconciliation was my stage of thinking about the Canadian common law doctrine of reconciliation when Insight asked me to speak here today.

Months of further, often interrupted, work has intervened since the brief flurry of emails with Insight that got me here today.

That work is not complete but is leading me to the conclusion that legal and social reconciliation are each subjects of very considerable complexity. Only one of them can be briefly dealt with in the allotted time today and that only in a very abridged form.

Legal reconciliation is what we will look at today because that is where I am working on just now. I hope my preliminary tentative conclusions make some sense or at least inspire some thought.

B. **Overview**

So you are not taken by surprise as we go along, I begin with a brief overview of the progress that the common law has made in digesting into its procedures and substance the most important aspects of indigenous customary law.

At the level of governing principles, that process is substantially complete. Identification of governing principles is a necessary first step in effecting legal reconciliation. The great authority of the Court tends to distort the importance of its conclusions and lead to the conclusion that what the Court says is all legal reconciliation in itself. The Court's job has been to give meaning to S.35(1) so S.35(1) can be be used as tool of reconciliation.

The Court's advice on the way ahead is wise, probably correct and largely ignored. The Court is telling us to go elsewhere to effect the infinitely ongoing reconciliation process. The Court advises governments to negotiate and to make the processes of reconciliation clearer and to set up specialized expert panels to determine the sufficiency of consultation and accommodation, and thus, justification for infringement of S.35(1) rights without the huge expense of scaling the legal system from trial to appeal in the Court.

A predictable concomitant of the high level at which the Court deals with reconciliation is that the Court has not commented on providing indigenous peoples at their community level with local constitutional governance structures that can provide able, transparent and also culturally legitimate local government.

The middle part of this paper looks at a number of legal historical vignettes that deal with legal processes possibly instructive to those of legal reconciliation in Canada that are drawn from English, and continental European legal history. I believe that the vignettes may contain striking lessons that clarify where legal reconciliation in Canada has come from and where it is going.

The paper ends with some conclusions about legal reconciliation in Canada based on the case law and this historical background.

C. Legal Reconciliation Up To Now

1. *1982 and S.35(1)*

S.35(1) is not a model of clarity. Its genesis came late to the constitutional amendment table when the parties to the amendment negotiations of the 1980s were tired and wanted the amendment process over. It was time to go home but all would be for nought without something to deal with the place in the new constitution of the peculiar rights of Canada's indigenous people. The final wording, less the word "existing", was proposed but in that form there was no reasonable limit put on what rights were to be given constitutional protection. The Premier of Alberta insisted that the word "existing" be added to S.35(1), the negotiators agreed that that word closed the flood gates on the perpetual protection of many of what might be long lost rights.[6]

The negotiators had little idea of what the "rights" protected by S.35(1) might be. Aside from a very old English case and some United States Supreme Court decisions[7] , some decisions of the Privy Council relating to the imperial experience of the customary laws of indigenous peoples[8] , an Australian High Court decision that suggested that aboriginal rights need not exist in certain "settled colonies"[9] and a handful of inconclusive decisions of the Court[10], the lawyers sitting with the Prime Minister and the Premiers in the constitutional negotiations had little to rely on.

As of 1982, there was still room to argue that, other than treaty rights, rights peculiar to indigenous Canadians might be nothing more than "usufructuary" – similar to the right of a deer to live in forest or a fish to swim in the sea or, if more than that, that they had been extinguished. Certainly, it would have surprised many if not most non-indigenous Canadians if it were suggested otherwise. For more than a decade after 1982, the official position of the Government of British Columbia was to continue to be

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[6] Smith, M., *Some Perspectives on the Origin and Meaning of s. 35 of the Constitution Act , 1982,* at http://oldfraser.lexi.net/publications/pps/41/s3_origin.html

[7] *The Case of Tanistry* (1608) 80 E.R.516 *Johnson and Graham's Lessee v. M'Intosh,* (1823), 8 Wheaton 543,*Worcester v. Georgia,* (1832), 31 U.S. 530, *App.Cas. 46.*

[8] *St.Catherine's Milling and Lumber Co. v. The Queen (1888), 14, In re Southern Rhodesia*,[1919] A.C. 211 ("S. Rhodesia"), *Okeykan v. Adele*, [1957]2 All E.R. 785 ("Okeykan").

[9] *Milirrpum v Nabalco Pty Ltd*, (1971) 17 FLR 141 ("Milirrpum").

[10] *Calder v. Attorney General of British Columbia*[1973] S.C.R. 131, *Kruger and Manuel v. R.* [1978]1 S.C.R. 104 ("Kruger").

that there were no "existing" aboriginal rights in British Columbia due to sovereign extinguishment through legislation during the period of the Crown Colony of British Columbia.[11]

Since 1982, the Court has determined how, in common law terms, the fundamental elements of indigenous customary law can be absorbed into the common law while forever protecting them.

In such process of absorption, the common law has arranged the rights contemplated in S.35(1) in three *phyla*, (i) aboriginal rights other than aboriginal title (personal property), (ii) aboriginal title (real property) and (iii) treaty rights (contracts). In the same process, found the appropriate legal principles to apply to each category. Not surprisingly, the Court applies some innovative concepts that mimic administrative law and the procedural and substantive elements of administrative law as the appropriate legal mechanism for deriving justice from S.35(1).

D. Aboriginal Rights Other than Aboriginal Title and Treaty Rights

1. *Guerin (1984)*

Two years after S.35(1) came into effect, the Court's decision in Guerin [12] found both that the nature of the interest of indigenous Canadians in reserve lands, while like certain common law rights, is *sui generis* and that the relationship of the Crown and the indigenous party to that case, while trust like, is also *sui generis.*

"*Sui generis"* is not, as sometimes suggested[13], a description that in any way denigrates the nature of the right to which it applies. It simply means that the interest is unique and thus forms its own legal species. In the terms of the common law, such *sui generis* rights and relationships were not previously part of the common law, are not applicable to all Canadians but potentially may be clarified by, rendered part of or otherwise put into an understandable relationship with the common law. The category of "*sui generis"* provides the common law with a fair and simple mechanism to absorb unfamiliar legal things.

The Guerin decision rendered the *sui generis* interest in that case comprehensible to the common law by accepting the existence of a unique legal interest and finding a unique fiduciary relationship between the Crown and the claimants in respect of such unique interest. In *Guerin,* no further analysis of the relationship between such *sui generis* interest and the common law was necessary. At the same time, in the way of the common law, it established in the common law the peculiar nature of other such *"sui generis"* interests.

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[11] The position was abandoned by the then NDP government of British Columbia during the appeal in *Delgamuukw v. British Columbia,* [1998] 1 C.N.L.R. 14 ("Delgamuukw").
[12] *R. v. Guerin* [1984] 2 S.C.R. 335.
[13] Minnawaanagogiizhigook (Dawnis Kennedy), *Reconciliation without Respect? Section 35 and Indigenous Legal Orders,* in Law Commission of Canada, *Indigenous Legal Traditions,* UBC Press, Vancouver, 2007, pp. 81 ff ("ILT").

2. *Mabo (1985)*

In 1985, the Australian High Court decision in Mabo[14] effected a revolution in international common law thinking about the inherent rights of indigenous peoples when it completely reversed the previous Australian judicial position established in 1971 in Milirrpum. The decision in that case denied the existence of such rights[15] based on Blackstone's concept that some colonies had no indigenous legal systems when settled[16]. Such conclusion in Milurrpum had been argued by the Government of British Columbia to apply to all lands in British Columbia in the Supreme Court of Canada before S.35(1) came into effect[17]. The essence of the Mabo is that native (aboriginal) title can exist and:

> "The nature and incidents of native title must be ascertained as a matter of fact by reference to law and customs [of the indigenous people].[18]

3. *Sparrow* (1990)[19]

Five years after Mabo, in the decision of the Court in Sparrow, Dickson C.J. and La Forest J. dealt with the relationship between the common law and S.35(1) protected rights as follows:

> " Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful then to avoid the application of traditional common law concepts of property as they develop their understanding of ... the *sui generis* nature of aboriginal rights."[20]

Dickson C.J. and La Forest J. avoided making the reference to indigenous "law and customs" made in Mabo. They preferred the term used in S. 35(1), "Aboriginal rights". They also found that aboriginal rights are not absolute but are subject to the necessary federal power to legislate and regulate for the good of all Canadians. In Sparrow, there was no suggestion that "reconciliation" is the fundamental meaning of S.35(1) although the word does appear in Sparrow the context of the birth of the doctrines of justification and consultation in Aboriginal Law when it is noted that:

> "Federal power must be <u>reconciled</u> with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights". [21][emphasis added]

The now attractive concept of "reconciliation" in the sense that it was popularised by the South African Truth and Reconciliation Commission led by the wise and charismatic Archbishop Tutu was still five

[14] *Mabo and Others v. Queensland (No.2),* [1992] 5 C.N.L.R. 1 ("Mabo").
[15] *Milirrpum v Nabalco Pty Ltd*, (1971) 17 FLR 141
[16] Blackstone, Sir William, *Commentaries on the Laws of England*, 1765, Vol. 1 p. 105.
[17] Milirrpum was quoted in the factum of the Government of British Columbia.
[18] P.59
[19] *R. v. Sparrow,* [1990] 1 S.C.R. 1075 ("Sparrow").
[20] Sparrow para. 68.
[21] Sparrow para. 62.

years in the future when the decision in Sparrow was delivered[22]. Along with other guidance with respect to what constitutes justification of the infringement of S.35(1) rights, the administrative law concept of consultation was introduced as an established common law mechanism drawn from administrative law for understanding the important interests of citizens affected by Crown action. Untempted by the unknown magic of reconciliation as a panacea, Dickson C.J. and LaForest J. found the underlying message of S.35(1) to be that it is a "solid basis for negotiation".[23]

The Swallow decision drew upon the *sui generis* mechanism of the common law to render a constitutionally recognized and accepted but legally peculiar "existing aboriginal right", understandable in common law terms. In thus defining that right, Sparrow provided the precedent for how the common law could also understand in common law terms all other such peculiar indigenous rights. All the incidents of the plethora of unique rights of indigenous peoples were not thereby known to the common law but common law space was made available for them that allowed, from time to time, their systematic absorption into Canadian common law.

4. *Van der Peet* (1996)[24]

Six years after Sparrow, it appears that the Court had been touched by the magic of South African reconciliation. In the conflicting decisions in *Van der Peet* and its sister cases, Gladstone[25] and N.T.C. Smokehouse[26], the majority of the Court chose to find reconciliation as the central message of S.35(1). In doing so, they established a doctrine of constitutional law, previously unknown to the common law, which accepted the findings in *Sparrow* but gave a new direction to their future utilization.

The majority of the Court for the first time used the term "reconcile" to describe the purpose of S.35(1)[27]. It did so broadly, apparently including the legal and social senses of reconciliation. What is to be reconciled with the sovereignty of the Crown was found to be "the distinctive indigenous societies with their own practices, traditions and cultures". They also found that in order to effect such reconciliation, "it is necessary to identify the distinctive features of those societies..." because, "those distinctive features ....need to be reconciled with the sovereignty of the Crown."[28] The majority recognized that it must take into account the "aboriginal perspective" in respect of such distinctive features , "yet do so in terms which are cognizable to the non-aboriginal legal system" because, "aboriginal rights exist within the general legal system of Canada"[29].

In effect, the Court found that "reconciliation" does not require that the common law understand and protect all the incidental procedural and substantive aspects of the *sui generis* customary law of an indigenous society including any legal limits imposed therein against abuse of the aboriginal right

[22] Tutu, Desmond, *No Future Without Forgiveness,* Doubleday, New York, 1999, pp. 67 ff. ("TuTu")
[23] Sparrow para. 51.
[24] *R. v. Van der Peet,* [1996] 2 S.C.R. 507 ("Van der Peet").
[25] *R. v. Gladstone,* [1992] 2 S.C.R. 723.
[26] *R. v. N.T.C. Smokehouse,* [1992] 2 S.C.R. 672.
[27] Van der Peet para. 61
[28] Vand der Peet para. 61
[29] Van der Peet, para. 49

derived from it. However, if a practice of the indigenous society in question can be proven to pre-date European arrival in North America and to be a distinctive feature of such society that practice does obtain the status of a constitutional right which may, if justified, be infringed.

As was found in Van der Peet's "sister case", Gladstone, such infringement may broadly extend to imposing common law limits on the right without examining if the underlying indigenous customary law contemplated its own limits on exercise of the right[30].

McLachlin J., as she then was, dissented from the majority decision in Van der Peet.[31] Based upon the evidence adduced of the customary fisheries law of the Sto:lo people, she held in dissent that a right to sell fish "for purposes of basic sustenance" did exist as a right protected by S.35(1).

Later in her dissenting reasons, she made two observations about the new doctrine of reconciliation.

First she noted that, following Mabo, there is more to be reconciled than prior indigenous occupation with Crown sovereignty; what needs reconciliation with the common law is "a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment".[32]

Second, she suggests a broader meaning for "reconciliation" than that of the majority, saying:

> "[S.35(1)]...seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with Aboriginal peoples".[33]

McLachlin J.'s dissent is particularly interesting in that she expressly rejects the approach of searching for a governing principle to guide what is or is not a protected aboriginal right in favour of, "what the common law and Canadian history tell us about aboriginal rights".[34] This is done both by adopting an empirical historic approach and citing common law precedent supporting the survival of the existing property rights and customary rights of the inhabitants of territories which became subject to the British Crown.[35]

The majority of the Court turned the course of Canadian law away from treating S.35(1) rights as the customary indigenous laws from which such rights, before European contact were derived.

5. *Haida*[36] (2004)

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[30] Gladstone, para. 60.
[31] Van der Peet, paras. 224 ff.
[32] Van der Peet, para. 230.
[33] Van der Peet, para. 230
[34] Van der Peet, para. 262.
[35] Van der Peet paras.260 ff.
[36] *Haida Nation v. British Columbia (Ministry of Forests),* [2004] 2 S.C.R. 511 ("Haida"),

In Haida, the court dealt with S.35(1) protection of unproven aboriginal title[37]. The conclusions of the case on that point follow form with previous S.35(1) cases heard in the Court and while important are not surprising.

For our purposes, Haida is important as a next step in describing how S35(1) rights are reconciled with the common law. McLachlin C.J., for the unanimous Court, accepted reconciliation as the underlying purpose of S.35(1)[38] and described in detail the Court's then understanding of such reconciliation and how it is achieved. In doing so, she admonishes Canadian governments to take policy action to make reconciliation easier, more certain, and more reconciliatory[39].

Not surprisingly, the detailed discussion of reconciliation in Haida is all about the legal part of reconciliation.

The Haida decision described the origin of reconciliation as flowing from the Crown's duty of honourable dealing toward aboriginal peoples which, in turn, arose from the Crown's assertion of sovereignty and *de facto* control of Canada. As a result, reconciliation began with the assertion of sovereignty and continues in perpetuity, it is not a legal remedy but an ongoing process mandated by S.35(1)[40].

The decision in Haida describes six classes of activities that are or should be part of the reconciliation process. Of their nature, they all relate to the reconciliation of distinctive elements of indigenous customary law with the common law and, as such, constitute an interesting insight into how the Court viewed the process of common law absorption, now labelled "reconciliation" proceeding.

Such classes of Crown actions were said to be:

(a) the negotiation of treaties[41];

(b) justification by consultation and, if appropriate, accommodation[42];

(c) the establishment of specialized regulatory schemes for determining the adequacy of consultation to which the courts can defer;

(d) government guidelines for dealing with aboriginal claims that fall short of such a regulatory scheme[43];

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[37] Haida, para. 38.
[38] Haida, para. 32.
[39] Haida para. 51, quoting *R. v. Adams* [1996] 3 S.C.R. 101, at para. 54, "the government, 'may not simply adopt and unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance.'"
[40] Haida, para. 32.
[41] Haida, para. 20.

[42] Haida, paras. 20 to 25.
[43] Haida, para. 51.

(e) negotiation (as preferable to litigation)[44]; and

(f) the ongoing operation of the common law relating to the constitutional status given to existing aboriginal and treaty rights by S.35(1)[45].

A treaty effects no final reconciliation between the Crown and an Aboriginal people but has normally effects mass extinguishment of what would otherwise be S.35(1) aboriginal rights in return for the certainty of the constitutionally protected rights set out in the terms of the treaty. Infringement of a treaty right requires justification and thereby engages consultation unless consultation is modified pursuant to the terms of a modern treaty[46].

Consultation, in seeking mutual understanding of respective interests and the effecting of any appropriate accommodations to minimize the impact of any infringement on a S.35(1) right deals with *ad hoc* infringements of such rights as a necessary part of any justification of such infringement. Consultation effects no extinguishment beyond whatever irreversible infringement may be justified by it.

The Court advised that Canada's governments could adopt regulatory schemes that would allow for extra-judicial review of the adequacy of particular cases of consultation according to a legally established process in order to determine when consultation and any appropriate accommodation has been properly carried out[47]. The Court clearly hopes to be spared from the ongoing task of considering the appropriate nature of all contested consultations by allowing the courts to defer to decisions of expert tribunals as it would defer in respect of the findings, for example of a securities commission. In the absence of any such scheme and its clearly enunciated process for review, the Court is forced to rely upon standard common law principles derived from the law of the judicial review of administrative decisions[48].

The Court identified the British Columbia 2002 *Policy for Consultation* as a government guideline falling short of a regulatory scheme[49]. Better guidance to all parties in respect of what constitutes appropriate consultation would reduce misunderstandings that ideally would lead to a hearing before a consultation commission but even now, seven years later, lead to the Courts.

E. Aboriginal Title

1. *Delgamuukw*[50] (1998)

[44] Haida, paras. 14 and 25.
[45] Haida, para. 32.
[46] *Little Salmon/Carmacks First Nation et. al. v. Attorney General of Canada* [2010] 3 S.C.R. 103, para. 46 ("Little Salmon").
[47] Haida, para. 51.
[48] Haida, paras. 60-63.
[49] Haida, para. 51.
[50] *Vide supra n.8.*

The decision of the Court in Delgamuukw in terms of the advance of legal science is insignificant as it found only that a new trial was necessary.

The very long *obiter dicta* in that case seems to represent an agreement among the justices of the Court to stop the fruits of the enormous and very expensive adversarial debate about the nature of aboriginal title that happened in the course of the case from being entirely wasted. Based on basic common law thinking and the development of aboriginal law relating to personal property rights before 1998, the conclusions of the Court were predictable. The *obiter dicta* proposes that aboriginal title, while an aboriginal right is real property and, as such, it is possessed of different characteristics from aboriginal rights in personal property and also subject to different tests of existence and limitations. These differences do not bear discussion here. There is nothing surprising in finding any lawyers understanding that rights in real property are inevitably different from rights in personal property.

F. Treaty Rights

1. *Mikisew Cree* (2005)[51]

s.35(1) expressly extends constitutional protection to rights created by treaties with indigenous peoples. In Mikisew Cree, the Court applied the by then well-developed principles relating to the infringement of aboriginal rights in personal and real property to possible infringement of rights under an historic treaty. As was pointed out in Haida in 2004, treaties are one of the principle mechanisms of reconciliation including reconciliation. The law treats them as the result of negotiations honourably conducted by the Crown that usually replaces aboriginal rights *en masse* by agreed extinguishment with the contractual provisions of a treaty.

Legal reconciliation in the context of treaty rights which may have been infringed by the actions of the Crown, was held in Mikisew Cree to be based on the same principle of justification through the consultation process founded in the honour of the Crown as is necessary to justify infringement of aboriginal rights.

2. *Little Salmon* (2010)

In Little Salmon, the Court considered the nature of terms in a modern treaty and their relationship to both to (i) the consultation process founded in the honour of the Crown with its strong procedural and substantive relationships with administrative law and (ii) general administrative law which applies to all Canadians, including all indigenous people.

In Haida and also in Wewaykum[52], the Court recognizes that (i) the Crown and indigenous people have a peculiar relationship due to the Crown's assertion of sovereignty over pre-existing indigenous societies, (ii) that relationship is fiduciary-like but not that of a fiduciary except in circumstances that would

[51] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.
[52] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245.

establish such a relationship, (iii) the guiding principal for dealings arising out of such peculiar relationship is that the Crown must act honourably, (iv) the Crown acting honourably in dealings with indigenous peoples which may infringe their peculiar constitutional rights requires that, in proportion to the seriousness of the infringement, the Crown consult with the affected indigenous people and, where appropriate, accommodate the interests of such indigenous people, (v) the level of consultation that is correct is measured by administrative law standards, and (vi) review of any resulting decision of the Crown following consultation is measured by administrative law standards.

Little Salmon adds to this analysis that the rules of general administrative law also apply to all dealings between the Crown and indigenous peoples. Thus the rules of natural justice and procedural fairness must be observed in any consultation based on justification of an infringement of a S.35(1) right because they are a common right of all Canadians.

As can be seen from the foregoing, the process of the common law embracing S.35(1) protected rights both procedurally and substantively has led to adoption of some peculiar administrative law-like doctrines and common administrative law doctrines to ensure legal reconciliation in respect of the justification of infringements of S.35(1) rights.

One wonders how long it will be before a Canadian administrative law text appropriates the administrative doctrines peculiar to indigenous people as the subject of a separate chapter.

G. History and Legal Reconciliation

The foregoing brief review of legal reconciliation as it exists today suggests that thirty years of intense judicial effort has enormously advanced the process of the common law sorting and categorising constitutionally protected *sui generis* indigenous customary practices, in such a way as to have inextricably and forever made Canadian common law, to the extent of such efforts, a hybrid of pre-existing Canadian common law and such practices while going very far in establishing procedural and substantive law based on existing common law models to make Canadian common law appear to be an increasingly homogeneous whole.

No one acquainted with the history of law need be surprised by this development once the common law was forced to recognise that it shared space with a myriad of constitutionally protected indigenous customary rights.

Before looking at some specific lessons from legal history, I think it is worth pointing out some contextual matters to be kept in mind whilst looking at such lessons.

1. *The Very Long Term Involved in Reconciliation*

It is instructive to recognize the timeframe in which our perpetual doctrine of reconciliation exists.

What is done in the pitifully short span of current lifetimes will have impacts millennia into the future unless you believe that all today's mistakes will be wiped away by Earth's collision with an asteroid at some point before you retire.

Processes have been followed many times in history which have rendered one group in society as a permanent underclass. The *Dalits* or untouchables of India represent perhaps the best know manifestation of this phenomenon. However, the *Helots* of ancient Sparta, the *Burakumin* of Japan, the *Cagots* of France and the Gypsies in many countries are or were permanently depressed castes of humans based on the customary laws to which they were or are subject.

It is possible that in the Americas both the majority of indigenous peoples and Afro-Americans do continue to be in danger of permanent underclass relegation.

Long term, those are the true stakes in the reconciliation game. It is a truism that those who forget history are doomed to repeat it. Given the stakes, we need all the guidance we can get.

2. *Reconciliation as a Profound Human Process*

"Reconciliation" both inside the doctrine of Canadian law and outside it in the wider context of human conflicts, is a profound human process.

By "profound", I mean that like "love" or "hate", it is divorced from specific cultures and is inherent in humans at all times and in all places. In the most fortunate circumstances, the process of reconciliation follows real and painful conflicts between individuals or groups. As a result the word "reconciliation", in its sense of humans making up and moving on, is charged with emotion in the faces and voices of those who are invited to become involved in it or who, being involved in it, struggle to achieve it. The Court has expressly told us that our constitution mandates that such process is to be ongoing in Canada, and has implied that it has a legal element and must effect a social change in Canada profoundly affecting both indigenous and non-indigenous Canadians.

An enormous amount has been written about reconciliation in its profound human sense[53]. I am not going to digress upon that literature here beyond saying that all such literature points to the fact that in such reconciliation, very basic human emotions such as healing, respect, trust, human dignity, truth, regret and forgiveness are engaged.

It appears that the Court has been moved my such profound concept in introducing concepts such as "the honour of the Crown" and the correct identification and mutual understanding of interests in the consultation process as well as the continuous urging of the Court that parties to indigenous claims negotiate mutually acceptable solutions rather than becoming adversaries in court[54].

3. *The Value of History in Better Understanding Legal Reconciliation Processes*

[53] For example, Battle, Michael, *Reconciliation, The Umbuntu Theology of Desmond Tutu,* The Pilgrim Press, Cleveland, 1997, Hayter, Priscilla B., *Unspeakable Truths, Transitional Justice and the Challenge of Truth Commissions,* 2nd. Ed., Routledge, New York, 2011, Helmick, Raymond G. and Petersen, Rodney, *Forgiveness and Reconciliation,* Templeton Foundation Press, Philadelphia, 2002, Kymlicka, Will and Bashir, Bashir, *The Politics of Reconciliation in Multicultural Societies,* Oxford U.P., New York, 2008, and Tutu vide supra n.22.

[54] For example, Van der Peet, para. , Delgamuukw, para. 70 , R. v. Powley, [2003] 2 S.C.R. 207, para. 50 , , *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 para. 17, Haida, para. 14, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 para. 24, "...S.35(1) has as one of its purposes, negotiation of just settlements of Aboriginal claims...".

Since 1982, the Court and the lower courts of Canada have been involved in finding, in the rational processes of the common law, a legally appropriate compass for guiding the country in answering something like the following fundamental but unstated question:

> "What is the right relationship to be between those peoples who came to parts of the territory that now constitutes Canada thousands of years ago, those who came here between four hundred years ago and yesterday and those who will come here in future?"

Faced with an almost numberless collection of constitutionally protected rights, they looked back at a few old English, American, Australian and Privy Council cases[55] relating to the existence and status of indigenous law and they have adapted a relatively limited arsenal of known common law principles to provide an intelligent and fair meaning legal context for those rights.

However, they, in the nature of their mandated judicial procedures, have not looked at historical examples of the processes of how different legal systems have related to each other and what has succeeded and what failed in those processes.

Processes analogous to what I call "legal reconciliation" are not unprecedented in the history of law. Understanding some of the lessons of that history may give guidance on the development of legal reconciliation in Canada and also teach both indigenous and non-indigenous Canadians that their respective legal systems are on a long but not novel journey together.

Canada is the inheritor of the legal histories of the peoples who have made it. Those histories both, indigenous and non-indigenous, are all measured in millennia. The civil law of Quebec has its origins in the Roman Republic. Canada's constitution and the common law have evolved from dim roots in pre-Conquest England . The wellsprings of what survives of the customary laws of Canada's indigenous peoples probably antedate both Rome and the Norman Conquest[56].

It is such respective antiquity that necessitates legal reconciliation.

4. *Lesson #1 – Legal Reconciliation Requires Mutual Respect and Knowledge*

An event of great importance in English history was England's conquest by the Normans in 1066. Ownership of most of the land was transferred to the conquerors. A substantial part of the pre-1066 English population lost their lives in the decades following the conquest. The English language was much changed. However, English law survived materially intact[57].

In 1066, law in Normandy was all unwritten customary law. While much unwritten customary law applied to strictly local affairs in the English backwoods, there was also much written law of general application that had been generated under the Anglo-Saxon constitution. Duke William of Normandy, who led the conquest of England, brought with him to England an Italian cleric and lawyer named

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[55] *Vide supra*, n.4.
[56] *Mitchell v. Canada (Minister of National Revenue)*[2001] 1 S.C.R. 911, para. 129 ("Mitchell").
[57] Pollock, Sir Frederick, Maitland, Frederick W., *The History of English Law*, 2nd ed., Cambridge, 1968, Vol.1 c. 3 *passim*.("Maitland").

Lanfranc. Lanfranc was to become the Archbishop of Canterbury and William's chief lieutenant in settling the future administration of England, including English law.

Lanfranc was trained as a lawyer at the University of Pavia in both Roman Civil and Lombard law. It is clear that upon arrival in England he set about mastering the doctrines of Anglo-Saxon law as within a few years of the conquest, he could hold his own with anyone in discussion of the principles of Anglo-Saxon law. Nor was this mere academic interest. Lanfranc, and consequently William, realized that the written Anglo-Saxon law provided a legitimate basis for our old friend, the Crown, and William's assumption of it. Useful Norman customs such as the use of juries were integrated into England's native laws but the core of the native law survived and was built upon[58].

This is more than English legal history. It is also the early history of our constitution and common law.

There are probably many lessons to be taken from this interesting historical vignette. I think the most important must be that when two completely different legal systems overlap and the parties to such systems are motivated to achieve a useful reconciliation of such systems, the persons effecting the reconciliation should treat both systems with respect and seek to understand them fully. In his mastering of Anglo-Saxon law, Lanfranc was fulfilling the essence of consultation: "Consultation in its least technical definition is people talking together for mutual understanding."[59]

Vast amounts of Canadian indigenous customary law ceased to exist long before 1982. Extinguishments due to treaties, effected unilaterally by sovereign power through loss of cultural memory due to dramatic cultural disruption have done away with much of the detail of indigenous customary personal property and real property law[60]. Some of this loss is to be regretted. Other losses to customary law such as that relating to slavery may not be. Despite relaxed rules of evidence relating to the establishment of traditional practices, the Court has treated it as, if not necessary, then expedient, for the Court to concentrate on distinctive practices surviving from such customary law and treat the procedural and substantive detail of such customary law as mere incidents of such practices.

Such incidents are not S.35(1) protected. Yet to the extent that no one challenges them,neither have all of them ceased to exist for the peoples whose traditions they are. It may be found that selling food fish in moderate quantities is not legal but nothing prohibits governance of indigenous communities according to traditional practices to the extent they work and are not otherwise illegal.

What survives of the ancient traditions of indigenous Canadians is worthy of respect. Respect is one of those words that crops up in discussion of reconciliation as a profound part of human nature. It has been questioned if social reconciliation is assisted by the narrow and dismissive view of the customary legal incidents of protected aboriginal rights[61]. There is a danger in thinking that legal reconciliation is a monopoly of the Court and the control of the infringements of S.35(1) rights that are worth the millions

[58] Maitland, Vol. 1 ch.4, *passim*.
[59] Haida para. 43.
[60] Mitchell, para. 10.
[61] ILT, pp. 77 to 113.

of dollars needed to finance the ascent of an alleged infringement of a S35(1) right to appeal in the Court.

What the Court has done in respect of S.35(1) rights is very important but much important reconciliatory law can be practiced at home in hundreds of indigenous communities by the adoption of governance systems that are legitimate in the eyes of affected citizenry by recapturing key elements of the community's indigenous culture and, with it, some of the dignity lost in the one-size-fits-all governance system of the Indian Act[62].

Bishop Tutu believes that restoration of the dignity of the oppressed effects the restoration of the dignity of the oppressor and in that reconciliation occurs[63]. Legal reconciliation can be humble but very effective.

5. *Lesson #2 – Separate Legal Traditions can Merge.*

Reconciliation is, of necessity, a two-way street. Indigenous and non-indigenous Canadians need to view its results as legitimate. A vocal minority of non-indigenous Canadians have expressed concerns about the creation of pockets of unfamiliar rights and law within Canada in the treaty process[64].

Historical experience suggest that providing some citizens with laws peculiar to them is not destructive of civil society and can, over time, allow disparate groups to "move on together".

As the Roman Empire broke up and northern Italy became inhabited by populations subject to complex but mutually unintelligible legal systems such as Roman civil law and Lombard law, a system of dealing with conflicts of law developed, the fundamental rule of which was that each individual was subject to the laws of his or her ancestors even while living in the same communities. Such state of affairs continued until, over centuries, both systems of law were studied and understood by the legal academics and judiciary of the day in a slow process of integration of useful elements from both systems[65].

In Mitchell the Court borrowed from the final *Report of the Royal Commission on Aboriginal Peoples*[66] (the "Report") to suggest that if the notion of "merged sovereignty" from the Report is to be given meaning:

> "...it must include at least the idea that aboriginal and non-aboriginal Canadians together for a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled."[67]

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[62] *An Act Respecting Indians,* R.S.C. 1985, c.I-5, as amended (the "Indian Act").
[63] Tutu p.31.
[64] Gibson, Gordon, *Comments on the Draft Nisga'a Treaty,* in BC Studies, Vol. 120 (Winter 1998-99) pp. 55 to 71.
[65] Maitland, Vol.1 pp. 13 to 15.
[66] Vol.2 (Restructuring the Relationship) (1996) at p 214.
[67] Mitchell, para. 129.

The Court went on to quote with approval from the Report to the effect that such shared sovereignty:

> "...a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation."[68]

All of this is a far cry from the factum of the Government of British Columbia in Kruger.[69] It also suggests that Canada has proceeded along the road of a merger of laws much more rapidly than the medieval Italians but the road has long been in use.

6. *Lesson #3 – The Common Law Merges with Sui Generis Customary Law*

While Duke William and Lanfranc found in England a peculiarly sophisticated set of written laws relating to a broad range of matters, everyday lives of the great mass of the population were people whose entire life revolved around a relatively small agricultural village known usually as a "manor"[70]. There were tens of thousands of manors in medieval England and day to day rights and activity on each manor were regulated by customary law peculiar to such manor. Each manor had one or more courts over which the lord of the manor or his steward presided. The law in such courts was determined from the court rolls recording the customs and from the memory of customs possessed by the oldest inhabitants[71]. By the late middle ages, it was accepted that any custom which had been carried on since before the coronation of King Richard I on 3 September, 1189 was a "good custom" and, as such, the basis for the enforcement of the such custom as a valuable right. As might be expected, there were certain similarities but also great differences between legally binding customs in different manors.

There is little doubt that Dickson C.J. faced with describing legally enforceable manorial customs would find them to be *sui generis.*

The very notion of the "common law" derives from the fact that common law was applicable to all people in all places in England. The laws of each manor, like Canadian indigenous customary law, was dependent upon the particular traditional usages of that manor which was proven by the best available record of the customs of that manor. Such customs were binding upon those who lived at the manor or sought an interest there.

How then is it that today there is absolutely nothing left of this enormous mass of customary law which once represented rights in much of the wealth of England?

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[68] Mitchell, para. 130.
[69] *Vide supra*, n. 4.
[70] Maitland, Vol. 1 pp. 594 to 605.
[71] Maitland, Vol. 1 pp. 592 to 593.

The cause was the activities of the central Royal Courts of common law and equity and their ability to make highly authoritative decisions in respect of the clarification, definition, discovery and even invention of custom for litigants claiming under manorial custom[72].

The common law courts but especially the Court of Chancery and other equity courts[73] all heard cases relating to matters of manor custom and by the late sixteenth century all their decisions were being recorded. Such case law was becoming part of the daily stock-in-trade of practising lawyers. The high authority of Royal Courts judgements inevitably involved both the common law and equity in the life of the manors, changing the local procedural and substantive law with their decisions[74]. A quotation from the records of the central courts became preferable to the testimony of elders about what was going on "time out of mind". Because such decisions all emanated from a tiny class of judges before whom argued a tiny class of lawyers, some of whom published reports of such decisions, such decisions also imposed an ever greater uniformity and legal coherence upon what they found to be binding custom. The fundamental process of the common law, of seeking principles of law from an abundance of conflicts relating to similar matters simply erased the authority of home-grown manorial custom over the course of a little over three centuries. In 1922, almost the last vestiges of it were abolished by statute[75].

The similarity between the medieval manors of England and the indigenous communities of Canada today is striking. This similarity can even be found in the fact that the same problems that exist in Canadian cases relating to proving aboriginal rights from oral evidence were often what drove litigants seeking to find and enforce their customary rights to the Royal Courts. However, there is a fundamental difference. While indigenous nations do not have institutions clearly analogous to manorial courts so that indigenous custom is not locally enforceable, to the extent that it can be shown to pass the tests of a S.35(1) right, it cannot suffer the abolition to which manorial custom was subjected in 1922.

Short of abolition however, it is not hard to see in Canadian aboriginal jurisprudence since 1982 the same merging processes effected by the Royal Courts upon manorial law from the fifteenth century to 1922. The Canadian judiciary is authoritatively rendering indigenous customary rights uniform both through binding precedents relating to each class of such rights and by disregarding elements of S.35(1) rights only incidental to such protected rights. Over just short of thirty years, the surviving mass of Canadian indigenous customary law has been given partial constitutional protection, been rendered understandable to the common law and made subject to infringement by the Crown pursuant to common law rules.

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[72] Jones, W.J., *The Elizabethan Court of Chancery,* Clarendon Press, Oxford, 1967 p.487 ("Jones").

[73] Even by the middle of the sixteenth century, cases relating to the customary law of manors was a substantial part of the case load of the Court of Requests, a prerogative court with a special jurisdiction to serve the poor, Knox, D.A., *The Court of Requests in the Reign of Edward VI 1547-1553,* Unpublished Cambridge University Ph.D. thesis, January 1974, p. 341.

[74] Jones, pp. 487-488.

[75] Holdsworth, Sir William*, An Historical Introduction to the Land Law,* The Law Book Exchange, Clark, N.J., 2004, p.48.

In the light of what we have seen of the historic power of the common law to absorb a mass of *sui generis* circumstances and authoritatively render them into common principles, there should be no surprise with what has happened since 1982.

There is now little that is not predictable inS.35(1) litigation. As 35(1) rights cannot to be abolished and are now well defined in law, the federal and provincial governments need to get on with developing the mechanisms of legal reconciliation discussed in Haida cheaper and more accessible through clear, more uniform and mutually acceptable guidelines relating to the ongoing achievement of legal reconciliation as well as the creation of mutually acceptable regulatory schemes to the decisions of which the courts would normally defer.

The adversarial cycle of victory and defeat could me materially reduced. Old lawyer specializing in S.35(1) litigation could retire and the legal fees they would thereby forego might be more usefully employed among the holders of S.35(1) rights.

7. *Lesson #4 – Nothing in Human Experience is Unique*

This last and very striking lesson from legal history comes from the very beginnings of English law.

Modern studies of traditional indigenous law in Canada canvas anthropological data and the memory of indigenous elders to seek to reconstruct what traditional indigenous law was and how it may be adopted as legitimate in application to the legal issues of modern indigenous people.

The experience of one such researcher is described in the 2007 collection of essays*, Indigenous Legal Traditions* edited by the Law Commission of Canada. The essay describes how an M.A. student from U.B.C. law school was confused by how traditional justice among the Sto:lo people of British Columbia lacked the concept of "crime" and "punishment". It goes on:

> "Then, one day, that all-important paradigm shift occurred, a lesson in decolonizing one's mind, an epiphany if you will: justice to the Sto:lo within the Sto:lo worldview does not look anything like the justice one finds within the Canadian criminal justice system. The latter may focus on "crime" and "punishment" but to the Sto:lo "justice" is centred upon the family."[76]

The student might have been less impressed by this epiphany if she had read Maitland's description of the earliest known stage of Anglo-Saxon traditional law. In that stage the "justice" was centred on the family. Preservation of peace within the tribe or kindred and protection against outside kindreds was fundamental to survival.

> "Anglo-Saxon polity preserved, even down to the Norman Conquest, may traces of a time when kinship was the strongest of all bonds. Such a stage of society... is not confined to any one region of the world or any one race....Step by step, as the power of the State waxes, the self-centred and self-helping autonomy of the kindred wanes. ...There is a constant tendency to conflict between the old customs of the family and the newer laws of the State; the family

[76] Palys, Ted and Victor, Wenona, *Getting to a Better Place,* in ILT, p.21.

> preserves archaic habits and claims which clash at every turn with the development of a law-abiding commonwealth of the modern type."[77]

Lest we be too hard on what might appear to be Maitland's lack of sympathy for family based justice, it is worthy of note that while the student was dealing with those elements of Sto:lo justice based on the family which admirably deal with preserving peace in the family in a culturally legitimate manner, she did not have to deal with the less pleasant side of kinship justice, the blood feud between kindreds which Maitland could report on based on a history of bloody Anglo-Saxon inter-kindred feuding.

For me, there was an epiphany in the congruity of these two quotations.

How interesting to think that forty or fifty generations ago, the ancestors of Canadians with Anglo-Saxon roots and only five or six generation ago the ancestors of Canadians with highland Scots roots would both find the legal system of Canada fundamentally incomprehensible, illegitimate and threatening to them and their families.

What does this insight mean to legal reconciliation in Canada today? It seems to me that it contains a number of lessons.

At the most basic level , it tells indigenous and non-indigenous Canadians that we are not so very different after all and that processes analogous to legal reconciliation of customary family-based fundamental values with those of a society built on marginalizing both custom and family in the management of public affairs are not new and extraordinary but old and normal.

Perhaps the same lesson is that there is not an unbridgeable gap between the legitimate legal perspectives of indigenous and non-indigenous Canadians which cannot be reconciled with better understanding of how we all got to where we are now.

Finally, drawing on the lesson that teaches us that different legal systems can operate in the same communities, it would appear that legal reconciliation may go far beyond the great cases heard in Ottawa that define the meaning of S.35(1). For indigenous people living lives in communities somewhat analogous to medieval manors, most of the important things in life have nothing to do with what happens in the Court. The details of their lives are dominated by governance systems with which they are often uncomfortable. The people of England have had much more than a thousand years to become comfortable with the waning of family and the waxing of the State. There is nothing to stop indigenous communities giving themselves more comfortable and probably more effective governance systems that utilise such traditions as retain meaning.

If reconciliation is a profound human process and law is integral to the existence of any society, the legal part of S.35(1) reconciliation may well require a revolution in the governance of individual indigenous communities far from Ottawa but where indigenous people mostly live.

[77] Maitland, p.31.

H. Conclusions

1. *Hopefully the Glory Days of S.35(1) Litigation are Over*

The Court has mandated reconciliation as a central doctrine of the Canadian constitution. Reconciliation is better understood instinctively than in massive definition. It is a profound human process. You know it, like honour, when you see it.

At the level of millions of people from as many cultural backgrounds as the world possesses, Canadian reconciliation is necessarily a complex process. In order to analyze it, it is necessary to ask what in both small and vast human communities is there which would have to be rendered known and comfortable to each other in order to be considered "reconciled".

All human societies have some form of law according to which they live which in one way or another dominate every aspect of dayly life. Thus, no matter what else in each reconciling society may need reconciliation, the laws of the reconciling societies will need to be reconciled.

After thirty years, the work of the Court relating to telling us the meaning of S.35(1) and describing procedures to effect legal reconciliation seems to be largely done. The Court's decisions in S.35(1) cases have for some years now been fairly predictable. For aboriginal law junkies, S.35(1) has provided millions of excited hours of concentrated of something like bliss. For counsel, it has provided a rich and interesting vein of work. For indigenous peoples it has provided a not always satisfying vision of their rights. The essential ground work of legal reconciliation has been done and the call to social reconciliation has been delivered.

2. *The Focus of Reconciliation Should Shift from the Courts*

As seen in the discussion of the decision in Haida, the Court gave excellent advice to Canadian governments. Clarification of the processes of reconciliation and relegating review of such processes to administrative tribunals, sadly, has not been a feature of a feature of the policies of even the most reconciliatory of provinces.

The Court has not suggested an aspect of legal reconciliation which is suggested by the study of reconciliation as a profound human function. If part of what reconciliation is about is the re-establishment of dignity, it is difficult to understand how the Indian Act survives as legislation dominating the lives of most indigenous Canadians. The well-meant protections of that statute are archaic, economically destructive and need to be re-thought. The rights created in it can be confirmed in more modern legislation. The continuance of such a statute is an affront to the dignity of all Canadians and hence contrary to the process of reconciliation. Of course, the Court is not to blame for this. It is not its role to legislate.

3. *Most Lives are Lived at Home*

The great and authoritative engine of legal reconciliation in Canada has been the Court. Over thirty years, relays of its Justices have skilfully applied the logic of the common law to the digestion by the

common law of the S.35(1) rights. News of each great decision defining some other aspect of S.35(1) is heard as a victory or a defeat for one side or the other. We can be forgiven for confusing such news from Ottawa with the whole of legal reconciliation. Note though that reconciliation of these "sides" has been found to be the message of S.35(1) of our fundamental law.

In fact, reconciliation cannot be achieved by the Court. The Court has performed the first step in legal reconciliation. The Court has, within the ambit of its powers, sought to advise Canada's governments how to assist the reconciliation process. However, real reconciliation can only be achieved in the minds of the Canadians wherever they live. All the clever legal work of the Court does no more than give a common law meaning to words in the constitution and guidance to governments and indigenous nations. All that Canada's government might do to make the processes of legal reconciliation more efficient will but reduce friction and expense.

Most indigenous Canadians still live in, near or with a relationship with their traditional communities. If indigenous customs survive, they mostly survive in the memories of the inhabitants of those communities. In effect, they often survive submerged by the often dysfunctional inheritance of the long history before 1982 including the Indian Act.

The its case law in respect of S.35(1), the Court has been both the prophet or reconciliation and the chief mechanic of legal reconciliation which is necessary for broader social reconciliation.

From here, reconciliation in both its legal and social senses must move out to the provinces with new relationships at the highest levels and governance structures at the community level that can be viewed by those living under them as culturally legitimate and worthy of respect as well as transparent and endowed with checks and balances to deal with the low grade corruption and abuse of power so well-known under current governance structures. It is perhaps overly sanguine to expect that those who will be checked and balanced will subject themselves to such new regimes.

That is another and complex problem and not the subject of this paper.

Never forget, the stakes are high. We will all, and our descendants, live with the results of successful or failed reconciliation.

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