

# Agent of Reconciliation — The Supreme Court of Canada and Aboriginal Claims

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The idea of “reconciliation” has gained considerable prominence as of late in both the political and judicial branches of government when discussing issues dealing with the competing interests of groups within Canadian society. The term connotes the re-establishment of harmony and good relations. On its surface, the idea of reconciliation appears neutral and does not contain any preconceived assumptions about political views or positions. It is also forward looking and does not dwell on past acts. Thus, it is an attractive idea and potentially very useful as a concept to forge new and positive relations in Canadian society. Its value as a concept has not gone unnoticed by the Supreme Court of Canada and has become the locus of judicial thought about Aboriginal — Canadian relations.

Indeed, the Supreme Court of Canada declares itself to be an “agent of reconciliation”<sup>1</sup> between Aboriginal peoples and non-Aboriginal peoples in Canada. To a certain extent, this responsibility has been unwillingly foisted onto the court by the failure of past Constitutional talks to further delineate and define the meaning of section 35(1) of the *Constitution Act, 1982*.<sup>2</sup> The failure of these political negotiations has now resulted in the Supreme Court of Canada taking the lead responsibility in determining the legal and political nature of the relationship that will exist between Aboriginal peoples and Canadians. Increasingly, Parliament, more often than not, finds itself in a reactionary position. For example, in both *Delgamuukw*<sup>3</sup> and *Corbiere*<sup>4</sup> the government of Canada is forced into crisis management to adequately respond to the Supreme Court of Canada’s radical changes to the rules of the game. However, in taking such a decisive role in managing Aboriginal — Canadian relations, the Court

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1. The idea for this phrase, which is the title of this paper, originated from an article written by P. Russel, “High Courts and the Rights of Aboriginal Peoples : The Limits of Judicial Independence” (1998) 61 Sask. L. R. 247 at p. 274.
  2. *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982*, (U.K.) 1982, c. 11; R.S.C. 1985, App. II, No. 44, as am. by the *Constitution Amendment Proclamation, 1983*, (SI/84-102), ss. 25, 35, 35.1 and 27.1. (hereinafter *Constitution Act, 1982*).
  3. *Delgamuukw v. British Columbia* [1998], 1 C.N.L.R. 14. (S.C.C.).
  4. *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999], S.C.J. N° 25708 (Q.L.).

may have placed the judiciary beyond its proper role as a third branch of government in Canada.

Beginning with its decision in *Sparrow*, the S.C.C. has opted to read into s. 35(1) of the *Constitution Act, 1982*, an analogous section 1 Charter type of analysis that allows governments to justify its infringement of Aboriginal and Treaty rights protected in the Constitution under certain circumstances.<sup>5</sup> This occurs at the “justification” part of the legal test for interpreting s. 35(1), where the court determines under what circumstances it is justifiable for the government to interfere in the exercise of Aboriginal and Treaty rights.

Assuming such a role is no doubt appropriate in the context of limiting “individual” rights where the interests of society as a whole “demonstrably justify” doing so. However, it is inappropriate in the context of determining the rights and responsibilities as between “peoples”. Since s. 35 deals with collective rights, the direction of the Supreme Court seems somewhat misguided. I intend to argue that it is inappropriate for the judiciary to be involved in decisions regarding the merits of when the constitutional rights of one political community in Canada can interfere with competing constitutional rights of another political community. I argue that it is far more appropriate a role for the courts to limit itself to monitoring the *process* of negotiations between representatives of the Canadian government and representatives of Aboriginal peoples to ensure negotiations are carried on in a fair and equitable manner. Once the court determines that there is an Aboriginal right protected by the Constitution, the necessary step of reconciliation of the Aboriginal or Treaty right belongs to the parties themselves and not the judiciary. The *Quebec Reference*<sup>6</sup> case reflects this approach and it is a model that ought to be adopted in the interpretation of section 35(1).

## I. AGENT OF RECONCILIATION

Section 35(1) of the *Constitution Act, 1982* states : “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”<sup>7</sup> The phrase “existing aboriginal and treaty rights” is obviously a very general and broadly worded statement. It is open to many

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5. *R. v. Sparrow* [1990], 3 C.N.L.R. 160 at pp. 176-182 (S.C.C.).

6. *Reference Relating to the Secession of Quebec from Canada*, [1918] 2 S.C.R. 217 (hereinafter referred to as *Quebec Reference*).

7. *Constitution Act, 1982*, *supra* note 2 at s. 35(1).

different interpretations. However, we know that such provisions are not interpreted in a vacuum. In this instance, there already existed a body of common law dealing with Aboriginal and Treaty rights that the court could consult in interpreting section 35(1). In fact, the court incorporates this body of common law into the definitional framework of section 35 by defining “existing” Aboriginal and Treaty rights as those rights recognised by the common law and have not been extinguished prior to April 17, 1982.<sup>8</sup>

Those familiar with the negotiations leading to the entrenchment of section 35 in the Constitution are keenly aware of the political and often contentious nature of these negotiations. Extensive compromises were made by all sides to come to some sort of agreement.<sup>9</sup> Still, agreement could only be reached on the most general of levels. However, it was agreed that further “identification and definition” of the rights of Aboriginal peoples would be pursued at subsequent First Minister’s meetings. The requirement to hold such further meetings was entrenched in the Constitution. This is a sad reflection on Aboriginal — Canadian relations because the provision essentially reflects the constitutional entrenchment of mistrust between the parties. History, however, is witness to the resulting failures of the constitutional mandated First Minister’s conferences to come to a clarification of the meaning to be given to the protection of Aboriginal and Treaty rights. For a brief period, agreement was finally reached in the 1992 Charlottetown Accord between the Aboriginal and government representatives on a number of key issues.<sup>10</sup> However, in a national referendum Canadians at the polls rejected the Accord including the detailed provisions relating to Aboriginal — Crown relations. Given the failure of the First Minister’s conferences in the 1980s, the task of defining Aboriginal rights in the Constitution fell squarely on the shoulders of the Supreme Court of Canada in *R. v. Sparrow*.<sup>11</sup>

In framing this decision, the court could not help but be influenced by the magnitude of the historic events surrounding the inclusion of section 35(1) in the Constitution. No doubt the court was aware that it symbolized a marked change in Canada’s treatment of Aboriginal peoples. In short, it embodied a mandate for

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8. *R. v. Sparrow*, *supra* note 5 at pp. 169-171.

9. For a concise overview of the events leading up to the inclusion of s. 35(1) see J. Frideres, *Aboriginal Peoples in Canada: Contemporary Conflicts*, 5th ed. (Scarborough: Prentice Hall Allyn and Bacon Canada, 1998) at p. 360.

10. For a full copy of the proposed legal test dealing with Aboriginal and treaty rights proposed by the Charlottetown Accord see J. Borrows and L. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary* (Toronto: Butterworths, 1998) at p. 585.

11. *R. v. Sparrow*, *supra* note 5.

re-evaluating past assumptions of Aboriginal — Canadian political and legal relations. The Supreme Court recognized the significance of section 35(1) as a call for change when it stated :

*It is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal people made the adoption of s.35(1) possible...<sup>12</sup>*

In addition, the court referred to a passage by Professor Lyon which emphasized the significance of section 35(1) as a solid constitutional basis for respecting Aboriginal rights :

*the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims by the Crown.<sup>13</sup>*

In 1990, the court knew that the prevailing social and political attitudes could no longer justify strict adherence to outdated and colonial attitudes regarding the place of Aboriginal peoples in Canadian society.

Chief Justice Dickson and Justice LaForest, in a jointly written judgement, held that the terms “recognized and affirmed” contained in section 35(1) incorporate a responsibility and duty on the Crown to “act in a fiduciary capacity with respect of aboriginal peoples”. However, the court did not view the rights protected in section 35(1) as absolute. It explained that “federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867*.”<sup>14</sup> According to the court, the way that the existence of federal power over Aboriginal peoples<sup>15</sup> and

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12. *R. v. Sparrow*, *supra* note 5 at p. 178.

13. *Ibid.* at p. 178 quoting Professor Lyon; “An Essay on Constitutional Interpretation” (1982) 26 Osgoode Hall L. J. 95 at p. 100.

14. *R. v. Sparrow*, *supra* note 5 at p. 181.

15. It is still an unsettled question if the federal government has a federal power over all of the Aboriginal peoples listed in section 35(2) of the *Constitution Act*. Currently, the federal government denies jurisdictional responsibility for the Métis. However, at the present, the

federal duty to Aboriginal peoples can be reconciled is to demand that any infringement of an Aboriginal right be *justified* according to certain guiding principles.

The justification test refers to that stage of analysis in interpreting s.35(1) after an infringement of an Aboriginal right has been proved. It is then up to the Crown to “justify” its infringement. In order to do so, the Crown must prove that the legislative objective is “compelling and substantial” and that the Crown has not breached its fiduciary duty to the Aboriginal claimant. The court looks at several factors to determine whether there has been a breach of the fiduciary responsibility at this stage. In *Sparrow* the court listed three such factors in addressing this part of the test. These are : whether there has been as little infringement as possible, whether there has been fair compensation, and whether the Aboriginal group has been consulted.<sup>16</sup> In *Delgamuukw*, the court held that consultation will always be required by the Crown to justify interference. However, the degree of consultation will vary “with the circumstances”. The court explained :

*In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title [...] In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.*<sup>17</sup>

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majority of influential academic and juridical opinion appears to be of the view that the Métis are “Indians” for the purposes of section 91(24). See for example, P. Hogg, *Constitutional Law of Canada*, 3rd ed., (Toronto : Carswell, 1992) and *R. v. Alphonse* [1993], 4 C.N.L.R. 19 (B.C.C.A.).

Given the conclusion by Chief Justice Lamer in *Delgamuukw* that Aboriginal rights protected under section 35(1) fall within the exclusive authority of Parliament under 91(24) because Aboriginal rights by definition are matters that effect the core of “Indianness”, it would be logical to conclude that since the Métis possess Aboriginal rights, they should also be included within the meaning of “Indian” in s. 91(24). It would be disjunctive and arbitrary to have the federal government exercise jurisdiction over the Aboriginal rights of the Métis, but not the Métis themselves, yet for all the other identified Aboriginal groups in section 35(2), (*i.e.* Indians, Inuit) the federal government would have exclusive jurisdiction over the Aboriginal rights of the Indians and Inuit as well as over their collective identities.

16. *R. v. Sparrow*, *supra* note 5 at p. 187.

17. *Delgamuukw v. British Columbia*, *supra* note 3 at p. 79.

It is this aspect of the test for interpreting s. 35(1) that the court has arguably been the most creative. Section 35(1) lies outside the Charter and is therefore not subject to the application of section 1 to justify any limitation on the exercise of the right. Nonetheless, the court interpreted the words “recognized and affirmed” in s. 35(1) to allow the government to infringe the right if the infringement is justified in the interests of Canadian society as a whole. In doing so, the court imposed itself to be the ultimate arbitrator as to what would be in the interests of society that could legitimately justify interference with a constitutionally protected right. As mentioned, this is a role the court is comfortable in resolving conflicts between individuals exercising Charter rights and the government. However, is this an appropriate role for a court to possess when the conflicts are between two autonomous self-governing entities representing very distinct constituencies?

## II. THE SUPREME COURT’S CHANGING RATIONALE FOR IMPOSING THE JUSTIFICATION ANALYSIS

Before describing some of the difficulties associated with a judicially controlled process of reconciliation between Aboriginal peoples and the Canadian majority, I would first like to summarize the Supreme Court’s expressed rationale for incorporating a justification analysis in defining the rights in s.35(1). Further, I will discuss why the basis of the rationale has subtly changed from that first stated in *Sparrow* to the now stated rationale in *Van der Peet*.

In the 1996 leading decision of *R. v. Van der Peet*<sup>18</sup>, Chief Justice Lamer uses once again the language of “reconciliation” in relation to defining Aboriginal rights. Except, this time he uses it to describe the very purpose and purpose of section 35(1). In *Van der Peet* he ignores any reference to s.91(24) as the rationale originally relied on in *Sparrow* for the inclusion of the justification test in the analysis of Aboriginal rights :

*[W]hat s.35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and **reconciled** with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose.*<sup>19</sup>

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18. *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177. (hereinafter referred to as *Van der Peet*).

19. *Ibid.* at p. 93 (emphasis mine).





Lamer C. J. draws support for his conclusion that section 35(1) provides the “constitutional framework for reconciliation” by referring to academic commentary that has described Aboriginal rights as a bridge between Aboriginal and non-Aboriginal cultures; in essence, a form of “intersocietal law” neither wholly English nor Aboriginal in origin.<sup>20</sup>

In the sister case of *R. v. Gladstone*,<sup>21</sup> released concurrently with *Van der Peet*, the Chief Justice clearly ties the justification standard first articulated in *Sparrow* to this new reasoning that section 35(1) is the sole basis for the notion of reconciliation apart from any reference to federal power in section 91(24). Lamer C. J. makes this clear in the following passage :

*Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive Aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive Aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that Aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of reconciliation of Aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where objectives furthered by those limits are of sufficient importance to the broader community as a whole, **equally** a necessary part of that reconciliation.*<sup>22</sup>

Chief Justice Lamer does not explain why the rationale for imposing a judicially determined reconciliation process changed from that articulated in *Sparrow* to that articulated in *Gladstone* and *Van der Peet*. Perhaps this change was prompted by the realization that the validity for imposing a justification test on the basis that the co-existence of equal constitutional provisions such as s. 91(24) and s. 35(1) necessitating a reconciliation process between federal power and federal duty might only apply to some of the Aboriginal peoples in s. 35(1). It is still unclear if the Métis, although Aboriginal peoples for the purposes of s. 35(1)

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20. *Ibid.* at p. 199.

21. *R. v. Gladstone* [1996], 4 C.N.L.R. 65. (hereinafter referred to as *Gladstone*).

22. *Ibid.* at p. 97 (emphasis in original).

are also “Indians” for the purpose of s. 91(24). If the finding is that they are not “Indians” then the rationale for imposing the justification test stated in *Sparrow* would not apply to the Métis. Secondly, the rationale in *Sparrow* may justify allowing the federal government to infringe Aboriginal rights. However, the rationale would not logically apply to the provinces because of the lack of any parallel jurisdiction over Aboriginal peoples in the Constitution.<sup>23</sup> Needless to say, building the reconciliation process and the imposition of the justification standard into the very definition of Aboriginal and Treaty rights in s. 35(1) nicely avoids the inconsistencies in the underlying purpose of the justification test. However, the theoretical basis for the imposition of the justification standard is now arguably weakened because, other than the court saying so, there is no logical reason for reading into section 35(1) such a limitation on the exercise of the rights protected therein. Furthermore, as Professor McNeil has observed, allowing the provinces the authority to infringe Aboriginal rights may actually be *ultra vires* the powers of the province since Aboriginal and Treaty rights are within the exclusive jurisdiction of Parliament under s. 91(24).<sup>24</sup>

### III. EXPANDING ALLOWABLE GOVERNMENT OBJECTIVES TO INTERFERE

*Van der Peet* also marks the beginning of Chief Justice Lamer’s expansion of the scope of possible legislative objectives that may merit overriding an Aboriginal or treaty right. In *Sparrow*, the court made it clear that a high onus would be on the government to justify interference. Depending on the context, legislative objectives found to be “compelling and substantial” may include objectives to ensure the conservation of the resource and public safety in the pursuit of hunting and fishing. The court in *Sparrow* also cautioned that vague references to legislative objectives “in the public interest” would not suffice. However, in *Gladstone*, Chief Justice Lamer begins to expand the types of objectives that can legitimately interfere with constitutionally protected Aboriginal rights. For example, valid legislative objectives now not only include conservation, but “objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in,

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23. This concern for the provinces may eventually be a moot point as Professor McNeil has observed that allowing the provinces to infringe an Aboriginal right is in direct contradiction with the conclusion in *Delgamuukw* that the subject matter of Aboriginal rights and title fall within the exclusive jurisdiction of Parliament under s. 91(24). See K. McNeil, *Defining Aboriginal Title in the 90’s : Has the Supreme Court Finally Got it Right?* (Toronto : York University Robart Centre for Canadian Studies, 1998) at pp. 26-27.

24. *Ibid.* at pp. 26-27.

the fishery by the non-Aboriginal groups.”<sup>25</sup> Two years later in *Delgamukw*, the court continues this trend by stating that reconciliation can justify interference for any number of valid purposes such as the “development of agriculture, forestry, mining, and hydroelectric power, the general 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.”<sup>26</sup> It would be hard to imagine a more exhaustive list of objectives “in the public interest” than this list volunteered by the Chief Justice. Indeed, to identify the “settlement of foreign populations” as a valid legislative objective sufficient to warrant interference with a constitutionally protected title to land prompted one Aboriginal law scholar to say that such justification is akin to justifying colonization itself :

*In reconciling Crown assertions of sovereignty with ancient rights stemming from aboriginal occupation, the Court labels colonization as an “infringement” [...] Calling colonization “infringement” is an understatement of immense proportions. While these “infringements” must be consistent with the special fiduciary relationship between the Crown and aboriginal peoples, the effect of the Court’s treatment of “infringement” is to make Aboriginal land rights subject to the “colonizer’s” objectives.*<sup>27</sup>

Is the purpose of section 35(1) to allow Aboriginal rights to be limited by the needs of society as a whole when those needs are of “sufficient importance”?<sup>28</sup> Is this what is meant by reconciliation? Does such a result reflect the intention of the parties who negotiated section 35(1)?

In *Delgamuukw*, the court uses the language of “sufficient importance” to illustrate the standard the Crown must achieve to justify interference. Something that is of “sufficient importance” is a rather low standard to justify the interference of a constitutionally protected right. This is a noticeable change from the language of “compelling and substantial” used in *Sparrow*.

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25. *Gladstone*, *supra* note 21 at p. 98.

26. *Delgamuukw v. British Columbia*, *supra* note 3 at p. 78.

27. J. Borrows, *Because It Does Not Make Sense : A Comment on Delgamuukw v. The Queen* (Toronto : University of Toronto, Faculty of Law, 1998) at p. 16 (unpublished at time of writing).

28. *Delgamuukw v. British Columbia*, *supra* note 3 at p. 78.

Thus, not only has the court expanded the scope of legislative objectives that can justify interference, the court has also lowered the standard the Crown needs to prove that any given valid objective justifies interference. Characterized in this way, section 35(1) offers little more than basic protection against the arbitrary use of authority by the Crown and little else. Otherwise, the Crown is free to interfere *ad libitum* with constitutionally protected Aboriginal and treaty rights.<sup>29</sup>

Certain members of the S.C.C., notably Justice McLachlin, were seriously concerned about this charitable trend being pursued by the Chief Justice on behalf of the interests of society as a whole. In *Van der Peet*, Justice McLachlin wrote a very strong dissenting opinion criticising the approach taken by the majority. She raised a number of concerns with the test advocated by the court regarding the standard and scope needed to justify interference by government.

Justice McLachlin described the Chief Justice's test as essentially permitting the constitutionally protected Aboriginal right to be "conveyed by regulation, law or executive act" if non-Aboriginal interests existed and merited some countervailing protection. The only requirement is that the distribution scheme "take into account" the Aboriginal right.<sup>30</sup> In other words, the Chief Justice's proposal allows the Crown to convey a portion of an Aboriginal right to others,

*not by treaty or with the consent of the Aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard Aboriginal rights and property. But my concern is more fundamental. How, without amending the constitution, can the Crown cut down the Aboriginal right? The exercise of the rights guaranteed by s. 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from Aboriginals to non-Aboriginals, would be to diminish the substance of the right that s.35(1) of the Constitution Act, 1982 guarantees to the Aboriginal people. This no court can do.*<sup>31</sup>

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29. It may be somewhat overstating the matter here because the justification standard in *Sparrow* requires more than a finding of a valid legislative objective. The test also requires the Crown to uphold the fiduciary relationship between the Crown and Aboriginal peoples in determining whether the legislation or action in question can be justified.

30. *R. v. Van der Peet*, *supra* note 18 at p. 280.

31. *Ibid.* at p. 283.

From McLachlin's perspective, it would seem that Chief Justice Lamer has taken the task of "agent of reconciliation" to lofty new heights previously unheard of in a constitutional democracy. Not only has the Chief Justice seen fit to endow the Supreme Court of Canada with the role of "agent of reconciliation" (an authority that goes beyond mere application of the common law to include political considerations), he has also saw fit that the court's role in reconciliation also justifies re-writing the Constitution itself!

It might be argued that the Supreme Court of Canada really has no choice but to legislate given the broad wording of section 35(1) and the failure of the government and Aboriginal parties to mutually agree on any clarification of the meaning of the provision. However, it does not necessarily follow that the court has the power to limit constitutionally protected rights without a provision like s.1 of the Charter that validates such government interference.

According to Professor Hogg, section 52(1) is applicable to the entire constitution including section 35(1).<sup>32</sup> Section 52(1) states as follows :

*The Constitution of Canada is the supreme law of Canada, and any law that inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

Peter Hogg concludes that section 52(1) confers no discretion on the court. If a law is found to be inconsistent with the Constitution, the law must be declared invalid and "gives the court no choice in the matter."<sup>33</sup> The remedies available to deal with inconsistent legislation are limited.<sup>34</sup>

The court's authority to allow interference by the government in certain circumstances is not one of the remedies allowed by s. 52(1). The court has, on occasion, under the doctrine of reconstruction been asked to read into legislation safeguards to comply with the Constitution's standards. However, in *Singh v. Minister of Employment and Immigration*<sup>35</sup> the power of the court to reconstruct legislation is very limited. "It is not the function of this Court to re-write the Act." There may be occasions for the court to conduct "crude surgery", but not

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32. P. Hogg, *supra* note 15 at p. 905.

33. *Ibid* at p. 905.

34. They include to the following : Reading down, Reconstruction, Constitutional exemption, Extension, and Temporary validity.

35. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

“plastic or re-constructive surgery”.<sup>36</sup> There certainly is no power to authorize infringement of constitutionally protected rights where the public interest is of sufficient importance. In the words of Justice McLachlin, in *Van der Peet* :

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36. *Ibid* at p. 236.

*[T]he Chief Justice's approach might be seen as treating the guarantee of Aboriginal rights under s. 35(1) as if it were a guarantee of individual rights under the Charter. The right and its infringement are acknowledged. However, the infringement may be justified if this is in the interest of Canadian society as a whole. In the case of individual rights under the Charter, this is appropriate because the Charter expressly states that these rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." However, in the case of Aboriginal rights guaranteed by s. 35(1) of the Constitution Act, 1982, the framers of s. 35(1) deliberately chose not to subordinate the exercise of Aboriginal rights to the good of society as a whole. [...] To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the constitution.<sup>37</sup>*

At most, if a legislative provision violated an Aboriginal right under s. 35(1), the court could allow temporary validity until such time as the legislation was remedied to comply with the right or in the unique case of Aboriginal peoples, by negotiations which could incorporate any restrictions of the right as part of a treaty and thus be referentially incorporated into the Constitution itself.

Confronted with a seemingly similar unrestricted constitutional right regarding language, the Supreme Court in the *Manitoba Language Reference*<sup>38</sup> case did not have the authority or feel compelled to "create law" that would allow the province of Manitoba to justify its infringement of a constitutional right requiring laws to be enacted in both English and French. Like s. 35(1), the language right was not subject to s. 1 of the Charter. The only remedy available to the court in such circumstances was to declare all laws in Manitoba unconstitutional and to impose a period of temporary validity to allow the province to comply with the Constitution. According to accepted constitutional interpretation principles, a remedy to permanently allow infringement of a constitutional right does not exist save section 1 as it applies to the Charter. In no other circumstances, but s. 35(1), has the court found it necessary to read into the constitution an analogous s. 1 justification remedy to shelter what is otherwise clearly unconstitutional legislation.

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37. *R. v. Van der Peet*, *supra* note 18 at pp. 280-281.

38. *Reference Re Language Rights Under the Manitoba Act, 1870*, (1985) 19 D.L.R. (4th) 1.



#### IV. NEGOTIATION OR JUDICIAL DECREE

From Justice McLachlin perspective, the majority's approach in *Van der Peet* has largely allowed the federal or provincial governments to avoid a fair and equitable process of political reconciliation by weakening the bargaining position of Aboriginal peoples. To allow governments to so easily over-ride Aboriginal rights by the justification standard gives an unfair advantage to them. Government lawyers have little to lose in not going to the negotiation table where "reconciliation" should ideally take place :

*Traditionally, [reconciliation] has been done 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 [...]. At this stage, the stage of reconciliation, the courts play a less important role. [...] It is for the Aboriginal peoples and other peoples of Canada to work out a just accommodation of the recognized Aboriginal rights. [...] Until we have exhausted the traditional means by which Aboriginal and non-Aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode Aboriginal rights seriously.*<sup>39</sup>

The role of the court as agent of reconciliation appears to have significantly usurped the responsibilities from the parties themselves to come to some sort of mutual reconciliation of their interests. This is not a desirable or befitting role for a court of general or appellate jurisdiction. As Justice McLachlin explains, the court is ill-equipped to undertake such inherently political responsibilities.

*A second objection to the approach suggested by the Chief Justice is that it is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement. The imprecision of the proposed test is apparent. "In the right circumstances", themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one I left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed. Courts may properly be*

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39. *R. v. Van der Peet*, *supra* note 18 at p. 283.

*expected, the Chief Justice suggests, not to be overly strict in their review; as under s. 1 of the Charter, the courts should not negate the government decision, so long as it represents a “reasonable” resolution of conflicting interests. This, with respect, falls short of the “solid constitutional base upon which subsequent negotiations can take place” of which Dickson C.J. and LaForest J. wrote in Sparrow...<sup>40</sup>*

Perhaps it is with these concerns in mind that the Royal Commission on Aboriginal Peoples opted to emphasize in its final report recommendations aimed at political reconciliation rather than to place such responsibilities of societal reconciliation in the “unsteady hands of judicial interpretation”.<sup>41</sup>

However, none of the important structural recommendations proposed by the Royal Commission have yet to be implemented.<sup>42</sup> Thus, until such changes are implemented, judges will continue to possess considerable discretion but without any clear guidance to aid in their interpretation of section 35(1). As Professors Borrows and Rotman declare : “without more concrete interpretative tools, there is a real danger that the undefined nature of Aboriginal rights as *sui generis* creates a situation where discretion is merely shifted from one institution to another within the colonial structure.”<sup>43</sup>

Given the socio-economic backgrounds of most judges and the historical record of the courts in defending colonial institutions, such discretion is generally not perceived as a good thing from the Aboriginal point of view. In fact, the court is often perceived as having a systemic bias against Aboriginal peoples’ claims.<sup>44</sup> On the other hand, Chief Justice Lamer has recently stated that such broad judicial discretion ought to not be seen as a cause for concern, but welcomed. He

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40. *Ibid* at p. 281.

41. D. Schneiderman, “Theorists of Difference and the Interpretation of Aboriginal and Treaty Rights” (1996) 14 *International Journal of Canadian Studies* 35 at p. 46.

42. For example, recommendations that call for implementing processes that will facilitate an equal partnership between Aboriginal peoples and Canada have not as yet been seriously considered by governments. For example, the issuance of a new Royal Proclamation and companion legislation that would expressly state the fundamental principles to guide Canadian — Aboriginal relations has yet to be initiated by Canada. See Standing Senate Committee on Aboriginal Peoples, *Transcripts of Evidence on the Special Study on Aboriginal Governance* (November, 1998 - May, 1999).

43. J. Borrows and L. Rotman, “The *Sui Generis* Nature of Aboriginal Rights : Does it Make a Difference” (1997) 36 *Alberta Law Review* 9 at p. 33.

44. See for example the discussion of the courts treatment of treaties in Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Vol. 2, (Ottawa : Canada Communication Group, 1996) at pp. 22-50.

predicts that the Royal Commission Report on Aboriginal Peoples will likely influence judges in areas of judicial discretion in the same way that the Law Reform Commission's past reports and recommendations have, in other areas of law, influenced judges, "particularly in deciding difficult issues of principle under the *Canadian Charter of Rights and Freedoms*."<sup>45</sup>

Professor Borrows has recently compared the recommendations of the Royal Commission regarding Aboriginal title with the Supreme Court of Canada's definition of Aboriginal title in *Delgamuukw*. He speculates that the court was influenced by the Royal Commission's views on the nature of Aboriginal title because of the apparent convergence of the court to be more in line with the Royal Commission's view on Aboriginal title. It is evident that the Court's definition of Aboriginal title is, in some respects, substantially greater than previous cases had recognized.<sup>46</sup> At the same time, Borrows notes that the Supreme Court stops considerably short of the mark in terms of embracing the full spirit and intent of the Royal Commission's call for a renewed relationship of equality and respect :

*The Crown's tautological assumption of underlying title limits Aboriginal choice in a most profound way because it has been interpreted to require the reconciliation of Aboriginal title with the assertion of Crown sovereignty, and therefore Crown use of land. Underlying Crown title diminishes Aboriginal title [...] because most Crown uses may be sufficient to displace Aboriginal use [...] The Royal Commission did not foresee the development of a concept of Aboriginal title that was so fully, and in my opinion unfairly, referenced to the interests of other Canadians.*<sup>47</sup>

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45. A. Lamer, C.J.C., Speaking Notes (paper presented to the Conference on *Building the Momentum — Implementing the Recommendations of the Royal Commission on Aboriginal Peoples*, April 23, 1999) at pp. 2-3.

46. J. Borrows, *Domesticating Doctrines : Aboriginal and Treaty Rights, and the Response to the Royal Commission on Aboriginal Peoples* (Paper presented to the Conference on Building the Momentum — Implementing the Recommendations of the Royal Commission on Aboriginal Peoples, April, 1999) at p. 32. [unpublished] Professor Borrows provides an excellent overview of the difference in treatment between the Supreme Court of Canada and the Royal Commission regarding the definition of treaties and Aboriginal title.

47. *Ibid.* at p. 32.

## V. MOVING IN THE RIGHT DIRECTION

In *Delgamuukw*, the court seems to backtrack somewhat. In encouraging negotiations, Lamer, C.J. may have realized the full implications of *Van der Peet*, in having the court become too zealous in its self-proclaimed role as agent of reconciliation - a role that more logically belongs to the parties themselves to perform. The last word by Chief Justice Lamer in *Delgamuukw* emphasises a preference for negotiations. He states :

*As was said in Sparrow, [...] s. 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place” [...] Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve what I stated in Van der Peet, to be a basic purpose of s. 35(1) — “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.<sup>48</sup>*

This judicial advice appears to move back in the direction advocated by Justice McLachlin in *Van der Peet* regarding the priority to be given political reconciliation over judicial reconciliation. As described earlier, Justice McLachlin would like to see the judiciary playing more of a back seat role. In *Delgamuukw*, Lamer C. J. seems to also imply that this is the preferred approach. The difference, however, between Justice McLachlin and the Chief Justice is that Justice McLachlin’s opinion regarding the justification stage of analysis is more consistent with the spirit and intent of s.52(1) of the Constitution. Her position would have a stronger impact in forcing the parties to negotiate once the Crown has infringed an Aboriginal right. In contrast, Chief Justice Lamer’s justification analysis allows the Crown to justify its infringement in the interests of the public as a whole provided that the Crown has satisfied the minimum “consultation” requirements with the Aboriginal claimant. Justice McLachlin’s approach places the Aboriginal party on an equal footing requiring the Crown to negotiate with the Aboriginal claimant if it wants to achieve its objectives. Chief Justice Lamer’s approach ultimately only requires a degree of consultation with the Aboriginal claimant, although admittedly “in some cases” full consent may be required. Thus, his preference for negotiation is just that — a preference. Justice McLachlin, however, would place such negotiations as a constitutional necessity if reconciliation is to take place.

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48. *Delgamuukw v. British Columbia*, *supra* note 3 at p. 86.

Thus, as it stands, the court has the last say in “reconciling” the interests of the parties. Thus, in the end, decision-making power over Aboriginal — Canadian relations rests in the “unsteady hands of the judiciary”<sup>49</sup>, despite the insight of Justice McLachlin that such a direction is misguided.

## VI. THE PROPER ROLE OF THE COURT IN BALANCING THE INTERESTS BETWEEN PEOPLES

According to Justice McLachlin, the preferred role of the court should be more of a monitor of fair process. It should not implicate itself in decisions on the merits of the competing claims between Aboriginal and non-Aboriginal peoples. This “monitoring” role is noticeably like the role the court adopted in the *Quebec Reference* case.<sup>50</sup>

The *Quebec Reference* case is another example where issues fundamental to the relationship between different peoples in Canada are addressed. However, the court took a different approach from *Van der Peet* and *Delgamuukw* in terms of its appropriate role in such circumstances.

A close comparison between the rights of Quebec and the rights of Aboriginal peoples may seem unconvincing at first. After all, how do you compare the rights of a province, as expressed by a clear majority of the population, and the rights of Aboriginal peoples contained in the Constitution? Granted, there are significant differences between the right of Quebec to secede and the rights of Aboriginal peoples in s. 35(1). However, there are common threads between the circumstances faced by the Quebec population and Aboriginal peoples that warrants closer scrutiny.

Both Aboriginal peoples and Quebecers desire to pursue their own unique and distinctive cultures without undue interference by a government perceived to represent the interests of a foreign and culturally distinct majority population in Canada. Both the interests of Quebec and Aboriginal peoples involve questions of constitutional interpretation in regards to the collective rights of a people(s) and how those collective rights *fit* into the overall constitutional framework of Canada. In the case of Quebec, when faced with the question of secession, the court has held that the underlying principles of federalism, democracy, constitutionalism and the rule of law and respect for

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49. D. Schneiderman, *supra* note 41 at p. 46.

50. *Supra* note 6.

minority rights require that good faith negotiations between the various parties be undertaken.<sup>51</sup>

The rights of Quebec in the case of a clear majority wishing to secede are equivalent to the rights of the federal government under the Constitution. The right of Quebec to secede is based on the unwritten but fundamental constitutional principle of democracy and the right of the federal government to maintain the current federal composition is based on the fundamental principles of constitutionalism and the rule of law. In such circumstances, the court held that “none of the rights or principles is absolute to the exclusion of the others” :

*This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec’s rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require **reconciliation** of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities “trumps” the other.<sup>52</sup>*

Relevant to the Aboriginal rights context is the Supreme Court of Canada’s discussion of the proper role of the court in this “reconciliation” process. This discussion is directly relevant to the proper interpretation that ought to be given s. 35(1) of the *Constitution Act, 1982* :

*If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately*

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51. *Ibid.* at par. 88.

52. *Ibid.* at par. 93 (emphasis mine).

assess. The **reconciliation** of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that **reconciliation** can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.<sup>53</sup>

The same concerns about the legitimate interests between peoples and the processes towards truth and reconciliation that are ill-suited in a court of law are equally true of Aboriginal government and non-Aboriginal government relations.<sup>54</sup> If this is true, it seems curious that the court has no problem interposing its own views on the strength and merits of the legitimate interests of the Aboriginal and non-Aboriginal government parties, yet it is so concerned with its inappropriate role in interposing its views in the Quebec secession context.

## VII. ABORIGINAL RIGHTS AS INHERENTLY POLITICAL RIGHTS

Aboriginal rights, properly interpreted, includes recognition of both an Aboriginal activity and a degree of jurisdictional control over the activity. Without a degree of jurisdictional control over the activity, the right would be meaningless to the contemporary needs of Aboriginal societies. It would simply be a protected activity divorced from the social circumstances of the Aboriginal society that is to benefit from its protection.<sup>55</sup> Because Aboriginal rights are collective rights belonging to a community of people, they involve, by necessity, a political dimension. To date, the courts have not generally understood the dual

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53. *Ibid.* at par. 101 (emphasis mine).

54. Paul Chartrand, former Commissioner of the Royal Commission on Aboriginal Peoples and legal scholar has recently stated that “In time the *Quebec Secession Case* might be seen in retrospect as the most important Aboriginal rights case in history” See Paul L.A.H. Chartrand, *Speaking Notes for an Opening Address* (Toronto : Building the Momentum : A Conference on Implementing the Recommendations of the Royal Commission on Aboriginal Peoples, April 22, 1999) at p. 13.

55. J. Borrows and L. Rotman, *supra* note 43 at p. 39. According to Borrows and Rotman :

Aboriginal rights have two primary components, a theoretical and a material element. The theoretical element is a constant, and concerns the underlying purpose for the right in question — namely the contemporary cultural and physical survival of Aboriginal societies. Meanwhile, the material element of the right involves its practice, which is fact and site-specific. Therefore, under the *sui generis* formulation, rights which are integral to the distinctive cultures of Aboriginal societies are, simultaneously, universal *and* fact and site-specific.

nature of Aboriginal rights. Instead, courts have largely focused on certain observable activities and whether they are culturally distinct enough from mainstream Canadian lifestyles to warrant their protection in the Constitution.

Thus, what the court must come to accept is that any decision regarding Aboriginal rights must be accepted as also involving a decision about the boundaries of government control regarding the protected Aboriginal activity. The right and the ability to exercise a degree of control over the right cannot be separated where the rights holder is a political community and not an individual citizen. Only in this way can the recognition of the right be true to its inherent collective nature. When dealing with rights of this nature, there is inherently a political dimension involved as there must be a determination of the jurisdictional boundaries as between the Aboriginal, federal and provincial authorities. Such determinations will involve considerations of many factors including economic circumstances, fiscal relations, internal community capacity, community identification, municipal relations, and inter-government protocols and policies to name but a few. These questions are not unlike the multitude of complex questions that would have to be resolved in the face of a clear majority of people in Quebec wishing to secede from Canada. They are political questions, which the judiciary, as third branch of government, has no legitimate role to play in such matters.

## CONCLUSION

In both the context of Aboriginal peoples and Quebec, there are legitimate constitutional rights and principles being asserted that conflict with the interests of Canadians as a whole. In such comparable circumstances, there is no legitimate reason why the Supreme Court of Canada should take an approach that denies the Aboriginal peoples of Canada less protection than Quebec. In the case of Quebec's assertion of sovereignty, the interests are equal as between Quebec and other government parties thus requiring an obligation on the parties to conduct principled negotiations. In the case of Aboriginal peoples, if there is a conflict between a constitutionally protected Aboriginal right and the Crown, the Crown should not have the advantage of being able to "trump" the Aboriginal right in the interests of Canada as a whole.

Why is "consultation" as opposed to "negotiation" generally acceptable to protect the constitutional rights of Aboriginal people, whereas in the context of Quebec secession, the rights are given equal status thus mandating negotiations in order to arrive at an acceptable solution for all parties? Are not the same principles of federalism, democracy, rule of law and protection of



minorities identified in the *Quebec Reference* case for resolving questions involving constitutional amendment appropriate for interpreting s. 35(1)? However, in answering that question the court may have to ask the further and perhaps more troublesome question of whether Aboriginal peoples, as collective political entities, are entitled to the same level of respect as provinces or federal political entities?