PEELING THE RECONCILIATION ONION

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A. Introduction

In March, 2009, the Government of British Columbia (the "Province") published a discussion paper (the "*Discussion Paper*") describing possible legislation to implement the Provinces' new relationship with B.C.'s Aboriginal peoples. It stated that implementation of such legislation, "…is intended to foster reconciliation, cooperation and partnership and contribute to certainty for Indigenous Nations and third parties (emphasis added)."

The legislation proposed in the *Discussion Paper* has not materialized but the Province's reconciliation efforts continue as do those of the federal government and other provinces. "Reconciliation", therefore, is a word and a concept in need of careful analysis for the benefit of policy makers. This piece is heuristic and seeks to provoke more thought about this complex matter.

B. Two meanings of Reconciliation in Canadian Law

In 1982, Section 35(1) of the *Constitution Act, 1982* (" 35(1)"), added to the Canadian constitution recognition of existing Aboriginal rights and title.

R. v. Sparrow [1990] 1 S.C.R. 1075. ("*Sparrow*") brought the concept of "reconciliation" into Canadian Aboriginal law. Faced with the argument that constitutional recognition of Aboriginal rights meant that any law affecting Aboriginal rights would have no force or effect, the Court found that, "federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights (emphasis added)".

In *R. v. Van der Peet*, [1996] 2 S.C.R. 507. ("*Van der Peet*"), the connection between 35 (1) and reconciliation was further developed by combining the legal logic of some early American jurisprudence, with that in *Mabo v. Queensland*, [1992] 5 C.N.L.R. 1., which held it possible to "reconcile" customary rights (Aboriginal law) and the "legal ideas of civilized society" (Australian law). The Court concluded that 35(1) mandated integration of concepts of Aboriginal law with Canadian law. The doctrine of justification in the context of the Crown's duty to consult and, if appropriate, accommodate ("Consultation") remains fundamental to resolution of infringements of Aboriginal rights. The use of Consultation to effect justification is an aspect of reconciliation.

In *R. v. Gladstone*, [1996] 2 S.C.R. 723. ("*Gladstone*"), the Court's dealing with the problem of natural resource allocation led to the conclusion that Aboriginal Canadians form part

of Canadian society and that objectives such as conservation, necessitate limitation of Aboriginal rights. Such limitation was held to be, "a necessary part of reconciliation". Reconciliation was also referred to not in terms of reconciliation of concepts of Aboriginal law with Canadian law but of "reconciliation of Aboriginal societies with the larger Canadian society of which they are a part… (emphasis added)." In *Van der Peet* and *Gladstone*, the two faces of reconciliation in Canadian law –what I will call "legal reconciliation" and "social reconciliation- were described but not named.

B. The Mechanics of Legal Reconciliation

In *Haida Nation v. British Columbia (Ministry of Forests),* [2004] 2 S.C.R. 511 ("*Haida")*, the Court traced the origin of legal 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. Legal reconciliation began with the assertion of sovereignty and continues in perpetuity. It is not a legal remedy but an ongoing process mandated by 35(1).

The explanation of reconciliation in *Haida* may not be limited to "legal reconciliation" and might also be intended by the Court to suggest the origins of Canadian "social reconciliation". However, while there was much that has been, since initial contact, much that is well-intentioned in the history of relations between the Crown and Canada's aboriginal peoples, there have also been social impacts upon Canada's Aboriginal peoples in that history that has generated the need for social reconciliation. Faced with the issue of legal reconciliation, the Court in *Haida* dealt in detail with the appropriate mechanics for reconciling *sui generis* Aboriginal rights stemming from pre-contact practices and recognized in 35(1), which might be called "Aboriginal law", with Canadian law.[1] In *Haida,* the Court did not advise on social reconciliation.

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

(a) negotiation of treaties;

(b) Consultation;

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

(d) government guidelines for dealing with Aboriginal claims that fall short of such a regulatory scheme; and

(e) 35(1).

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[1] *Haida*, paras. 17, 20 and 32,

All such classes may and sometimes are simultaneously engaged. A treaty effects no final reconciliation between the Crown and an Aboriginal people. Infringement of a treaty right engages Consultation. Regulatory schemes and guidelines may be adopted by the Crown to strengthen the legal reconciliation process. When reconciliation breaks down, ultimate recourse is to the courts as the arbiter of what is appropriate legal reconciliation.

The Court has not closed the categories of legal reconciliation.

TreatyMaking

It is the nature of treaties consensually to extinguish some Aboriginal rights while seeking to make surviving rights comprehensible in Canadian law. Treaties effect reconciliatory "translation" of surviving Aboriginal law into a mixture of oblivion, defined packages of Canadian law and, in British Columbia and possibly elsewhere, a category of surviving rights not dealt with in treaty.

Consultation

Justification of infringement by Consultation first appeared in *Sparrow.* Unlike treaty-making, Consultation does not deal with all or most of an Aboriginal peoples' rights but *ad hoc* with individual infringements of specific rights or alleged rights. It seeks to identify competing interests in a balanced approach to infringements that minimizes infringement but allows appropriate infringement to proceed with as little impact as possible upon the infringed right. Consultation does not incorporate such right into Canadian law but effects a harmonious co-existence of laws..

In *Haida*, the Court suggested to the Province that it adopt a regulatory scheme that would allow for provincially established extrajudicial review to determine when appropriate Consultation is effected. It hoped to spare the courts from this ongoing task by allowing the courts to defer to decisions of an expert tribunal.

Administrative Schemes and Guidelines

The Court identified the Province's 2002 *Policy for Consultation* as a government guideline falling short of a regulatory scheme. It appears that some aspects of the proposed legislation suggested in the *Discussion Paper* may fall into the category of a regulatory scheme aimed at both legal and social reconciliation while seeking to minimize the role of the courts in legal reconciliation. However, while the Court in *Haida* suggested creation of a specialized tribunal for judging the appropriateness of Consultation, the legislative scheme outlined in the *Discussion Paper* appeared to seek to establish a more comprehensive program that would carry out Consultation or perhaps seek to replace Consultation in the form described by the courts with undefined "shared decision making".

The scheme of such legislation might have included the kind of tribunal for extrajudicial review of Consultation according to the administrative law principles suggested by the Court. This may be part of what is called "comprehensive" engagement between the Province and Aboriginal peoples. Given the ability of Aboriginal people to challenge the sufficiency of any particular Consultation, it would seem to complete the scheme of the *Discussion Paper* to create such an institution if, as has been asserted, (i) "shared decision making" generally leaves the final power to govern British Columbia to the Crown so that there is only a limited Aboriginal veto of the sort contemplated by the Court in *Delgamuukh v. British Columbia,* [1997] 3 S.C.R. 1010. ("*Delgamuukh*"), and (ii) "shared decisionmaking" encounters, the same problems of dissatisfied Aboriginal parties as in Consultation as practised to date.

The Province's "New Relationship" has extended the ambit of "administrative schemes and guidelines" to a point at which such schemes and guidelines become not easily distinguishable from a process that, at times, preempts Consultation. The Province has done so in a substantial number of documents made with Aboriginal communities in respect of legal and social reconciliation. While the treaty process continues, such documents fill the gap in the process of legal reconciliation existing in respect of communities that are not subject to a treaty while also effecting ongoing social reconciliation. It is notable that similar *ad hoc* legal reconciliatory processes are being followed in Ontario

Pending treaties, the Province has sought to advance reconciliation with negotiation of many such documents to establish a pre-treaty *modus vivendi.* Nor does creation of any such *modus vivendi* necessarily constitute Consultation as enunciated by the Court. Not surprisingly, they resemble the non treaty documents of international diplomacy, finding common ground, offering financial inducements, establishing protocols for ongoing relationships and agreeing on procedures for further diplomatic work. In them, the Province has exhibited a flexibility that is sometimes lacking in treaty negotiation.

It should be noted that similar *ad hoc* processes seeking reconciliation are being used in Ontario where the land is already subject to treaties.

C. The Mechanics of Social Reconciliation

Legal authority for social reconciliation lies in *Gladstone* and the acceptance of *Gladstone* in *R. v. Marshall*, [1999] 3 S.C.R. 533 para. 41 ("*Marshall #2*). As noted above, in *Gladstone*, the Court held that limits imposed on Aboriginal rights for the good of the "broader political community of which they [the Aboriginal peoples] are a part is a necessary part of reconciliation." The Court went on to hold, "In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of Aboriginal societies with the rest of Canadian society may well depend on their successful attainment" (emphasis added).

That passage is the judicial authority for the existence of a constitutional responsibility of Canadian governments to effect social reconciliation which goes beyond the integration and co-

existence of laws. The Court, not surprisingly offers no advice on the government policies which might help achieve such social reconciliation. However, the words, "*more importantly*" must have meaning. Their most obvious meaning is that the Court views the constitution as mandating more than mere legal reconciliation and that social reconciliation is the *more important* aim of our constitution. At the same time, it is not rational to envision social without legal reconciliation.

D. Individual Reconciliation – A Third Face of Reconciliation?

Development of the doctrines integral to legal reconciliation in Canada has required a litigation process lasting nearly four decades. Social reconciliation in Canada has developed outside the courts as a parallel development in the policy of governments over nearly five decades.

It is instructive to look briefly at the South African experience because it has been reported in great detail, its processes were carefully drafted as part of the new constitution of South Africa, it has been the subject of wise legal and moral commentary and it has been widely influential in the fostering of processes of social reconciliation and identifying, if not naming, what may be a third face of reconciliation what I shall call "individual reconciliation".

In South Africa, the danger of social breakdown added pressure to development of reconciliation processes that would work, if not to reconcile all to all, at least profoundly to change the minds of many and reduce the risk of social cataclysm. For the drafters of the new South African constitution, the past had to be dealt with and it had to be dealt with quickly and efficiently if the worst were to be averted.

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

While the indigenous African philosophical insights of *ubuntu* theology are interesting, equally interesting is that *ubuntu* theology absorbs the fundamentals of Christian theology relating to reconciliation; forgiveness and redemption. In this way, *ubuntu* theology also became a route by which religious Afrikaners, long imbued with their being a "chosen people" in their

own "promised land" could mentally move towards mutual understanding, apology and forgiveness.

Tutu's insights are drawn from a philosophical amalgam of different traditions but they are worthy of notice in any discussion of social reconciliation as tested in the SATRC and the changing of the South African public mind as, arguably, insights of universal applicability to reconciliation processes elsewhere. His reconciliation of African village values with the values of traditional white South Africarelies upon intellectually extracting the axiomatic concept of universal human dignityfrom these otherwise sometimes conflicting values systems. Seeking social reconciliation, a process of the mass changing of minds, in a philosophical vacuum may prove fruitless, and, in disappointed hopes, counterproductive.

However, it must be recognized that the inspiring scenes of individual reconciliation in the SATRC were individual epiphanies achieved face-to-face between transgressor and transgressed guided by one of the great thinkers of our time. What Tutu and the SATRC achieved were individual acts of mutual healing. In order fully to understand the processes of social reconciliation it must be understood that there is also "individual reconciliation" – a process carried on at the individual level of transgressed and transgressor but when multiplied in the consciousness of whole societies becomes at least a part of social reconciliation. Too much could be made of this concept but it would not be cautious to dismiss it. If whole societies do not rise to the dignity-restoring heights of individual encounters in the SATRC, there would seem to be some ability to reduce unforgiveness across populations using the mutually accepted truth, remorse, apology and forgiveness that make up Tutu's process for achieving individual reconciliation.

The South African experience shows that individual reconciliation can inspire broader social reconciliation. Given the human nature of the reconciliatory process, it is difficult to believe that individual reconciliation is not integral to successful social reconciliation. The workings of the SATRC were at a personal level involving moving scenes of individual remorse, apology and forgiveness. However, the publication of those stirring personal examples of the power of the reconciliation process have had a social reconciliatory effect in South African and other societies in conflict, worldwide.

It is important to remember that the SATRC existed in the context of a legislative dismantling of *apartheid* and implementation of legislation benefiting previously disadvantaged peoples establishing a "new relationship*"* between the Government of South Africa and its people. Establishment of equal civil rights and reduction of interracial tension through the reconciliation processes of the SATRC have been supported by money spent to effect social reconciliation by alleviating the social inheritance of *apartheid.*

E. Canadian Social Reconciliation

Canadian social reconciliation might be said to have started in 1960 when Aboriginal people with "status" under the *Indian Act* (Canada) living on reserves were enfranchised. That

was an essential first step in restoring the dignity of Aboriginal peoples. In 1982, 35(1) marked the willingness of non-Aboriginal Canadians to accept that legal and social reconciliation could become principles of the fundamental law although 35(1) spoke in the veiled tongue of the Delphic Oracle. It took a decade for the Court to begin to recognize that 35(1) effected a constitutional imperative to achieve both legal and social reconciliation.

During the decades of litigation that led to the clarification of the processes of legal reconciliation, there were themes of social reconciliation developing in Canada. Space does not allow discussion of them all. The federal government embarked upon an on-going "N*ew Relationship*" in 1998 and since 2007, Ontario has followed a "*New Approach*" to Aboriginal affairs, however, in a discourse aimed at B.C. lawyers, it seems appropriate to look at social reconciliation in British Columbia as an illustration of the process.

F. British Columbian Social Reconciliation

British Columbia is unique in Canada as long largely standing outside the legal reconciliation of treaty making. Historically, this resulted from rugged geography and the poverty of British Columbia's colonial government. The Colony was too poor to purchase treaties and useable land was too scarce to follow the treatymaking process followed in the flatter lands of Canada east of the Rocky Mountains which, by treaty, allocated large tracts to reserves and the rest of the land to the Crown. The Colony followed the instructions of the Colonial Office by adopting the policy for land settlement developed by the Colonial Office under similar conditions in the Cape Colony. That policy allocated self-selected lands to Aboriginal communities as reserves without treaties and treated the balance of the land as "unoccupied" for purposes of the English common law and thus free for settlement upon disposition by Crown grant. Implicitly, this meant that if there were any Aboriginal rights or title in such unoccupied lands, that they were extinguished by the sovereign authority of the Colonial government before British Columbia joined Canada in a series of proclamations and ordinances relating tofhunting, fishing and land use.

The Colonial theory for there being no Aboriginal rights or title in British Columbia unoccupied lands ("Colonial extinguishment") remained Provincial policy until 1990, when there were meetings between the Province and Aboriginal leaders which led to the creation of the B.C. Claims Task Force. The B.C. Claims Task Force Report in 1991 set out a procedure for the negotiation of treaties in British Columbia which was incorporated in 1992 into an agreement between the First Nations Summit, Canada and the Province. Legislation establishing the British Columbia Treaty Commission (the "BCTC") became effective in 1996.

The BCTC aims to advance legal reconciliation in B.C.by making treaties. However, even after 1990, the Province relied on Colonial extinguishment in the lower courts in *Delgamuukh* and only abandoned Colonial extinguishment during *Delgamuukh's* appeal to the Court.

The Province effected recognition of potential aboriginal title in B.C. between 1990 and 1996. By doing so, the Province recognized that British Columbia is subject to the same process of legal reconciliation as in the rest of Canada. Abandonment of extinguishment was the most important step in B.C. history toward legal and social reconciliation. Such step illustrates the close interrelationship of the two faces of reconciliation found by the Court. Legal reconciliation is impossible if there are no aboriginal rights or titles that survive to be legally reconciled with Canadian law. Social reconciliation in British Columbia could make little progress if Aboriginal law and, therefore, legal reconciliation were ignored.

In 2005, the Province met with leaders of the principle groups representing the Aboriginal peoples of B.C.. Those meetings led to the publication of a document entitled, "*The New Relationship*" (the "*The New Relationship*"). When faced with the multiplicity of issues that must be dealt with to achieve social reconciliation in B.C. that the Province adopted the same "new relationship" concept used by Canada in 1998 and in South Africa a few years before that. Accepting that *legal* reconciliation was progressing as contemplated by the means set out, above, the Province then acknowledged that if any progress were to be made towards *social* reconciliation inB.C., it would have to be made in a new way involving reallocation of resources and a strategy to make more equal the living standards of Aboriginal with nonAboriginal British Columbians.

The "Statement of Vision" in *The New Relationship* is illustrative of how far the Province would go to reassure Aboriginal British Columbians of the existence of a genuinely socially reconciliatory new relationship. Such Statement of Vision reflected, in suitably diplomatic language, an understanding of the case law of the Court relating to reconciliation.

In October 2008, the Union of B.C. Indian Chiefs ("UBCIC") sought to have the Province introduce legislation that would further *The New Relationship.* From late in 2008, the Province and UBCIC representatives entered into *in camera* negotiations. The result was the *Discussion Paper.*

The *Discussion Paper* built upon *The New Relationship.*. *The New Relationship* mapped out a social reconciliatory program which fit Provincial policy within the bounds of the decisions of the Court with respect to legal and social reconciliation issues. The *Discussion Paper* seemed willing to contemplate a more extreme interpretation of *The New Relationship.*

The Province planned to legislate based on the *Discussion Paper* shortly after publication of the *Discussion Paper*. However, the unclear nature of important concepts discussed led to concerns by industry about what seemed to be a material change in the governance of provincial resources and the nature of Aboriginal rights...Aboriginal groups and their lawyers also expressed strong concern.

The reaction to the *Discussion Paper* demonstrates the fragility of social reconciliation. It suggests that it may be appropriate to apply the humane principles of "individual reconciliation" in the design of social reconciliation processes. Overlooking that legal

reconciliation and social reconciliation are related but very different processes and that they seem to have some roots in individual reconciliation may lead to confusion in policy and legislation that seeks to achieve monolithic reconciliation. Fair minded people will accept openly demonstrated truth and change their minds in light of it. The obscure does not change minds. The covert embitters.

Consultation is a fair process derived from fair processes in administrative law adapted to the circumstances of the relationship between the Crown and Aboriginal citizens possessing unique rights. As discussed in *Haida* it can be improved.. Uncertainty, the diametrically opposite result to reconciliation, may result from trying to legislate an infringement justification process dramatically different from what the Court has found it is or advised that it should be. What the Court has found and advised is complex and seeks to be fair in effecting a balancing act that has already allowed, and yet promises, progress in legal reconciliation.

Social reconciliation offers broad scope to governments. However, it seems fair to suggest that seeking to force social reconciliation through legislation that does not recognize the binary nature of legal and social reconciliation by using the broad policy discretion available in respect of social reconciliation to seek to modify the hard-wrought common law of legal reconciliation requires caution.

H. Seeking a Social Reconciliation Touchstone

The route to legal reconciliation is mapped by the Court. Deviation from that route would lead to a challenge in the courts and either a reaffirmation of legal reconciliation as we know it or some variation thereof which judiciously adapts it to the circumstances of the challenge.

The route to social reconciliation is broader and resides in the good faith efforts of governments to bring into effect “new relationships” or “new approaches” which will “reconcile” Aboriginal and nonAboriginal Canadians. Such process is historic; subject, at least, to political, philosophical, scholarly and popular influences. It is also open to dangers including (i) the creation of a caste that profits from a new “recognition and reconciliation” industry while legal and social reconciliation show little advance among the broader Aboriginal population, and (ii) augmenting a culture of dependence from wellmeant government generosity unwisely distributed and managed.

In the normal course, the courts properly avoid concerning themselves with government policy or its results. It is unrealistic in Aboriginal litigation almost entirely devoted to claims of Aboriginal rights and title to look to the courts to formulate tests for what is socially reconciliatory.. It is even more unrealistic in that context to look to the courts to direct the governments of Canada upon the formulation of policy about how social reconciliation is to be achieved. A judicial challenge to the constitutionality of specific government actions relating to social reconciliation based upon the Charter of Rights and Freedoms in Part I of the *Constitution*

Act, 1982 might elicit some direction from the courts about the formulation of appropriate tests and policies relating to social reconciliation.

Much thought needs to be dedicated to what can act as a true compass in creating "new relationships" and "new approaches" that will effect legal and social reconciliation. The simple question, drawn from the individual reconciliation experience of the SATRC, "will this action increase or decrease the dignity of the parties" casts light on what actions will or will not be reconciliatory.

Such a question and other touchstone questions, need to be applied to every aspect of the relationships of Canada, its provinces and territories with Aboriginal Canadians if attempts at reconciliation, generated without peeling the reconciliation onion, are not to lead to many more apologies.