# The Politics of Reconciliation in Multicultural Societies

*Edited by*
Will Kymlicka and Bashir Bashir

OXFORD
UNIVERSITY PRESS

# Contents

# 8

# The Jurisprudence of Reconciliation: Aboriginal Rights in Canada

*Mark D. Walters*

The concept of reconciliation has become increasingly important to political theory and practice over the past decade. It has been invoked as a way of building peaceful relations between ethnic, cultural, and religious communities after periods of conflict or oppression—the South African Truth and Reconciliation Commission providing the most famous example (Asmal et al. 1997). It has informed the design of power-sharing arrangements in societies divided by opposing factions, as in Northern Ireland (Porter 2003). It has shaped public discourse about the rights of indigenous peoples, both domestically, in countries like Australia, and internationally, in the committees and working groups of the United Nations (Council for Aboriginal Reconciliation 2000; U.N. Declaration on the Rights of Indigenous Peoples 2006). It is usually assumed that reconciliation offers to political discourse something that the liberal concepts of democracy, justice, equality, and the rule of law cannot—in particular, ideas of repentance, forgiveness, healing, and harmony. But the features of reconciliation that make it a powerful political ideal also make it controversial. Reconciliation is sometimes said to undermine liberal values by permitting the sacrifice of justice and the rule of law in favour of amnesty and truth, or by allowing personal moral convictions into the public institutional domain (Gutmann and Thompson 2000: 22–44; Philpott 2006b: 25–33).

Reconciliation is not often considered as a legal concept. The use of law as an instrument to help achieve the end of reconciliation is frequently acknowledged. But little attention seems to have been given to the possibility that reconciliation may be, in some societies at least, an intrinsic

part of what law is—or, to be more precise, what the ideal of legality or the rule of law requires. Of course, if some conception of reconciliation really does form an intrinsic part of what we mean by the rule of law within liberal democracies overcoming past conflict, then concerns that reconciliation and liberalism conflict may prove to be unfounded.

In this essay, I will suggest that reconciliation is an aspect of legality. I will argue, in other words, that embraced by the politics of reconciliation is a jurisprudence of reconciliation. To this end, I will explore the use of the concept of reconciliation within the Canadian law on the rights of Aboriginal peoples. The Canadian experience is particularly useful in this respect. As Paul McHugh has written, many former colonies have adopted policies of reconciliation to address the grievances of indigenous minorities, but 'only the Canadians [have] fashioned a constitutionally-sanctioned and court-driven jurisprudence of reconciliation' (McHugh 2004: 579). Indeed, authority can now be cited—in lawyerly fashion—for the proposition I wish to defend. The 'dimensions of the rule of law', the Ontario Court of Appeal recently held, include 'respect for minority rights... [and] reconciliation of Aboriginal and non-Aboriginal interests' (*Henco* 2006a: para. 142).[1]

It should be emphasized, however, that the connection between reconciliation in Canadian law and reconciliation in general political theory and practice is hardly clear, and the judicial approach to reconciliation in Canada may fall short of the normative ambitions that reconciliation generally inspires. The example of Canadian Aboriginal rights law can help our understanding of the politics of reconciliation, but so too can the politics of reconciliation provide a critical perspective from which to assess the judicial approach to reconciliation and Aboriginal rights in Canada.

The essay begins with some general comments on the dimensions of reconciliation and legality, with a view to establishing a framework for the analysis. It then provides a brief history of reconciliation within the political discourse on Aboriginal peoples in Canada. Finally, it considers reconciliation as an organizing theme within the Canadian law of Aboriginal rights. At the end of this analysis, it will be possible to explain the sense in which reconciliation may be considered an unwritten principle of legality within post-colonial liberal democracies confronting the modern legacy of past injustice.

[1] Full citations to cases are given at the end of the chapter.

## The Dimensions of Reconciliation and Legality

Reconciliation means different things in different contexts. For the purposes of this discussion, I will distinguish between three uses of the term. First, we may speak of two people reconciling—the reconciliation of spouses after a period of separation comes to mind. I will refer to this as 'reconciliation as relationship'. Secondly, we may speak of people being reconciled to their fate, in the sense of accepting or being resigned to a certain state of affairs that is unwelcome but beyond their control. I will refer to this as 'reconciliation as resignation'. And, thirdly, we may speak of reconciliation as a process of rendering inconsistencies consistent—reconciling financial accounts being an example. This I will refer to as 'reconciliation as consistency'.

A common theme links the conceptions of reconciliation as relationship, resignation, and consistency. They all involve finding within, or bringing to, a situation of discordance a sense of harmony. Beyond this, however, they are very different.

Reconciliation as resignation is a one-sided or asymmetrical process in which one adopts an attitude of acceptance about circumstances that are unlikely to change. Insofar as reconciliation in this sense implies peace of mind in the face of an undesirable inevitability, it may be seen as a positive, even commendable, attitude to develop. But, it may also suggest that one has given up struggling against some challenge, and this may be cause for regret or even criticism. In other words, the morality of reconciliation as resignation depends upon the circumstances.

Reconciliation as consistency, in contrast, could be symmetrical or asymmetrical—one could reconcile two financial statements by adjusting the calculations in one or both statements. Like the morality of resignation, however, the morality of consistency depends upon the circumstances. Reconciliation in this sense could involve a technical or mechanical process of fitting disparate parts together. But it could also require moral judgement. For example, Ronald Dworkin argues that 'integrity' or consistency in political decision-making—treating like cases alike—is a distinct moral virtue (Dworkin 1986: 178). Indeed, he goes so far as to say (following Rawls) that moral reasoning generally involves the search for 'reflective equilibrium', or reconciliation between one's specific opinions and commitments on the one hand and the more abstract moral principles that they presuppose on the other hand, so that together they represent a coherent body of moral thought (Dworkin 1996).

Reconciliation as relationship, unlike the other two forms of reconciliation, is always, to a certain extent, two-sided or reciprocal, and it has a degree of intrinsic moral worth or value about it. When we speak of two people reconciling we usually have in mind a situation in which differences are resolved or set aside and amicable relations re-established. It may involve an apology or atonement for past wrongdoing by one side and forgiveness or acceptance of reparations by the other, or it may only involve an agreement to disagree about the past without attribution of blame. But invariably it involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations for a harmonious relationship. This is a morally rich sense of reconciliation. It often implies a cathartic process of facing past evil openly, acknowledging its hurtful legacies, and affirming the common humanity of everyone involved. Reconciliation as relationship is about peace between communities divided by conflict, but it is also about establishing a sense of self-worth or internal peace within those communities.

The different forms of reconciliation therefore involve different states of mind. Reconciliation as consistency usually implies reconciling propositions, facts, ideas, statements, interests, or rights, rather than people. As such it is a process that can take place independently of the attitudes of people who might be affected (although those people may or may not accept the results). Reconciliation as resignation and reconciliation as relationship are different. One can be forced to put up with a certain situation or person, but before it can be said that one is *reconciled* to the situation or with the person, one has to have adopted the right reconciliatory attitude.[2] Reconciliation as either resignation or relationship cannot be imposed from without; it is a condition at which people arrive themselves.

Of course, if groups of people are involved, attitudes must somehow be aggregated. We may say, for example, that a people is reconciled to its fate, or two peoples are reconciled with each other, if the relevant peoples involved have, collectively, adopted positions of reconciliation. In these cases, members of the group may or may not individually adopt the right reconciliatory attitude. It would be surprising for a group to adopt a reconciliatory position collectively if a sizeable portion of its members had not adopted a reconciliatory attitude individually, but not impossible. It is therefore useful to distinguish between individual or personal

[2] On the relationship between individual reconciliation and questions of human psychology, see Potter 2006.

reconciliation on the one hand and collective or political reconciliation on the other.

Finally, reconciliation may be considered as either an empirical state of affairs or a normative value. It may be possible to say of two former adversaries that they came to an agreement and are now, as a matter of fact, reconciled. But it may also be possible to say that good relations between two peoples with opposing cultural traditions necessitate an indefinite search for reconciliation, so that reconciliation in this case is not a fact as much as a normative principle that guides decision-making on an ongoing basis.

As we shall see, all three forms of reconciliation—relationship, resignation, and consistency—are relevant to political and legal discourse on Aboriginal rights in Canada, as are the various ways—mechanical, moral, personal, political, factual, and normative—that they may be manifested. We shall also see, however, that reconciliation as resignation and reconciliation as relationship are difficult to accommodate directly within a jurisprudence of reconciliation, given the institutional limitations that judges confront. In contrast, reconciliation as consistency, when it takes the form of an interpretive enterprise aimed at political-moral coherence, is—to borrow Dworkin's conclusion about reflective equilibrium—essentially 'the traditional common law method' (Dworkin 2006: 251). Indeed, it is in this conclusion that we can see a connection between reconciliation and legality.

Legality, or the rule of law, is, of course, a contested concept. It is generally taken to imply governance through laws that are general, clear, prospective, stable, and rational, and the adjudication of disputes about law by an independent judiciary whose courts are open and accessible and generally conform to the idea of due process (Fuller 1969: 33–94; Raz 1979: 210–29). Although the rule of law is largely a procedural ideal, within theories of liberal constitutionalism it has some moral substance. The enterprise of governing through law is said to respect individual dignity by respecting equal citizenship—an ideal premised upon a relationship of reciprocity between governors and governed that is defined by commitment to a 'constitutional' rather than a simple 'majoritarian' conception of democracy (Allan 2001: 21–5). Informed by this sense of legality, the judicial task when applying general rules to individual circumstances is seen as one of upholding the minimal standards of due process and equality necessary for constitutional democracy to flourish (Allan 2001: 121–60). In hard cases, as Dworkin would say, judges must embrace the value of 'integrity', the value of extending to everyone the rights extended

to some so that equal concern and respect is secured for all, and this end is best achieved, he says, by the judicial recognition of those rights that are implicit within the theory of political morality that shows past decisions about rights to be as coherent and just as they can be (Dworkin 2006: 140–86). Dworkin insists that integrity within decision-making is essential for the emergence of a community of principle—a 'true' community in which 'each citizen must accept demands on him, and may make demands on others, that share and extend the moral dimension of any explicit political decisions', a 'moral' community in which citizens 'are in some sense the authors' of a collection of laws that they can accept as consistent in principle (Dworkin 1986: 189, 201). The interpretive exercise that integrity implies is one that seeks reflective equilibrium between explicit propositions of law on the one hand and the set of abstract moral principles that they presuppose on the other—or, we may say, it implies a form of reconciliation as consistency. In this minimal sense, then, reconciliation is intimately connected with the rule of law, and, we may say, to a deep or constitutional sense of democracy implicit within the liberal conception of the rule of law. What this connection means for other forms of reconciliation, in particular the reconciliation of peoples in post-conflict situations, remains to be seen.

## Reconciliation and the Politics of Aboriginal Rights in Canada

The politics of reconciliation were recognized and practised long before Europeans arrived in North America—a point illustrated vividly in the epic story that the Haudenosaunee, or Six Nations Iroquois, tell about the founding of their constitution, the Great Law of Peace (Fenton 1998). The narrative explains how a visionary Iroquoian named Deganawidah reconciled warring communities and helped to establish a confederation of nations. The turning point in the story is the performance by Deganawidah of a sacred 'ceremony of condolence' for a grief-stricken chief named Hiawatha. Deganawidah gave to Hiawatha strings of wampum shells and symbolically wiped the tears from his eyes, unblocked his ears, and cleared his throat, and when the ceremony was complete, he said: 'My junior brother, your mind being cleared and you being competent to judge, we now shall make our laws' (Parker 1916: 24).

For the Haudenosaunee, and many other Aboriginal peoples in North America, political order came not from the coercive will of a sovereign, but through cultivating relationships of spiritual-kinship that linked individuals,

clans, villages, nations, and the natural world together (Alfred 1999). Maintaining a sense of ordered freedom within these societies required that individuals and communities honour the sacred duties of care and respect that ties of spiritual-kinship implied, and it depended on the repair of those ties through condolence customs when they became damaged by conflict or division.

These traditions of reconciliation were recognized and partially incorporated in treaties between Aboriginals and Europeans. Indeed, the best written accounts of Aboriginal condolence customs are the records of treaties held between the mid-seventeenth and early nineteenth centuries (Fenton 1985: 4). By the Covenant Chain treaties, for example, the King of England was incorporated into the Aboriginal web of spiritual-kinship, becoming not a sovereign over Aboriginal peoples, but a relation to them, and thus subject to the duties of care and respect that Aboriginal relations generally owed one another. When the relationship became strained, as it often did, condolence and gift exchanges were the solution. On these occasions, said one Haudenosaunee chief in 1756, 'we should comfort one another [and] drive away the Spirit of Anger & discord from our hearts . . . in order that we might deliberate maturely upon public matters' (O'Callaghan 1856–61: vol. viii, 193). Even violent conflict was resolved in this way. '[W]e know that by your Laws a Murderer must dye,' a chief said to a colonial governor in 1733, 'but it has been concluded by the ancient covenant between our ancestors, that if any such accident happen'd, . . . it should be reconciled and forgiven and . . . burryed in oblivion' (O'Callaghan 1856–61: vol. v, 963). Through the wiping of tears and clearing of ears and throats, 'passion and bad humour' were replaced 'with mutual friendship and calmness' (O'Callaghan 1856–61: vol. viii, 193) and the parties were able to see each other 'full of honor and humanity' (O'Callaghan 1856–61: vol. ix, 37). In this way, it was said in 1743, the parties were able to 'make up th[e] breach in the Covenant Chain'—to 'reconcile' (O'Callaghan 1856–61: vol. vi, 238–40).

Reconciliation through spiritual condolence was thus central to Aboriginal ideals of legality. But condolence only produced reconciliation and reconciliation only secured the conditions for legality because condolence had personal and spiritual meaning for members of Aboriginal communities. Reconciliation through condolence within the Aboriginal–Crown treaty relationship must have secured conditions for legality—to the extent that it did—in a different way, for the members of the European party to this relationship could not have had the same personal reaction to the custom as their Aboriginal counterparts had. The description of the

Crown's Indian Affairs representative, Sir William Johnson, 'march[ing] on at the Head of the Sachems singing the condoling song which contains the names, laws & Customs of their renowned ancestors' (O'Callaghan 1856–61: vol. viii, 130–5), suggests that a sincere demonstration of respect for a people's law might secure reconciliation between different legal traditions and, at the same time, a genuine sense of reconciliation between peoples—even if the condoling song had no spiritual meaning for officials in Johnson's position. The old treaties suggest, in other words, that legal traditions as well as peoples can be reconciled, and that reconciliation may be personal and political in different ways for the different peoples involved.

The lessons of these early treaties were forgotten or considered obsolete by the mid-nineteenth century, and our brief history of reconciliation in Canada can move directly to 1990, the year that Aboriginal grievances exploded as a topic of national political debate.

In the summer of 1990, Aboriginal political leaders mounted an effective campaign against a set of constitutional reforms that would have recognized Quebec as a 'distinct society' within Canada, arguing that such recognition was unjust as long as Aboriginal claims to distinct status were ignored (Miller 1991: 289–307). Their actions thus helped to trigger the national-unity crisis that followed the failure of these reforms. At about the same time, Mohawk protests against a local municipality near Montreal that planned to build a golf course on Mohawk land became violent. A 78-day standoff with the police and army ensued (York and Pindera 1991). The images of heavily armed Canadian soldiers and Mohawk warriors staring at each other across barricades shocked a Canadian society that prided itself on its peaceful and just character.

Largely in response to these events, the Canadian government established a Royal Commission on Aboriginal Peoples to investigate Aboriginal grievances in Canada. In its 1996 report, the Royal Commission described the initial period of coexistence when Europeans showed at least some respect for indigenous peoples and their tribal customs through treaties like the Covenant Chain, and it then described a long history of colonial domination and oppression that followed. It recounted how the British Crown assumed sovereignty over native peoples without their consent, and how it then opened their lands to settlement and resource development—sometimes, but not always, after signing treaties of land surrender the true meanings of which were, and still are, controversial. The report described how Indians were settled onto small 'reserves' where traditional lifestyles were difficult to sustain, ancient ceremonies banned,

and customary forms of self-government severely restricted. The report explained that Indians, Métis, and Inuit came to be treated not as full citizens of Canada, nor as independent nations, but as wards of the Crown—a status reflected in the fact that Inuit were not given the right to vote in federal elections until 1950, and Indians did not receive that right until 1960. Aboriginal peoples were to be civilized and gradually assimilated into the surrounding society. In this respect, the Royal Commission gave special attention to the policy of separating Aboriginal children from their families and educating them in church-run residential schools where Aboriginal languages and cultures were suppressed and students were frequently subjected to physical and sexual abuse.[3]

The Royal Commission concluded that a century and a half of dispossession and disrespect left Aboriginal communities with serious social problems, including high rates of poverty, substance abuse, and disease, but it did not result in their assimilation. The most oppressive policies had been abandoned by the 1960s, a land-claims negotiation process began in the 1970s, and in 1982 Canada amended its Constitution to recognize and affirm 'existing aboriginal and treaty rights'—a provision that, as the Supreme Court of Canada stated in 1990, 'renounces the old rules of the game' and calls 'for a just settlement for aboriginal peoples' (*Sparrow* 1990: 1106–7, quoting Lyon 1988: 100).

The Royal Commission stated that Canadians were thus in a good position to 'learn from the mistakes of the past' and develop 'a national policy of reconciliation and regeneration' (RCAP 1996: vol. i, 229). It insisted that by following certain 'avenues of reconciliation', in particular by embracing the values of 'mutual recognition, mutual respect, sharing and mutual responsibility', a new relationship between Aboriginal and non-Aboriginal people in Canada might emerge (RCAP 1996: vol. i, 2, 694). The extension of voting rights to Inuit and Indians in the mid-twentieth century established a form of democracy in Canada, but its majoritarian premises were insufficient. The Royal Commission insisted that only by pursuing 'the goal of equal, co-existing, and self-governing peoples' would Canada 'preserve and enhance the values of liberal democracy in a manner appropriate to a multinational society' (RCAP 1996: vol. i, 679, 681). A connection was thus made between reconciliation and a broad and complex notion of democracy founded upon the idea of (what may be called) multinational citizenship.

[3] RCAP 1996: vol. i, ch. 5 (early treaty relations), ch. 6 (imposition of colonial policies), ch. 9 (reserves and the Indian Act), and ch. 10 (residential schools).

In its response to the Royal Commission report, the Canadian government issued a 'Statement of Reconciliation' in which it formally expressed its 'profound regret' to Aboriginal people for its past policies, and it accepted reconciliation as 'an ongoing process' that would involve implementing rights of Aboriginal self-government and renewing treaty relationships (Canada 1998). Provincial governments have adopted similar policies. Most recently, the provincial government of British Columbia has created a Ministry of Aboriginal Relations and Reconciliation charged with the mandate of promoting the government's 'New Relationship' with Aboriginal nations through 'on-going discussions founded on the principles of mutual respect, recognition and reconciliation' (British Columbia 2006: 8; Penikett 2006: 254–6).

But perhaps the most substantive invocation of reconciliation yet has been the response to the legacy of the residential schools policy. There are about 78,000 former residential school students still alive, and, by 2006, 10,583 of them had sued the government and churches for compensation for abuse and cultural loss in nine class actions brought in the courts of six provinces and three territories. The Canadian government appointed former Supreme Court of Canada justice Frank Iacobucci to negotiate an end to this litigation, and in May 2006, the Indian Residential Schools Settlement Agreement was signed.

Under the terms of the Agreement, the government will pay $1.9 billion in compensation to former students. But monetary payments are just one part of the settlement. Through the Agreement, the parties will seek 'the promotion of healing, education, truth and reconciliation and commemoration' (IRSSA 2006: preamble). To this end, the Agreement provides for the creation of a Truth and Reconciliation Commission (TRC) as a forum in which people involved in or affected by the residential school system may give an account of their experiences (IRSSA 2006: Schedule N). The TRC has a $60 million budget and a five-year mandate. It will establish a documentary record of the residential school policy and its legacy, but the record will be 'anonymized to the extent possible' and no conclusions about individual civil or criminal responsibility will be made (IRSSA 2006: Schedule N). Healing, not attribution of blame, is the objective:

> The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgment of the injustices and harms experienced by Aboriginal peoples and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that

will forge a brighter future. The truth of common experiences will help set our spirits free and pave the way to reconciliation. (IRSSA 2006: Schedule N)

It is important to note that the parties to the Agreement recognize that reconciliation will be 'an ongoing individual and collective process' that will require commitment from all those affected, including former students, their families and communities, churches, former school teachers and administrators, the government, and Canadians generally—for '[r]econciliation may occur between any of the above groups' (IRSSA 2006: Schedule N).

It may be said, then, that the theme of reconciliation dominated Aboriginal relations from the seventeenth to the early nineteenth centuries, and again from the mid-1990s to the present. Its form was historically, and is now, 'reconciliation as relationship': it was, and is, about re-establishing relationships of trust, honour, respect, and tolerance between vastly different peoples at all levels, from individuals to local communities to governments. In the modern context, both personal and political reconciliation are pursued, though different exercises in institutional design are contemplated for each type of reconciliation. The Truth and Reconciliation Commission appears directed mainly at achieving personal and local community reconciliation, whereas Aboriginal self-government seems directed mainly at achieving political and national reconciliation in which a sense of multinational citizenship is forged through recognizing diversity and self-determination.

## Aboriginal Rights and the Jurisprudence of Reconciliation

The Royal Commission on Aboriginal Peoples, which counted among its seven members a former Supreme Court of Canada justice and a Quebec Court of Appeal justice, was sceptical about the ability of courts to contribute to reconciliation. It concluded that the incremental manner in which judges in the common law tradition advance the law, the deference they extend to governments and legislatures, and the respect they show for established legal precedent, might prevent them from articulating the innovative constitutional transformations that reconciliation requires. The Commission even suggested that, given these limitations, 'courts can become unwitting instruments of division rather than instruments of reconciliation' (RCAP 1996: vol. i, xxvi).

In fact, judges had previously demonstrated considerable willingness to engage in the reinterpretation of common law principles affecting Aboriginal peoples. Relying on nineteenth-century American cases that took the Crown's early treaty relationship with Indians seriously, Canadian judges rediscovered the common law doctrine of Aboriginal title in 1973, thus forcing the government to begin negotiating native land claims (*Calder* 1973). In this way, the judiciary acted as an instrument for reconciliation long before the term entered into common usage.

The role of the judiciary was then enhanced with the constitutional reforms of 1982. The recognition of 'existing aboriginal and treaty rights' in section 35(1) of the Constitution Act, 1982, not only 'elevated existing common law aboriginal rights to constitutional status', but it extended constitutional protection 'beyond the aboriginal rights recognized at common law' (*Mitchell* 2001: para. 11). In the course of interpreting section 35, judges embraced the idea of reconciliation. In the same year that the Royal Commission reintroduced reconciliation into Canadian political discourse, the Supreme Court of Canada held in the case of *R.* v. *Van der Peet* that reconciliation provides the cornerstone of Canadian Aboriginal rights law (*Van der Peet* 1996: para. 31). *Van der Peet* would be the first in a long series of judicial decisions on reconciliation and Aboriginal rights. Almost a decade later, the Supreme Court of Canada would state:

> The fundamental objective of the modern law of aboriginal and treaty rights, is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. (*Mikisew* 2005: para. 1)

There has been, however, an element of insularity about the Court's approach to the concept of reconciliation. It has not considered that concept in light of Aboriginal traditions or the early Crown–Aboriginal treaty relationship. Little or no reference has been made to the emergence of reconciliation within political discourse in Canada. And no mention has been made of the increasing importance of reconciliation to post-conflict situations in other countries, or to the expanding literature on this topic in political science and political theory. Although since 1996 none of the institutional limitations identified by the Royal Commission have prevented Canadian courts from articulating a new foundation for Aboriginal rights based upon reconciliation, the possibility remains that courts can be, as the Royal Commission feared, 'unwitting instruments of

division rather than instruments of reconciliation'. Indeed, it may be argued that this possibility has on occasion materialized because of the insular approach taken by judges to reconciliation. On other occasions, however, judges in Canada seem to have recognized that a rich sense of reconciliation—what we may call reconciliation as relationship—represents an integral part of the rule of law in Canada. In considering the judicial experience in this respect, it will be useful to invoke all three forms of reconciliation set out above—resignation, consistency, and relationship—as an analytical framework.

### *Reconciliation as Resignation*

The *Van der Peet* case involved a woman of the Sto:lo First Nation in British Columbia who was charged with the offence of selling ten salmon without a licence; she claimed in her defence an Aboriginal right under section 35(1) to engage in commercial fishing. Writing for the majority of the Supreme Court of Canada, Chief Justice Antonio Lamer observed that Aboriginal rights, as rights enjoyed only by Aboriginal peoples, could not be justified by the 'philosophical precepts of the liberal enlightenment'—which is, of course, a highly debateable point (*Van der Peet* 1996: para. 19; for a liberal defence of Aboriginal rights, see Kymlicka 1995a). He concluded that Aboriginal rights were affirmed in section 35 because of 'one simple fact', namely, Aboriginal societies were 'already here' when Europeans arrived to claim what is now Canada, thus giving Aboriginal peoples a status different from that of 'other minority groups in Canadian society' (*Van der Peet* 1996: para. 30).

From this fact, Lamer drew the following conclusion: 'what s. 35(1) does is provide the constitutional framework through which the fact that aboriginal people lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown' (*Van der Peet* 1996: para. 31)—the 'sovereignty of the Crown' here signifying the sovereignty of the Canadian state (the Queen being Canada's head of state). The content of the rights protected by section 35 is therefore to be defined in light of that purpose: Aboriginal rights are those rights that are 'directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown' (*Van der Peet* 1996: para. 31). Lamer proceeded to state that, in general, this purpose is achieved by protecting those Aboriginal customs, practices, and traditions that were integral to distinctive Aboriginal cultures prior

to their first contact with Europeans. In the case of the Sto:lo people, however, the judges concluded that the practice of selling fish was only incidentally, not integrally, important to pre-contact Sto:lo culture, and therefore the Aboriginal claim failed.

Read literally, the Court's formulation of reconciliation in *Van der Peet* is not an example of reconciliation as relationship. It may be said that what is contemplated is the reconciliation of two facts, the fact of Aboriginal pre-existence with the fact of Crown sovereignty; alternatively, it may be said that what is contemplated is the reconciliation of two sets of juridical claims, the claims arising from the prior occupation of territory by Aboriginal peoples with the claim of sovereignty by the Crown over that territory. There is no mention of the reconciliation of peoples. To the extent that people are implicitly involved, however, the formulation may suggest reconciliation as resignation rather than relationship. The Court may be said to imply that Aboriginal societies are to be reconciled with the fact that the Crown is now sovereign over them.

For Aboriginal peoples who question the moral foundations of Crown sovereignty, this way of expressing reconciliation may be troubling. It has been suggested in relation to reconciliation in Northern Ireland, for example, that the formal principle of constitutional sovereignty 'should not serve as a check on reconciliation in advance', for such a check is inconsistent with 'parity of esteem' (Porter 2003: 223). The insistence upon Crown sovereignty as a fixed reality with which Aboriginal societies and their claims must be reconciled may be said to undermine parity of esteem in the Canadian context.

In the case of *Mitchell* v. *Canada*, which denied an Aboriginal claim to transport goods across the American–Canadian border without paying customs duties, Justice Ian Binnie (joined by only one other judge) attempted to address this concern by arguing that Aboriginal people should not see Crown sovereignty as an alien force from 'across the seas', but merely as a way of describing the Canadian state, a state that 'aboriginal and non-aboriginal Canadians together form' (*Mitchell* 2001: para. 129). Binnie stated that if, as Professor John Borrows has argued, 'the accommodation of aboriginal rights should not be seen as "a zero-sum relationship between minority rights and citizenship; as if every gain in the direction of accommodating diversity comes at the expense of promoting citizenship",' then the reverse is also true (*Mitchell* 2001: para. 164, citing Borrows 2001: 40 quoting Kymlicka and Norman 2000: 39). To uphold the sovereign interest of Canadians as a whole, including Aboriginal peoples, is not to deny constitutional space for Aboriginal peoples as

members of distinct cultures. Binnie argued that when we say that some Aboriginal claims are incompatible with Crown sovereignty and cannot be protected for that reason, we are saying that the claim 'relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community' (*Mitchell* 2001: para. 164). In Binnie's view, perceiving Crown sovereignty as a sovereignty 'shared' by Aboriginal and non-Aboriginal peoples is 'essential to the achievement of reconciliation as well as to the maintenance of diversity' (*Mitchell* 2001: para. 167).

Under Binnie's formulation, the judicial exercise of reconciliation is transformed from one of reconciling the pre-existence of Aboriginal peoples with Crown sovereignty to one of reconciling claims for cultural diversity with claims for common citizenship, on the understanding that a legitimate conception of common citizenship embracing Aboriginal and non-Aboriginal peoples already exists. As a matter of normative political theory, this is a more compelling way of expressing the task of reconciliation. However, it does not solve the moral problem—the apparent lack of parity of esteem—that Binnie hoped to solve, for he cannot explain how or when a legitimate sense of shared sovereignty or common citizenship was forged between Aboriginal and non-Aboriginal Canadians. Under his approach, the most important and controversial steps toward reconciliation between peoples are assumed already to have taken place, even before the exercise of reconciliation under section 35 begins. In contrast, the Royal Commission on Aboriginal Peoples concluded that reconciliation was an ongoing process in which a sense of multinational citizenship and democracy would only emerge as relationships of mutual respect and self-determination were constructed.

In the end, it is hard to escape the impression that the Court has concluded that Aboriginal peoples must be reconciled with the fact of Crown sovereignty, or, in other words, with the fact of their place within the Canadian state. Of course, the Court cannot make Aboriginal peoples reconciled to this fate, at least not directly. Only Aboriginal peoples can develop the necessary reconciliatory attitude or adopt the necessary reconciliatory position of acceptance for reconciliation as resignation to exist. The Court's formulation of reconciliation is therefore best described as a form of reconciliation as consistency, albeit an asymmetrical or one-sided form. The goal, then, is for judges to articulate Aboriginal rights so as to render the pre-existence of Aboriginal societies within a territory, or more accurately the claims arising from that pre-existence, consistent with the assertion by the Crown of sovereignty over the territory.

### *Reconciliation as Consistency*

Reconciliation as consistency can be either one-sided or two-sided, and it can be either a mechanical process or an exercise in judgement requiring moral evaluation. Although in the *Van der Peet* case, Chief Justice Lamer implied that Crown sovereignty is an immutable fact to which Aboriginal societies are to be reconciled—which suggests a one-sided form of reconciliation—he also accepted that Aboriginal rights are 'rights peculiar to the meeting of two vastly dissimilar legal cultures' and 'a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives' (*Van der Peet* 1996: para. 42, quoting Walters 1992: 412–13). Indeed, he went so far as to say that the law of Aboriginal rights is neither Aboriginal nor non-Aboriginal in origin, but 'is a form of intersocietal law' (*Van der Peet* 1996: para. 42, quoting Slattery 1992: 120–1). In other words, Lamer appeared to accept that the reconciliation of Aboriginal pre-existence with Crown sovereignty involves the articulation of a unique body of law that emerges from (as Justice Beverley McLachlin writes) a 'reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples' (*Van der Peet* 1996: para. 310). Lamer thought both legal perspectives would count in this process, but not equally: Aboriginal perspectives must, he said, be 'framed in terms cognisable to the Canadian legal and constitutional structure' (*Van der Peet* 1996: para. 49).

So while Crown sovereignty may be a fixed reality to which Aboriginal societies must be reconciled, this process of reconciliation involves the combination of both Aboriginal and non-Aboriginal legal traditions in a morally defensible way to produce an intersocietal law that, although consistent with the Canadian constitutional structure, is not to be seen as either Aboriginal or non-Aboriginal in character. This is still a form of reconciliation as consistency, not relationship. But because it involves combining elements from two cultures rather than just one, and because the result must be morally justified rather than just mechanically feasible, one can begin to see how this exercise in reconciliation as consistency might encourage the adoption of individual attitudes and collective positions that could lead to the reconciliation of peoples. We might say, then, that the judicial approach to reconciliation as consistency adopted in *Van der Peet* manifests some evidence of reconciliation as relationship as a normative principle.

For reasons that are not clear, the Court has since retreated from this approach to reconciliation. In its decision in the *Bernard & Marshall* cases, the Court adopted a one-sided and mechanical approach to reconciling

legal traditions or perspectives. Chief Justice McLachlin, writing for a majority of the Court, said that 'reconcil[ing] the aboriginal and European perspectives' on land ownership requires that judges identify the Aboriginal practice relating to land prior to the assertion of Crown sovereignty and then 'translate' that practice into a 'modern right' by 'seek[ing] a corresponding common law right' (*Bernard & Marshall* 2005: para. 51). Although this process of translation is supposed to represent a 'process of reconciliation', the result is that no Aboriginal nation can assert Aboriginal title to land unless prior to the Crown's assertion of sovereignty their relationship to land amounted to property as defined by 'common law property rules' (*Bernard & Marshall* 2005: paras. 52, 54).

In separate reasons, Justice Louis LeBel, with Justice Morris Fish agreeing, objected forcefully to this approach to reconciliation as translation. The goal, wrote LeBel, is 'to reconcile aboriginal and common law perspectives on ownership', and unless 'aboriginal conceptions of territoriality, land-use and property' are used 'to modify and adapt the traditional common law concepts of property' we may be saying, in effect, 'that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights' (*Bernard & Marshall* 2005: paras. 130, 127). It may be said, then, that LeBel viewed reconciliation of legal traditions as a two-sided, moral process of integration, while the majority of the Court treated reconciliation as a one-sided, mechanical process of translation—not as mechanical as the reconciliation of financial accounts, perhaps, but close. The translation of Aboriginal practices into equivalent common law rights in *Bernard & Marshall* is certainly inconsistent with the aspiration of a morally defensible 'intersocietal' law identified in *Van der Peet*. In *Bernard & Marshall*, the Court's notion of reconciliation as consistency seems to have become detached from the normative moorings provided by the value of reconciliation as relationship.

Another sign of the detachment of consistency from relationship is the Court's use of reconciliation as a way to justify legislative infringements of established Aboriginal rights. In the case of *R.* v. *Gladstone*, in which an Aboriginal commercial fishing right was recognized, Chief Justice Lamer observed that the articulation and protection of Aboriginal rights under section 35 'are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part', and therefore 'limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a

whole, equally a necessary part of that reconciliation' (*Gladstone* 1996: para. 73). In the 1997 case of *Delgamuukw* v. *British Columbia*, Lamer provided an extensive list of legislative purposes that could justify limitations on Aboriginal rights for the purpose of 'the reconciliation of aboriginal societies with the larger Canadian society of which they are a part', including 'the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims' (*Delgamuukw* 1997: para. 165). These justifications for infringing Aboriginal rights to land and resources sound a lot like (one is tempted to say) colonialism. For judges to say that Aboriginal societies must be reconciled to 'the settlement of foreign populations' who desire to exploit their lands and resources does seem an odd approach to reconciliation as a mechanism of decolonization.

However, the constitutional status of Aboriginal rights is not wholly ignored in this process. It is not sufficient for the legislature to have one of these purposes in mind for it to be empowered to infringe those rights. Legislative infringements of Aboriginal rights in favour of 'economic development', for example, are only valid, according to the Court, if undertaken in a proportionate and honourable way after Aboriginal peoples are duly consulted so their interests are accommodated to the extent possible.

In the infringement-justification cases, the Court acknowledges that the point of section 35 is not just reconciliation of Aboriginal societies with Crown sovereignty, but the reconciliation of Aboriginal societies with the larger Canadian society of which they form a part. In one sense, this formulation of reconciliation edges closer to the idea of reconciliation of peoples, or reconciliation as relationship. In another sense, however, it seems to move away from that strong sense of reconciliation by seeming to reduce reconciliation to a mere balancing of interests. It has been observed in other contexts that reconciliation is made 'benign' 'through its reduction to a balancing of differences' (Porter 2003: 70). Of course, balancing majority and minority interests in relation to scarce resources is always a complex matter that implicates questions of justice, equality, and fairness. But unless the richness of reconciliation as relationship is inserted into this interpretive process to affect the outcome, to speak of reconciling interests is simply a different way of speaking of balancing interests—it is to adopt a form of reconciliation as consistency that is detached from the objectives of reconciliation as relationship.

The one aspect of the infringement-justification doctrine that resonates with the richer conception of reconciliation as relationship is the imposition by the Court of a duty to consult Aboriginal peoples before their rights are limited. Indeed, the expansion of this duty in recent years is the clearest sign that reconciliation as relationship does form an integral part of the Canadian conception of legality or the rule of law.

### *Reconciliation as Relationship*

Reconciliation within normative political theory and as practised in states emerging from periods of conflict is usually understood to involve acts of repentance and forgiveness or other demonstrations of reciprocal respect for the common humanity of the people involved, so that a line can be drawn under a troubled past and relationships of social and political harmony may flourish. This sense of reconciliation as relationship is also, in a general way, the sort of reconciliation that Aboriginal peoples traditionally sought to achieve through condolence customs, and it is the sort of reconciliation that the Royal Commission on Aboriginal Peoples advocated. But despite having used the language of reconciliation for more than a decade, Canadian judges have never been very explicit about what they think reconciliation means in the context of Aboriginal and non-Aboriginal relations. Their decisions certainly do not provide any detailed accounts of reconciliation as relationship. Recent decisions of lower courts in the residential schools litigation may provide some explanation for this reticence.

As seen, the Residential Schools Settlement Agreement ends a series of class actions by providing compensation for former students and by establishing a Truth and Reconciliation Commission. To be legally effective, the Agreement had to be approved by the nine courts in which the litigation was commenced, and this approval was given in a set of coordinated judgments issued in December 2006 and January 2007.

Before approval was granted, interested parties were afforded an opportunity to object to the Agreement. In court proceedings in British Columbia, one Aboriginal organization objected that the Agreement did not contain an explicit apology from the government. Counsel stated to the court:

> Aboriginal Justice Systems almost always stress reconciliation. Aboriginal Justice Systems also usually stress the need to restore harmony and peace to a community. Leaving parties dissatisfied or with feelings of inadequacy or lack of completion does not restore community harmony or peace. For Aboriginal students of

> Residential Schools and their families, an apology will acknowledge the wrong suffered by them and validate their struggle for compensation and redress. (*Quatell* 2006: para. 34)

In his judgment approving the Agreement, the Chief Justice of the British Columbia Supreme Court, Donald Brenner, stated that the court did not have power to order Canada to issue an apology, but even if it did 'an apology offered pursuant to an order of the court would be of doubtful value; its underlying compulsion would destroy its effectiveness' (*Quatell* 2006: para. 32). However, Brenner appreciated that there was, given Aboriginal justice traditions, 'an important cultural component to this' (*Quatell* 2006: para. 34). He agreed that an apology would 'assist the objective of all parties in achieving the goal of a national reconciliation', and in an unusual move he made a non-binding 'request' that the lawyer appearing for the Attorney General of Canada 'ask that the Prime Minister give consideration to issuing a full and unequivocal apology on behalf of the people of Canada in the House of Commons' (*Quatell* 2006: paras. 36, 35).

In his judgment approving the Agreement, Justice Robert Kilpatrick of the Nunavut Court of Justice stated that the Agreement, by adopting 'holistic' methods of 'healing' through a Truth and Reconciliation Commission, respected 'Inuit perspectives'—in particular, the Inuit understanding of justice as a 'dynamic human process' that 'restores harmony and balance to relationships that are damaged' (*Ammaq* 2006: paras. 61, 62). The judge was blunt about the advantages of such an agreement over litigation: 'This Court is not equipped to address the holistic healing perspectives of the individual, his or her family and the community in a way that does justice to the larger Inuit and aboriginal perspectives on life, on living and on conflict resolution' (*Ammaq* 2006: para. 61).

Here, then, are rare examples of Canadian judges linking the idea of reconciliation to Aboriginal legal traditions. But in the very act of recognizing the unique Aboriginal perspective on reconciliation, the judges deny that it could form a meaningful part of adjudication within the non-Aboriginal legal system. Reconciliation as repentance, personal healing, and social harmony is, they assumed, impossible to enforce judicially.

In one sense, their conclusions merely confirm the point made above, that reconciliation as resignation, or the ability of Aboriginal peoples to accept the past and move on, and reconciliation as relationship, or the healing of social bonds within and between communities, are ultimately conditions that arise through the attitudes and decisions of affected

people and their communities, conditions that cannot be directly ordered into existence by judicial fiat. Of course one way of explaining this conclusion is to assert that a liberal conception of the rule of law could not tolerate the imposition of particular moral positions on people; a liberal state cannot force individuals to adopt feelings of remorse that might lead to an apology. But it is perhaps easier simply to observe that the external imposition of reconciliatory attitudes is a logical impossibility. As soon as the people involved in the process of reconciliation sense that the other side is not genuine in its expressions of trust and respect, the process will cease being one of reconciliation.

In another sense, however, the judges in these two residential school cases seem almost too extreme in their assumption that Aboriginal reconciliation traditions cannot be relevant to non-Aboriginal law. Even if reconciliation as relationship cannot be enforceable directly by courts, it can still operate as a normative value that informs the interpretation of law. If so, there seems to be no reason why a commitment to reconciling legal traditions could not lead to the integration of Aboriginal approaches to reconciliation into our understanding of that norm. But before considering that possibility, it is appropriate to stop and consider the extent to which judges have acknowledged reconciliation as relationship as an interpretive norm.

The Supreme Court of Canada seems to have been aware of the limited ability of judges to achieve the meaningful reconciliation of peoples. In *Van der Peet*, Justice McLachlin stated that reconciliation was traditionally achieved through 'the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests' (*Van der Peet* 1996: para. 313). More recently, Justice LeBel has stated that 'negotiation... remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown' (*Okanagan Indian Band* 2003: para. 47). Indeed, the Court now seems to view one of its primary roles to be encouraging reconciliation through negotiation.

This point is perhaps best illustrated by the 2004 cases of *Haida Nation* and *Taku River*. In these cases, the Court concluded that where Aboriginal peoples have made claims to lands or resources that have not yet been authoritatively determined, the government is under a duty to consult with them before opening those resources to development, with a view to accommodating their interests pending final resolution of the claim. In writing the decisions in these cases, Chief Justice McLachlin stated: 'Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed

Crown sovereignty' (*Haida Nation* 2004: para. 20), or '*de facto* Crown sovereignty' (*Taku River* 2004: para. 42), the respective 'sovereignty claims' being 'reconciled through the process of honourable negotiation' (*Haida Nation* 2004: para. 20). 'This process of reconciliation', she continued, 'flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people' (*Haida Nation* 2004: para. 32). The point of consultation and accommodation, then, is to seek 'compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation', for '[b]alance and compromise are inherent in the notion of reconciliation' (*Haida Nation* 2004: paras. 47, 50).

There is little evidence here of Binnie's idea of shared sovereignty. Not only is Crown sovereignty treated as distinct from Aboriginal sovereignty, but it is treated as merely 'assumed' or '*de facto*'. These are perhaps the first Canadian cases in which Aboriginal 'sovereignty' is acknowledged and in which the traditional conception of Crown sovereignty is adjusted to accommodate it. Until treaties are made with Aboriginal peoples, the Court seems to be saying, Crown sovereignty does not have all of the attributes of lawful authority. Reconciliation through negotiation, then, is all about establishing the legal and moral authority of the Canadian state. In this respect, the role of judges is fairly limited. The Court, in effect, employs the conception of reconciliation as relationship as an interpretive principle from which duties of consultation and accommodation are identified that provide legal incentives for political actors to achieve their own version of reconciliation. The Court cannot tell Aboriginal or non-Aboriginal individuals to adopt a particular moral position for the purposes of furthering the chances of reconciliation, nor can it tell Aboriginal or non-Aboriginal governments to adopt the decision to reconcile. But, the Court can order the Crown—that is, the government of Canada—to adopt the attitude of honour that is essential for the reconciliation of peoples to flourish.

The normative weight of reconciliation does not dissipate once treaties are signed and Crown sovereignty is put on firmer moral and legal ground. McLachlin states that the duty of consultation and accommodation 'continues beyond formal claims resolution' (*Haida Nation* 2004: para. 32). And so, for example, where certain Aboriginal nations ceded territories by treaty in 1899 subject to the right to pursue traditional activities on the lands until they were 'taken up' by the government for other purposes, the

Court ruled that the government remains under an obligation to consult and accommodate Aboriginal interests before exercising the right to take up lands (*Mikisew* 2005). As Justice Binnie states: 'Treaty making is an important stage in the long process of reconciliation, but it is only a stage' (*Mikisew* 2005: para. 54). Consultation, he continued, 'is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation'—reconciliation not just of facts, claims, laws, or legal perspectives, but 'reconciliation of aboriginal *peoples* and non-aboriginal *peoples*' after a 'long history of grievances and misunderstanding' (*Mikisew* 2005: paras. 63, 1 (emphasis added)). Even though no court can order reconciliation as relationship—no court can order two peoples to be reconciled—the consultation cases suggest that reconciliation as relationship can be a normative principle that shapes the interpretation of legal rights and duties, establishing a constitutional framework for political actors to seek the reconciliation of peoples.

And there is some evidence that the jurisprudence of reconciliation does indeed affect the politics of reconciliation. In 2005, the Canadian government and the Assembly of First Nations signed a 'Political Accord' on the implementation of Aboriginal self-government, the preamble of which, after citing the Court's statements on reconciliation from *Van der Peet* and *Haida Nation*, states that both First Nations and Canada 'recognize that evolving jurisprudence is creating pressure for new approaches for achieving reconciliation' (First Nations–Federal Crown Political Accord 2005). The parties to the Accord therefore commit themselves 'to work jointly to promote meaningful processes for reconciliation and implementation of section 35 rights', in particular by working to implement the 'inherent right of [Aboriginal] self-government'.

The terms of treaties signed in late 2006 may be cited as concrete examples of progress in this respect. A treaty on land rights and self-government made with the Maa-nulth First Nations, for example, contains the following statements in its preamble: the Maa-nulth people 'have used, occupied and governed their traditional territories from time immemorial'; Canada and British Columbia acknowledge the Maa-nulth 'perspective' that 'harm and losses in relation to their aboriginal rights have occurred in the past', and they 'express regret if any acts or omissions of the Crown have contributed to that perspective'; and, finally, the parties rely on the treaty 'to move them beyond the difficult circumstances of the past', for they 'are committed to the reconciliation of the prior presence of the Maa-nulth First Nations and the sovereignty of the Crown through the negotiation of this Agreement which will establish new government-to-government relationships based

on mutual respect' (Maa-nulth First Nations Final Agreement 2006; see also Lheidli T'enneh First Nation Final Agreement 2006 and Tsawwassen First Nation Final Agreement 2006).

In this document of political reconciliation we can see the jurisprudence of reconciliation at work. We can also see in particularly explicit form the emergence of a conception of multinational citizenship. In the past, some judges have been sceptical about the idea of a multi-dimensional conception of citizenship in Canada. The claim by Mohawk people in the *Mitchell* case that they held their Aboriginal rights as 'citizen[s] of Haudenosaunee' was described as 'pushing the envelope' of Aboriginal autonomy, and thus rejected by two judges (*Mitchell* 2001: paras. 119, 125). But in the Maa nulth Treaty we find provisions acknowledging the power of Maa-nulth First Nations governments to 'make laws in respect of citizenship in the applicable Maa-nulth First Nation' together with provisions that recognize that 'Maa-nulth First Nation Citizens who are Canadian citizens or permanent residents continue to be entitled to all the rights and benefits of other Canadian citizens or permanent residents' (Maa-nulth First Nations Final Agreement 2006: articles 13.13.1 and 1.9.1). People can be dual citizens in relation to two states, but they can also be dual citizens in relation to two nations within one state.

## Reconciliation as an Unwritten Principle of Legality

Within the Haudenosaunee oral tradition on the Great Law of Peace, reconciliation is treated as necessary for social harmony, political coordination, and rational deliberation. For a society that rejected coercive state authority, reconciliation was integrally related to the ideal of legality or the rule of law. Families, clans, villages, and ultimately nations that buried their troubles through reciprocal condolence were in a position to deliberate together with honour to establish relations of peace—and therefore of law. For a judge to rule, as one judge recently did, that negotiations to resolve an Aboriginal land claim would be contrary to the rule of law and should cease so long as Haudenosaunee protesters continued to occupy the disputed lands in violation of a court order, is to adopt a very different conception of the rule of law—one that celebrates law's power to impose order and certainty over law's respect for processes of dialogue and engagement (*Henco* 2006b). However, the judge's order was overturned on appeal in a decision in which Justice John Laskin affirmed that the 'dimensions of the rule of law' include not just the need to enforce court

orders, but also 'respect for minority rights... [and] reconciliation of Aboriginal and non-Aboriginal interests through negotiations' (*Henco* 2006a: para. 142). Laskin made no reference to Haudenosaunee traditions on reconciliation and legality, but his understanding of the rule of law captures something of the essence of those traditions.

It is now possible to see why the value of reconciliation is an intrinsic aspect of the liberal conception of legality or the rule of law. Governance through law implies the existence not just of a powerful authority, but a legal authority (Dyzenhaus 2006). For an authority to be legal its commands must count as law as opposed to mere force. To count as law, however, rules must comply with the unwritten principles of legality—or, as Lon Fuller said, 'the morality that makes law possible' (Fuller 1969: 33). Though largely procedural, these unwritten principles do, as Fuller insisted, have some moral substance. They require that judges interpret law, to use Dworkin's language, in a spirit of integrity or consistency, extending to all people equal concern and respect. And through integrity comes that sense of true community in which people, as citizens rather than subjects, identify laws as their own, with a moral rather than just coercive force. There is, in other words, an intimate connection between reconciliation as consistency and the liberal conceptions of both legality and democracy. But there is also, in some societies at least, a connection between legality, democracy, and a richer sense of reconciliation, the sense of reconciliation as relationship.

For post-colonial states that seek to establish relations of justice and harmony with indigenous minorities who have suffered histories of injustice, and who continue to suffer from the legacy of those histories, the ideal of integrity or consistency that normally secures the value of legality is not enough. In these instances, there is often reason to believe that state authorities that have inherited the mantle of power from colonial predecessors are simply not, in the sense demanded by the ideal of the rule of law, *legal* authorities in relation to indigenous peoples. Their sovereignty is, as Chief Justice McLachlin has stated, '*de facto*'. For the ideal of legality to flourish, authority must be *de jure*.

This transition from power to law is not something that can be achieved in one single step, by the making of a deal or the signing of a paper. The damage to cultural identity and human dignity that must be overcome has been too sustained and deep for that. The integrity that legality demands will involve demonstrations of equal respect for entire peoples for whom the authority of law will only materialize as the process of political reconciliation does. The value of equal citizenship that lies at the heart of the

rule of law within liberal democratic societies, the value that permits people to accept the moral authority of their own laws, must be aggregated and a form of multinational citizenship appropriate for a multinational liberal democracy must emerge, one that perceives national allegiances and identities not as singular and mutually exclusive, but as a complex web of interlocking relationships built upon reciprocal acts of trust and tolerance. In the unique circumstances of decolonization, the usual reconciliation as consistency that legal interpretation implies must be supplemented by the normative value of reconciliation as relationship before the conditions necessary for the rule of law are established.

On occasion, Canadian judges have approached reconciliation in a one-sided, mechanical way or as just another way of balancing competing interests. They have, in these cases, lost sight of the richer sense of reconciliation that legality demands in post-colonial settings. On other occasions, Canadian judges have acknowledged the frailty of law's moral authority in relation to Aboriginal peoples, and they have articulated legal rights and duties that provide normative support for activities of reconciliation within the political realm. In these cases, we see evidence of reconciliation—in the rich sense that it has within the politics of reconciliation—operating as an unwritten principle of legality. We also see, implicitly at least, willingness by Canadian judges to question the simple equation of legislative will exercised by representatives elected on majoritarian principles with constitutional legitimacy. Underlying the judicial encouragement of processes of treaty negotiation is an assumption that the Canadian constitutional order rests upon a more complex notion of democracy, one in which citizenship is multidimensional and novel forms of governance, nowhere acknowledged in the formal terms of the written constitution, must emerge as an integral aspect of addressing legacies of past injustice.

At present, Canadian judges therefore seem uncertain about what sort of reconciliation law demands. Perhaps the answer could be found by returning to the idea of reconciling legal cultures. If judges were to take seriously the reconciliation of Aboriginal and non-Aboriginal legal traditions they might come to regard the jurisprudence of reconciliation as an intersocietal legal concept, informed, in part, by Aboriginal conceptions of reconciliation. This task would require a far more sophisticated understanding of Aboriginal customs and traditions than a non-Aboriginal academic observer like myself could offer. But it is perhaps reasonable to assume that the result would be a constitutional order in which the reconciliation of peoples and the rule of law are embraced as inseparable moral imperatives.

## Citations to Cases

*Ammaq* (2006): *Ammaq* v. *Canada (Attorney General)* [2006] Nu.J. No. 26 (Nunavut Court of Justice).

*Calder* (1973): *Calder* v. *Attorney General of British Columbia* [1973] S.C.R. 313 (Supreme Court of Canada).

*Delgamuukw* (1997): *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010 (Supreme Court of Canada).

*Gladstone* (1996): *R.* v. *Gladstone* [1996] 2 S.C.R. 723 (Supreme Court of Canada).

*Haida Nation* (2004): *Haida Nation* v. *British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 (Supreme Court of Canada).

*Henco* (2006a): *Henco Industries Ltd.* v. *Haudenosaunee Six Nations Confederacy Council* [2006] O.J. No. 4790 (Ontario Court of Appeal).

*Henco* (2006b): *Henco Industries Ltd.* v. *Haudenosaunee Six Nations Confederacy Council* [2006] O.J. No. 3285 (Ontario Superior Court).

*Bernard & Marshall* (2005): *R.* v. *Marshall; R.* v. *Bernard* [2005] 2 S.C.R. 220 (Supreme Court of Canada).

*Mikisew* (2005): *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388 (Supreme Court of Canada).

*Mitchell* (2001): *Mitchell* v. *Canada (Minister of National Revenue)* [2001] 1 S.C.R. 911 (Supreme Court of Canada).

*Okanagan Indian Band* (2003): *British Columbia (Minister of Forests)* v. *Okanagan Indian Band* [2003] 3 S.C.R. 371 (Supreme Court of Canada).

*Quatell* (2006): *Quatell* v. *Canada (Attorney General)* [2006] B.C.J. No. 3231 (British Columbia Supreme Court).

*Sparrow* (1990): *R.* v. *Sparrow* [1990] 1 S.C.R. 1075 (Supreme Court of Canada).

*Taku River* (2004): *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550 (Supreme Court of Canada).

*Van der Peet* (1996): *R.* v. *Van der Peet* [1996] 2 S.C.R. 507 (Supreme Court of Canada).