RECONCEIVING THE DUTY TO CONSULT AND ACCOMMODATE
ABORIGINAL PEOPLES: A RELATIONAL APPROACH

by

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Abstract

Duty to consult and accommodate jurisprudence does not live up to the promise of reconciliation that the Supreme Court of Canada has identified as the grand purpose of section 35(1) of the Constitution Acts. I argue that a relational framework to the duty to consult and accommodate would forward reconciliation between Indigenous and non-Indigenous peoples within Canada. I suggest four bijural principles to ground this framework: respect, recognition, reciprocity and reconciliation – all of which find support in Canadian and Indigenous laws.

The principle of respect situates Indigenous and non-Indigenous peoples within a web of relationships that define our identities and level of self-respect. Practical strategies include making interdependence primary, rejecting colonial attitudes, and creating space for Indigenous communities to foster cultural difference.

The principle of recognition involves two aspects: acknowledgement and affirmation. Acknowledgment involves acknowledging historic wrongs, taking responsibility, and moving forward together in light of the history. Practical strategies include recognizing the value of Indigenous storytelling, creating spaces for meaningful listening, and making a commitment to remember and change. Affirmation involves formally entrenching in law the inherent rights of Indigenous communities. It involves rejecting the assumption of settler entitlement to Indigenous lands, putting all issues on the table in political negotiations, and creating a sphere of recognition for Indigenous governance and legal systems.
The principle of reciprocity involves engaging with cross-cultural others to create an equally beneficial relationship aimed at mutual understanding. Practical strategies include dialogical engagement with no hidden agenda, starting from a point of wonder, humility and risk, and striving for embodied connections with cross-cultural others.

The principle of reconciliation involves a long-term process to rebuild damaged relationships between Indigenous and non-Indigenous peoples. Practical strategies include rebuilding trust, developing a shared vision of the future, creating processes to manage conflicts that arise, and implementing concrete actions to move towards the shared vision.

In the context of the duty to consult and accommodate, each principle points to attitudinal shifts and concrete actions that have implications for Canadian judges and governments. Implementing this relational framework provides a promising pathway forward to rebuild Indigenous/non-Indigenous relationships within Canada.
Preface

This dissertation is my original and independent work and therefore I take responsibility for any errors or omissions.

Some parts of this dissertation reproduce and adapt writing from published articles as follows. Permission has been granted to reproduce these articles in this dissertation.

- A version of Chapter 2, section 2.1 and some sections in 2.4 have been published in Kirsten Manley-Casimir, “Reconciliation, Indigenous Rights and Offshore Oil and Gas Development in the Canadian Arctic” (2011) 20:1 Review of European Community and International Environmental Law 29.

- Some paragraphs in Chapter 1, section 1.6 and a version of Chapter 5, section 5.2.4.1 and some paragraphs in section 8.2.1 have been published in Kirsten Manley-Casimir, “Creating Space for Indigenous Storytelling in Courts” (2012) 27(2) Canadian Journal of Law and Society 231.

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List of Abbreviations

BC – British Columbia
EPA – Energy Purchase Agreement
FIT – Feed-In Tariff
FNCFCS – First Nations Child & Family Caring Society of Canada
IRS – Indian Residential Schools
IRSSA – Indian Residential Schools Settlement Agreement
MMF – Manitoba Métis Federation
LARC – Land Application Review Committee
LSCFN – Little Salmon/Carmacks First Nation
RCAP – Royal Commission on Aboriginal Peoples
RCMP – Royal Canadian Mounted Police
TRC – Truth and Reconciliation Commission of Canada
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This is dedicated to Kevin Watson and Ed Gyoba – you brought love, light and laughter to all our lives and we miss you dearly.
Chapter 1: Towards a Relational Approach to the Duty to Consult and Accommodate

There was such a strong will to disappear us, to disappear us from the places where we lived, the places where we were born. Our present is informed by our histories and we have to engage with these histories to understand where we are right now.¹

In recent years, Canadian courts have increasingly recognized the need to reconcile the pre-existing rights of Indigenous Peoples with the existence and rights of non-Indigenous people within Canada. Many contemporary disputes arise in the context of resource or other development projects where Indigenous Peoples have established or yet-to-be established claims over their ancestral territories.² The Supreme Court of Canada has begun to elaborate the duty to consult and accommodate and provide a framework for Indigenous peoples and the Canadian government to manage these disputes in accordance with the constitutional protections afforded to Aboriginal rights under section 35(1) of the Constitution Acts.³

In this dissertation, I argue that the duty to consult and accommodate, as it is currently formulated, does not live up to the promise of reconciliation that the Supreme Court of Canada has identified as the grand purpose of s. 35(1). Building on the case law and academic work to date, I suggest that a relational approach to the duty to consult and accommodate would move Indigenous and non-Indigenous peoples within Canada along the path of reconciliation. I suggest four bijural principles to

² A few high profile examples include the Oka crisis, the blockade in Caledonia and the recent anti-fracking protests in New Brunswick.
³ Constitution Acts, 1867 to 1982, Schedule B, Department of Justice (Ottawa: Canada Communications Group, 1989) [Constitution or Constitution Acts].
ground this relational approach: respect, recognition, reciprocity and reconciliation – all of which find support in Canadian law and Indigenous legal traditions. Each principle points to attitudinal shifts and concrete actions that need to take place in the context of intercultural disputes that arise. Implementing this framework to guide the development and implementation of the duty to consult and accommodate under section 35 provides one promising pathway for rebuilding the relationship between Indigenous and non-Indigenous communities within Canada.

1.1 Setting the Stage

More and more frequently, issues of Aboriginal and treaty rights, competing sovereignties and political and economic forces collide as resource extraction companies aim to profit from the development of resources from lands and waters within Indigenous traditional territories. In addition, global pressures with respect to the increasing demand for commodities, such as oil, continue to exert pressure on both the Canadian government and Indigenous Nations to extract resources from Indigenous traditional territories. Many Indigenous Nations within Canada find their traditional territories continually being encroached upon or degraded due to such developments. The pressure and concerns of environmental groups are often aligned with Indigenous resistance to such encroachment, creating more political pressure on the Canadian government to ensure that such interests are taken into account.

In addition to political pressure, the Canadian government has legal obligations to consult with Indigenous communities where their interests may be affected by such developments. Canadian jurisprudence in the area of Aboriginal law has developed rapidly since the inclusion of section 35 in the Constitution Acts in 1982. Since the late
1990s the Supreme Court of Canada has outlined the Canadian government and industry’s legal obligations with respect to consulting and accommodating Indigenous communities. The Court has clarified that although industry may be called upon to facilitate the consultation and accommodation process, the legal obligation of the duty to consult and accommodate falls exclusively on the Canadian government. The Court has specified that the government has legal obligations that include a duty:

- to consult with Indigenous communities where an Indigenous community has asserted or proven Aboriginal or treaty rights;
- to act honourably in dealing with Indigenous communities;
- of good faith in consultations, accommodations and negotiations and to avoid sharp dealing;
- to substantially attempt to address Indigenous concerns.

The Court has also clarified that in considering whether the duty to consult and accommodate has been met, the government must balance the interests of the broader Canadian society with those of the affected Indigenous community.

Although the jurisprudence provides some useful starting points to guide the Canadian government, industry and affected Indigenous communities in what appropriate consultation might look like, the Supreme Court of Canada has failed to

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4 Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511 [Haida Nation] at para 53.
5 Ibid at para 27.
9 Haida Nation, supra note 4 at para 29.
10 Delgamuukw, supra note 8 at para 186.
11 Haida Nation, supra note 4 at para 42.
12 Delgamuukw, supra note 8 at para 168.
13 Haida Nation, supra note 4 at para 50; see also Taku River Tlingit First Nation v British Columbia (Project Assessment Director), [2004] 3 SCR 550 [Taku River] at para 2.
articulate a well-developed normative framework to guide the development of the duty to consult and accommodate. The current legal landscape has resulted in a tendency for the Canadian government and industry to approach their legal obligations to consult in a way that only meets the minimum necessary requirements.

The government’s minimalist approach to consultation, coupled with the Court’s insistence on balancing Indigenous interests against the interests of the broader Canadian society has had three clear effects:

1. it elevates the protection of non-Indigenous interests and correspondingly minimizes the constitutionally protected rights of Indigenous communities;

2. it fails to adequately recognize the special constitutional status of Indigenous communities whose rights are enshrined in section 35 of the Constitution Acts; and

3. it fails to recognize the importance and status of the relationships between Indigenous nations and the Canadian government.

As currently formulated, the duty to consult and accommodate fails to provide a substantive mechanism for Indigenous communities to participate in decision-making related to their traditional territories.

A central question in duty to consult and accommodate case law is whose experiences, knowledges, and truths’ shape legal practices and interpretations\textsuperscript{14} in the context of Indigenous/non-Indigenous disputes. To date, the duty to consult and accommodate jurisprudence relies heavily on common law to the exclusion of Indigenous legal traditions and principles. In this dissertation, I assert that creating a more balanced approach that draws on both common law and Indigenous legal

\textsuperscript{14} Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48(2) UBC L Rev 593 at 607.
traditions is useful to create a normative framework to guide the development of a relational approach to the duty to consult and accommodate.

1.2 Situating My Work

Indigenous legal theorists have been undertaking the difficult work of revitalizing Indigenous legal systems and visioning how Canadian courts might consider such systems in developing Aboriginal rights jurisprudence. John Borrows, for example, translates Indigenous legal traditions for non-Indigenous legal actors through the use of narrative and case law method to break down some of the institutional and intellectual barriers that exist within the Canadian legal system in considering Indigenous laws. Val Napoleon has created a respectful consultation methodology to create dialogue within Indigenous communities in an effort to document Indigenous legal traditions across Canada. Napoleon does this by personally collecting and training other researchers to collect Indigenous stories and analyze those stories collectively using the case law method. In this way, the researchers are able to identify common themes across stories that illustrate particular Indigenous laws and document a layered, nuanced interpretation of such laws. Along with Borrows and Napoleon, other Indigenous scholars, such as Gordon Christie, James Sákéj Youngblood Henderson, Lucy Bell, Jaime Battiste, Tracy Lindberg to name a few, critically engage Canadian Aboriginal rights jurisprudence to illuminate the colonial underpinnings of the judicial reasoning and precedents. Often these scholars engage in these critiques by drawing on Indigenous knowledge and laws.

Many non-Indigenous scholars also articulate ways in which the legal systems could work together productively. These scholars include Patrick Macklem, Mark Walters, Shin Imai, Brian Slattery, Jeremy Webber, and Bradford Morse to name a few. Like these and other scholars, this dissertation is an attempt to articulate an approach for Indigenous legal systems to interact in respectful relationships with the Canadian legal system. Elsewhere I have critiqued the colonial underpinnings of Canadian Aboriginal rights jurisprudence. In this dissertation, I attempt to bridge the gaps between Indigenous legal traditions and the non-Indigenous legal system. This dissertation builds on the ideas put forth by Borrows, Napoleon and other Indigenous and non-Indigenous scholars, in recognizing their calls to find ways for Indigenous legal systems to speak within the Canadian legal system. In heeding this call, I attempt to create a new framework based on bijural principles to bridge the current chasm between Indigenous and non-Indigenous legal systems.

1.3 Starting Points

My first starting point is that Indigenous communities have developed effective ways to manage disputes that arise both within their own communities and in relationships with non-Indigenous communities. Further, these Indigenous dispute resolution mechanisms are relevant and useful to contemporary issues and would improve the content and relevance of Canadian Aboriginal law in resolving Indigenous/non-Indigenous disputes. As Emily Snyder, Val Napoleon and John

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Borrows assert “significant intellectual resources ... exist within Indigenous communities for thinking about and challenging social problems.”\textsuperscript{17} Drawing on these resources will enhance and further develop appropriate dispute resolution in the Canadian context.

My second starting point is that Canadians value equality and do not believe Indigenous people should be criminalized, have shorter lifespans and live in impoverished conditions based solely on their ethnicity. As such, it seems reasonable to suggest that many Canadians would like to find appropriate solutions to the issues Indigenous claims raise and that these solutions might require an element of distributive justice.

My third starting point is that there is value in diversity. Diversity of cultures, legal systems, values and ideas create a more interesting world and create the possibility to continue to improve our social and democratic institutions by drawing on the best models from multiple sources. Indigenous communities form an important part of the diversity within Canada and internationally. Valuing diversity implies a commitment to encourage the on-going existence of various communities and to enable those communities to flourish. So far, in the context of Indigenous communities within Canada, I would argue that we are not doing a very good job at creating conditions for on-going existence and flourishing. Creating conditions to support diversity, however, is arguably an important part of Canada’s identity.

My fourth starting point is that law is socially constructed. The values embodied by and replicated within the Canadian legal system emerge from a particular cultural

\textsuperscript{17} Snyder, Napoleon & Borrows, \textit{supra} note 14 at 597.
medium (namely Eurocentric) and reflect cultural biases. In the context of Indigenous/non-Indigenous relations, such biases often determine the outcome of intercultural conflicts that arise and operate to the detriment of Indigenous communities and legal systems, creating an uneven playing field from the outset.

1.4 **Acknowledging My Perspective**

As a non-Indigenous person writing in the area of Aboriginal law, I am acutely aware of my positioning as an outsider. I am aware of the danger of imposing my own culturally biased views of what I think might be a reasonable solution to some of the intractable issues facing Indigenous peoples within Canada. In approaching issues raised in Aboriginal law, I heed Taiaiake Alfred’s warning that non-Indigenous theorists have something to contribute to the debate but should first consider their own complicity, position, and prejudices in thinking through the issues.\(^{18}\) Further, I heed Alfred’s warning to be wary of positing ideas and solutions that might be imposed upon Indigenous communities and peoples to “solve” their problems.\(^{19}\)

I also heed John Borrows’ call to make non-Indigenous institutions more fully reflective of the Indigenous cultures and legal traditions that have helped shape Canada.\(^{20}\) For this reason, I focus on how the Canadian courts and governments might approach the duty to consult and accommodate differently to improve processes to resolve disputes and enhance the relationship between Indigenous and non-

\(^{18}\) Taiaiake Alfred & Glen Coulthard, "A Conversation on Decolonization" (Presentation organized by the Department of History and the First Nations Studies Program at the University of British Columbia, 15 March 2006).
Indigenous peoples within Canada. Rather than focusing on what Indigenous peoples might do in response to the existing system, I focus on the weaknesses and limitations of the current conceptualization of the duty to consult and accommodate and consider how to reformulate this duty in a way that enhances Indigenous/non-Indigenous relationships.

I give primacy to Indigenous critical theory where possible. Due to the relatively small number of Indigenous academics, giving primacy to these theorists does not necessarily mean that the majority of my writing references these theorists. Rather, I have actively sought out relevant articles written by Indigenous theorists and engaged with the ideas such theorists have raised. I rely on Mari Matsuda’s approach of “looking to the bottom,” which involves explicitly seeking out the theories of those who are uniquely able to relate theory to the concrete experiences of oppression. Matsuda asserts that “looking to the bottom can lead to concepts of law radically different from those generated at the top.” I hope that by engaging with the ideas of critical Indigenous theorists and respecting their contributions and voices, I might mitigate some of the potential dangers of the limitations of my non-Indigenous perspective.

1.5 Creating a Common Language: Defining Key Terms

In this dissertation, I use several terms that require clarification. I use the term “Indigenous” to refer to peoples within Canada who self-identify as First Nations, Métis, Inuit and any related identities. Although within these communities, most Indigenous peoples prefer to be referred to by the name of their individual community

22 Ibid at 326.
or territorial grouping, in order to facilitate my discussion in this dissertation, I use the term “Indigenous” to denote First Nations, Métis and Inuit peoples. I use the term “Aboriginal” when discussing the area of law that deals with Aboriginal rights and title claims under section 35(1) of the *Constitution Acts*. I use the term “Indian” only to refer to that particular legal status under the *Indian Act*.\(^{23}\)

I use the term “non-Indigenous” to refer to peoples, values and institutions associated with non-Indigenous Canadian culture. I use this term to denote primarily Western liberal theories that have informed the development of the modern Canadian state. My use of the term “non-Indigenous” does not include other bodies of thought such as Asian or Arab theory and philosophy. I deliberately choose this term to position Indigenous peoples, cultures and institutions as the norm against which the dominant culture is measured. In positioning Indigenous peoples, cultures, and institutions as the norm linguistically, I decenter Canadian institutions to create more balance in the way Indigenous cultures and peoples are represented.

I also use the term “Indigenous worldviews”. I am aware that there is a great diversity in cultural values and beliefs among Indigenous communities within Canada.\(^{24}\) The worldview and beliefs of Indigenous peoples do not necessarily easily fit within one broad category. Similarly, there is diversity within the dominant Canadian culture. For the purposes of discussing the issues coherently, however, it is necessary to

\(^{23}\) RSC 1985 [*Indian Act*].

have some general terms in order to contrast Indigenous perspectives with those of mainstream Canadian culture.

In this article, I use the term “colonialism” to refer to the European expansion into Canada, in which Europeans asserted sovereignty over the land and peoples and justified (and continue to justify) this assertion through a belief in their superiority over the Indigenous peoples already inhabiting the land. In my view, colonialism is an ongoing process that continues to affect the lives of all Canadians, to the detriment of Indigenous communities within Canada. I use the term “colonial” to denote the attitudes of Eurocentric superiority which were key in dispossessing Indigenous nations of their lands and dismantling Indigenous governance and social systems.

I also use the term “Indigenous legal traditions” and “Indigenous laws” interchangeably to describe the wide range of legal systems that Indigenous communities have developed to regulate relationships within their societies and with peoples beyond their own societies.25 These systems emerged from “Indigenous cultures as a contextually specific set of ideas and practices aimed at generating the conditions for greater peace and order.”26 Indigenous legal traditions “were self-complete, non-state systems of social ordering that were successful enough for [Indigenous groups] to continue as societies for tens of thousands of years.”27 These traditions included ways of dealing with disputes, ranging from intersocietal to

25 Here I am using a definition that is similar to that used in the Indigenous Bar Association’s “Accessing Justice and Reconciliation Project,” online: Indigenous Bar <http://www.indigenousbar.ca/indigenouslaw/project-documents> (retrieved 5 September 2015).
26 Snyder, Napoleon & Borrows, supra note 14 at 596.
interpersonal disputes and often include kinship systems and other ceremonial traditions such as the potlatch and sundance. Importantly, Indigenous legal traditions have developed over generations through deliberation and debate. Furthermore, they have historically evolved and, despite the onslaught of colonialism, have survived or been revived to apply to contemporary circumstances. When drawing on principles supported by Indigenous legal traditions, I also rely upon principles found in cultural and social practices within Indigenous communities. This broad view of what constitutes law is reflected in my approach that considers law as created not only by the state but also in social spaces to regulate relationships within and between communities.

Finally, I use the term “intercultural” and “intersocietal” interchangeably to describe the space where Indigenous and non-Indigenous societies meet. I am aware of the longstanding debates on the definition of the term “culture” but do not address this debate in this dissertation. For the purposes of this dissertation, I use the term “culture” to describe all the things that have led to where a person is and to the development of that person’s perspective. This idea of culture includes the social, political and geographical influences that impact a person’s identity. In this dissertation, I use this term to denote a difference between Indigenous and non-

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Indigenous communities due to the different ways that knowledge, identity and values are transmitted within those societies.

1.6 Scope and Limitations

As a non-Indigenous legal scholar, I am far removed from the realities on the ground in Indigenous communities. I echo Hadley Friedland’s insight that “while legal scholarship does have contributions to make, the ‘heavy lifting’ of law will still remain in the hands of practitioners on the ground, acting on their responsibilities.”31 The lawyers working with Indigenous communities, both Indigenous and non-Indigenous, have a tremendous responsibility and key role in influencing changes within section 35 case law. In addition, Indigenous communities hold the primary responsibility of working through Indigenous legal traditions within their communities to revitalize such traditions and making them responsive to the realities facing their communities. There are many examples of this happening throughout Canada32 and increases in respectful, collaborative work between academics, practitioners and communities will continue to support everyone’s role in revitalizing and implementing Indigenous legal traditions. Finally, judges and governments have an important to play in contributing to decolonization. The cooperation of the judiciary and government in interrogating colonial assumptions, working collaboratively with Indigenous communities, and creating space for Indigenous laws to influence decision-making will be key

32 See e.g. Native Counselling Services of Alberta, Home/Fire: Ending the Cycle of Family Violence (Hinton, Alberta, 2014), which documents several community justice processes for dealing with family violence within Indigenous communities within Canada.
components in restructuring Canada’s institutions to create more justice and fairness for Indigenous nations.

Because my dissertation has the potential to become unduly expansive, it is imperative to limit the breadth and scope of the literature that I consider and analyze in developing a relational framework to the duty to consult and accommodate. Each of the four principles of respect, recognition, reciprocity and reconciliation could form a dissertation on its own. There are many bodies of literature that address each of the four principles and it is not possible for me to consider all of the various relevant literatures in my discussion of each principle. As a result, one way in which I have scoped the discussion is by starting from the standpoint that what has been largely missing from the development of Aboriginal law generally and the duty to consult specifically is the influence of Indigenous legal traditions and legal theory. As such, where possible, I give significant consideration to what Indigenous theorists say about Indigenous legal traditions to interpret each principle.

Another limitation is that because I spend a lot of time articulating how the four principles in the relational framework might be interpreted when looking through a bijural lens, a main focus of my dissertation is on theory. Although I deal with some practical actions and models for applying this relational framework, particularly in my discussion of applying the framework in Chapter 8, there is much more work that can be done on how to operationalize the relational framework and apply it to Aboriginal law disputes. This is work I plan to tackle in the future.

A related limitation stems from the discipline in which I am writing – the discipline of law. As a legal scholar, for the purposes of this dissertation, I focus on
case law emanating from the Supreme Court of Canada and other Canadian courts, as well as Indigenous philosophies and laws. As a social justice lawyer, I want to believe that judges and lawyers in the Canadian system are capable of learning about and applying Indigenous laws and principles. The theoretical difficulty that arises is that the Canadian legal system is inherently conservative. The Canadian legal system’s reliance on precedent makes it difficult to imagine fundamental changes being made within that paradigm. It is also an institution based on Eurocentric moral and cultural values and its institutions reinforce such values to maintain the status quo.33

The Canadian court system has been heavily criticized for having processes hostile to Indigenous claims34 and for rendering judgments that serve colonial interests. These critiques, in my view, are valid, and court judgments often leave much to be desired with respect to advancing Aboriginal rights in Canada. Recognizing the limits of the Canadian legal system in advancing Aboriginal rights, my purpose here is two-fold:

1. to provide constructive suggestions to judges on how they might approach the interpretation and development of the duty to consult and accommodate in Aboriginal-rights cases, within the structural constraints of the colonial legal system; and

2. to suggest a new approach that the Canadian government might take to rebuild relationships with Indigenous communities through the duty to consult and accommodate.

In addressing how judges and governments might approach the duty to consult and accommodate differently, I do not wish to diminish the agency of Indigenous nations in

34 See e.g. Bradley Bryan, “Legality Against Orality” (2011) 9(2) Law, Culture and the Humanities 261 [Bryan, “Legality Against Orality”] (rules of evidence are hostile to Indigenous oral history and force Indigenous claimants to transform their understandings of oral history to support their claims).
dismantling colonialism. Rather, as a legal scholar I focus on changes that can be
made within Canadian institutions. I leave the difficult work of dismantling
colonialism while living within it and revitalizing Indigenous governance systems to
Indigenous thinkers and leaders.

In making suggestions to improve how judges make decisions in Aboriginal
rights cases, I remain aware of the very persuasive arguments for establishing separate
Indigenous courts or other institutions to decide such cases.\textsuperscript{35} I share Judge Mary Ellen
Turpel’s view, however, that reforming the mainstream legal system and creating
separate pathways to justice for Indigenous communities need not be an either/or
proposition. Turpel writes,

\begin{quote}
We spent several years in a distracting debate over whether justice reform
involves separate justice systems or reforming the mainstream system. This is a
false dichotomy and fruitless distinction because it is not an either/or choice. The
impetus for change can be better described as getting away from...colonialism and
domination. ...Resisting colonialism means a reclaiming by Aboriginal people of
control over the resolution of disputes and jurisdiction over justice, but it is not as
simple or as quick as that sounds. Moving in this direction will involve many
linkages...\textsuperscript{36}
\end{quote}

The establishment of separate, culturally appropriate Indigenous justice systems is an
ideal.\textsuperscript{37} Indigenous communities need time to design and establish such institutions,
however, as well as to build capacity and resources to support their ongoing

\textsuperscript{35} This paragraph is reproduced from Manley-Casimir, “Creating Space”, \textit{supra} note 16 at 233-34.
\textsuperscript{36} Mary Ellen Turpel, “Reflections on Thinking about Criminal Justice Reform,” in eds. Richard Gosse,
James Youngblood Henderson & Roger Carter, \textit{Continuing Poundmaker and Riel’s Quest: Presentations
Made at a Conference on Aboriginal Peoples and Justice} (Saskatoon: Purich Publishing, 1994) 206
[Turpel, “Reflections”].
\textsuperscript{37} In Manley-Casimir, “Incommensurable”, \textit{supra} note 16, I argue that the Canadian legal system is ill
equipped to deal with Aboriginal-rights cases because of the different world views that form the basis of
the Canadian legal system and of Indigenous legal orders. Although this argument may seem to
contradict my suggestions here, it is my contention that changes still need to be made to the current
system in the interim until separate, more culturally appropriate forums can be established and
maintained to deal with Aboriginal claims.
functioning. I hope the suggestions made in this dissertation on ways to reform the Canadian justice system may enable Canadian judges to make more equitable, fair, and respectful decisions when faced with Aboriginal claims, until such time as more culturally appropriate dispute-resolution mechanisms are set up.

I also rely on critical theorists, both Indigenous and non-Indigenous, who recognize the exclusion of Indigenous voices in the development of Aboriginal law and theorize with this stark absence in mind. Critical legal theory posits that law is not only made by the state but also is found in everyday experiences.38 This approach democratizes law in its insistence that legal knowledge is not the exclusive domain of legal professionals; rather this approach emphasizes that everyone contributes to the creation of law and legal meaning at all levels of society. In accordance with this approach, I do not exhaustively engage with every early influential European theorist in my discussions of each principle although I do acknowledge relevant bodies of literature. Since my approach is focused on reconceiving the duty to consult and accommodate to include Indigenous legal traditions and principles, I create as much space as possible to do so throughout this dissertation.

Further, because this dissertation is legal in nature and I take an interdisciplinary approach, I do not engage in a comprehensive way with philosophical writers or other experts in various other disciplines that might be relevant. I do at points draw on useful theories in relation to the various principles from a variety of

literatures to expand upon how the relationship between Indigenous and non-
Indigenous peoples and legal systems might be better formulated. My engagement with
such literatures is meant to be illustrative rather than comprehensive.

With respect to my critical legal analysis, although I engage with feminist theory
and critique, I do not explicitly engage in a gendered analysis of the various principles.
Rather, I focus more broadly on the interpretation of the principles through a lens of
non-Indigenous and Indigenous theory and law. I am mindful of the importance of
engaging in a gendered analysis of Indigenous legal traditions and Canadian law.\textsuperscript{39}
Due to space constraints, this type of analysis will be left for future work.

My analysis and discussion is focused on the space between Indigenous and
non-Indigenous cultures. As such, I do not address in any particular detail the way in
which Indigenous communities might organize their own internal affairs or deal with
issues that arise within such communities in relation to the duty to consult and
accommodate. In my view, these decisions and internal issues are best dealt with at a
community level with outside expertise being sought when needed and appropriate. As
a result, I focus on what Canadian judges and the Canadian government might do to
implement the relational framework I advocate.

In addition, because I focus on the space between Indigenous and non-
Indigenous cultures, I suggest four principles that find support in many, if not most,
Indigenous legal traditions. I am aware of the emerging debate about the problems
with pan-Indigenous approaches and the need to focus more specifically on particular

\textsuperscript{39} See \textit{e.g.} Snyder, Napoleon & Borrows, \textit{supra} note 14 at 598.
Indigenous legal traditions. Although I do not address this debate specifically in the context of this dissertation, the relational framework I advocate would be improved, in my view, by including a consideration of the specific Indigenous legal traditions relevant to the dispute at hand. The four principles within the framework provide a starting point for a bijural approach to the duty to consult and accommodate, which actively supports a more specific consideration of individual Indigenous legal traditions within the context of Indigenous/non-Indigenous disputes.

Later in this dissertation I advocate for dialogue between Indigenous and non-Indigenous people to come up with appropriate solutions to intercultural disputes. For the purposes of this dissertation, I was not able to complete fieldwork to create dialogue with Indigenous peoples about the choice and interpretation of the principles and the application of the framework. I did not engage in fieldwork because I hold the view that building relationships with Indigenous communities takes time and needs to be done respectfully and appropriately. During the time I had to complete this dissertation, I was not able to ensure that I could spend the amount of time needed to develop and maintain those relationships. This is a shortcoming that I take very seriously, particularly because I try as much as possible to live my theory. Although this does not mitigate this shortcoming fully, this dissertation is in part a result of bijural dialogue since two Indigenous mentors have provided input and comments to which

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40 See e.g. Napoleon & Friedland, "Roots to Renaissance", supra note 27 at 3; Friedland, “Reflective Frameworks”, supra note 31 at 15.
42 I have relied heavily on Gordon Christie’s detailed comments on this dissertation and done my best to address them. In addition, I have consulted at several points with Kimberly Murray, who taught me her Medicine Wheel approach, which forms the basis of the relational framework I propose.
I have attempted to respond in my analysis. At some point in the future, however, I would welcome the opportunity to create dialogue with Indigenous peoples and communities about the ideas in this dissertation.

This leads to a final limitation. Although more and more Indigenous academics and other allies research and write in a respectful way about Indigenous legal traditions,\textsuperscript{43} information with respect to and the accessibility of such traditions to non-Indigenous academics remains limited.\textsuperscript{44} As such, I have relied on what is currently available to support the identification and interpretation of the four principles that form the contours of the relational framework I advocate. As more research, writing and thinking on Indigenous legal traditions is completed and becomes more accessible, academic thought in relation to principles that might form the contours of a bijural approach will continue to evolve.

1.7 \textbf{Theoretical Perspective}

In this dissertation, I reconceptualize the duty to consult using two primary theoretical approaches: (1) a decolonial approach; and (2) a bijural approach. Using these two complementary approaches deepens my analysis and provides a useful

\textsuperscript{43} In addition to John Borrows’ extensive work, another key example is the Indigenous Bar Association’s project, in partnership with the Truth and Reconciliation Commission and the Indigenous Law Research Unit at the University of Victoria, which has created syntheses of seven Indigenous legal traditions from across Canada using a culturally respectful research protocol with the participating Indigenous communities. Dr. Val Napoleon leads this project and Hadley Friedland is the Project Coordinator. Project information and materials are available online: Indigenous Bar \texttt{<http://www.indigenousbar.ca/indigenouslaw>} (retrieved 5 September 2015).

\textsuperscript{44} Friedland, “Reflective Frameworks”, supra note 31 at 12. Friedland points out that the most ideal resources for learning about and accessing Indigenous laws, which require full immersion in a specific culture to access, are the least available resources at this time. She also points out that the most available resources are those that are publicly available, which includes ethnographic work by outsiders to the communities, fiction by community members and transcripts of legal proceedings. She notes, however, that these are the least ideal resources as they raise serious questions of bias and legitimacy. Her article provides a thoughtful way forward to work respectfully and rigorously with Indigenous laws as law.
theoretical lens through which to consider how the duty to consult and accommodate jurisprudence might be developed to more fully support the purpose of reconciliation underlying section 35. Specifically, it enables me to consider not only the legal integrity of the duty to consult jurisprudence but also the purpose of the duty in fostering important societal values.

1.7.1 A Decolonial Approach to the Duty to Consult and Accommodate

First, I approach the problem of reconceptualizing the duty to consult using a decolonial lens. This approach includes critically considering Canadian jurisprudence, unpacking its colonial assumptions and analyzing how to reformulate it in a way that does not perpetuate colonialism. James (Sákéj) Youngblood Henderson has proposed a three-stage process by which Indigenous legal thinkers might deconstruct Canadian case law and revitalize Indigenous legal principles within the Canadian legal framework.45 Henderson argues that Indigenous scholars and lawyers need to

1. decolonize judicial precedents by interrogating the colonial assumptions upon which such precedents are based;46
2. renew Indigenous ecological orders which have determined the principles and structures of Indigenous societies and laws;47 and
3. recognize diversity as the prime assumption of the legal system while resisting false universality and impartial reasoning.48

Although I approach the dissertation as a non-Indigenous person, Henderson’s process provides a useful perspective on how one might use a decolonial approach to critique Aboriginal law.

46 Ibid at para 77.
47 Ibid at para 86.
48 Ibid at para 96.
Using a decolonial lens, I draw on theorists who work in the area of critical theory generally and specifically in critical Indigenous theory. Indigenous communities within Canada have suffered as a result of the continuing imposition of European culture and values on such communities through colonial structures. One result of this is the on-going construction of Indigenous Peoples and cultures within Canada as the source of the problem. By contrast, Indigenous thinkers have effectively pointed out that it is important to deconstruct and interrogate colonial structures and governments to understand the way in which Eurocentric values and assumptions perpetuate the false construction of Indigenous Peoples as inferior, primitive and dependent.

Increasingly, Indigenous theorists call into question the legitimacy of colonial institutions to provide justice for Indigenous Peoples on the basis that such institutions are set up to support decision-making that maintains the non-Indigenous status quo. In law, many Indigenous scholars critique the decisions of Canadian courts using a decolonial lens to uncover the Eurocentric biases and values underlying Canadian jurisprudence. In addition to sound legal and analytic reasoning, such critiques are convincing because they are written by Indigenous thinkers and are infused with their particular Indigenous worldviews and cultural understandings. Many theories of

49 See e.g. Alfred, Wasáse, supra note 19 at 155.
51 It is important to recognize that Indigenous theories of decolonization reflect the particular cultural viewpoints of the theorist. Taiaiake Alfred, on one hand, as a Mohawk from Kahnawá:ke, is critical and outspoken - respected attributes within Mohawk culture. His theory of decolonization reflects his views of his community as sovereign and embodies the Mohawk warrior ethic (Alfred & Coulthard, supra note 18). John Borrows, on the other hand, an Anishinabe of the Chippewas of the Nawash First Nation, purposefully avoids direct confrontation in keeping with the values of his Nation. In Recovering Canada: The Resurgence of Indigenous Law (Toronto: University of Toronto Press, 2002) [Borrows, Recovering Canada] at 21, John Borrows asserts “that the most important message in First Nations
decolonization center on the understanding that this form of critique is both legitimate and powerful because the critique privileges Indigenous ways of knowing, provides a counter-narrative from the viewpoint of the colonized, and considers the difficult questions of how theory will play out on the ground in Indigenous communities.\(^{52}\)

Indigenous theorists provide insights on how to bridge two seemingly contradictory worldviews and create dialogue between Indigenous legal traditions and the Canadian legal system. Because many Indigenous theorists have access to Elders and other with insight on Indigenous laws and ways of thinking, such theorists occupy a leadership position within the project of decolonization. Decolonization theories, in particular those written by Indigenous thinkers, are important to consider since Indigenous thinkers are uniquely positioned to provide a critique of Canadian legal developments for the following reasons:

1. Indigenous leaders have creative and valuable ideas on avenues towards decolonization;

2. Indigenous thinkers are uniquely positioned\(^ {53}\) to think through issues affecting their particular communities and ground their theories in local realities; and

3. Indigenous thinkers are among the few with access to the knowledge particular to their communities, including the cultural knowledge central to community life and the wisdom of Elders to inform their theoretical approaches.

In thinking through the issues facing Indigenous communities, Indigenous peoples experience the violence of colonialism in a totally different way than non-Indigenous

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\(^{52}\) Smith, supra note 41 at 2.

\(^{53}\) By giving primacy to Indigenous thinkers, I am subscribing to the notion put forward by critical legal scholars that Indigenous people have a unique voice and position from which to assess Canadian law: see Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (New York: New York University Press, 2001) at 9.
peoples; as a result, Indigenous thinkers are undertaking the difficult task of theorizing decolonization while simultaneously living within the realities and systems of colonial violence.

Decolonization theories are based upon recognition and respect for Indigenous peoples and the need for solutions to be developed in accordance with and from within Indigenous cultural frameworks. The end goal of such theories is the recognition of Indigenous sovereignty, envisioned in various ways. Further, these theories explore the ways in which colonial structures tend to reinforce the status quo and limit the recognition of different cultural values, legal systems and worldviews.

In this dissertation, I rely on theories of decolonization, particularly those written by Indigenous scholars, to provide a lens through which to analyze Canadian case law. Uncovering the colonial assumptions and values that underpin decisions in Canadian courts is important to determine whether or not Canadian courts can provide justice for Indigenous Peoples who choose to litigate their claims within the Canadian legal system. In examining Canadian jurisprudence through a decolonial lens, I

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56 Indigenous scholars generally envision a significant amount of independence for Indigenous governments with varying degrees of interaction with the Canadian state. Taiaiake Alfred, for example, relies on the seminal ideas underlying the Two Row Wampum, where two boats, representing European and Indigenous governments, travel side-by-side and do not interfere in each other’s autonomy, freedom, or power (Taiaiake Alfred, Peace, Power, Righteousness: An Indigenous Manifesto (Toronto: Oxford University Press, 1999) [Alfred, Peace, Power, Righteousness] at 52-53). Other Indigenous scholars envision independent Indigenous governments with more interdependence with the Canadian state. John Borrows, for example, asserts that Canada should become more Indigenous within its mainstream governance institutions and that more Indigenous people should participate in and inform the development of Canadian institutions (John Borrows, Recovering Canada, supra note 51 at 140).
unpack underlying colonial values and assumptions that may have influenced the
development of the duty to consult and examine how a decolonized doctrine of the duty
to consult might be constructed.

1.7.1.1 Using a Decolonial Approach as a Non-Indigenous Scholar

In approaching the problem using a decolonial lens, an important question
arises regarding what a decolonial approach looks like for a non-Indigenous person
doing this type of work. While several non-Indigenous theorists have revealed the
colonial underpinnings of Canadian law, an exploration of some key ways to
overcome the difficulties of approaching the issues raised in Aboriginal law from the
theoretical perspective as a non-Indigenous scholar might be helpful in justifying and
legitimizing the usefulness of such an approach.

One key starting point is for non-Indigenous theorists to interrogate their
personal history and culture to understand their complicity in the continuing
oppression and exploitation of Indigenous peoples perpetuated through colonial
structures and ideology. Interrogating this positioning is a difficult and
uncomfortable task since it causes one to question the truths upon which one’s identity
is built. Undertaking this task is important, however, since colonial ideology has
negative effects on both Indigenous and non-Indigenous peoples.

57 See e.g. Douglas C Harris, Landing Native Fisheries: Indian Reserves and Fishing Rights in British
Columbia, 1849-1925 (Vancouver: UBC Press, 2008); Patricia Seed, Ceremonies of Possession in
Europe’s Conquest of the New World, 1492-1640 (Cambridge, UK: Cambridge University Press, 1995);
Renisa Mawani, “Genealogies of the Land: Aboriginality, Law, and Territory in Vancouver’s Stanley
58 Alfred & Coulthard, supra note 18.
In the context of legal theorizing, such an interrogation involves examining and re-examining one’s own assumptions and perspectives in considering the issues raised by Aboriginal law. Further, it includes the need to critique the assumptions that underlie colonial institutions, which forces one to rethink his or her view of the world. In sifting through the legal discourse and reasoning in Aboriginal rights cases, it is necessary to unpack the ways in which Canadian courts reinforce power differentials between Indigenous and non-Indigenous peoples within Canada by making decisions that support Eurocentric values and beliefs. In doing so, non-Indigenous theorists can deconstruct the ideology underlying colonial institutions and envision new ways to restructure social, political, legal and economic institutions.

Non-Indigenous theorists can work in concert with Indigenous thinkers to push people beyond colonial ideologies. In doing this important work, non-Indigenous theorists need to recognize the appropriate limits of their contributions. As Alfred points out, non-Indigenous theorists can act as allies in dismantling colonialism if they leave the responsibility of providing solutions to problems facing Indigenous communities to Indigenous thinkers. It is up to non-Indigenous people to work at a personal level to decolonize and to work within non-Indigenous communities to decolonize others while Indigenous leaders and thinkers appropriately focus on

59 Ibid.
60 Here I use the word “allies” to denote non-Indigenous people who examine their own complicity within colonial institutions, accept their own humility in not knowing the reality facing Indigenous peoples, actively seek to learn in relationship with Indigenous peoples and communities, and most importantly, have earned the trust of Indigenous peoples. I do not therefore use the term allies lightly.
61 Alfred & Coulthard, supra note 18.
62 Ibid.
creating approaches to deal with issues within their own communities, with other
Indigenous communities, and with non-Indigenous governments.

Another key starting point of using a decolonial critique as a non-Indigenous
scholar is being aware that in trying to critique Canadian law through this lens, I do not
inadvertently devalue the resistance and influence of Indigenous peoples and legal
traditions on the development of Canadian law. As Craig Womack, a Creek scholar,
argues:

…it is just as likely that things European are Indianized rather than the
anthropological assumption that things Indian are always swallowed up by
European culture. I reject, in other words, the supremacist notion that
assimilation can only go in one direction, that white culture always overpowers
Indian culture, that white is inherently more powerful than red, that Indian
resistance has never occurred in such a fashion that things European have been
radically subverted by Indians.\(^\text{63}\)

As I engage in a decolonial critique, I am aware of the need to struggle against the urge
to portray Indigenous peoples in a one-dimensional light as victims of the ugly colonial
machine. Indigenous peoples have resisted colonial policies, practices and laws
throughout Canada’s history and continue to do so. Further, Indigenous legal
traditions have influenced the development of legal doctrine in the area of Aboriginal
law. In addition to the past influence of Indigenous laws in this developing area of law,
I add my voice to the chorus of other scholars who assert that there is both legitimacy

\(^{63}\) Craig S Womack, *Red on Red: Native American Literary Separatism* (Minneapolis: University of
Minnesota Press, 1999) at 12. The Muscogee (or Muskogee), also known as the Creek, are a Native
American people traditionally from the southeastern woodlands. Today Muscogee people live primarily
in Oklahoma, Alabama, Georgia, and Florida.
and value in more heavily infusing Indigenous legal principles into Canadian jurisprudence on Aboriginal law.\textsuperscript{64}

\textbf{1.8 A Bijural Approach to the Duty to Consult and Accommodate}

In advocating for a bijural approach to the duty to consult and accommodate, I draw on both Indigenous and non-Indigenous theories from a variety of disciplines to discuss the content and interpretation of each principle. My approach is deliberately focused on creating links between Indigenous and non-Indigenous legal traditions. In addition, I draw on intercultural theories of dispute resolution to frame my analysis. These theories consider how disputes might be resolved where two cultures come into contact and may reflect different cultural contexts. Intercultural dispute resolution theory also includes theorists who consider such disputes in other countries and cultural contexts. Throughout my analysis, I also draw on other literatures including legal pluralism, legal anthropology and environmental legal theory.

\textbf{1.9 Methodological Approach}

In my attempt to further develop the duty to consult, the first and most important way that I draw on Indigenous legal traditions is by using the Medicine Wheel to frame my approach to each principle and to rethink the overall relationship between Indigenous and non-Indigenous peoples within Canada. Kimberly Murray, an accomplished Mohawk lawyer and the current Assistant Deputy Attorney General of the Aboriginal Justice Division, Ministry of the Attorney General of Ontario, taught me

her Medicine Wheel approach to organizing her thoughts in writing papers, creating strategic directions in her professional work and honing her litigation strategies.\textsuperscript{65}

This approach emphasizes the holistic and relational aspects of the processes necessary to move from one reality towards a new vision or outcome. When sharing her understanding of the teaching, Kim pointed out that this teaching is interpreted in many different ways and this is just her particular interpretation. In using this approach to frame my discussion of each principle and to organize my argument throughout this dissertation, I have interpreted Kim’s teaching and adapted it to my purpose. I hope that I have used the framework appropriately and I take responsibility for any errors in interpreting and applying this framework.

\textsuperscript{65} Kimberly Murray was formerly the Executive Director of the Truth and Reconciliation Commission of Canada. This teaching was given to Kimberly Murray by two Ojibway women, Marian Jacko and Ann Solomon. Kimberly provided me with permission to share and use this approach within my dissertation. It is worth noting that as a non-Indigenous person, using this framework to try and write this paper has been challenging. Using this approach rather than the Western approach I am more accustomed to, however, is my way of engaging in an effort to understand across cultures. It also exemplifies the need to take risks, to live with discomfort and to engage cross-cultural others with humility. As I have written this paper, I have gone back to Kim and my supervisor Gordon Christie for feedback that has furthered this process of cross-cultural engagement and has enhanced my imperfect understanding of Indigenous perspectives and legal theory.
The Medicine Wheel teaching involves Four Directions: at the South Door, the focus is on relationships; at the West Door, the focus is on reflection; at the North Door, the focus is on movement; and at the East Door, the focus is on vision (see Figure 1.1 above). At the South Door, by which you enter, the focus on relationships prompts consideration of all the relationships that might be affected by the issue under consideration. At the West Door, the focus on reflection encourages consideration and
acknowledgement of the historical context in which the issue arises. At the North Door, the focus on movement encourages consideration of the ways in which to move forward by keeping in mind the relationships at stake and the history that provides much-needed context. Finally, at the East Door, the focus on vision provides an opportunity to consider “a vision of how things are and might be...[and understand] the actual in light of the possible.”

In addition to the Medicine Wheel framework, I draw on Indigenous legal principles and critical Indigenous theory to interpret each principle. I do this in order to rebalance the discussion by infusing it with Indigenous voices and ideas. By drawing on Indigenous legal principles, I hope to highlight the multijuridical and legally pluralistic framework that acknowledges the common law, civil law and Indigenous law roots of Canada.

Such an analysis provides new perspectives and possibilities for reconceptualizing the duty to consult.

Throughout the dissertation I rely primarily on written material for the purposes of my analysis. I consider relevant literature written by non-Indigenous and Indigenous theorists. Where possible, however, I give primacy to Indigenous theorists. This results from the recognition that Indigenous Peoples, despite the diversity within and among different groups, relate to the world in a significantly different way than non-Indigenous people. These unique worldviews inform both the way in which ideas are written and orally expressed and the ideas themselves. In discussing theories of

66 Unger, supra note 33 at 24.
67 In “Creating an Indigenous Legal Community”, supra note 20 at para 23, Borrows advocates for the use of this framework for recognition of Indigenous legal traditions within the Canadian legal system.
decolonization, therefore, Indigenous peoples are uniquely situated to design and confront the processes of decolonization in culturally appropriate ways.

I also take a wide view of the law and what literatures and ideas might be useful in thinking through the complex issues raised in this work. I follow John Paul Lederach’s lead and am open to ideas that come to me serendipitously and through my peripheral vision. Lederach, who works in the area of intercultural dispute resolution on the ground, suggests that often the best ideas come from unexpected places and that sometimes focusing on the problem with tunnel vision excludes legitimate and effective strategies. He describes peripheral vision as “the capacity to situate oneself in a changing environment with a sense of direction and purpose and at the same time develop an ability to see and move with the unexpected.” Following Lederach’s lead, I have remained open to literatures and theories that may not seem central. This has not distracted from my main focus on decolonial and intercultural theories, but has instead enhanced my analysis throughout.

In between each chapter of this dissertation, I have included, in italic type, a hypothetical story about the Yellow Valley First Nation and a development company called Green Co. that aims to develop a mining project on Yellow Valley First Nation’s lands. The role of this story in my dissertation is to provide an illustration of how to operationalize the relational framework I propose in the context of a dispute involving Indigenous rights and non-Indigenous interests. On one hand, the story illustrates the pitfalls of the duty to consult and accommodate when it is not focused on building

68 Lederach, Moral Imagination, supra note 55 at 118.
69 Ibid.
relationships. On the other hand, the story illustrates the positive benefits to both parties when the duty to consult and accommodate keeps Indigenous/non-Indigenous relationships as the central focus of consultation and accommodation processes.

The Yellow Valley First Nation story illustrates the implementation of a relational framework to the duty to consult and accommodate through fictional storytelling. By including narratives, I ask the reader to consider the way in which the fictional account of a relationship between a development company and an Indigenous nation relates to the larger discussion of the principles-based framework in this dissertation. These stories illustrate two contrasting approaches to the duty to consult and accommodate which, on one hand, creates conflict over a resource extraction project and, on the other, creates a collaborative partnership in such a project. These narratives illustrate the difference between the government’s current checklist approach to consultation and a relational approach to the duty to consult and accommodate.

Finally, I attempt to illustrate how a principles-based approach to duty to consult might work in the real world. I do this by including a “How” section in my discussion of each principle in which I suggest concrete strategies that could be implemented in relation to each principle. In the final chapter, I then apply the

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70 The importance of grounding my analysis in real world examples has been emphasized to me in various ways throughout my academic career. At my oral defence of my LLM thesis, the hardest question that I was asked was by Lorena Fontaine, an accomplished Cree and Anishnabe scholar and the only Indigenous person on my committee. She asked me how my theory would work in a small First Nations community of 50 people made up mainly of women. In addition, throughout the drafting of this dissertation, Gordon Christie has pushed me to think about how my ideas would actually work in practice and how my ideas might be presented in a way that actually persuades the Supreme Court of Canada to implement this approach in the context of the duty to consult. Attempting to address these questions has been a difficult yet worthwhile struggle.
principles-based framework to the duty to consult and accommodate to demonstrate how this approach might be applied in practice.

1.10 A Note on Structure

In writing about the principles, I structured each chapter to address what the principle is and what Indigenous and non-Indigenous perspectives might contribute to the interpretation of each principle. I then address why each principle is important to implement and how the principle might be implemented on the ground. Although each of the chapters focusing on the four principles addresses these questions, I found that in some cases Indigenous conceptions of the principles were more similar to non-Indigenous conceptions (such as reciprocity) than in the context of other principles (such as respect). As a result, the structure of each chapter dealing with the principles differs somewhat based on my review of the relevant literature. In each of the chapters discussing the principles (Chapters 4 through 7), however, I address the fundamental questions of what, why and how with respect to each principle.

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71 I initially tried to use the Medicine Wheel framework within each principle by structuring my discussion of each principle according to the considerations in the Four Directions. I therefore initially structured the discussion as follows:

1. Relationships – I considered which relationships were implicated in each principle and the considerations that might arise within the various relationships. For example, I considered respect in the context of Indigenous and non-Indigenous government, between Indigenous and non-Indigenous peoples more generally and among Indigenous peoples and non-Indigenous peoples separately.
2. Reflection – I reflected on whether or not that principle had been implemented in the context of Indigenous/non-Indigenous relations within Canada.
3. Movement – I considered how one might move towards implementing each principle.
4. Vision – I discussed what a world in which each principle was implemented might look like.

After writing several chapters, I realized that this structure was repetitive in that the relationships implicated likely would be the same for each principle. Further, I realized that in approaching the chapters dealing with each principle using this structure, it took too long to get to what the principle I was actually discussing might mean (only in the third section on movement did I start to discuss interpretations of that principle).
Finally, I deliberately chose not to set out a concise definition of each principle for the purposes of my framework. One of the advantages of using principles to guide a relationship-based approach is the flexibility of the principles; as I discuss in Chapter 3, the interpretation of the principles is flexible in that it can evolve over time to adapt to contemporary needs. As a result, setting out a completely static definition of each principle may be counter-productive. Since creating a new vision of Canadian society in which Indigenous and non-Indigenous people move along a journey of reconciliation will necessarily be non-linear, unpredictable and treacherous, the principles need to be sufficiently flexible to meet the demands of the journey. So rather than setting out an authoritative definition of the principles, I sketch the broad contours of what each principle might mean and how it could support a relational approach to the duty to consult and accommodate.

1.11 Mapping My Path

In this Chapter, I have mapped out the dissertation, outlined the relevant terminology, my starting points, and my methodological and theoretical approaches.

In Chapter 2, I examine how the Court has interpreted reconciliation in its case law and how that interpretation has evolved over time. In considering the reconciliation jurisprudence, I conclude that the Court’s interpretation has changed over time in three ways:

1. the Court has moved from a narrower focus on what reconciliation means for the Canadian government in its relationship with Indigenous communities to a broader circle of reconciliation that includes all Canadians;

2. the Court has identified at least two normative values to guide the interpretation of reconciliation: honour and fair treatment; and
3. The Court has shifted the focus of reconciliation from backward-looking to forward-looking.

I then consider the duty to consult, which the Court has identified as a process that flows out of the purpose of reconciliation. I examine the duty to consult case law to analyze whether the Court’s jurisprudence in that area promotes the grand purpose of reconciliation at the heart of section 35. Specifically, I examine *Rio Tinto Alcan v Carrier Sekani Tribal Council*[^72] and *Beckman v Little Salmon/Carmacks First Nation*[^73] and conclude that the Court’s current approach to the duty to consult is limited in failing to consider historical grievances and the quality and character of the relationship between the government and Indigenous communities.

In Chapter 3, I argue that four principles – respect, recognition, reciprocity and reconciliation – may provide a useful framework to guide a new relationship-based approach to the duty to consult and accommodate. I assert that principles are useful in that they are flexible, adaptable and their interpretations can change over time to fit emerging circumstances. I then examine historical precedents for the use of principles, including treaties and wampum belts and other areas of law where the Supreme Court of Canada has embraced principles to guide the development of law. I contrast the use of principles to guide the development of the duty to consult jurisprudence with the court's current reliance on administrative law principles as too limited for several reasons; the administrative law principles that the Court uses:

- were not developed to respond to the special constitutional status that Indigenous people have within Canada;

[^72]: [2010] 2 SCR 650 [*Rio Tinto*].
[^73]: [2010] SCJ no 53 [*Little Salmon*].
• do not support the fostering or improvement of relationships between Indigenous and non-Indigenous peoples; and
• do not acknowledge or build upon the *sui generis* nature of Aboriginal rights.

I suggest therefore that, rather than transplanting a developed procedure and area of law that did not contemplate Aboriginal claims in its design, a more appropriate approach identifies principles that (1) draw on both common law and Indigenous legal traditions and (2) are developed specifically to guide the duty to consult in the context of Aboriginal claims. I then introduce the four principles and outline and how I used the Medicine Wheel approach to identify the four principles of respect, recognition, reciprocity and reconciliation for the framework.

In Chapter 4, I outline the principle of respect. Specifically, I focus on respect between individuals and respect between cultural groups. I discuss the effect of the historically disrespectful treatment of Indigenous peoples on the individual self-respect of Indigenous community members. I argue that respect involves the valuing of something or someone and the perception that that something or someone is worthy of particular treatment based on that valuing. I suggest that three ways to implement the principle of respect in the intercultural relationship include making interdependence and relationships primary, rejecting colonial attitudes and stereotypes of Indigenous peoples, and creating political and legal space for the expression and flourishing of cultural difference.

In Chapter 5, I outline the principle of recognition. Recognition has two aspects: acknowledgment and affirmation. ‘Recognition as acknowledgment’ requires a close examination of the history of colonialism and its effect on Indigenous individuals and communities within Canada. Acknowledgment requires creating spaces for Indigenous
and non-Indigenous peoples to come together so that Indigenous peoples can share their counter-narratives and express their stories of peoplehood. In listening to Indigenous stories, non-Indigenous peoples might experience transformative change through a consideration of how each of us continues to benefit from colonial policies and laws to the detriment of Indigenous communities. I suggest that implementing this aspect of recognition involves restorying Canada’s history through Indigenous storytelling, creating conditions for meaningful listening, and making a commitment to remember and change.

The second aspect – ‘recognition as affirmation’ – involves formally entrenching in law the pre-existing, inherent rights of Indigenous communities. This sense of recognition includes the affirmation of Indigenous sovereignty and jurisdictional capacity. Affirmation involves rejecting the assumption of settler entitlement to Indigenous lands, being open to all issues during Indigenous/non-Indigenous political negotiations, and creating a sphere of recognition for Indigenous nations to revitalize appropriate forms of governance and legal systems.

In Chapter 6, I outline the principle of reciprocity. Building on the writing of Indigenous and non-Indigenous theorists in various disciplines, including democratic moral theory, feminist theory, intercultural dispute resolution and collaborative therapy, I advocate a substantive conception of reciprocity that involves dialogue, humility, embodied engagement and emotional connection. This conception of reciprocity includes a reconceptualization of human relationships within a web of interdependence that includes all life forms, animate and inanimate, as well as past, present and future generations. Embracing the application of reciprocity in the context
of Indigenous/non-Indigenous relationships creates opportunities for meaningful engagement in dialogue, which provides the potential for mutual understanding across cultures.

In Chapter 7, I outline the principle of reconciliation as developed in academic theory. I revisit my discussion of the Supreme Court of Canada’s interpretation of reconciliation in Chapter 2 and I argue that the Court’s interpretation constitutes a limiting vision of reconciliation. This is so since although it does require the government to consult, accommodate and negotiate with Indigenous peoples, the Court’s interpretation of reconciliation includes justifying the infringement and limitation of Aboriginal rights. A new and substantive interpretation, I assert, conceptualizes reconciliation as a process aimed at fundamentally rebuilding a damaged relationship. Reconciliation therefore includes reparations for historical wrongs along with three key components: truth-telling, taking responsibility, and taking action. Practical ways to begin rebuilding Indigenous/non-Indigenous relationships involves rebuilding trust between the parties, linking the past and present to envision the future, developing a shared vision of an interdependent future, creating flexible processes to support the relationship, and implementing concrete actions to move towards that shared vision.

In Chapter 8, I apply the principles-based framework to the duty to consult. First, I discuss how the attitudinal shifts and concrete measures necessary to implement the framework might inform the process of designing effective consultations processes between Indigenous peoples and Canadian governments. Specifically, I consider how judges within the Canadian legal system might develop the duty to consult
jurisprudence using a relationship-based approach framed by the principles. I then consider how the Canadian government might engage with Indigenous communities using this approach with a view to affecting a more appropriate resolution of disputes outside the court process.

In Chapter 9, I provide a summary of the principles-based approach and my concluding thoughts.
The Yellow Valley First Nation is a community inhabiting northern Ontario that has lived in the Valley for as long as anyone can remember. The First Nation has 453 registered members under the Indian Act. The community’s oral tradition confirms that the current members are descendants from ancestors with specific stewardship responsibilities to care for those lands. Yellow Valley First Nation is located at the fork of two rivers, which supply the community members with fish. The community has traditionally relied on animals native to the Valley and continues to hunt and trap in the area. Hunting and trapping techniques are passed down from parent to child and many laws of the community are instilled in the children through teachings on the land. The fish and animals in the area have provided for the sustenance needs of the community since time immemorial.

The First Nation has survived many disruptions since the Europeans settled in North America. These disruptions include the forcible removal of children to residential schools, the imposition of foreign membership provisions which displaced traditional ways of determining who are members of the community, and significant pollution to upstream waters from nearby industry that have damaged the fish stocks. With respect to nearby industry, a smelting plant was set up in the mid-1990s and over the years, the First Nation has complained to the government and other organizations about the extreme pollution in the river and deformities in fish caught from the river.

The community faces some difficult social problems due to this legacy and due to the rapid change from an active, seasonal lifestyle to sedentary living within the boundaries of the community. There are high amounts of diabetes and related
disabilities among community members, high rates of unemployment due to lack of opportunities in the area and the school within the community burned down in 1985 and has yet to be rebuilt. There are substance abuse issues and recently the leadership has become aware of increasing use of prescription medications primarily brought into the community by members returning from the big cities.

The community has a strong sense of identity and strong leadership working tirelessly to improve the lives of community members. The leadership has created a ten-year economic development plan, which includes funding for community members to engage in skill development and capacity building to support innovative, community-driven business ideas. In addition, the leadership has prepared a consultation protocol, which indicates that it is open to development proposals in which it can provide significant input and from which the community can benefit.

The Yellow Valley First Nation is situated in the boreal forest, close to densely treed areas, which support moose and caribou populations as well as smaller animals. The First Nation’s reserve lands encompass approximately 2% of the communities’ traditional territories. The First Nation is party to a treaty in which its proprietary interest in its larger traditional territory was surrendered for an amount of $12 per person (although this interpretation is subject to controversy) with a residual payment of $5 per person per year thereafter. Hunting, fishing and trapping rights were preserved. In recent years, more non-Indigenous people have started to purchase land in the area to keep as summer cottages and community members have noticed a reduction in the amount of wildlife they are able to hunt and
trap. In addition, there is more and more interest in mining and cutting down trees in the area by forestry companies.
Chapter 2: The Divergence Between the Duty to Consult and Accommodate and the Reconciliation Purpose of Section 35

Reconciliation must be proactive in seeking to create an encounter where people can focus on their relationship and share their perceptions, feelings, and experiences with one another, with the goal of creating new perceptions and a new shared experience.¹

Section 35 of the Constitution Act, 1982 enshrines constitutional protection of Aboriginal and treaty rights for Aboriginal peoples within Canada.² The Supreme Court of Canada in R v Sparrow³ held that section 35 should be interpreted in relation to the purposes for which it was enshrined (what the Court calls “a purposive analysis”).⁴ The Court has identified reconciliation between Aboriginal and non-Aboriginal Canadians as the “grand purpose” of section 35.⁵ In its reconciliation jurisprudence, the Court has linked reconciliation explicitly to the normative values of honour and justice. It links

² Constitution Acts, 1867 to 1982, Schedule B, Department of Justice (Ottawa: Canada Communications Group, 1989) [Constitution or Constitution Acts] at sec 35(1). Section 35(1) provides that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” For the purposes of this discussion of reconciliation I focus on the Canadian Aboriginal law jurisprudence dealing with reconciliation. Although I engage with some theory related to reconciliation in this Chapter, to avoid repetition, I leave my detailed discussion of theories dealing with reconciliation to Chapter 7, when I discuss the fourth principle of reconciliation.
³ R v Sparrow, [1990] 1 SCR 1075 [Sparrow].
⁴ Ibid at para 56.
⁵ Beckman v Little Salmon/Carmacks First Nation, [2010] SCJ no 53 [Little Salmon] at para 10. It is worth noting that some Indigenous scholars have criticized the concept of reconciliation as enunciated by the Court as arbitrary and unsupported by precedent: see D’Arcy Vermette, “Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples” (2011) 29 WYAJ 55 [Vermette, “Dizzying Dialogue”] at sec I; see also Russel Lawrence Barsh & James (Sákéj) Youngblood Henderson, “The Supreme Court’s Van der Peet Trilogy: Naive Imperialism and Ropes of Sand” (1997) 42 McGill LJ 993 at sec B. Although these arguments are persuasive, the focus of my analysis is on the case law as it has developed which includes the concept of reconciliation. As such, rather than critiquing the concept of reconciliation itself, I am arguing for an interpretation of reconciliation that rebuilds relationships between Indigenous and non-Indigenous communities within Canada through the development of processes and jurisprudence related to the duty to consult and accommodate. This approach is in keeping with my attempt to create dialogue between the Canadian legal system and Indigenous legal traditions rather than focusing exclusively on critiquing the legitimacy of the Canadian legal system itself in adjudicating Indigenous claims. I leave that important work for another paper.
reconciliation with honour by articulating that the process of reconciliation flows out of the requirement that the Crown deal honourably with Aboriginal claims.⁶ It links reconciliation with justice by considering the context of settlement and the historical grievances of Indigenous claimants in its decision-making.

The Court also elaborated procedural duties arising from the purpose of reconciliation. Specifically, the Court identified the duty to consult and accommodate as a duty falling on the Canadian government when its decisions have the potential to impact Aboriginal or treaty rights.⁷ As a constitutional duty grounded in section 35, the duty to consult and accommodate should support and promote the enunciated purposes of that section. I argue that the Court’s current conceptualization of the duty to consult and accommodate, which set out the government’s minimum legal duties, provides a useful starting point, but without a fundamental shift in focus that gives primacy to the quality of the relationship between Indigenous and non-Indigenous peoples, the purpose of reconciliation underlying section 35 will remain unfulfilled.

I first consider the Supreme Court of Canada’s conception of reconciliation and how this has evolved in section 35 jurisprudence. My analysis reveals that the Court has articulated reconciliation in various ways and recent case law points to a broadening interpretation of reconciliation that (a) encompasses a larger circle of participants; (b) links the purpose of reconciliation to normative values such as honour and justice; and (c) is more forward-looking and prospective. Second, I examine the Supreme Court of Canada’s jurisprudence relating specifically to the duty to consult

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⁶ *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida Nation*] at para 32.
and accommodate Indigenous interests where government decisions may impact proven and claimed section 35 rights. I then analyze two Supreme Court of Canada cases – *Rio Tinto* and *Little Salmon* – to illustrate the limitations of the current approach to the duty to consult and accommodate in fulfilling the reconciliation purpose of section 35.

### 2.1 Reconciliation as the Fundamental Purpose of Section 35

The Supreme Court of Canada has held that section 35 should be interpreted in light of the purpose underlying its enactment – a purpose it has identified as reconciliation. The Court first considered the purpose of reconciliation in relation to Crown decisions that infringed constitutionally protected Aboriginal rights. In *Sparrow*, which dealt with a claim for an Aboriginal right to fish for food, the Court held that “federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.”

Here the Court considers the power under section 91(24) of the *Constitution Act, 1867* that gives jurisdiction over “Indians and Lands Reserved for Indians” to the federal Parliament.

In creating the link between the purpose of reconciliation and justifiable limitations on Aboriginal and treaty rights, the Court recognized that where the federal Parliament enacted legislation that interferes with Aboriginal and treaty rights, the government bears the onus of justifying the infringement of Aboriginal rights; the

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8 *Sparrow*, supra note 3 at para 62.
9 Recently *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot’in Nation*] at paras 128-52, the Supreme Court of Canada dealt with the division of powers with respect to federal and provincial jurisdiction over Aboriginal peoples and territories. It is not clear what the implications of that decision may be in relation to cases dealing with to jurisdictional disputes in the context of Aboriginal claims.
regulation does not impose undue hardship; and the regulation does not deny the
rights-holders their preferred means of exercising their right.\(^{10}\) Where interference
with an Aboriginal or treaty right is found, the government would have to show that
there is a valid legislative objective\(^{11}\) and that the Crown has acted honourably and in
accordance with its special trust relationship with Aboriginal peoples.\(^{12}\)

In *Sparrow*, the Court provided the following examples of measures that might be
characterized in this way:

An objective aimed at preserving s. 35(1) rights by conserving and managing a
natural resource, for example, would be valid. Also valid would be objectives
purporting to prevent the exercise of s. 35(1) rights that would cause harm to the
general populace or to aboriginal peoples themselves, or other objectives found to
be compelling and substantial.\(^{13}\)

The Court justifies the objective of conservation as “compelling and substantial” on the
basis that conservation of the resource is consistent with respect for and recognition of
section 35 rights. In other words, if an Aboriginal community has a right to fish for
salmon but the government does not ensure that conservation measures are
implemented to preserve sufficient salmon stocks, the constitutionally protected right
to fish for salmon would not be sufficiently protected. The Court held that “the
conservation and management of our resources is consistent with aboriginal beliefs
and practices, and, indeed, with the enhancement of aboriginal rights.”\(^{14}\) The Court
also held that after conservation, Aboriginal rights that are constitutionally protected,
such as rights to fish for food and ceremonial purposes, must be given priority over the

\(^{10}\) *Sparrow*, *supra* note 3 at para 70.

\(^{11}\) *Ibid* at para 71.

\(^{12}\) *Ibid* at para 75.

\(^{13}\) *Ibid* at para 71.

\(^{14}\) *Ibid* at para 74.
rights of other users, such as commercial and sport fishers.¹⁵ This is so because in accordance with the honour of the Crown and the special trust relationship, the government is required to prioritize Aboriginal rights because of their constitutional nature over other interests (that are not constitutionally protected).¹⁶

In relation to public safety, the Court held that the federal government has a duty to legislate to ensure the safety of all citizens and that Aboriginal rights cannot be implemented in a way that might cause “harm to the general populace or to aboriginal peoples themselves.”¹⁷ The Court added that other objectives might also be found to be compelling or substantial.¹⁸ Although the objectives of conservation and public safety seem to point to a high threshold for an objective to be categorized as compelling and substantial, more recent decisions substantially broaden objectives that might justify the infringement of section 35 rights.

In R v Gladstone,¹⁹ the Court held that limits placed on Aboriginal rights could be justified on the basis of reconciliation, particularly in taking account of the needs of broader society. Here, for the first time, the Court added the requirement to balance the duty to respect existing Aboriginal and treaty rights under section 35 against the duty to take into account the rights and freedoms of all Canadians in government decision-making. In Gladstone, the Court was dealing with a claim for a right to fish for trading purposes. As such, the Court altered its interpretation of reconciliation to support a finding that limited Aboriginal rights on the basis that government decision-

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¹⁵ Ibid at paras 76–77.
¹⁶ Ibid at para 78.
¹⁷ Ibid at para 71.
¹⁸ Ibid.
¹⁹ R v Gladstone, [1996] 2 SCR 723 [Gladstone].
making was in the public interest. To see how the Court explicitly justifies the limitations on Aboriginal rights in the name of reconciliation, it is worth reproducing the relevant passage in full:

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 the reconciliation of aboriginal societies with the broader political community of which they are part; 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.\(^\text{20}\)

Here, in addition to conservation, the Court includes the pursuit of economic and regional fairness as an objective that can be characterized as “compelling and substantial.”\(^\text{21}\) As a result of this case, the Court opened the door to an ever-expanding list of limitations on Aboriginal rights that might be justified in the name of reconciliation.\(^\text{22}\)

In *Delgamuukw*, the Supreme Court of Canada expanded on the types of limits that might justify infringement of Aboriginal rights. After citing the rationale mentioned in *Gladstone* for such limits, the Court held that:

\begin{quote}
the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the
\end{quote}

\(^{20}\) *Ibid* at para 73.

\(^{21}\) *Sparrow*, supra note 3 at para 71.

environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.\textsuperscript{23}

Here, the Court provides a long list of potential justifications for infringing the constitutionally protected rights of Aboriginal communities in relation to their traditional lands and ties this list to the purpose of reconciliation.

In \textit{R v Van der Peet},\textsuperscript{24} the Court indicated that a purposive analysis of section 35 was necessary because such an approach would allow courts to interpret Aboriginal rights in a way that permits “growth and development over time to meet new social, political and historical realities.”\textsuperscript{25} In addition, the Court noted that identifying the reasons underlying the recognition and affirmation of Aboriginal and treaty rights in section 35 would influence the definition of such protected rights.\textsuperscript{26} In the majority judgment in \textit{Van der Peet}, Chief Justice Lamer held:

When the court identifies a constitutional provision’s purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision; it is articulating the reasons underlying the protection that the provision gives. With regards to s. 35(1), then, what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of aboriginal peoples; it must identify the basis for the special status that aboriginal peoples have within Canadian society as a whole.\textsuperscript{27}

Lamer goes on to enunciate the rationale behind the enactment of section 35 as follows:

\textsuperscript{23} \textit{Delgamuukw v British Columbia}, [1997] 3 SCR 1010 [\textit{Delgamuukw}] at para 165.
\textsuperscript{24} \textit{R v Van der Peet}, [1996] 2 SCR 507 [\textit{Van der Peet}].
\textsuperscript{25} \textit{Ibid} at para 21 (citing \textit{Hunter v Southam Inc} [1984] 2 SCR 145 at 155). This section builds on the case law discussion on reconciliation from an article that I wrote on reconciliation in the context of the development of Arctic offshore oil and gas; see Kirsten Manley-Casimir, “Reconciliation, Indigenous Rights and Offshore Oil and Gas Development in the Canadian Arctic” (2011) 20:1 RECIEL 29 [Manley-Casimir, “Reconciliation”].
\textsuperscript{26} \textit{Van der Peet, supra} note 24 at para 3.
\textsuperscript{27} \textit{Ibid} at para 27.
In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, what 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; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.28

This enunciation of reconciliation as the purpose of section 35 stresses the need to reconcile the sovereignty of the Crown with the pre-existence of Aboriginal societies.

This points to the need to engage in a formal legal analysis of Aboriginal claims in relation to Crown sovereignty, which the Court tries to address in subsequent section 35 case law.29

One way the Court has engaged in this analysis is by characterizing section 35 case law as sui generis (meaning ‘of its own kind’);30 consequently, the content of Aboriginal and treaty rights under section 35 should draw on both Indigenous and common law perspectives equally. In Van der Peet, the Court held:

It is possible, of course, that the Court could be said to be ‘reconciling’ the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either

28 Ibid at paras 30–31 (emphasis added).
30 Sparrow, supra note 3 at para 59.
a narrow or broad conception of aboriginal rights; the notion of ‘reconciliation’ does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.\textsuperscript{31}

Here, the Court formulates reconciliation as a bridging concept that values both Indigenous and non-Indigenous perspectives. This statement points to the possibility that the Court might be open to incorporating Indigenous legal traditions into section 35 jurisprudence.\textsuperscript{32}

Reconciliation of Indigenous and non-Indigenous legal traditions can be interpreted in various ways.\textsuperscript{33} Both traditions could be valued equally as sources for developments in Aboriginal law or one tradition could have primacy over the other. The majority in \textit{Van der Peet} adopted the latter approach in articulating an idea of reconciliation that constrains Indigenous perspectives by requiring that any Aboriginal rights recognized under section 35 be framed in a way that is “cognizable to the Canadian legal and constitutional structure.”\textsuperscript{34} This means that claims must be framed in a way that are justiciable within Canadian courts; in other words, the claims must comply with the terminology, procedures and legal claims that can be recognized by those courts. As such, Aboriginal claimants must frame their relationships to

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31 & Van der Peet, supra note 24 at para 50. \\
32 & Although the Court has incorporated some aspects of Indigenous legal traditions, particularly in recognizing the authority of oral history evidence to support Aboriginal claims, it does not rely explicitly on Indigenous legal principles in any of its decisions. John Borrows suggests many practical ways for the Court to do this: see generally John Borrows, \textit{Canada’s Indigenous Constitution} (Toronto: University of Toronto Press, 2010) [Borrows, \textit{Canada’s Indigenous Constitution}]. \\
33 & For a discussion of the divergent interpretations of reconciliation within the Supreme Court of Canada, see McNeil, “Reconciliation”, supra note 22. \\
34 & Van der Peet, supra note 24 at para 49. \\
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territories in ways that do not “strain the Canadian legal and constitutional structure” regardless of whether this framing conforms with or strains Indigenous legal structures.

Interestingly, all three judges who authored the decision in Van der Peet relied on Mark Walters’ assertion that “a morally and politically defensible conception of aboriginal rights will incorporate both [Aboriginal and non-Aboriginal] legal perspectives.” Walters’ assertion that both Indigenous legal traditions and common law inform the development of Aboriginal rights, however, has been increasingly watered down through the Supreme Court of Canada’s references to considering “Aboriginal perspectives” and “common law.” This terminology, which juxtaposes ‘perspectives’ with ‘law’, highlights the hierarchy that infuses Aboriginal and treaty rights jurisprudence – a hierarchy that privileges common law concepts and effectively excludes Indigenous legal principles.

Requiring Indigenous peoples to frame their claims in a way that is cognizable to the Canadian legal and constitutional structure creates difficulties for claimants in proving their claims in Canadian courts. For example, case law has established that to prove Aboriginal rights and title, claimants must show that they engage in rights cognizable to the Canadian legal system pre-contact (for Aboriginal rights) or at the time of the assertion of Crown sovereignty (for Aboriginal title). The ironic effect of

37 Van der Peet, supra note 24 at para 60.
38 Delgamuukw, supra note 23 at paras 114 & 152.
these time frames are that Indigenous nations were not even aware of what common law categories might be at the point at which they must prove they had rights cognizable to the Canadian legal system.

The way in which the Court has framed reconciliation creates a hierarchy that privileges common law over Indigenous laws. D’Arcy Vermette notes that the Court’s failure to give equal legal authority to Indigenous legal traditions in its interpretation of reconciliation ensures that “Aboriginal systems must do all the reconciling.”39 This is so because Indigenous claimants are required to accommodate the colonial legal system, which fails to take account of Indigenous laws, to have their Aboriginal rights recognized and affirmed.40 Vermette asserts that “[t]he Court is establishing a clear dominance between cultures” in that through the principle of reconciliation “Aboriginal cultures are forced to accommodate the colonizer’s common law, assertion of sovereignty and the needs of broader society.”41 The failure to give authority to Indigenous laws limits the potential of section 35 to fulfill the larger purpose of reconciliation.

2.2 Movement Towards a Broader Interpretation of Reconciliation

As the jurisprudence develops, the Court has signaled its willingness to adopt a broader interpretation of reconciliation in three ways: first, it has explicitly expanded the people involved in its reconciliation analysis to include members of the larger Canadian society; second, it has linked reconciliation to the normative values of

39 Vermette, "Dizzying Dialogue", supra note 5 at 61.
40 Ibid.
41 Ibid at 65.
honour and justice; and third, it has shifted the focus of reconciliation to be forward-looking and prospective.

2.2.1 Expanding the Circle of Reconciliation: A Double-Edged Sword

As discussed above, early case law on reconciliation focused on reconciling the conflicting legal duties of the federal government (i.e. Crown power with Crown duties) and the pre-existence of Indigenous peoples with Crown sovereignty. Although the broader Canadian public was implicated within these articulations, the Court’s pronouncements about reconciliation focused primarily on the relationship between the Canadian government and Indigenous peoples. This is because constitutional duties in general are applied only in relation to government; constitutional provisions can only be breached by and enforced against governments or organizations exercising government functions. As such, this focus for reconciliation makes sense.

More recently, the Court has shifted its articulation of reconciliation to explicitly include non-Indigenous Canadians. In Little Salmon, the Court held that the “reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Acts, 1982.” Here the Court shifts the focus away from the Crown and Indigenous peoples to broaden the circle of reconciliation to include the Crown, Indigenous peoples, and the Canadian public at large.

The shift to broaden the circle to include non-Indigenous Canadians generally corresponds with the academic literature on reconciliation that advocates for

42 This is particularly so in relation to the public safety objective articulated in Sparrow.
44 Little Salmon, supra note 5 at para 10.
reconciliation processes to occur within every level of society. The Court’s inclusion of
the broader public, however, is a double-edged sword as broadening the circle has
enabled the Court to expand the justifications for infringement of constitutionally
protected rights by considering the needs of larger Canadian society. As Justice
McLachlin points out in her dissent in Van der Peet, relying on reconciliation to
balance the rights of non-Indigenous and Indigenous peoples is problematic in two
ways:

1. it effectively transfers the constitutional protections of Aboriginal rights under
   section 35 to non-Indigenous peoples; and
2. it fails to give appropriate priority to Aboriginal rights in relation to other
   people’s interests that are not similarly protected by the Constitution.

Rather, Justice McLachlin argues that the concept of reconciliation must be interpreted
in light of the second fundamental purpose articulated in Sparrow of achieving “a just
and lasting settlement of aboriginal claims.”

As discussed above, Sparrow established that the government could infringe
constitutionally protected Aboriginal and treaty rights if, among other things, it could
show that the objective was compelling and substantial. Subsequent cases have
expanded what might be categorized as compelling and substantial by including
objectives that serve the needs of the broader Canadian society.

45 I expand on this in Chapter 7.
46 Van der Peet, supra note 24 at para 310 & 315.
47 Ibid at para 311. In Gladstone, supra note 19, the Supreme Court of Canada limited the priority it gave
towards Aboriginal fishing rights in the context of a commercial fishery.
48 Van der Peet, ibid at para 310.
2.2.2 A Balancing Act: Pitting Indigenous Rights Against the Interests of Larger Canadian Society

The Court’s broadening of the circle of reconciliation to include “non-aboriginal communities” has coincided with a movement by the Supreme Court of Canada towards a balancing test in the reconciliation jurisprudence. As Walters notes, despite the potential of reconciliation as articulated in early case law, the Court’s more recent interpretations of reconciliation have moved toward a balancing test whereby constitutionally protected Aboriginal rights are balanced against non-Indigenous interests. In balancing the constitutionally protected rights of Indigenous people with the interests of broader Canadian society, the Court privileges non-Indigenous over Indigenous priorities and visions; this is so because, as Justice McLachlin stresses in her Van der Peet dissent, even the requirement to balance these rights against one another privileges non-Indigenous interests since it elevates such interests to quasi-constitutional status where only the rights of Aboriginal peoples are constitutionally protected.

The Mitchell case provides an illustration of this privileging. In Mitchell, Grand Chief Michael Mitchell of the Mohawks of Akwesasne crossed the United States/Canada border with some blankets, bibles, motor oil, food, clothing, and a washing machine that he had purchased in the US. He declared the goods to the

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49 Mitchell, supra note 35 at para 149.
50 In “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka & Bashir Bashir, eds, The Politics of Reconciliation in Multicultural Societies (Oxford: Oxford University Press, 2008) 165 [Walters, "Jurisprudence"], Mark Walters notes that the Supreme Court of Canada’s decision in Van der Peet held that Aboriginal law was drawn from both Canadian law and Indigenous legal traditions. This conception of Aboriginal law pointed to the potential for a robust interpretation of what he terms “reconciliation as relationship” (180). Walters describes reconciliation as relationship as “two-sided or reciprocal,” and as having “a degree of intrinsic moral worth or value about it” (167).
Canadian customs agents but refused to pay duty on the basis that he had existing Aboriginal and treaty rights exempting him from doing so. Chief Mitchell, along with other Mohawks of Akwesasne, presented everything but the motor oil to the Mohawk community of Tyendinaga to symbolize the renewal of the historic trading relationship between the two communities. The oil was taken to a store in Akwesasne territory for resale to members of the Akwesasne community. Chief Mitchell was served with a Notice of Ascertained Forfeiture claiming $361.64 for unpaid duty, taxes and penalties.

In the minority judgment in Mitchell, Justice Binnie held that reconciliation involved the idea of “merged sovereignty” that was articulated in the Royal Commission of Aboriginal Peoples (RCAP). Specifically, he held that the idea of merged sovereignty included “that aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort.” Justice Binnie asserted that it is this Aboriginal/non-Aboriginal sovereign entity that must be reconciled with existing Aboriginal and treaty rights. This reconciliation includes the idea of “partnership without assimilation.” Later he contrasts reconciliation with mutual isolation pointing to a conceptualization of reconciliation that envisages mutuality and on-going interactions.

In Mitchell, Justice Binnie characterizes reconciliation as an “objective that lies at the heart of a purposive interpretation of s. 35(1).” He pits the “national interests

\[52\] Mitchell, ibid at para 129.
\[53\] Ibid.
\[54\] Ibid at para 130.
\[55\] Ibid at para 134.
\[56\] Ibid at para 155.
that all of us have in common” against the “distinctive interests that for some purposes differentiate an aboriginal community” and concludes that “reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty.”

Here Justice Binnie emphasizes the commonality of interests between all Canadians and rejects the assertion that Aboriginal communities might be entitled to differential treatment in the context of international borders.

Framing reconciliation in this way positions Indigenous interests in opposition to the national interests that all of us have in common. This framing not only suggests that Indigenous interests are not aligned with Canada’s interests but also fails to support a rich articulation of reconciliation that requires negotiation and rebuilding or relationships between the Canadian and Indigenous governments. As Walters argues, much of the section 35 jurisprudence constitutes a type of “one-sided” approach to reconciliation, which requires Indigenous peoples to resign themselves to the reality that they must live according to the Canadian government’s vision of how their territories should be used and adjust their expectations accordingly.

The problem with this interpretation of reconciliation is that it runs counter to a rich conception of

57 Ibid at para 164.
58 Although this reasoning may seem uncontroversial from a non-Indigenous perspective, one could imagine a different result whereby the Supreme Court of Canada recognized the sovereign authority of the Mohawks of Akwesasne to move freely within their traditional territory and directed the Canadian government to attempt to enter into negotiations with the United States to come up with a policy that facilitated the movement of members within their own community separated by the international border. The Mitchell case raises particularly difficult issues because, on one hand, it involves significant financial implications for both the US and Canada with respect to any duty exemptions; on the other hand, this decision has a significant impact on the everyday lives of the Mohawks of Akwesasne in requiring community members to pay duty on items they purchase for use or gifting within their own communities.
59 Walters, "Jurisprudence", supra note 50 at 180.
reconciliation,\textsuperscript{61} which involves the rebuilding of relationship in a way that empowers both parties to move together towards a shared vision. Rather than a win-lose situation, a rich conception of reconciliation moves people towards a win-win.

\textbf{2.2.3 From Balancing to Translation: Further Constraints on the Interpretation of Reconciliation}

In addition to applying a balancing test in the reconciliation jurisprudence, the Court has imposed a translation requirement on protected Aboriginal rights. In \textit{R v. Marshall; R v. Bernard},\textsuperscript{62} the Supreme Court of Canada reinforced this interpretation of reconciliation as creating a significant limitation on the exercise and protection of Aboriginal rights. The Court held that in the context of Aboriginal title claims, Indigenous practices in relation to land had to be translated into a corresponding common law property right to merit recognition under the doctrine of Aboriginal title.\textsuperscript{63} Walters notes that this translation requirement is inconsistent with a robust conception of reconciliation and with the conception of Aboriginal law as intersocietal.\textsuperscript{64}

The requirement of translation raises the difficulty of translating cultural conceptions from one culture into a different cultural form. Bradley Bryan argues that Indigenous conceptions of relationships to land arise within a particular ontological framework and that in “subsuming Aboriginal social relations into the language of proprietary institutions [we risk]...a full-scale eradication to those culturally specific

\textsuperscript{61} Walters, "Jurisprudence" \textit{supra} note 50 at 183 also criticized the Court's conceptualization of reconciliation as a balancing of interests, which he asserts makes the test "benign".

\textsuperscript{62} \textit{R v Marshall; R v Bernard}, [2005] 2 SCR 220 [\textit{Marshall & Bernard}].

\textsuperscript{63} \textit{Ibid} at paras 48–51. This translation approach was confirmed in \textit{Tsilhqot'in Nation}, \textit{supra} note 9 at para 32 although the Court did stress the need for flexibility in the approach to translation.

\textsuperscript{64} Walters, "Jurisprudence" \textit{supra} note 50 at 180–81.
ontological grounds.” In the context of claims of Aboriginal title, the idea of translating Indigenous relationships with territories to common law property concepts raises several problems including the difficulty of accurate translation and the constraining effect of translation.

The language of the Canadian legal system reinforces the legitimacy of the Canadian social structure and the history that corresponds to that structure. As such, the language of the non-Indigenous legal system may not reflect Indigenous realities. As Jean-François Lyotard explains, a case of “differend” occurs when conflict between two parties is regulated in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom. The wrong suffered by Indigenous claimants may not be able to be cognizably communicated to a judge in the non-Indigenous legal system. Moreover, “a translation from one language to another presupposes that the sense presented by a phrase in the language of departure can be recovered by a phrase in the language of arrival.” Such translation may not be possible in the context of Aboriginal claims since the societal values of Indigenous peoples and legal traditions may differ from those underpinning the non-Indigenous legal system.

Just as the cultures from which people come strongly influence their perceptions of cultural values so the ideas and perceptions that underlie a specific construction of

68 Lyotard, supra note 66 at 48–49.
reality shape the institutions and social structure of a particular culture. Jan Vansina argues that all messages within a culture “are expressed in the language of a culture and conceived, as well as understood, in the substantive terms of a culture.” As a result, since cultural messages are specific to their cultural context, these messages are best interpreted in relation to the culture from which they come.

Since cultural values are shaped in the particular context from which they emerge, when such values are judged by the cultural values of another tradition there is the possibility for misunderstanding. Nussbaum suggests that “the particular categories we choose are likely to reflect our own immersion in a particular theoretical tradition” and may be inappropriate in assessing a different culture’s standards. Similarly, in his discussion of section 35 jurisprudence, Borrows highlights the Eurocentric nature of the exercise of translation that the Supreme Court of Canada has enunciated in its Aboriginal title jurisprudence. He says:

Despite attempts to incorporate Aboriginal perspectives and Aboriginal laws, s. 35(1) remains securely tied to its non-Aboriginal foundations. There is no real Indigenous law cited to arrive at appropriate decisions. In fact, the Supreme Court of Canada has taken to translating Aboriginal perspectives and practices into common law rights.... Making common law the ultimate measure of ancient Aboriginal traditions virtually ensures that non-Aboriginal cultural aspirations will predominate within s. 35.

As Borrows highlights, the exercise of translation that the Court infused into the test for Aboriginal title in Marshall & Bernard privileges non-Indigenous values and visions for land use over Indigenous visions of their relationships to land.

A further difficulty of translation – or perhaps more accurately an instance of untranslatability – arises due to the colonial construction of Indigenous peoples as “prior.” As Elizabeth Povinelli argues, Indigenous peoples are constrained to speak in the past tense while settler colonial narratives are framed using present and future tenses. In other words, Indigenous peoples are conceptualized as prior to the colonial nation state and therefore must describe their cultures, traditions, and legal orders in the past tense to be heard by settler colonial states and institutions. Requiring Indigenous peoples to construct their realities as prior, however, devalues the reality that Indigenous cultures, traditions and legal orders have survived to the present day despite the colonial onslaught of assimilative measures. Translating present and future Indigenous reality may therefore pose a challenge for people thinking through colonial categories.

Despite the difficulty of translation between cultures, several scholars have provided ideas on how to address this difficulty. Talal Asad, for example, has suggested a way in which to approach the task of translation in a productive and respectful way. Asad argues that “[all] good translation seeks to reproduce the structure of an alien discourse within the translator’s own language.” He asserts that

\[ \text{[t]he call to transform a language in order to translate the coherence of the original, poses an interesting challenge to the person satisfied with an absurd-sounding translation on the assumption that the original must have been equally absurd: the good translator does not immediately assume that unusual difficulty in conveying the sense of an alien discourse denotes a fault in the latter, but instead critically examines the normal state of his or her own language. The relevant question} \]

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therefore is not how tolerant an attitude the translator ought to display toward the original author (an abstract ethical dilemma), but how she can test the tolerance of her own language for assuming unaccustomed forms. 75

Here Asad asserts that the responsibility of the good translator is to interrogate the assumptions that the translator herself holds as well as the assumptions that underpin her language rather than concluding automatically that the culture being translated is less worthy of respect. Asad’s insistence on interrogating one’s own position not only recognizes the contingency and limits of the translator’s language but also the limits of the translator’s perspective when engaging in the exercise of translation.

Jorge Valadez offers another suggestion for addressing the difficulty of translation; he argues that “[e]ven in cases involving untranslatability, it is possible to understand another framework by familiarizing ourselves with it; by learning how those who hold a different framework categorize entities in the world, explain events, legitimate empirical and normative claims, and so forth... .” 76 He asserts that through this process one can come to see the world differently. 77 Valadez points out, however, that getting to this point requires sincere and extended efforts over a lengthy period of time. 78 Further, such efforts require more than just a focus on translating concepts but instead involve gaining an understanding of a different framework through which to view the world. 79 Although extended immersion within a different culture is necessary in order to create a shift in the way one sees the world, such immersion poses a

75 Ibid at 157.
77 Ibid.
78 Ibid.
79 Ibid.
particular problem for most judges, other legal actors, and government officials due to barriers in opportunities for such immersion and time constraints.

Given the difficulties of translation between Indigenous and non-Indigenous cultures (and the potential for untranslatability), the importation of a requirement to translate Indigenous legal concepts into concepts cognizable to the common law raises a particular problem. As Martha Nussbaum asserts “it may ... be problematic to use concepts that originate in one culture to describe and assess realities in another – and all the more problematic if the culture described has been colonized and oppressed by the describer’s culture.”80 Not only is translation very difficult from one culture and language to another but also the exercise of translation if not done carefully is likely to replicate the colonial power dynamic to the advantage of the colonizers. As a result, the imposition of a translation requirement in the context of Aboriginal claims disadvantages Indigenous claimants when they attempt to fit their relationships with their territories into common law categories and even where successful, constrains their abilities to relate to their lands according to Indigenous legal traditions.

2.2.4 Tethering Reconciliation to Honour and Justice

The Court has conceptualized reconciliation in a way that: (1) includes recognition of pre-existing Indigenous communities prior to the assertion of Crown sovereignty; (2) requires a balancing of pre-existing Aboriginal rights with Crown sovereignty and the needs of broader society; and (3) necessitates a translation into rights cognizable to the common law. More recent case law has begun to provide further contours of the reconciliation purpose underlying section 35. The Court, in its

80 Nussbaum, supra note 71 at 381.
recent jurisprudence, signals a movement towards linking the purpose of reconciliation underlying section 35 to two concepts – honour and justice.

### 2.2.4.1 Reconciliation and the Honour of the Crown

In the jurisprudence, the concept of honour is linked explicitly to the Crown’s duties towards Aboriginal peoples under section 35.\(^{81}\) The Supreme Court of Canada clarified that the honour of the Crown “refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.”\(^{82}\) Specifically, the Court asserts that

\[
\text{[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’}^{83}
\]

Further, the Court highlights that the honour of the Crown cannot be delegated; “the Crown cannot contract out of its duty of honourable dealing with Aboriginal people”\(^{84}\) since it applies “independently of the expressed or implied intentions of the parties.”\(^{85}\) The honour of the Crown is therefore a constitutional principle\(^{86}\) that governs all aspects of the relationship between the Crown and Aboriginal peoples.

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\(^{81}\) There is compelling critical commentary about the concept of the honour of the Crown due to the legacy of dishonourable conduct on the part of colonial governments and the Canadian government: see e.g. Mariana Valverde, “The Honour of the Crown is at Stake: Aboriginal Land Claims Litigation and the Epistemology of Sovereignty” (2011) 1(3) UC Irvine L Rev 955. Although I agree with such critiques, the focus of this chapter is to engage with the legal doctrines developed by the Supreme Court of Canada. In this section, therefore, I engage with the legal doctrine as the Court has developed it to date rather than critique the fact that the Court developed this doctrine in the first place.


\(^{83}\) *Haida Nation*, supra note 6 at para 17 citing *Sparrow*, supra note 3 at 1105–6.

\(^{84}\) *Little Salmon*, supra note 5 at para 61.

\(^{85}\) *Ibid*.

\(^{86}\) *Ibid* at para 42.
In *Tsilhqot’in Nation*, the Supreme Court of Canada found that the provincial government had breached its duty to consult and accommodate when it authorized the removal of timber from Tsilhqot’in lands in 1983. In doing so, the Court retroactively applied this legal duty even though the first case to mention the government’s duty to consult was *Sparrow*, which was decided 7 years after the provincial government’s decision was made. Moreover, it was only in 2004 and 2005 that the Court fleshed out the duty to consult and accommodate in *Haida Nation*, *Taku River* and *Mikisew Cree*. In applying the duty to consult and accommodate retroactively, the Court appeared to be attempting to redress some of the imbalance between the state and Indigenous claimants in section 35 disputes.

Although the Court’s articulation of the Crown’s honour seems to support an interpretation that requires the Crown to act honourably in all its dealings with Indigenous peoples, there exists at least one exception to the application of this constitutional principle within Canadian jurisprudence. The Federal Court of Appeal has clarified that the Crown’s honour does not apply in the context of litigation. In the context of adversarial litigation, therefore, there is no requirement on the Crown to act honourably.

In *Haida Nation*, the Court also concluded that the honour of the Crown requires the Crown to respect potential, not-yet-proven Aboriginal rights. The Court notes that

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87 *Tsilhqot’in Nation*, supra note 9 at paras 93 & 95–96.
“[s]ection 35 represents a promise of rights recognition, and ‘[i]t is always assumed that the Crown intends to fulfill its promises.’”\footnote{Ibid; \textit{R v Badger}, [1996] 1 SCR 771 [\textit{Badger}] at para 41; \textit{Manitoba Métis Federation}, supra note 82 at para 9.} As such, the Court expands the reconciliation purpose of section 35 to include the “potential rights embedded in [Aboriginal] claims.”\footnote{\textit{Haida Nation}, supra note 6 at para 25.} It is for this reason that the Court held that the honour of the Crown requires it to respect potential but yet unproven interests.\footnote{Ibid at para 27.}

The Court also linked the honour of the Crown to a duty to protect the integrity of the contested resources claimed under section 35 until an appropriate resolution is achieved. Specifically, the Court noted that for the Crown “[t]o unilaterally exploit a claimed resource during the process of proving and resolving Aboriginal claims to that resource, may be to deprive the Aboriginal claimants of some or all the benefit of the resource. That is not honourable.”\footnote{Ibid.} Christie argues that the Crown’s honour requires that it “act to preserve the interests, so that they can serve as grounds for a negotiated arrangement.”\footnote{Christie, “Developing Case Law”, supra note 88 at para 124.} He argues that the rules set out in \textit{Haida Nation} require the Crown to be concerned with preserving the Aboriginal interests at stake, pending a final agreement about the nature and scope of these rights in the modern context.\footnote{Ibid at para 120.} He writes:

along the way to final determination, in the time leading up to a resolution of claims either through litigation or negotiation, it would seem that [Aboriginal claimants] should never be faced with a situation in which the Crown could legitimately
remove all possible Crown lands from the negotiating table ... thinking it could satisfy its honourable obligations through compensation.  

Christie argues, however, that in practice there have been many instances of cases where the Crown has dealt with the interest claimed by Indigenous communities in a way that fails to preserve the interest at the heart of the dispute.  

Finally, the Court held that reconciliation is not a final legal remedy but rather is an on-going process. It clarified that reconciliation is:

a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. This process of reconciliation 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.  

The Court highlighted that Aboriginal peoples who are signatories of treaties are entitled to honourable conduct on the part of the Crown, as Aboriginal peoples have paid a hefty price in surrendering their Aboriginal interests in land through those treaties. The Court also stressed the importance of adopting a process that reflects the Crown’s honour and highlights that if the processes used are not honourable, factors such as mitigation measures in the final decision-making may not correct fundamental flaws in the process.  

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95 Ibid at para 121.  
96 Ibid at paras 105–15.  
97 Haida Nation, supra note 6 at para 32.  
98 Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), [2005] 3 SCR 388 [Mikisew Cree] at para 52.  
99 Ibid at para 68.
2.2.4.2 Reconciliation and Justice

The Court also emphasized the link between reconciliation and the normative value of justice. The Court held that “section 35 calls for a just settlement for aboriginal peoples.” I explore what the Court means by a “just settlement” in considering the reasoning and outcomes in a handful of Aboriginal and treaty rights cases. In this section, I consider some recurrent themes that can be drawn out of seminal section 35 cases to determine what the Supreme Court of Canada suggests justice might look like for Indigenous peoples within Canada. In considering these themes, I explore whether the Court’s vision of justice has changed as the case law relating to section 35 has evolved. Throughout my examination I consider how the Court’s vision of justice relates to the purpose of reconciliation. I conclude that although significant limitations still exist within the case law there is promising movement in recent jurisprudence that points to higher weight being placed on the importance of justice as a key component of reconciliation.

The first theme that emerges from the case law is that section 35 protects Aboriginal rights that are clearly linked to the pre-sovereignty ways of life of Indigenous communities. The Court’s view of justice in early section 35 cases limited the constitutional protection of Aboriginal rights to those rights that correspond with

100 Tsilhqot’in Nation, supra note 9 at para 23.
101 Sparrow, supra note 3 at para 54 citing Noel Lyon, “An Essay on Constitutional Interpretation” (1988) 26:1 Osgoode Hall LJ 95 at 100. The idea of a just and fair settlement was picked up in Justice McLachlin’s dissent in Van der Peet, supra note 24 paras 229–30. More recently, this idea was picked up in the majority judgments in Haida Nation, supra note 6 at para 20 (in the context of treaties), Taku River, supra note 7 at para 24 and Manitoba Métis Federation, supra note 82 at para 66.
102 Due to space constraints, this examination is not intended to be comprehensive.
103 R v Sappier; R v Gray [2006] 2 SCR 686 [Sappier & Gray] at para 24. These rights have been characterized in the jurisprudence as “site-specific” Aboriginal rights, such as fishing and hunting rights that correspond to a particular physical area.
practices associated with the particular way of life of Indigenous communities prior to the assertion of European sovereignty. Most notably in Van der Peet, the Court held “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”\textsuperscript{104} The Court held that such practices were those that were of central significance to the Aboriginal culture in question.\textsuperscript{105} Subsequent cases have confirmed that this characterization of Aboriginal rights significantly diminishes the possibility that Aboriginal communities can prove commercial rights to fishing, harvesting or gathering.\textsuperscript{106}

In the context of Aboriginal title, the Court has also linked the proof of title to the pre-sovereignty occupation of territories by Aboriginal communities, specifically with respect to proving the boundaries of claimed territories. In Delgamuukw, the Supreme Court of Canada held:

In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of pre-sovereignty occupation, there must be continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.\textsuperscript{107}

Once proven, Aboriginal titleholders can put the lands to any use except uses that would threaten the viability of the land to support future generations; specifically, the Court held that once established “aboriginal title encompasses the right to choose to

\textsuperscript{104} Van der Peet, supra note 24 at para 46.

\textsuperscript{105} Ibid at para 54. This test has been the subject of much academic commentary and it is not my intention to review all of this literature or engage in this debate. See e.g. John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997) Am Indian L Rev 37 [Borrows, "Frozen Rights"]; see also Barsh & Henderson, supra note 5.

\textsuperscript{106} See e.g. Lax Kw’alaams Indian Band v Canada (Attorney General), [2011] 3 SCR 535 [Lax Kw’alaams].

\textsuperscript{107} Delgamuukw, supra note 23 at para 16.
what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples.”108 This limit on Aboriginal titleholders’ decision-making in relation to Aboriginal title lands is referred to as the “inherent limit.”

In Tsilhqot’in Nation, the Supreme Court of Canada introduces some flexibility in its requirements to prove Aboriginal title by upholding the British Columbia Supreme Court’s trial decision, which found that occupation was proven by showing regular and exclusive use of sites or territory within the claimed area.109 As such, the Court, for the first time, explicitly accepted a territorially based conception of Aboriginal title that did not require proof of occupation or regular use of every part of the claimed territory.110 Specifically, the Court held that the Tsilhqot’in had to prove occupation and regular use of the territory but not intensive use of every part of its claimed territory. In Tsilhqot’in Nation, the Court, for the first time, upheld a finding of Aboriginal title. Tsilhqot’in Nation points to promising movement towards greater flexibility within Aboriginal law doctrines generally and a higher emphasis on the idea of justice in informing court decisions.

A second theme that emerges in the early case law is a unique definition of the Crown-Indigenous relationships. In Sparrow, the Supreme Court of Canada acknowledged the existence of a fiduciary relationship between the Crown and

108 Ibid at para 166.
109 Tsilhqot’in Nation, supra note 9 at paras 66 & 27.
110 It is worth noting that this territorially based conception is limited since it corresponds to the area that the Tsilhqot’in claimed in this case and not to the full traditional territorial lands that the Tsilhqot’in historically used.
Aboriginal peoples under section 35. Although fiduciary doctrine remains somewhat undefined, it has two contrasting interpretations in the context of the characterization of Crown-Aboriginal relationships: on one hand, the Crown’s fiduciary duty can be seen as reflecting discriminatory attitudes that position Indigenous peoples as primitive and incapable of responsibly managing their affairs. Viewed in this way, fiduciary doctrine reflects paternalistic attitudes that position Indigenous Peoples as child-like and in need of the Canadian government’s guidance on managing its affairs. On the other hand, fiduciary duty can be seen to reflect the early treaty relationships, which can be regarded as imbued with honour. Viewed in this light, the treaties established a relationship of trust between Indigenous Peoples and colonial powers, which created a responsibility for colonial governments and its successors to act in the best interests of Indigenous nations.

Recent case law explicitly rejects the interpretation that fiduciary doctrine reflects paternalistic attitudes towards Aboriginal peoples. In *Wewaykum Indian Band v Canada*, the Supreme Court of Canada held that the government’s fiduciary duty to

\[\text{Wewaykum Indian Band v Canada, [2002] 4 SCR 245 [Wewaykum].}\]
Aboriginal peoples was premised upon the need to “facilitate the supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of Aboriginal peoples.”\textsuperscript{116} The Court positively cited Brian Slattery for the proposition that fiduciary duty is neither grounded in paternalism nor the view of Aboriginal peoples as primitive.\textsuperscript{117} The Court did recognize that the high degree of discretionary control that the Crown undertook through its fiduciary duty had positive aspects of protecting some Aboriginal interests but also left Aboriginal peoples “vulnerable to the risks of government misconduct and ineptitude.”\textsuperscript{118}

In *Tsilhqot’in Nation*, the Supreme Court of Canada expanded upon the fiduciary duty doctrine. The Court explicitly considers the impact of the doctrine of fiduciary duty in the justification analysis in the context of government decisions that infringe section 35 rights. The Court found that fiduciary duty imposes specific limits on the government’s ability to justify infringement of Aboriginal title.

The first limit within the justification analysis linked to the government’s fiduciary duty was that “incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.”\textsuperscript{119} This holding specifically implicates considerations of justice as it mirrors the inherent limit that the Court previously placed on Aboriginal titleholders in using their lands. The inherent limit has been the subject of substantial academic criticism due to paternalistic overtones, which suggest that Aboriginal titleholders are incapable of making

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\textsuperscript{116} *Ibid* at para 79. It is worth noting that in *Wewaykum* at para 81, the Court departed from *Guerin*, *supra* note 111, in clarifying that fiduciary duty does not exist at large but rather in relation to specific Indian interests.
\textsuperscript{117} *Ibid* at para 79 citing Slattery, "Understanding Aboriginal Rights", *supra* note 114 at 753.
\textsuperscript{118} *Ibid* at para 80.
\textsuperscript{119} *Tsilhqot’in Nation*, *supra* note 9 at para 86.
\end{flushright}
reasonable and sustainable decisions in relation to their lands.\textsuperscript{120} Although importing a corresponding limit on government infringement of Aboriginal title lands does not alleviate the paternalism of the inherent limit on Aboriginal title-holders in their uses of their lands, the Court’s articulation of this corresponding limit on government’s infringement of Aboriginal title has mitigated some power imbalances between government and Indigenous communities as it relates to the doctrine of Aboriginal title.

The Court created a second limit in the justification analysis linked to the government’s fiduciary duty in importing the \textit{R v Oakes}\textsuperscript{121} test into the final step of the analysis. In the context of proven Aboriginal title,\textsuperscript{122} after considering the sufficiency of consultation and accommodation and whether the government could prove a compelling and substantial objective, the Court held that it must examine whether the government had acted in accordance with its fiduciary duty. This final inquiry requires courts to consider two factors:

\begin{itemize}
  \item[a)] whether the government is acting in a way that “respects that Aboriginal title is a group interest that inheres in present and future generations.”\textsuperscript{123} Specifically, “this means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.”\textsuperscript{124}
\end{itemize}


\textsuperscript{121} \textit{R v Oakes}, [1986] 1 SCR 103 [\textit{Oakes}].

\textsuperscript{122} It is not yet clear whether this additional step will also apply in other instances, for example, to the infringement of treaty rights or proven site-specific Aboriginal rights.

\textsuperscript{123} \textit{Tsilhqot'in Nation}, \textit{supra} note 9 at para 86.

\textsuperscript{124} \textit{Ibid}. This is a mirror of the inherent limit on Aboriginal titleholders that limits them from using their lands in ways that might deprive future generations of the benefit of that land enunciated in \textit{Delgamuukw}, \textit{supra} note 23 at para 128. This is the first time, however, that the Court has articulated that this limit also constrains government infringements. As such, this is a positive development in my view.
b) whether the government’s infringement is justified in relation to three key factors, originally enunciated in *Oakes*:

1. Rational connection – that the infringement is necessary to achieve the government’s objective;

2. Minimal impairment – that the government goes no further than necessary to achieve the objective; and

3. Proportionality – that the benefits are not outweighed by the adverse effects on the Aboriginal interest.125

There is voluminous literature dealing with the *Oakes* test in the context of Charter rights cases. It will be interesting to see how Canadian courts will apply this test in the context of government infringement of Aboriginal rights.126

The Supreme Court of Canada’s decision in *Manitoba Métis Federation*127 illustrates that the concept of justice has been revived as a central consideration in determining the outcomes of section 35 cases. In that case, the Court considered whether Canada breached its obligation to implement promises made to the Métis people in section 31 of the *Manitoba Act*.128 Section 31 provided that Canada would set aside 1.4 million acres of land to be given to Métis children. There had been significant delay in implementing section 31 of the *Manitoba Act* on the government’s part and by the time scrip was issued to the Métis children most of the section 31 land interests had already been sold. Due to this delay and other circumstances, the Métis have retained very little land in the Red River area. The Manitoba Métis Federation (MMF) sought a

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125 *Tsilhqot’in Nation*, supra note 9 at para 1107.
126 The potential effects of the importation of the *Oakes* test into the justification analysis would require a complex analysis of the relevant case law, which I cannot adequately address in this dissertation.
127 Although in this section I focus on *Manitoba Métis Federation*, supra note 82, there are arguably earlier instances when justice was imported into section 35 jurisprudence. One example is the interpretive principles enunciated in *R v Nowegijick*, [1983] 1 SCR 29 [Nowegijick], where the Supreme Court of Canada held that “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”
declaration that Canada had breached its promises on the basis of fiduciary duty doctrine or alternatively on the basis of the honour of the Crown. The government argued that the MMF’s claim was barred by the law of limitations or the equitable doctrine of laches. In the result, the Court held that the Métis were entitled to a declaration that Canada failed to implement s. 31 of the Manitoba Act as required by the honour of the Crown.

In the context of the government’s argument that the MMF’s claim was statute-barred or barred through the application of the equitable doctrine of laches, the Court examined the relationship between justice and reconciliation. The Court wrote:

What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the Charter and underlying s. 31 of the Manitoba Act, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and … cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less.

The Court also considered the “historical injustices” suffered by the Métis as a central component of its reasoning in finding that the Métis had not waived its rights or acquiesced through delay in bringing the claim. Here the Court explicitly links the

\[^{129}\text{Black's Law Dictionary, 6th ed (St Paul, Minn: West Publishing Co, 1990) at 875, defines laches as “neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity”}.\]

\[^{130}\text{The Court did not find that a fiduciary duty applied in this case.}\]

\[^{131}\text{Manitoba Métis Federation, supra note 82 at para 140. It is important to note that the Court mistakenly identified section 35 as being within the Charter in this passage.}\]

\[^{132}\text{In Mitchell, supra note 35, the Court explicitly recognizes that purpose of section 35 as including a just resolution of historical grievances. The Court held, at para 49, that section 35 was aimed at resolving ancient grievances of Aboriginal peoples: “in Sparrow...the Court construed s. 35(1) as affirming the promise of a new commitment by Canadians to resolve some of the ancient grievances that have exacerbated relations between aboriginal and non-aboriginal communities.”}\]
need to address the constitutional, historical grievances of the Métis to further the purpose of reconciliation. It therefore links the idea of justice with reconciliation.

The nexus between justice and reconciliation is also emphasized in theorizing about reconciliation in the Aboriginal law context.\(^{133}\) RCAP suggests that the lenses of justice and reconciliation should be used together to interpret and implement historic treaties and to govern continuing treaty relationships.\(^{134}\) Similarly, E Ria Tzimas argues that within reconciliation processes, justice and reconciliation are inextricably linked. In reflecting on the relationship between these concepts in the context of the South African Truth and Reconciliation Commission, Tzimas notes:

> there was a widespread recognition that justice and reconciliation were complementary and that one without the other would be detrimental to both. Justice was required to promote equitable relations. Reconciliation was required to put an end to endless cycles of recrimination and punishment. Together, each of those concepts provided the parameters for the legitimate use of the other.\(^{135}\)

Here Tzimas highlights the importance of linking justice with reconciliation. She notes that concepts of justice lead towards the promotion of more equal relationships, which is sorely needed in the context of Crown-Indigenous relationships. Considerations of justice therefore are central to the purpose of reconciliation that underpins section 35.

As the jurisprudence develops, the Court seems to be putting more emphasis on the explicit link between justice and the purpose of reconciliation underpinning section 35. In *Tsilhqot’in*, for example, the Supreme Court of Canada explicitly recognized that what is at stake in Aboriginal law cases “is nothing less than justice for the Aboriginal


\(^{134}\) RCAP, *ibid* at Recommendation 2.2.2.

group and its descendants and the reconciliation between the group and broader society.”

Further, *Manitoba Métis Federation* signals the Court’s recognition that unresolved historic grievances threaten the achievement of reconciliation between Indigenous and non-Indigenous peoples within Canada. In *Manitoba Métis Federation*, the Court explicitly incorporates the language of justice into its judgment and acknowledges the importance of a just outcome in section 35 cases. This movement is promising. The two more recent cases illustrate that reconciliation may support notions of distributive justice in recognizing jurisdiction over traditionally held lands and in remedying historic grievances.

### 2.2.5 Shifting the Focus: Reconciliation as Forward-Looking and Prospective

In earlier case law, the Supreme Court of Canada stressed the importance of considering both the “historical and future relationship with the Aboriginal peoples in question.” More recent case law has shifted in focus to broaden the Court’s interpretation of reconciliation to be more forward-looking and focused on resolving disputes prior to litigation. In *Little Salmon*, Justice Binnie notes the shift in focus from *Sparrow*, which was concerned with “sorting out the consequences of infringement” to *Haida Nation*, which “attempted to head off such confrontations by imposing on the parties a duty to consult and if appropriate accommodate in circumstances where development might have a significant impact on Aboriginal rights.

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136 *Tsilhqot’in Nation*, supra note 9 at para 23. The Court said this in the context of an *obiter* statement relating to a withdrawn government argument about a defect in the pleadings barring the Tsilhqot’in’s case.

137 *Taku River*, supra note 7 at para 24.
when and if established.”\textsuperscript{138} Rather than focusing on trying to address the dispute after the fact, the Court has endorsed proactive measures to reduce conflict and the need to resort to litigation.

The Court has interpreted reconciliation in a way that creates positive obligations on the Canadian government to engage in dialogue with Indigenous peoples in various circumstances. Reconciliation includes the imperative, in the Court’s view, for government to consult with and accommodate Indigenous peoples when government decisions may impact Aboriginal rights. Further, the Court has explicitly linked reconciliation to the government’s duty of good faith in negotiations, which in the Court’s view is often preferable to litigation.\textsuperscript{139} Recent articulations of reconciliation have therefore fundamentally shifted to be more forward-looking, proactive, constructive and relationship-oriented.

\textsuperscript{138} Little Salmon, supra note 5 at para 53. Although Justice Binnie seems to be addressing confrontations that arise in the context of asserted Aboriginal rights, I suggest that this shift in focus to consultation processes to head off confrontations applies equally in the context of both asserted and proven rights.

\textsuperscript{139} In Delgamuukw, supra note 23 at para 207, the Court held that “the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.” Similarly, in Rio Tinto Alcan v Carrier Sekani Tribal Council, [2010] 2 SCR 650 [Rio Tinto] at para 38, the Supreme Court of Canada recognized that the principle of reconciliation is aimed at promoting ongoing negotiations. In Mikisew Cree, supra note 98 at para 54, the Court confirmed that the negotiation of a binding treaty does not end the government’s duties of consultation and accommodation that flow out of the principle of reconciliation. Instead, reconciliation requires ongoing dialogue as decisions are made that may negatively impact Aboriginal communities whether or not they are signatories to a Treaty: see Little Salmon, supra note 5 at 91. For two articles supporting the view that Courts should be encouraging on-going dialogue and negotiation between Indigenous communities, governments and industry, see Shin Imai, “Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes” (2003) 41:4 Osgoode Hall LJ 587; and Kent Roach, “Aboriginal Peoples and the Law: Remedies for Violations of Aboriginal Rights” (1992) 21 Man LJ 498 at para 3. It is worth noting, however, that there is recent judicial precedent finding that there is no duty to negotiate on the part of the provincial or federal governments in the context of an alleged breach of treaty rights: see Songhees Nation v. British Columbia, 2014 BCSC 1783 [Songhees Nation].
The conceptualization of reconciliation as forward-looking has both advantages and disadvantages. On one hand, the forward-looking focus permits Indigenous and non-Indigenous peoples to envision a way to move forward in relationship with one another toward a shared future.\footnote{I discuss this in Chapter 7.} On the other hand, shifting the focus away from the past might permit and provide justification for denying the relevance of the past to the creation of a better future. As I discuss more fully in Chapter 5, the denial of the past can permit non-Indigenous peoples (including the Crown) to minimize the harm that Canadian laws and policies have inflicted upon Indigenous peoples, which continue to have an on-going negative impact within Indigenous communities. In so minimizing, non-Indigenous peoples could emphasize the Court’s forward-looking articulation of reconciliation to justify a common position of forgetting the past and moving on\footnote{Borrows, Canada’s Indigenous Constitution, supra note 32 at 171; Judith Lewis Herman, Trauma and Recovery (New York: Basic Books, 1992) at 8.} without engaging in the challenging work of meaningful reconciliation.

**2.3 The Duty to Consult and Accommodate as a Procedural Requirement of Reconciliation**

The duty to consult and accommodate has evolved as a central constitutional mechanism to promote the reconciliation of the relationship between the Crown and Indigenous peoples in relation to Aboriginal and treaty rights. The duty to consult and accommodate is a positive obligation on government where it contemplates actions that may impact existing or yet-to-be-determined Aboriginal or treaty rights.\footnote{Haida Nation, supra note 6 at para 27.}
The Supreme Court of Canada first mentioned the duty to consult in *Sparrow* but articulated in detail what the duty to consult might involve in *Delgamuukw*. In *Delgamuukw*, in the context of the possible infringement of Aboriginal title, the Court held:

There is always a duty of consultation. ... The nature and scope of the duty of consultation will vary with the circumstances. 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. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of aboriginal peoples whose lands are at issue. 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. Here the Court confirms the existence of the duty to consult and sets out a spectrum of consultation depending on an assessment of the strength of the Aboriginal claim.

In *Haida Nation*, the Supreme Court of Canada held that the duty to consult and accommodate flows out of the principle of reconciliation, and requires the federal and provincial governments to consult and potentially accommodate Aboriginal interests in the case of proven and not-yet-proven claims by Aboriginal communities. The Court held that the duty to consult “arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.” Here the Court affirmed that the duty to consult not only applies in the context of established rights

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143 The Court first mentioned this duty in *Sparrow*, supra note 3 at para 82 in the context of analyzing justified infringements of section 35 rights.
144 *Delgamuukw*, supra note 23 at para 168.
145 *Haida Nation*, supra note 6 at para 32.
146 *Ibid* at para 27.
147 *Ibid* at para 35.
but also in the context of not-yet-proven but asserted rights. In relation to not-yet-proven rights, the Court held:

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.\textsuperscript{148}

In \textit{Haida Nation}, the Court also clarified that the principle of reconciliation requires balancing and compromise\textsuperscript{149} and good faith effort on the part of government to substantially address the concerns of Aboriginal communities.\textsuperscript{150}

Although protecting asserted but unproven rights is arguably a necessary precondition to moving towards a just and fair settlement of Aboriginal claims, the Court has made it clear that asserted claims do not require the same level of consultation as proven claims.\textsuperscript{151} The duty to consult owed in cases of asserted rights therefore may not be as high as in cases of proven rights. Given the differing scope of the duty to consult in the context of asserted versus proven rights, Indigenous communities have an incentive to settle their claims to receive higher procedural

\begin{footnotesize}
\textsuperscript{148} \textit{Ibid} at para 27.
\textsuperscript{149} \textit{Ibid} at para 50; see also \textit{Taku River}, supra note 7 at para 42.
\textsuperscript{150} \textit{Haida Nation}, supra note 6 at para 49. This paragraph reproduces and adapts writing from Manley-Casimir, “Reconciliation” supra note 25 at 34.
\textsuperscript{151} \textit{Tsilhqot’in Nation}, supra note 9 at para 79.
\end{footnotesize}
protections through consultation processes. Further, the differing scope provides incentives for industry and government to rush through consultations processes prior to claims being settled. In British Columbia, for example, where a high number of unsettled claims still exist, industry proponents are racing to consult Indigenous communities prior to the final settlement of claims in order to purposefully avoid higher consultation requirements, which at the highest level might require the Indigenous nation’s full consent for a project to proceed.

In Mikisew Cree, the Court emphasized, in the treaty context, that adequate consultation in advance of decision-making was necessary to properly manage relationships between Aboriginal peoples and the Canadian government and in order to promote reconciliation. The Court held that unilateral Crown action that ignores the mutual promises made by treaty is the “antithesis of reconciliation and mutual respect.”

The duty to consult and accommodate lies on a spectrum depending on the strength of the Indigenous communities’ Aboriginal rights or treaty claims. In Grassy Narrows First Nation v. Ontario (Natural Resources), the Court clarified that the government has a positive duty to inform itself about the impacts of a proposed project

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152 Christie, "Developing Case Law", supra note 88 at para 139. Christie argues that the Supreme Court of Canada’s differing requirements for the duty to consult in cases of unsettled versus settled claims exerts an assimilative pressure on Aboriginal nations to settle claims to gain stronger protection.


154 Mikisew Cree, supra note 98 at para 4.

155 Ibid at para 49.

156 Grassy Narrows First Nation v Ontario (Natural Resources), 2014 SCC 48 [Grassy Narrows].
and communicate its findings to the affected Aboriginal community.\textsuperscript{157} After doing so, the government is responsible for determining the extent of its consultation duties.

In \textit{Haida Nation}, the Court elucidated how to determine the extent of consultation and accommodation in each particular case:

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. ... At the other end of the spectrum lie cases where a strong \textit{prima facie} case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.\textsuperscript{158}

Because there are so many variables with respect to the strength of the claim, the processes put in place, and any government responses, the sufficiency of consultation and accommodation is assessed on a case-by-case basis and is context specific.

The Court also clarified that Indigenous claimants have an important role in the process of assessing the strength of the claim in outlining their claims clearly, delineating the scope and nature of the Aboriginal rights they assert, and describing the alleged infringements of those asserted rights.\textsuperscript{159} It is up to the government, however, to assess the strength of the asserted claim and determine the scope of consultation since the government’s “[k]nowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate.”\textsuperscript{160}

\begin{footnotesize}
\begin{enumerate}
\item[Ibid] at para 52.
\item[Haida Nation, supra note 6 at paras 43–44.]
\item[Ibid at para 36.]
\item[Ibid at para 37.]
\end{enumerate}
\end{footnotesize}
is responsible to determine the strength of the claim is problematic in that a finding of a strong *prima facie* claim requires more intensive consultation; since more intensive consultation involves more costs, both in government time and in providing resources to Aboriginal claimants to participate meaningfully in consultations, there are built-in incentives for the government to assess an Aboriginal claim as weak.\textsuperscript{161}

The Court also clarified that Aboriginal peoples cannot frustrate consultation processes by refusing to participate or by placing unreasonable conditions on the government.\textsuperscript{162} The duty to consult has been articulated as requiring the parties to “work together to reconcile their interests.”\textsuperscript{163} Here the Court emphasizes the collaborative nature of the duty to consult and the contrast between consultation processes and litigation.\textsuperscript{164} The Court held that consultation “is a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests.”\textsuperscript{165} This duty invokes the honour of the Crown, must be interpreted generously\textsuperscript{166} and is compulsory.\textsuperscript{167} In cases where government efforts to consult and accommodate have been found inadequate, the Court may suspend or quash the government’s decision,\textsuperscript{168} provide injunctive relief,

\begin{flushright}
\textsuperscript{161} Although if the government assesses the claim as weak without sufficient basis to do so, it would open the door to judicial review, which could potentially lengthens the process. I am indebted to Gordon Christie for this point.
\textsuperscript{163} \textit{Rio Tinto} at supra note 139, para 34.
\textsuperscript{164} \textit{Ibid}.
\textsuperscript{165} \textit{Ibid} at para 74.
\textsuperscript{166} \textit{Ibid} at para 89.
\textsuperscript{167} \textit{Ibid} at para 75.
\textsuperscript{168} \textit{Tsilhqot’in Nation}, supra note 9 at para 79.
\end{flushright}
order damages or order that appropriate consultation and accommodation be carried out.\textsuperscript{169}

The Court’s articulation of the duty to consult and accommodate has been critiqued by some academics as constituting a limiting vision of constitutionally protected Aboriginal rights. Gordon Christie, for example, argues that the duty to consult only requires the Canadian government to consult Indigenous nations about the visions that the government has for the uses of Indigenous lands but does not require that lands be used in a way that corresponds to Indigenous nations’ understandings of their relationships with their territories.\textsuperscript{170} Christie notes that “[i]n seeking to trigger the duty to consult, an Aboriginal nation is acknowledging its lack of alternative recourse, and seeking to bring to bear this inadequate, assimilative tool upon problems generated by the larger colonial context within which its members have lived for many generations.”\textsuperscript{171} As currently formulated, the duty to consult may not leave room for Indigenous peoples within Canada to promote their visions of how they want to relate to their traditional lands and waters, particularly where claims are asserted and not-yet-proven.\textsuperscript{172}

Many of the measures that the Supreme Court of Canada lists as meeting the requirement of appropriate consultation do not require either the government or private business parties to engage in meaningful dialogue with Indigenous peoples. In the context of asserted claims, even where the Court has identified a strong \textit{prima facie}

\begin{footnotesize}
\textsuperscript{169} \textit{Rio Tinto}, \textit{supra} note 139 at para 37.
\textsuperscript{170} Christie, "A Colonial Reading" \textit{supra} note 29 at para 56.
\textsuperscript{171} \textit{Ibid} at para 45.
\textsuperscript{172} This paragraph reproduces and adapts writing from Manley- Casimir, "Reconciliation", \textit{supra} note 25 at 35.
\end{footnotesize}
case, it indicates that an Indigenous community will be given the “opportunity to make submissions for consideration [a one-way communication process from the Indigenous community to the decision-makers], formal participation in the decision-making process [a process designed without the input of Indigenous stakeholders which may not include a forum for engaging in actual, sustained dialogue],\textsuperscript{173} and provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the decision [a one-way communication from government to the Indigenous community].”\textsuperscript{174} Nothing in this description indicates that the consultation process would involve non-Indigenous parties coming to understand the harm that the resource development creates or threatens to create from the Indigenous community’s perspective.\textsuperscript{175} Rather than engaging in a mere checklist exercise in the context of the duty to consult and accommodate, a more desirable approach would be to enter into relationship with Indigenous leaders and community members and attempt to genuinely understand the harms from their perspectives.

Finally, the duty to consult and accommodate is the Canadian government’s responsibility and cannot be delegated to private interests.\textsuperscript{176} However, it is often private development companies that not only have the appropriate level of familiarity with the project proposal but also the expertise in the particular industry to provide the

\textsuperscript{173} A prime example of this occurs in \textit{Little Salmon}, supra note 5, which I analyze at the end of this chapter.
\textsuperscript{174} \textit{Haida Nation}, supra note 6 at para 44.
\textsuperscript{175} In “Mining, Consultation, Reconciliation and the Law” (2011) 10:1 Indigenous LJ 1 at para 91, Rachel Ariss & John Cutfeet discuss idea of understanding the harm from Indigenous perspectives in the context of resource development projects.
\textsuperscript{176} \textit{Haida Nation}, supra note 6 at para 53.
requisite information to consult with Indigenous communities.\textsuperscript{177} As a result, in practice, private development companies perform much of the consultation with the government supervising those parts of the process. This begs the question of whether the government is in fact delegating much of it duty to consult and accommodate to private industry and whether courts should closely consider the extent of government involvement in consultation processes that heavily involve private industry stakeholders. Even in this supervisory role, however, it is evident that the Canadian government’s interests are aligned with project development since the Canadian economy is highly dependent on the resource extraction industry for its growth. As such, there is an inherent bias built into the doctrine of the duty to consult and accommodate that is pro-development. Where Indigenous communities oppose such development, it is hard to imagine that the government’s duty to consult and accommodate might stop a proposed project.

The duty to consult and accommodate as it is currently conceptualized also creates problematic practical implications for Indigenous communities. Some Indigenous communities are inundated with consultation requests for resource development projects, but may not have adequate personnel to deal with the many requests, and may lack expertise to respond meaningfully.\textsuperscript{178} The complexity of transmission development, oil and gas extractions, or mining projects, to name a few, would overwhelm most small communities. The consultation requests place a huge


\textsuperscript{178} Conversation with Leanna Farr, member of the Temagami First Nation who worked extensively on developing Temagami First Nation’s Consultation Protocol (13 January 2011).
burden on Indigenous communities. In addition, socio-economic and social issues facing many Indigenous communities may divert attention away from meaningfully participating in consultations.

In the context of proven Aboriginal title, the Court has made clear that the government’s duty to consult and accommodate is stringent, and that decisions made with respect to such lands may require the full consent of the Aboriginal titleholders.\textsuperscript{179} In \textit{Tsilhqot’in}, the Court clarified that the Aboriginal nation’s consent would be required in cases where Aboriginal title is proven, however, the government could justify the infringement of Aboriginal title if it showed that:

\begin{itemize}
  \item it has discharged its duty to consult and accommodate;
  \item its actions were backed by a compelling and substantial objective; and
  \item the action was consistent with the government’s fiduciary duty.\textsuperscript{180}
\end{itemize}

The Court has also held that in some cases of infringement, fair compensation may be required.\textsuperscript{181}

The relationship between consent and infringement is problematic. The idea of Aboriginal titleholders’ consent is incongruent with unilateral, justifiable government infringement of proven Aboriginal title. It is also incongruent that infringement of Aboriginal title could be consistent with the government’s fiduciary duty if the doctrine of fiduciary duty no longer rests on paternalistic grounds. Finally, what is most incongruent is the way in which this conceptualization of the duty to consult and accommodate is linked to a fulsome understanding of the purpose of reconciliation.

\textsuperscript{179} \textit{Tsilhqot’in Nation}, supra note 9 at para 76.
\textsuperscript{180} \textit{Ibid} at para 77.
\textsuperscript{181} \textit{Delgamuukw}, supra note 23 at para 169.
2.3.1 The Duty to Accommodate: A Heavy Burden on Aboriginal Peoples

The duty to accommodate flows from concerns raised during meaningful consultations. The Court articulates the duty to accommodate as “seeking compromise in an attempt to harmonize conflicting interests” and as requiring “good faith efforts to understand each other’s concerns and move to address them.” The Court has stressed that “[r]esponsiveness is a key requirement of both consultation and accommodation;” as such, it may require a change in the government plans or policies to accommodate Aboriginal concerns.

Accommodation in practice has resulted in minor changes to government plans. Just like the duty to consult, the duty to accommodate does not require any consideration of how an Aboriginal community might want to use the lands in question. Rather, the Crown continues to make all the fundamental decisions about how the lands are used and Aboriginal concerns may result in modifications to how those plans are put into action. The duty to accommodate therefore creates a minor burden on the government (or industry) and by contrast, imposes a heavy burden on Indigenous communities to accommodate the government’s plans and the needs of broader Canadian society.

Just as it does with respect to reconciliation, the Court limits the potential of the duty to accommodate by reinforcing the need to balance decisions related to accommodation between asserted Indigenous and other societal interests. In *Haida Nation*, supra note 6 at para 49.

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182 *Haida Nation*, supra note 6 at para 49.
183 *Taku River*, supra note 7 at para 25.
184 Christie, "Developing Case Law", supra note 88 at para 64.
185 Ibid.
186 Christie, "A Colonial Reading", supra note 29 at note 56.
Nation, the Court linked the duty to consult and accommodate explicitly to the principle of reconciliation. The Court held:

Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.\(^{187}\)

Here the Court articulates that the duty to accommodate involves balancing competing societal interests against constitutionally protected Aboriginal and treaty rights and grounds this balancing in the purpose of reconciliation. As D’Arcy Vermette notes: “[t]he problem with such an approach is that the Crown is not in a position to make such a determination with any degree of neutrality or objectivity.”\(^{188}\) This balancing test positions Aboriginal rights in opposition to other interests and brings to mind the image of a scale where if one side wins the other side loses.

In *Haida Nation*, the Court indicated that the duty to accommodate does not require agreement to be reached\(^{189}\) but courts will consider the appropriateness of the accommodation in light of Aboriginal concerns:

...the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.\(^{190}\)

Although the Court indicates that the government may be required to take steps to avoid irreparable harm and minimize the effects of the infringement in cases where it

\(^{187}\) *Haida Nation*, *supra* note 6 at para 50; see also *Taku River*, *supra* note 7 at para 2.

\(^{188}\) Vermette, "Dizzying Dialogue", *supra* note 5 at sec III.

\(^{189}\) *Haida Nation*, *supra* note 6 at para 42.

\(^{190}\) *Ibid* at para 47.
assesses the Aboriginal communities’ claims as strong, Aboriginal peoples may have different perspectives on what constitutes irreparable harm.\textsuperscript{191}

Further, the Court’s statement relating to irreparable harm could be read in two ways. It could be interpreted to support the avoidance of irreparable harm to Aboriginal rights or interests (full stop) or it could be interpreted to support the avoidance of the irreparable harm to the extent possible in the context of the infringement of those rights or interests. The first interpretation might support the revoking of a license or the stopping of a proposed development if the harm were characterized as irreparable to Aboriginal rights or interests. The second interpretation accepts the reasonableness of the fact of infringement and seeks to come up with a solution to avoid irreparable harm in the context of the project going forward. This second interpretation does not contemplate stopping the project within the possible scope of solutions to address the Aboriginal concerns raised.

The case law on accommodation supports the second interpretation where there is no questioning of whether the project should go forward; rather, the question is how the project will proceed in light of the related Aboriginal concerns. The Court stresses the fact that the process of accommodation “does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. ... Rather, what is required is a process of balancing interests, of give and take.”\textsuperscript{192} This clarification

\textsuperscript{191} See generally Ariss & Cutfeet, supra note 175; and Ma’iingan, supra note 67. This is especially so since many Indigenous legal traditions require the consideration of the rights of all life forms (both animate and inanimate) and of past and future generations in decision-making. I expand on this in Chapter 4.

\textsuperscript{192} Haida Nation, supra note 6 at para 48. Although the idea of a veto may be controversial to the broader Canadian society, if Indigenous communities were to have a veto power the government would be highly incentivized to negotiate. This would arguably also serve the broader purposes of reconciliation that the Court has articulated in relation to the government’s duty to negotiate.
confirms the limiting vision of the Court’s interpretation of the duty to consult and accommodate – a vision which requires Indigenous communities to bear the brunt of the accommodation.

Although not many cases exist at the Supreme Court of Canada level on whether the duty to accommodate has been met, there are several lower court decisions that support a view of accommodation that requires the government to make concessions or change its plans to appropriately address the concerns of affected Aboriginal communities.\(^\text{193}\) It is worth noting, however, that in all of those cases, the project proceeded.

2.4 Limits of the Duty to Consult and Accommodate in Fulfilling the Purpose of Reconciliation: \textit{Rio Tinto} and \textit{Little Salmon}

Two recent Supreme Court of Canada cases illustrate some of the limitations of the duty to consult and accommodate in promoting the purpose of reconciliation. In this section, I examine in detail the cases of \textit{Rio Tinto} and \textit{Little Salmon} with a view to determining the extent to which the Court’s consideration of the duty to consult and accommodate meshes with the recent developments in the reconciliation jurisprudence.

2.4.1 \textit{Rio Tinto v Carrier Sekani Tribal Council}

In \textit{Rio Tinto}, the British Columbia government sought approval of a 2007 energy purchase agreement (EPA) for the sale of excess power to BC Hydro. The issue arose

\(^{193}\) See \textit{e.g. Wi’ilitsux v British Columbia (Minister of Forests)}, [2008] BCJ No 1599 (BCSC) [Wi’ilitsux] at para 220; see also \textit{Gitanyow First Nation v British Columbia (Minister of Forests)}, [2004] 38 BCLR (4th) 57 (BCSC) [\textit{Gitanyow}] at para 50. This paragraph reproduces and adapts writing from Manley-Casimir, "Reconciliation", \textit{supra} note 25 at 35–36.
against a backdrop of the Carrier Sekani First Nation’s (“Carrier Sekani”) historical grievance regarding the initial construction of the hydro dam. In the 1950s, the BC government authorized the building of a dam and reservoir, which altered the flow of water in the Nechako River. The Carrier Sekani has relied on the Nechako River for fishing and sustenance purposes since time immemorial. When the dam and reservoir were built, the BC government had not consulted with the Carrier Sekani. At the time the case was heard, the Carrier Sekani’s treaty claims were still unresolved.

The BC Utilities Commission held that the BC government had no duty to consult with respect to the EPA since it would not have any effect on the water levels of the Nechako River, rather water releases would flow to the Kemano River to the west. At the Supreme Court of Canada, the Carrier Sekani argued for a broad interpretation of the duty to consult. It asserted that even if the EPA did not impact the Nechako River water levels, the duty to consult should be triggered since the EPA is part of a the larger hydro-electric project that continues to impact its rights negatively.

In the result, the Supreme Court of Canada upheld the Commission’s decision finding that the duty to consult was not triggered despite the underlying historical breach regarding the initial building of the dam. Specifically, the Court held:

An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. ...The question is whether there is a claim or right that potentially may be adversely impacted by the current government conduct or decision in question. Prior or continuing breaches, including prior

194 *Rio Tinto*, supra note 139 at para 3.
197 *Ibid* at para 12.
198 *Ibid* at para 52.
failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.\textsuperscript{199}

Here the Court clarified that the duty to consult is only triggered in the case of current government decisions that may affect proven or not-yet-proven Aboriginal or treaty rights. Aboriginal claimants therefore have to show that a current government decision may negatively impact section 35 rights.

The Court highlighted that the duty to consult is not appropriate as a remedy in cases of past decisions that may have negatively impacted Aboriginal or treaty rights.\textsuperscript{200} The Court held:

Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past.\textsuperscript{201}

Here the Court stresses that consultation is not an appropriate process to deal with historical breaches of section 35 rights. Other remedies are available such as compensation or damages. Although this comment might be interpreted to support negotiations regarding the past breach, it may also be interpreted as supporting further litigation. Excluding the relevance of the past historical grievance from the scope of the government’s duty to consult in relation to decisions built upon that historical breach limits the ability of this duty to encourage the parties to constructively address the root

\textsuperscript{199} Ibid at paras 48–49.
\textsuperscript{200} Ibid at para 54.
\textsuperscript{201} Ibid at para 83.
causes of the dispute. Parties with an unresolved historical grievance might have difficulty meeting in good faith regarding government decisions that arise directly out of that unresolved grievance.

Here I am arguing that unresolved historical grievances should be included within the scope of the duty to consult and accommodate in the context of Aboriginal communities with proven Aboriginal or treaty rights claims. This argument is equally compelling in the context of Aboriginal claimants with asserted claims where there are unresolved historical grievances. In the context of British Columbia, for example, where there are many unresolved historical Aboriginal claims, a fulsome conception of the duty to consult and accommodate would include consideration of past or on-going breaches. Without considering the fundamental causes of the rupture in the relationships between Indigenous communities and the Canadian state – the colonial project itself – Indigenous communities and the rest of Canada will remain paralyzed in a colonial straitjacket.

The Court’s holding in Rio Tinto supports a forward-looking approach to the duty to consult where current government decisions might negatively impact proven or yet-to-be proven section 35 rights. It flatly rejects a broader approach to the duty to consult that is grounded in addressing the fundamental disputes that threaten to impede the reconstruction of positive relationships between Indigenous peoples and the Canadian state. If a broader duty to consult were imagined, however, it would open up the possibility that all issues that contributed to the current dispute could be dealt with constructively through dialogue. This view of consultation would more appropriately link the duty to consult with the reconciliation purpose of section 35. It
would also more appropriately link reconciliation to the normative values of honour and justice.

2.4.2 Beckman v Little Salmon/Carmacks First Nation

In *Little Salmon*, the Supreme Court of Canada considered a dispute that arose in the context of an application by a Yukon resident, Larry Paulsen, for a grant of 65 hectares for farmland. The land subject to the grant applications was made up of lands surrendered by the Little Salmon/Carmacks First Nation ("Little Salmon"), which bordered Little Salmon’s settlement lands. It was subject to an existing treaty right of access for hunting and fishing for subsistence. The lands were governed by the Little Salmon/Carmacks First Nation Final Agreement (LSCFN Treaty), which provided that land surrendered under the Treaty could be taken up from time to time for other purposes, including agriculture. One Little Salmon member, Johnny Sam, had existing trap lines within the Paulsen land grant, a small proportion of which would be negatively impacted by the land grant.

Under the LSCFN Treaty, section 16.7.1 established the Fish and Wildlife Management Board. This Board is made up of six representatives from the Yukon First Nations and six representatives from government and has the primary authority to manage fish and wildlife in the Yukon. Given this role, one would expect that the recommendations of this Board would carry significant weight and impact land use decisions. After the Paulsen application and before the final decision was made, the

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203 The Court of Appeal found that one-third of one percent of Johnny Sam’s trap line, which covered 21,435 hectares, would be affected.
Fish and Wildlife Management Board proposed to designate 10,000 hectares as a Habitat Protection Area to protect wildlife and habitat in the area of the Yukon River.\textsuperscript{204} The Paulsen lands fell within this area.\textsuperscript{205} The proposal did not call for a freeze on land grants within the proposed Habitat Protection Area.\textsuperscript{206}

Little Salmon had made the territorial government aware of its concerns regarding the Paulsen land grant in writing. Its concerns included the negative impacts on Johnny Sam’s trap line and on nearby timber harvesting, the loss of animals to hunt and potential damage to adjacent cultural and heritage sites.\textsuperscript{207} The letter did not mention the Habitat Protection Area proposal. Little Salmon had a representative who sat on the Land Application Review Committee (LARC), which was responsible for reviewing Paulsen’s application.\textsuperscript{208} The representative was invited to attend the Committee meeting to discuss the Paulsen land grant but was unable to attend for undisclosed reasons. No other Little Salmon representative attended the meeting.

The remaining LARC members, made up of mainly territorial government officials, considered the First Nations’ concerns as raised in the letter and concluded that the loss of 65 hectares would be minimal for Johnny Sam. They noted that, in any event, Johnny Sam could apply for compensation under the Little Salmon Treaty for any diminution in value relating to his trap lines. Subsequently, the First Nation met with Yukon Agricultural Branch Staff who took the position that the government

\textsuperscript{204} Little Salmon, supra note 5, para 20. 
\textsuperscript{205} Ibid. 
\textsuperscript{206} Ibid. 
\textsuperscript{207} Ibid at para 23. 
\textsuperscript{208} Ibid at para 19.
consulted through the LARC process and that meetings and discussions with the First Nation were not legally required but instead had been only a courtesy.209

In October 2004 the Director approved the Paulsen application and informed Larry Paulsen by letter of the approval.210 It failed to inform the First Nation that a decision had been made until the summer of 2005 – over eight months later.211 In the interim, the Little Salmon First Nation and Johnny Sam continued to express their opposition in letters to the Yukon government.212

The First Nation launched an application for judicial review based in part on its perception that the Yukon government’s behaviour undermined relationships between the government and Little Salmon.213 It asserted that the Director’s reliance on compensation for Johnny Sam failed to account for the cultural and educational importance of Johnny Sam’s trap line and for the fact that Johnny Sam was not interested in compensation. The First Nation submitted, however, that since forest fires had already damaged a portion of Johnny Sam’s trap line, the loss of the additional 65 acres was significant.214 In addition, it submitted that timber-harvesting activities were also negatively impacting Johnny Sam’s ability to continue his traditional trapping pursuits.215 Further, the First Nation argued that the Paulsen building would trigger a no-shooting zone that would affect Johnny Sam’s use of his cabin and trap line.

210 Ibid at para 27.
211 Ibid at para 29.
212 Ibid at para 28.
213 Ibid at para 32.
214 Ibid at para 21.
215 Ibid at para 23.
The Supreme Court of Canada held that the decision of the territorial government to approve Paulsen’s land grant met the standard of reasonableness and fell within a range of reasonable outcomes.\(^\text{216}\) The Court also held that face-to-face consultation between the First Nation and Director was not necessary to meet the requirements of the duty to consult.\(^\text{217}\) Specifically, the Court held:

consultation was made available and did take place through the LARC process... and the ultimate question is whether what happened in this case (even though it was mischaracterized by the territorial government as a courtesy rather than as the fulfillment of a legal obligation) was sufficient.\(^\text{218}\)

Citing *Taku River*, the Court confirmed that consultation held in a forum created for another purpose may satisfy the duty to consult as long as the appropriate level of consultation is provided.\(^\text{219}\)

The Court also held that Johnny Sam was not a necessary party to the consultation because his entitlement was a “derivative benefit based on the collective interest of the First Nation of which he was a member.”\(^\text{220}\) By contrast, the Court highlighted that Larry Paulsen’s stake in the decision was of “considerable importance.”\(^\text{221}\) It held that Paulsen was an ordinary citizen entitled to a government decision reached with procedural fairness within a reasonable time. It positioned Paulsen as an innocent victim caught in the middle of the dispute between the First Nation and the territorial government. The Court notes:

It is impossible to read the record in this case without concluding that the Paulsen application was simply a flashpoint for the pent-up frustration of the First Nation

\(^\text{216}\) *Ibid* at paras 15 & 48.
\(^\text{217}\) *Ibid* at para 15.
\(^\text{218}\) *Ibid* at para 39.
\(^\text{219}\) *Ibid*. I discuss this further in Chapter 3.
\(^\text{220}\) *Ibid* at para 35.
\(^\text{221}\) *Ibid*.
with the territorial government bureaucracy. However, the result of disallowing the application would simply be to let the weight of this cumulative problem fall on the head of the hapless Larry Paulsen (who still awaits the outcome of an application filed more than eight years ago). This would be unfair.\textsuperscript{222}

Here the Court gives considerable weight to Paulsen’s eight-year wait in hearing about the outcome of his application. Although eight years is admittedly a long time to wait for a government decision, one’s perspective might shift in considering that the disputes between the Canadian government and Indigenous peoples have been ongoing for hundreds of years and the formal negotiations of the Little Salmon Treaty took over 20 years. Although taking Paulsen’s perspective into account certainly should have weighed into the decision-making, Johnny Sam’s and the Little Salmon First Nation’s perspectives should have also been given considerable weight.

Similar to \textit{Rio Tinto}, the \textit{Little Salmon} case highlights the limits of the duty to consult and accommodate in fulfilling the reconciliation purpose at the heart of section 35. In the end, the Little Salmon First Nation did not feel that the process of consultation provided an adequate forum for its concerns to be meaningfully heard. Further, the First Nation did not feel that the outcome of the consultation was just.\textsuperscript{223} Had more face-to-face dialogue taken place, other concerns might have been raised including the Habitat Protection proposal and the cumulative impacts of the diminishment of Johnny’s Sam trap line. Although this may not have altered the government decision, at least the Little Salmon First Nation may have considered the process fairer and more legitimate since its concerns had been heard.

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\textsuperscript{222} \textit{Ibid} at para 80.

\textsuperscript{223} See \textit{Taku River}, \textit{supra} note 7, and \textit{Mikisew Cree}, \textit{supra} note 98, for other cases where the First Nation was not satisfied with the process or outcome of the consultations.
In *Little Salmon*, the Court failed to consider the *quality* of the relationship and the *character* of the interactions between the Crown and Little Salmon. The Court found that the duty to consult had been met based on the fact that Little Salmon had received notice of the Paulsen application and had an opportunity to state its concerns through the LARC process.\(^{224}\) I would characterize this as a checklist approach. A better approach would be to consider how the government acted and whether those actions supported the rebuilding of positive relationships. If the Court had taken this approach, it would have considered the government’s position that consultation was a mere courtesy and its failure to notify Little Salmon that a decision had been made for over eight months as negative factors in assessing whether the duty to consult and accommodate had been met. Specifically, these factors would have affected the Court’s assessment of whether the consultation in this case furthered the purpose of reconciliation by upholding the Crown’s honour and advancing a just and fair outcome.

Rather than considering the quality of the relationship, the Court, in its duty to consult jurisprudence, sets out the minimal requirements for the Crown to meet its legal duty to consult and accommodate. Without a more detailed analysis of the way in which the Crown engages in consultations, the duty to consult and accommodate will continue to fall short of promoting the grand purpose of section 35 – the reconciliation of Indigenous and non-Indigenous peoples.

### 2.5 Concluding Thoughts

The shift from sorting out the consequences of infringement to requiring consultation prior to infringement occurring is a welcome development in the section

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\(^{224}\) *Little Salmon*, *supra* note 5 at para 79.
reconciliation case law. The Supreme Court of Canada has laid the groundwork for the development of the duty to consult and accommodate in a way that fosters further relationship-building between Indigenous and non-Indigenous peoples within Canada. To achieve the potential for the duty to consult to provide “the necessary foundation of a successful relationship with Aboriginal people,” however, the Court needs to provide more guidance on how appropriate consultation processes might be implemented. As Mark Walters notes, reconciliation involves “finding within, or bringing to, a situation of discordance a sense of harmony.” Without reconsidering the way in which we engage and speak with one another, it will remain difficult to create a sense of harmony between Indigenous and non-Indigenous peoples. Further, without more detailed directives on how the Crown might engage in a meaningful consultation process, the reconciliation purpose underlying section 35 may remain largely unfulfilled. In the following Chapters, I suggest that a framework building upon bijural principles might be useful to guide the development of the duty to consult and accommodate in a way that fosters the building of positive, long-term, sustainable relationships between Indigenous and non-Indigenous peoples within Canada.

225 Ibid at para 55.
226 Walters, "Jurisprudence", supra note 50 at 167.
In 1990, a resource extraction company, called Green Co, came onto lands that fell within the Yellow Valley First Nation’s traditional territories. Green Co had not contacted the First Nation but had licenses from the Ontario government to commence exploratory drilling in the area. The lands subject to the licenses were largely made up of forest areas that the First Nation used to hunt and trap. Within the lands there was also a half-square kilometer area of spiritual significance, which included burial sites and a hilly area where Elders went on vision quests and passed down traditional teachings and ceremonies to younger community members.

Green Co began exploratory drilling and soon after Yellow Valley’s representatives went out to ask the company to stop. Green Co asserted that it had valid licenses to conduct exploratory drilling and the government was aware that it intended to do so. The leadership of the Yellow Valley First Nation contacted the Ministry of Environment to find out the status of the drilling and whether the government had assessed the possible impact such drilling could have on its rights to hunt and trap in the area. The government responded that it would provide information on the project out of courtesy and faxed the relevant documentation.

The First Nation held a community meeting in which it decided to create a blockade to deny access to the exploratory drilling sites. The most important site to be protected was the burial site and spiritually significant area so it blocked road access in several locations to protect this area. Green Co arrived to find its access obstructed. At this point, Green Co tried to initiate some consultations with the Yellow Valley leadership about gaining access to the drilling sites. The leadership agreed to a meeting at which it expressed its concerns about the exploratory drilling,
including its effects on the sacred burial and spiritual sites as well as the animals in the area. Green Co altered its plan slightly by agreeing to drill the other sites first and leave those located in that spiritual area until later. The community members did not feel this plan adequately addressed its concerns and continued to blockade the road. Green Co then filed an application for a court injunction, which was granted. Many community members were arrested for breaching the injunction, including the Chief and Band Council members. Due to on-going demonstrations and objections from Yellow Valley’s leadership and community members, Green Co abandoned its mining operation in the area.
Chapter 3: Developing a Relational Framework for the Duty to Consult and Accommodate: A Principles-Based Approach

We need to ask: “How can this relationship be repaired and work in the future?”¹

The duty to consult and accommodate as it is currently formulated does not further the goal of reconciliation underlying section 35. In this chapter, I suggest that one way to develop the doctrine of the duty to consult and accommodate to further reconciliation is through the development of an intersocietal, normative, relational framework to mediate the two legal systems. I suggest that this framework would best be based on principles² – specifically the principles of respect, recognition, reciprocity and reconciliation – that find support in both Indigenous and non-Indigenous legal systems.

I argue that the principles-based approach is useful to apply to the duty to consult and accommodate for four reasons:

1. principles provide a prescriptive framework to help assess the sufficiency of consultation processes;

2. principles are flexible and can evolve to changing circumstances;

3. there are historical and legal precedents that support the use of a principles-based approach to guide the development of legal doctrine in various areas; and

4. such an approach, when developed particularly to apply in the area of the duty to consult and accommodate in Aboriginal law, is more suitable than transplanting an existing procedure from a different area of law that was not designed specifically to address the complexities that arise in Aboriginal law.

² For the purposes of my discussion, I use the word “principles” to denote abstract legal prescriptions.
Further, I assert that a principles-based approach that draws on intersocietal principles would usefully guide the rebuilding of Indigenous/non-Indigenous relationships and create more legitimacy within consultation and accommodation processes and case law.

Before launching into my discussion, it is useful to clarify that the “principles-based approach” that I advocate rejects a universalist application of principles. To clarify, a universalist approach involves an approach whereby “justice is satisfied by appealing to a set a principles and procedures that can neutrally adjudicate parties’ rights and interests.” Taiaiake Alfred notes that such an approach detaches the principles from “the colonial mythology of settler society through the application a disciplined logic of just principles.” Principles are seen as universal, objective and context-neutral. Such principles, however, are drawn out of and reflect Eurocentric understandings of human identity and relationships. As David Kahane points out “[p]rinciples and procedures that pretend to stand above culture may in fact operate to the advantage of some social groups and the disadvantage of others.” Such an approach has operated to the disadvantage of marginalized and less powerful groups, including Indigenous communities.

5 Ibid.
6 Ibid.
By contrast, the ‘principles-based approach’ that I propose is context-specific\(^7\) and takes into account the history of colonialism and related power imbalances in the hopes of creating a more culturally-appropriate conceptualization of the duty to consult and accommodate based on principles supported by both Indigenous legal traditions and non-Indigenous legal systems. A principles-based approach, therefore, is attuned to power imbalances, the historical context and the realities facing Indigenous communities on the ground.

In this Chapter, I begin my discussion of a principles-based approach by considering the desirability of such an approach. I then focus on the importance of intersocietal principles in the context of the duty to consult and accommodate. First, I discuss the strengths and challenges of a principles-based approach. Second, I discuss how a principles-based approach is useful in the context of the duty to consult and accommodate particularly in contrast to the Supreme Court of Canada’s endorsement of administrative law forums as meeting the government’s duty to consult in some cases. Third, I describe historical and legal precedents that support principles-based approaches in Aboriginal and other areas of law. Finally, I discuss how I identified the four principles and used the Medicine Wheel approach to structure my analysis of the four principles.

\(^7\) Several intercultural dispute resolution theorists stress the importance of taking context into account when thinking through processes of intercultural dispute resolution in Indigenous contexts: see e.g. Michelle LeBaron, “Learning New Dances: Finding Effective Ways to Address Intercultural Disputes” in Catherine Bell & David Joshua Kahane, eds, *Intercultural Dispute Resolution Aboriginal Contexts* (Vancouver: UBC Press, 2004) 11 at 13; Kahane, *supra* note 3 at 29 & 45.
3.1 Strengths and Challenges of a Principles-Based Approach

There are several strengths of a principles-based approach to guide the development of the duty to consult and accommodate. A principles-based approach articulates general prescriptions for courts to consider when faced with claims that pit Indigenous interests against non-Indigenous interests. By articulating a principles-based approach, judges can evaluate consultation processes with regard to the articulated principles and adapt the interpretation and application of the principles to the particular fact situations before the courts. There is powerful normative force\(^8\) in articulating overarching principles to guide courts and legislators in Aboriginal rights cases. A principles-based approach is useful because courts are used to applying principles and carefully interpreting them in the context of particular fact situations. Moreover, principles can help to guide decision-makers to achieve balance between competing objectives.\(^9\) Principles can also guide implementation by legislators and governments and help encourage the consistent application of laws and policies once in place.\(^10\)

A second strength of a principles-based approach is flexibility.\(^11\) Flexibility is a strength in two ways: in the selection of which principles could form part of the framework and in the interpretation of the principles in the context of


\(^11\) Gunningham & Sinclair, ibid at 855.
Indigenous/non-Indigenous disputes. Such an approach can be adapted to new social conditions and reformulated to accommodate changing social values and norms.\(^\text{12}\) The flexible application of principles to evolving circumstances is a characteristic of Indigenous legal traditions.\(^\text{13}\) This flexibility leaves space for the addition of new principles as social changes occur or new ideas are formed.\(^\text{14}\) Flexibility is also valuable given that such an approach can take into account the fluid and overlapping boundaries between cultures and the “shifting nature of cultural identities.”\(^\text{15}\)

The flexibility of a principles-based approach can be contrasted with the rigidity of rules-based approaches.\(^\text{16}\) Rules-based approaches allow for more determinacy because rules command specific outcomes.\(^\text{17}\) Rules provide direction on what to do, provide for more certainty in terms of expected legal behaviour and are thus enforceable. This creates a significant advantage in some circumstances, perhaps particularly in situations where power imbalances exist.\(^\text{18}\) Rule-based approaches, however, may not create enough room for discretion that can take into account the context-specific factors of a particular legal dispute since either the rule applies or it does not. One example in the context of Aboriginal law is the evidentiary timeframe that claimants must use to prove Aboriginal rights. In Van der Peet, the Supreme

\(^\text{14}\) Réaume, supra note 12 at para 9.
\(^\text{16}\) For the purposes of this discussion, rules can be understood as “specific legal prescriptions”: Lisa Dufraimont, “Realizing the Potential of the Principled Approach to Evidence” (2013) 39:1 Queen’s LJ 11, para 17. It is noteworthy that Ronald Dworkin and HLA Hart were involved in a 30-year debate over rules versus principles. I do not address their theories in this dissertation.
\(^\text{17}\) Ibid at para 19.
\(^\text{18}\) I am indebted to Douglas Harris for this insight.
Court of Canada held that the crucial date for determining an Aboriginal right is “the period prior to contact between Aboriginal and European societies.”\(^{19}\) Any practice or tradition therefore must have formed part of the Aboriginal society’s distinctive pre-contact culture. This rule around the timeframe for proving Aboriginal rights created difficulties in the context of Métis rights claims under section 35. In *R v Powley*,\(^{20}\) the Court had to change the timeframe for proving Métis rights because Métis communities only came into being after the assertion of sovereignty. The rigidity of the test for Aboriginal rights, therefore, created the need to develop a different test for Métis communities. Some commentators have opined that these differing tests in the context of First Nations and Métis communities make the evidentiary burden lighter for Métis claims;\(^{21}\) this different evidentiary burden could have the unintended effect of creating an advantage for Métis communities in the case of competing claims with a proximal First Nation to the same territory.

In addition, rule-based approaches can develop in a way that creates inconsistency between rules; a corollary of this is that rules that evolve may not obviously be tied to an underlying policy rationale.\(^{22}\) By contrast, principles-based approaches provide flexible contours to guide decision-making in individual cases that enable decision-makers to measure the outcome in relation to the principles. Although principles-based approaches, therefore, involve higher intellectual engagement and

\(^{19}\) *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*] at para 60.

\(^{20}\) *R v Powley*, [2003] 2 SCR 207 [*Powley*].


\(^{22}\) Dufraimont, *supra* note 16 at para 18.
demands on decision-makers, such approaches avoid the unthinking, mechanistic application of rules that may result in outcomes that are difficult to justify.

A third strength is that a principles-based approach allows for continual revision, renegotiation and dialogue on which principles might apply and how they should be interpreted. Although this could also be construed as a disadvantage given the time and resources required to revise and renegotiate the selection and interpretation of principles, I characterize this as an advantage in light of my argument that only through meaningful commitment to rebuilding relationships will Indigenous and non-Indigenous peoples move forward constructively. A principles-based approach therefore opens up new opportunities for respectful discussion and debate between Indigenous and non-Indigenous people regarding the identification of appropriate principles to guide intersocietal relationships. It also provides on-going opportunities for engagement in dialogue around the interpretation of the principles. There is value in creating meaningful opportunities for Indigenous and non-Indigenous peoples to critically engage with one another to move towards a thoughtful rebuilding of the intersocietal relationship. Further, there is value in interrogating whether there are principles that can guide the rebuilding of this relationship based on some degree of intersocietal agreement. A principles-based approach has the

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23 Ibid at para 27.
24 Ibid at para 28.
25 I suggest that dialogue about revisions and renegotiation should itself be guided by larger principles as well that are set out by the parties beforehand through dialogue and in a context that mitigates power dynamics to the best degree possible.
26 Indigenous Law Research Unit, Revitalizing Indigenous Law and Changing the Lawscape of Canada (Victoria: University of Victoria, 2014) at 8.
potential to remain relevant and up-to-date if Indigenous and non-Indigenous people commit to engaging in respectful intersocietal dialogue and debate regarding the appropriate choice and interpretation of mutually acceptable principles.

The articulation of key principles to guide the creation of a new relationship between Indigenous peoples and the Canadian government would serve as an important reminder of the ideals that all Canadians might strive for in rebuilding relationships with Indigenous peoples. The adoption and implementation of the four principles may lead to a mutual understanding of the history and legacy of Canada’s treatment of Indigenous peoples, which may lead to more understanding of the issues facing and more positive interactions with Indigenous communities.28

A principles-based approach, however, does have its challenges. The first challenge of a principles-based approach includes that the principles are abstract and multi-layered concepts. The full meanings of the principles will therefore likely be contested.29 Since different people will inevitably interpret the principles differently, it may be difficult to come up with a universally agreeable interpretation of each principle and to articulate it in a way that is easily understood and applied. Patrick Macklem suggests that it may not be useful for principles to be “pitched at such an abstract level that they are of limited use in assessing the justice of particular constitutional arrangements.”30 Initially, however, to garner agreement between Indigenous and non-

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28 Morris Te Whiti Love, “The Waitangi Tribunal’s Roles in the Dispute Resolution of Indigenous (Maori) Treaty Claims” in Catherine Bell & David Joshua Kahane, eds, Intercultural Dispute Resolution in Aboriginal Contexts (Vancouver: UBC Press, 2004) 128 at 133. Love highlights the significant role the Waitangi Tribunal has played in influencing the wider community through its inquiry into and reporting on claims brought by Maori alleging breaches of treaty rights by the New Zealand government.
29 Réaume, supra note 12 at para 7.
30 Macklem, Indigenous Difference, supra note 15 at 41.
Indigenous peoples on principles to guide the rebuilding of a healthy relationship, the principles may need to be cast at a high level of generality. Only through thoughtful, engaged discussion and deliberation will more nuanced interpretations arise.

The abstract nature and initial generality of the principles identified also speaks to another potential challenge. The identification of principles supported in Indigenous legal traditions necessarily requires a pan-Indigenous approach. Several theorists have critiqued such approaches on the basis that pan-Indigenous approaches flatten the complexity and nuance of the hundreds of Indigenous legal traditions that exist within different Indigenous communities. One way to overcome this concern is by selecting the principles through intersocietal deliberation wherein a broad range of Indigenous communities from different Indigenous legal traditions are represented. In addition, once the appropriate principles are identified, the principles can be adapted to the particular circumstances and societal context. The principles would provide general guideposts on how to move forward in the intersocietal relationships but the form and process of how the relationship evolves would depend on how that particular community interprets the principles and how the various parties design the consultation processes in line with the principles.

31 It is worth noting that this type of discussion may not have cultural resonance with some Indigenous people, such as Elders or traditional knowledge keepers, who may wish to approach a more narrative form of engagement. I am indebted to Larry Chartrand for this point.
33 As I highlighted in Chapter 1, I based the identification of principles for this framework on a review of written sources, which was not ideal. The hope is, however, that this work can provide a way into valuable Indigenous/non-Indigenous dialogues regarding whether and how intersocietal principles might be used to further reconciliation.
The indeterminacy of the principles can also be seen as a strength as it permits diverse interpretations and encourages intersocietal debate.\textsuperscript{34} Napoleon and Friedland note that there is value in creating forums for productive discussions about similarities and differences in interpretation between Indigenous and non-Indigenous legal systems.\textsuperscript{35} Not only might interpretations differ from Indigenous and non-Indigenous perspectives but also the differing societal contexts may also influence the methodology of how best to interpret the principles.\textsuperscript{36} Macklem points out that Indigenous/non-Indigenous disagreement over the interpretation of a principle actually reinforces the importance of that principle by illustrating agreement over its value.\textsuperscript{37} In other words, if it is worth engaging in a discussion about the interpretation of a principle, the principle itself is valuable.

Second, even where a relatively concise interpretation is articulated, the principles can be interpreted and applied differently by different actors, such as legislators, policy-makers and judges. In the context of Aboriginal rights claims, this might manifest in two parties with opposing views relying on the same principle to support opposing positions. This no doubt poses a significant challenge. Judges, legislators and policy-makers are often confronted with competing interpretations and

\textsuperscript{34} Macklem, "Distributing Sovereignty", \textit{supra} note 27 at 1349. One issue that often arises in the context of such debates is that only people interested in participating show up. Often therefore people engaged in such discussions acknowledge that they are addressing people who already believe there is a problem and that something needs to be done to remedy the problem. The more difficult issue is in trying to bring people with dissimilar viewpoints into discussion who actually start from a point of being open-minded about the contestability of their perspectives.


\textsuperscript{37} Macklem, "Distributing Sovereignty", \textit{supra} note 27 at 1349.
persuasive arguments supporting differing views and are skilled at resolving interpretive disputes. Currently, there exist limitations in the way judges interpret principles within the context of Aboriginal law given their limited knowledge of Indigenous legal traditions and social structures. Indigenous scholars, however, point to ways in which to create legal institutions that are more responsive to and reflective of Indigenous laws,\(^{38}\) which provides one way to deal with this challenge with positive potential.

Another related challenge is that the development of a generally accepted interpretation of each principle will be incremental. As a result, this development may take place over a long period of time. In many cases involving claims that the government breached its duty to consult and accommodate, the disputes arise because of pressure from industry or government (or both) to develop the natural resources upon claimed Indigenous lands.\(^{39}\) As such, the long timeline that may be required to allow for the evolution of the principles through case law may not immediately impact Indigenous peoples’ claims in the near future. The principles-based approach, however, could quite rapidly be implemented in other areas, such as in guiding


\(^{39}\) In “Conclusion: Judicial Aesthetics and Aboriginal Claims” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon, SK: Purich Publishing Ltd, 2004) 288 [Wilkins, ”Judicial Aesthetics”], Kerry Wilkins recognizes that Indigenous peoples and individuals are often compelled to bring claims to Canadian courts as a defense to a criminal prosecution or in response to government and non-Indigenous pressures on their lands and resources.
government consultation and accommodation processes, and thereby begin to have impacts quite quickly.\textsuperscript{40}

A final challenge is that the principles themselves may be interpreted from a Eurocentric perspective, particularly since most Canadian judges are non-Indigenous and the legal system itself is based on Eurocentric precedents. As such, there is danger that the interpretation of the principles within the framework might rely more heavily on Eurocentric interpretations to the exclusion of Indigenous interpretations. One danger is that such interpretations may not as accurately capture varied cultural values, particularly those focused on communal values.\textsuperscript{41} Kahane points out the importance of considering the power dynamics that have shaped and continue to shape legal interpretation.\textsuperscript{42} One way to mitigate this challenge is to create spaces for Indigenous peoples to participate in shaping the discussion around the choice of principles and the interpretation of such principles. Courts have procedures to provide parties with opportunities to get relevant perspectives and information before the court. As well, other mechanisms – such as community dialogues with youth, Elders, men and women – could be set up to ensure Indigenous engagement with and participation in shaping a principles-based approach in various areas of Aboriginal law. Finally, a key strategy to mitigate this danger is to appoint more Indigenous judges to the bench in all levels of court, including at the Supreme Court of Canada. Many

\textsuperscript{40} Gordon Christie, “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39 UBC L Rev 139 [Christie, “Developing Case Law”] at para 121, highlights the reality that in many cases that are litigated in Canadian courts, the land and resources in question are no longer available for First Nations claims. He highlights this particularly in relation to First Nations that are situated in urban areas, such as the Musqueam in Vancouver.

\textsuperscript{41} MacKem, "Distributing Sovereignty", \textit{supra} note 27 at 1341.

\textsuperscript{42} Kahane, \textit{supra} note 3 at 29.
scholars support this as a strategy to ensure that Indigenous laws are taken into
account in all disputes, including those that arise in Aboriginal law.43

The value that principles offer in guiding the re-creation of a new relationship
between Indigenous and non-Indigenous people in the context of the duty to consult
and accommodate outweighs the challenges in applying the principles. Principles
provide the contours of a useful overarching framework that is flexible enough to guide
consultation processes, which deal with a myriad of different issues, uncertainties and
specificities. In addition, such a framework makes explicit the values at stake and
aligns the attitudes of all parties involved in decision-making.44 As such, principles
provide a fundamental starting point to guide cooperative deliberation and action.45
Further, principles “require reflection and justification for actions, which in
themselves, are signals of ‘good governance.’”46 For all these reasons, a principles-
based approach is well suited to support the reformulation of the duty to consult and
accommodate on a relational basis.

43 Patricia A Monture-Okanee & Mary Ellen Turpel, “Aboriginal Peoples and Canadian Criminal Law:
Rethinking Justice” (1992) UBC L Rev 239 (Special Edition) at para 17; D’Arcy Vermette, “Colonialism
at para 51; Canadian Bar Association, “Federal Judicial Appointment Process” (October 2005) at 3,
online: <http://www.cba.org/CBA/Submissions/pdf/05-43-eng.pdf> (retrieved 5 September 2015);
John Hopkins and Albert Peeling, “Aboriginal Judicial Appointments to the Supreme Court of Canada”
(Indigenous Bar Association, 2004) at 14, online:
<www.indigenousbar.ca/pdf/Aboriginal%20Appointment%20to%20the%20Supreme%20Court%20Final.pdf> (retrieved 5 September 2015); Canadian Association of Law Teachers, "Canadian Association of Law Teachers Panel on Supreme Court Appointments" at 1, online: <http://www.acpd-calt.org/wp-content/uploads/2010/12/SupremeCourt_panel.pdf> (retrieved 5 September 2015); Lorne Sossin, 
“Should Canada have a Representative Supreme Court?” (SC Working Paper 2009-07, Special Series on the Federal Dimensions of Reforming the Supreme Court of Canada, Institute of Intergovernmental Relations, School of Policy Studies, Queen’s University) at 7, online:
45 Ibid.
46 Ibid.
3.2 The Limits of Using Administrative Law to Satisfy the Duty to Consult and Accommodate

The Supreme Court of Canada has endorsed the use of administrative law forums to meet the government’s duty to consult Indigenous peoples in various contexts. In *Rio Tinto*, the Supreme Court of Canada upheld the BC Utilities Commission’s finding that the duty to consult was not triggered by the underlying historical breach regarding the initial construction of the dam. In *Little Salmon*, the Court upheld the process of the LARC in gathering input from the Little Salmon First Nation as satisfying the government’s duty to consult. These cases confirm that administrative law tribunals, in some instances, have jurisdiction to consider the sufficiency of consultation and that such tribunal processes can also satisfy the government’s duty to consult and accommodate. This is so where the jurisdiction to consider these issues is delegated to the tribunal in its mandate. Here I assert that a principles-based approach is more appropriate than relying on existing administrative law structures in the context of the duty to consult and accommodate because a principles-based approach has a higher potential to support the rebuilding and restructuring of Indigenous/non-Indigenous relationships on a more equitable footing.

Several theorists have pointed out the problems of using an existing Canadian legal structure that was designed for other purposes to resolve issues raised in the

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context of the duty to consult and accommodate. Janna Promislow and Lorne Sossin critique the use of administrative law structures on the basis that such structures fall short of respecting Aboriginal rights and jurisdictions. This is because these structures were set up for distinct purposes that may not have included specific consideration of the unique constitutional status of Indigenous communities and how consultation with such communities might best be designed in light of this status. Administrative law forums are generally available to the public to provide commentary and input into decisions that may affect their interests. As such, including Indigenous communities within such processes may unintentionally position such communities as just another stakeholder within the administrative law process and fail to create forums for actual dialogical engagement between Indigenous communities and government decision-makers.

Relying on intersocietal principles to guide Indigenous/non-Indigenous consultation processes may also have the important effect of increasing the legitimacy of such processes and rebuilding Indigenous peoples’ trust in the Canadian legal process. As James Tully asserts:


49 Promislow & Sossin, supra note 47 at 454.

50 Some might argue that the lack of representation of Indigenous laws within the Canadian legal system does not create an issue of legitimacy given the fact that 97% of the population is non-Indigenous. In my view, an answer to this argument comes in the form of both the content of the disputes and the statistics in Canadian law. With respect to the content of the disputes, the fact that Canada is constructed on Indigenous lands with on-going historical disputes about how colonial-Indigenous relationships were constituted creates moral considerations regarding the legitimacy of colonial/settler institutions. With respect to the statistics, the fact that Indigenous peoples are disproportionately represented in at least
...where cultural diversity has been recognised and accommodated in various ways, confrontation and conflict have eased and the members of a constitutional association have been able to work together on their common problems. ...The mutual recognition of the cultures of citizens engenders allegiance and unity for two reasons. Citizens have a sense of belonging to, and identification with, a constitutional association in so far as, first they have a say in the formation and governing of the association and, second, they see their own cultural ways publicly acknowledged and affirmed in the basic institutions of their society. ... these two features nurture a strong sense of pride in the association.51

Here Tully makes clear that in order to feel a sense of ownership, belonging and pride, citizens need to take part in the formulation, design, and processes of governing institutions and have their cultural values acknowledged and affirmed within larger society.

To date, Indigenous contributions in shaping Canada have been pushed to the margins. By contrast, were there intersocietal agreement on how to move forward together in relationship, the legal system would have more legitimacy and be more relevant to the lives of both Indigenous and non-Indigenous peoples. As Mark Bennett notes:

If we are to peacefully and symbiotically coexist, we need to come to some agreement about the fair terms of that coexistence. This goal however immediately poses a problem: Given differences in perspective over a wider variety of areas – inter alia science, spirituality, philosophy and (especially in this case) political theory – how are we to identify what the fair terms of our relationship would be? Do we use Western political thought or Indigenous political thought? Is there a way that we can adjudicate between, or weigh up, the pros and cons of each political tradition, and then use the best tradition as it stands? Alternatively, can we reconcile the traditions and build a just relationship on some kind of inter-tradition consensus?52

two keys areas of law – criminal and child welfare – creates a daily crisis of legitimacy when Indigenous laws are excluded from consideration within the Canadian justice system.

If consultation processes were designed through dialogue between Indigenous community and non-Indigenous parties at the outset, the legitimacy (and perception of legitimacy) of the processes would be improved from Indigenous perspectives. Since legitimacy is a primary measure of a functioning legal system, increasing the legitimacy of consultation processes is a key component of reconciliation.

3.3 Historical and Legal Precedents for Principles-Based Approaches

One potential objection to the adoption of a principles-based approach is that it takes the Aboriginal law case law in a totally new, radical direction. I argue, however, that in fact a principles-based approach is consistent with both the historical development of Indigenous/non-Indigenous relationships within Canada and with the Supreme Court of Canada’s jurisprudence in various areas of law, including Aboriginal law.

Both in Canada and in other common law jurisdictions, there exist historical precedents of principles-based framework to guide Indigenous/non-Indigenous relationships. Treaties between Indigenous and non-Indigenous societies embody particular principles that guide the interpretation of the promises made in the context of treaty negotiations. The language of principles is particularly prominent in the interpretations that Indigenous theorists provide when analyzing early treaties. Heidi Kiiwetinepinesiik Stark, for example, identifies the foundational principles that underlay Anishinaabe treaty-making with the United States and Canada as respect, responsibility, and renewal.53 The idea of principles to guide decision-making is a

central feature of many Indigenous legal traditions so it logically follows that principles would be a primary source of guidance in negotiating and interpreting early treaties.

In addition, other agreements, such as the Royal Proclamation of 1763 have been interpreted to embody foundational principles to guide the relationship between Indigenous and non-Indigenous peoples. When interpreted in conjunction with the Treaty of Niagara, John Borrows, for example, identifies principles including alliance, peace, friendship and respect to ground the relationship between the Indigenous nations represented and the British Crown. Similarly, RCAP notes that the Royal Proclamation, although reflecting imperial aims in its drafting, was interpreted by Indigenous communities as reflecting larger principles such as autonomy, peace and friendship.

Similarly, modern day treaties in Canada are also informed by larger principles. Preambles for modern treaties often contain references to larger principles. The Preamble of the Nisga’a Treaty, for example, articulates the larger principles of sharing, mutual recognition and reconciliation. Similarly, the Preamble of the Maa-

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55 Royal Proclamation of 1763, RSC 1985 App II No 1 [Royal Proclamation].
56 John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed, Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference (Vancouver: UBC Press, 1997) 155 [Borrows, "Wampum at Niagara"] at 164. It is important to note, however, that there is debate around the actual principles that exist given the varying interpretations of the purpose of the Royal Proclamation from Indigenous and non-Indigenous perspectives (155).
58 Nisga’a Final Agreement Act, SBC 1999, c 2 [Nisga’a Treaty].
Nulth First Nations Final Agreement\textsuperscript{59} articulates the principle of mutual respect and reconciliation in its Preamble. Arguably, these principles will be used to guide the implementation and interpretation of the treaty provisions set out in the remainder of those documents.

Principles are also used to guide the implementation and interpretation of treaties in other common law jurisdictions. The most prominent example is in New Zealand in the context of the Treaty of Waitangi. In relation to that Treaty, the Waitangi Tribunal evaluates the Crown’s action or inaction against the intent of the parties that signed the Treaty of Waitangi.\textsuperscript{60} Since inception, the Tribunal has explicitly identified and applied Treaty principles to guide its decision-making with respect to Crown action and any recommendations it makes to the Crown in the case of a breach.\textsuperscript{61} The Tribunal has identified the following principles as flowing from the words of the treaty: active protection of Maori interests;\textsuperscript{62} partnership;\textsuperscript{63} fiduciary duty;\textsuperscript{64} mutual benefit;\textsuperscript{65} reciprocal exchange;\textsuperscript{66} redress for past breaches;\textsuperscript{67} duty to consult;\textsuperscript{68} development;\textsuperscript{69} and equity.\textsuperscript{70}

\textsuperscript{61} Ibid at 29–30.
\textsuperscript{62} Ibid at 32.
\textsuperscript{63} Ibid at 34.
\textsuperscript{64} Ibid at 36.
\textsuperscript{65} Ibid at 33.
\textsuperscript{66} Ibid. Here the Tribunal explained that the idea of reciprocal exchange included the exchange of the right to govern for Maori’s full tribal authority and control over lands and valued possessions.
\textsuperscript{67} Ibid at 34.
\textsuperscript{68} Ibid.
\textsuperscript{69} Ibid at 38.
\textsuperscript{70} Ibid at 39.
The Supreme Court of Canada has also embraced principles-based approaches in various areas of law. One prominent example is the Court’s identification and application of principles to guide the interpretation of constitutional law. In *Quebec Secession Reference*, the Court identified four underlying principles animating the interpretation of the *Constitution*: the protection of minorities; federalism; democracy; and constitutionalism and the rule of law. It then applied these principles to the reference questions and held that Québec did not have a unilateral right to succession.

Similarly, the Court has applied a principles-based approach to evidence law. As Lisa Dufraimont notes, evidence law has shifted from primarily rule-based to a principles-based approach in recent decades. This shift occurred largely in response to two perceived problems with the law of evidence: that it was unnecessarily rigid and unnecessarily complex. Some examples of principles that are applied in the area of evidence law include probative vs. prejudicial value, reliability and necessity. Interestingly, Dufraimont notes that the shift to a principles-based approach has not eliminated the application of rules to evidence law but instead has occurred in two different ways:

1. Certain specific rules have been replaced with justificatory principles (what she terms the “replacement method”);  
2. Traditional rules of evidence have been retained but made subject to discretionary principles analysis (what she terms the “additive method”).

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71 *Quebec Secession Reference*, supra note 8 at paras 55–82. The Court was careful to indicate that this was a non-exhaustive list of constitutional principles.  
73 *Ibid* at para 3.  
75 *Ibid* at para 32.  
76 *Ibid*.
Principles can therefore supplement existing case law by adding an overarching framework to create more consistency in analyses within a particular area of law.

Finally and importantly, in the area of Aboriginal law, the Supreme Court of Canada has embraced the application of principles. The principles that have been applied to Aboriginal law disputes to date include: the liberal construction of treaties and the honour of the Crown. Each of these principles are useful in moving the discussion forward in how Indigenous and non-Indigenous peoples should relate to one another as relationships continue to evolve. The Court’s approach, however, reflects the context-specific and limited perspective that the common law takes in adjudicating the specific disputes before it. The principles-based approach I advocate, by contrast, asks the Court and government to consider the bigger picture of how the law can forward the grand purpose of reconciliation underlying section 35. In my view, the approach set out in this framework complements the existing principles and legal rules that the Court has identified. In other words, I advocate for an additive approach that builds on the existing legal rules identified, adds more nuanced layers to the principles the Court had identified so far and creates a more robust framework through which to determine the outcomes of Aboriginal law disputes.

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77 Although some may also include “reconciliation” as a principle that the Court has identified, to remain consistent with my analysis in Chapter 2, I am characterizing reconciliation as the purpose of section 35 rather than as a principle identified by the Court to guide Aboriginal law. In Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 Sup Ct L Rev (2d) 595 [Slattery, “Generative Structure”] at 623, Slattery identifies the principles of recognition and reconciliation as two sets of complementary constitutional principles underlying section 35(1).

78 In my discussion of the four principles in subsequent chapters, I discuss the existing principles that the Supreme Court of Canada has already identified. I would need to do a further article to flesh out those relationships more fully.
3.3.1 Intersocietal Normative Frameworks in Early and Contemporary Indigenous/Non-Indigenous Relations

The development of intersocietal norms and values as a way to mediate between cultures has a long history in the context of Indigenous and non-Indigenous relations. In North America, the early encounters between Indigenous peoples and European colonists resulted in both formal and informal agreements that established ways of relating to one another based on agreed upon norms and processes. These norms provide evidence that intercultural agreements can be put into place in order to provide a reasonable means of resolving disputes.

In a study of formal and informal legal processes that evolved during the early colonization of North America, Jeremy Webber documents the development and evolution of intersocietal norms between Indigenous peoples and early settlers. To deal with various realities that existed at the time, including maintaining peace and the recognition of Indigenous land rights, intersocietal legal regimes were set up to deal with all sorts of disputes, ranging from crimes against the person to property rights.

Similarly, Richard White identified what he termed “the middle ground” between Indigenous and non-Indigenous peoples that resulted from “the need of

80 Webber, ibid. It is worth noting that some scholars are critical of the possibility of developing mutually agreed upon intersocietal norms. For example, in “‘Thou Wilt Not Die of Hunger...For I Bring Thee Merchandise’: Consent, Intersocietal Normativity, and the Exchange of Food at York Factory, 1682-1763” in Jeremy Webber & Colin M Macleod, eds, Between Consenting Peoples: Political Community and the Meaning of Consent (Vancouver: UBC Press, 2010) 77 [Promislow, “Consent”], Janna Promislow critiques the idea that norms always form in intercultural worlds (82-83) and asserts that shared practices may not be linked with shared understandings of the reasons for those practices (104-105).
81 Ibid at 648.
people to find means, other than force, to gain the cooperation or consent of foreigners.”

Finding this middle ground required each party “to attempt to understand the world and the reasoning of others and to assimilate enough of that reasoning to put it to their own purposes.”

The forging of intercultural norms to guide the on-going relationships between early settlers and Indigenous peoples therefore required both the motivation to engage with and a willingness to attempt to understand, at least partially, the cultural values of the other.

The early treaties are, perhaps, the most prominent example of intersocietal agreements that draw on traditions, values and practices from both Indigenous and non-Indigenous societies. Webber notes that looking at the principles underlying the early treaties is particularly helpful to discern intersocietal normative standards at a time when power was relatively balanced between Indigenous and non-Indigenous societies. Similarly, Borrows asserts that “treaties...can be seen as creating an intersocietal framework in which first laws [i.e. Indigenous legal traditions] intermingle with Imperial laws to foster peace and order across communities.”

The Two Row Wampum is a good example of an early treaty that embodies central principles of intercultural cooperation between nations, on the basis of peace, friendship and respect.

83 Ibid.
84 Tully, supra note 51 at 117.
85 Webber, "Relations of Force", supra note 79 at 657. This is so because in Webber words, these agreements were negotiated “before indigenous societies were undermined.”
86 John Borrows, Canada’s Indigenous Constitution (Toronto: University of Toronto Press, 2010) at 21.
87 Tully, supra note 51 at 127–28.
The tradition of creating intersocietal frameworks to guide relationships has continued in present day Canada. Various modern day treaties, for example, set out co-management bodies that are responsible for decision-making in relation to various areas such as land use, resource development and water use. Other agreements, such as the *Kunst’aa guu – Kunst’aayah Reconciliation Protocol*,\(^\text{88}\) also set out responsibilities and principles to guide decision-making processes in a way that includes both Indigenous and non-Indigenous perspectives. This Protocol, for example, begins by outlining the fundamental disagreements between the parties in the context of sovereignty, title, ownership and jurisdiction over Haida Gwaii. In spite of these fundamental disagreements, however, the Haida Nation and British Columbia negotiated a cooperative framework to “seek a more productive relationship and hereby choose a more respectful approach to coexistence by way of land and natural resource management on Haida Gwaii through shared decision-making.”\(^\text{89}\) These agreements result from long-term negotiations and hard fought compromises that create workable intersocietal frameworks to guide decision-making.

The development of intercultural principles is also supported within Indigenous legal traditions and the common law. The genesis of the Haudenosaunee Confederacy provides an example of the development of intercultural principles to guide relationships between nations. This Confederacy was made up between the Mohawk, Oneida, Onondaga, Cayuga and Seneca nations who came together to create peace

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\(^{88}\) *Kunst’aa guu – Kunst’aayah Reconciliation Protocol* (2009). This agreement was negotiated in 2009 between the Haida Nation and British Columbia to establish a framework for joint decision-making and provide a means of building a new relationship, online: Haida Nation <http://www.haidanation.ca/Pages/Agreements/pdfs/Kunstaa%20guu_Kunstaayah_Agreement.pdf> (retrieved 5 September 2015).

\(^{89}\) *Ibid* at 1.
between the nations.\textsuperscript{90} These five nations were brought together on the basis of a number of principles, including peace, power and righteousness.\textsuperscript{91} This approach values the development of norms to guide the relationship between societies. Similarly, there is support for intersocietal principles within the common law itself in the context of Aboriginal law. The Supreme Court of Canada has held that Aboriginal law is “sui generis” and necessarily must draw upon both common law ideas and precedents and Indigenous legal traditions and perspectives.\textsuperscript{92} This includes the idea that principles developed within the common law applicable to Aboriginal law disputes should take the form of intersocietal principles that draw on both Indigenous and non-Indigenous legal traditions.

3.4 Identifying the Four Principles

In approaching the creation of a principles-based, intersocietal framework to guide the development of the duty to consult and accommodate, the goal is to identify principles based on core values and norms that are common to Indigenous and non-Indigenous communities. Intersocietal principles can provide a way to assess existing relationships and institutions and move forward to create more justice within those relationships. As Macklem argues:

principles that potentially possess normative significance to Aboriginal and non-Aboriginal people alike... can provide standards for determining the justice of existing constitutional arrangements and suggest ways in which just distributions of power can be established or promoted in light of contemporary social reality.”\textsuperscript{93}

\begin{itemize}
  \item \textsuperscript{90} Beverly Jacobs, \textit{International Law/The Great Law of Peace} (LLM Thesis, University of Saskatchewan, Faculty of Law, 2000) [unpublished] at 13 & 16.
  \item \textsuperscript{91} \textit{Ibid} at 13; see also generally Taiaiake Alfred, \textit{Peace, Power, Righteousness: An Indigenous Manifesto} (Toronto: Oxford University Press, 1999) [Alfred, \textit{Peace, Power, Righteousness}].
  \item \textsuperscript{92} \textit{R v Sparrow}, [1990] 1 SCR 1075 (SCC) [\textit{Sparrow}] para 59.
  \item \textsuperscript{93} Macklem, \textit{Indigenous Difference, supra} note 15 at 45.
\end{itemize}
Rather than relying solely on European norms to decide cases involving Aboriginal law, principles that are supported by both traditions can be identified to provide more appropriate outcomes. As Webber notes:

if we seek constitutional principles rooted in the experience and structure of Canada’s societies – if we want to avoid the blind reproduction of principles founded on colonial imposition or the rote copying of European models – we have to take account of the plurality of sources of Canadian law, an approach that respects, moreover, the plurality of peoples that have contributed to making Canada.94

By drawing on principles from both Indigenous and non-Indigenous legal traditions, courts deciding duty to consult and accommodate cases might rely less on economic considerations and rather would take into serious account the interests of Indigenous communities in maintaining connections with their traditional territories.

I identify four principles drawn from both Indigenous legal traditions and non-Indigenous legal systems that I hope will advance thinking about the duty to consult and accommodate to enable Indigenous communities to participate more fully in decision-making and to increase the potential for reestablishing trust between Indigenous and non-Indigenous peoples:

1. Respect
2. Recognition
3. Reciprocity
4. Reconciliation

As is evident in the following discussion, each principle is supported by a variety of sources including international law, Canadian jurisprudence, and Indigenous and non-

94 Webber, "Relations of Force", supra note 79 at 660. See generally Borrows, Canada's Indigenous Constitution, supra note 86, who also advocates the recognition of Indigenous legal traditions as an important source of Canadian law.
Indigenous legal theories. In this section, I outline the way in which I approached the task of identifying these principles.

Over the past decade, I have researched Aboriginal law. In studying various legal issues that affect Indigenous communities, I have read widely in the area with a particular focus on the writing and theorizing of Indigenous scholars. In reading this body of work and the Supreme Court of Canada’s Aboriginal law decisions, I identified the principles that scholars and judges used in describing and determining Indigenous/non-Indigenous disputes. I then asked how a principles-based framework might work in the area of Aboriginal law and decided that the long list of principles that I identified was too long to form the basis of a workable framework. I decided that I needed a smaller set of principles, but was uncertain how to narrow the list.

Serendipitously, at the same time I was co-teaching the Intensive Program in Aboriginal Lands, Resources and Governments at Osgoode Hall Law School with Kimberly Murray. We designed a participatory class exercise that taught the students how to create an outline using a Western method and an Indigenous method – the

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95 My particular focus on the work of Indigenous scholars stems from the recognition that as a non-Indigenous person I do not share the cultural perspective of Indigenous communities and this is a limitation that I take very seriously. As a result, I give primacy and consider the work on Indigenous scholars in all my writing in order to create a more balanced approach and to respect the ideas and contributions of Indigenous scholars and leaders to come up with solutions to the problems facing their communities.

96 These principles included giving primacy to relationships, restoration of harmony, reconciliation, respect, reciprocity, recognition, stewardship, equality of peoples, respect for diversity, truthtelling, recognition of sovereignty, territoriality, and fairness.

97 It is important to note that the best way to narrow the principles would have been to consult widely with Indigenous peoples in addition to studying written work. Due to the time restrictions with my PhD as well as personal circumstances I was not able to complete fieldwork for the purposes of this dissertation. I hope to do some consultation in the future, however, to further explore what is written here in relationship with Indigenous peoples.
I shared a Western approach to creating an academic paper outline. Kim then shared her Medicine Wheel Framework with the class, revealing how she uses the Four Directions teaching to think through legal issues that arise in Aboriginal law.

Since the Medicine Wheel approach has Four Directions, I thought it might make sense to use this approach to determine which four principles might be broad enough to encompass the various other principles that I had identified. From my studies in Aboriginal law, three principles were apparent to me: the principle of respect, which forms the basis of the early treaty relationships; the principle of recognition, which brings to mind the need for political and legal recognition of Aboriginal governance rights, as well as mutual recognition between Indigenous and the Canadian governments; and the principle of reconciliation, which was a primary focus of the current Truth and Reconciliation Commission’s mandate with respect to the Indian Residential Schools Experience. A fourth principle emerged as I continued my reading in the area of intercultural dispute resolution – the principle of reciprocity.

After my preliminary identification of the four principles, I reread RCAP and realized it outlined four principles in its 1996 report to guide the creation of a new relationship: the principles of respect, recognition, sharing and responsibility. Two of my principles paralleled the RCAP principles: respect and recognition. The other two principles RCAP principles of sharing and responsibility might fit within the idea of reciprocity. Although RCAP has been criticized by some Indigenous scholars for a

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98 It is important to note that the Medicine Wheel is one Indigenous framework among many. 99 RCAP, supra note 57, Vol 1, Part 3, Ch 16.
variety of reasons, the principles it identifies to form the contours of a new relationship seem to be relatively uncontroversial. As was proposed by RCAP, I recognize the potential of a principles-based approach as a valuable way to reformulate the duty to consult and accommodate in a culturally appropriate way.

### 3.4.1 The Medicine Wheel Framework

The Medicine Wheel is a teaching that has been passed down by Elders from one generation to the next in many Indigenous communities across North America, including Anishnabe, Ojibway and Cree. The purpose of the Medicine Wheel is to help people see and understand things in a different way. As Phil Lane, Jr, Judie Bopp, Michael Bopp, Lee Brown and Elders describe: “Just like a mirror can be used to see things not normally visible (e.g. behind us or around a corner), the medicine wheel can be used to help us see or understand things we can’t quite see or understand because they are ideas and not physical objects.” The Medicine Wheel is a teaching common to many Indigenous communities, however, in addition to the Medicine Wheel, there are other Indigenous ways of understanding the world that are also often

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100 See e.g. Larry Chartrand, “Re-Conceptualizing Equality: A Place for Indigenous Political Identity” (2001) 19 WYAJ 243 (criticizes RCAP’s finding that Aboriginal self-government would be subject to the Canadian Charter of Rights and Freedoms, 1982); Patricia Monture-Angus, “Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice” (1999) 19(2) Can Woman Stud 24 (criticizes RCAP for failing to consider the impact of colonialism in some of its recommendations and in particular on Aboriginal women).
101 Phil Lane Jr, Judie Bopp, Michael Bopp, Lee Brown & Elders, The Sacred Tree (Lethbridge, AB: Four Worlds International Institute, 1984) at 9.
102 See John Borrows (Kegedonce), Drawing Out Law: A Spirit’s Guide (Toronto: University of Toronto Press, 2010) at 134. It is worth noting that some anthropologists attribute the Medicine Wheel to Plains Indians due to an anthropological discovery of a circle of stones on Big Horn mountain in Wyoming; see e.g. Don Grey, “Big Horn Medicine Wheel Site” (1963) 8(19) Plains Anthropologist 27 (he includes speculative remarks about this site being of Cheyenne origin).
103 Marion Jacko, Conversation re: Medicine Wheel Teaching (25 May 2015).
105 Lane, Bopp, Bopp, Brown & Elders, supra note 101 at 9.
cited, such as the seven Grandfathers’ Teachings and the 13 Grandmother Moon Teachings.106

The Medicine Wheel teaching involves Four Directions that can represent many different things. A non-exhaustive list of what the Four Directions represents follows:

- the four races, which are all part of the same human family living on the same Mother Earth;107
- the four elements of air, water, fire and earth, which all “must be respected equally for their gift of life;”108
- the four aspects of human nature: emotional, physical, mental and spiritual, which each must be equally developed to be healthy and well-balanced;109
- the four sacred medicines: tobacco, cedar, sage and sweetgrass;110 and
- the four stages of life: infant, child, adult and Elder.111

For the purposes of this framework, I rely on the interpretation given to me by Kim Murray. This interpretation is as follows: at the South Door, the focus is on relationships; at the West Door, the focus is on reflection; at the North Door, the focus is on movement; and at the East Door, the focus is on vision (see Figure 1.1, Chapter 1).

In the relational framework to the duty to consult and accommodate, I focus on the principle of respect at the South Door because respect is the foundation of lasting and meaningful relationships. In the West Door, the principle of recognition focuses on acknowledgement of the colonial history that has created the issues we are currently

107 Lane, Bopp, Bopp, Brown & Elders, supra note 101 at 10.
108 Ibid at 11.
109 Ibid at 12.
110 Native Women’s Centre, supra note 106.
111 Jacko, supra note 103.
facing in Canada with respect to Indigenous/non-Indigenous relationships. The principle of reciprocity is at the North Door and relates to the responsibility of Indigenous and non-Indigenous peoples to create a new respectful relationship. Finally, the principle of reconciliation at the East Door constitutes the process of rebuilding that relationship and moving our society towards a vision of good relations. Figure 3.1 below depicts the Medicine Wheel with the four principles of this framework in each of the Four Directions.

Figure 3.1 - A Principles-Based Approach to the Duty to Consult and Accommodate
The significance of the Medicine Wheel is that the Four Directions and corresponding principles within the framework are all inter-related and work together to achieve the vision. Because the structure of the principles-based approach is based on the holistic Four Directions teaching, the principles are relational and complementary. As with Carrier legal traditions, “[e]ach of these principles is expected to be followed concurrently and with equal weight. No one principle is understood to have greater significance than any other principle.”¹¹² This approach, therefore, enables a focus on how the principles work together and complement one another to achieve a common goal rather than focusing on conflicts and competing objectives within the framework itself. Where principles point in different directions, deliberation on various options to move forward might occur and discussion and consensus could be sought on the option that if followed most fully implements all principles within the framework.

The circular form of the Wheel represents the reality that truly achieving a new and improved relationship between Indigenous and non-Indigenous people requires a continuously evolving process and revisiting each of the principles regularly to ensure that the relationship between Indigenous and non-Indigenous people remains strong (see Figure 3.2 below). As Borrows explains:

The maintenance of mutual good relationships, through positive support and assistance (miyo-wicehtowin) is often represented by the circle in Cree Law. Circles are considered sacred and represent the bringing together of peoples. They

¹¹² Borrows, Canada’s Indigenous Constitution, supra note 86 at 92. Borrows notes that fundamental principles in Carrier law are respect, responsibility, obligation, compassion, balance, wisdom, caring, sharing and love.
are meant to remind people of Mother Earth and their journey through life: from the earth, to infant, to child, through adulthood to old age and back to the earth. This circular relationship is central to the effectiveness of the principles-based approach and supports the need for continuing evolution in the thinking around the important values that should inform Aboriginal rights jurisprudence. It also highlights the need to revisit each of the four principles on a regular basis in order to continue renewing and improving the relationship. For the purpose of this dissertation, the approach is applied to the duty to consult and accommodate but might be usefully applied in other areas of Aboriginal law.

Figure 3.2 - Interrelationships Between the Principles

Finally, it is important to clarify that I suggest that the principles-based approach might be limited to governing the intercultural aspects of the relationship between Indigenous peoples and the Canadian state. Within this framework, both

Indigenous and non-Indigenous peoples retain autonomy within their respective spheres but these principles act as common standards “derived not from their traditions of justice taken independently, but from a mediation across traditions.”\textsuperscript{114} As such, ideally, there would continue to exist jurisdictional space within both Indigenous and non-Indigenous communities to protect cultural difference. These principles build on similarities in cultural values and permit the resolution of disputes that arise where Indigenous and non-Indigenous cultures intersect and overlap. Having identified the four principles of respect, recognition, reciprocity and reconciliation, I now consider each principle in more detail.

\textsuperscript{114} Webber, "Relations of Force", \textit{supra} note 79 at 657.
Several years after it had abandoned its exploratory drilling in Yellow Valley’s territory, Green Co hired a new Chief Executive Officer, Jay Springle, who had grown up just outside Yellow Valley First Nation and had personal ties to the community. Jay Springle contacted a Band Council member with whom he had played Lacrosse competitively and apologized for the previous dealings that Green Co had with the community. Jay suggested that he would like to renew discussions about whether Green Co could work in partnership to develop a mining operation in the area that would provide benefits to both Green Co and the community. Green Co had a detailed Consultation Policy, which included abiding by First Nation’s Consultation Protocols, assigning specific staff members to meet with the First Nation regularly and providing direct benefits to Aboriginal communities through its development projects. Green Co assigned its staff members Gavin Lock and Lynette Reagan to be the company’s representatives in the consultations. Gavin had a degree in business and was a member of Bearclaw First Nation, which was relatively close to Yellow Valley First Nation. Lynette was a non-Indigenous person who had completed her degree in Aboriginal studies and worked extensively with Indigenous communities throughout her career. In accordance with the Yellow Valley’s consultation protocol, Gavin and Lynette began by writing a letter requesting a meeting with Chief and Council or their delegated representatives to discuss renewing talks about developing a partnership for a mining project.

The provincial government, through its Aboriginal Community Liaison program, funded a position within Yellow Valley for a community member to act as the main point of contact in relation to consultations regarding the potential project.
Brenda Johnston was hired as she had occupied many positions within Yellow Valley’s Band Council structure and she had drafted the Consultation Protocol. Due to a series of crisis within the community, Brenda was not available for a meeting for several months and had to reschedule two meetings. Gavin and Lynette met with Brenda when she was available and started to discuss how consultation processes in relation to the development of a mining operation might best proceed. They came up with a set of questions and Brenda took those back to the leadership and community for discussion.

After the Yellow Valley leadership and community had considered the draft consultation questions, they indicated support for the suggestion that a neutral facilitator should help guide the consultation process. In the next several months both sides were able to come up with a final list of potential people, interview and hire a mutually agreeable facilitator, Toby Parkins. Toby was funded through a government program set up to facilitate meaningful consultation processes with Aboriginal communities. One of the conditions of funding was that the facilitator would report regularly to government so that it could remain apprised on what was occurring in the consultation process. This government ministry also assigned a specific consultation officer to monitor consultation in relation to this project. The officer was available to either party and would at times attend the consultation meetings in person.

Over the course of several meetings that Toby facilitated, Brenda, Gavin and Lynette worked together to come up rules that would guide the consultation process in relation to the mining project. One idea that Brenda had was for the company to
fund a part-time youth position to shadow and work with her on the consultation process to develop more capacity within the community to deal with consultation requests. Brenda had already passed this idea by the leadership and community and had support for this youth position. Gavin and Lynette brought this idea to the Board of Green Co who supported funding this position if the government would match it. The government agreed to do so through its Youth Employment Program and a youth by the name of Johnny Martin started attending all subsequent consultation meetings and learning about the consultation process through working with and shadowing Brenda. At Brenda’s request, the government provided funding for Johnny and Brenda to attend a course that provided an overview of the legal requirements of the duty to consult and accommodate.
Chapter 4: The South Door: The Principle of Respect

The power to control their destinies as Aboriginal peoples, to maintain control over their self-definition, must be fundamental, for otherwise we could imagine a people being constructed by another. If Aboriginal communities lose the power to control their self-definition they lose themselves – they effectively become “another.”

The first of the four principles is respect. Implementing and applying the principle of respect is central to creating a renewed relationship between Indigenous and non-Indigenous people. RCAP highlights that “respect is the essential precondition of healthy and durable relations between Aboriginal and non-Aboriginal people in this country.” For the purposes of my discussion, I focus on respect in two contexts: respect for persons as between individuals and respect between cultural groups. I also discuss the effect of the historically disrespectful treatment of Indigenous peoples on the individual self-respect of community members. In this chapter, I argue that an intersocietal conception of respect that draws on both Indigenous and non-Indigenous theories includes a focus on interdependence, a rejection of colonial attitudes and stereotypes and the creation of space to express cultural difference.

The concept of respect has been the topic of great theoretical inquiry over the years with many attempts to elucidate its meaning. Theories of respect focus on three aspects: first, the meaning of respect; second, the justification for showing respect; and third, how one might act to demonstrate respect. With regard to the first aspect, general understandings of the meaning of respect include that respect is an attitude, a

way of treating something or someone that involves a kind of valuing. Respect involves perceiving something as worthy of a special kind of attention. It may embody both positive aspects of treating something or someone as valuable and worthy and negative aspects of avoiding degrading, insulting, injuring or interfering with other people or valued objects.

With regard to justifying the need for respect, one understanding accords with the human rights approach, which posits that all people are entitled to respect on the basis of their common humanity (“respect for persons”). Theorists have pointed to various reasons to justify respect for persons including on the basis of human rationality, morality, consciousness and the capacity to suffer. Other theorists have justified respect for persons grounded in the fact that each person is situated within a social, relational and political structure. Still others justify respect for persons on a groundless and unconditional basis.

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4 Ibid.
9 Utilitarianism argues that the capacity to suffer grounds human worth: see e.g. John Stuart Mill, Utilitarianism (Chicago, IL: University of Chicago Press, 1906).
Indigenous theorists point to a broader conception of respect that includes not only human beings within the group entitled to respect but also nonhuman entities. Moreover, Indigenous worldviews include past and future generations within this broader vision of respectful relationships. Such views include a notion of mutuality that involves mutual responsibilities for people and other beings taking part in respectful relationships. In such views, failing to abide by appropriate respectful protocols and behaviours may result in negative consequences.

In this Chapter, I begin by briefly outlining the sources that provide support for the choice of the principle of respect as useful in grounding an intercultural framework. I then address what respect is according to non-Indigenous and Indigenous theories, why respect is important and how it might be implemented in the context of Indigenous/non-Indigenous relationships.

4.1 Sources for the Principle of Respect

The United Nations Declaration on the Rights of Indigenous Peoples12 ("Declaration") identifies mutual respect as one of the guiding principles for its human rights approach to the rights of Indigenous peoples internationally.13 Similarly, RCAP identifies the principle of mutual respect as one of the four principles in its approach to create a renewed relationship between Indigenous and non-Indigenous peoples within

Although it does not specifically use the word ‘respect’ within either provision, the inclusion of section 25 and 35 within the Constitution Acts, 1982, also supports and acts as a source for this principle in indicating a constitutionally protected status for Indigenous peoples within the Canadian constitutional framework. The Supreme Court of Canada has also emphasized the principle of respect in several key Aboriginal rights cases. Finally, non-Indigenous and Indigenous theorists support the principle of respect as a central tenet of democratic societies and Indigenous cultures, respectively.

4.2 Substantive Content of the Principle of Respect

I have structured the discussion of the substantive content of the principle of respect as follows:

- The **What**? What is respect? What are its central characteristics? How might conceptions of respect differ between Indigenous and non-Indigenous cultures?

- The **Why**? Why should people engage the principle of respect in the context of Indigenous/non-Indigenous relationships? Are there moral imperatives that support the implementation of the principle of respect in Indigenous/non-Indigenous relationships?

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14 RCAP, supra note 2, vol 1, Ch 16, sec 1.2.
16 See e.g. Kant, supra note 6; Rawls, supra note 7; Sartre, supra note 8; Taylor, "Politics of Recognition", supra note 10; Benhabib, *Situating the Self*, supra note 10; Dillon, "Respect and Care", supra note 3; Bruce Morito, *An Ethic of Mutual Respect: the Covenant Chain and Aboriginal-Crown Relations* (Vancouver: UBC Press, 2012).
And finally.... the *How?* How might the principle of respect be implemented concretely to provide a way forward in the complex historical relationship between Indigenous and non-Indigenous peoples within Canada?

### 4.2.1 The What?

As I mentioned at the outset, respect involves valuing something or someone as worthy of special attention and may require both positive and negative actions to treat that something or someone in a way that reflects that valuing. Dillon notes that respect “is a particular mode of apprehending something, which is the basis of the attitude, conduct, and valuing. The person who respects something perceives it quite differently from one who does not respect it and responds to it in light of that perception.”

Respect therefore involves a particular understanding one has towards someone or something, which mandates a certain attitude and appropriate treatment of that person or object. Importantly, Dillon also notes respect involves the perception that the person or object has value in itself and not only in relation to its use or relationship to us.

#### 4.2.1.1 Non-Indigenous Theories of Respect

The modern idea of respect for persons includes a human rights view that stresses the intrinsic value of each person’s worth based on the fact that they are members of the human community. In the Western tradition, this view originated with Immanuel Kant’s philosophy in which he held that the moral law requires that people be treated with respect because people are ends in themselves. In Kant’s view, people

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18 Dillon, "Respect and Care", *supra* note 3 at 108.
19 *Ibid* at 110.
20 Kant, *supra* note 6. Due to space constraints I do not focus on all the complex details of Kant’s theory but rather give a broad summary of one understanding of his theory in order to ground my larger discussion. It is also important to note that the interpretation of Kant’s theory is subject to debate: see *e.g.* Stephen L Darwell, “Two Kinds of Respect” (1977) 88:1 *Ethics* 36 at 36.
are entitled to respect because they are rational, autonomous moral agents and this fact grounds their intrinsic value.\textsuperscript{21} A person’s moral task is to develop his or her rational, autonomous capacity and other people are required to refrain from doing anything to detract from this task.\textsuperscript{22}

This view of respect involves intellectual, emotional and moral interpretations that guide a particular way of acting towards something or someone. As Dillon articulates, this idea of respect for persons involves:

(a) recognizing that a being is a person;

(b) appreciating that persons as such have intrinsic moral value;

(c) understanding that the fact that someone is a person constrains us to act only in certain ways in connection with her; and

(d) acting or being disposed to act in those ways out of that recognition, appreciation, or understanding.\textsuperscript{23}

Respect, in this view, is due to the person \textit{as a person} based on a particular feature that is worthy of this attitude. As such, respect is generalizable to include other people who also share that feature.\textsuperscript{24} If one has a view that a person is worthy or respect on the basis of his or her humanity (or ability to rationalize or make moral decisions or on another basis), all people are worthy of respect on that basis.

This idea of a generalized respect for persons on the basis of their fundamental humanity supports equal treatment of people as persons. This idea provides a baseline of respect – a reason for demonstrating respect based only on the fact that one belongs to the human community (rather than based on other factors such as the person’s

\textsuperscript{21} Dillon, "Respect and Care", \textit{supra} note 3 at 113.

\textsuperscript{22} \textit{Ibid.}

\textsuperscript{23} \textit{Ibid} at 112.

\textsuperscript{24} \textit{Ibid} at 110.
This idea of respect for persons based on common humanity emerged at the same time as philosophical theories celebrating the universality of reason and the importance of impartiality and rationality. These ideas have all become central tenets of the Canadian legal system.

Treating human beings as entitled to universal human rights accords with the rational, universal precepts of the legal system. It accords with “the principled reduction of the objects of thought to a common measure, to universal laws.” As Iris Marion Young explains:

Normative reason’s requirement of impartiality entails a requirement of universality. The impartial reasoner treats all situations according to the same rules, and the more rules can be reduced to the unity of one rule or principle, the more this impartiality and universality will be guaranteed. For Kantian morality, to test the rightness of a judgment the impartial reasoner need not look outside thought, but only seek the consistency and universalizability of a maxim. If reason knows the moral rules that apply universally to action and choice, then there will be no reason for one’s feelings, interests, or inclinations to enter in the making of moral judgments.28

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25 See Darwell, supra note 20. Darwell provides a useful account of two kinds of respect: (1) recognition respect, which involves “a disposition to weigh appropriately in one’s deliberations some feature of the thing in question and to act accordingly” (38); and (2) appraisal respect, which is “an attitude of positive appraisal of [a] person either as a person or as engaged in some particular pursuit” (38). See also Stephen Hudson, “The Nature of Respect” (1980) 6:1 Soc Theory & Pract 69. Hudson provides a useful characterization of four different kinds of respect: (1) obstacle respect, which is where the object of respect is a barrier that must be overcome (i.e. a mountaineer’s respect for the elements during a climb) (74); (2) directive respect, which is respect shown to “something which must be capable of being taken as a guide to action” (i.e. a police officer’s respect for the accused’s right to counsel) (71); (3) institutional respect, which is respect for “social institutions, practices, offices, positions, or persons or things which represent such items, or persons who function in roles defined by such items” (i.e. respect for judges because they are judges not on an individual basis) (74-75); and (4) evaluative respect, which “involves a favorable attitude toward an object of respect for certain reasons” (i.e. respect for someone because of upright moral character) (72).


28 Ibid at 385.
Given its emphasis on impartiality and universality, the idea of respect for persons based on common humanity is easily cognizable to the common law. This impartial view reduces the need to consider differing perspectives, particularities and subjectivities by positioning the judge as the final arbiter tasked with providing a dispassionate judgment devoid of desire and affectivity.\(^{29}\)

In the context of Indigenous/non-Indigenous relations, this generalized respect creates difficulty because the history of Indigenous/non-Indigenous relations has created a legacy of oppression that influences the current realities of both Indigenous and non-Indigenous people. The reality of people’s lives is nuanced, contextual and requires attention to differences between people. Indigenous peoples within the Canadian constitutional framework are entitled to different treatment, recognized in the particular constitutionalized protections of Aboriginal rights under section 35. As a result, the principle of respect needs to provide for enough flexibility to account for the differential treatment for Indigenous communities – treatment that recognizes Indigenous communities’ particular identities as shaped by their specific histories, locations and geographies.

Two points are worth noting with regard to this generalized conception of respect: first, the idea of respect for persons is an abstract proposition until it is actually put into action in relationship with another;\(^{30}\) and second, this conception of respect does not address the way respect might take account of each person’s particular


identity, situatedness and specificity.\textsuperscript{31} Since putting the abstract proposition of respect for persons into action requires interaction with other people, engaging in respect for persons involves deliberating about the meaning of the principle of respect for persons in an actual relationship with another and deciding what conduct is appropriate in relation to that principle.\textsuperscript{32} In the context of cross-cultural relationships, this means that interacting with cross-cultural others is central to this understanding of respect.

Several theorists point to the importance of including personal history, identity and specificity in theories dealing with respect for persons. Seyla Benhabib argues that in any conception of respect one must seriously acknowledge “difference, alterity and the standpoint of the ‘concrete other.’”\textsuperscript{33} Similarly, Iris Marion Young highlights the importance of considering affectivity, particularity and difference in theories of morality.\textsuperscript{34} Finally, Charles Taylor asserts that any theories based on the absence of differentiation in the context of equal freedom or respect leave a very small margin for the recognition of difference\textsuperscript{35} or distinct cultural identities.\textsuperscript{36} Taylor therefore advocates taking an open stance towards cross-cultural others to learn about aspects of different cultures worthy of respect and valuing.\textsuperscript{37} These theories all highlight the importance of situating respect within an actual relationship and taking account of the particular identities of individuals and their situatedness within communities.

\textsuperscript{31} Farley, supra note 10; Benhabib, \textit{Situating the Self}, supra note 10; Dillon, "Respect and Care", supra note 3; Young, "Asymmetrical Reciprocity", supra note 10; Taylor, "Politics of Recognition", supra note 10.
\textsuperscript{32} Bird, supra note 30 at 215.
\textsuperscript{33} Benhabib, \textit{Situating the Self}, supra note 10 at 167.
\textsuperscript{34} Iris Marion Young, \textit{Justice and the Politics of Difference} (Princeton: Princeton University Press, 1990) [Young, \textit{Justice}] at 117.
\textsuperscript{35} Taylor, supra note 10 at 51.
\textsuperscript{36} \textit{Ibid} at 52.
\textsuperscript{37} \textit{Ibid} at 72–73.
For the purposes of this framework, Robin Dillon’s theory of care respect is useful as it highlights, like many Indigenous theories of respect, the importance of interdependence and relationality. Dillon critiques Kant’s theory on the basis that its focus on individual pursuits of the good life by exercising rationally autonomous moral agency leads to the conclusion that people’s responsibility is primarily to keep our distance from one another.\(^{38}\) This approach, in Dillon’s view, emphasizes separation between people rather than interdependence. She asserts that a more useful conception of respect for persons involves:

1. “valuing and responding to others in their concrete particularity;”\(^{39}\)

2. “coming to understand them in light of their own self-conceptions and trying to see the world from their point of view;”\(^{40}\) and

3. “caring for others by responding to their needs, promoting their well-being, and participating in the realization of their selves and their ends.”\(^{41}\)

Dillon articulates a view of respect that is grounded in the idea that what is of worth for all people is each person’s individual and human “me-ness.”\(^{42}\) Such a view tacitly recognizes each person’s cultural distinctiveness.

Kantian respect can be characterized as dispassionate and detached from others.\(^{43}\) In contrast, Dillon’s care respect involves a commitment to attend to others with “intensely focused perception”\(^{44}\) and pay attention to all aspects of each person’s

\(^{38}\) Dillon, "Respect and Care", supra note 3 at 113.
\(^{39}\) Ibid at 115.
\(^{40}\) Ibid.
\(^{41}\) Ibid at 116. This last aspect of caring for others includes the recognition that people’s sense of self-worth develops in relationships with others. I discuss this idea below.
\(^{42}\) Ibid at 118.
\(^{43}\) Ibid at 120.
\(^{44}\) Ibid.
particularity in his or her concrete context. She describes the core attitude of care respect as “cherishing, a form of respect that involves profoundness of feeling, treasuring, warm regard, solicitous concern.” This attitude requires active engagement between people and responsiveness to each other’s needs.

Care respect provides room for generalized respect for persons (acknowledgement of sameness among people) and also provides a means to acknowledge difference between people due to its focused attention on each person’s identity and particularity. This conception of respect requires people to take a humble stance – “it calls us to be slow to judge and generous in our evaluation, recognizing the reality of deep disagreement among morally sincere persons, our own limitations in understanding, and the profound impact of our evaluations.” This conception of respect involves taking care to provide room for meaningful listening to other people’s subjective understandings of their own identities, experiences and histories.

Care respect not only involves a responsibility to avoid degrading, insulting and harming others but also involves positive responsibilities to contribute in constructive ways to other people’s existence. This conception of respect involves “a determination to discover, forge, repair, and strengthen connections among persons in ways that

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45 Ibid.
46 Ibid.
47 Ibid at 120–21.
48 Ibid at 122–23.
49 Ibid at 123.
50 Ibid at 128.
benefit all of us.” Dillon asserts that care respect values both individuality and interdependence and joins people in a community of mutual concern and mutual aid.

Theories that emphasize the importance of learning about the specificity and particular identity of cross-cultural others are useful in the context of Indigenous/non-Indigenous relations. The importance of learning about the perspectives, values, traditions and laws of cross-cultural others may lead to a widening of perspectives and transformative learning across cultures. Through this type of interaction, people from different cultural contexts may transform their own understandings of what constitutes respectful relations and contribute to the creation of a better society.

4.2.1.2 Indigenous Theories of Respect

There is a great diversity of Indigenous cultures within Canada and theories of respect are heavily dependent on the cultural, social and political context from which they arise. Although there is a danger in generalizing across the rich and diverse Indigenous cultures within Canada, Indigenous theorists point to some commonalities among Indigenous legal traditions and philosophies relating to the principle of respect. For the purposes of this section, I do not claim to provide an authoritative account of Indigenous theories of respect, rather I sketch some central characteristics of such theories to examine similarities and differences in interpreting the principle of respect.

Just as non-Indigenous theories support the conception of respect for persons so Indigenous philosophies support this conception of respect. Dale Turner notes, for example, that the Great Law of Peace of the Haudenosaunee peoples holds that “a

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51 Ibid at 129.
52 Ibid.
human being possesses intrinsic value and ought to be accorded respect.”

This means that one must recognize that others “have the right to speak their mind and choose for themselves how to act in the world.” Similarly, Alfred notes that “[t]he freedom and power that come with understanding and living a life of indigenous integrity are experienced by people in many different ways, and respect must be shown to the need for individuals to find their own way according to their own vision.” This view of respect highlights the fact that each person is entitled to have their own vision of how to live their life and choose for themselves how to act in the world.

Another aspect of this idea of respect includes an explicit recognition of respect among all members of Indigenous communities, including women, men, youth and Elders. Many Indigenous legal traditions have principles about gender relations. It is important to note, however, that there is “a widespread disjuncture between these ideals and everyday gender norms and practices” within Indigenous communities. Similarly, there are principles around including youth and Elders within community decision-making structures, however, these may or may not be implemented in an ideal way in various communities. I mention this not to pass any judgment around this reality, rather, to highlight that many of the principles underlying both Indigenous and non-Indigenous legal systems describe idealistic notions of community rather than the actual implementation of such principles.

53 Dale Turner, This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy (Toronto: University of Toronto Press, 2006) at 49.
54 Ibid.
57 Ibid.
Despite apparent similarities to non-Indigenous theories of respect, however, Indigenous understandings of respect include the explicit recognition that respect takes place and is defined by responsibilities to the larger cultural community. Gordon Christie asserts that “[r]esponsibilities act to define a core of the identity of the individual, just as the existence of a society centred around responsibilities defines the identity of Aboriginal communities.”

In the Haudenosaunee tradition, for example, the concept of respect includes the notion of responsibility to use one’s talents to the benefit of the larger community. Similarly, in the Anishinabek tradition there is a strong emphasis on responsibilities in the context of respecting others; “Anishinabek peoples have obligations (*daebizitawaugaewin*) to their families and community: to support them, to help them prosper, and to exercise their rights to live and work.”

Finally, in the Cree tradition, *miyo-wicehtowin* “requires Cree peoples as individuals and as a nation to conduct themselves in a manner such that they create positive good relations in all relationships;” this concept includes the idea that people have positive obligations to provide support and assistance to others. These examples demonstrate

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59 Teyowisonte interviewed by Alfred, *Wasáse, supra* note 55 at 272. Teyowisonte, a Kanien’kehaka youth, describes the traditional notion of “autonomous responsibility,” which “means that you lead your own life consciously aware of how your actions affect the Nation” (275). Teyowisonte also notes a key concept in Haudenosaunee culture is “self-betterment for the collective” (272).
61 *Ibid* at 85.
that embedded within many Indigenous theories of respect is the positive responsibility that people support others, work to maintain positive relationships and contribute their abilities for the benefit of the community.

In contrast to liberal theories, Christie asserts that due to their experiences over the millennia, Indigenous peoples have worked out the broad strokes of what it is to lead a good life. These visions of how to live with other beings respectfully have been worked out “from a combination of wisdom gleaned from mythological time and thousands of years spent reflecting on the best ways to live.”63 As such, there is a shared philosophical vision of the good life within Indigenous communities. This shared vision is based not only on rational, intellectual grounds but also on “the ‘feel’ and beauty of the truth of the assertion,” on the “connections of this assertion to established ways of living,” and on “ways laid down by ‘original instructions’... bolstered by the wisdom of those of experience and reflection.”64 This shared vision has been refined over time using intellectual, reflective, sensory and communal resources to provide a system of belief that gives “essential guidance in the task of living good lives” for both individuals and communities.65

A key feature of Indigenous conceptions of respect is that members of Indigenous communities are taught respect through the transmission of stories, communal values and teachings. Christie notes

in Aboriginal communities the ways of living valued and promoted are such as to require years of gentle instruction, a process of maturation aided by a community’s

64 Ibid at para 105.
65 Ibid.
careful system of guidance. Central to this process or moral education is building a core sense of responsibility, one which would come to be an integral part of one’s sense of personal identity. ... This sense must be carefully instilled, carefully nurtured and carefully maintained. An individual possessed of this sense will know what to do and how to act so as to travel the good path, to live a good life. This involves, essentially, doing as one must towards fellow beings, both human and non-human.66

Much of this learning takes place through direct observation and experiences out on the land through relationships with family members and Elders within communities.67

Indigenous conceptions of respect may differ from non-Indigenous philosophies in that Indigenous theories hold that a broader range of beings are entitled to a generalized respect. These beings include persons and also nonhuman entities, animate and inanimate. As RCAP notes: “[m]any Aboriginal people, particularly those adhering to traditional ways, accord respect to all members of the circle of life – to animals, plants, waters and unseen forces, as well as human beings.”68 Lederach notes that Indigenous peoples have a

seemingly innate capacity to imagine themselves in relationship not only with the human community but also with everything that surrounds them in the animate and inanimate world. The earth, the rocks, the trees, the sky, the air, the fish, the bear, the deer – all speak to them. ... The marvel for indigenous people is not that rocks speak. It is that they, as a human community, retained a capacity to hear the rocks sing.69

66 Ibid at para 106.
68 RCAP, supra note 2, vol 1, Ch 16, sec 1.2; Donna Greschner, “Aboriginal Women, the Constitution and Criminal Justice” (1992) 26 UBC L Rev 338, paras 23 & 27. The Supreme Court of Canada recognized the respect for all life that characterizes Indigenous philosophies in R v Van der Peet, [1996] 2 SCR 507 [Van der Peet] at para 214. The Supreme Court of Canada recognized that the Sto:lo “viewed salmon as more than just food; they treated salmon with a degree of respect since the Sto:lo community was highly reliant and dependent on the fish resources.”
Similarly, E Richard Atleo (Umeek) asserts that the Nuu-chah-nulth aspired “to live, albeit not always successfully, as though personal and community well-being is dependent on, and must be inclusive of, all reality, including water, land, plants, animals, humans, and indeed, anything that seems to be alive.” 70 Rather than focusing exclusively on the ways in which animals, plants, waters and lands can be exploited for the benefit of human beings, Indigenous philosophies consider animate and inanimate beings in decision-making processes.

Indigenous conceptions of respect include the humble recognition of one’s place within all of creation. Taiaiake Alfred argues that Indigenous peoples “are rooted in the recognition and respect of sensitivity to one’s place in creation and awareness of one’s place in the circle of integrity.” 71 This humble recognition supports the view that all life forms are entitled to equal respect. As Lyons asserts:

it has been a mandate of our people to look after the welfare of the land and its life. Central to this responsibility is a recognition and respect for the equality of all the elements of life on this land. Recognition and respect for the equality of all elements of life is necessary because it brings us into perspective as human beings. If all life is considered equal, then we are no more or no less than anything else. Therefore, all life must be respected. Whether is a tree, a deer, a fish, or a bird, it must be respected because it is equal. 72

Since many Indigenous philosophies feature a respect for all life, such philosophies are focused on “relationships of connection to the land and each other.” 73 Much like care

71 Alfred, Wasáíse, supra note 55 at 39.
respect described above, the focus is on relationality and connectedness rather than individuality and separation.

Alfred notes that Indigenous conceptions of respect involve the idea of “a universal relation among autonomous elements of Creation.” Alfred describes this “first principle” as “[t]he idea of recognizing our universal connection and at the same time respecting our differences.” Key aspects within this notion of respect are that both interdependence and respect for difference are primary.

Decision-making about land and resource use focuses on the holistic effects and the interdependence between all life forms. As Gunn notes “in determining the scope of rights Indigenous peoples have to their lands, it is important to recognize that rights to use land are not just distributed amongst humans, but that other animals and plants must be considered in allocations and permissible uses.” Human interests do not necessarily take precedence over the interests of other life forms in decision-making processes. This concept of respect for all life forms therefore stands in stark opposition to non-Indigenous views of land as an exploitable commodity.

In addition to considering all life forms in a non-hierarchical way, Indigenous theories of respect are broader than non-Indigenous theories in the fact that Indigenous theories accord respect to past and future generations. Alfred asserts: “We have to refer to both the past and the future in our decision-making. This is where we get the concept of the ‘seven generations:’ we’re supposed to be listening to our

74 Alfred, Wasáse, supra note 55 at 266.
75 Ibid.
grandfathers, our ancestors, but we also need to listen to the grandfathers yet to come.”

This is so because respecting one’s ancestors and future generations is one of
the conditions under which Indigenous peoples believe their lands were given to them
by the Creator.

Lederach relates a story about an Indigenous woman from Kenya in a conflict
resolution seminar trying to explain the dynamic relationship between past, present
and future in the Kalenjin worldview. As Lederach relates,

she explained in her native language of Kalenjin, people would say the past that lies
before me and the future that lies behind me. She then explained: ‘This morning I
understood that what we know, what we have seen, is the past. So it lies before us.
What we cannot see, what we cannot know is the future.’ Then she began to walk
backward. ‘So the past we see before us, but we walk backward into the future.
Maybe my grandparents’ way of saying it was more accurate.

Lederach goes on to explain: “[a]s such, the journey is toward a past that lies before us.
... The past and future are not seen as dualistic, polar opposites. They are connected,
like ends of a circle that meet and become seamless.” Past, present and future
generations therefore all form part of the web of relationships that continue to inform
decision-making in many Indigenous worldviews.

4.2.1.3 Respect Between Cultural Groups

In the context of respect between cultural groups, respect takes on additional
aspects, including respect for difference both at an individual and a collective level.

77 Taiaiake Alfred, Peace, Power, Righteousness: An Indigenous Manifesto (Toronto: Oxford University
People (Akwesasne: White Roots of Peace, 1973), sec 57 at 221: “Thus the Five Nations completely united
and enfolded together, united into one head, one body, and one mind. They shall therefore labour,
legislate, and council together for the interest of future generations.”
Rev 85 [Christie, "Delgamuukw and the Protection"] at note 5.
79 Lederach, Moral Imagination, supra note 69 at 136.
80 Ibid.
Respect for difference involves moral and ethical evaluations of “legitimately different ways of being.”81 In this view, the quality of difference lies in the values that anchor the practices of such different ways of being.82 In other words, the cultural values and identities that anchor Indigenous communities and are reflected in their relationships with territories, governance structures and social structures constitute the ‘difference’ that merits respect.

The idea of respect for difference manifests within the cultural and political philosophy of many Indigenous peoples. The Two Row Wampum, for example, envisioned two boats travelling alongside one another with the understanding that neither Indigenous nor non-Indigenous parties to the agreement would interfere in the other’s internal affairs.83 Osennontion, a Mohawk woman, argues “[i]t should be said that when we were given our own ways to life, we were never given a government for any others but ourselves, and to this day, we maintain our end of the original agreement to co-exist, not to impose our ways on others.”84 Embedded within the Haudenosaunee legal system, therefore, is an explicit commitment to respect for difference.85

82 Ibid.
84 Osennontion & Skonaganleh:rá, supra note 17 at 8–10; Monture-Okanee & Turpel, supra note 73 at para 53.
85 It is worth noting that the Haudenosaunee have a particular way to relating to the world based on their history and cultural practices that supports interdependence yet protects against assimilation and integration: see Borrows, Canada’s Indigenous Constitution, supra note 60 at 76. As such, the vision articulated through the Two Row Wampum of ‘coexistence’ may be understood to approximate the notion of ‘tolerance’. There is a lot of literature that examines the idea of tolerance and its distinction from respect; see e.g. Benjamin L Berger, “The Cultural Limits of Legal Tolerance” (2008) 21 Can J Law

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The early treaties provide a useful example of the development of an intercultural understanding of respect that included respect for difference. In the negotiation of the early treaties, each side observed ceremonies from both colonial and Indigenous traditions to solidify the terms of the agreement. Although the two sides to the early treaties may have had different motivations – securing military alliances for the colonizers and ensuring that their cultural, territorial and national integrity remained intact for Indigenous peoples – such agreements were based on an imperfect yet palpable sense of mutual respect.

The doctrine of Aboriginal rights as it has evolved within Canadian jurisprudence can also be understood as embodying the concept of respect for difference. As Brent Olthius argues “the doctrine of Aboriginal rights was born and finds continued sustenance in the reconciliation of inter-societal normative difference.” This inter-societal normative difference, I would argue, is not only due to

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87 Brent Olthius, “The Constitution’s Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982” (2009) 54 McGill LJ 1 at para 30. Canadian jurisprudence also supports the concept of respect for difference in the context of equality claims under section 15 of the Charter. In Andrews v Law Society of British Columbia, [1989] 1 SCR 143 [Andrews] at para 34, the Supreme Court of Canada held that “[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.” Further, the Court held that differential treatment may be necessary to accommodate differences between people and that such treatment can in fact promote equality between people (see Andrews at para 31; see also R v Big M Drug Mart, [1985] 1 SCR 295 [Big M] at para 124. The concept of respect for difference, therefore, is central to the promotion of equality under Canadian law. As Donna Greschner, supra note 68 at para 5, highlights, the conception of equality as the identical treatment of men and women “is at best problematic for aboriginal women and men because...aboriginal societies are grounded in notions of harmony, complementarity and balance, not sameness.” Although the idea of equality can be helpful and persuasive in arguments supporting Indigenous rights (see e.g. Patrick Macklem, Indigenous Difference and the Constitution of Canada (Toronto: University of
cultural differences but also to historical differences (that Indigenous peoples lived in what is now Canada first) and jurisdictional differences (that Indigenous peoples exercised sovereignty prior to the arrival of European others). The concept of respect for difference therefore applies not only to cultural but also territorial and governmental difference in the context of Indigenous peoples within Canada.

The concept of respect for group difference is also a key element of the principle of respect. Respect for group difference across cultures is based on the belief that cultural diversity and the continuing existence of different cultural forms are valuable. Diversity in cultural forms is valuable in that each culture develops particular beliefs and ways of being in the world, which shape the identities of members of those cultures. Those beliefs then are self-reinforcing and serve to provide a strong sense of communal identity within groups.

The concept of respect for group difference also includes recognition of the cultural diversity between and among Indigenous nations. As RCAP asserts: “we need to ensure that the distinctive contributions of different Aboriginal peoples are recognized and to avoid an artificial homogenization of Aboriginal cultures.”

Although it is useful to make generalizations in order to discuss Aboriginal rights and

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88 Macklem, ibid at 4.
89 The concept of respect for difference is supported by the Supreme Court of Canada in the seminal case on s. 1 of the Charter: R v Oakes, [1986] 1 SCR 103 [Oakes] at para 64. Here the SCC says that “respect for cultural and group identity” is one of the “values and principles essential to a free and democratic society.”
91 RCAP, supra note 2, vol 1, Ch 16, sec 1.2.
the flourishing of Indigenous cultures, it is important to remain vigilant to avoid essentializing Indigenous peoples and cultures.

Respect for group difference is central to renewing the relationship between Indigenous and non-Indigenous peoples.\(^92\) Charles Taylor argues that we ought to approach different cultures with the presumption that “all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings.”\(^93\) Taylor argues that this requires an “act of faith,” particularly when considering the value and worth of cultures sufficiently different from our own where “we may have only the foggiest idea \textit{ex ante} of in what its valuable contribution might consist.”\(^94\) He asserts that we need to engage with others on a personal level across cultures with an openness to the possibility that other cultures that have existed for a long period of time have aspects that deserve our admiration and respect.\(^95\) Through learning across cultures, each party’s judgments of what aspects of culture are worthy and valuable might also be transformed from one’s original familiar standards.\(^96\)

\subsection*{4.2.2 The Why?}

There are several reasons why it would be valuable for Indigenous/non-Indigenous peoples to implement respect as a guiding principle in their on-going relationships. First, there has been a significant amount of harm created due to a lack of respect towards Indigenous communities, which has had a negative impact on both

\begin{footnotes}
\footnote{Ibid.\(^92\)}
\footnote{Taylor, "Politics of Recognition", \textit{supra} note 10 at 66.\(^93\)}
\footnote{\textit{Ibid} at 67.\(^94\)}
\footnote{\textit{Ibid} at 72–73.\(^95\)}
\footnote{\textit{Ibid} at 70.\(^96\)}
\end{footnotes}
individual and collective identities. Indeed, the harm and damage inflicted upon
Indigenous peoples within Canada is tantamount to the denial of their inherent
cultural identity and value. The related imperative for implementing the principle of
respect is therefore the rectification of harm and the rebuilding of healthy
communities. Second, living together in respect is central to rebuilding
Indigenous/non-Indigenous relationships on a morally sound basis. There exists both
the potential and need to restructure Indigenous/non-Indigenous relationships on a
more just and legitimate footing and the principle of respect forms an essential part of
this restructuring. In this section, I discuss the history of disrespectful treatment of
Indigenous peoples and its effect on Indigenous peoples’ sense of self-respect. I then
discuss the advantages of restructuring Indigenous/non-Indigenous relationships to
live together in respect.

4.2.2.1 Canada’s History of Disrespect Towards
Indigenous Peoples

For much of Canada’s history, disrespect has characterized the relationship
between Indigenous and non-Indigenous peoples. The disrespect shown towards
Indigenous communities manifests both on an individual and collective level.
Successive governments implemented policies, sanctioned by law, aimed at devaluing
and destroying Indigenous identities and cultures within Canada. The federal
government’s intent in 1920 as expressed by Duncan Campbell Scott, then Deputy
Minister of the Indian Department, was “to continue until there is not a single Indian
in Canada that has not been absorbed into the body politic, and there is no Indian
question, and no Indian Department.”⁹⁷ The Canadian government’s policies of assimilation purposefully denigrated Indigenous cultures, degraded Indigenous peoples and distanced Indigenous peoples from their communities. The forced assimilation of Indigenous peoples included breaking down the cultural ways of such peoples, physically separating family members from one another and instilling Eurocentric ways “through repetitive drills and exercises in schools, factories, prisons and armies.”⁹⁸

European colonizers justified the taking of Indigenous lands as their own by characterizing Indigenous cultures as uncivilized and primitive.⁹⁹ This taking needed justification since at the time of colonization international law did not allow for the claiming of lands occupied by other sovereign nations.¹⁰⁰ In order to dispossess Indigenous peoples of their lands, therefore, European colonizers needed to create a theory to support the application of European laws in territories outside their nation’s borders.¹⁰¹ The theory created equated sovereignty and nationhood with civilization thereby positioning Indigenous peoples outside this definition.¹⁰²

Eurocentric notions of cultural superiority posited European cultures as further along the evolutionary scale than Indigenous cultures.¹⁰³ In this view, “all cultures and

¹⁰⁰ Ibid at 53–54.
¹⁰¹ Ibid at 4.
¹⁰² Ibid.
peoples are mapped hierarchically in accordance with their location on a historical process of development.” European societies and institutions were characterized as the highest and most developed on the scale and Indigenous peoples were considered primitive, savage and uncivilized. European institutions were also seen as universal and reasonable in contrast to Indigenous societies, which were seen as primitive and childlike.

As such, efforts to Christianize and Europeanize Indigenous peoples were constructed as benevolent. As Tully argues, colonizers “saw themselves as enlightened guardians who were preparing lower, childlike and pre-consensual peoples for a superior, modern life; in this way they could regard the destruction of other cultures with moral approval.” By viewing Indigenous peoples and cultures as merely at a lower stage of human development, European powers could justify the violent and unequal treatment of Indigenous peoples in the colonies.

The policies of assimilation legally implemented in Canada included compulsory enfranchisement provisions under the Indian Act, whereby First Nations women who married non-Indigenous men lost their status. Other laws were enacted prohibiting raising money for Aboriginal legal claims from 1927 to 1951 and prohibiting cultural ceremonies such as the potlatch and the tamanawas from 1884 to 1951. The residential school system was also imposed on Indigenous peoples, in which

104 Tully, supra note 98 at 64.
105 Ibid at 65.
106 Ibid.
107 Ibid at 91.
109 Ibid at 117. The potlatch is a central economic, political and legal ceremony practiced by west coast First Nations and the tamanawas is the Blackfoot sun dance.
Indigenous children were forcibly removed from their families, and continues to have
destructive intergenerational consequences for entire communities.\textsuperscript{110}

By theorizing Indigenous inferiority without really understanding those
cultures, colonizers made generalizations based on harmful, inaccurate stereotypes.
The process of stereotyping “denies the inherent complexity of every individual’s
identity, reducing him or her to a mere cipher for a group, to whom a negative enemy-
image can then all too easily be attached.”\textsuperscript{111} These stereotypes justified the
disrespectful treatment of Indigenous peoples by colonial authorities. These attitudes
also surface in court decisions. For example, in the heavily criticized British Columbia
Supreme Court decision in \textit{Delgamuukw}, Chief Justice McEachern stated that the
Gitxsan and Wetsuweten’s “ancestors had no written language, no horses or wheeled
vehicles, slavery and starvation was not uncommon, wars with neighbouring peoples
were common, and there is no doubt, to quote Hobbes, that aboriginal life in the
territory was, at best, ‘nasty, brutish and short.’”\textsuperscript{112} Although this decision was reversed
and the above comments were rejected at both the British Columbia Court of Appeal
and the Supreme Court of Canada, it is disconcerting, to say the least, that a judge


within the Canadian court system would include a comment in 1991 that so vociferously denigrates Indigenous cultures.\textsuperscript{113}

Disrespectful attitudes towards Indigenous peoples also engendered both a disregard for and mischaracterization of Indigenous governance structures and legal systems. The disregard manifests in the assumption that such governance structures and legal systems may have been used in the distant past but are unable to address the circumstances facing Indigenous communities in the present day.\textsuperscript{114} The mischaracterization surfaces in the allusion to Indigenous institutions and legal systems are idyllic and utopian, with no negative features.\textsuperscript{115} Indigenous institutions and legal structures are useful in the present day because they are a particular response by reasoning people to universal human issues.\textsuperscript{116} Disrespectful attitudes towards Indigenous institutions and legal systems contribute to their continued marginalization and dissuade critical engagement with the ideology, principles and application of such institutions in the present day.

\textsuperscript{113} Bell & Asch, supra note 103 at 60 point out that a more subtle example occurred in Baker Lake v Ministry of Indian Affairs, [1979] 107 DLR (3d) 513 (FCA) at 83, where Justice Mahoney of the Federal Court of Canada said: “[t]he fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive.” Bell and Asch point out that although this comment is not explicitly racist, this comment makes clear that the Court was considering the Inuit’s culture in an evolutionary stages view and characterizing Inuit culture as more primitive than Eurocentric cultures on the scale of evolution (at 60).

\textsuperscript{114} Borrows, Canada’s Indigenous Constitution, supra note 60 at 23.


4.2.2.2 Internalizing Disrespect: Indigenous Identities and Self-Respect

The disrespectful attitudes towards Indigenous peoples were justified through the construction of stereotypical and inaccurate representations of Indigenous identities and cultures. Frantz Fanon has eloquently described the violence that results internally for colonized peoples as a result of the imposition of inaccurate colonially constructed Indigenous identities:

And then the occasion arose I had to meet the white man’s eyes. An unfamiliar weight burdened me. A real world challenged me. In the white world the man of color encounters difficulties in the development of his bodily schema. Consciousness of the body is solely a negating activity. It is a third-person consciousness. The body is surrounded by an atmosphere of certain uncertainty.... And I was battered down by tom-toms, cannibalism, intellectual deficiency, fetishism, racial defects ... I took myself far off from my own presence ... What else could it be for me but an amputation, an excision, a hemorrhage that spattered my whole body with Black blood.117

Here Fanon graphically describes the negative effects of the imposition of colonial stereotypes on his identity and physical experience. The imposition of negative stereotypes on cross-cultural others arises from the erection of imaginative boundaries between non-Indigenous and Indigenous peoples. Such boundaries justify a physical distancing between cross-cultural groups and results from a refusal to put the self into question.118

The disrespectful treatment of Indigenous communities directly impacts the development of Indigenous peoples’ individual notions of self-respect. Taylor argues that one’s sense of identity develops in the context of relationships with others, which

117 Frantz Fanon, Black Skin, White Masks (New York: Grove Press, 1967) [Fanon, Black Skin] at 110–11.
can affect the development of self-respect both positively and negatively.\textsuperscript{119} Dillon describes self-respect as “a complex of multiply layered and interpenetrating phenomena that compose a certain way of being in the world, a way of being whose core is a deep appreciation of one’s morally significant worth.”\textsuperscript{120} In her view, self-respect requires both intellectual and experiential appreciation of one’s worth;\textsuperscript{121} it is important to both \textit{know} and \textit{feel} one’s worth.\textsuperscript{122} What this means is that it is not enough to know on an intellectual level that you are worthy of respect but that it is actually necessary to feel that sense of being valued and worthy. In the context of oppressed communities whose identities are constructed as less valuable and less worthy, it may be difficult for some members of those communities to develop both intellectual and emotional aspects of positive self-respect.

Self-respect has also been linked to the respect accorded to cultural groups at a political level. Taylor notes that the respect for group identity can shape the development of self-respect of members within particular groups.\textsuperscript{123} He argues “[e]qual recognition is not just the appropriate mode for a healthy democratic society. Its refusal can inflict damage on those who are denied it, according to a widespread modern view…. The projection of an inferior or demeaning image on another can

\begin{thebibliography}{99}
\bibitem{119} Taylor, "Politics of Recognition", \textit{supra} note 10 at 32.
\bibitem{121} \textit{Ibid} at 239. Dillon notes: “Intellectual understanding involves having beliefs which one has reason to accept as true, then coming by inference to have other beliefs which one takes to be true in virtue of their logical relation to warranted beliefs, where the believing, inferring, and assessing need not engage emotions. Experiential understanding involves experiencing something directly and feeling the truth of what is experienced.”
\bibitem{122} \textit{Ibid} at 234. The need to value oneself, in her view, is one of the deepest human needs (242). In the context of self-respect, Taylor, "Politics of Recognition", \textit{supra} note 10 at 26, also notes that recognition by others can be thought of as “a vital human need”.
\bibitem{123} Taylor, \textit{ibid} at 36.
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actually distort and oppress, to the extent it is internalized.”124 Here Taylor highlights the link between respect among social groups and how respect given or its absence can affect the development of self-respect.

Dillon also asserts that the political and social positioning of groups significantly affects self-respect.125 The importance of political recognition in the development of self-respect is also central, in her view as “damaged self-respect is integrally connected to oppression.”126 She argues:

The source of some damage to self-respect is an implicit interpretive framework of self-perception whose organizing motif is worthlessness. And this framework...is not a private phenomenon but is a feature of the historical and socio-political situatedness of individuals. Self-respect may be damaged not because individuals fail to have appropriate thoughts and emotions but because they fail to have an appropriate situation, one that would support the construction of a basal framework for positive valuation.127

Here Dillon notes that self-respect on an individual level “is constituted by and reflects prevailing forms of social and political life.”128 She notes that self-respect is “constructed in and by social, cultural and political contexts, which for many categories of persons are contexts of oppression.”129 She argues that ameliorating damaged self-respect requires work on a personal, emotional level but, in addition, improving the prevailing socio-political contexts may yield improved self-understandings and an improved level of self-respect.130

124 Ibid.
125 Dillon, "Self-Respect", supra note 120 at 227.
127 Ibid at 243. To support this claim, Dillon cites a large body of work within philosophy and psychology on the social construction of emotion and personality, especially in connection with gender.
128 Ibid at 244.
129 Ibid at 245.
130 Ibid at 249.
In the context of Indigenous communities within Canada, RCAP also highlights the link between respect at the political level and self-respect. RCAP concludes that people can be active and responsible members of their communities only if they have a sense of their own worth and the conviction that what they say and do in both the public and the private sphere can make a significant contribution. However, this sense of self-respect is based in part on society’s recognition of the value of an individual’s activities and goals. A multinational society that treats the culture of a member nation with derision or contempt may well undermine the self-respect of people belonging to that culture.\\(^{131}\)

RCAP highlights the close link between recognition at the collective level and feelings of self-respect at the individual level.

Fanon highlights the way in which violence in the colonial relationship can be internalized by those cultures that are denigrated and oppressed.\\(^{132}\) As such, members of colonized communities internalize the devaluing messages and may turn the violence they experience towards themselves or others in close personal relationships. Violence within Indigenous communities, such as violence against women, “is connected to the larger social structures of inequality within any society... and is therefore intimately linked with the broader colonial context.”\\(^{133}\) Lack of respect at a political and cultural level may damage Indigenous peoples’ self-respect and contribute to social problems present in some Indigenous communities. One imperative for implementing the principle of respect therefore is to rectify the harm disrespect causes at an individual level and to contribute to the health of Indigenous communities.

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\\(^{131}\) RCAP, *supra* note 2, vol 1, Ch 16, sec 1.1.
\\(^{133}\) Snyder, Napoleon & Borrows, *supra* note 56 at 604. The authors note that Indigenous law could usefully and appropriately address these issues within Indigenous communities.
4.2.2.3 Restructuring the Relationship to Live Together in Respect

There are many advantages to be gained from shifting from a relationship characterized by disrespect to one based on respect, cooperation and interdependence. In addition to increasing the capacity of Indigenous peoples both individually and collectively through the creation of conditions that support positive self-respect, implementing the principle of respect in Indigenous/non-Indigenous relationships would prioritize proactive, constructive collaboration over adversarial, destructive conflicts. For example, in the area of litigation, if the Canadian government were to create a neutral mediation body that tried to proactively deal with disputes prior to them going to litigation, and provide supports for Indigenous leaders and government representatives to negotiate realistic solutions prior to escalation, many disputes may be resolved without recourse to the courts. Litigation is notoriously expensive, risky and stressful. Diverting conflicts away from the court system may allow for more resources to be put into capacity-building, negotiating mutually agreeable courses of action and managing intercultural relationships.

Implementing the principle of respect may also allow Indigenous peoples to focus on reclaiming and reconstructing Indigenous institutions and legal traditions from within. The disrespectful onslaught of assimilationist policies has positioned Indigenous peoples in a defensive stance. Correspondingly, this has diverted Indigenous peoples’ attention away from proactively creating and implementing their visions of what they want their societies to be and how they want to express their cultural identities. Living together in respect would reduce the need for a defensive
posture and provide positive space for Indigenous peoples to live in accordance with their own sense of collective identity and values.

4.2.3 The How?

Reflecting on the history of Indigenous/non-Indigenous relationships within Canada suggests that the relationship to date has not been constructive and that conflicts will continue to bubble to the surface due to the dysfunction in the intercultural relationship. The first and most important precondition to implementing the principle of respect to restructure this relationship therefore is the acknowledgement that the relationship needs to be improved. This acknowledgment supports the idea that the intercultural relationship might be restructured on a sounder basis, which includes implementing the principle of respect.

In addition to this precondition, I suggest that there are three concrete starting points to begin to transform the relationship between Indigenous and non-Indigenous peoples and put it on a more solid footing. These three starting points include (1) making our interdependence and responsibilities towards one another primary; (2) rejecting colonial attitudes and stereotypes; and (3) creating space to express and foster cultural difference.

4.2.3.1 Making Interdependence and Mutual Responsibilities Primary

A first way to implement the principle of respect is to make our interdependence and responsibilities towards one another primary. Respect requires a shift in

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134 Goldberg-Hiller, "Subjectivity", supra note 118 at 175, suggests that we “need to make primary, the importance of our responsibility toward another".
understanding from a perspective that we are valuable solely as individuals to one that recognizes that we all exist within a web of relationships. Rather than starting from the Eurocentric perspective that sees people as valuable because they have the capacity for rational, individualistic thought, we need to shift our perspective to understand that we are in fact constituted by our relationships with others. As Monture asserts: “I am because I know my name, my family, my clan, and my nation.”135 Similarly, Jennifer Nedelsky argues we need to recognize that “our essential humanity is neither possible nor comprehensible without the network of relationships of which it is a part.”136 This relational understanding requires a paradigm shift from a consideration of not only what is best for oneself but also what is best for everyone else. This requires that people take a wide-angle and long-term view of the effects of decisions on everyone, both Indigenous and non-Indigenous.

In settings of protracted violence, John Paul Lederach asserts that recognizing the centrality of relationships and interdependence is pivotal to constructive social change.137 He asserts that we need to understand that “the well-being of our grandchildren is directly tied to the well-being of our enemies’ grandchildren.”138 In Lederach’s view, conflict is embedded in relational spaces, networks and connections139 and therefore the solutions must emerge “from relational sources, connections and

137 Lederach, Moral Imagination, supra note 69 at 34–35. Lederach defines constructive social change as “the pursuit of moving relationships from those defined by fear, mutual recrimination, and violence towards those characterized by love, mutual respect, and proactive engagement” (42).
138 Ibid at 35.
139 Ibid at 76.
obligations.”\textsuperscript{140} This suggests that intercultural relational spaces need to be created in order to facilitate dialogue that might lead to appropriate processes for resolving disputes.

Viewing our interdependence as primary corresponds with Indigenous perspectives that value all life forms. If solutions need to emerge from relational spaces, communication needs to occur within all relevant relationships. Atleo asserts that according to Nuu-chah-nulth worldviews humans can engage in dialogue with all life forms through the vision quest. The vision quest, called \textit{?uusumc?}, enables people to “see beyond the purely physical reality of nature.”\textsuperscript{141} The vision quest also allowed [the Nuu-chah-nulth] to discover that creation is a unity in spite of its apparent fragmented appearance and contradictory nature. For example, although deer, wolf, and salmon are scientifically classified as animals within the biological dimension of existence and therefore as separate from humans, Nuu-chah-nulth peoples also know and experience these animals as \textit{quu?as}, as people like themselves. The same is true of trees and the multitude of other life forms. What this means is that Nuu-chah-nulth peoples had to find some way to live with these other \textit{quu?as} who were recognized as life forms, as living beings who were originally part of one language and community.\textsuperscript{142}

Finding ways to communicate with other life forms through vision quests enabled Nuu-chah-nulth peoples to establish respectful protocols for such interactions.\textsuperscript{143}

The crucial idea stemming from Atleo’s description of the vision quest is the aspect of spiritual connection, which might also be understood as an emotional or embodied connection. In the context of various life forms that make up our world, a prerequisite is spending more time physically in areas where other life forms live.

Reconnecting with nature, therefore, constitutes a first important step to being alive to

\textsuperscript{140} Ibid at 77.
\textsuperscript{141} Atleo (Umeek), supra note 70 at 35.
\textsuperscript{142} Ibid at 35–36.
\textsuperscript{143} Ibid at 37.
the various life forms with whom we are interrelated and upon whom our realities depend.

Once we accept interdependence among people and other life forms as primary, the idea of responsibilities between such life forms make sense. If our wellbeing is bound up with the wellbeing of others, we have a responsibility to take good care of ourselves and of others. In this view, responsibilities to past and future generations also make sense. It is easy to understand, from a non-Indigenous perspective, that the quality of our grandchildren’s’ lives depends upon decisions we make today. It also becomes easier to understand how our past ancestors might be affected: we may do damage to their memories by making irresponsible decisions of which they would have disapproved.

Conceptualizing ourselves as embedded within a web of relationships made up of all life forms justifies the notion of mutual respect and responsibility among life forms. Making interdependence and mutual responsibilities primary requires a radical shift in focus away from individualism towards an understanding of our embeddedness in a complex web of relationships. This complex web includes Indigenous and non-Indigenous peoples and other life forms across a wider expanse of time than non-Indigenous peoples are accustomed to considering.

4.2.3.2 Rejecting Colonial Attitudes and Stereotypes

The desire to control and assimilate is based on a negative view of Indigenous peoples and cultures. In order to rebuild relationships between Indigenous and non-Indigenous peoples on the basis of respect, we need to reject colonial attitudes and the
harmful stereotypes such attitudes engender. Some ways in which to shift attitudes and jettison stereotypes include non-Indigenous people learning more about the history of Indigenous/non-Indigenous relations within Canada and learning about Indigenous peoples and cultural values by engaging with Indigenous peoples on a personal level.

Canada’s international reputation as a peaceful, democratic nation is a source of pride for many Canadians. Most Canadians, however, are sorely misinformed or completely ignorant about the history of colonialism and the impact that assimilationist policies and laws have had on Indigenous peoples within Canada. This is so despite the work of the Truth and Reconciliation Commission, which documented survivors’ stories, held National Events and brought media attention to the Indian Residential School legacy.

Expressing genuine willingness to learn from Indigenous peoples is in itself a demonstration of respect. Moreover, genuine interest in learning about Indigenous cultures affirms the value of such cultures. Taylor advocates engaging in intercultural dialogue and participating in other-cultural practices as necessary processes to

144 In the context of critically engaging with Indigenous legal traditions, Friedland, "Reflective Frameworks", supra note 115 at 34, suggests several ways to move past stereotypes when dealing with materials in which one might find descriptions of Indigenous law: she argues for a shift in assumptions that starts from the premise that Indigenous peoples were and are reasoning people with reasonable social and legal orders; Indigenous legal orders exist in the present and those engaging with them should describe them in the present tense; and understand that Indigenous laws are a particular response to universal human issues.

145 There are several ways in which to improve the understanding of the history of Indigenous/non-Indigenous relationships on a broad scale, including curriculum reform in schools and public education campaigns through traditional and social media.

146 Greschner, supra note 68 at para 6. As Greschner argues: “One indication of respect is the willingness to learn from another.”
recognize the moral “equality-in-difference” of people from other cultural groups.\textsuperscript{147}

Iris Marion Young also advocates modes of cross-cultural interaction such as greeting, rhetoric and storytelling to craft a more comprehensive intercultural understanding.\textsuperscript{148}

Non-Indigenous people might learn about Indigenous cultural values in attending Indigenous cultural events but they also may have the important and uncomfortable experience of being the only person in the room who does not know how to act. This positioning as an outsider may create a transformative learning experience whereby non-Indigenous people might begin to understand some of the foreign experiences Indigenous peoples face when they participate in Canadian institutions, like schools, courts and prisons.

Attempting to understand (however imperfect that understanding might be) Indigenous peoples’ perspectives and cultural values is important for non-Indigenous peoples to be able to appropriately contextualize disputes that arise involving Aboriginal rights. Without attempts to understand Indigenous perspectives and cultures, the actions of Indigenous communities in living their laws through blockades, peaceful protests and public demonstrations may be misunderstood and mischaracterized. As Wapshkaa Ma’iingan (Aaron Mills) points out Indigenous communities participate in blockades and other public protests as an act of jurisdiction

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in accordance with the laws governing their peoples.\textsuperscript{149} When this perspective is made explicit, one’s understanding of acts of protest shifts: instead of Indigenous peoples being seen as criminal, unruly, and unlawful, the blockades are reframed as a symptom of clash of jurisdiction resulting from unresolved historical grievances. In other words, Indigenous protests and blockades take place because there has been a lack of respect in the relationship to date and the relationship is broken.

The willingness to learn from Indigenous peoples requires engaging with Indigenous peoples on a personal level. This involves the ability and willingness to listen, hear the voices and accept the truths of Indigenous experiences.\textsuperscript{150} More engagement will inevitably increase the amount of knowledge that non-Indigenous and Indigenous peoples have about one another\textsuperscript{151} and may increase the level of intercultural respect.\textsuperscript{152} Napoleon and Friedland, for example, describe a story common to several Indigenous legal traditions, including the Gitksan, Cree, Taigish and Secwepemc, about “a member of one group spending time with another people – human or animal – and returning with new knowledge that is incorporated into the practices and intellectual frameworks of his or her own people.”\textsuperscript{153} A key message in these stories is that the experience of spending time with another group increases

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\textsuperscript{150} Greschner, \textit{supra} note 68 at paras 31 & 32.
\textsuperscript{151} Wong, \textit{supra} note 11 at 175.
\textsuperscript{152} \textit{Ibid} at 177; see also Samar El-Masri, “Interethnic Reconciliation in Lebanon After the Civil War” in Joanna R Quinn, ed, \textit{Reconciliation(s): Transitional Justice in Postconflict Societies} (Montréal: McGill-Queen’s University Press, 2009) 263 at 274.
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respect between the different peoples and/or animals.\textsuperscript{154} Similarly, in the context of intersocietal human relationships, Ms. Montague asserts

it’s very easy to have an enemy when you can’t see the enemy’s face. So, once there’s some kind of direct interaction and people meet one another on a face-to-face basis, the dynamics change. And it’s not as easy to hate, because the faceless monster on the other side of that wall has got my blue eyes or brown eyes, has a name, has a family – they are a person.\textsuperscript{155}

Wilson asserts that “the more we can not only know of others but also the more empathy we can feel with them, the less likely are we to be dependent on stereotyped representations in intercultural encounters.”\textsuperscript{156} As a result, increasing intercultural contact is a key strategy necessary to deconstruct stereotypes.

Increased contact alone, however, is not enough. Wilson asserts that intercultural contact is only effective to deconstruct stereotypes when it is repeated and extended over time.\textsuperscript{157} This is in part because it takes time to build trust between people so people will only start to share stories about themselves after repeated contact. In addition, although repeated contact is necessary, it is not sufficient in itself without deeper engagement between people through dialogue. As Lynagh notes, mere contact “doesn’t shift anything – I could sit with you for hours and I wouldn’t have any greater understanding of your values, your beliefs, or I wouldn’t have any greater respect.”\textsuperscript{158} As a result, extended, recurrent, high quality engagement is what is necessary to deconstruct stereotypes and effectively change peoples’ attitudes.

\textsuperscript{154} Ibid at 15.
\textsuperscript{155} Ms. Montague interviewed by Wilson, What Works for Reconciliation?, supra note 111 at 35.
\textsuperscript{156} Ibid at 13.
\textsuperscript{157} Ibid at 42.
\textsuperscript{158} Ms. Lynagh interviewed by Wilson, What Works for Reconciliation?, ibid at 43.
In his legal historical study of early interactions between Indigenous and non-Indigenous peoples in North America, Jeremy Webber provides an example that supports the need for sustained, regular contact across cultures to generate increased understanding and respect. Webber notes that “[t]he intensity of [the] interaction [of] [early colonists] with Aboriginal peoples often generated a high level of mutual understanding and respect.”\(^{159}\) Specifically, he noted that fur traders and missionaries, who had higher amounts of interaction with Indigenous peoples, had more solicitude towards Indigenous communities than agricultural settlers due to their respective amounts of interaction.\(^{160}\) Webber notes that agricultural settlers had “few amicable contacts with Aboriginal peoples” and “little opportunity for discussion and exchange.”\(^{161}\) In addition, agricultural settlement created more conflicts over lands between settlers and Indigenous peoples, which increased the likelihood that settlers would have negative cross-cultural interactions. Higher amounts of personal interaction and interdependence between non-Indigenous and Indigenous peoples may therefore increase the amount of respect between cultures.

### 4.2.3.3 Creating Space to Express and Foster Cultural Difference

Finally, implementing the principle of respect includes relinquishing the historic control that the Canadian government has exerted over the lives of Indigenous communities and creating a space for such communities to express and foster cultural difference. This involves the creation of both physical and jurisdictional space. With

\(^{159}\) Webber, "Relations of Force", supra note 86 at 636.

\(^{160}\) Ibid at 636-37.

\(^{161}\) Ibid at 637.
respect to the need for physical space, Indigenous communities rely on and maintain close relationships with their ancestral territories. Indigenous peoples not only depend on the resources within their territories for economic and physical sustenance but their relationships with their specific ancestral territories sustain their cultural and spiritual identities. The centrality of territory to Indigenous peoples makes the protection of the territorial relationship of utmost importance. As Matthew Chapman argues “the maintenance of the territorial connection must be the condition precedent of the survival of Indigenous cultures and, therefore, the survival of indigenous peoples as peoples.” Chapman argues that states around the world are more willing to support the protection of the cultural rights of Indigenous peoples but are much more reluctant to support the protection of territorial and self-determination rights. The stability provided to Indigenous communities by securing territorial rights, however, is central to the survival and identities of Indigenous peoples.

The need to create physical space for Indigenous communities to flourish is closely related to the need to create jurisdictional space for the protection of cultural difference. This includes space for Indigenous governments to govern their communities according to their cultural traditions and values. Indigenous governments therefore may differ in form and design both from mainstream institutions and from those of other Indigenous communities based on differing cultural values. As Wilkins asserts, the Canadian legal system:

\[\text{...}\]

\[162\] Chapman, supra note 90 at 360.
\[164\] Chapman, supra note 90 at 362.
must dedicate sufficient ‘constitutional space for Aboriginal peoples to be Aboriginal,’ to borrow Donna Greschner’s wonderful phrase. This entails respecting and protecting communities’ power, and indeed duty, to defend such individuals, lands and resources as may remain to them against mainstream ‘laws and policies which are demonstrably threatening to their culture,’ and generally to address their own needs and imperatives in ways that they themselves consider effective and appropriate, even when those aims and ways differ substantially from what we in the mainstream culture might have done or preferred. This, in turn, necessarily involves ‘the significant letting go of Canadian government power over the lives of Aboriginal citizens,’ and accepting that self-governing Aboriginal communities are bound sometimes to make mistakes – even by their own reckoning – that it cannot be our business, uninvited, to correct.

Respecting jurisdictional space for Indigenous peoples therefore includes the acceptance that such communities may design different institutions, legal systems and processes that are culturally appropriate to their communities.

Respecting jurisdictional space also includes recognizing Indigenous sovereignty as an effective way to protect collective difference. As Macklem suggests:

Each side cherishes its own collective difference and values sovereignty as a way of expressing that difference and protecting it from the encroaching views of the other. Collective difference, far from being a reason for refusing to recognize a community’s sovereignty, is in fact a precondition of such recognition. The value of sovereignty lies in the legal space it establishes for a community to construct, protect, and transform its collective identity. Sovereignty, simply speaking, permits the legal expression of collective difference.

Here Macklem asserts that the recognition of Indigenous sovereignty would create a legal space for Indigenous governments to envision and support their collective identity as a community. He is careful to point out that because sovereignty is socially constructed, it is not tied to one institutional form but can be sculpted and recreated to serve the purposes of Indigenous communities, one of which is to protect collective

166 Macklem, Indigenous Difference, supra note 87 at 110.
167 Ibid at 111.
difference.\textsuperscript{168} The recognition of sovereignty therefore is a central way that Aboriginal law could protect the expression of Indigenous collective difference.

The creation of jurisdictional space includes the ability to design and implement legal institutions that reflect and enforce Indigenous legal traditions. Indigenous peoples need to participate “in defining the meaning, institutions and standards of justice in their own communities.”\textsuperscript{169} Donna Greschner asserts that building a just legal system requires “ensuring that [Aboriginal peoples] are the systems’ dreamers, architects and caretakers.”\textsuperscript{170} This requires that Indigenous communities be tasked with coming up with culturally-appropriate solutions to the problems facing their own communities\textsuperscript{171} and equally importantly that non-Indigenous peoples trust their ability to do so.

The creation of this jurisdictional space would support Indigenous peoples’ ability “to define who they are;” it would provide the “potential for self-definition which includes their capacity to project their own theories and particular forms of knowledge.”\textsuperscript{172} This would enable Indigenous communities to make laws and policies that reflect Indigenous conceptions of respect for all life forms and past and future generations. It would enable Indigenous communities to reinvigorate governance structures specifically formulated to protect Indigenous cultural difference.

The recognition of Indigenous territorial, jurisdictional and governance rights poses the most difficulty for the Canadian constitutional structure and Canadian
society as a whole. Inevitably, such rights will create conflicts between Indigenous and non-Indigenous peoples because such rights compete for scarce resources (land) and conflict with the vision that Canada has created of how it should be governed. The federal structure, however, already allows for different levels of jurisdictional and governance powers. With enough support and a new, shared vision\textsuperscript{173} of how Canada might be restructured on the basis of mutual respect, Indigenous governance and territorial rights might become a reality.

4.3 Visions of Respect

The principle of respect seems like something that should be reasonable to implement in the context of managing the relationships between Indigenous and non-Indigenous peoples. History, however, has demonstrated that respect has not characterized these relationships to date. The creation of a truly intercultural understanding of the principle of respect would be informed by and reflect Indigenous and non-Indigenous visions. Engendering respect in the intercultural relationship would involve deliberately rejecting stereotypes and negative attitudes towards Indigenous peoples and recognizing their cultural, territorial and governance rights.

The principle of respect would also involve both negative and positive acts on the part of the Canadian government.\textsuperscript{174} To implement the principle of respect, the Canadian government would need to refrain from interfering with decisions that Indigenous governments make with respect to their territories and peoples. In the context of Aboriginal title to lands, for example, this would include non-interference

\textsuperscript{173} I discuss some practical ways of moving this discussion forward and creating a shared vision in Chapter 7, which deals with the principle of reconciliation.

\textsuperscript{174} Macklem, \textit{Indigenous Difference}, supra note 87 at 238.
with decisions relating to the uses to which such lands might be put. The Canadian government could take positive action to provide funding and support so that Indigenous governments can properly exercise their inherent authority to govern their nations.

There is much to gain from implementing the principle of respect and having this principle guide government and legal decision-making in the context of Aboriginal rights claims. As RCAP notes: “[r]espect among cultures creates a positive, supportive climate for harmonious relations, as opposed to the acrimonious and strife-ridden relations of a culture of disdain. Respect for the unique position of Canada’s First Peoples... should be a fundamental characteristic of Canada’s civic ethos.” Implementing an intercultural principle of respect to guide Indigenous/non-Indigenous relations would create more peace and justice between Indigenous and non-Indigenous people within Canada.

175 In Delgamuukw, supra note 15 at paras 125–28, the Supreme Court of Canada held that there is an inherent limit on the uses to which Aboriginal title lands can be put by the Aboriginal titleholders. The Court:

The content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands.... For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).

176 RCAP, supra note 2, vol 1, Ch 16, sec 1.2.
Over the course of the first year, Brenda, Johnny, Gavin and Lynette worked collaboratively to create a consultation process that was acceptable to both the Yellow Valley First Nation’s leadership and community members and the Board at Green Co. Through these meetings, Toby facilitated the discussions so that both sides were made aware of each other’s concerns. Toby also designed activities aimed at brainstorming creative solutions to the issues raised. After completing an exercise aimed at coming up with various solutions to the community’s concerns that any mining in the spiritually significant area would breach the community’s laws, the group decided that the resources located within the spiritually significant site would not be part of the development plan. The Board at Green Co was disappointed with this decision but realized that compromises would have to be made in order to maintain a good relationship with the First Nation and develop the mining project accordingly.

The consultation framework that Green Co and Yellow Valley came up with set out a shared vision for what both parties could agree upon in partnering on a mining project. This shared vision included that the overarching vision was that development projects could proceed as long as the project provided mutual benefits and was done in accordance with Yellow Valley’s stewardship responsibilities. Specifically, the parties agreed that the project could proceed as long as:

- it provided significant benefits to both Green Co and the Yellow Valley community

- Green Co and Yellow Valley participated in decision-making in partnership, and

- once the development project was over, Green Co would remediate the lands and waters as closely as possible to their pre-project state.
Chapter 5: The West Door: The Principle of Recognition

People need opportunity and space to express to and with one another the trauma of loss and their grief at that loss, and the anger that accompanies the pain and the memory of injustice experienced. Acknowledgment is decisive in the reconciliation dynamic. It is one thing to know; it is yet a very different social phenomenon to acknowledge. Acknowledgment through hearing one another’s stories validates experience and feelings and represents the first step toward restoration of the person and the relationship.  

The second of the four principles is recognition. The principle of recognition has two central aspects: acknowledgement and affirmation. In this Chapter, I argue that in the context of Indigenous/non-Indigenous relationships, ‘recognition as acknowledgement’ involves accepting that harm occurred, communicating that acceptance to the victim of wrongdoing and taking responsibility. ‘Recognition as affirmation’ involves formally entrenching in law the pre-existing, inherent rights of Indigenous communities. This sense of recognition includes the affirmation of Indigenous sovereignty and jurisdictional capacity and specifically rejects “the politics

of recognition,”³ which includes the Canadian state’s delegated granting of political recognition only where it serves settler colonial interests.⁴ Affirmation involves rejecting the assumption of settler entitlement to Indigenous lands, being open to all issues during Indigenous/non-Indigenous political negotiations, and creating a sphere of recognition for Indigenous nations to revitalize appropriate forms of governance and legal systems.

Acknowledgement requires providing spaces for Indigenous peoples to share their stories of how colonialism has impacted their lives. It is central to the Medicine Wheel teaching that posits that in the West Door the purpose is to reflect on the history and context of the issue at hand.⁵ Acknowledgement involves accepting that harm occurred, communicating that acceptance to the victim of wrongdoing and taking responsibility. In the context of Indigenous/non-Indigenous relationships, acknowledgement requires providing spaces for Indigenous peoples to share their stories of how colonialism has impacted their lives. Acknowledgement also requires non-Indigenous peoples to openly listen to Indigenous storytelling about their experiences of colonization. Most difficult, it requires non-Indigenous peoples to

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⁴ Glen Sean Coulthard, Red Skin White Masks: Rejecting the Colonial Politics of Recognition (Minneapolis: University of Minnesota Press, 2014) [Coulthard, Red Skin White Masks] at 152.
⁵ In a conversation with Kimberly Murray, (16 November 2011), I consulted with her about my preliminary thoughts on where in the Medicine Wheel the four principles might fit. I initially thought that the principle of recognition might fit in the Vision section. She expressed her view, however, that recognition is about acknowledgement and so it fits more appropriately in the Reflection section. She also felt that reconciliation fits better in the Vision section. This conversation altered my perspective on what recognition means because I was starting from the idea of recognition as formal legal recognition of Indigenous jurisdiction, which is very different from acknowledgement and reflection on the history of what has brought us here today. This difference is reflected in my discussion of the two meanings of recognition in this chapter.
interrogate their complicity within the history of colonialism – to consider how each of us has and continues to benefit from colonial policies and laws imposed on Indigenous peoples.

Recognition as acknowledgement focuses on Indigenous peoples’ individual and collective identities in highlighting the importance of listening to and accepting their subjective accounts of colonialism and their rightful place in the world. It also focuses on creating spaces for Indigenous collectivities to articulate their understandings of history and their communities’ stories.

The second aspect of recognition – affirmation – flows out of acknowledgement. Just like acknowledgement, affirmation requires close listening to Indigenous people regarding the content of pre-existing Indigenous laws and governance systems. It relates to Indigenous communities’ rights to inherent self-determination, law making and sovereignty. This aspect of recognition, in Borrows’ words, “describes a thought process that brings an accepted idea to awareness again.” In other words, affirmation does not grant or create rights but instead upholds the inherent, pre-existing rights of Indigenous peoples and nations.

‘Recognition as affirmation’ requires the creation of space for Indigenous communities to revitalize their own governance, legal, political, economic and social systems on their own terms. Such affirmation may include formal legal recognition of Indigenous jurisdiction yet requires a beginning stance on the part of non-Indigenous peoples that the goal is to step back so that Indigenous communities retake control of decision-making within their communities by establishing processes, systems and

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6 Borrows, Canada’s Indigenous Constitution, supra note 2 at 181.
institutions reflective of that community’s societal values and relevant to its contemporary needs and realities. As the discussion below illustrates, both acknowledgement and affirmation form essential and interrelated components of the principle of recognition.

Both aspects of recognition – acknowledgement and affirmation – focus on the recognition of Indigenous peoples’ identities. Acknowledgement focuses on Indigenous peoples’ individual and collective identities in highlighting the importance of their subjective accounts of colonialism and their rightful place in the world. Acknowledgement also focuses on creating spaces for Indigenous collectivities to articulate their shared understandings of history and their communities’ stories. Affirmation also focuses on individual and group identity in creating a space for Indigenous governance, jurisdiction and decision-making authority to take its place within the Canadian constitutional framework.

In this Chapter, I begin by outlining the sources that provide support for the choice of the principle of recognition. I then draw on relevant jurisprudence and academic work, including domestic, international and Indigenous legal theories to propose a robust conception of the substantive content of each aspect of the principle of recognition.

5.1 Sources for the Principle of Recognition

The principle of recognition as acknowledgement is supported in the work of the various Truth and Reconciliation Commissions around the world. The Preamble of
the Declaration includes an acknowledgement that the particular histories and cultural backgrounds of Indigenous peoples should be taken into account in implementing its provisions.\(^8\) Since the process of drafting it heavily involved Indigenous peoples from different parts of the world, the Declaration is particularly authoritative as a source to support the principle of recognition. In several cases, the Supreme Court of Canada has also highlighted the need to acknowledge the impacts of colonialism on Indigenous peoples.\(^9\) In intercultural dispute resolution literature, acknowledgement of the past is supported as one of the most important components of healing a divided society.\(^10\) It is also seen as a key component to any peace-building strategy that aims to build a renewed, positive relationship between groups who have a history of violence and distrust.\(^11\)

Similarly, the principle of recognition as affirmation is supported in international law, Canadian domestic law, Indigenous legal traditions and academic writing, both by Indigenous and non-Indigenous scholars. The Preamble of the Declaration emphasizes the need to affirm Indigenous rights in several places.\(^12\) The


\(^11\) Ibid.

\(^12\) Declaration, supra note 8 at Preamble (recognizing urgent need to respect inherent rights and treaty agreements), Art 26 (states shall give legal recognition and protection to Indigenous peoples’ lands, territories and resources), Art 27 (states shall recognize Indigenous peoples’ laws, traditions, customs and land tenure systems), Art 31 (states shall take effective measures to recognize and protect Indigenous right to cultural heritage, traditional knowledge, cultural expressions and intellectual
Declaration asserts that the affirmation of the rights of Indigenous peoples will “enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.” Section 35(1) of the Constitution Acts also provides a strong source for the principle of affirmation as it recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada.” In addition, Indigenous legal traditions provide a rich source for the principle of recognition as affirmation. Finally, as the below discussion will highlight, academic writing supports the need for affirmation of Aboriginal rights and Indigenous sovereignty.

5.2 Substantive Content of the Principle of Recognition

In discussing the substantive content of the principle of recognition I have structured my discussion as follows: first, I reflect on the history of misrecognition and nonrecognition of Indigenous identities and the effects of this on Indigenous and non-Indigenous peoples. Second, I discuss ‘recognition as acknowledgement’ and address what acknowledgement is, why it is important and how it might be implemented. I then consider strategies that might facilitate acknowledgement including recognizing the value of Indigenous restorying, creating spaces for meaningful listening and making a commitment to remember and change. Third, I discuss ‘recognition as affirmation’ and address the what, the why and the how of this aspect of recognition.

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property), and Art 37 (right to have treaties recognized, observed and enforced). Although the preceding articles constitute specific places where the word recognition, or a form thereof, is included, the entire Declaration recognizes Indigenous rights, which as Article 43 establishes, “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”

13 Ibid at Preamble.
14 Borrows, Canada’s Indigenous Constitution, supra note 2 at 129.
5.2.1 Reflections on Misrecognition and Nonrecognition

To date, the relationship between Indigenous and non-Indigenous peoples has been characterized by nonrecognition and/or misrecognition of Indigenous peoples’ identities. In particular, there has been a failure to recognize Indigenous peoples’ identities as self-sustaining, autonomous and culturally cohesive communities. As Charles Taylor notes, demands for recognition are linked to the idea that identity is partly shaped by recognition or by its absence and that this can affect a person’s understanding of who they are.\textsuperscript{15} The concept of nonrecognition is closely related to denial or ignorance, both purposeful and inadvertent. Throughout Canada’s history, the Canadian state has failed to recognize Indigenous peoples as peoples and implemented policies and laws aimed at assimilating Indigenous peoples and eradicating Indigenous cultures.

Misrecognition includes the imposition of negative stereotypes and inaccurate representations of Indigenous peoples and cultures to the point that such misrecognition has harmed the integrity of the underlying Indigenous societal values and the identities of Indigenous community members. Examples of misrecognition include justifying the dispossession of Indigenous peoples of their lands based on theories that constructed Indigenous peoples as savage and primitive; constructing Indigenous peaceful protesters as unlawful when they are living by their own laws of protecting and preserving their territories for future generations;\textsuperscript{16} and construing


Indigenous demands for compensation for resource development projects taking place within their traditional territories as exploitative rather than just.

Both nonrecognition and misrecognition have been closely linked to cultural imperialism. As Iris Marion Young notes: “[t]o experience cultural imperialism means to experience how the dominant meanings of a society render the particular perspective of one’s group invisible at the same time as they stereotype one’s group and mark it out as Other.” ¹⁷ In Young’s view, misrecognition places those marked as different (in this case Indigenous peoples) into the difficult situation of being defined negatively as a lack or absence of the highly regarded characteristics of the dominant culture (European colonizers). ¹⁸ Likewise, Charles Taylor asserts: “[n]onrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.” ¹⁹ Similarly, as Coulthard notes colonized peoples can form a psychological attachment to master-sanctioned forms of recognition²⁰ resulting in the colonized internalizing structurally unequal relations as natural.²¹ Both non and misrecognition therefore negatively affect Indigenous communities and peoples due to the invisibility of their concerns, the imposition of negative stereotypes upon them, and the internalized acceptance of unequal power relations.

¹⁸ Ibid at 60.
²⁰ Coulthard, “Indigenous Peoples”, supra note 3. Coulthard’s theory is heavily influenced by Frantz Fanon.
²¹ Coulthard, *Red Skin White Masks*, supra note 4 at 32. Here Coulthard is engaging with Frantz Fanon’s theories.
Nonrecognition can also be used to justify and deny wrongdoing after it has taken place. As such, literature addressing the phenomenon of denial in the context of criminal behaviour both at a personal and state level is instructive. In the context of state atrocities committed against marginalized communities, Stanley Cohen examines the way in which individuals that participate in the commission of such atrocities, either actively or by turning a blind eye, rationalize their action or inaction. Cohen asserts that denial is used as an unconscious defense to protect a person from unwelcome or threatening knowledge. Through the use of denial, a person therefore tries to push back any troubling recognition until it disappears. Such denial can be sincere or in bad faith.

There are many strategies that can be used to promote such denial or, in the case of state atrocities, organized forgetting. As Trudy Govier highlights, to avoid acknowledgement of wrong acts, perpetrators may:

1. deny that the act even happened or insist something else happened;
2. allow for the fact that the act was wrong but say they did not do it; or
3. admit the act occurred, was wrong, and that they did it, but deny responsibility because they had no real alternative or they committed the wrong with good intentions.

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23 Ibid.
24 Ibid at 39.
25 Ibid at 37.
26 Judith Lewis Herman, *Trauma and Recovery* (New York: Basic Books, 1992) at 8. Herman talks about the way in which perpetrators promote forgetting; ‘organized forgetting’ is a term I came up with.
Judith Herman sets out the predictable pattern of responses that perpetrators follow after committing an atrocity: “[a]fter every atrocity one can expect to hear the same predictable apologies: it never happened; the victim lies; the victim exaggerates; the victim brought it on herself; and in any case it is time to forget the past and move on.”

In Borrows’ persuasive discussion of this phenomenon in the context of Indigenous peoples within Canada, he argues that each of these strategies has been used in response to Indigenous peoples asserting their rights. Within Canada, non-Indigenous governments used these strategies both to deny the existence of asserted Indigenous rights as well as retroactively justify the dispossession of Indigenous peoples after knowingly committing oppressive acts.

Herman also points out that witnesses to such atrocities are caught in the conflict between victim and perpetrator and may find it very tempting to take the side of the perpetrator because “[a]ll the perpetrator asks is that the bystander do nothing.” Conversely, to side with the victim, the witness must identify with the victim and “share the burden of pain.” Coupled with the history of negative stereotyping of and inaccurate attitudes towards Indigenous peoples within Canada, it may be difficult for non-Indigenous people to identify with the issues facing and empathize with Indigenous peoples. If non-Indigenous people are bombarded with negative images of Indigenous communities and do not have previous positive

28 Herman, supra note 26 at 8.
29 Borrows, Canada’s Indigenous Constitution, supra note 2 at 172–173.
30 I am indebted to Gordon Christie for this point.
31 Herman, supra note 26 at 7.
32 Ibid.
interactions and images from which to draw different conclusions, the tendency may be to blame Indigenous peoples for the issues they are currently facing. This blaming might take the place of the more appropriate but difficult recognition that government-sponsored assimilative policies and the imposition of colonialism are the primary causes of such issues.

Just as nonrecognition and denial have negative consequences in the context of Indigenous/non-Indigenous relations so does misrecognition. Several theorists posit that there is a strong correlation between (mis)recognition and identity.\(^{33}\) As Taylor argues: “[o]ur identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or a group can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.”\(^{34}\) He argues that our identities are shaped in dialogue and interaction with others and often through struggles against identities that others project onto us.\(^{35}\) Although the causes of the high proportions of social problems within Indigenous communities within Canada are complex and multifaceted, it is arguable that the nonrecognition and misrecognition of Indigenous identities and peoples have contributed significantly to the current state of affairs.


\(^{34}\) Taylor, ibid at 25. This argument links back to my discussion of self-respect in Chapter 4.

\(^{35}\) Ibid at 33.
Misrecognition is “based on the conviction that ‘others’ are lesser moral beings, or perhaps lack moral status altogether.”\textsuperscript{36} Canada’s oppressive policies towards Indigenous peoples were justified by Eurocentric notions of cultural superiority, which posited European cultures as further along the evolutionary scale than Indigenous cultures.\textsuperscript{37} In this view, “all cultures and peoples are mapped hierarchically in accordance with their location on a historical process of development.”\textsuperscript{38} European societies and institutions were characterized as the highest and most developed on the scale and Indigenous peoples were considered primitive, savage and uncivilized.\textsuperscript{39} European institutions were also seen as universal and reasonable in contrast to Indigenous societies, which were seen as primitive and childlike.\textsuperscript{40}

This stereotypical view of Indigenous peoples as less civilized helped early colonizers justify the taking of Indigenous lands though the labour theory, which posited that ownership of land arose only when a person mixed his or her labour with the land.\textsuperscript{41} This view justified the taking of Indigenous lands for the purposes of agriculture and provided an argument against Indigenous ownership of lands that were used for hunting, fishing and gathering. As Tully notes:

The problem facing [John] Locke and his like-minded contemporaries was that the Aboriginal peoples recognised themselves as organized into sovereign nations with jurisdiction over their territories when the Europeans arrived. ...Since the

\textsuperscript{36} Natalie Oman, “Paths to Intercultural Understanding: Feasting, Shared Horizons, and Unforced Consensus” in Catherine Bell & David Joshua Kahane, eds, \textit{Intercultural Dispute Resolution in Aboriginal Contexts} (Vancouver: UBC Press, 2004) 70 at 73.
\textsuperscript{38} James Tully, \textit{Strange Multiplicity: Constitutionalism in an Age of Diversity} (Cambridge, UK: Cambridge University Press, 1995) at 64.
\textsuperscript{39} \textit{Ibid} at 65.
\textsuperscript{40} \textit{Ibid}.
\textsuperscript{41} John Locke, \textit{Second Treatise of Government} (John Locke, 2014) at 17.
Aboriginal peoples were unwilling to cede all the land the settlers desired to take, a justification was required for taking land and establishing European sovereignty without requiring the consent of the native peoples.42 By theorizing that Indigenous peoples were childlike and primitive, early theorists bent on rationalizing the taking of Indigenous lands could justify such taking without requiring agreements to be negotiated or Indigenous peoples’ consent.

The misrecognition of Indigenous peoples as lacking sufficient civility to be recognized as nations derogated from Indigenous understandings of their cultures and place in the world. Coulthard argues that a precondition to any meaningful change is a “loosening of internalized colonialism.”43 Appropriate recognition requires respect for the nation-to-nation relationships embodied in the early treaty relationships. For non-Indigenous people, it is important to understand the history of non and misrecognition and the effects that it has had in shaping both our and Indigenous peoples’ identities.44 For Indigenous peoples, it is important for meaningful acknowledgment to take place of the history of colonization and of how that history has shaped Indigenous identities and realities. For non-Indigenous people, it is important to acknowledge that the assumptions upon which we live our lives (i.e. that we own our houses legitimately, that we live in a free country) are premised on the unlawful dispossession of Indigenous peoples of their territories. The whole nation is implicated in the decisions of past governments and the whole nation needs to be involved in the process of moving beyond that legacy.

42 Tully, supra note 38 at 71.
43 Coulthard, Red Skin White Masks, supra note 4 at 166.
44 For an in-depth study of the way non-Indigenous peoples might decolonize themselves see Paulette Regan, Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada (Vancouver: UBC Press, 2010) [Regan, Unsettling the Settler].
Lack of recognition on a nation-to-nation level will hinder Indigenous peoples’ ability to lead their communities to health and create positive counternarratives to reshape their individual and collective identities. Misrecognition has negatively shaped collective identities in ways that perpetuate long-term harm to the cultural values of Indigenous communities. Othius argues “that the pernicious effects of misrecognition – the distortions – reach their maximum when, by virtue of the prevailing power structure, the once-inaccurate reflection comes to dominate, and the group loses something irreplaceable.” Without nation-to-nation recognition, Indigenous peoples face an uphill battle in developing positive self-respect due the socio-political context. This may impede some communities’ abilities to bring health and balance back into their nations.

5.2.2 Critiques of State-Granted Recognition

There are several scholars who persuasively critique the current forms of state-granted recognition in the context of Indigenous communities within Canada. In general, these scholars argue that the term ‘recognition’ has been used politically to legitimize existing power differentials and support the continuing dispossession of Indigenous communities within colonial contexts. Taiaiake Alfred, for example, argues that any form of recognition granted by Canadian institutions replicates colonial power dynamics and fails to achieve decolonization for Indigenous peoples. In particular, Alfred launches a sustained critique of the current movement to have Aboriginal rights

recognized within Canadian institutions - a movement he calls ‘Aboriginalism’.\(^{46}\) He claims that self-government agreements,\(^{47}\) land claims, and Aboriginal rights doctrines all contain basic concessions to the colonial status quo.\(^{48}\) He asserts that “it is impossible either to transform the colonial society from within colonial institutions or to achieve justice and peaceful coexistence without fundamentally transforming the institutions of colonial society themselves.”\(^{49}\) He therefore advocates for a radical rehabilitation of the state.\(^{50}\)

Similarly, Glen Coulthard critiques state-granted recognition because the terms of such recognition are determined by the oppressors’ interests and therefore reproduce configurations of colonial power.\(^{51}\) This is so because the settler colonial state only recognizes Indigenous rights that do not challenge the state’s imperatives.\(^{52}\) Coulthard notes that recognition is constructed as the property of the settler state and is therefore seen as a gift that the settler colonial state bestows upon Indigenous peoples.\(^{53}\) Further, he argues that the switch to the terminology of recognition has not challenged the colonial foundation of state power, which has been “structured into a relatively secure or sedimented set of hierarchical social relations that continue to facilitate the dispossession of Indigenous peoples of their lands and self-determining


\(^{47}\) Alfred argues that “[s]elf-government and economic development are being offered precisely because they are useless to us in the struggle to survive as peoples and so are no threat to the Settlers and, specifically, the interests of the people who control the Settler state” [ibid at 37 (emphasis in original)].

\(^{48}\) Ibid at 265.

\(^{49}\) Ibid at 154.

\(^{50}\) Ibid at 155.


\(^{52}\) Ibid.

\(^{53}\) Ibid.
authority.”54 Rather, he sees recognition as a means by which the settler colonial state maintains hegemonic power relations in a context of domination over Indigenous peoples.55

Coulthard argues that a resurgent politics of recognition requires Indigenous peoples to empower themselves, revitalize their societies,56 and challenge the legitimacy of colonial institutions to act as an arbiter of Indigenous claims.57 He recognizes the need for Indigenous peoples to engage with the Canadian system but advocates for a cautious and strategic approach.58 Finally, he argues that Indigenous peoples need “to practice decolonial, gender-emancipatory, and economically nonexploitative alternative structures of law and sovereign authority grounded in a critical refashioning of the best Indigenous legal and political traditions.”59 His approach therefore looks to Indigenous communities to draw on their internal strengths to revitalize their legal and political systems and only engage with those who will engage with them in a constructive manner.60

Elizabeth Povinelli is also critical of state-granted recognition. She argues that Indigenous presence “sharply confronts the sovereign power of the settler state over its territory as well as the means and application of violence that constitutes the settler state’s sovereignty.”61 She notes that one of the ways in which Indigenous claims are

54 Coulthard, Red Skin White Masks, supra note 4 at 6-7.
55 Ibid at 15.
56 Ibid at 18.
57 Ibid at 81.
58 Ibid at 102.
59 Ibid at 179.
60 Ibid at 43.
controlled by settler colonial states is by locating such claims in the past.\textsuperscript{62} By contrast, settler “truth” is described using the present and future tenses.\textsuperscript{63} Since Indigenous and non-Indigenous people are not located in the “same narrative tense of belonging,”\textsuperscript{64} it creates a division reinforcing the dichotomy between Indigenous peoples as ‘primitive’ and settler states as ‘civilized.’ Povinelli therefore argues that in order for Indigenous claims to be recognized within settler colonial systems, those claims must “speak their difference” within a legislated settler colonial norm.\textsuperscript{65}

In Povinelli’s view, Indigenous people’s claims for recognition are also constrained because settler colonialism demands that colonized subjects identify with an impossible standard of authentic traditional culture.\textsuperscript{66} As Povinelli explains: “no indigenous subject can inhabit the temporal or spatial location to which indigenous identity refers – the geographical and social space and time of authentic Aboriginality.”\textsuperscript{67} Because the term ‘indigenous’ refers to a time period prior to the establishment of the settler state, Indigenous peoples are put in an impossible position whereby their mere physical presence in contemporary times contradicts the very claims they are trying to prove. Similarly, Jonathan Goldberg-Hiller notes that because Western law has rigid and fixed legal categories, it has a tendency to “force an Indian

\textsuperscript{62} Ibid at 23.
\textsuperscript{63} Ibid at 23.
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid at 25.
\textsuperscript{67} Ibid.
As such, Indigenous peoples’ identities are constrained and defined by non-Indigenous legal categories.

These critiques of state-granted recognition highlight the limitations of approaches to Indigenous/non-Indigenous relationships that are based on political expediency. The principle of recognition – as both acknowledgment and affirmation – differs from politically motivated approaches to recognition, in that the principle itself needs to be interpreted in a way that is aimed at creating momentum to rebuild relationships between Indigenous and non-Indigenous communities on a meaningful basis. Unlike political approaches to recognition, the principle of recognition in this framework, as the following discussion elaborates, emphasizes the importance of both acknowledgment and affirmation for both Indigenous and non-Indigenous people within Canada. This principle also hinges on acknowledging and affirming Indigenous voices and perspectives on history and on Indigenous governance and legal systems that will serve Indigenous communities in contemporary times.

5.2.3 Recognition as Acknowledgement

The concept of acknowledgement is essential to renewing the relationship between Indigenous and non-Indigenous peoples. In this section, I begin by

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69 Indigenous and non-Indigenous theorists support the importance of acknowledging the history and effects of colonization on Indigenous peoples in international and Canadian contexts. See Behrendt, “Cultural Conflict”, supra note 2 at 117 (in the context of Australia); Love, supra note 2 at 132 (in the context of New Zealand); Borrows, Drawing Out Law, supra note 2 at 223 (in the context of Canada); Borrows, Canada’s Indigenous Constitution, supra note 2 at 79 (acknowledgement as central to Anishinibek philosophy); Jeremy Webber, “Commentary: Indigenous Dispute Settlement, Self-Governance, and the Second Generation of Indigenous Rights” in Catherine Bell & David Joshua Kahane, eds, Intercultural Dispute Resolution in Aboriginal Contexts (Vancouver: UBC Press, 2004) 149 [Webber, "Commentary"] at 150; Quinn, Reconciliation(s), supra note 2 at 187 (discussing healing
discussing what acknowledgement is, why it is important and how acknowledgement might take in the context of Indigenous/non-Indigenous relations. I then consider strategies that might facilitate acknowledgement including recognizing the value of Indigenous restorying, creating spaces for meaningful listening and making a commitment to remember and change.

5.2.3.1 The What?

Acknowledgement involves accepting something as true to oneself and then marking the knowledge or awareness of that fact to someone else sincerely. Govier points out that acknowledgement involves two aspects: first, recognition that previously denigrated people or groups have status as human beings and deserve to have their voices heard; and second, the admission of full or partial responsibility for wrongs against others and the acceptance of one’s accountability in that context. Acknowledgement therefore requires that a person admits and accepts something to him or herself, articulates that acceptance to someone else (usually the victim of wrongdoing), and accepts responsibility for the wrongful act. This acceptance involves recognizing and articulating one’s complicity in the wrongdoing.

In the context of Indigenous/non-Indigenous relations within Canada, the issue of acknowledgement arises because non-Indigenous peoples “know or are in a position to know unwelcome things that we do not wish to spell out or publicly admit.” These

unwelcome things include that historically the society of which we are a part and the
government that we supported denied Indigenous peoples’ humanity through
assimilative policies, unlawful dispossession of lands, and breach of treaty promises.
Further, the legacy of these injustices continues to the present day and non-Indigenous
Canadians continue to benefit from this historical wrongdoing. As such, non-
Indigenous Canadians along with key Canadian institutional actors (judges,
government officials and others) bear the responsibility to acknowledge and rectify that
wrongdoing.

Another important part of acknowledgement is acknowledging the resistance of
Indigenous communities to colonial oppression. Historically, Indigenous peoples
frequently objected to the imposition of Eurocentric conceptions of law and society to
displace Indigenous cultural forms and institutions. In the context of the residential
schools, for example, many Indigenous peoples resisted sending their children to those
schools by continuing their seasonal movements in areas where they knew the Indian
agents and church officials would not be.\textsuperscript{73} Children at the residential schools also
resisted assimilative practices speaking their own languages, openly defying school
authorities, and executing escape plans.\textsuperscript{74} Indigenous resistance to oppressive policies
and laws has continued to the present day. There are numerous contemporary
examples of Indigenous resistance, particularly to resource extraction projects that
threaten the integrity of Indigenous traditional territories and challenge Indigenous
jurisdiction.

\textsuperscript{73} James Rodger Miller, \textit{Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada}
(Toronto: University of Toronto Press, 1989) at 189.
\textsuperscript{74} \textit{Ibid} at 199.
In the legal arena, Indigenous peoples have also resisted the usurpation of their traditional jurisdiction and law-making authority. In the context of the imposition of common law on Indigenous peoples, Borrows highlights:

Indigenous peoples have not generally acquiesced to the common law’s purported replacement of their laws. Historically, the relationship of the common law and civil law to Indigenous legal traditions has not been peaceful and unchallenged. Indigenous peoples have frequently objected to the common law’s presumption of complete displacement.75

It is important to highlight that Indigenous peoples are not merely passive objects upon which colonial policies were imposed. Rather, Indigenous peoples actively resist the imposition of colonial laws and chose to live by their values and beliefs about how to live their lives and organize their communities to the extent they were/are able to do so. As such, it is important to create spaces to celebrate and share stories of Indigenous resistance.

Acknowledgement can take many forms. In Canada, one contemporary example of acknowledgement is occurring through the work of the Truth and Reconciliation Commission of Canada (TRC) dealing with the Indian Residential Schools Legacy.76

The TRC is actively involved in statement gathering from survivors of Indian Residential Schools, documenting survivors’ stories, and memorializing those stories

75 Borrows, Canada’s Indigenous Constitution, supra note 2 at 19.
76 It is worth noting that this Commission arose as a term of the Indian Residential Schools Settlement Agreement (IRSSA), online: <http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf> (retrieved 5 September 2015). The IRSSA arose in response to significant litigation against the Canadian federal government and several churches in Canada who ran the Indian Residential Schools for over 150 years from the early 1800s to the late 1990s. This Agreement required that the Canadian government to apologize, pay nominal damages to survivors for the harm they experienced, and establish the Truth and Reconciliation Commission of Canada. The impetus for this Commission therefore was not reconciliatory at its roots and although there is no question that an apology for the horrific legacy of Indian Residential Schools was due, there are many more injustices that have been perpetrated against Indigenous communities that need to be addressed to repair the relationship between Indigenous/non-Indigenous communities within Canada.
through the establishment of a National Research Centre. Other forms of
acknowledgement include criminal trials, public commissions of inquiry, apologies, reparations, memorials and symbolic restitution.

5.2.3.2 The Why?

The concept of acknowledgement is closely linked with the principle of reconciliation. As Hamber and Kelly note acknowledging and dealing with the past is potentially the most important aspect of reconciliation. Similarly, Trudy Govier argues, “acknowledgement of [wrongs committed by some persons and groups against

77 See the Truth and Reconciliation Commission of Canada’s website at <www.trc.ca> (retrieved 5 September 2015).
80 Govier, “What is Acknowledgement”, supra note 70 at 84.
81 Frayling, supra note 79 at 31.
82 Hamber & Kelly, supra note 79 at 299.
others] is regarded as pivotal in reconciliation and as constituting a necessary first step towards dealing with the past and achieving something like sustainable peace." In this view, acknowledgement constitutes an important first step in the journey towards healing divided societies.

Acknowledgement is important in the context of Indigenous/non-Indigenous relationships from the perspective of Indigenous peoples, non-Indigenous peoples and society as a whole. For Indigenous peoples, “acknowledgment offers a kind of vindication” as it legitimates their claims and provides victims of wrongdoing with a sense of relief because their claims are no longer denied. Such acknowledgement recognizes Indigenous peoples’ identities, experiences and humanity. It also affirms Indigenous peoples’ sense of self since it validates their experiences and how the wrongful treatment has shaped their identities. In addition, acknowledgement may help rebuild Indigenous peoples’ trust towards non-Indigenous people.

Non-Indigenous people benefit from acknowledgement because self-knowledge is the first step towards healing. By listening to and hearing Indigenous perspectives on their experiences, we, as non-Indigenous people, can stop denying Indigenous peoples’ experiences and deceiving ourselves about the state’s role in creating the depressed material conditions facing Indigenous communities. Moreover, non-Indigenous people can acknowledge our complicity within the current system and the

83 Govier, "A Dialectic of Acknowledgement", supra note 27 at 36.
84 Ibid at 40.
85 Ibid at 42.
87 Cohen, supra note 22 at 255.
benefits that we have derived at the expense of Indigenous peoples within Canada.\textsuperscript{88} Govier suggests that there is a moral imperative in acknowledgement in that we need to take responsibility for “acts of wrongdoing for which we have shared responsibility or with which we have been significantly affiliated.”\textsuperscript{89} By doing so, non-Indigenous peoples benefit from addressing any feelings of guilt and shame associated with the historical mistreatment of Indigenous communities.\textsuperscript{90}

From the perspective of the benefit to Canadian society, acknowledgement is a necessary stage through which any successful process of societal recovery must pass.\textsuperscript{91} As Quinn notes, “not until the facts are recognized and people have come to terms with the events of the past can society begin to grieve its losses.”\textsuperscript{92} Likewise, Morris Te Whiti Love asserts: “[i]t is difficult to move beyond a historical grievance if that grievance is not acknowledged.”\textsuperscript{93} Similarly, RCAP notes:

before Aboriginal and non-Aboriginal people can get on with the work of reconciliation, a great cleansing of the wounds of the past must take place. The government of Canada, on behalf of the Canadian people, must acknowledge and

\textsuperscript{89} Govier, "What is Acknowledgement", supra note 70 at 73.
\textsuperscript{90} Ibid at 87. Another potential advantage for non-Indigenous Canadians could result if Indigenous peoples were willing to offer forgiveness. If so, non-Indigenous Canadians could benefit from accepting such forgiveness. Whether or not Indigenous peoples choose to forgive non-Indigenous Canadians and governments for their experiences of colonization will be up to Indigenous peoples individually and collectively. For the purposes of this dissertation, I do not address the concept of forgiveness in detail although many theorists writing in the area of intercultural and postconflict dispute resolution argue that forgiveness is centrally important to moving forward: see \textit{e.g.} Thomas, supra note 86 at 25; Frayling, supra note 79 at 31–32 citing Archbishop Desmond Tutu; Wilhelm Verwoerd, “Toward a Response to Criticisms of the South African Truth and Reconciliation Commission” in Carol AL Prager, ed, \textit{Dilemmas of Reconciliation: Cases and Concepts} (Waterloo: Wilfrid Laurier University Press, 2003) 245 at 264.
\textsuperscript{91} Quinn, "What of Reconciliation?", supra note 88 at 179.
\textsuperscript{92} Ibid at 180.
\textsuperscript{93} Love, supra note 2 at 132. He says that the Waitangi Tribunal in New Zealand provides an important forum for the acknowledgement of historic grievances of Indigenous peoples and recommendations for moving forward.
express deep regret for the spiritual, cultural, economic and physical violence visited upon Aboriginal people, as individuals and as nations, in the past. And they must make a public commitment that such violence will never again be permitted or supported.94

As RCAP suggests, acknowledgement by the Canadian government for the state-sanctioned violence visited upon Indigenous peoples is a necessary step to reconciliation and healing on the part of Indigenous peoples and all of Canadian society.95 Such acknowledgement implies a commitment not to do those things again, which offers a degree of (cautious) reassurance to the victims of wrongdoing that the wrongs will not be repeated.96

From a societal point of view, there are potential costs in failing to acknowledge Indigenous peoples’ experiences. Such costs include the fact that without acknowledgement, we cannot hope to resolve the outstanding issues97 that continue to create conflicts between Indigenous and non-Indigenous people and continue to create

94 RCAP, supra note 78, vol 1, Ch 1, sec 4.
95 Prime Minister Stephen Harper, “Statement of Apology” (3 November 2008), online: <http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649> (retrieved 5 September 2015). It is notable that some Indigenous people have reacted negatively to Harper’s apology as insincere due to his subsequent policies and laws; see, e.g., Daniel Wilson, “An Insincere Apology”, (20 April 2013) [Wilson, “An Insincere Apology”] online: rabble.ca <http://rabble.ca/blogs/bloggers/daniel-wilson/2013/04/insincere-apology> (retrieved 5 September 2015); see also Jennifer Henderson & Pauline Wakeham, “Colonial Reckoning: National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada” (2009) 35:1 Engl Stud Can 1 at 2. It is also worth noting that although Prime Minister Stephen Harper signed the IRSSA and delivered the formal apology on behalf of the Canadian government, former Prime Minister Paul Martin was the government representative that ensured that this agreement was negotiated and finalized prior to his term expiring: Chief Phil Fontaine, Context and Background to the Settlement Agreement (Assessing the Indian Residential Schools Litigation & Settlement Processes, Conference, University of Toronto, 18 January 2013). As discussed more fully in Chapter 7, the Harper Government’s apology related to the Indian Residential Schools is but a partial step towards acknowledgement because although it deals with a very significant issue that has caused a tremendous rupture in the relationship between Indigenous and non-Indigenous people, it is but one terrible example of the many oppressive government policies and laws that have been imposed on Indigenous peoples since colonization. Further, as I discuss later, without accompanying acts of good faith, an apology means very little.
96 Govier, “A Dialectic of Acknowledgement”, supra note 27 at 42.
97 Govier, “What is Acknowledgement” supra note 70 at 74.
disparate social, economic, political and legal circumstances for Indigenous communities. As Borrows writes:

The Canadian state continues to benefit from Indigenous losses through their possession of Indigenous lands and the exercise of virtually unconstrained legal power over them. The failure to acknowledge and remedy this situation is perhaps the underlying cause of conflict between Indigenous peoples and the Crown in this country. 98

Lack of acknowledgement contributes to increased and on-going conflicts between Indigenous and non-Indigenous peoples. 99 Moreover, without acknowledgement we stifle our ability to work collectively to improve Indigenous/non-Indigenous relations, articulate fundamental values, 100 rebuild relationships and thereby strengthen Canada as a nation.

5.2.3.3 The How?

The preceding discussion suggests that acknowledgement is beneficial for Indigenous peoples, for non-Indigenous people and for all of society. However, it is also clear that getting to a point of acknowledgement – that is working though self-knowledge and then articulating that personally or publicly to the victim(s) of wrongdoing – is a difficult process. As Cohen articulates, the goal is to “transform ignorance into information, information into knowledge, knowledge into acknowledgement (cognition into recognition, sight into insight), and finally acknowledgement into action.” 101

In Cohen’s view, there is a need to interrogate “the conditions under which information is acknowledged and acted upon” and then try to create those

98 Borrows, Canada’s Indigenous Constitution, supra note 2 at 170.
99 Ibid at 170; Govier, "What is Acknowledgement", supra note 70 at 79.
100 Govier, "A Dialectic of Acknowledgement", supra note 27 at 42.
101 Cohen, supra note 22 at 247.
conditions. The conditions necessary to facilitate acknowledgement include cognitive, emotional, moral and practical aspects:

- “[t]he cognitive demands are to know what is happening, to retain the information in a zone of awareness not easily blocked off,” and to find an appropriate way to frame the wrongdoing;

- “[t]he emotional demand is for feelings – empathy, outrage, shame, compassion – to be widely shared, expressed and culturally available;”

- the moral demand includes the sentiments that the act was wrong and cannot be tolerated and therefore that an action must be taken in relation to the wrongful act;

- the practical demands are that something can be done, that is known about and can be acted on.

The key conditions therefore include having access to the requisite information and data, emotionally connecting with this information or the people involved, transforming that emotional connection into a moral imperative to act and figuring out what can and should be done in the circumstances.

One way to elicit an emotional response of non-Indigenous people is to engage in a pedagogy of discomfort that forces people to question dominant preconceptions and myths. Such a pedagogy involves getting the participants to “move outside their comfort zones, [which are] ... the inscribed cultural and emotional terrains that we

\[^{102}\text{Ibid.}\]
\[^{103}\text{Ibid at 249–50.}\]
\[^{104}\text{Ibid at 250.}\]
\[^{105}\text{Ibid.}\]
\[^{106}\text{Ibid. This is sometimes called “consequential social action.”}\]
\[^{107}\text{Regan, Unsettling the Settler, supra note 44 at 52.}\]
occupy less by choice and more by virtue of hegemony.”

By engaging in a pedagogy of discomfort the goal is to connect on an emotional level with and create a paradigm shift in the person. The best way to create such a shift is by increasing the amount of personal interactions and learning opportunities through real-world experiences in relationship with Indigenous peoples. There are several practical ways to engage non-Indigenous people on an emotional level; these include providing space for Indigenous restorying, creating conditions for meaningful listening and making a commitment to remember and change.

5.2.3.3.1 Restorying Canada’s History Through Indigenous Storytelling

Colonization has systematically disrupted, displaced, and devalued the existence of Indigenous peoples within Canada. The colonial encounter has shaped both colonizer and colonized - colonizer as civilized, enlightened saviour and colonized as the negation of that image. The psychological decolonization of Indigenous peoples therefore includes a reformulation of self, of one’s story, and of one’s place in the world. It involves mending the split against the self that the colonial encounter produces.

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110 Regan, Unsettling the Settler, supra note 44 at 44.
111 Ibid at 4–5.
112 This section draws heavily on the following article: Manley-Casimir, "Creating Space", supra note 108 at 239–240.
113 Patricia J Williams, The Alchemy of Race and Rights: Diary of a Law Professor (Cambridge, MA: Harvard University Press, 1991) at 119–20, describes a memory of hearing her White friends whisper about coloured people and then later realizing that she was coloured: remember the terrible crash of that devastating moment of union, the union of my joyful body and the terrible power of that devouring symbol of negritude. I have spent the rest of my life recovering from the degradation of being divided against myself, I am still trying to overcome the polarity of my own vulnerability".
The origin of a people is centrally important to the identity, values and institutions of that particular community of people. As Maori theorist Moana Jackson writes: “[t]he soul of a people, the essence of their being, exists within the warmth of their philosophy, it is nurtured and sheltered by the wisdom of their culture and their law. To oppress a people, to set in place the bloody success of colonisation, is to destroy the soul.”\(^{114}\) The disruption of a people’s story is one of the central effects of colonization. Citing Aküm Longchari, a philosopher, historian and human rights advocate from Nagaland, Lederach explains:

Aküm articulated the need to understand at a much deeper level the significance of narrative, of story. From the perspective of Indigenous people, he would explain, original violence might best be understood as the disruption - and far too often, outright destruction - of a people’s story. These patterns are found on every continent and with every aboriginal group’s story. The arrival of Europeans in the Americas, the Great March of Tears of the Cherokee, the impact of British and then Indian nation-building for the Nagas, and the establishment of Australia and the destruction of aboriginal families and life are but a few examples of narratives broken, their stories of peoplehood disrupted.\(^{115}\)

Viewed in this light, colonization systematically disrupted, destroyed and perverted Indigenous stories by marginalizing and devaluing Indigenous perspectives on social meaning, identity and their peoples’ place in the world. In the Canadian context, therefore, space must be created for the reconstruction and remembering of Indigenous stories, not only within Indigenous cultures but also within non-Indigenous society and institutions.

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Longchari proposes a solution to the disruption of Indigenous stories of peoplehood. While acknowledging that the disruption cannot be directly repaired, he advocates for the concept of “restorying” history. Lederach explains:

One cannot go back and remake history. But that does not mean the history is static and dead. History is alive. It needs recognition and attention. The challenge, Aküm would often express, lies in how, in the present, interdependent peoples ‘restory,’ that is, begin the process of providing space for the story to take its place and begin the weaving of a legitimate and community-determined place among others’ stories.... Narrative has the capacity to create, even heal, but it has had its voice taken. A return to giving narrative a place and voice was needed.116

The concept of restorying has profound implications for Canadian law. Not only do non-Indigenous people need to recognize the way in which colonialism has disrupted Indigenous stories but they also need to facilitate the creation of a space in which Indigenous peoples can restory Canada’s history.117 Lederach suggests that the history that needs restorying includes recent events, lived history, remembered history and narrative.118

Through their restorying of history, Indigenous peoples create valid counternarratives of the colonization of Canada. As Hernandez-Truyol argues:

The history of the European search for and finding and populating the Americas, scrutinized from a Native viewpoint, might reveal a dramatically different interpretation. History retold from this perspective might see the landing and taking of land in the Americas not as discovery but rather theft, the Christianization not as evangelization but as cultural genocide, and the decimation of Native populations not as just war or self defense but as a holocaust.119

116 Lederach, ibid at 140.
117 Some of the most high profile ways in which these spaces are being created in through the use of Truth and Reconciliation Commissions around the world, including in Canada in relation to the Residential Schools Legacy: for more information see Truth and Reconciliation Commission of Canada website at <www.trc.ca> (retrieved 5 September 2015).
118 Lederach, Moral Imagination, supra note 115 at 141.
As Hernandez-Truyol makes plain, depending on one’s perspective, Canada’s history can be seen as benevolent, on one hand, or violent, on the other. Through the creation of counternarratives, Indigenous peoples challenge dominant understandings of history. Indigenous restorying therefore functions as an act of resistance. Such stories expose the violence of settlement thereby challenging the founding narratives of settler colonies. As Michael Shapiro notes “to produce an ethics responsive to contestations over identity and the spatial stories upon which structures of recognition rest, it is necessary to disrupt the dominant practices of intelligibility.” Indigenous restorying creates a mechanism to decenter dominant understanding of Canada’s history and reinscribe Indigenous stories upon the land.

In the context of Canadian law, creating spaces for Indigenous storytelling is also key to learning about Indigenous legal precedents. As Napoleon and Friedland highlights some Indigenous stories are about law and therefore are “a deliberate form of precedent.” They note:

Each Indigenous society has its own political and legal order, and the oral traditions will reflect those overall structures and find meaning within them. Most Indigenous societies were non-state, so the stories are decentralized forms of precedent that are drawn upon by decentralized, but collective, authorities. Some stories are formal and collectively owned (e.g., Gitksan adaawk), others are in the form of ancient and recent legal cases (e.g., Gitksan and Cree law cases), and others are structured to record relationships and obligations, decision-making and resolutions, legal norms, authorities and legal processes. Still others record violations and abuses of power, and responses to these breaches of law. All of their

120 Henderson & Wakeham, supra note 95 at 4. Henderson & Wakeham note the immense difficult of establishing the truth of settlement’s violence (5).
stories provide an architecture that enables thinking with analogy and metaphor as a form of collaborative problem-solving.\textsuperscript{123}

Indigenous stories, therefore, provide a means to access Indigenous legal systems and engage with these systems critically with a view to incorporating useful aspects of these to improve Canadian law.

In highlighting the need to restory Canada’s history, it is important to acknowledge that although Indigenous stories have been marginalized within the dominant narrative, Indigenous peoples have retained in their collectives memories the myths, narratives, laws and languages that support their identities.\textsuperscript{124} As Henderson notes: “Canadians and the Crown are like a bunch of beads with no threading. Aboriginal peoples have connections to our lands, our people, our stories. We can dance their dance, but they can’t dance ours.”\textsuperscript{125} Without Indigenous counternarratives, it is Canada that has lost its sense of history and identity. It is Canada’s history that needs restorying.

\textbf{5.2.3.3.2 Creating Conditions for Meaningful Listening}

In the context of reconstructing Indigenous and non-Indigenous relationships on more solid ground, conditions must be created for meaningful listening to occur to Indigenous stories. Borrows suggests that it is essential to create “more respectful spaces where Indigenous peoples can tell their stories and extract meaning from

\textsuperscript{123} \textit{Ibid} at 12.

\textsuperscript{124} For a detailed discussion of this, see Kirsten Manley-Casimir, “Incommensurable Legal Cultures: A Vision of an Alternative World” (2012) 30:2 WYAJ 137 [Manley-Casimir, “Incommensurable”].

them.” He argues that creating a more supportive social context for Indigenous peoples would enable Indigenous peoples to remember and mourn their losses and move forward in repairing the damaged relationships central to their well-being. 

Creating spaces for meaningful listening to Indigenous storytelling has transformative potential. Paulette Regan notes that storytelling can create transformative learning. As Edmund O’Sullivan notes such learning “involves a shift in consciousness that dramatically and permanently alters our way of being in the world.” Storytelling is like a bridge between people and cultures. Personal narratives have the potential to touch people deeply and it is in that deep emotional connection that transformative paradigm shifts take place.

Storytelling is also transformative because it positions everyone as potential participants in acknowledgment processes. All people tell stories as a way to communicate who they are. As Hetherington notes: “you just see the transformation when people felt that they have been heard – the way that their bodies were changing, how receptive and responsive they would be to understand, that respect for listening.” Indigenous cultures are rich with storytelling as a means of passing down important information about cultural values, social structures, legal traditions and personal histories. Creating spaces for storytelling affirms the importance of Indigenous stories and the value of Indigenous people’s experiences.

128 Regan, *Unsettling the Settler*, supra note 44 at 31–32.
131 Ms. Hetherington interviewed by Wilson, *ibid* at 35.
If Indigenous people restory their histories without a culturally-appropriate forum and an audience willing to listen, this would continue to deny and silence Indigenous voices, stories and perspectives. Meaningful listening therefore involves a willingness on the part of non-Indigenous others to engage not only on an intellectual but also on an emotional level with Indigenous peoples. It also means that spaces need to be created that are respectful to Indigenous peoples and facilitate the telling of their stories in their own words.\textsuperscript{132}

Safe intercultural spaces need to be created for the sharing of Indigenous stories. Feeling safe is critical to sharing deeply emotional stories and taking the risk to do so.\textsuperscript{133} Since these disputes arise in the space between cultures, solutions will most appropriately emerge from within this space. To create safe intercultural spaces, dialogue and negotiation needs to take place about the best way to make such spaces safe and culturally-appropriate for Indigenous peoples to share their stories and for non-Indigenous peoples to bear moral witness\textsuperscript{134} to such stories.\textsuperscript{135}

Another way to create such spaces is by changing existing spaces to be more culturally appropriate. In the context of the Canadian legal system, the creation of truly intercultural spaces is not possible since those institutions as they are currently structured are built upon Eurocentric conceptions of justice.\textsuperscript{136} The limitations to

\textsuperscript{132} Tully, supra note 38 at 57.
\textsuperscript{133} Mr. McCallion interviewed by Wilson, What Works for Reconciliation?, supra note 10 at 36.
\textsuperscript{134} As Cohen, supra note 22 at 256, explains: “Moral witness looks for the quiet but certain knowledge of what the powerful deny and would rather not have witnessed. ...They are active bystanders – powerless to intervene, but a reminder to perpetrators that not everyone approves or colludes, and that their future denials will be countered by another testimony.”
\textsuperscript{135} Creating safe spaces includes choosing neutral venues, establishing rules and providing skilled facilitation: see Wilson, What Works for Reconciliation?, supra note 10 at 37.
\textsuperscript{136} I am indebted to Mariana Valverde, Editor-in-Chief of the CJLS, for this point.
transformative change created by the colonial underpinnings of Canadian courts certainly make this option less than ideal. Since Canadian courts remain one of the few forums where Indigenous peoples can bring their claims to protect their lands, cultures and peoples, however, changes to court processes that make courts more respectful to Indigenous testimonies may create room for meaningful listening to Indigenous stories.\(^{137}\)

### 5.2.3.3.3 Making a Commitment to Remember and Change

As discussed, a common response to historical injustice in contemporary circumstances is to insist that we all, as a society, “forgive and forget”\(^ {138}\) or “forget the past and move on.”\(^ {139}\) This position might suit those who have historically participated in creating the oppressive conditions for marginalized communities or those who continue to benefit from such oppression. The idea of forgiving and forgetting, however, skips the important step of acknowledgement on the part of non-Indigenous peoples and governments of the wrongful acts committed against Indigenous peoples. Rather than “forgive and forget”, Nicholas Frayling suggests we should “remember and change.”\(^ {140}\)

Making a commitment to remember and change involves several components: first, we have to acknowledge the systemic harm that assimilative, state-sponsored policies have created within Indigenous communities, including the damage that mis and nonrecognition have done to Indigenous peoples’ collective identities and

\(^{137}\) I suggest some concrete ways in which Canadian judges might change their approaches and courts may change their processes to facilitate this storytelling in Chapter 8.

\(^{138}\) Frayling, *supra* note 79 at 29.

\(^{139}\) Herman, *supra* note 26 at 8.

\(^ {140}\) Frayling, *supra* note 79 at 29.
individuals’ sense of self. As Quinn asserts: “[a]cknowledging the events of the past and one’s complicity in them is particularly important”\(^{141}\) in order to move forward as a society. Moreover, non-Indigenous peoples must be open to their emotional response in hearing Indigenous peoples’ experiences.\(^{142}\) This means that non-Indigenous peoples ideally need to hear Indigenous peoples’ stories directly in their own words.

The importance of remembering and restorying cannot be underestimated in the process of making a commitment to change and take positive action. As Quinn notes: “[t]he combination of coming to terms with the past and one’s emotional response to it hinges upon memory and the remembering of past events. Past recollections form a critical component of the acknowledgement process.”\(^{143}\) Remembering past events is a critical part of acknowledging the truths of Indigenous peoples’ experiences and creating the conditions necessary to take positive action to ensure that oppressive events of the past are not repeated. We have a moral duty to remember – to hear and honour the marginalized voices that speak the unspeakable.\(^{144}\)

**5.2.4 Recognition as Affirmation**

The second aspect of the principle of recognition is affirmation. As mentioned above, affirmation is closely linked to and flows out of acknowledgement. Once non-Indigenous peoples meaningfully listen to Indigenous experiences about how colonization and assimilative policies have affected them, there is a moral imperative to

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\(^{141}\) Quinn, ”What of Reconciliation?”, *supra* note 88 at 178.

\(^{142}\) This requirement is obviously one of the most difficult aspects of acknowledgement. Not all non-Indigenous people will engage with Indigenous stories or emotionally connect with such stories. As previously discussed, denial is a common coping mechanism as is desensitization to disturbing truths. This may prove to be the biggest obstacle to overcome.

\(^{143}\) Quinn, ”What of Reconciliation?”, *supra* note 88 at 180.

\(^{144}\) Verwoerd, *supra* note 90 at 267.
take action. Affirmation takes meaningful listening into a different realm of trying to understand the forms and customs behind Indigenous governance and legal traditions. Affirmation includes the idea that once Indigenous stories are heard and Indigenous peoples as collectives are provided the forum to restory and create counternarratives, it will add to the record of the Indigenous governance mechanisms that governed and continue to govern Indigenous communities effectively. Once these stories are shared, one potential way forward is to work for formal legal recognition of Indigenous governance and jurisdictional rights. Importantly, affirmation also includes the idea that Indigenous nations already possess and exercise rights that are affirmed.145

5.2.4.1 The What?

Historically, the Canadian state has violently excluded Indigenous peoples from membership within the national community.146 This exclusion was effected by defining who qualifies as an “Indian” under the Indian Act147 and excluding others, by enacting laws granting Indigenous peoples full citizenship rights only if they renounced their Aboriginal community membership, and by making it illegal to raise money for Aboriginal legal claims from 1927 to 1951 and prohibiting cultural ceremonies and law, such as the potlatch and the tamanawas from 1884 to 1951.148 The Indian residential schools system was also imposed on Aboriginal peoples, which forcibly removed

145 Borrows, Canada’s Indigenous Constitution, supra note 2 at 181, says: “The very concept of recognition implies that such power already exists within a community.”
146 Goldberg-Hiller, “Persistence of the Indian”, supra note 68 at 24. Goldberg-Hiller highlights how political processes mask and legitimate who is included and who is excluded from community.
147 This was not the first Act to define who qualified as “Indians”; see An Act for the Better Protection of Lands and Property of the Indians of Lower Canada, S Prov C 1850, c 42 cited by Napoleon, “Extinction by Number”, supra note 45 at 115; and see the Act to Encourage the Gradual Civilization of Indian Tribes in this Province, and to Amend the Laws Relating to Indians (1857) cited in Miller, supra note 73 at 152.
148 Napoleon, ibid at 117. The potlatch is a central economic, political and legal ceremony practiced by west coast First Nations and the tamanawas is the Blackfoot sun dance.
Indigenous children from their homes, and continues to have destructive consequences for entire communities.\textsuperscript{149}

Limited affirmation of Indigenous rights has occurred through treaties, legislation, and court cases. The early treaties constituted formal agreements based on respect for and recognition of the rights of Indigenous peoples as sovereign nations.\textsuperscript{150} Walters notes that treaties constituted relationships and “represent a shared understanding of and commitment to a normative framework for cross-cultural relationships.”\textsuperscript{151} Modern day treaties, such as the Nisga’a Treaty and recent treaties coming out of the BC Treaty Process,\textsuperscript{152} also affirm the inherent rights of Indigenous communities as prior owners of the lands and as self-determining nations. Similarly, some co-management agreements affirm the rights of Indigenous communities to participate in decision-making and govern areas of protected land and waters.\textsuperscript{153}

Canadian legislation has also granted limited recognition of Indigenous rights. Some examples include the \textit{First Nations Jurisdiction over Education in British}
Columbia Act, which affirms some limited rights by transferring jurisdiction over education on reserve lands to First Nations governments; and the First Nations Land Management Act, which provides limited rights to First Nations governments to manage their reserve lands but provides for strict guidelines by which they may do so.

The most prominent example of the formal recognition and affirmation of Aboriginal rights through law is section 35 of the Constitution Acts. Under section 35, the Canadian courts have affirmed Aboriginal rights to fish, hunt and harvest wood as well as rights to be consulted and accommodated in the context of resource development projects. Further, some court cases have recognized the continuing existence of Indigenous legal traditions after colonization in the context of customary marriages, adoptions and governance, land and resource use.

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154 SC 2006, c 10.
155 It is important to note that although this act was lauded as a great step forward in transferring jurisdiction over education to First Nations governments, the federal government was very reluctant to provide funding to support this transfer of jurisdiction, see online: First Nations Education Steering Committee <http://www.fnesc.ca/wordpress/wp-content/uploads/2011/03/April-15-2011-Federal-government-reneges-on-funding-negotiations-with-FNESC.pdf> (retrieved 5 September 2015). Years of negotiation finally resulted in a Tripartite Education Framework Agreement signed by the British Columbia government, federal government and First Nations Education Steering Committee that provided the requisite funding to support First Nations jurisdiction over education on reserve, online: <http://www.aadnc-aandc.gc.ca/eng/1327671439967/1327674065864> (retrieved 5 September 2015).
156 SC 1999, c 24.
157 See e.g. section 6, which provides for the adoption of a detailed, written land code.
159 See, e.g., R v Alphonse [1993] 4 CLNR 19 (BCCA) [Alphonse].
160 See, e.g. R v Sappier; R v Gray [2006] 2 SCR 686 [Sappier & Gray].
161 See, e.g. Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511 [Haida Nation] and Taku River Tlingit First Nation v British Columbia (Project Assessment Director), [2004] 3 SCR 550 [Taku River].
162 Connolly v Woolrich, (1867), 17 RJQ 75, 11 LCJur 197 (Que SC) [Connolly] [which upheld the validity of a Cree marriage and awarded the son of that marriage a share in Mr. Connolly’s estate], online: Union of British Columbia Indian Chiefs Digital Collections <http://gsdl.ubcic.bc.ca/collect/firstnai/archives/HASH015e/4954e019.dir/doc.pdf> (retrieved 5 September 2015).
All of these above examples of limited affirmation of Indigenous rights could be seen to fall within the category of the politics of recognition. With the exception of a handful of comanagement agreements, in particular those negotiated with the Haida, none of the above examples affirm Indigenous sovereignty. In order to move beyond the politics of recognition, it is necessary to put all the major issues on the table. These include contentious issues like the application of the Canadian Charter of Rights and Freedoms to Indigenous governance and the legitimacy of the Crown’s assertion of sovereignty over Indigenous territories. The affirmation of Indigenous sovereignty through formal legal recognition of Indigenous jurisdiction and governance forms an important part of the principle of recognition. In Christie’s words, such affirmation supports “the ability of Aboriginal peoples to continue to define themselves, including the capacity to project their own theories and particular forms of knowledge.”\footnote{Christie, “Law, Theory and Aboriginal Peoples” (2003) 2 Indigenous LJ 67 [Christie, “Law, Theory”] at 72.} It does not create new rights; rather it recognizes Indigenous peoples’ pre-existing inherent rights and responsibilities.\footnote{Borrows Canada’s Indigenous Constitution, supra note 2 at 181.}

Affirmation also involves the idea of mutuality or reciprocity.\footnote{Ibid at 201.} Not only are there advantages to the formal recognition of Indigenous sovereignty and jurisdiction so that Indigenous peoples can participate more fully in the governance of their communities but also Indigenous peoples may recognize the legitimacy of Canadian laws as a result of this new legal framework. This reciprocal affirmation would lead to

\footnote{Casimel v ICBC, (1993), 106 DLR (4\textsuperscript{th}) 720 (BCCA) [which held that two elderly grandparents had adopted their 30-year-old grandson by Carrier law and were therefore entitled to death benefits as dependent parents upon his death].}
\footnote{See Borrows, Canada’s Indigenous Constitution, supra note 2 at 52.}
\footnote{Borrows Canada’s Indigenous Constitution, supra note 2 at 181.}
\footnote{Ibid at 201.}
more peace, stability and better relations over the long-term between Indigenous and non-Indigenous peoples.

Reciprocal affirmation also might lead non-Indigenous people to open themselves up to creative ways to increase the amount of representation, participation and control that Indigenous peoples have within Canadian institutional structures. This affirmation of the importance of creating peaceable and respectful relationships would entail embracing and putting into action the vision embodied in the Two Row Wampum and other early treaties and alliances, whereby Indigenous and non-Indigenous governments manage their own internal affairs and work out mutually agreeable ways to manage intercultural issues and conflicts.

There are some problems, however, with affirmation. The Canadian state has granted limited legal recognition to some communities to the exclusion of others. By constructing Indigenous peoples as “Indian” and excluding other Indigenous peoples as not “Indian” enough, the state has selectively included some Indigenous peoples by both granting and limiting their rights within Canada. As Jonathan Goldberg-Hiller notes, “[t]he Indian has travelled globally as both a framework for naming the native and the savage ..., and as a formal legal category for understanding, regulating, and limiting aboriginal sovereignty.”\(^{168}\) The Canadian state has on the one hand, granted rights under the Indian Act, which many see as restrictive of freedom, and on the other, created categories of Indigenous peoples who are excluded from that regime. It has also, due to the history of colonial expansion, treated Indigenous communities differently over the course of colonization; some communities are beneficiaries of

historic treaties and others are eligible for negotiations under modern treaties and yet others are eligible for both. This history points to a difficulty with the idea of formal legal recognition – that such recognition always includes choices and definitions of what and who are included.\textsuperscript{169}

Legal recognition of Indigenous jurisdiction can be problematic if such recognition is circumscribed in a way that disempowers Indigenous communities from creating culturally appropriate mechanisms and laws to govern their own communities.\textsuperscript{170} It is not enough to say that Indigenous peoples have governance rights without sufficient space for the creation of culturally appropriate mechanisms that may differ from non-Indigenous mechanisms. This is why the politics of recognition are not sufficient; rather, the principle of recognition requires that Indigenous peoples have jurisdiction to determine the structures and systems that are appropriate to govern their communities. Instead of delegated jurisdiction, therefore, the principle of recognition requires actual affirmation of inherent sovereignty of Indigenous communities to govern a sphere of unfettered jurisdiction.

\textbf{5.2.4.2 The Why?}

In colonial contexts, one of the most difficult issues to address is the ethical issue of why colonial law applies to the exclusion of Indigenous laws. As Goldberg-Hiller points out, the question of “Whose law?” directs itself “to the ethical question of the relevant community.”\textsuperscript{171} Indigenous peoples individually and collectively have been

\begin{itemize}
\item \textsuperscript{169} \textit{Ibid} at 35.
\item \textsuperscript{170} \textit{Ibid} at 36.
\item \textsuperscript{171} Goldberg-Hiller, “Subjectivity”, supra note 121 at 166.
\end{itemize}
excluded from the process of determining whose law should be applied and from contributing to the discussion around what the content of that law should be.

Indigenous communities need to be involved in the processes and mechanisms of affirmation of pre-existing rights and need to contribute to what the vision of that affirmation might be. The form of such recognition is yet-to-be-determined and will flow out of dialogue and negotiations between Indigenous and non-Indigenous peoples. Without acknowledgement and Indigenous participation in the processes of coming up with community agreement on what affirmation might look like, affirmation may lack legitimacy. To ensure legitimacy, it is important to provide Indigenous peoples with “an opportunity to develop a community voice prior to its fixation in the law.”172 It is also important to note that affirmation is just another step towards reconciliation and is not the end goal of the process of creating a new relationship between Indigenous and non-Indigenous peoples.

Although some Indigenous theorists and activists do not necessarily include affirmation by the Canadian state as a central goal for Indigenous peoples,173 formal recognition of Indigenous jurisdiction and governance rights arguably provides several advantages. One advantage is that affirmation upholds “the unique relationship Aboriginal peoples enjoy with the state, expressed in their constitutionally-protected rights.”174 Such affirmation also highlights that “Canada was and continues to be

172 Ibid at 174.
173 See generally Coulthard, Red Skin White Masks, supra note 4 & Alfred, Wasáse, supra note 46.
constituted on Aboriginal territories”\textsuperscript{175} – a fact that Macklem asserts is a “foundational feature of Canadian constitutional identity.”\textsuperscript{176}

Another advantage is that if Indigenous governments and legal traditions were formally recognized within Canadian law, it may reduce external criticism of such governmental forms and laws and enable Indigenous nations to get on with the work of designing their governance and legal structures to support the goals and values of their communities. In the context of the affirmation of Indigenous legal traditions, Borrows suggests that

Integrity also depends upon the system’s recognition, from within and by others. Recognition secures a jurisdictional space for its operation that encourages the respect of the public and facilitates access to resources. When legal systems do not have to continually defend and justify their existence or worth, they are less vulnerable to arguments that challenge their authenticity.\textsuperscript{177}

Here Borrows highlights that securing jurisdictional space for Indigenous governments to create culturally appropriate structures reduced the need to defend such structures from outside criticism. Affirmation may also stem internal criticisms, which can detract from the hard work facing Indigenous communities of designing culturally appropriate laws and governance structures.

A second advantage is that affirmation may enhance Canada’s democratic structure because Indigenous peoples will have a greater part in governance and the creation of laws that affect their lives.\textsuperscript{178} Borrows asserts that given the current distribution of political power “Canadian law rests on shaky foundations within


\textsuperscript{176} \textit{Ibid} at 105.

\textsuperscript{177} Borrows, \textit{Canada’s Indigenous Constitution}, supra note 2 at 116.

\textsuperscript{178} \textit{Ibid} at 156.
Indigenous communities because it pays so little attention to their values and participation.”

Affirming the inherent rights of Indigenous peoples to govern their own communities would create the space necessary for legitimate, culturally-appropriate government structures and institutions. It would also replace the paternalistic and oppressive forms of government that have been imposed on Indigenous communities through settler colonial laws.

Rather than mimicking Eurocentric governance structures, Indigenous governments can create structures to support and govern their own communities, which are consistent with the values underlying their communities. Borrows rightly insists that “[l]aw is most successful when it expresses the normative order of the people whom it serves.” Since the culture and geography of each community is unique, Indigenous communities themselves are best suited to create laws and structures to govern their communities to address their contemporary realities.

A third and related advantage is that affirmation of Indigenous governance and laws may create legitimacy and reduce conflicts between Indigenous and non-Indigenous peoples. Rather than having to resort to protest when non-Indigenous interests conflict with Indigenous perspectives on jurisdiction and territories, affirmation of Indigenous governance rights may enable negotiations and dialogue to take place between appropriate bodies. On the ground conflicts may be reduced and more appropriate dispute resolution procedures could then be engaged.

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179 Ibid at 208.
180 Borrows, Drawing Out Law, supra note 2 at 64.
181 Borrows, Canada’s Indigenous Constitution, supra note 2 at 272.
5.2.4.3 The How?

In order for affirmation to take place in a way that provides space for Indigenous peoples to create culturally-appropriate mechanisms to govern their own communities, non-Indigenous peoples and institutions need to let go of the tendency towards imposing colonial laws and institutions on Indigenous peoples. Perhaps the most important thing that needs affirmation is the pre-existing and on-going sovereignty of Indigenous nations.\textsuperscript{182} As Macklem highlights the definition of ‘sovereignty’ is contested, historically contingent, culturally specific, and socially constructed.\textsuperscript{183} As such, Eurocentric governance and legal institutions reflect particular cultural values that may not be appropriate to impose on Indigenous communities to preserve collective difference.

There are three main ways in which to implement the principle of recognition as affirmation. First, non-Indigenous people need to reject the assumption of settler entitlement to Indigenous lands.\textsuperscript{184} If we start from the premise of Indigenous sovereignty, the assumptions upon which we live our everyday lives – that we legitimately own our houses, that we are entitled to live in comfort and freedom, and that justice for Indigenous peoples within Canada will not have any measurable impact

\textsuperscript{182} For the purposes of this discussion, the concept of sovereignty includes an internal sovereignty that permits affirmation of Indigenous jurisdiction over internal and intersocietal affairs. For Indigenous communities within Canada, this view of sovereignty generally includes a continuing relationship with the Canadian state with varying degrees of nation-to-nation governmental interactions.
\textsuperscript{184} Carole Blackburn, “Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada” (2007) 13(3) \textit{J} of the Royal Anthropological Institute 621 at 633.
on our lives – need to be interrogated. Starting from a point where settler entitlement to Indigenous lands is not the starting assumption requires that we reenvision what Canada would look like should justice be attained for Indigenous peoples.

Second, in order for meaningful affirmation of Indigenous rights and sovereignty to be implemented, the terms of negotiation must not be dictated by the more powerful (non-Indigenous) party. In the past, for example, the Canadian government has insisted that a requirement of some modern day agreements is that the Charter applies to Indigenous government. Although to some people, this may seem both appropriate and reasonable, the imposition of the Charter on Indigenous governments may be undesirable and could stifle the creation of appropriate, alternative governance structures. In order to move beyond the politics of recognition, even contentious issues need to form part of the negotiation and dialogue relating to Indigenous governance and jurisdiction. This means that there will necessarily be uncomfortable issues raised within negotiations including challenges to the legitimacy of Canadian claims of sovereignty.

Third, it is important that Indigenous nations have jurisdictional space to design and implement governance, legal and social structures that reflect their nation’s societal values and respond to contemporary circumstances. Borrows advocates for the creation of a “sphere of recognition” enabling Indigenous communities to regulate their own affairs through the creation of culturally appropriate mechanisms. As Borrows

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186 Borrows, Canada’s Indigenous Constitution, supra note 2 at 179.
points out, creating a sphere of recognition would ensure that Elders, families, clans and other bodies within Indigenous societies, whose roles are otherwise usurped by the imposition of state-like institutions, could perform vital functions. Such a sphere would enable Indigenous governments to design institutions or practices that are founded upon values and premises that support the continued existence of the unique features of Indigenous societies.

This sphere of recognition would also enable Indigenous governments to make choices that challenge non-Indigenous stereotypes about how such communities should relate to their territories. For example, such a sphere would enable Indigenous communities to exploit resources from within their territories if that were a choice supported by community members. This sphere would lessen the scope of external interference and concomitantly enlarge the choices available to Indigenous peoples on how community members might relate to each other, their territories, their governments and non-Indigenous people.

Recognition as affirmation includes the idea that Indigenous communities within Canada have a considerably greater and protected sphere of control over decisions central to their communities’ interests and wellbeing. This conception includes the ability to make decisions about uses of lands and territories, membership and social policies. It also includes the necessity that Indigenous communities themselves design the forms and processes of governance institutions. Rather than requiring, for example, a municipal-like government, the form of government may be considerably different to reflect societal values and contemporary realities. As

\[187\] Ibid.
Macklem\textsuperscript{188} and Borrows\textsuperscript{189} suggest, this view of Indigenous sovereignty is compatible and supported by the federalist structure of the Canadian state, which divides powers among various governments – federal, provincial, territorial and municipal. Creating a further level of Indigenous government based on nation-to-nation relationships, therefore, fits within the Canadian federalist structure.

5.3 Visions of Recognition

Both acknowledgement and affirmation aim to uncover and uphold Indigenous perspectives and truths. Acknowledgement focuses on creating space for Indigenous peoples to articulate their experiences and share their stories of the on-going effects of colonization within their lives and communities. Acknowledgement aims to create space for Indigenous restorying and validation that their experiences are indeed authentic. Acknowledgement also involves willingness on the part of non-Indigenous peoples to listen to difficult stories and take on the uncomfortable task of interrogating one’s role in these histories. Most difficult, it requires non-Indigenous peoples and institutions to publicly acknowledge Indigenous understandings of truth and commit to make changes to right historical wrongs. Such acknowledgement can happen through meaningful listening to Indigenous storytelling, making a commitment to remember Indigenous counternarratives, and taking action to make positive changes to the relationship between Indigenous peoples and the Canadian state.

Affirmation also aims to uncover Indigenous truths and perspectives by formally articulating the capacities and functions of Indigenous governments. It affirms

\textsuperscript{188} Macklem, \textit{Indigenous Difference}, supra note 175 at 110.
\textsuperscript{189} Borrows, \textit{Canada’s Indigenous Constitution}, supra note 2 at 124.
Indigenous nations’ responsibilities to govern their own communities and ensure on-going relationships with their territories, ancestors, future generations, and all entities inhabiting those territories. Rather than creating new rights, affirmation accepts and confirms Indigenous peoples’ perspectives on how they can live “in a good way” and relate to their territories in keeping with their sense of identity and community.

190 In my interactions with Indigenous peoples, Indigenous community members often express their view of living a good life in this way.
About six months after the consultation process has begun, Gavin and Lynette were invited to and attended a Community Feast. The Feast gave both Gavin and Lynette an appreciation of the strong sense of community and the pride that community members had in their cultural and spiritual beliefs. It also highlighted the deep connections that the community had to their territory. After attending this Feast, Gavin and Lynette asked Brenda if it might be a good idea for an invitation to be extended to the Board members the next time. Brenda said that she would bring up the idea with the leadership.

About a year and a half into the consultations, Green Co indicated that it wanted Lynette to move off the Yellow Valley consultation team and start consulting on a different project. Lynette insisted that she stay on the consultation team as the workload was too much for Gavin alone and she had developed great relationships with Brenda and Johnny through the consultation process. She stressed that continuity is essential in terms of developing relationships and taking her off this project might signal a lack of commitment to the consultation process. Green Co was persuaded by Lynette’s argument and kept Lynette on the consultation team.

Over the course of the next two years, the consultation group was able to come up with a plan that sufficiently accommodated the First Nation’s concerns and provided benefits to the community. In addition to a profit-sharing plan, the plan also included apprenticeships for community members as well as paid positions once the apprenticeships were completed. Green Co also created a position for an Aboriginal Liaison to facilitate communications between the leadership and the company about day-to-day decisions. Brenda ended up being selected to fill this full-
time position. Green Co and the provincial government also provided funding for Brenda, in her role as Community Liaison, to attend several months of intensive training at Green Co’s headquarters and participate in any professional development training they offered their own employees. Green Co also brought employment development information to the community so that any interested members could get a sense of the different jobs available in the company and to provide community members with an opportunity to express interest in learning more or applying for an apprenticeship.
Chapter 6: The North Door: The Principle of Reciprocity

...we have to try as much as possible to get them to at least realize that they are going to have to twist their minds a little bit (or a lot) to try to get into the same frame of mind as us, or to try to get on the same wavelength. They must realize that their own thinking cannot be applied to what we are going to say, so that what we say “fits” - there seems to be a tendency for that to happen. We must somehow get them to empty their heads of what they may think they know about us, so that they are prepared to begin to learn the truth.¹

In this Chapter, I suggest that the principle of reciprocity might form a central part of reanimating and rebuilding the relationship between Indigenous and non-Indigenous peoples within Canada. Applying the principle of reciprocity to Indigenous/non-Indigenous relations may create meaningful engagement in dialogue resulting in mutual understanding across cultures. Reciprocity is closely linked with mutuality and interdependence. A common understanding of reciprocity involves relationships between people that benefit both parties. This understanding comes with the underlying expectation that if one person benefits the other by providing a good (i.e. a gift, support, shelter or food), the other party will reciprocate and provide a similar or similarly valued good at some future point in time.

I first highlight manifestations of reciprocity within Indigenous and non-Indigenous cultures and in intercultural interactions between such cultures. Second, I outline the sources that provide support for the choice of the principle of reciprocity – in particular highlighting the various Indigenous and non-Indigenous sources that cite and draw on the principle of reciprocity in the context of Indigenous/non-Indigenous relations. Third, I draw on relevant academic work, including democratic moral theory, ethnography, feminist theory, intercultural dispute resolution, collaborative therapy

and Indigenous legal theories to discuss the substantive content of the principle of reciprocity. I argue that reciprocity involves engaging in intercultural dialogue, embracing humility and risk, and opening oneself up to embodied engagement and emotional connection.

6.1 Reciprocity in Non-Indigenous and Indigenous Cultures

Reciprocity is a common norm in non-Indigenous and Indigenous cultures within Canada. In non-Indigenous culture, a familiar example is the basic rule of polite social interaction that calls for reciprocating a question that has been asked of you (e.g. A: “How are you today?” B: “I’m well. How are you?”). Another example is the custom of inviting those who have hosted you for dinner at their house back to yours in order to make the relationship even or reciprocal. Accepting an invitation at someone’s house for dinner creates an expectation that you will host his or her family at your house for dinner at some point in the future. If you fail to do so, you risk being seen as ungrateful and may jeopardize your chances of being invited again. A related example of reciprocity is the practice of bringing a gift to the host of a dinner or dinner party. Bringing such a gift carries the expectation that if the giver were to host their own dinner party and reciprocate by inviting the initial host to their own house, the initial host would bring a gift that is relatively equivalent in value to the gift received. (e.g. You bring a $13 bottle of wine as a host gift. The other party brings a similarly valued bottle of wine as a host gift when invited back. The relationship may risk becoming uneven if the second party brought a $100 bottle of wine, as the first party may feel that the initial gift was insufficient or may subsequently feel pressured to purchase a much more expensive bottle of wine if invited back.)
There are other more meaningful examples of the social practice of reciprocity. Between close friends, for example, there is the expectation that each would support the other through difficult times. My brother-in-law’s relationship with his good friend, Ed, provides an instructive example. When Ed and Kevin were in university together, Ed did not have a lot of extra cash and Kevin routinely paid for drinks and meals if they went out. Fast-forward 20 years into their friendship now that Ed was a very successful owner of his own company, Ed never let Kevin pay when they were out together. This occurred even though Kevin was fully capable and willing to pay but Ed insisted on showing his gratitude for Kevin’s generosity during university.

By contrast, a lack of reciprocity can have the effect of threatening to destroy or actually destroying a relationship. Where one person does not live up to his or her promise or the relationship generally is one-sided, the relationship may not survive over the long-term. Reciprocity therefore acts to not only initiate relationships but also supports the sustainability of relationships over the long-term.

There are many more possible examples of reciprocity that could be given in the context of non-Indigenous society. These include reciprocity around gift giving at holidays and birthdays and also include invitations to important events, like weddings, which are often expected to be reciprocated. In international relations, there exist larger examples of reciprocity in the context of military relationships where Canada has been expected to support its allies during times of war and where Canada would expect that support to be reciprocated if it were ever in need.
Several theorists point out other manifestations of reciprocity in modern industrial societies. James Carrier argues that reciprocal relationships are present among family members, within marriages, and among relatives, friends and neighbours. He also points out the reciprocal relationships manifest within market transactions, such as in relationships where small shop owners let regular customers accumulate a tab or credit. In such relationships, Carrier points out that there is an understanding that the shop owner will trust the regular customer to pay the tab when he or she is able to and that the regular customer will keep frequenting that shop rather than purchasing items at other stores. He also cites numerous other examples, such as:

- local fundraisers (like selling Girl Guide cookies to neighbours);
- party selling (like Tupperware parties, where friends are invited and expected to purchase things and the host benefits from those purchases); and
- loyalty in manufacturing and supplier relationships.

In highlighting these examples of reciprocity in Western industrial societies, Carrier points out that it is not particularly helpful to characterize Indigenous societies as only structured around gift relations and Western societies as only structured around

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3 Carrier, ibid at 88–90.
4 Ibid at 91–92.
5 Ibid at 92.
6 Ibid at 93.
7 Ibid.
commodity relations, rather it is important to recognize that “these sorts of relations coexist and interact with other sorts of relationships in complex ways.”

Reciprocity is also present as a value in Indigenous societies. Marcel Mauss’ seminal sociological and ethnographic work, *The Gift*, documents many examples of reciprocity in various Indigenous communities, including the potlatch and other customs. Mauss examines the practice of gift giving in various Indigenous societies including Haida, Tlinglit, Maori and Trobriands. He concludes that gift giving in such societies is closely linked with and reinforces kinship relations and social structures. Mauss also found that some types of gifts are closely bound with identity and may embody magical, religious and spiritual powers. One of his central contributions was in articulating that the act of giving a gift obliges the receiver to return a gift in the future. Although Mauss’ studies were influenced by colonial attitudes of Eurocentric superiority, his contribution to understanding reciprocity as a central value across all societies is useful for the purposes of this discussion.

Indigenous communities continue to practice the norm of reciprocity in contemporary times. Roberta Jamieson argues that reciprocity has a rich, complex meaning in Indigenous cultures; reciprocity “is not just some isolated concept, rather it is an integral part of an almost universal Indigenous worldview.” Jamieson explains

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8 *Ibid* at 102.
10 For a discussion of the problematic simplification of Indigenous societies as based solely on gift systems and Western societies as based solely on commodity systems, see Carrier, *supra* note 2.
11 Mauss, *supra* note 9 at 8. Here he is discussing the Maori “taonga”.
12 *Ibid* at 5.
that reciprocity “almost always arises from a relationship involving mutual respect, humility and joy.”\textsuperscript{14} She further notes that reciprocity is “usually accompanied by protocols and may trigger other reciprocities.”\textsuperscript{15} Christine Cyr notes that in Indigenous teachings reciprocity is a “balanced system of giving whole-heartedly and receiving the generosity of others.”\textsuperscript{16} Cyr notes a Lakota teaching that says that “true giving has to cost you dearly, it has to hurt in some way to really mean anything.”\textsuperscript{17}

Reciprocity and sharing are central values within many Indigenous communities. As the RCAP notes:

Sharing and reciprocity are important components of many Aboriginal world views, which see all living beings as striving for harmony, within themselves and with their surroundings. An animal that is asked to give up its life for food must be given recognition in a thanksgiving ceremony. People share their goods and homes with visitors, who in turn express their gratitude by making gifts to the hosts or other needy persons at a later date. Reciprocity in gift giving has also been a long-standing feature of commercial and other relations among Aboriginal nations. The bonds that hold many Aboriginal communities together are created and renewed in public ceremonies of sharing through the giving and receiving of gifts, as with the potlatch among the west coast nations. Sharing is seen not just as one kind of relationship among many, but as the basis of all relationships.\textsuperscript{18}

Here RCAP makes clear that the principle of reciprocity manifests in many different ways within Indigenous communities – in relationships between people and animals, in relationships between people within communities, and in relationships between people across cultures. The norm of reciprocity continues to be important and practiced within many Indigenous cultures.

\textsuperscript{14} Ibid.  
\textsuperscript{15} Ibid.  
\textsuperscript{17} Ibid.  
\textsuperscript{18} Canada, \textit{Final Report of the Royal Commission on Aboriginal Peoples} (Ottawa: Supply and Services Canada, 1996) [RCAP] at vol 1, Ch 16, sec 1.3.
6.1.1 The Early Treaties: Reciprocity in Intercultural Relationships

In the Canadian context, the negotiation of treaties between Indigenous communities prior to European arrival in North America and subsequently with European powers embodied the principle of reciprocity. The early treaties created military and trade alliances with various goods exchanged for the purposes of mutual benefit. Indigenous peoples benefitted from trading with Europeans and negotiated the agreements to provide an understanding of how the land would be shared. Conversely, the Europeans negotiated the early treaties to secure military alliances with powerful Indigenous nations to ensure their survival and to enlist the help of powerful warriors against other European powers competing for control over what became Canada. Through the early treaties, therefore, both Indigenous and European parties exchanged promises and goods for the purposes of establishing relationships of mutual benefit.

The early treaties provide a useful example of early manifestations of reciprocity practiced across cultures. During the treaty negotiations, British and Indigenous representatives practiced gift-giving and performed ceremonies and rituals drawn from both cultural traditions to cement the interdependent relationships created through the early treaties. As Leonard Rotman comments:

The mutuality of the treaty-making process between Britain and the Aboriginal peoples is illustrated by its development as a combination of British and Aboriginal practices. These treaties were characterized by the use of written, parchment copies, the recording of agreements on wampum belts, and the exchange of presents. ...The rights guaranteed to Aboriginal peoples in treaties with the Crown are the result of consensual negotiations between the Crown and Aboriginal peoples. Each side
obtained valuable consideration from the other, but only after giving up something equally desired.\textsuperscript{19}

Here Rotman highlights the way in which Indigenous and non-Indigenous practices were combined and complemented one another in the treaty-making processes. In addition, the reciprocal exchange of gifts cemented the relationship between Indigenous nations and the British Crown.

The treaties established a way in which Indigenous and non-Indigenous peoples could live together in peace. As Borrows argues, both Indigenous and non-Indigenous peoples are beneficiaries under the treaties. He asserts:

\begin{quote}

The mutuality of indigenous and non-indigenous peoples as treaty beneficiaries is often overlooked because it is most often indigenous peoples striving to assert their rights. Yet there are a number of potential inheritors of treaty rights beyond indigenous nations, bands, and individuals. The British and Canadian Crowns certainly received many benefits from the treaties. Their citizens were able to peacefully settle and develop most parts of the country on a footing of consent. Non-indigenous Canadians trace many of their rights to do certain things in this country to the consent that was granted to the Crown by Indigenous peoples in the treaty process.\textsuperscript{20}
\end{quote}

Borrows highlights that Indigenous and non-Indigenous peoples are inextricably linked due to the mutuality and reciprocity that underlay the early treaties. This shared historical reality creates on-going imperatives to recognize the interdependence of Indigenous and non-Indigenous communities and collaborate to find mutually agreeable ways to manage the intercultural relationship.

Less formalized relationships between Indigenous peoples and early settlers were also based on reciprocity. Jeremy Webber highlights that intersocietal norms


developed between Indigenous peoples and early settlers “based on reciprocal interaction, in which each party received something of value.” Webber points out that this process was gradual and imperfect; the “parties therefore began a process of trial and error, initially seeking to establish good faith and mutual respect through the reciprocal exchange of gifts.” Gift-giving therefore provided both a means to create and sustain relationships between Indigenous and non-Indigenous peoples over the long-term.

In both Indigenous and non-Indigenous societies therefore reciprocity continues to be highly valued as a social norm. In reconceptualizing the relationship between Indigenous and non-Indigenous peoples within Canada, reciprocity is useful because it is drawn from and finds support as a value and practice in both Indigenous and non-Indigenous cultures. In relation to disputes that arise in the context of Aboriginal law, Dwight Newman suggests that the methodology of theorizing the law should reflect the cross-cultural context. To reanimate the relationship between Indigenous and non-Indigenous peoples, the choice of reciprocity as a central principle is justifiable based on the fact that it finds support within both worldviews and bridges the complexity of the cross-cultural context.

### 6.2 Sources for the Principle of Reciprocity

The principle of reciprocity is cited in international law, Indigenous legal traditions and academic writing. The *Charter of the Indigenous and Tribal Peoples of* 

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22 *Ibid* at 656.

the Tropical Forests bases the social and cultural development of Indigenous peoples on several principles, including reciprocity.\textsuperscript{24} RCAP also provides support for the principle of reciprocity in renewing the relationship between Indigenous and non-Indigenous peoples.\textsuperscript{25} RCAP conceptualizes this principle as “sharing” and highlights the importance of “future generations coming together and forming stable, mutually beneficial relationships.”\textsuperscript{26} Both early and modern day treaties also provide a strong source for the principle of reciprocity as such instruments set out both rights and obligations to govern the relationship between Indigenous peoples and the Canadian state.\textsuperscript{27} The principle of reciprocity is also supported in academic writing relating to ethnography and moral theory,\textsuperscript{28} upon which I draw heavily for the purposes of this chapter.

\textsuperscript{25} RCAP, supra note 18, vol 1, Ch 16, sec 1.3 (need to embrace reciprocity in relationship between Indigenous and non-Indigenous peoples within Canada); RCAP also elaborates this in its discussion in the same section on the principle of sharing. See also Honourable René Dussault, “The Vision of the Royal Commission on Aboriginal Peoples” (2007) 70 Sask L Rev 93 at para 7.
\textsuperscript{26} RCAP, ibid at vol 1, Ch 16, Intro.
Importantly, the principle of reciprocity is also supported by Indigenous philosophies and legal traditions.\textsuperscript{29} In his discussion of Haudenosaunee culture, Borrows notes that the three white rows of the Two Row Wampum stand for mutuality, sharing, interdependence and interconnectedness.\textsuperscript{30} Borrows also notes that reciprocity between people and rocks as a central tenet of Anishinibek law.\textsuperscript{31} Reciprocity is also a central value of Cheyenne culture.\textsuperscript{32} Similarly, as Chief Justice Robert Yazzie highlights, mutuality, solidarity and reciprocal obligations as central tenets of Navajo peacemaking.\textsuperscript{33} For the Gitksan and Wet’suwet’en, reciprocity and gifting form central parts of their feasts which sanction the system of land tenure, kinship politics, and the distribution of values.\textsuperscript{34} In addition, nurturing, generosity, and

\begin{footnotesize}
\begin{enumerate}
\item Karl Nickerson Llewellyn & Edward Adamson Hoebel, \textit{The Cheyenne Way} (Norman: University of Oklahoma Press, 1941) at 247–251.
\item Richard Daly, \textit{Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs} (Vancouver: UBC Press, 2005) at xxvi.
\end{enumerate}
\end{footnotesize}
reciprocity are governing morals of Innu culture. Reciprocity is also central to Nuu-chah-nulth culture.

6.3 Substantive Content of the Principle of Reciprocity

I have structured the discussion of the substantive content of the principle of reciprocity in the following way:

- The What? What is reciprocity? What are its central characteristics? How might reciprocity differ when it is practiced across cultures? Can reciprocity work where power imbalances between participants from different cultures exist?

- The Why? Why should people engage in reciprocity in the context of Indigenous/non-Indigenous relationships? Are there moral imperatives that support such engagement?

- And finally…. the How? Are there pre-conditions that must be present in order for the principle of reciprocity to animate Indigenous/non-Indigenous relationships? How might the principle of reciprocity be implemented in concrete ways to provide a way forward in the complex historical relationship between Indigenous and non-Indigenous peoples within Canada?

6.3.1 The What?

Many theorists argue that reciprocity is a central governing principle in all societies. Ethnographers have observed the norm of reciprocity at play in both European and Indigenous societies. Peter Blau, for example, argues that:

When people are thrown together, and before common norms of goals or role expectations have crystallized among them, the advantages to be gained from entering into exchange relations furnish incentives for social interaction, thus fostering the development of a network of social relations and a rudimentary group structure. Eventually, group norms to regulate and limit the exchange transactions emerge, including the fundamental and ubiquitous norm of reciprocity, which makes failure to discharge obligations subject to group sanctions.
In this understanding of reciprocity, which Blau calls “exchange reciprocity”,
reciprocity is seen as “a mutually gratifying pattern of exchanging goods and services”\textsuperscript{38} 
that contributes to social stability.\textsuperscript{39} Social stability is created through reciprocity 
because the first person to give a gift or provide a service acts on the expectation that 
the recipient will provide a similar and equivalent gift or service in return.\textsuperscript{40} The gift-
giving creates a sustained relationship between both parties until the receiver does in 
fact reciprocate by giving something in return; this time lapse between the initial gift 
and that given in return contributes to social peace while the receiver accumulates 
enough to provide something in return\textsuperscript{41} and/or until an opportunity presents itself to 
do so. During this time period, the recipient is indebted to the initial gift-
giver.\textsuperscript{42} This 
norm of reciprocity creates stability in relationships due to the mutual dependence of 
the parties.\textsuperscript{43}

In the context of Indigenous peoples’ willingness to share the land with 
European newcomers, it might be useful to highlight a third aspect of exchange 
reciprocity – the pressure to rebalance the relationship. Jamieson highlights that 
reciprocity is intended to maintain balance and equilibrium in a relationship.\textsuperscript{44} The 
initial gifting creates imbalance in the relationship between the giver and receiver. 
Exchange reciprocity creates a moral and social imperative to restore balance. As Blau 
explains, there is a “strain towards reciprocity in social relations, but reciprocity on one

\begin{footnotesize}
\begin{enumerate}
\item Gouldner, \textit{supra} note 28 at 170.
\item \textit{Ibid} at 172.
\item \textit{Ibid} at 177.
\item \textit{Ibid} at 174.
\item \textit{Ibid}.
\item \textit{Ibid} at 167-168.
\item Jamieson, \textit{supra} note 13.
\end{enumerate}
\end{footnotesize}
level creates imbalances on others, giving rise to recurrent pressures for re-equilibration and social change.”

If we accept that both European and Indigenous peoples value reciprocity and we consider where we are in the gift-giving cycle, we are likely to conclude that non-Indigenous people have benefitted from the sharing of Indigenous lands but have failed to provide an equivalently valuable gift or service in return. An even more accurate conclusion might be that non-Indigenous people through successive governments have failed to abide by the moral imperative of exchange reciprocity. This has resulted in an imbalance in the relationship that contributes to social tensions. The strained relationships that currently exists between Indigenous communities and the Canadian government has resulted in corresponding social instability that bubbles to the surface at various times in the form of intercultural conflicts, such as in Oka, Ipperwash, Burnt Church, Caledonia and more recently in the Idle No More movement.

Because of the continuing dynamic shifts between balance and imbalance, continual adjustments must be made resulting in what Blau calls “a dialectical pattern of social change.” As E Richard Atleo suggests, this social change occurs as various life forms negotiate with one another to create protocols to live peacefully and respectfully together. Atleo warns however that there is a polarity inherent in our lived reality and that all life forms need to be vigilant to ensure that our

45 Blau, supra note 28 at 314.
46 Ibid.
47 Atleo (Umeek), supra note 36 at 122.
interdependence is managed in a way that is aimed to create balanced and harmonious relationships.48

A second aspect of this conception of reciprocity is that manifestations of reciprocity are culturally and temporally specific, that is, the “concrete formulations [of exchange reciprocity] may vary with time and place.”49 Dale Dewhurst provides one example of a culturally distinct formulation of reciprocity that arises from within Indigenous worldviews:

[W]ith regard to Aboriginal property, there were many instances where it was considered acceptable to take an item without anyone else’s express permission, provided something of equal or greater value was left in its place. Anyone who tried to take advantage of this customary way by leaving nothing, or by leaving goods of inferior worth, would be punished or tormented by the spirits, the community, or both.50

Here Dewhurst describes a cultural norm of reciprocity that emphasizes equivalence in the value of gifts and social sanctions in the event that participants do not abide by the appropriate cultural protocols. Dewhurst’s example highlights that what counts as ‘mutually gratifying’ may depend on the cultural context.51 Indeed, reciprocity may take diverse forms in different cultural settings.

The culturally distinct formulation of reciprocity that Dewhurst describes may differ in form from how reciprocity might manifest in Eurocentric cultures. Historically, the various manifestations in the performance of reciprocity may have contributed to misunderstandings between Indigenous and non-Indigenous peoples.

48 Ibid at 10-11.
49 Gouldner, supra note 28 at 171.
51 I am indebted to Gordon Christie for this point.
As Larissa Behrendt documents, Aboriginal notions of reciprocity were misunderstood as theft by early settlers in Australia when Aboriginal Australians gave the settlers kangaroo then took caps and other items in exchange.⁵²

### 6.3.1.1 Power and Reciprocity

Reciprocity can involve unequal power relations between the gift-giver and the receiver. Alvin Gouldner highlights that exchange reciprocity can take several forms: (1) the gift-giver can be forced to benefit the receiver due to unequal power relations and a lack of alternatives;⁵³ (2) the gift-giver and receiver can engage in a relationship of continuous yet unequal exchanges;⁵⁴ or (3) both parties experience “mutuality of gratification”⁵⁵ and reciprocate in an equivalent fashion.⁵⁶

In reflecting on the history of Indigenous/non-Indigenous relationships within Canada, all three forms arguably existed at different time periods. Working backwards, the third form, which involves mutuality of gratification through relatively equivalent exchanges, may have characterized the early relationships between Indigenous and non-Indigenous peoples. Bruce Morito’s detailed historical study of the early treaties demonstrates that the treaty relationships were entered into because such relationships brought mutual benefits to Indigenous and European allies.⁵⁷ Morito argues that early treaty relationships were characterized by gift-giving and wampum

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⁵³ Gouldner, supra note 28 at 164.
⁵⁴ Ibid at 165. He calls this “reciprocity imbalance.”
⁵⁵ Ibid at 168.
⁵⁶ Ibid at 174.
protocols that were used to rebalance and sustain relationships between Indigenous and European leaders.58

The second form, characterized by continuous yet unequal exchanges, might describe the relationship between Indigenous and non-Indigenous peoples as European diseases ravaged Indigenous populations and settlers began to populate North America in much larger numbers. During this historical period, Indigenous peoples, under a variety of circumstances, exchanged their lands for grossly less valuable goods or promises that were often not kept.59 As a result, Indigenous peoples were dispossessed of vast tracts of lands and relegated to small pockets designated as reserves.

Finally, the first form, where the gift-giver may be forced to benefit the receiver due to unequal power relations and a lack of alternatives, may describe the current situation facing many Indigenous communities. Due to a steep imbalance in socio-economic status and a lack of related opportunities, Indigenous peoples commonly and increasingly face pressures to negotiate agreements with resource development companies that fail to provide benefits proportionate to the risks undertaken by Indigenous communities.60 Although some Indigenous communities within Canada are

58 See generally Morito, *ibid*.
not in this position, many communities face a power, knowledge and capacity imbalance in negotiations with resource companies and government.

Given the existence of power imbalances between Indigenous communities and other parties, the question arises whether reciprocity can exist within such a relationship. It is clear that some form of reciprocity can exist within a relationship where an imbalance of power exists as manifested in Gouldner’s descriptions of the various ways reciprocity might be practiced. In attempting to create a new, more respectful way forward in the context of Indigenous/non-Indigenous relationships, however, it is the third form – involving mutuality of gratification and continuously striving for equilibrium in the relationship – that would transform and decolonize the relationship. In order to create conditions conducive to this form of reciprocity, it may be necessary for the parties with more power in the relationship to support the party who lacks power in order to create more equilibrium in the power dynamic.

In order to rebalance power in Indigenous/non-Indigenous relationships, government and third parties might provide financial resources, capacity-building opportunities and commit to the creation of long-term sustainable relationships with

61 It is worth noting that even where Indigenous communities have successfully negotiated Impact and Benefits Agreements (IBA), circumstances within the community may make it difficult for community members to actually benefit from the IBA; discussion with Gary Kissack, (3 October 2014). For example, if social problems within the community detract from the ability for community members to consistently show up to work at a job available as a result of the IBA and makes it untenable for a community member to remain employed within the resource development company, the community may not reap all the anticipated benefits from the negotiated agreement.

62 This statement is not meant to detract from the communities who have developed the capacity and expertise to negotiate with resource companies and governments and successfully navigate those relationships in ways that benefit their communities and further their visions of how they want to relate to their territories; see e.g. Terry Milewski, “How Quebec Cree Avoided the Fate of Attawapiskat: On the Eastern Shore of James Bay, A Very Different Story”, CBC News (14 May 2013), online: <http://www.cbc.ca/news/politics/how-quebec-cree-avoided-the-fate-of-attawapiskat-1.1301117> (5 September 2015).
Indigenous communities. This requires a shift in mindset from one where each party is set on their own agenda to one in which the priority is not necessarily moving a particular agenda forward but is instead premised on the idea of creating a new relationship and a new idea of community in the context of Indigenous and non-Indigenous peoples within Canada. Joel Handler argues,

[the] realities of association in community may require ‘unequal contributions.’ With community, mutuality extends beyond exchange to enduring bonds of interdependence, caring and commitment. The transition is from reciprocity to solidarity to fellowship.\(^63\)

Viewed in this light, reciprocity creates enduring bonds of interdependence, including a shared sense of purpose, and then moves toward fellowship and community. Here Handler makes clear that in the context of power imbalances, being part of a new interdependent community may require unequal or different contributions.

**6.3.1.2 On Reciprocity: Democratic Moral Theory**

The concept of exchange reciprocity provides a useful starting point to map out a conception of the principle of reciprocity for the purposes of this framework. The importance of reciprocity as a norm that contributes to social peace and stability provides a solid foundation to explore further articulations of reciprocity in moral and Indigenous theories. In this section, I engage with deliberative democratic moral theories that focus on the creation of mutual understanding across cultures.

Moral theories of reciprocity focus on relationships between people of different cultures who engage with one another with a view to mutual understanding. In

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Seyla Benhabib posits a theory of “symmetrical reciprocity,” which is a means by which people from different cultures can come to understand one another across difference. In her view, symmetrical reciprocity involves a moral conversation, which is built upon the central premise that one can reverse perspectives with a cultural other and create “a condition of actual or simulated dialogue” with that other. The point of this dialogue is to create conditions conducive to intercultural agreement. Benhabib asserts that this form of actual or imagined dialogue is not the same as empathy as it does not involve “emotionally assuming or accepting the point of view of the other.” Rather, Benhabib asserts that this reversal of perspectives “means merely making present to oneself what the perspectives of others involved are or could be, and [asking the question of] whether I could ‘woo their consent’ in acting the way I do.” Central to Benhabib’s conceptualization of symmetrical reciprocity is therefore that one can actually or imaginatively engage in dialogue with a cultural other and that the purpose of such engagement is to determine if the cultural others’ perspective is such that he or she might agree with or consent to one’s perspective on a contentious issue.

Although Benhabib recognizes that actual dialogue is preferable to imagined dialogue, she asserts that where actual dialogue with cultural others is not possible, it would suffice to imagine oneself in a conversation with a cross-cultural other. In her view, contextuality, narrativity and specificity are central as symmetrical reciprocity

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65 *Ibid* at 137.
66 *Ibid.* In this view, Benhabib agrees with Arendt’s theory.
67 *Ibid*.
involves a view of “the self as a being immersed in a network of relationships with others.”69 Moreover, she asserts that “respect for each other’s needs and the mutuality of effort to satisfy [those needs] sustain moral growth and development.”70 In Benhabib’s view, the symmetry of reciprocity arises because one can reverse perspectives with a cultural other and thereby come to a place of mutual understanding.

In response, Iris Marion Young developed the concept of “asymmetrical reciprocity.”71 She critiques Benhabib’s theory on the basis that “the idea of symmetry in our relations obscures the difference and particularity of the other position.”72 Rather, in Young’s view, since each person is distinguished by a particular history and social position their relationship is asymmetrical.73 Young asserts that although people can acknowledge and take account of one another,74 they can never effectively reverse positions “across socially structured difference, which also usually involves relations of privilege and oppression.”75 This is so because each person brings to an intercultural encounter his or her own perspective and identity that has been shaped by his or her particular personal, social and contextual history.

Young is critical of Benhabib’s idea of reversing perspectives because this idea “assumes that the perspectives brought to a situation are equally legitimate,” which

69 Ibid at 149.
70 Ibid.
71 Young, ”Asymmetrical Reciprocity“, supra note 28 at 341.
72 Ibid at 346.
73 Ibid at 341.
74 Ibid at 343.
75 Ibid at 347.
may not be true, particularly where “structured social injustice exists.” In Young’s view, this poses particular dangers since “[w]hen privileged people put themselves in the position of those who are less privileged, the assumptions derived from their privilege often allow them unknowingly to misrepresent the other’s situation.” These dangers, according to Young, include projecting inaccurate assumptions onto cultural others to reinforce a complementary image of oneself and failing to listen to cultural others based on the assumption that you already know their perspective through an imagined dialogue. In the context of Indigenous/non-Indigenous relations, it is arguable that structured social injustice does exist and that reversing perspectives therefore might pose these particular dangers. This imaginative exercise also raises the “spectre of appropriation,” since “[i]n the effort to empathize with the marginalized, those who have privilege may begin to speak on behalf of the excluded usually mistranslating their experience and thereby reinforcing their silence.”

Rather, Young advocates for listening carefully across differences and distance between unlike peoples. This effort to listen across difference takes as its starting point that each person to an intercultural encounter has a unique perspective and there is thus an asymmetry between participants in such a dialogue. As such, there are

76 Ibid at 350.
77 Ibid at 349.
78 Ibid at 350.
81 Young, “Asymmetrical Reciprocity”, *supra* note 28 at 345.
inevitably aspects of each person’s reality that go beyond the possibility that the other can share or imagine that reality. As Young describes:

[p]articipants in communicative interaction are in a relation of approach. They meet across distances of time and space and can touch, share and overlap their interests. But each brings to the relationships a history and structured positioning that makes them different from one another, with their own shape, trajectory, and configuration of forces.

This description is useful in that the idea of a “relation of approach” highlights the continuous movement of participants towards each other in trying to come to mutual understanding but also emphasizes that there will always remain some “respectful distance” between participants in an intercultural dialogue.

Natalie Oman acknowledges this distance as she contends that building intercultural understanding requires “an acknowledgment that my interlocutor has an irreducible perspective born of particular experiences, that must, in some part, remain unknowable to me.”

Young asserts that in asymmetrical reciprocity, gift giving takes the form of dialogue and communication. This dialogue results in asymmetry in that the gifts are not equivalent and cannot be reduced to relations of symmetrical equivalence. This is so because each time a gift is offered and is accepted, it creates asymmetry, which is not necessarily rectified by the receiver giving a different gift back. In Young’s view, each instance of gift giving and acceptance creates a new asymmetry. Young asserts:

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82 Ibid at 351.
83 Ibid.
84 Ibid at 352.
85 Benjamin Berger suggests that another useful way to envision relational reciprocity is by using “the language and idiom of encounter”; see Benjamin L Berger, “The Cultural Limits of Legal Tolerance” (2008) 21 Can JL & Jur 245 at para 12.
86 Oman, supra note 79 at 73.
87 Young, "Asymmetrical Reciprocity", supra note 28 at 355.
88 Ibid at 355.
Every speech act that aims at understanding entails an *offer* by the speaker to make good on its meaning, and the understanding of the speech act entails an *acceptance* of that offer by a listener. These illocutionary gestures of offering and accepting meanings create and sustain the social bond.89

Participants to an intercultural dialogue are bound together through the give-and-take of sharing stories, finding voice and meaningful listening.90

The second way dialogical engagement across cultures creates asymmetry is due to the time lapse between gift-giving instances. Just as earlier elucidated in the discussion of exchange reciprocity, the gift giving is separated by time and therefore “a reciprocal bond endures precisely because of the asymmetry of time between gifts. Each moment of gift-giving opens onto a future of our relationships, precisely because there is no simultaneity of exchange.”91 These time lapses between communications therefore create an ongoing relationship or bond between participants in the intercultural dialogue.

Both Benhabib and Young’s ideas contribute to the further development of a substantive articulation of reciprocity. Benhabib’s focus on engaging in dialogue with cultural others highlights the interpersonal, cross-cultural potential of reciprocity. Young’s critique highlights the importance of actual (rather than imagined) dialogue and the reality that there will always remain some distance between people engaged in an intercultural dialogue due to their particular historical, geographical and personal locations. A critique that can be made of both Benhabib and Young’s theories of reciprocity is the unquestioning acceptance that participants to an intercultural dialogue

89 *Ibid* at 356.
90 This idea of reciprocity through dialogical engagement is linked to my previous discussion of recognition.
91 Young, "Asymmetrical Reciprocity", *supra* note 28 at 355.
dialogue engage in that dialogue with a specific agenda, that is, to woo the other’s consent. As I discuss more fully in the final section of this Chapter, participants to an intercultural dialogue might instead approach the encounter from a stance of wonder, humility and risk with the only agenda being to come to as a close a point of mutual understanding as possible.

6.3.2 The Why?

We have seen that exchange reciprocity contributes to social stability through the creation of an expectation that people are dependent upon one another for goods and services. Exchange reciprocity also creates incentives for people to engage in relationships of mutual dependence with one another and provides a mechanism for sustaining those relationships. Participants in an intercultural relationship might engage in reciprocity for two additional reasons: first, there are moral imperatives for doing so; and second, there are advantages to gain from engaging with intercultural others with a view to coming to a point of mutual understanding.

6.3.2.1 Moral Aspects of Reciprocity

In addition to economic and social advantages, reciprocity also has moral dimensions. In his discussion of exchange reciprocity, Gouldner argues that reciprocity is “a generalized moral norm...which defines certain actions and obligations as repayment for benefits received.”\textsuperscript{92} Reciprocity “hinges...on a shared conception of the moral propriety of repayment.”\textsuperscript{93} The moral character of the norm of reciprocity, Gouldner asserts, requires “that people should help those who help them, and

\textsuperscript{92} Gouldner, supra note 28 at 170.
\textsuperscript{93} Ibid at 175.
therefore, those whom you have helped have an obligation to help you.”94 As such, “it is
morally improper, under the norm of reciprocity, to break off relations or to launch
hostilities against those to whom you are still indebted.”95 This view of reciprocity,
therefore, holds that in interpersonal, intracultural and intersocietal relationships,
exchange reciprocity creates an expectation of peaceable relations and that a gift or
service will be provided in return. Gouldner notes that negative consequences might
flow from a lack of exchange reciprocity including feelings of guilt, social stigma and
related penalties.96

The moral dimensions of reciprocity highlight why it is important to engage in
reciprocity in relationships. In highlighting the negative consequences and the
impetus to avoid such consequences as a motivating factor for engaging in reciprocity
in relationships, however, there is the risk that reciprocity could be understood as a
relatively empty concept based primarily on self-interest. That is, a party to a
relationship might come to see obligations as things that he or she should fulfill out of
nothing more than concern about the bad consequences that might flow back to him or
herself if he or she does not match a gift given with a roughly equal gift exchanged.97
This conception of reciprocity based on the idea of self-interest as the primary
motivator is problematic.

The moral imperative to engage in reciprocity in the context of Indigenous/non-
Indigenous relations must be based on something much deeper than self-interest. This

94 Ibid at 173; see also Lévi-Strauss, supra note 28 at 54.
95 Gouldner, supra note 28 at 175.
96 Ibid at 170; see also Blau, supra note 28 at 97.
97 I am indebted to Gordon Christie for this critique.
moral imperative can be sketched out to include the four principles that make up this framework. The details of the moral imperative, however, need to be worked out through cross-cultural dialogue and evolve within relationships. Morito argues that a distinct moral economy developed during the early treaties that formed the Covenant Chain.98 A similar moral economy might be developed out of an evolving, engaged, reciprocal relationship between Indigenous and non-Indigenous peoples.

6.3.2.2 Mutual Understanding

The end goal of reciprocity in relationships is mutual understanding. Mutual understanding is important so that people can communicate both within and, particularly for our purposes, across cultures. In Inuit culture, for example, the central Inuit principle of Tukisiumaqatigiinniq means the “conscious understanding of others as the basis of mutual relationships.”99 What is important to highlight in this principle of Tukisiumaqatigiinniq is the deliberate and mindful focus on the need to understand others to form meaningful relationships.

Moving toward mutual understanding can enable people engage in a cross-cultural encounter to learn about different ways of being in the world, different ways of designing social institutions, and different ways of relating to others. Without mutual understanding, Indigenous cultural forms risk misinterpretation by non-Indigenous people and institutions by being forced through the filter of Eurocentric cultural standards. As Charles Taylor remarks: “[w]e are always in danger of seeing our ways of acting and thinking as the only conceivable ones. That is exactly what ethnocentricity

98 Morito, supra note 57 at 11.
99 Borrows, Canada’s Indigenous Constitution, supra note 29 at 103–104.
consists in. Understanding other societies ought to wrench us out of this; it ought to alter our self-understanding.”

Moreover, Taylor suggests that “understanding another society can make us challenge our self-definitions...because we cannot get an adequate explanatory account of them until we understand their self-definitions, and these may be different enough from ours to force us to extend our language of human possibilities.” Intercultural understanding, therefore, may not only lead to further understanding of another culture outside our own but may also lead to a deeper understanding of our own culture and the assumptions upon which it is based.

In the context of cross-cultural relationships, particularly where the values of the differing cultures are divergent, mutual understanding is a moving target. As Charles Taylor highlights, the cross-cultural encounter will always result in a sense of unfamiliarity and strangeness between those coming from very different philosophical and spiritual backgrounds. Because participants to a cross-cultural dialogue come to the place of encounter with very different experiences and views, attaining perfect mutual understanding is not possible. As such, the idea of mutual understanding might better be conceptualized as an on-going process that expands each participant’s “horizons”.


To understand other societies, Taylor suggests that we need to develop a new, clear, easy-to-understand language that permits us to contrast the values found in other cultures with those found in our own.\textsuperscript{104} This new shared language would enable us to formulate both their way of life and ours as alternative possible human variations and to enunciate a “cluster of possibilities” for how society might be organized.\textsuperscript{105} As Peter Winch suggests, “we may learn different possibilities of making sense of human life,” which may both transform and deepen our understandings of ourselves and our cultures.\textsuperscript{106} This perspective leaves intact the possibility that there will be some aspects of other cultures that remain difficult to comprehend but that we can still engage with others across cultures and find ways of living peacefully together as we strive toward mutual understanding. By engaging with others in a clear language derived from the interaction between cultures, new possibilities for a shared future and deeper understandings might therefore emerge.

Natalie Oman suggests the utility of understanding intercultural dialogue as embodying a moving consensus with the goal of sharing horizons. Oman suggests that even when a significant degree of intercultural understanding has been achieved this success can never signal a cessation of effort on the part of the interlocutors or the cultural groups they belong to, because any understanding that is reached is necessarily transitory, since it is an understanding of finite aspects of a living culture that is heterogeneous, contested, and changing. It follows that any agreement based on such understanding must be in the nature of a ‘moving consensus’—an accord that must be open to renegotiation and fine-tuning over time.\textsuperscript{107}

\begin{flushright}
\footnotesize
\textsuperscript{104} Taylor, "Understanding and Ethnocentricity", \textit{supra} note 100 at 125. He calls this a “language of perspicuous contrast.”
\textsuperscript{105} \textit{Ibid} at 126 & 129.
\textsuperscript{106} Peter Winch, “III. Understanding a Primitive Society” (1964) 1:4 Am Philos Q 307 at 321.
\textsuperscript{107} Oman, \textit{supra} note 79 at 74.
\end{flushright}
Here Oman highlights the need for on-going dialogue to account for the shifting and fluid nature of living cultures; this fluidity requires on-going dialogue to ensure that cross-cultural participants continue to deepen their understandings of one another. Oman suggests that a moving consensus that can adapt to the changes and transformations within and between the different cultures provides “the best long-term hope of those who seek intercultural stability.”  

The need for continual renewal and dialogue to contextualize and contemporize agreements is particularly acute in the case of Indigenous/non-Indigenous relations because Indigenous and non-Indigenous cultures each have particular features that create unique and on-going challenges to the achievement of intercultural understanding. These differing cultural values and forms support the need for regular dialogue to ensure agreements are mutually beneficial and support the contemporary needs and understandings of both communities.

Due to the divergence in cultural forms and values between Indigenous and Eurocentric cultures, Oman suggests that intercultural dialogue should be aimed at getting the parties to a place of “sharing horizons.”  

This idea of sharing horizons builds upon yet sits in contrast to theorists that suggest that true intercultural understanding can lead to a “fusion of horizons.” In her discussion of Indigenous/non-Indigenous relations, Oman suggests that “[i]n relationships of this sort which tend towards the genuinely ‘cross’ cultural end of the spectrum where the difference in standpoint to be bridged dialogically is much greater, it seems more

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108 Ibid at 88.
109 Ibid at 82.
accurate to speak of the understanding that may be achieved through this process as a sharing of horizons, rather than a seamless fusion.”\textsuperscript{111} This means that each party is open to learning from, engaging with and trying to understand the cultural other even where there are aspects of the communication that make it difficult to do so and that will remain unknowable.

Oman’s idea of sharing horizons encourages participants in intercultural dialogue to be open to new possibilities and alternatives. She suggests that the sharing horizons approach constitutes more of “a sensibility, rather than a blueprint”\textsuperscript{112} and “is not something that can be brought about in the same way twice; in every particular case, that approach will be implemented differently, and even within a single case, the techniques employed to build intercultural understanding will change over time.”\textsuperscript{113}

Here Oman highlights the need for flexibility, adaptability and evolution in intercultural interactions.

\textbf{6.3.3 The How?}

There are several ways to implement the principle of reciprocity in Indigenous/non-Indigenous relationships. In this section, I discuss various ways to do this to continue to develop a substantive articulation of reciprocity. This conception of reciprocity, what I term “relational reciprocity”, builds on the ideas discussed previously. Relational reciprocity involves engaging in dialogue, beginning from a stance of wonder, humility and risk and embracing embodied engagement and emotional connection in intercultural relationships.

\textsuperscript{111} Oman, supra note 79 at 82.
\textsuperscript{112} Ibid at 88.
\textsuperscript{113} Ibid.
6.3.3.1 Dialogical Engagement

The first aspect of relational reciprocity emphasizes the need to engage in dialogue with people across cultures. In order to successfully transcend geographies of violence and start on the journey of creating cultures of peace, Lederach argues that intercultural conflict resolution processes need to be rooted in authenticity, context and human relationships.\textsuperscript{114} The importance of engaging with and learning from Indigenous peoples cannot be underestimated. Borrows suggests that engagement is central to overcoming the colonial dynamics that continue to exclude Indigenous peoples from Canadian society.\textsuperscript{115} He suggests that central to this engagement is the creation of “more respectful spaces where Indigenous peoples can tell their stories and extract meaning from them.”\textsuperscript{116} Embedded within the idea of engaging in relationships is the key aspect of dialogue between Indigenous and non-Indigenous peoples.

Other theorists also assert that the key to intercultural understanding is actual dialogical engagement with people from other cultures. A key component of Young’s theory, for instance, is that reciprocal relationships are created through actual dialogue with cultural others. Similarly, Oman asserts

\textquote{Surely intercultural understanding is something that is created with specific other people, at its most fundamental level. If the understanding that I attain is to be contextualized and sensitive to the implications of power inequalities between myself and those I seek to build understanding with, it must be dialogical. Such an approach cannot be about speaking for, but must aggressively emphasize the importance of speaking with.}\textsuperscript{117}

\textsuperscript{114} Lederach, \textit{Moral Imagination}, supra note 28 at 76.
\textsuperscript{115} Borrows, \textit{Canada’s Indigenous Constitution}, supra note 29 at 173.
\textsuperscript{116} \textit{Ibid.}
\textsuperscript{117} Oman, \textit{supra} note 79 at 79.
Similarly, Dallmayr argues that of the many possible modes of cross-cultural encounter, dialogical engagement and interaction is the “most genuine and normatively most commendable.”\textsuperscript{118}

Engaging in dialogue with people from other cultures is central to help participants to an intercultural dialogue situate themselves within a collective social reality. As Young argues:

Dialogue with one another not only teaches us about the narrative histories and interests of each of the others. Through it we also construct an account of the web of social relations that surrounds us and within which we act. This collective social reality cannot be known or understood from the particular point of view of any one of us alone.\textsuperscript{119}

Intercultural dialogue provides a fuller picture of social reality by putting one’s perspectives in the context of the relationship between people of different cultures. Such dialogue also enlarges participants’ understanding in a way that would not otherwise be available to them without having engaged in that dialogue.\textsuperscript{120}

Henderson argues that constitutional governance might be reconceptualized as relational rather than Imperial\textsuperscript{121} and advocates for the unsettling of colonial conceptions of humanity “to generate new forms of dialogue between peoples and power.”\textsuperscript{122} Moreover, he argues that the relationship between Indigenous nations and the Canadian state should involve dialogical governance, which requires “mutuality,

\begin{footnotesize}
\begin{enumerate}
\item Dallmayr, \textit{supra} note 101 at 31. In addition to dialogical engagement, the other modes that Dallmayr discusses include conquest, conversion, assimilation and acculturation, partial assimilation: cultural borrowing, Liberalism and minimal engagement, conflict and class struggle (at 3–31).
\item Young, "Asymmetrical Reciprocity", \textit{supra} note 28 at 359.
\item \textit{Ibid} at 360.
\item \textit{Ibid} at para 34.
\end{enumerate}
\end{footnotesize}
honesty and creativity.”\textsuperscript{123} Henderson also advances the idea of “generative dialogue” which

is a conversation in which people think together in a constitutional relationship. Thinking together implies that you no longer take your own legal tradition or parallel position as final. You relax your grip on certainty and interests and listen to the genuine legal possibilities that result simply from being in a relationship with others, possibilities that might not otherwise have occurred.\textsuperscript{124}

This thinking together results from sharing ideas through dialogue. Drawing on the strong traditions of dialogue and deliberation in Indigenous legal traditions,\textsuperscript{125} Henderson advocates for innovation to existing governance structures through the process of “deep discussion, honest reflection, and committed action.”\textsuperscript{126} He suggests that dialogical governance could result in rethinking the existing division of governmental powers and may enable new forms of governance based on shared sovereignties.\textsuperscript{127}

\textbf{6.3.3.2 Wonder, Humility and Risk}

Relational reciprocity also involves particulars ways of approaching an intercultural dialogue. Prerequisites of engaging in a meaningful intercultural dialogue include beginning from a stance of wonder and humility and embracing a willingness to take risks. Participants in the intercultural dialogue need to be open to “[learning]
something new, beyond themselves, from their interaction with the others.”128 Young explains: “[c]ertainly communication and moral respect require some sense of mutual identification and sharing. But without also a moment of wonder, of an openness to the newness and mystery of the other person, the creative energy of desire dissolves into in-difference.”129 Wonder requires an openness to new ideas and an acceptance that only through interaction and dialogue with others can we explore new possibilities for alternative futures.

Humility is closely related to wonder. Humility is a central value within many Indigenous philosophies. As Lucy Bell describes that for Kwakwaka’wakw people it is “important to remember to carry yourself with care in everything that you do” and keep in mind the “ancestors and future generations” in doing so.130 This posture of humility is apparent in much of the theorizing of Indigenous scholars who often highlight the partiality of their knowledge. Near the end of her article entitled “Kwakwaka’wakw Laws and Perspectives Regarding Property”, Bell writes, for example, “I take full responsibility for the conclusions drawn. If in the decisions and conclusions that I have made I have misunderstood or misapplied anything, that is my responsibility and for it I apologize to my ninogad and ask for their patience as I strive to learn more.”131 Similarly, Atleo asserts that humility is a central principle in Nuu-chah-nulth

128 Young, ”Asymmetrical Reciprocity”, supra note 28 at 352.
129 Ibid at 357.
131 Bell, ibid at para 71.
worldviews and is characterized by an attempt to maintain an “inner smallness” in order to engage in a successful vision quest. This humble stance arises from “an acknowledgment of the relative insignificance of the human in comparison to a creation that remains mostly a mystery.”

Similarly, Tracey Lindberg is explicit about the importance of humility in Indigenous philosophies and her humility is apparent in her writing. In the conclusion of her PhD dissertation, she writes a letter to an Indigenous mentor who passed away before she completed her project: “I have never pretended to be an expert on our laws and I did what you said, and referred to the sources you trusted. It is humbling to know how little I know. It is exciting to know how much I have to learn.” She ends her dissertation with the phrase: “All of which is said with good intention.” Atleo also exhibits humility in his writing as he concludes his description of central Nuu-chah-nulth principles that could inform a new constitutional relationship between Indigenous and non-Indigenous peoples within Canada. He writes: “This book represents a Nuu-chah-nulth perspective on this developmental process, which must begin with darkness and move towards light. It is an emergent perspective that requires the addition of other perspectives in order to be more complete.”

Likewise, theorists writing in the area of intercultural dispute resolution highlight the importance of humility as a starting point to achieving peaceful relations

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132 Atleo (Umeek), supra note 36 at 36.
133 Ibid at 63-64.
134 Ibid at 133.
136 Ibid at 373.
137 Atleo (Umeek), supra note 36 at 169.
between conflicting parties. John Paul Lederach, for example, asserts that humility involves the recognition that we are part of a larger whole and the understanding that learning and truth seeking are lifelong adventures. Similarly, Iris Marion Young suggests that in approaching a situation in which one is attempting to communicate with a cultural other, a stance of moral humility is necessary in which “one starts with the assumption that one cannot see things from the other person’s perspective, and waits to learn by listening to the other person to what extent they have similar experiences.”

Vulnerability and risk are both implicitly linked to this conception of humility. In Lederach’s view, humility requires one to “accept vulnerability and risk stepping into the unknown by seeking constructive engagement with those most feared and least understood.” This acceptance of risk and vulnerability requires an openness to the perspectives of others and a flexibility in relation to one’s own perspective. As Natalie Oman contends, it is necessary to

hold open the possibility of self-transformation through the discovery of ‘experiences recalcitrant to my way of understanding’ that may be encountered in the process of seeking intercultural understanding. This perpetual openness to the potentialities of dialogical interaction precludes zealotry and dogmatism in intercultural relationships.

On a related note, Dallmyr advocates for the utility of engaged dialogical encounters, which have the aim of seeking to “understand the other’ even at the risk of self-critique
and decentering, which entails that ‘one has to believe that one could be wrong.’”\textsuperscript{142} The prerequisites for meaningful dialogical engagement across cultures therefore include humility, risk and vulnerability in addition to a deliberate letting go of the certainty of one’s own perspective.

\textbf{6.3.3.3 Embodied Engagement and Emotional Connection}

Finally, relational reciprocity includes the idea that participants in cross-cultural dialogue engage with each other not just intellectually but emotionally as well. Unlike Benhabib and Young’s articulations of reciprocity, which explicitly exclude emotional aspects, a crucial aspect of engaging in dialogue to achieve relational reciprocity is being open to emotion, discomfort and unsettling.

Relational reciprocity requires an openness to learning and self-transformation. Using my peripheral vision, I stumbled upon a useful article written by a collaborative therapist on the way this discipline approaches dialogical processes in the context of therapeutic encounters. The collaborative therapy approach, as described by Jan DeFehr encompasses exactly the kind of approach I would advocate for in engaging in dialogue with a view to coming to a place of mutual understanding in the context of Indigenous/non-Indigenous relationships. As Jan DeFehr writes:

\begin{quote}
When Collaborative therapists want to deepen understanding, they do not generally turn to analytical methods. They engage in a process of inquiry that is dialogical. They listen to understand. Their understanding is open-ended, ‘hard-won’ through the relational ‘back and forth’ of conversation; they do not want to understand too quickly. Possibilities are inherent in such a mutually influencing process, but they
\end{quote}

\textsuperscript{142} Dallmayr, \textit{supra} note 101 at 48–49. In his theorizing, Dallmayr draws heavily on the work of Tzvetan Todorov, Hans-George Gadamer and Jacques Derrida.
cannot be known ahead of time, nor can all the twists and turns of the dialogue be pre-figured.... A ‘genuine’ conversation has a life of its own...

Here as DeFehr points out, to begin a dialogue with a view to mutual understanding, it is useful to begin with no hidden agenda. Instead, the agenda is merely the simple yet elusive goal of engaging in conversation to really meaningfully understand the other person’s perspective. This beginning stance requires participants to let go of the urge to control the outcome of the dialogical engagement and instead follow the “twists and turns of the dialogue” to see where it takes them.

Embodied engagement not only requires an attentiveness to the words of the cultural other but also attentiveness to the rhythm and flow of the conversation, the voice and tone of the other as well as to the silences and emotions. This embodied attentiveness requires what Lederach terms “sensuous perception”, which is “the capacity to use and keep open a full awareness of that which surrounds us by use of our complete faculties.”

Embodied engagement with cultural others also requires a willingness to be open to emotion. Again in the context of collaborative theory, DeFehr points out that embodied engagement requires the ability to spontaneously respond into an emerging conversation, doing and being what the situation seems to call for, ‘in the manner called for,’ without any ready-made, step-ordered directives to guide them. As both client and therapist ‘shape’ the

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144 This beginning stance contrasts with Benhabib’s reliance on Hannah Arendt’s theory which posits that the participants in intercultural dialogue are engaging with one another with a view to try to ‘woo the other’s consent.’

145 DeFehr, *supra* note 143 at 20.

conversation with their bodily participation within it, as they engage in a process of “becoming present to one another,” the conversation, with all its visible and invisible influences, touches and moves them. Transformation and generativity are presumed inherent to dialogic interaction.\textsuperscript{147}

Here DeFehr points out that embodied engagement requires an openness to being \textit{touched as a human being} and sharing emotional experiences with others. Similarly, Paulette Regan asserts that “learning to listen involves engaging our whole being, using silence not to deny, but to welcome and recognize the transformative possibilities of the stories we do not want to hear.”\textsuperscript{148} Through this sharing, participants in intercultural dialogues can “become connected with each other in a new, active way.”\textsuperscript{149}

DeFehr also advocates for “privileging striking moments”\textsuperscript{150} that move us during dialogical interaction. Such moments are those that remain embedded in our memories long after the dialogical interaction takes place. For me, moments that I find memorable are those that engaged my emotions and created a physical reaction. In particular, things that made me laugh, cry, or get excited, nervous or angry are more likely to remain embedded in my memories and propel me to action.

I can remember in vivid detail, for example, attending an International Women’s Day Celebration in Masset on Haida Gwaii, which was hosted by a well-respected Haida woman, Crystal Robinson. The celebration consisted of women from the community sharing their gifts of song, speech and poetry. At the end of the celebration, Ms. Robinson closed the ceremony by explaining that she had been given

\textsuperscript{147}DeFehr, \textit{supra} note 143 at 15.
\textsuperscript{148}Paulette Regan, \textit{Unsettling the Settler Within: Canada’s Peacemaker Myth, Reconciliation, and Transformative Pathways to Decolonization} (PhD Dissertation, University of Victoria, 2006) [unpublished] [Regan, \textit{Canada’s Peacemaker Myth}] at 225.
\textsuperscript{149}DeFehr, \textit{supra} note 143 at 25.
\textsuperscript{150}\textit{Ibid} at 27.
the responsibility to be the keeper of her nations’ songs as a child. The Elders of her community had trained her to be able to share those songs as she grew. She shared that she had been forced to attend residential school and there she was taught that her culture was something to be ashamed of. As a result, she had never sang the Haida songs she had been taught. It was a powerful and striking moment when she sang her song for the first time publicly at that Celebration. Her song touched everyone deeply and brought everyone in the room to tears.

Another example of the effectiveness of the use of emotion in creating intercultural understanding can be found in the writing of Tracey Lindberg, an accomplished Cree scholar. Dispersed throughout her dissertation, Lindberg included journal entries that she wrote as she completed her dissertation which focused on Indigenous peoples’ experiences with the Canadian criminal justice system. Lindberg writes:

Sometimes I cry when I talk about in/justice issues. I know, because I live Scott Momaday’s understanding of “memories in (our) blood.” Often, there is a roiling pain in my stomach when I think of the Canadian in/justice system. I think that part of it is the irony of the nomenclature. Another part is the recognition of the futility of hoping for justice when the colonial deck is quite loaded. It is hard to subtract yourself from the colonized and institutionalized in/justice system when you and your relations are impacted by it. My responses are often, I imagine, dismissed as emotional and not intellectual responses. I have come to understand that this pain that I feel in my belly, my chest, my head – which beckons tears of ragepainanger, is a completely rational response to the colonial mentality. My body quite naturally rejects the implantation of colonial thought. My tears are indicators of the depth of the fissure existing between my mindbody space and those of others differentially situated in the colonial experience. I am not mere observer. I cry for those who are in such turmoil that they cannot afford to insulate themselves from jail. I cry for those whose anger is less diluted than my own and who act rather than feel.\textsuperscript{151}

\textsuperscript{151} Lindberg, supra note 135 at 144–145.
Lindberg’s thoughts are honest, reflective and emotional. Her words convey the power of the colonial legal system in shaping Indigenous peoples’ self-perceptions and experiences within Canada. Her journal entries convey the impact of colonial laws and institutions on her life as an Indigenous scholar/woman/community member. Through the use of emotion, Lindberg effectively communicates the physical impact of colonial policies and the destruction such policies have wrought on Indigenous institutions, laws and peoples.

The importance of being open to emotional engagement to create meaningful and lasting social change cannot be emphasized enough. As Jennifer Nedelsky argues, affective response is central to good judgment in legal contexts.\(^{152}\) Nedelsky asserts that failing to attend to affect can result in an inability to properly weigh the moral aspects of a problem.\(^{153}\) She argues that if people were presented with a violation of someone’s rights and engage with their affective responses,

they would not just make a purely intellectual assessment that this was a bad idea; rather, they would feel outraged, angry, upset. In other words, they would have an affective attachment to an abstract idea, learned, nonetheless, through concrete instances. This affective commitment could then be used to begin the process of shifting other affective responses.... It takes affect to change affect.\(^{154}\)

Here Nedelsky argues that emotion is central to good judgment and to weighing moral decisions.\(^{155}\) If people working in law or government fail to engage or take note of their affective responses, such people may not be able to fully understand the context and

\(^{152}\) Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 McGill LJ 91
\(^{153}\) Ibid at section IA.
\(^{154}\) Ibid at section V.
\(^{155}\) Lederach, Moral Imagination, supra note 28 at 176, also advocates for the need to reconnect with human emotions in the context of political decision-making.
perspective of cultural others whom they encounter. Further, without affect, Nedelsky suggests, one cannot appropriately respond to issues that have a moral component.

6.4 Visions of Reciprocity

Relational reciprocity involves a dramatic shift in the way Indigenous and non-Indigenous peoples approach and encounter one another. It requires the development of an understanding of Indigenous and non-Indigenous people as part of an interconnected whole. It requires humility, vulnerability, risk and openness to other perspectives. By engaging with Indigenous communities from a stance of humility and openness, which includes being attuned to the silences, hesitations, emotions and voices of others, non-Indigenous peoples might be able to alter their understandings of the historical context that has led to current issues affecting Indigenous/non-Indigenous relations and to take the risks necessary to reconceptualize how the relationship might be reformulated on a more equitable footing going forward. More importantly, non-Indigenous and Indigenous people might be able to engage in ongoing dialogues that actually create a higher level of mutual understanding — understanding that might motivate everyone to loosen their grasps on certainty and let dialogical interaction create new forms of relationships and knowledge.

Relational reciprocity requires a willingness to connect with one another on an emotional level through embodied engagement in dialogue across cultures. A commitment to relational reciprocity in Indigenous/non-Indigenous relations constitutes a profound paradigm shift. Applying the principle of reciprocity in the

\[156\] Jamieson, supra note 13.
context of Indigenous/non-Indigenous relationships may create more respectful relationships by enabling effective communication across cultural difference.
During the course of the mining operation, Lynette heard from Brenda about a potentially successful greenhouse venture that several community members had started with funding from the Yellow Valley leadership. Unfortunately, the funding ran out before the greenhouse could be completely set up. The business plan envisioned that this greenhouse would be able to provide 80% of the community’s vegetables within a three-year period at a fraction of the cost to community members since the current supply of vegetables had to be flown in by charter plane. Lynette approached Green Co’s Board to discuss whether there was any possibility that they could provide interim funding or another solution to support the completion of the greenhouse project. One Board member was connected to a philanthropist interested in supporting Indigenous business ventures. In the end, Green Co and the philanthropist provided the funding needed to complete the construction of the community greenhouse and the community is now producing the majority of vegetables that the community needs at a more affordable cost for community members.
Chapter 7: The East Door: The Principle of Reconciliation

Anything less than true reconciliation leaves the underlying issues intact beneath a veneer of liturgy. Anything less is a rerun of the same old, same old – a tinkering at the edges of what is possible.¹

The idea of reconciliation between Indigenous and non-Indigenous peoples is gaining currency in colonial contexts. In several countries, including South Africa, Australia and Canada, reconciliation processes have been created to address the historic grievances of and the current socio-economic conditions facing Indigenous communities. Although reconciliation strategies differ depending on the context, reconciliation as a concept is increasingly embraced as valuable in creating meaningful change in Indigenous/non-Indigenous relationships within colonial states.

The concept of reconciliation, however, does have critics. Some scholars have rejected the discourse of reconciliation on the basis that it aims to pacify Indigenous nations without addressing power dynamics, social inequality and outstanding historical claims. Audra Simpson, for example, claims that the discourse of reconciliation abets on-going colonial violence towards Indigenous lands and peoples by “settling” Indigenous claims by acknowledging the suffering and relegating the violence of colonial history to the past.² Similarly, Carole Blackburn argues that the language of reconciliation is used politically to legitimate the settler colonial state and

push injustice and state culpability as it relates to Indigenous peoples into the past. In this chapter, I address these critiques in trying to articulate a useful way forward for both Canadian courts in interpreting the principle of reconciliation and for Canadian governments in applying the principles of reconciliation to its consultation and accommodation processes.

As discussed in Chapter 2, in the context of Aboriginal law, the Supreme Court of Canada’s interpretation of reconciliation has relied heavily on non-Indigenous understandings and has marginalized Indigenous interests in balancing them against the broader interests of non-Indigenous society. In this chapter, my interest is in examining a new normative source for the principle of reconciliation that draws on intersocietal understandings, in particular by considering Indigenous views on reconciliation.

In Chapter 2, I concluded that although the Supreme Court of Canada’s approach to reconciliation has shifted over the years and it remains limited in that the Court fails to deliberately consider the quality and character of the relationships between the Indigenous communities and the Canadian government involved in legal disputes. In this chapter, I expand upon a relational approach to reconciliation; I argue that reconciliation is a process aimed at rebuilding a ruptured relationship. Rebuilding such relationships involves acknowledging the harm done to the relationship, accepting responsibility to make positive changes, working towards

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healing people from the damage done, 6 rebalancing the power in the relationship, 7 and (re)creating trust between the parties. 8 This rebuilding includes a time and effort-intensive process to rebuild trust in the relationship and redefine ways to be in relationship across all levels of society. I conclude by outlining key steps to move towards reconciliation: rebuilding trust in the relationship; developing a shared vision for an interdependent future; creating mutually agreed upon processes for managing the relationship and conflicts as they arise; and implementing concrete actions to move towards the shared vision.

Within Canada, there has been recent movement towards reconciliation between Indigenous and non-Indigenous communities. The most prominent contemporary example of reconciliation in the Canadian context is the establishment of the TRC. The TRC was established as part of the Indian Residential Schools Settlement Agreement (IRSSA), which also provided for individual compensation for survivors, a commemoration fund and a healing fund. The TRC is tasked with documenting and preserving the stories of Indian Residential School (IRS) Survivors, establishing a National Research Centre containing key documents relating to the IRS legacy, and hosting several National events to honour survivors. The TRC is coming to the end of its mandate in 2015, however, the importance of the TRC’s role is in the creation of awareness of the history of residential schools and providing opportunity for dialogue about this sorry part of Canada’s history within the broader political and

5 Napoleon, ibid at 178.
6 Lederach, Building Peace, supra note 4 at 78.
7 Ibid at 65. See also Napoleon, "Who Gets to Say What Happened?", supra note 1 at 185; Napoleon notes that "issues such as power imbalances do not disappear without someone deliberately doing the very difficult and terrifying work of dismantling them".
8 Napoleon, ibid at 186.
social realm. The records of survivors’ stories as well as the collection of relevant
documents for the National Archive will provide a rich resource that has the potential
to uncover further truths about the Indian Residential School legacy and fuel on-going
dialogue about Indigenous/non-Indigenous relationships.

The Canadian federal government made a formal commitment to reconciliation
through the signing of the IRSSA and the establishment of the TRC. Within six months
of the IRSSA, Prime Minister Stephen Harper publicly apologized to IRS survivors for
Canada’s role in running the schools and for the devastating and destructive impact the
schools had on survivors and their families.\(^9\) It is noteworthy, however, that 15 months
later, Prime Minister Stephen Harper stated at the G20 Pittsburgh Summit, that “[w]e
have no history of colonialism” in Canada.\(^10\) In addition, for the duration of the TRC’s
mandate, Harper’s federal government consistently refused to release or provide access
to relevant government documents for the National Archive, including Royal Canadian
Mounted Police (RCMP) documents. As a result, the TRC spent valuable time and
money in litigation against the government to enforce the government’s commitments
in the Settlement Agreement to release the relevant documents. Unfortunately, the
Canadian government’s purposefully obstructive behaviour runs counter to its
commitments to reconciliation in the IRSSA and undermines the sincerity of its
apology for the IRS legacy. It also exemplifies a diametrically opposed approach to
reconciliation than the relational approach I advocate.

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\(^9\) Prime Minister Stephen Harper, “Statement of Apology”, (3 November 2008), online: Aboriginal

\(^10\) Aaron Wherry, “What Was He Talking About When He Talked About Colonialism”, Maclean’s (1
Within Canada, there are signs that Indigenous communities are not happy with the status quo and will continue to assert their jurisdiction to advance recognition of their rights through various means including blockades, demonstrations, and court actions.\textsuperscript{11} As such, there are arguments supporting the need for effective reconciliation processes that are viewed as legitimate by both Indigenous and non-Indigenous peoples to support social stability and enhance justice within Canada.

7.1 Sources for the Principle of Reconciliation

The principle of reconciliation is supported in international law, Canadian law, academic theory and Indigenous legal traditions. Although the word “reconciliation” is not specifically used in the Declaration, the entire Declaration speaks to the great need to repair the relationship between Indigenous peoples worldwide and the States within which they are living. In fact, the need for the Declaration itself points to an urgent call within the international community for political and social change in the way that nation states relate to Indigenous peoples living within their borders. The Declaration sets out “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”\textsuperscript{12} and speaks to the legacy of oppression that many Indigenous peoples have endured.

As discussed in Chapter 2, Canadian case law supports reconciliation as a primary purpose to guide Indigenous/non-Indigenous relationships. Academic theorists have characterized the enactment of section 35 of the Constitution Acts as an act of


\textsuperscript{12} Ma’iingan (Aaron Mills), \textit{ibid} at para 73; Albinati, \textit{ibid} at 7.
reconciliation. In addition, the Supreme Court of Canada has held that reconciliation is the ‘grand purpose’ of section 35 in Aboriginal rights jurisprudence. Some Indigenous\textsuperscript{14} and non-Indigenous\textsuperscript{15} theorists also support the concept of reconciliation. Finally, the idea of reconciliation is a central tenet in many Indigenous legal traditions.\textsuperscript{16}

7.2 Substantive Content of the Principle of Reconciliation

Although various strategies of reconciliation are increasingly being deployed in colonial contexts, many questions still remain about the concept of reconciliation. In applying Matsuda’s approach of looking to the bottom, I include a detailed consideration of Indigenous theorists views of reconciliation to inform my discussion of its substantive content. I have structured this section as follows:


\textsuperscript{16} See e.g. Chief Justice Robert Yazzie, “Navajo Peacemaking and Intercultural Dispute Resolution” in Catherine Bell & David Joshua Kahane, eds, Intercultural Dispute Resolution in Aboriginal Contexts (Vancouver: UBC Press, 2004) 107 at 110 (reconciliation as a central goal in Navajo peacemaking); Napoleon, ”Who Gets to Say What Happened?”, supra note 1 at 179 (reconciliation as central to Indigenous restorative justice processes); Dale Dewhurst, “Parallel Justice Systems, of a Tale of Two Spiders” in Catherine Bell & David Joshua Kahane, eds, Intercultural Dispute Resolution in Aboriginal Contexts (Vancouver: UBC Press, 2009) 213 at 217 (a central value in the Tsuu T’ina system is to restore and heal relationships through spiritual teachings).
The What? What is reconciliation? Is reconciliation a process or an outcome or both? What does academic literature reveal about reconciliation? What are the critiques of reconciliation that Indigenous theorists raise?


The How? How might the principle of reconciliation be implemented? What are the challenges of applying the principle of reconciliation in the context of Indigenous/non-Indigenous relations within Canada? Are there concrete pathways forward to implement this principle?

7.2.1 The What?

To date, reconciliation is the only principle of the four in this framework that the Supreme Court of Canada has dealt with extensively. In Chapter 2, I critiqued the Court’s approach to reconciliation as limited in interpreting reconciliation as requiring a balancing between the constitutionalized rights of Indigenous communities and the needs of broader Canadian society. Further, in the name of reconciliation the Court has enumerated a long list of objectives that the government can rely on to justify government infringement of section 35 rights. Although the Court has more recently moved towards a more positive, relationship-oriented interpretation of reconciliation, manifested in the duty to consult, accommodate, and negotiate, even these positive duties compel Indigenous communities to accept the government’s vision of how Indigenous territories should be used. Having considered the limitations of the

There are many related questions that arise from this initial inquiry that are beyond the scope of the discussion in this chapter, including:

- If reconciliation is a process, what does it require on the part of government in the context of Indigenous communities?
- Does it require any actions to be taken by non-Indigenous people generally or by Indigenous peoples?
- Do corporate entities, such as resource development companies, have a role to play in the process of reconciliation?
- If reconciliation, on the other hand, is an outcome, what does it look like? What might the vision be of a country with a colonial history if it were to achieve reconciliation once and for all?
reconciliation jurisprudence in Chapter 2, the focus of this Chapter is on fleshing the substantive concept of reconciliation by considering academic literature related to reconciliation processes in colonial and post-conflict societies.

### 7.2.1.1 Towards an Intersocietal Interpretation of the Principle of Reconciliation

Although commonly used, reconciliation is a relatively fluid concept in that it can be used in a variety of contexts. The word reconciliation generally is used to describe relationships between different things (whether these “things” might be people, financial records or ideas). The Merriam-Webster dictionary defines reconciliation as:

1. the act of causing two people or groups to become friendly again after an argument or disagreement (what Walters terms “reconciliation as relationship”); and
2. the process of finding a way to make two different ideas, facts, etc., exist or be true at the same time (what Walters terms “reconciliation as consistency”).

The first definition focuses on the process of repairing the relationship between people after something has damaged the relationship. This “reconciliation as relationship” seems to be the most commonly accepted definition in reconciliation literature. By contrast, “reconciliation as consistency” focuses on the intellectual exercise of creating agreement between two different ideas.

Both of these definitions are useful for the purposes of my discussion. Reconciliation as relationship is about the quality, character, and endurance of

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relationships between individuals and/or groups. Reconciliation as relationship is supported by Indigenous legal traditions; as Lori Graham notes that the “concept of restoration or repair is at the center of many indigenous legal systems.”\textsuperscript{21} As Walters notes, reconciliation as relationship is always “two-sided or reciprocal” and “has a degree of intrinsic moral worth about it.”\textsuperscript{22} This type of reconciliation “invariably involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations for a harmonious relationship”\textsuperscript{23} and is “a morally rich sense of reconciliation.”\textsuperscript{24} Reconciliation therefore centres on the relationships between Indigenous and non-Indigenous peoples and involves moral judgements about how best to repair damage within the relationship.

Reconciliation as consistency is also useful and wholly relevant to interpreting the principle of reconciliation. Walters notes that this understanding of reconciliation can involve the difficult task of fitting disparate ideas together through moral judgements.\textsuperscript{25} This understanding is particularly relevant to the work of Indigenous theorists as they theorize decolonization while living within it. Such theorists confront colonial ideologies in their daily lives and experience the dissonance between the realities they and other Indigenous peoples face and their visions of moving beyond those realities.

\textsuperscript{22} Walters, ”Jurisprudence”, supra note 15 at 168.
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{25} Ibid at 167.
Another useful set of definitions relevant to interpreting reconciliation is to consider the definition of the verb “reconcile”. The Merriam Webster online dictionary defines reconcile as follows:

1. a: to restore to friendship or harmony <reconciled the factions>
   b: settle, resolve <reconcile differences>
2. to make consistent or congruous <reconcile an ideal with reality>
3. to cause to submit to or accept something unpleasant <was reconciled to hardship>
4. a: to check (a financial account) against another for accuracy
   b: to account for.26

The first two definitions roughly equate to the two definitions of reconciliation listed above: the first focuses on restoring harmony and resolving differences between people or groups (reconciliation as relationship); and the second focuses on making two ideas consistent (reconciliation as consistency). The third and fourth definitions add further layers to a substantive interpretation of reconciliation as the third focuses on accepting an unpleasant reality or idea (what Walters calls “reconciliation as resignation”);27 and the fourth focuses on both “reconciliation as accuracy” and “reconciliation as accountability.”

Paulette Regan notes that reconciliation as resignation is the interpretation many Indigenous scholars use to characterize reconciliation processes in Canada.28 Walters argues that this type of reconciliation is “one-sided” and requires a person to

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28 Paulette Regan, Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada (Vancouver: UBC Press, 2010) [Regan, Unsettling the Settler] at 60.
adopt “an attitude of acceptance about circumstances that are unlikely to change.”

This is consistent with some Indigenous theorists’ characterization of reconciliation discourse as pacifying in that it assuages non-Indigenous guilt over the historical treatment of Indigenous communities within Canada without requiring any significant change in the lives of non-Indigenous peoples. In this view, reconciliation discourse masks the need for decolonization and requires Indigenous peoples to accept the unpleasant reality of colonial oppression.

Reconciliation as accuracy, which is most often used in the financial context, is useful to consider the relationship between Indigenous counternarratives about the violence of settlement and the dominant historical narrative that positions Canada as a nation founded upon peacemaking. Positioning these contrasting narratives side-by-side requires people to recalibrate their understandings of historical truth. Just as in the financial context, to reconcile two divergent statements, people can make changes to one or both or can try to fit the divergent parts together into a coherent whole. Reconciliation as accuracy, therefore, challenges whose truth has informed the historical record and how to deal with historical wrongs once revealed.

29 Walters, "Jurisprudence", supra note 15 at 167. He notes however that depending on the context this can be viewed as a positive attribute in that it demonstrates adaptability to changing circumstances or a negative attribute in that it connotes resignation to an unpleasant reality.
31 This understanding is closely linked to reconciliation as consistency but provides a slightly different lens through which to consider reconciliation.
32 Regan, Unsettling the Settler, supra note 28 at 86. Regan discusses the colonial peacemaker myth as central to the ongoing rationalization of Canada’s oppression of Indigenous communities.
33 Walters, "Jurisprudence", supra note 15 at 167.
Finally, reconciliation as accountability, which is closely related to accuracy, highlights the need for a comprehensive explanation of history. The need to “account for” all items on a budget means that nothing relevant is excluded. Transposing this idea into an interpretation of reconciliation in the context of Indigenous/non-Indigenous relationships would necessitate that space be created for all relevant stories to be voiced and heard to inform a new historical narrative. The idea of accountability also highlights the need for Indigenous and non-Indigenous peoples to take responsibility for proactively engaging in reconciliation processes and committing to undertake the difficult work of repairing damaged relationships. All of these various, interrelated interpretations of reconciliation highlight the need to think carefully about how to deal with the difficult questions that non-Indigenous peoples and government have to face, such as how do Indigenous stories reveal historical truths that challenge dominant narratives of Canadian history; why have such stories been silenced; and what should be done about historical wrongs once revealed.

7.2.1.2 Is Reconciliation a Process and/or an Outcome?

Reconciliation is often conceptualized as a process by which parties to a relationship damaged by conflict rebuild and transform their relationship.34 It involves transformation35 – substantive changes to the underlying relationship between individuals or groups. Scholars considering the principle of reconciliation in post-conflict societies, including colonial contexts, stress the view that reconciliation is a

34 Lederach, *Building Peace, supra* note 4 at 23.
process\textsuperscript{36} aimed at repairing a damaged relationship through the acknowledgment of harm done, acceptance of responsibility for that harm, and commitment to rebuilding trust in the relationship. Reconciliation is not a static state, rather it is achieved in establishing shifts in attitudes towards one another,\textsuperscript{37} including the ability to anticipate and envision a shared future.\textsuperscript{38} As such, reconciliation is a long-term process. It involves establishing mutually agreed-upon, flexible processes to support the relationship and effectively deal with conflicts that arise.\textsuperscript{39} Reconciliation is therefore a flexible, on-going and responsive process that continually adapts to support a new, constructive relationship as it evolves.

One might also conceptualize reconciliation as an outcome – as an end point where a society is created in which relationships are sustainable, respectful and healthy. One benefit to conceptualizing reconciliation as an outcome is that it provides a fixed end point for the process of reconciliation. Promising the achievement of some type of goal may provide incentive for non-Indigenous peoples to participate; conversely, conceptualizing reconciliation as an on-going process with no end may dissuade non-Indigenous peoples from embarking on that journey.\textsuperscript{40}


Conceptualizing reconciliation as an outcome, however, holds potential danger. As Keavy Martin notes, focusing on healing and reconciliation can “entail a fixation upon resolution that is not only premature but problematic in its correlation with forgetting.” Conceptualizing reconciliation as a resolution or final solution to the issues plaguing Indigenous/non-Indigenous relationships is problematic in that it may ignore continuing inequities that exist and fail to continue to address on-going injustices. The fixation upon resolution is premature in that there may not be any “actual progress towards a functional or just society” but rather a focus on the “emotional release from the guilt accrued by colonial history.” This correlation with forgetting is particularly problematic because as Martin notes “[m]oving on – or forgetting – is a luxury not everyone can afford.”

Similarly, Roger Epp points out that solemn offers of reconciliation on the part of non-Indigenous peoples are problematic in that they are “forward-looking, suspicious of history, or, more likely, indifferent to it, and [incorporate]...an almost-willful amnesia about whatever might be divisive.” Further, Martin stresses that “this push for closure is in many ways a longing for oblivion – for the luxury of forgetting and for the absolution of amnesia.” As Martin eloquently points out, “the desire for closure – for an end to the problem – has only ever led to further error and injustice.” This is certainly the case when one reflects on the history of Indigenous/non-Indigenous

41 Ibid at 49.
43 Martin, supra note 40 at 61–62.
44 Ibid at 54.
45 Epp, supra note 15 at 228.
46 Martin, supra note 40 at 61.
47 Ibid at 62.
relationships in Canada. Instead, Martin argues that “[r]ather than searching for the end of this particular story, then, let us turn instead to the messy, quotidian details of the present: the complaints, the confusions, the contradictory claims.”

Given the dangers of conceptualizing reconciliation as an outcome, for the purposes of this framework, it is more useful to conceptualize reconciliation as an on-going process. Although potentially daunting to non-Indigenous peoples and governments, this view of reconciliation corresponds with Indigenous teachings, such as the Medicine Wheel, that emphasize the need to renewal and revitalization of relationships. Relationships are perpetually dynamic and in need to great care to ensure their health. Conceptualizing reconciliation as a process, therefore, enables us to focus on current issues that arise while at the same time placing those issues in the long view of reconciliation.

7.2.1.3 Indigenous Critiques of Reconciliation

In recent years, particularly in light of the work of the TRC in Canada, scholars are exploring the value and limitations of engaging the discourse of reconciliation to advance the rights of Indigenous communities within Canada. Several Indigenous theorists offer persuasive critiques of reconciliation discourse. Taiaiake Alfred, for example, critiques it on the basis that it masks the need for a fundamental restructuring of political, social and economic relations. He argues that Indigenous peoples need to reject reconciliation “as the orienting goal of Indigenous peoples’

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48 Ibid.
49 Alfred, "Restitution", supra note 30 at 183.
political and social struggles.”50 He juxtaposes reconciliation with “a true and lasting foundation for justice that will result in meaningful changes in the lives of Indigenous peoples and in the return of their lands.”51 His concern is that without restitution of lands to Indigenous peoples and other forms of reparations for past harms and continuing injustices against Indigenous peoples, “reconciliation will permanently absolve colonial injustices and is itself a further injustice.”52

Although Alfred provide a trenchant critique of reconciliation, he gives limited indications that certain prerequisites might support Indigenous peoples engaging with reconciliation at some point in the future.53 These prerequisites include:

- willingness on the part of the Canadian government and non-Indigenous peoples to recognize their ongoing complicity in the oppression of Indigenous communities within Canada and take appropriate action to make amends for historic and ongoing wrongs;
- significant reparations, including restitution of lands unlawfully taken;54 and
- a radical rehabilitation of the state, which includes making space for Indigenous institutions that are non-liberal in form.55

Alfred therefore sees the dismantling of the colonial system within Canada and a significant reformulation of Indigenous/non-Indigenous relationships as essential prerequisites to embracing the discourse of reconciliation.

Similarly, Gregory Younging asserts that non-Indigenous peoples have an important distance to travel to begin the process of reconciliation. This requires non-

50 Ibid at 181.
51 Ibid
52 Ibid.
53 Ibid at 187.
54 Ibid at 182.
Indigenous peoples within Canada to “face up to what has been done in their name, and...own it as being part of who they are.”  

56 He highlights the importance of “blood memory” which means that “the experience of those that have gone before us is embedded in our physical and psychological being.”  

57 He asserts that unless non-Indigenous peoples embrace their “blood memory” they will not be able to forge a better path into the future.  

58 Acknowledging our blood memory brings with it responsibility to act in light of our ancestor’s legacies.  

59 He notes that the Canadian governments’ actions do not support its discourse of reconciliation. He cites Canada’s initial opposition to the Declaration as illustrative of the government’s open hostility towards Indigenous peoples within Canada and as an impediment to reconciliation. Although Younging is critical of reconciliation discourse, he does not reject outright the idea that reconciliation might be a useful concept to guide Indigenous/non-Indigenous relationships at some point in the future.  

Jeff Corntassel, Chaw-win-is and T’lakwadzi are also critical of the Canadian government’s reconciliation discourse. They assert that the Canadian state’s vision of reconciliation “seeks to legitimize the status quo rather than to rectify injustice for Indigenous communities.”  

60 They also question the legitimacy of the Canadian state
due to its illegal occupation of Indigenous homelands. They highlight the discordance between this illegitimacy and the Canadian state’s assertion that it is in a position to make an offer of redress to Indigenous peoples. Finally, they suggest that reconciliation discourse is used as a façade for the Canadian government to support its image internationally as a peacekeeping nation while continuing its colonial oppression of Indigenous communities.

Again, however, the authors do not reject reconciliation outright. They insist that “meaningful reconciliation effort must confront colonialism not only historically but as part of an ongoing process that continues to impact present generations of Indigenous youth and families.” They note that for Indigenous peoples, reconciliation might be conditional upon the Canadian state and non-Indigenous peoples living up to obligations of reparations or restitution. Finally, they highlight that “any pursuit of reconciliation must first acknowledge the asymmetrical power relationships between states and Indigenous peoples which can so easily derail questions of justice and decolonization.” It becomes clear, therefore, that although Corntassel, Chaw-win-is and T’lakwadzi are skeptical about the current incarnation of reconciliation, they hold the view that it might hold potential if:

- it were to recognize that injustice against Indigenous communities continues to the present day;
- if it were to recognize and address power imbalances; and

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61 Ibid at 141.
62 Ibid.
63 Ibid at 138.
64 Ibid at 145.
65 Ibid.
66 Ibid.
• if non-Indigenous people and the Canadian government were to demonstrate their commitment to rebuilding the relationship on the basis of justice.

Finally, Roland Chrisjohn and Tanya Wasacase argue that the word “reconciliation” is a form of rhetoric aimed at persuading Canadians that a prior peaceful relationship existed between Indigenous and non-Indigenous peoples within Canada when, in their view, no such relationship existed. Rather, they assert that “before two parties can reconcile they must, at some earlier time, have been conciled; that is, two distinct parties, independent and moving in their own direction for their own reasons, meet, share, and decide to make their independent ways forward into a single, combined effort.” They argue that reconciliation “is an attempt to insinuate a revised and bogus history of Indian/non-Indian relations in Canada” since the “(ex)termination of Indigenous peoples and their unsurrendered pre-existing title to land and resources is central to the political economy of Canada; was, is, and will continue to be.” Further, they argue that, in the context of the TRC, the process would not have any tangible effect on the lives of survivors who told their stories as considerations of justice were notably absent.

Several key themes emerge from the above critiques. These scholars highlight the importance of reconciliation processes actually making a difference in Indigenous

68 Ibid at 222.
69 Ibid at 226.
70 Ibid at 227.
peoples day-to-day lives.71 These critiques emphasize the importance of non-Indigenous people and the Canadian government living up to the promise of reconciliation by taking responsibility for past and ongoing wrongs and taking action to address power imbalances and make systemic changes. Finally, all of these scholars highlight the importance of considerations of justice in the context of reconciliation; several suggest that the Canadian government and non-Indigenous peoples should make reparations – by doing what can be done in contemporary circumstances to right the wrongs that have occurred and put Indigenous peoples into as close a position as possible as they would have been had the wrongs not occurred.

The above critiques also highlight the “profound gap of authenticity”72 between the discourse of reconciliation and the lived realities of Indigenous communities within Canada. Lederach describes this “authenticity deficit” as follows:

...in deep rooted conflict, people locate themselves and change and gauge authenticity within an expansive view of time and an intuitive sense of complexity. These create a cautious approach to promises that constructive social change will happen in a short period of time, independent of the historical context in which violence has evolved. In short, there is a pervading sense of pessimism. This does not mean that desired changes are not hoped for or even possible, in the short term. But pessimism provides a point of departure for understanding the nature of change. Very simply it says this: Gauging whether the change process is genuine requires serious engagement with the complexity of the situation and a long-term view. ...People living in settings of violence often give a warning: If the proposed changes lack a serious account of complexity or a long-term commitment, then the proposed changes are dangerous. The legacy of the setting and their lived experience inculcates a high degree of respect for the regenerative capacity of violence, repeated patterns, and shifting ground filled with traps.73

72 Lederach, Moral Imagination, supra note 39 at 53.
73 Ibid at 54-55.
Lederach notes that this “pessimism” or “well-grounded realism” is a gift for those living within geographies of violence. It allows people faced with ongoing oppression to gaze toward the “horizon of hope” while remaining indifferent to the violence that might otherwise restrict or destroy their lives.

Through their gift of pessimism, the Indigenous scholars discussed above offer compelling critiques of the limitations of reconciliation in advancing relationships between Indigenous and non-Indigenous peoples within Canada. In my view, however, these scholars leave room for the potential of reconciliation. The ability to cynically critique reconciliation while maintaining hope in its potential stems from Indigenous scholars’ insider perspective, wherein they are theorizing decolonization while living within the confines of colonialism. Matsuda dubs this the “experience of dual consciousness” noting that “[t]he dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of color. These people have used duality as a strength, and have developed strategies for resolving this dissonance through the process of appropriation and transformation.” Given that “law….consists of language, ideals, signs, and structures that have material and moral consequences,” Indigenous theorists have developed the ability to transform concepts within this system to support their own aims and reflect their own experiences.

Taking account of the complex relationship that Indigenous scholars have with the idea of reconciliation provides a unique prism through which to interpret this

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74 Ibid at 54.
75 Ibid at 55.
76 Matsuda, supra note 42 at 341. To be precise, she calls it “the minority experience of dual consciousness” but to avoid confusion I omitted the word “minority” here.
77 Ibid at 333.
78 Ibid at 337.
principle. Despite the dangers, reconciliation provides a useful, final principle for the relational framework to reconceive the duty to consult and accommodate. There are significant limitations to the idea of reconciliation as solely a state-centered, top-down process.\textsuperscript{79} Further, the Canadian government has in many instances derailed genuine attempts at rebuilding Indigenous/non-Indigenous relationships through its statements and actions.\textsuperscript{80} As Freeman notes, however, “the concept of ‘reconciliation’ is still valuable, because it underlines the emotional, psychological, and human changes that are...necessary for true decolonization.”\textsuperscript{81}

\subsection*{7.2.1.4 Three Key Aspects of the Principle of Reconciliation: Truth-telling, Taking Responsibility and Taking Action}

Reconciliation literature supports three key aspects to create transformative, systemic changes: truth-telling, taking responsibility and taking action. The concept of truth-telling and taking responsibility are closely linked to acknowledgement as discussing in Chapter 5. Once the truth has been told and people have taken responsibility for past wrongs, taking action is a central component of maintaining the momentum of reconciliation processes and rebuilding better relationships.

The first key substantive aspect of reconciliation is truth-telling, which involves the public disclosure of both subjective and objective evidence relating to the wrongs committed. In the context of the TRC, this has involved creating spaces for sharing of Indigenous experiences of residential schools and the disclosure of previously

\textsuperscript{79} Freeman, \textit{supra} note 15 at para 9.
\textsuperscript{80} \textit{Ibid.}
\textsuperscript{81} \textit{Ibid.}
confidential government documents related to the schools. Truth-telling therefore demands both Indigenous and non-Indigenous peoples’ participation.

The link between truth and reconciliation is deeply embedded both in the movement towards truth commissions worldwide and within academic theory. John Ralston Saul argues that reconciliation can only occur if it is based on truth; he asserts that Indigenous peoples’ truths must be spoken to enable both Indigenous and non-Indigenous peoples to move forward.82 He acknowledges that sharing truths will be painful for both “the speaker and the listener, but these truths must be spoken because healing is itself a painful process.”83 Here Ralston Saul links truth with healing and reconciliation.

The importance of truth-telling cannot be underestimated; it is vitally important to the work of reconciliation in that it

- restores the dignity and identity to those who have suffered grievous harms;84
- documents the stories of those who have suffered oppression and corrects misrepresentations of the past;85
- prevents governments from publicly claiming the wrong never occurred;86
- raises societal awareness of the legacy of injustice and creates conditions favourable to healing for survivors;87

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83 Ibid.
86 Ibid.
87 Ibid.
• promotes remembrance of tragedies and makes recurrence less likely. Finally, as Federico Lenzirini notes, truth-telling holds special significance for Indigenous peoples because revealing the truth about the founding violence of colonialism and its devastating consequences for Indigenous peoples demonstrates that Indigenous claims are well-founded and that Indigenous peoples are entitled to justice. As such, truth-telling provides a means by which evidence is documented that supports Indigenous political and legal claims.

In the context of Indigenous communities within Canada, each time Indigenous truths are revealed it threatens to blow the lid off of the myth that Canadians tell themselves about what Canada is. Truth-telling therefore creates a counter-history of Indigenous resistance and constitutes an act of resistance in itself. This plays the important role of ensuring that “the scars remain visible” thereby mitigating organized forgetting. When Indigenous truths about the residential schools legacy, for example, are revealed, documented and shared, the wider conditions and circumstances of the whole colonial system become visible. Truth-telling therefore creates a critical wave of momentum towards reconciliation, Indigenous resurgence, and decolonization.

In a course focused on reconciliation, Lee Maracle and Victoria Freeman draw on the Sto:lo concept of lummi – “facing ourselves” – as a key starting point to help students acknowledge their own relationship with colonialism and examine the

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88 Ibid.
89 Ibid.
90 Henderson & Wakeham, supra note 59 at 9.
91 Martin, supra note 40 at 63.
92 Henderson & Wakeham, supra note 59 at 5.
benefits of colonialism and white privilege in their lives.\textsuperscript{93} Freeman notes: “Lummi involvement involves the hard work of working through the emotional and psychic structures on both sides that perpetuate colonialism without our even realizing it, through our often unconscious emotions of guilt, shame, fear, and anger.”\textsuperscript{94} As Freeman asserts, non-Indigenous people:

have to become reconciled to something very unpleasant, which is our history on this continent. Non-Indigenous people have to acknowledge that colonialism happened and continues, and we must acknowledge our own relationship to it. We have to acknowledge that, like it or not, all non-Indigenous peoples, even recent newcomers, benefit from the colonialism of the past and from ongoing colonizing actions in the present. We also have to be reconciled to the very unpleasant vision of Canadians that emerges from Indigenous scholarship. We are not who we thought we were and it is difficult to accept this. It is hard to accept that our nation is founded on broken promises, prejudice, illegitimate assumptions of sovereignty, and colonial violence, and that it continues to perpetuate these things. It is hard to acknowledge that we have largely failed to take up our responsibilities as non-Indigenous peoples living on Turtle Island by virtue of the treaties. It is hard to admit that we have failed in our responsibilities to Indigenous peoples, to both Indigenous and non-Indigenous ancestors who signed the treaties, and to the land, and for that reason we are here under false pretences. ... It is hard to accept that this is the situation we find ourselves in. It is hard to teach these truths to our children.\textsuperscript{95}

Linking truth with reconciliation positions non-Indigenous peoples in an unsettling, uncomfortable position. It may “stir up powerful negative emotions such as resistance, defensiveness, and denial of feelings of paralysis” because hearing Indigenous truths can be both unpleasant and dangerous.\textsuperscript{96} It also poses a challenge for Indigenous

\textsuperscript{93} Freeman, supra note 15 at para 27.
\textsuperscript{94} Ibid.
\textsuperscript{95} Ibid at para 15.
peoples because in sharing their truths they are forced to revisit the trauma and harms they have experienced individually and collectively.97 The work of truth-telling is both challenging and dangerous but offers important potential for transformative change in pushing forward reconciliation processes.

A second key aspect of a substantive interpretation of reconciliation is the importance of taking responsibility. Taking responsibility for one’s actions or actions for which one may be accountable is a central tenet in Indigenous restorative justice processes.98 Many theorists focusing on historical wrongs consider whether those wrongs should or can be redressed in contemporary circumstances. Such theorists consider the above questions on a moral and philosophical basis.99 In the context of historical grievances on the part of Indigenous peoples, such theorists raise questions of whether the descendants of settlers and colonial powers are responsible for making reparations to members of Indigenous communities whose predecessors were the victims of historic wrong-doing. In other words, should Canadians today be held responsible for the unlawful dispossession of Indigenous lands where the dispossession happened a long time ago and current Canadians did not elect the governments who made those unjust decisions?

97 TRC Interim Report, supra note 84 at 12.
98 Verwoerd, supra note 71 at 272.
There are arguments on both sides of this debate, however, the argument that I find the most compelling comes from theorists who assert that characterizing the colonial dispossession of Indigenous communities as a ‘historical wrong’ is inaccurate since the dispossession continues to have adverse effects on Indigenous communities. Such theorists point to evidence such as the disparate social and economic conditions facing Indigenous communities as compared with other Canadians as evidence of the on-going, intergenerational effects of colonial policies. This viewpoint is also supported by Younging’s idea of ‘blood memory’ – that Canadians today need to own up to the actions of past governments and our ancestors and take responsibility for the contemporary impacts of such actions. Accepting this viewpoint leads to the conclusion that contemporary Canadians and governments are responsible for making reparations for past wrongs.

There are compelling moral reasons to embrace such an approach for non-Indigenous peoples. Redressing historic wrongs can remove the moral taint of past actions that harm one’s personal commitment to and association with the nation state. In other words, Canadians have a sense of pride and derive well-being from their association with Canada and such feelings are diminished to the extent that the

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100 Due to space constraints I cannot go into this debate in detail. In general these theorists identify whether reparations are owed at all; the key historical wrong or injustice; who should be held accountable for that wrong; who might be entitled to membership as a beneficiary of any reparations agreement; and what reparations measures might be appropriate to make the person or group whole. Matsuda, supra note 42 at 381–382; Vrdoljak, supra note 96 at 197; Graham, supra note 21 at 82; Brenda L Gunn, "More than Money: Using International Law of Reparations to Determine Fair Compensation for Infringements of Aboriginal Title" 46 UBC L Rev 299 [Gunn, "More than Money"] at para 41.
Canadian government has made decisions that have produced injustice in the past.\textsuperscript{102} The moral taint associated with past injustices therefore breeds feelings of shame, guilt and remorse.\textsuperscript{103} Further, moral taint continues to exist until those injustices are redressed.\textsuperscript{104}

In addition to moral taint, there are compelling positive reasons to redress historic wrongs. Taking responsibility for wrongs committed in our names – from which we continue to benefit and Indigenous peoples continue to suffer – creates a moral obligation to take action for social change to remedy ongoing injustices. This requires a significant transformation of consciousness\textsuperscript{105} that shifts focus away from Indigenous peoples as the problem (“their problem”) to the illegitimate foundation of Canadian society as the problem (“our problem”).\textsuperscript{106}

In addition, there are compelling moral reasons to support such an approach from Indigenous perspectives. Redressing historic wrongs offers new hope to Indigenous communities that past and continuing injustices will be recognized and dealt with appropriately. Although no amount of compensation (whether monetary or other) can proportionately account for the loss experienced by Indigenous communities over the past several generations,\textsuperscript{107} measures that aim to redress the injustice as appropriately as possible given the current circumstances provides an important first step forward.

\begin{quote}
\textsuperscript{103} Lenzirini, supra note 85 at 622.
\textsuperscript{104} Ibid at 622.
\textsuperscript{105} Freeman, supra note 15 at para 33.
\textsuperscript{106} Henderson & Wakeham, supra note 59 at 16.
\textsuperscript{107} Matsuda, supra note 42 at 397.
\end{quote}
Taking responsibility has implications on an emotional level both for individuals and for groups. On an individual level, when people open themselves up to hearing Indigenous truths and reflect on how those stories implicate them personally, the transformative potential of reconciliation arises. On a group level, taking responsibility can create important incentives to take action that makes systemic, lasting changes to redress the wrongs that have occurred. As Celeste Hutchinson notes, taking responsibility has important implications for taking action.108

The final key aspect of a substantive interpretation of reconciliation is taking action to demonstrate a sustained commitment to right relationships.109 These actions can be performative or symbolic, such as public apologies,110 public commitments to ensure it does not happen again111 or the erection of public monuments.112 Performative actions can have significant benefits, including public, moral acknowledgement of historical injustice.113 Actions can also be concrete, such as implementing measures that create systemic changes within political, legal and institutional structures.114 In relation to Indigenous nations within Canada, examples includes the constitutionalization of Aboriginal and treaty rights in section 35 and the negotiation of modern land claims agreements and treaties.

108 Hutchinson, supra note 99 at para 11.
110 In “Exoneration for Louis Riel: Mercy, Justice, or Political Expediency?” (2004) 67 Sask L Rev 359, para 82, Jean Teillet notes that official state apologies have value in committing a state to non-repetition and to justice. She asserts, however, that apologies must be followed by further commitments to healing, reconciliation, and reparations.
111 Vrdoljak, supra note 96 at 225. Vrdoljak characterizes guarantees of non-repetition or non-recurrence as potentially the most far-reaching redress for Indigenous peoples.
112 Posner & Vermeule, supra note 102 at 729.
113 Ibid at 730.
114 Freeman, supra note 15 at para 10.
In considering concrete actions that might be taken in the name of reconciliation, academic writing on reparations owed to Indigenous peoples is instructive. In general, theories of reparation “asserts that one group of individuals bears an obligation to remedy a historical injustice that it, or some prior group, inflicted on another group of individuals.” The concept of reparations “is a legal concept generated from the bottom. It arises not from abstraction but from experience.” Further, since “[r]eparations claims are based on continuing stigma and economic harm and ongoing discrimination,” they are acts of resistance in themselves.

Indigenous theorists point to various ways through which reparations might be made for past and on-going wrongs, including restitution of lands and cultural property taken, restoring self-determination rights, guarantees that such wrongs will not be repeated through legislation or court decisions, and supports to ensure Indigenous communities can heal from the damage that has occurred. As Bradford

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115 For a comprehensive review of reparations measures within the Canadian context in relation to Aboriginal peoples and non-Aboriginal groups see Bradford W Morse, "Indigenous Peoples in Canada and Their Efforts to Achieve True Reparations" in Frederico Lenzirini, ed, Reparations for Indigenous Peoples: International and Comparative Perspectives (Oxford: Oxford University Press, 2008) 271 at 271.
116 Posner & Vermeule, supra note 102 at 711. This article provides an important overview of the theoretical arguments, challenges and practical considerations in designing and implementing reparations programs.
117 Matsuda, supra note 42 at 362.
118 Ibid at 381-382.
120 Hutchinson, supra note 99.
121 Graham, supra note 21.
Morse notes Indigenous claims for reparations fit broadly within two categories: (1) restoration of lands illegally taken and (2) restoration of self-determination rights.\textsuperscript{122}

The purpose of reparations is to place the injured party in as close as possible a position that they would have been had the harm not occurred.\textsuperscript{123} Where the harm that occurred therefore was that lands were illegally taken, the same lands should be given back and if that is not possible, lands of similar size and quality should be given back. Where the harm is of cultural loss, measures should be implemented to revitalize cultural forms and promote healing from any deliberate infliction of cultural suppression. These examples illustrate the clear link between the nature of the harm and the remedy provided through reparations.

The importance of reparations as a crucial step in the process of reconciliation cannot be emphasized enough. As Matsuda notes:

Reparations recognizes the personhood of victims. Lack of legal redress for racist acts is an injury often more serious than the acts themselves, because it signifies the political non-personhood of victims. The grant of reparations declares, “You exist. Your experience of deprivation is real. You are entitled to compensation for that deprivation. This nation and its laws acknowledge you.”\textsuperscript{124}

Further Matsuda notes that the concept of reparations is powerful for marginalized groups because it is not neutral: “[i]t is tilted toward the bottom...Reparations, like the right to strike, is a concept for the have-nots. As such, it has primarily progressive power.”\textsuperscript{125} The progressive power of reparations reveals its integral connection to reconciliation; reparations hold the potential to rebalance power and remedy injustice – key components of rebuilding Indigenous/non-Indigenous relationships.

\textsuperscript{122} Morse, \textit{supra} note 115 at 279.
\textsuperscript{123} Vrdoljak, \textit{supra} note 96 at 212.
\textsuperscript{124} Matsuda, \textit{supra} note 42 at 390.
\textsuperscript{125} \textit{Ibid} at 393.
Reparations are also transformative. Reparations “is a concept directed at remedying wrongs committed against the powerless. ... It recognizes the crimes of the powerful against the powerless. It condemns the exploitation and adopts a vision of a more just world.” Matsuda notes therefore that reparations have “an aspirational, affirming, idealistic attraction” coupled with a strong backbone, which provides concrete measures to improve substantive justice for marginalized communities. As Graham notes reparations serve dual aims: “to redress wrongs as well as repair and restore damaged relationships.”

Reparations is a component of reconciliation because it addresses injustice as the starting point to repairing relationships. It also deters future violations in making the state accountable for the past injustice. There is therefore a link between justice and peaceful relations, justice and social stability, and justice and reconciliation. The idea of justice includes that for reconciliation processes to be meaningful, real changes must occur in Indigenous peoples’ lives. As such, reconciliation is not only about repairing relationships it is about repairing unjust relationships between Indigenous and non-Indigenous peoples.

7.2.2 The Why?

There are several practical reasons supporting reconciliation in the context of Indigenous/non-Indigenous relationships. In addition to the various reasons set out in

126 Ibid at 394.
127 Ibid.
128 Graham, supra note 21 at 77.
129 Ibid at 79.
130 Lenzirini, supra note 85 at 622.
131 Verwoerd, supra note 71 at 253.
132 Graham, supra note 21 at 103.
previous chapters for implementing the principles in this framework, the reasons to implement the principle of reconciliation include: first, to contribute to social stability and reduce intercultural conflicts; and second, to reconceptualize Canadian citizenship by affirming Canada’s Indigenous roots.

The first reason that people might engage in reconciliation is to contribute to social stability and reduce intercultural conflicts. Rebuilding Indigenous/non-Indigenous relationships on a sound basis to move towards an interdependent future would align the goals of Indigenous and non-Indigenous peoples thereby reducing instances of conflict. Creating trust and working together at the front end to figure out how processes might work most effectively would lead to more collaboration and less conflict over time. This investment in rebuilding the relationship would also likely prevent the escalation of and divert conflicts away from adversarial court processes.  

The second reason to implement the principle of reconciliation is to move towards decolonization. The dominant colonial narrative includes the incomplete view that Canada was structured by drawing on the British and French traditions. This colonial narrative ignores the reality that Indigenous peoples and legal traditions have contributed significantly to the creation of Canada.

Reconciliation requires that Indigenous peoples and values contribute to the creation of norms to govern society and resolve intercultural disputes. In the context of the Canadian legal system, Borrows’ stresses the fundamental need to recognize Indigenous legal principles and step away from a purely colonial view of the relationship between colonial and Indigenous law. He asserts that “Canada can become more fully Indigenous, more fully rooted in this place and less rooted in its
colonial past if it acknowledges, adopts, and creates laws that are founded in the experiences that [Indigenous people] have had in these territories that now make up Canada.”

He advocates for the creation of a pluralistic, multijuridical framework in Canadian law that encompasses common law, civil law, and Indigenous law as equally authoritative sources of law.

Shifting from a culture of separation and animosity to a culture of reconciliation requires a reconceptualization of Canada’s history and the meaning of citizenship. John Ralston Saul notes that Canada is deeply shaped by Indigenous peoples and perspectives. Further, he argues that Canada’s reliance on mythologies that exclude Indigenous heritage makes our country dysfunctional in its failure to embrace our true national identity. Not only do Canadian institutions, values and laws reflect the influence of this heritage but the entire country exists on Indigenous lands. Failing to embrace Canada’s national identity undermines the potential to create genuine community and healthy relationships. As such, there is a moral imperative to move forward together in relationship by restorying Canada’s Indigenous past.

7.2.3 The How?

Reconciliation requires re-envisioning Indigenous and non-Indigenous peoples in an interdependent, mutually beneficial relationship, which involves large-scale, constructive social change. Constructive social change in this context involves

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134 Ibid at 155.
135 John Ralston Saul, A Fair Country: Telling Truths About Canada (Toronto: Penguin Canada, 2009) [Saul, A Fair Country] at 3. It is worth noting that Saul’s characterization of Canada as a “métis civilization” is very controversial and can be seen as offensive to Métis people within Canada. I am indebted to Larry Chartrand for this observation.
136 Ibid at 5.
interrogating the shared history of Indigenous and non-Indigenous peoples and reconstructing the relationship brick-by-brick. This involves first deconstructing and then reconstructing social, political, and legal institutions to reflect our shared history and shared vision for the future.

After extensive review of literature dealing with reconciliation around the world, Gráinne Kelly and Brandon Hamber suggest that the process of reconciliation involves five interwoven and related strands:

- Developing a shared vision of an interdependent and fair society;
- Acknowledging and dealing with the past;
- Building positive relationships;
- Significant cultural and attitudinal change; and
- Substantial social, economic and political change.\(^{137}\)

The challenge of reconciliation is daunting. Because the issues that arise in the context of Indigenous/non-Indigenous relationships are complex and cut across a broad spectrum of social, political and legal issues, constructive social change involves many different peoples and organizations as well as significant time and resources. Lederach notes that “[w]e need to develop the capacity to think about the design of social change in time units of decades.”\(^{138}\) As such, we need to take a long view of reconciliation and

\(^{137}\) Hamber & Kelly, supra note 38 at 291.

\(^{138}\) Lederach, Building Peace, supra note 4 at 78. In an interview with Dr. Stephen Corrymeela, Robin Wilson, What Works for Reconciliation? (Belfast: Democratic Dialogue, 2006) [Wilson, What Works for Reconciliation?] at 22, online: Conflict Archive on the Internet <http://cain.ulst.ac.uk/dd/reports.htm> (retrieved 5 September 2015), notes that Corrymeela stated that reconciliation in Ireland is likely to be a 30-40 year task and his organization had already been working towards reconciliation for 50 years. Wilson also cited an interview with Mary Montague, who notes in the Irish context: “we have to take very, very seriously the fact that we’re not even close to reconciliation and recognise that the journey that
realize that sufficient time and resources need to be committed to design appropriate processes to rebuild relationships.

Reconciliation is a large-scale endeavor and represents a complex combination of problems. Transforming relationships involves social, economic and political as well as emotional and psychological aspects. As a result, reconciliation is both an individual and a group process. The damage to Indigenous/non-Indigenous relationships has been caused by generations of oppression resulting in a high degree of mistrust. As such, reconciliation processes will also take a long time to design and implement to create sustainable transformative change.

In this section, I outline some practical ways forward in implementing the principle of reconciliation and suggest a roadmap drawn from intercultural dispute resolution theory, Indigenous legal traditions and collective impact literature. These pathways forward include rebuilding trust in the intercultural relationship, developing a shared vision of an interdependent future, and creating processes to support the new relationship to implement concrete actions to move towards the shared vision that has been articulated.

we have to make is going to take an awfully long time – and may be not even [realized] within our generation, because people are carrying so much hurt”.

139 Wilson, What Works for Reconciliation?, ibid at 17.
140 Ibid at 17.
141 IRSSA, supra note 36 at Schedule N.
Rebuilding Trust in Damaged Relationships

Rebuilding trust between Indigenous and non-Indigenous peoples is a central aspect of reconciliation. This is so because “[t]rust is a basic and essential element of human relationships and is fundamental at all levels.” As Trudy Govier notes:

Trust is an attitude of confident expression that most others will act in a morally decent way most of the time. To trust other people in this sense is to believe – *in the absence of certainty* – that they will act in ways that are generally constructive and not harmful to us. If we trust, we can confidently engage in relationships and cooperative arrangements and accept some degree of vulnerability.

Trust involves vulnerability in that it requires people to take the risk to believe that others will act in a way that is caring, thoughtful and respectful. Trust is the central ingredient that determines whether relationships will be productive and healthy.

Between peoples from different cultures holding diverse beliefs, trust is closely bound up with accepting commonalities and differences and engaging with cross-cultural others.

One challenge for implementing the principle of reconciliation is that the harm that colonial powers and subsequently the Canadian government inflicted upon Indigenous communities through assimilative policies and laws is significant. In colonial contexts, Govier notes that the harm has gone in only one direction. Unlike conflicts that involve two sides perpetrating harmful acts upon one another, colonial governments have inflicted violence on Indigenous peoples lacking political and social

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143 Govier, *ibid* at 19 (emphasis in original).
144 Hamber & Kelly, *supra* note 38 at 291.
power.\textsuperscript{146} Since the harm has been largely unidirectional, achieving reconciliation places a great burden on Indigenous peoples to overcome this colonial legacy.

Rebuilding trust is one of the most difficult aspects of reconciliation. As Trudy Govier notes:

The plain fact is that people living in the same society need to cooperate; to cooperate, they need to trust; and in the aftermath of violence and oppression, that is difficult. To say that people alienated by wrongdoing are in no position to trust and cooperate is an understatement. Efforts toward reconciliation can be understood as attempts to end alienation and resentment and build relationships characterized by some degree of trust.\textsuperscript{147}

In Canada, oppressive government policies and law have been consistently imposed on Indigenous peoples for over a generation. As such, rectifying harm and rebuilding trust in the relationship will take a significant amount of attention, effort, and time on the part of both Indigenous and non-Indigenous peoples.\textsuperscript{148}

Rebuilding trust rests on genuine acknowledgment of harm done and, equally importantly, requires the wrongdoer to demonstrate a commitment to act in a morally sound way.\textsuperscript{149} Walters highlights that a morally rich sense of reconciliation involves “sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations of a harmonious relationship.”\textsuperscript{150} In Indigenous restorative justice processes, the concept of reconciliation is “usually applied to less serious crimes where there can actually be a righting of the wrong and a restoration of

\textsuperscript{146} Ibid.
\textsuperscript{147} Ibid at 7.
\textsuperscript{148} Ibid at 208.
\textsuperscript{149} Ibid at 18.
\textsuperscript{150} Walters, “Jurisprudence”, supra note 15 at 168.
relationships.”\textsuperscript{151} Overcoming the significant harm of the colonial legacy requires a shift from allocating blame to reconstructing the relationship on a morally rich basis.

A key aspect of rebuilding trust is keeping promises. To date, the Canadian government has done a poor job at keeping the promises made to Indigenous peoples in a variety of contexts. Just one example is that it has arguably breached promises made in the early treaties on a number of levels. On a general level, successive Canadian governments have failed to treat Indigenous peoples in accordance with the rule of law, which was an implicit commitment the government made when it entered into early treaty relationships with Indigenous communities,\textsuperscript{152} including:

- the lack of voting rights for Aboriginal peoples until the late 1960s;\textsuperscript{153}
- lack of parity in government benefits for Aboriginal veterans;\textsuperscript{154}
- outlawing raising money for litigation relating to Indigenous rights, and;\textsuperscript{155}
- forcibly removing children from their families.\textsuperscript{156}

On a more specific level, Canadian governments have also failed to keep particular promises made in the early treaties relating to:

- delivering quality education on reserves;\textsuperscript{157}

\textsuperscript{151} Napoleon, "Who Gets to Say What Happened?", \textit{supra} note 1 at 180.
\textsuperscript{152} Borrows, "Creating an Indigenous Legal Community", \textit{supra} note 133 at para 32.
\textsuperscript{153} Canada, \textit{Final Report of the Royal Commission on Aboriginal Peoples} (Ottawa: Supply and Services Canada, 1996) [\textit{RCAP}] at vol 1, Ch 9, sec 9.12. It is worth noting that it could be argued that the extension of voting to independent Indigenous nations without consent is a violation of the rule of law, particularly if one accepts the view that Indigenous nations are sovereign. I am indebted to Larry Chartrand for this point.
\textsuperscript{154} \textit{Ibid} at vol 1, Ch 12, sec 4.4.
\textsuperscript{155} Val Napoleon, “Extinction by Number: Colonialism Made Easy” (2001) 16 CJLS 113 [Napoleon, “Extinction by Number”] at 117.
\textsuperscript{156} \textit{TRC Interim Report, supra} note 84 at 1.
• allocating lands in accordance with promises made, and;\footnote{158}{Manitoba Métis Federation Inc v Canada (Attorney General) [2013] 1 SCR 623 [Manitoba Métis Federation].}
• failing to recognize Indigenous jurisdiction over traditional Indigenous territories.\footnote{159}{Ma’iingan (Aaron Mills), supra note 11 at para 73.}

A central component of reconciliation therefore is a significant shift in the government’s approach to and actions in fulfilling historic and present-day promises to Indigenous communities.

Reconciliation demands different strategies in different geographical settings. Roger Epp notes that in remote areas, where resources are scarce and Indigenous and non-Indigenous peoples rely on the same resources for their livelihoods, people “are understandably threatened by negotiations or court judgments that require them to share access to dwindling resources and available livelihoods.”\footnote{160}{Epp, supra note 15 at 228.} It is for this reason that Epp asserts that the most meaningful work of reconciliation will lie in small face-to-face initiatives in communities where Indigenous and non-Indigenous peoples exist in close proximity to one another.\footnote{161}{Ibid at 238.} In such contexts, commonalities between cross-cultural peoples, such as relationships to nature and the history of family through the generations living on the land, might form the basis of mutual understanding.\footnote{162}{Ibid at 241.}
7.2.3.2 Linking the Past and Future to Re-envision the Present

Reconciliation requires holding onto an awareness of the past and at the same time envisioning a shared future; it is therefore a paradoxical process. This is so since reconciliation asks both sides to consider past harms that caused the separation and distrust between peoples and at the same time envision a shared, interdependent future. As Lederach articulates, “reconciliation promotes an encounter between the open expression of the painful past, on the one hand, and the search for the articulation of a long-term, interdependent future, on the other hand.” As such reconciliation is at once a backward and forward-looking process.

In the context of reconciliation, there is a critical link between memory of the past and the capacity to envision a shared future. Napoleon asserts: “[i]t is memory that holds the truth of our experiences – the content of reconciliation – and what we do with our memories determines our capacity to imagine our future.” Moving towards a shared future therefore relies on the ability to deal effectively with the past – to examine the historical record with care and let that history inform the creation of the relationship in the present and future.

A key component of linking the past to the future is a belief that the future holds promise for a better relationship. Lederach contends that “[r]econciliation...represents a place, the point of encounter where concerns about both the past and the future can

163 Lederach, Moral Imagination, supra note 39 at 29.
164 Lederach, Building Peace, supra note 4 at 31.
165 Hamber & Kelly, supra note 38 at 293; Lederach, ibid at 31.
166 Napoleon, ”Who Gets to Say What Happened?”, supra note 1 at 178–79.
meet. Reconciliation-as-encounter suggests that space for the acknowledging of the past and envisioning of the future is a necessary ingredient for reframing the present.” ¹⁶⁷ In this view, reconciliation provides a way for grieving and dealing with the past so that people can move forward to create new healthier relationships.

### 7.2.3.3 Developing a Shared Vision of an Interdependent Future

In colonial contexts, reconciliation involves developing a shared vision of an interdependent future.⁷ Hamber and Kelly assert that “the articulation of a common vision of an interdependent, just, equitable, open, and diverse society is a critical part of any reconciliation process.” ¹⁶⁹ This is so because people are “motivated to lead better lives when supported by shared aspirations” ¹⁷⁰ and when they feel that they have constructively contributed to the vision towards which they are moving. The development of this vision, therefore, is one of the most important starting points in the process of reconciliation.

Envisioning a shared future requires a long-term view that imagines an interdependent, respectful relationship between Indigenous and non-Indigenous peoples. The idea of creating a shared vision of an interdependent future hearkens back to the original intentions behind the negotiation of the early treaties. Sara Mainville notes that the intention behind the early treaties was to create a shared future for

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¹⁶⁷ Lederach, *Building Peace*, supra note 4 at 27.
¹⁶⁸ Hamber & Kelly, supra note 38 at 287.
¹⁶⁹ Ibid at 291.
Indigenous and non-Indigenous peoples.\textsuperscript{171} As such, it may be reasonable to imagine that creating such a vision might be attainable in the present.

The contemporary (mis)interpretation of the early treaties, however, illustrates the distance that exists from where we are right now (relationship characterized by separation and distrust) and where we want to go (relationship characterized by interdependence and respect). Indigenous peoples consistently insist that the original motivation behind the early treaties was to share the land and establish ways to live peacefully together. The early treaties, as Mainville notes, envisioned regular treaty councils whereby both sides would meet to resolve disputes and renew their commitments to remain in respectful relationships with one another.\textsuperscript{172} The Canadian government, however, tends to interpret the early treaties in a way that limit its responsibilities to contribute to the relationship and live up to the promises of those treaties.

In order to develop a shared vision of an interdependent future, space needs to be created that facilitates dialogue across cultures and empowers equal participation.\textsuperscript{173} Creating space for effective intercultural dialogue includes having a skilled facilitator to lead the discussions, establishing mutually agreed upon processes to guide the discussion and addressing power imbalances.

First, a skilled, independent facilitator is necessary to lead the discussions to develop the shared vision to ensure that everyone participates freely and that the

\textsuperscript{171} Mainville, supra note 14 at para 23.
\textsuperscript{172} Ibid at para 37.
\textsuperscript{173} I discussed some ways to create respectful intercultural spaces in Chapter 6 (Recognition) and Chapter 7 (Reciprocity).
discussion remains both respectful and productive. A facilitator might also design and create interactive, participatory exercises to encourage people to work together to build trust, articulate key concerns and create a shared vision. Such exercises might include art-based activities, role playing, and storytelling. Storytelling is key to create a solid foundation for relationships in building trust and has been identified as a key ingredient to successful reconciliation processes.

Second, the discussions would benefit from establishing guidelines from the outset to guide the discussions so that all participants feel comfortable sharing their perspectives. New processes need to be created to regulate interactions on a personal and group level in Indigenous/non-Indigenous relationships. These new processes ideally would emerge from within the relationship – through cooperative deliberation on appropriate rules to guide collaborative decision-making.

Indigenous legal traditions and knowledge can be drawn on to create processes to guide deliberation and discussions to develop a shared vision. Indigenous peacemaking protocols, for example, can provide a useful model for rules and processes to guide deliberations. Such protocols include deep-rooted consensus-based decision-making processes that might usefully apply in reconciliation

175 Wilson, What Works for Reconciliation?, supra note 138 at 44, notes how effective arts-based activities can be to build trust in reconciliation processes.
176 In the context of the Haudenosaunee Confederacy, the Peacemaker established processes to ensure that the Mohawk, Oneida, Onondaga, Cayuga and Seneca Nations could engage in dialogue and manage any disputes: see Beverly Jacobs, International Law/The Great Law of Peace (LLM Thesis, University of Saskatchewan, Faculty of Law, 2000) [unpublished] at 22.
177 There are both historic and contemporary examples of diplomatic protocols created between Indigenous nations to establish peaceful relationships within what is now Canada. The Great Law of Peace is the most well-known example of a historic diplomatic agreement. One contemporary example includes the negotiation of boundaries within territorial waters between First Nations communities.
processes. In addition, Indigenous restorative justice processes also provide a rich source of knowledge in the providing a model for deliberating together to create new relationships. These traditions can be drawn on to help create procedural rules of engagement at the discussions about creating a shared vision and designing appropriate processes.

Finally, there is a need to mitigate power imbalances that could inhibit participation in deliberations leading to the articulation of a shared vision. As Lederach notes, “[c]hange will involve a rebalancing of power in the relationship by which all those involved recognize one another in new ways. Such recognition will increase the voice and participation of the less powerful in addressing their basic needs and will legitimize their concerns.” Implicit in the need to rebalance power in the relationships is the need to deal with fundamental substantive and procedural concerns of all those involved. Creative ways to change the balance of power might include holding meetings in various locations including within Indigenous territories, which positions non-Indigenous participants in the role of cultural outsider and requires them to adapt to local customs and protocols.

Napoleon and Friedland provide an instructive example on designing discussions in a way that mitigates power imbalances. They describe a conference


\[\text{\footnotesize \cite{180}}\] Lederach, Building Peace, supra note 4 at 65.

\[\text{\footnotesize \cite{181}}\] \textit{Ibid} at 66.
focused on drawing out Indigenous laws from Indigenous stories in which they started the conference with a bannock-making contest for the express purpose of shifting typical power dynamics.\footnote{Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” in Dale Turner, ed, Oxford Handbook on Indigenous Governance (Oxford: Oxford University Press) [forthcoming] [Napoleon & Friedland, “An Inside Job”] at 23.} In starting the conference in this way, it positioned Indigenous community members as experts and legal academics as learners. This had the effect of creating a sense of teamwork and community from the outset. Subsequently, discussions occurred in small groups where academics, professionals and community members worked together to apply Western legal analysis to Indigenous stories, under the guidance of a trained facilitator.\footnote{Ibid at 23.} The feedback from the conference was overwhelmingly positive, especially from Indigenous community participants, as it provided a safe space in which “[e]veryone had something familiar to work with, and everyone had something new to integrate and learn through the process.”\footnote{Ibid at 25.} The conference design carefully considered power dynamics and created a balanced approach to legal analysis that mitigated potential power imbalances.

\subsection*{7.2.3.4 Creating New Patterns, Processes and Structures to Support the Relationship}

To make the fundamental shift from destructive to productive relationships, reconciliation requires creating new patterns, processes and structures to support new relationships; the goal of reconciliation is “the generation of continuous, dynamic, self-regenerating processes that maintain form over time and are able to adapt to
environmental changes.” The new patterns that need to be created involve engaging Indigenous and non-Indigenous peoples and governments in recurrent, constructive interactions.

The new processes need to be both strong enough to maintain their form and flexible enough to respond to what is needed to sustain the relationship as it evolves. Lederach notes that there will inevitably be crises that erupt throughout the relationship that require immediate attention. There will also be on-going longer-term initiatives that focus on rebuilding the relationship and maintaining the momentum towards the shared vision. As such, processes need to address the more immediate crises as well as the longer-term needs of constructively transforming relationships. Because both resolving immediate issues and longer-term initiatives all support the shared vision, Lederach asserts that short-term solutions and projects need to be measured by their longer-term implications.

Reconciliation requires a dramatic and powerful shift in focus. Rather than focusing on trying to figure out a quick-fix to issues that arise, the focus shifts to creating decision-making processes that maintain the quality of the relationship. It is clear that there is a deep need for transformative change within the relationship, however, it is easier to come up with short-term, quick-fix solutions to crises that arise as symptoms of the dysfunctional relationship between Indigenous and non-Indigenous peoples. Lederach notes that to deal with immediate crises:

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185 Lederach, Building Peace, supra note 4 at 84.
186 Lederach, Moral Imagination, supra note 39 at 85.
187 Lederach, Building Peace, supra note 4 at 84.
188 Ibid at 75.
negotiations move to find what is doable, focus on those steps and solutions, especially where violence can be halted, and defer the deeper transformation to later timeframes. Political negotiated pragmatism carries the day. The result is touted as a solution, when it roughly approximates an ‘arrangement’ with deferred processes.  

Agreements dealing with immediate crises, however, do not address the roots of the conflict. When violence subsides, there is time for longer-term transformational change to occur. Lederach notes, however, that an agreement is often seen as a solution that ends the problem. This view masks the deeper cause of the issues embedded within the quality of the relationship – in the “relational epicenter of the conflict.”

Reconciliation processes need to be responsive to immediate crises but must also support the long-term goal of relationship-building. As such, responses to immediate crises should support the rebuilding of relationships over the long-term. For instance, in response to peaceful protests against resource development projects in traditional territories, the government might engage in negotiations rather than bring in the police; rather than building more jails to house the increasing number of Indigenous inmates, those funds might be directed towards increased social programming and community supports to address the roots of criminality and recidivism; and rather than engaging in jurisdictional disputes over which level of

\[\text{\textsuperscript{189}}\] Lederach, Moral Imagination, supra note 39 at 46.  
\[\text{\textsuperscript{190}}\] Ibid at 44.  
\[\text{\textsuperscript{191}}\] Ibid at 47.  
\[\text{\textsuperscript{192}}\] Lederach, Building Peace, supra note 4 at 75.  
\[\text{\textsuperscript{193}}\] Section 91(24) of the Constitution Acts divide federal and provincial jurisdiction over various areas. The federal government has jurisdiction over “Indians, and lands reserved for Indians” and the provincial government has jurisdiction over other areas such as healthcare, child welfare and education. The complex legal framework creates what Constance MacIntosh terms “jurisdictional roulette” in which Aboriginal peoples are caught in the middle between the two levels of government, neither of which wants to bear the financial responsibilities for programs and services: see Constance MacIntosh,
government covers medical costs for Indigenous children, the government might pay first and settle the dispute internally later. This shift in focus to relationality creates a totally different set of responses to dealing with intercultural disputes that arise in the Canadian context.

7.2.3.1 Implementing Concrete Actions to Move Towards the Shared Vision

Finally, appropriate structures need to be put in place to support the movement towards the shared vision. In addition to a shared vision, collective impact literature identifies four more components for successful constructive social change processes:

1. Shared measurement systems
2. Mutually reinforcing activities
3. Continuous communication, and
4. Backbone support organizations.

Due to space constraints I address each of the components listed above briefly in turn.

First, in the context of a relational approach, in addition to other potential shared...
measurements that the parties to the relationship would agree on, a shared measurement system would consider Indigenous and non-Indigenous peoples’ subjective feelings about the relationship and how any intersocietal disputes were resolved. Second, parties need to commit to a process whereby their activities and actions support the shared vision. In this way, activities can be measured against whether they help the relationship move towards the shared vision or away from it; reflective learning can be used to help parties reflect on what has been successful and what has failed in the movement towards a shared vision\textsuperscript{196} and adapt accordingly.

Third, the parties need to be in continuous communication and meet regularly to ensure that both sides remain committed to the process and the challenge and are accountable for their activities that move them towards the shared vision. This continuous communication provides the opportunity to engage in reflective learning to replicate successes and learn from initiatives that were less successful.\textsuperscript{197} Successful reconciliation processes also set aside time specifically aimed at reflecting on past processes in order to improve in the future.\textsuperscript{198} Finally, it is necessary to have a team of people or an organization to coordinate the actions and activities of both parties and help measure progress towards the shared vision.\textsuperscript{199} Without such a body, large-scale social change initiatives risk disorganization and loss of momentum.

\textsuperscript{196} Wilson, \textit{What Works for Reconciliation?}, supra note 138 at 26.
\textsuperscript{197} Ibid at 26.
\textsuperscript{198} Mr. McCallion interviewed by Wilson, \textit{What Works for Reconciliation?}, ibid at 49.
Creating appropriate processes to guide the rebuilding of damaged relationships is important in order to establish common standards and rules of living together in the present so that Indigenous and non-Indigenous people can move forward toward a shared future. Indigenous scholars also note that reconciliation processes need to be designed with significant Indigenous participation and decision-making. Top-down, state-centric approaches to reconciliation will not effectively address the harms that have occurred within Indigenous communities. As Corntassel, Chaw-win-is and T’lakwadzi note, community approaches to reconciliation can more appropriately move people forward towards healing because such approaches respond to community needs in dealing with colonial harms.\textsuperscript{200} Reconciliation therefore involves a complex process that requires negotiations and compromise to ensure that the process reflects Indigenous views on appropriate processes and actively engages Indigenous and non-Indigenous peoples in a way that sustains their commitment to transformative action in relationship with one another.

7.3 Visions of Reconciliation

In the context of Indigenous/non-Indigenous relationships, reconciliation is a complex and difficult process. In colonial contexts, reconciliation requires redefining and rebuilding relationships at every level of society\textsuperscript{201} – between Indigenous and non-Indigenous governments, between Indigenous and non-Indigenous peoples, between non-Indigenous peoples and their governments and between Indigenous peoples

\textsuperscript{200} Corntassel, Chaw-win-is & T’lakwadzi, supra note 60 at 143.

\textsuperscript{201} Lederach, \textit{Building Peace}, supra note 4 at 122.
within communities. Reconciliation will not be a linear process since “spaces of reconciliation contain fissures, failures, and ambiguities.” Although it is not a quick-fix to the many problems created by the legacy of colonialism, working towards a shared interdependent future by implementing processes of reconciliation is a better fix. In its focus on the process of relationship-building, reconciliation requires a commitment to working towards a common goal and appropriate process and structures to support large-scale, cross-sector collaboration.

Here I have sketched out some practical steps that might guide the design of reconciliation processes to create a new relationship between Indigenous and non-Indigenous peoples. In the next chapter, I apply this framework to the duty to consult and accommodate to illustrate how such an approach might be implemented on the ground. In creating adaptive, relationally focused reconciliation processes, we can harness the transformative capacity of reconciliation in the hopes of moving “from a culture of violence and separation to a culture of interdependence and dialogue.”

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202 Napoleon, "Who Gets to Say What Happened?", supra note 1 at 180, stresses the need for Indigenous peoples to reconcile with those who has hurt them on a personal level.
203 Henderson & Wakeham, supra note 59 at 22.
204 Lederach, Building Peace, supra note 4 at 151.
205 Ibid at 144.
The Yellow Valley First Nation has been working in partnership with Green Co for 20 years. Green Co exploited the mining resources and also remediated the mining site by making sure the contamination was cleaned up. Green Co’s mining project was successful. Green Co was able to make a significant profit and maintain good relationships with the First Nation. During the period of the project, the community was able to employ 50 people on a regular basis through jobs created by the project. Yellow Valley was also able to rebuild its school and build a new community centre with its share of the profits from the mining project. The community greenhouse continues to provide vegetables for the community and has expanded its business to include some sales to local grocery and convenience stores. Green Co no longer has a formal partnership with the Yellow Valley First Nation but has partnered successfully with many other Indigenous communities and is known as a visionary leader in its field. Representatives from Green Co, including Lynette, are often invited to present at industry conferences to provide presentations on best practices in Aboriginal consultation processes and industry partnerships. Lynette, Gavin, Johnny and Brenda meet every couple of years to catch up and both Lynette and Gavin attend the Community Feast. Over the course of the mining project, Brenda and Lynette developed a deep and lasting friendship. They plan to take a trip together in the future as Brenda has always wanted to travel to Europe and Lynette has family in Ireland.
Chapter 8: Applying the Principles-Based Framework to the Duty to Consult and Accommodate

In any given context, the worst thing is not to possess the power to make a difference for the better. The next worst thing is having that power and not being willing to use it.¹

In this Chapter, I return to my discussion of the duty to consult and accommodate in Chapter 2 and apply the principles-based approach to demonstrate how it might be practically implemented by Canadian courts in section 35 jurisprudence and by Indigenous and non-Indigenous governments to guide consultation processes. In this Chapter, first, I provide a summary of the attitudinal shifts and concrete actions that arise from my discussion of the four principles. Second, I discuss how the principles might be applied in the context of court processes and by judges within the Canadian system to differently approach judging in Aboriginal rights cases involving the duty to consult and accommodate. Finally, I discuss how the four principles might be useful to help government work effectively with Indigenous communities to design consultation processes that support the development of long-term, cooperative relationships between the parties. Applying the framework to the duty to consult illustrates how using the principles-based approach as a lens to guide the way in which consultations occur might expand those processes to more effectively fulfill the reconciliation purpose at the heart of section 35.

8.1 Implementing the Framework to Guide Consultation Processes: Attitudinal Shifts Coupled with Concrete Actions

Within the relational framework, the principles-based approach fits well with the idea of consultation as a process aimed at moving the parties towards reconciliation as envisioned in section 35. The framework requires that certain attitudinal shifts take place to enable Indigenous and non-Indigenous peoples to engage with one another constructively and start to rebuild relationships that are mutually beneficial. The following table provides a summary of the attitudinal shifts and concrete actions that are required that correspond with each of the four principles. Although the concrete actions do not necessarily follow specifically from the attitudinal shifts, they are interrelated in meaningfully implementing the larger principle.

Table 8.1 - Attitudinal Shifts and Concrete Actions Necessary to Implement the Framework

<table>
<thead>
<tr>
<th>Principle</th>
<th>Attitudinal Shifts</th>
<th>Concrete Actions</th>
</tr>
</thead>
</table>
| Respect   | • Make interdependence and situatedness within an expansive web of relationships primary  
             • Interrogate and reject colonial attitudes and stereotypes                      | • Create spaces for Indigenous communities to express and foster cultural differences |
| Recognition| • Recognize the value of Indigenous stories and experiences of colonization       
               • Make a commitment to meaningfully listen to Indigenous stories               
               • Make a commitment to remember those stories and change behaviours          | • Create spaces for meaningful listening to Indigenous stories                     
<pre><code>                                                                                   | • Create a sphere of recognition within which Indigenous communities can create appropriate governance and legal structures |
</code></pre>
<table>
<thead>
<tr>
<th>Principle</th>
<th>Attitudinal Shifts</th>
<th>Concrete Actions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>entitlement to Indigenous lands</td>
<td>Increase opportunities for sustained cross-cultural interactions (think about where these opportunities already exist and build upon those)</td>
</tr>
<tr>
<td>Reciprocity</td>
<td>• Be open to discussing all issues in dialogue/negotiation</td>
<td>• Engage in dialogue across cultures</td>
</tr>
<tr>
<td></td>
<td>• Begin with an attitude of wonder and humility</td>
<td>• Increase opportunities for sustained cross-cultural interactions (think about where these opportunities already exist and build upon those)</td>
</tr>
<tr>
<td></td>
<td>• Be willing to take risks</td>
<td>• Engage in dialogue across cultures</td>
</tr>
<tr>
<td></td>
<td>• Engage with cross-cultural others with no hidden agenda with the aim to create personal connections</td>
<td>• Increase opportunities for sustained cross-cultural interactions (think about where these opportunities already exist and build upon those)</td>
</tr>
<tr>
<td></td>
<td>• Embrace embodied engagement</td>
<td>• Engage in dialogue across cultures</td>
</tr>
<tr>
<td></td>
<td>• Be attuned to feelings, senses and emotions</td>
<td>• Increase opportunities for sustained cross-cultural interactions (think about where these opportunities already exist and build upon those)</td>
</tr>
<tr>
<td></td>
<td>• Be open to emotional connections across cultures</td>
<td>• Engage in dialogue across cultures</td>
</tr>
<tr>
<td></td>
<td>• Make a commitment to engage across cultures with a view to mutual understanding</td>
<td>• Increase opportunities for sustained cross-cultural interactions (think about where these opportunities already exist and build upon those)</td>
</tr>
<tr>
<td>Reconciliation</td>
<td>• Recognize damage to the relationship</td>
<td>• Get all interested stakeholders to the table (divide groupings into smaller social change areas in order to manage logistics)</td>
</tr>
<tr>
<td></td>
<td>• Commit to rebuilding trust within the relationship</td>
<td>• Develop a shared vision for the future (involve a skilled independent facilitator)</td>
</tr>
<tr>
<td></td>
<td>• Take a long-term view of the process for rebuilding the relationships</td>
<td>• Commit time and resources to create mutually agreeable processes to manage the relationship and deal with any disputes (include continuous communication processes and regular meetings)</td>
</tr>
<tr>
<td></td>
<td>• Be patient</td>
<td>• Create a list of concrete</td>
</tr>
</tbody>
</table>
As Table 1 outlines, there are significant attitudinal shifts that need to take place in order for Indigenous and non-Indigenous peoples to implement the framework. Many of these shifts create a particular challenge for people occupying decision-making roles in the Canadian legal system and within Canadian government bureaucracies. In particular, these shifts require people in decision-making positions to become aware of and reject the bifurcation of consciousness that enables them to justify harmful decisions in the name of their professional role. In addition, the relational framework requires particular concrete actions to rebuild relationships and move Indigenous and non-Indigenous people towards a shared vision of the future. In this section, I outline some ways in which judges and government officials might embrace these attitudinal shifts and take some concrete steps to implement the principles.
8.1.1 Creating New Patterns and Processes: A Relational Framework for Canadian Judges

A debate exists about the role of Canadian law in the decolonization of Canada. Some view state law as violent in silencing alternative visions of law as well as in enforcing laws based on colonial interests to the detriment of Indigenous peoples. In this view, Canadian law systemically exerts violence in various ways to maintain the status quo. This systemic violence also constrains judges within the Canadian legal system. Robert Cover argues that law is infused with violence since when “a judge articulates her understanding of a text...somebody loses his freedom, his property, his children, even his life.” In his view, the power of the legal system is an organized, social practice of coercion, backed by the power of the state to enforce violence on those who come before it.

In Cover’s view, judges choose interpretations of law that reinforce the status quo and state law contributes to the silencing of alternative legal forms by backing those choices with state power. Cover asserts: “Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal

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6 Cover, “Bonds”, ibid at 819.
traditions, they assert that this one is the law and destroy or try to destroy the rest.”

The judge's decision reflects his or her choice between the plethora of interpretations, which embody the values of different normative communities. In making their decisions, judges quash alternative interpretations of law by imposing their own legal interpretation and claiming it as authoritative.

Indigenous theorists also implicate the formal legal system in the colonial violence directed toward Indigenous peoples. Frantz Fanon argues that colonial law is directly implicated in the violent suppression of revolution and resistance. Similarly, Taiaiake Alfred asserts,

Recognizing that violence is the foundation of state power and that violence is expressed implicitly in all of its institutions, we must acknowledge that social peace is not a benign situation. Social stability, as it is commonly conceived, is in fact a relation of force, of acts and threats of violence, of a coercion of Onkwehonwe to silent surrender.

Here Alfred asserts that the coercive force of the Canadian state is based on violence, which is inherent in all colonial institutions, including Canadian courts.

Clearly, state law has the capacity to oppress. State law, however, also has the capacity to liberate and create freedom. In many court cases, judges have rendered

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9 Frantz Fanon, The Wretched of the Earth (New York: Grove Weidenfeld, 1963) [Fanon, The Wretched of the Earth] at 208.


11 This paragraph reproduces and adapts from Manley-Casimir, “Creating Space”, supra note 5 at 235.
decisions finding legislation unlawful or unjustifiably oppressive toward a particular community. Judges also make decisions that permit societies to live in peace rather than in a constant state of conflict. Although Cover offers a trenchant critique of the judiciary, he asserts that “judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence.”12 Law therefore plays an important role in society to decide conflicts, regulate people’s social interactions, and create peace.13

In considering the role of Canadian law in the decolonization of Canada, it is helpful to distinguish between two effects of law’s function. Nicholas Blomley distinguishes between law-preserving violence, which maintains the status quo, and law-making violence, which replaces an old legal order with a new one.14 When deciding Aboriginal rights cases, courts are faced with a choice between enforcing the state’s violence to preserve the colonial status quo or doing so to create a new legal order that respects Indigenous people’s rights and autonomy and moves Canada toward a decolonized reality. It is safer and easier to make decisions that support colonial policies. In order to advance the principles of justice, freedom, and liberty upon which Canada prides itself, however, Canadian courts may need to take on the difficult task of creating new law that challenges colonial ideology and policies in cases involving Aboriginal rights. A significant first step toward doing so is for judges to embrace the attitudinal shifts necessary to implement this relational framework.15

12 Cover, "Nomos and Narrative", supra note 3 at 53.
13 This paragraph reproduces and adapts from Manley-Casimir, “Creating Space”, supra note 5 at 240.
15 This paragraph reproduces and adapts from Manley-Casimir, “Creating Space”, supra note 5 at 240.
There are competing views about the efficacy of Canadian courts for supporting and promoting systemic social change. In the context of Aboriginal rights cases, the Canadian legal system is set up in a way that has structural constraints within which judges must operate. These include formal court procedures, legal rules and acceptable methods of legal reasoning, including reliance on past case precedents. I aim some suggestions towards Canadian judges because they are key actors in shaping these structural constraints, choosing whether to abide by such constraints, and thereby shaping the contours of the relationship between Indigenous and non-Indigenous peoples in various ways, including in duty to consult and accommodate cases. I suggest that judges, even within the structural constraints of the court system, can play a role in supporting Indigenous and non-Indigenous peoples and governments in pursuing the purpose of reconciliation embodied in section 35.

There are some ways that judges could start to demonstrate the attitudinal shifts set out in Table 1 in their approaches to decision-making and written judgments. First, judges could acknowledge that they represent the settler colonial legal system and openly interrogate the way in which the law has evolved to promote colonial interests. This interrogation will necessarily be difficult, because judges may need to consider their own complicity within the colonial legal system, but it is central to arriving at just decisions in Aboriginal-rights cases. In some cases, courts have explicitly acknowledged the effects of colonialism on Indigenous communities,\textsuperscript{16} and these

\textsuperscript{16} The most prominent case in this respect is \textit{R v Gladue}, [1999] 1 SCR 688 \textit{[Gladue]}, in which the Supreme Court of Canada recognized the disproportionate incarceration rates among Aboriginal peoples in the Canadian criminal justice system and held that sentencing courts must consider the personal and historical circumstances of each Aboriginal offender in determining an appropriate sentence. In
acknowledgements are important starting points from which to begin to right Indigenous/non-Indigenous relationships. 17

In examining the colonial interests that state law serves and judges’ positioning within that system, judges may realize their personal limitations in understanding the perspectives of the Indigenous claimants. This may lead to a realization that courts need to facilitate mechanisms for cultural sensitivity training for legal personnel including judges and Crown lawyers. In addition, court processes can facilitate opportunities for Indigenous Elders and leaders to share their expertise on the Indigenous culture and legal principles relevant to the dispute. With Indigenous peoples’ input, courts may be able to implement mutually acceptable mechanisms to provide more context, cultural knowledge, and training for judges so that decisions may be more balanced in considering both non-Indigenous and Indigenous interests. 18

Second, Canadian judges might open themselves up to being unsettled and uncomfortable. Drawing on the idea of a pedagogy of discomfort, they might take on the challenge of the need to struggle, to be discomforted and unsettled in engaging in

considering these circumstances, courts may consider the personal history of the offender as well as systemic issues that have arisen within the offender’s community as a result of colonial policies and laws. 17 Although such acknowledgements are central to moving toward the creation of new, more respectful relationships between Indigenous communities and the Canadian state, it is important to keep in mind a central caution regarding the further perpetuation of symbolic and subtle forms of violence by courts. Courts can continue to enact symbolic violence on Aboriginal communities, even while distancing themselves from oppressive policies of the past, if they continue to make decisions that reinforce and legitimize contemporary forms of colonialism. Decisions that continue to dispossess Aboriginal communities from their traditional territories are but one manifestation of court-enforced colonialism in contemporary Canadian society. The mere recognition of colonialism and the Canadian court system’s complicity within it, although important, may not be sufficient to address the systemic trampling of Aboriginal rights in Canada in the absence of decisions that actually challenge colonialist agendas and overtly question the dominant legal, political, and economic framework; see Glen S Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada” (2007) 6 Contemp Polit Theory 437 [Coulthard, "Subjects of Empire"] at 451.

the difficult task of decolonization. This challenge will require judges to open themselves up to the reality that Indigenous peoples’ narratives about their stories of peoplehood disrupted are inherently and necessarily emotional and may require judges to experience the pain and loss conveyed by Indigenous storytellers as a result of their colonial experiences.

Being open to Indigenous stories, judges may struggle against the very human urge to withdraw and separate their emotional selves from their professional, judging selves. This emotional withdrawal, or “bifurcation of consciousness,” is closely implicated in the preservation of self. By separating their emotional selves from their professional duties, compassionate people can blame the system for causing the pain rather than recognizing their own complicity in that system. The bifurcation of consciousness has the unfortunate effect of silencing Indigenous peoples by failing to recognize the relevance of their pain to the issues in dispute, reinforcing unequal power relations, and preventing non-Indigenous people, including judges, from engaging in creative acts that are deeply transformative. Embracing affect in decision-making, by contrast, can lead to better decisions.

Third, judges might work to create spaces that respect Indigenous peoples and facilitate genuine listening. One way to create such a space is by working with

19 Paulette Regan, Unsettling the Settler Within: Canada’s Peacemaker Myth, Reconciliation, and Transformative Pathways to Decolonization (PhD Dissertation, University of Victoria, 2006) [unpublished] [Regan, Canada’s Peacemaker Myth] at 18. Regan insists that non-Indigenous people need to join the struggle to decolonize.
21 Regan, Canada’s Peacemaker Myth, supra note 19 at 191.
Indigenous representatives to come up with creative ideas for adapting the rules of
evidence to facilitate Indigenous storytelling. Creating space for Indigenous
storytelling may be important to ensure that Indigenous Elders are respected and to
recognize the holistic worldviews of Indigenous peoples, which may be best reflected
in a narrative style of testimony. The idea of creating space for Indigenous storytelling
within courts is linked to the idea put forward by Justice Lance Finch that legal
professionals, including lawyers and judges, have a “duty to learn” about Indigenous
legal orders. Justice Finch’s suggestion supports the need to rethink how court
processes enable judges to listen to and learn from Indigenous peoples.

By adapting the rules of evidence to enable genuine listening to and engagement
with Indigenous witnesses, courts can create respectful spaces in which the knowledge
of Indigenous Elders can be shared. Borrows highlights the failure of Canadian courts
to treat Elders with the respect that is their due:

Aboriginal Elders frequently have to endure questioning and procedures that are
inconsistent with their status in their communities. The wisdom they have attained
and the struggles they have endured in acquiring this knowledge demand that they
be shown the highest honour and deepest respect ... [This treatment] is tantamount
to discrediting their reputation and standing in the community.

Borrows also highlights that such questioning breaches Indigenous protocols,
demonstrates ignorance and contempt for the knowledge of Elders, and disrespects

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23 Ardith Walkem, *Co-Chair Remarks* (Celebrating Indigenous Legal Traditions Law Conference, First Nations House of Learning, University of British Columbia, Vancouver, 6-7 November 2006). Walkem noted that the rules of evidence fail to acknowledge that groups of Indigenous people, rather than individuals, may collectively hold the knowledge necessary to resolve a dispute.


the Indigenous culture they represent. Adapting the rules of evidence to allow Indigenous Elders to share their knowledge on their own terms, without having to defend their credentials or endure disrespectful treatment, might eliminate further disrespectful treatment in Canadian courts.

The rules of evidence could also be adapted to recognize the holistic worldviews of Indigenous peoples. In reading Indigenous writing and listening to Indigenous stories, I have observed that Indigenous people often start from the very beginning of the story and “circle” into the truth. Perhaps this narrative method reflects a more holistic world view that recognizes the interconnections of all beings and things; perhaps, as Longchari and Lederach suggest, the reason Indigenous people sometimes give testimony that starts at the very beginning is that doing so allows them to restore—to reclaim and reassert their cultural identities, values, and localities and restore their place in history.

The judge might facilitate genuine listening by permitting those giving testimony to provide their complete story without time constraints. At the Celebrating Indigenous Legal Traditions Law Conference hosted by the University of British Columbia, Professor Michael Jackson told a story about putting an Elder on the stand in Delgamuukw, at the Elder’s insistence. This was contrary to his usual practice, since the Elder would not tell Jackson what he was going to say. When the Elder took the stand, he began with “Since the beginning of time...,” and he told his story for

26 Ibid.
28 Michael Jackson, Comments (Celebrating Indigenous Legal Traditions Law Conference, First Nations House of Learning, University of British Columbia, Vancouver, 6-7 November 2006).
three full days. At the end of the story it was clear why the Elder had started at the beginning, and his testimony was relied on in the final judgment. Because the Court provided a forum for the Elder to tell the full story, the Elder was able to restory the existence of his community.

Lederach makes clear that peace building cannot be rushed. This is particularly so when Indigenous communities are engaged in a struggle to restory their existence as a people. The judge might therefore allot ample hearing time for Aboriginal-rights cases and make clear at the outset that the rules of evidence may be adapted to permit Indigenous witnesses to engage in a narrative style of testimony. By providing adequate time for Indigenous storytelling, Canadian courts might implement in practice the holding in Delgamuukw that oral history evidence must be respected.

Fourth, judges might take an active role in supporting the operation of flexible platforms to facilitate the resolution of disputes involving Indigenous/non-Indigenous disputes. One key aspect of such platforms is the need to create opportunities and effective ways to negotiate. As Shin Imai notes, courts can play a central role in

\[\text{\footnotesize \cite{Lederach, Moral Imagination, supra note 27 at 160: “People working with reconciliation need to rethink healing as a process paced by its own inner timing, which cannot be programmed or pushed to fit a project. People and communities have their own clocks.”}}\]

\[\text{\footnotesize \cite{It is important to highlight that any adaptations to facilitate Indigenous storytelling in courts would ideally be brought forward by the Indigenous community involved in the litigation, in order to provide the most culturally appropriate ways in which Indigenous testimonies might be presented to the courts. These suggestions merely offer one example of a way in which courts might adapt their processes to this end.}}\]
supporting the importance of and efficacy of negotiations in making decisions that promote on-going dialogue in the context of the duty to consult and accommodate.31

Finally, Canadian judges can engage their moral imagination in making decisions involving Aboriginal claims. Lederach defines moral imagination as “the capacity to imagine something rooted in the challenges of the real world yet capable of giving birth to that which does not yet exist.”32 Although many theorists point to the limitations of transformative social change occurring through the Canadian court system,33 Canadian courts remain one of the few forums where Indigenous peoples can bring their claims to protect their lands, cultures and peoples.34 As such, courts play an important role in redefining the relationship between Indigenous peoples and the Canadian state when Indigenous claimants choose to afford them the opportunity to resolve disputes involving Aboriginal rights.

In engaging the moral imagination, judges can adopt a transformational approach that recognizes the possibility that the existing system, structures, and relationships may need revisioning.35 The moral imagination asks judges to imagine

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32 Lederach, Moral Imagination, supra note 27 at ix.
34 Kerry Wilkins, “Conclusion: Judicial Aesthetics and Aboriginal Claims” in Kerry Wilkins, ed, Advancing Aboriginal Claims: Visions/Strategies/Directions (Saskatoon, SK: Purich Publishing Ltd., 2004) 288 [Wilkins, "Judicial Aesthetics"] at 288, recognizes that Indigenous peoples and individuals are often compelled to bring claims to Canadian courts as a defence to a criminal prosecution or in response to government and non-Indigenous pressures on their lands and resources.
35 Paulette Regan, Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada (Vancouver: UBC Press, 2010) [Regan, Unsettling the Settler] at 54.
that multiple realities and worldviews can exist simultaneously\textsuperscript{36} without the need to impose colonial views on Indigenous peoples. The moral imagination could, for example, enable a Canadian judge to question the basis and legitimacy of the Canadian state’s assertion of sovereignty without requiring the corresponding dismantling of the state. This questioning may instead lead to the creation of mutually agreed dispute resolution mechanisms that create dialogue and transform Indigenous/non-Indigenous relationships from those based on violence and coercion to those based on mutual respect.

\textbf{8.1.2 Practical Implications for the Development of Duty to Consult and Accommodate Jurisprudence}

The principles-based approach has particular implications in the context of the development of the duty to consult and accommodate case law. In developing the case law in light of the principles, courts might examine with care the way in which the consultation processes were designed and the extent to which such processes were the result of collaborative efforts between the affected Indigenous community, government, and industry.

In duty to consult and accommodate cases, courts might consider the following additional questions in applying this relational framework to their legal decision-making as they measure the appropriateness of the consultation process. One key factor judges might consider is whether the consultation process addressed the primary issue that is damaging the relationship. In cases where there are unresolved

\textsuperscript{36} Lederach, \textit{Moral Imagination}, \textit{supra} note 27 at 62, says that the moral imagination is built upon the capacity to embrace multiplicity.
historical grievances, consultation processes need to be designed to provide room for the parties to explore whether any accommodations might be made in the particular government decision that address the historical grievance. For example, although the historical decision that negatively impacted an Indigenous community’s right might not be able to be redressed in the context of the current decision, a court may consider whether it makes sense that some compensation be included as part of the accommodation measures in light of the on-going historical grievance. In *Little Salmon*, the Court specifically excluded this possibility in its decision. Suggesting that the duty to consult and accommodate therefore include the consideration of historical grievances at the root of the dispute requires a significant shift in the law. Linking the duty to consult and accommodate with reconciliation, however, raises the possibility that the duty to consult and accommodate could address historical grievances in some way. Any measures aimed at addressing such grievances could then be taken into account when the parties come to a satisfactory agreement with respect to how to deal with the historical grievance. Understanding the dispute at issue in the context of the larger history of the relationship between the Canadian government and the Indigenous community provides a way to contextualize the current dispute over consultation and move towards a more balanced resolution that supports a constructive consideration of the past in shaping present and future relationships.

Judges might also consider consultation processes in light of the principle of respect. In so doing, courts might consider the following questions in analyzing the sufficiency of consultation and accommodation processes:

- Was sufficient time allocated for the community to develop its consultation protocol?
• If an Indigenous community consultation protocol existed, did the government and industry follow it? If not, does government or industry have a compelling reason not to have followed it? Were these reasons communicated clearly to the affected Indigenous community?

• Was documentation provided in a way that was accessible and relevant to Indigenous leadership and community members?

• Did consultation begin at an early, reasonable time in the process?

• Was the approach of the parties consistent with nurturing respect in the relationship throughout the entire process?

Here the idea of care respect, which links people together in an empathetic, caring relationship, might be useful to consider in relation to the Canadian government’s and industry’s responsibilities to contribute to the well-being of the affected Indigenous community and to ensure the community’s ability to continue to relate with its traditional territory.

In relation to the principle of recognition, court might consider whether the consultation process provided opportunities for community members to tell their stories and interact directly with government and industry officials. Relevant questions might include:

• Did the design of the consultation processes involve face-to-face interactions between the parties?

• Did the consultation process provide a forum for Indigenous and non-Indigenous parties to share their perspectives completely with one another?

• Did the consultation process provide for reasonable timelines and processes for Indigenous representatives to report back to the community and raise any additional community concerns and input?

• Did the consultation process account for unanticipated events within the Indigenous community and extend timelines as appropriate to enable meaningful participation?
• Did the consultation process provide additional information, capacity building or expertise to enable meaningful participation?

Here the focus is on creating personal, empathetic connections between the parties so that each parties’ concerns and perspectives are shared and inform the process and decision-making.

Courts might also consider the principle of reciprocity in assessing the sufficiency of the duty to consult and accommodate. In light of the great imbalance that currently exists in Indigenous/non-Indigenous relationships and the history of colonial oppression, Indigenous communities should benefit significantly from resource development or other projects that take place on their traditional territories.

Courts might therefore consider the following questions in relation to the principle of reciprocity:

• Did the Canadian government and industry provide the necessary financial and other resources to enable the Indigenous community to participate effectively in consultations?

• Did the Canadian government fund a position or reimburse community staff time spent on consultations in relation to the project in issue?

• Did the process acknowledge and try to mitigate any power imbalances?

• Does the project contemplate benefits to the particular community and has the community participated in discussions around how it might benefit from the project?

• Were cultural protocols related to consent and gifting followed as appropriate throughout the consultations?

Even in cases where the effect on Indigenous interests is considered minimal by industry and government, there may be reasonable ways in which to ensure benefits to affected Indigenous communities. For example, in a solar energy project that does not have significant environmental impacts, it might be reasonable that the solar energy
company provide some percentage of the energy produced to the affected Indigenous community. Alternatively, employment or capacity-building opportunities might be possible with respect to developments close to Indigenous lands.37

Finally, in relation to the principle of reconciliation, courts might consider whether the consultation process has supported the creation of a new relationship and enabled the parties to work together in a proactive manner. Questions courts might consider in assessing the sufficiency of consultation processes and accommodation measures might include:

- Does this outcome require both sides to meet in the middle to the extent possible?
- Was there room in the process for the Indigenous parties’ vision of how they wish to relate to their lands to be considered?
- Did both parties participate in the design of the consultation processes?
- Was there sufficient time allocated to enable the parties to participate meaningfully in the consultations?
- Were there different forums and strategies used to ensure that community members understood the project, its implications and the basis for decisions made?
- Do the parties feel that the consultation process and accommodation measures were sufficient? If not, why not?
- Did the Canadian government, industry and the Indigenous community act in a way that supports an improvement in the relationship?
- Does the outcome of the case support the link between long-term sustainable reconciliation with considerations of justice in light of the Canada’s colonial history?

These considerations look at both the process and outcome in determining whether the consultation process forwarded the rebuilding of Indigenous/non-Indigenous relationships.

8.1.3 Implementing the Relational Framework in Government Consultation: Necessary Attitudinal Shifts

In implementing the four principles in this framework, government and Indigenous communities will have to radically rethink how they approach and relate to one another. Shifting to a perspective that accepts that Indigenous and non-Indigenous people are linked within an interdependent web of relationships supports an approach that is collaborative rather than adversarial, engaged rather than isolationist, and constructive rather than damaging.

Shifting attitudes involves learning about Canada’s colonial history and interrogating how that history has come to influence the relationships between the Canadian government and Indigenous peoples. It involves thinking about the government’s role in oppressing Indigenous communities through law and policy and considering how to address that history in a way that is constructive, takes responsibility, and signals a significant change in the way government relates to Indigenous communities. Rejecting the assumption that non-Indigenous people are entitled to Indigenous lands has the potential to create a radical shift in the way the Canadian government approaches relationships with Indigenous peoples.

The Canadian government and individuals working within government institutions need to interrogate whether denial strategies form a part of government policy and law and influence daily decision-making. If policies and laws continue to
tarnish government relationships with Indigenous peoples and communities, the government has a responsibility to consider how to make fundamental changes to its practices. In concert with commissions of inquiry, ombudsman reports, and law reform commission reports, the government can start to creatively reconsider its role in relation to Indigenous communities. In doing so, it can reanimate its laws and policies to support a conception of reconciliation that gives primacy to mutually beneficial, collaborative, long-term relationships with Indigenous communities.

There have been some significant strides in recent years relating to government policies drafted specifically to address how governments might create better long-term relationships with Indigenous communities. In British Columbia (BC), for example, the provincial government and BC First Nations leaders signed a document entitled: “A New Relationship,”38 which outlines the commitment of the leadership of the First Nations Summit, the Union of BC Indian Chiefs, the BC Assembly of First Nations and the BC government to re-establish respectful relationships and create a more positive relationship between the governments going forward. More recently, Ontario signed a Political Accord with the Chiefs of Ontario, which affirms First Nations inherent right to self-government and commits the parties to work together on issues of mutual interest, including resource benefits sharing, the treaty relationship and jurisdictional matters.39 By making a public commitment to embrace a new attitude and move

forward in partnership with Indigenous leaders, governments can provide a solid
starting point to renew relationships.

The federal government has also made several public commitments to renewing
relationships with Indigenous communities over the years. These include the
Statement of Reconciliation;\textsuperscript{40} the Indian Residential School Apology; and the
statement of support for the \textit{Declaration}. It is noteworthy that Indigenous leaders and
communities have criticized all three of these public commitments for different
reasons. Although these public articulations of commitment to new relationships with
Indigenous communities are an important starting point, therefore, unless
government at all levels acts in a way consistent with those commitments, such
statements do not carry normative significance. A shift in the ideology of government
bureaucracy is necessary to fully embrace the attitudinal shifts necessary to implement
this relational framework.

There are several ways the necessary attitudinal shifts could influence
government policies and processes. Government could train its workers to prioritize
creating personal connections and relationships with Indigenous peoples and
communities. One way to do this would be for governments to make a commitment to
create consistency in the personnel who have contact with particular Indigenous
peoples/communities. For example, in the context of accessing public services,
governments could implement a policy, to the extent it is possible, that the
government worker with whom the Indigenous person accessing services has contact

\textsuperscript{40} The Honourable Jane Stewart, \textit{Statement of Reconciliation} (7 Jan 1998), online: Aboriginal Affairs
is consistent, known, and accessible to them. In addition, that person could act as a central referral source to connect Indigenous clients to other relevant government services to address their needs holistically. This practice mirrors the structure of personal delivery of services to Indigenous peoples by Indigenous organizations. For example, the Thunder Bay Indian Friendship Centre has particular staff members responsible for services to Indigenous elders. These staff members help coordinate logistics and act as a central resource person to help the Indigenous elders with their needs on a holistic basis.

Similarly, in the context of the duty to consult and accommodate, government could implement a policy to ensure consistency in personnel who deal with Indigenous community representatives in relation to consultation matters between government and that community. This consistency would require that the government assign a staff member to build relationships with the community who would be aware of the historical and local circumstances of the community and would be able to establish personal relationships with the Indigenous community representatives. Such consistency would lead to more efficiency and reduce the burden on Indigenous peoples to educate government staff members on the realities facing their communities and any historical grievances related to the issues raised in consultations.

Personal approaches to relationships with Indigenous peoples also require meaningful listening and the creation of sufficient time to create relationships of trust. This means that rather than rushing to get through as many clients as possible in as short a time as possible, government processes need to be adjusted to allow for
government employees who interact with Indigenous peoples to allocate more time to create relationships and build trust with Indigenous peoples. Creating space for a higher amount of interaction and a more personal approach to serve Indigenous peoples within government services may require a fundamental restructuring of such services. This could include creating positions for an Indigenous staff person to serve Indigenous clients in a culturally appropriate way. This may also require having a mechanism to identify Indigenous clients and provide culturally appropriate services that are designed specifically to support relationship building.

These suggestions point to the possibility of committing to a larger systemic rethinking of internal government processes and training of government personnel so that all government employees understand the specialized goal of rebuilding relationship with Indigenous peoples at the heart of reconciliation. Not only does reconciliation need to occur at the highest government-to-government levels but also reconciliation needs to be infused within the attitudinal and work culture of government offices. All government departments, even those that may seem far removed from Indigenous issues, need to participate in a systematic rethinking of how they might restructure their service provision, policies, decision-making, and work cultures to facilitate the rebuilding of relationships with Indigenous peoples on the basis of respect, recognition, reciprocity and reconciliation.

Government officials who occupy roles that include authoritative decision-making in relation to Indigenous peoples might also make a deliberate commitment to expand their circles of interaction to meet more Indigenous peoples and understand
Indigenous societies. For example, the Gladue Judges and Crown lawyers who prosecute Aboriginal offenders in Toronto’s Gladue Court are regularly invited to attend Aboriginal Legal Services of Toronto’s (ALST) annual Feast that celebrates offenders who have participated successfully in its Community Council Diversion Program. Part of the reason that it is important for such judges and lawyers to attend this function is to witness first-hand the value of the diversion program in real people’s lives. The Feast is a celebration of the accomplishments of offenders and also represents a welcoming back of the offenders into their communities. At the Feast, there are Council Elders who share stories about having personally participated in the Community Council program, which turned their lives around. As a result, of this program, they are able to help other offenders navigate their way out of the criminal justice system. Only through personal interactions and attendance at Indigenous events will government officials begin to understand the larger context of their decision-making. By attending the Feast and hearing Indigenous stories, judges and Crown lawyer might be more open to recommending diversion of Aboriginal offenders to the Community Council Program. Enlarging the understanding of government decision-making therefore opens up the possibility of transformative learning.

41 Increasing intersocietal interaction and understanding of the conditions facing northern Ontario First Nations communities is the goal of the annual trips to Kitchenuhmaykoosib Inninuwug First Nation: see Louise Brown, “Northern Reserve ‘KI’ Wants 25 Ordinary Canadians to Visit to Experience its Culture”, Tor Star (19 May 2013), online: <http://www.thestar.com/news/canada/2013/05/19/northern_reserve_ki_wants_25_ordinary_canadians_to_visit_to_experience_its_culture.html> (retrieved 5 September 2015); “Royal visit to remote Ontario reserve was ‘moving, enlightening and uplifting,’ Countess says”, Natl Post (19 September 2014), online: <http://news.nationalpost.com/2014/09/19/royal-visit-to-remote-ontario-reserve-was-moving-enlightening-and-uplifting-countess-says/> (retrieved 5 September 2015).

42 As part of the Intensive Program in Aboriginal Lands, Resources and Governments in 2011, Kimberly Murray and I arranged a visit for the class to the Gladue Court in Toronto. That morning, no offenders showed up to court so the class had the opportunity to have a discussion with the judge, the Crown
Just as discussed above in relation to judges, government officials need to open themselves up to their feelings, be aware of their emotional and physical responses to their experiences of direct engagement with Indigenous communities, and be prepared to consider those experiences in their decision-making. This does not mean that in all cases Indigenous interests would win out, rather it means that governments officials, just like judges, might embrace affect in their decision-making and thereby make better decisions.

Similarly, where government officials are making decisions about resource extraction developments that affect Indigenous interests, physically visiting the location where such developments might take place and speaking directly to community members about the impact of the decision provides invaluable information that otherwise remains unknowable. This information includes hearing stories from Indigenous community members about their connection to their territory and their worries associated with any developments. It also creates an opportunity to understand the significance of the place at the epicenter of the conflict.43

Making an effort to spend time in places that Indigenous peoples frequent, such as at community events and through community visits, demonstrates a willingness to learn about the real lives of Indigenous peoples and to create relationships that

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43 During my participation in the Intensive Program in Aboriginal Lands, Resources and Governments in 2001, I researched the legal, environmental and economic impacts of offshore oil and gas development in Hecate Strait on the Haida inhabiting Haida Gwaii. I had the opportunity to visit Haida Gwaii to share my findings with the Band Council. Visiting Haida Gwaii enhanced my understanding of how significant the potential negative impacts of offshore oil and gas development would be for the Haida and the environment.
contribute to a better understanding across cultures. Government might consider making attendance at such events a required part of government jobs in order to demonstrate its commitment to meaningfully engage with Indigenous peoples and communities and encourage government staff learning about Indigenous histories.

8.1.4 Considerations for Government Consultation Processes

The duty to consult and accommodate could include earlier consultation requirements related to the assessment of the Indigenous interests that might be affected by a proposed development or government decision. Christie suggests that consultation processes are best designed by the Crown working with concerned Indigenous communities. Designing mutually acceptable processes together is advantageous in that it may result in less animosity from the outset and more support in the final outcome. Attention to the quality of the consultation, the degree to which the Indigenous community participates in the design of the consultation process, and the buy-in of the Indigenous party to the consultation process are key components of a relationship-based approach to the duty to consult and accommodate.

Provincial and territorial governments, if they have not already done so, could draft consultation guidelines and protocols to outline processes to consult with Indigenous communities. British Columbia, Alberta and Ontario are among several

45 Ibid at para 72. In this section, I offer some ideas of how consultation processes might be designed using the four principles in this framework. It is important to highlight at the outset, however, that the most successful consultation processes will be designed in partnership between the affected Indigenous community, industry and government. As such, processes may differ from those outlined here based on the particular processes that are found to be mutually agreeable.
46 See the British Columbia government’s website for a number of documents it has drafted for various purposes setting out consultation and accommodation guidelines, online: Government of British
provinces that have drafted consultation guidelines. Similarly, the federal government has drafted consultation and accommodation guidelines with a view to providing consistency and coordination between federal, provincial and territorial governments. It is important to note that the process of coming up with the finalized version needs to be acceptable to all parties and not unilaterally imposed by government. Consultation processes that do not take into serious account feedback from Indigenous leaders will be ineffective in supporting the rebuilding of new relationships between Indigenous and non-Indigenous peoples.

In addition, industry and government should actively seek out Indigenous communities’ consultation protocols, which often offer a roadmap to non-Indigenous parties who might want to engage an Indigenous community in consultation. Where conflicts exist between the consultation processes set out in government policies and Indigenous protocols, a relational framework would require ongoing discussion, deliberation and negotiation about amending the processes to support the reconstruction of Indigenous/non-Indigenous relationships.

Another important component of implementing this relational framework is to ensure that government engage in deliberative decision-making processes with Indigenous communities and industry at the beginning of consultation processes to develop the guidelines to facilitate effective relationship-building. This would also


47 See the federal government’s consultation and accommodation guidelines online: Aboriginal Affairs and Northern Development <http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675#chp2_1_2> (retrieved 5 September 2015).
establish rules around the processes and regularity of communications regarding the project and dispute resolution processes in the event that conflicts arise.

Rebuilding constructive relationships in the context of the duty to consult and accommodate involves a continuous, flexible process of learning and dialogue. Lederach argues that the creation of transformative social change relies on the establishment of a “context-based, permanent, and dynamic platform capable of non-violently generating solutions to ongoing episodes of conflict.” Such platforms need to be flexibly designed in recognition that the relationship between the Canadian state and Indigenous groups is fragile and requires continual renewal, renegotiation, and dialogue.

One key aspect of such flexible platforms is the need to create effective ways to negotiate. Indigenous and non-Indigenous parties to negotiations relating to resource development need to establish guidelines for setting up informal, accessible, and mutually designed conflict-resolution processes should the negotiations hit obstacles. Affected Indigenous communities need to play a central role in designing the processes and rules governing negotiations in order to build and maintain flexible and appropriate conflict-resolution platforms and mitigate power imbalances. In the context of agreement that a resource development project should proceed in partnership with Indigenous communities, processes that are set up at the beginning may need to be revised or replaced as the project progresses and the relationships

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48 Lederach, Moral Imagination, supra note 27 at 47.
49 In relation to the Indian Residential Schools Settlement Agreement, Regan, Canada’s Peacemaker Myth, supra note 19 at 151, highlights the shortcomings of the federal government’s attempt to unilaterally impose a tort-based resolution process, which was seen as illegitimate and unacceptable to survivors.
evolve. Supporting a collaborative relationship requires building in regular communications, including in-person meetings to ensure all parties are implementing actions that further the shared vision.

The personnel involved in consultation processes can make or break relationships. Government consultation staff ideally would:

1. be knowledgeable in the legal aspects of the duty to consult and accommodate;
2. have a deep understanding of the history of Indigenous/non-Indigenous relationships; and
3. have personal experience working with Indigenous communities.

Relationship building would be most successful if representatives on both sides prioritized the importance of the interconnected and interdependent nature of Indigenous/non-Indigenous relationships and considered relationship building as a key factor in decision-making processes.

Government might consider providing funding for mutually agreeable facilitators to facilitate consultation process and design. Such facilitators can make the consultation processes less costly in the long-term by providing expertise on designing processes, helping the parties deal effectively with contentious issues, and supporting the creation of a collaborative, mutually beneficial relationship. The time commitment required by such facilitators may vary with the extent of the government’s duty to consult and accommodate. Establishing and training a pool of experienced facilitators may increase trust between the parties as Indigenous communities, governments and industry experience the value of neutral facilitation in designing constructive consultation processes. Again, it is important to highlight that the process of selecting,
training and using facilitators to support consultation needs to be agreed upon through collaborative deliberation in order for such facilitators to be effective and seen as legitimate.

The government might make the funding of a Community Liaison position within the affected Indigenous community a regular part of establishing consultation processes where projects will impact an Indigenous community. This Community Liaison staff person would be the point of contact within the community for industry and government as the project proceeds. Government and industry could ensure that the Liaison has opportunities for increased training and developing expertise in relation to the project so that decisions made during the course of a collaborative project are understandable and effectively communicated to the community. In funding a community member to fill this position, government and industry would be contributing to capacity building within the community, as well as increased expertise and employment opportunities. Creating this position may also enable trust to increase between the parties over the longer term.

Government could also implement concrete legislative and policy measures that incentivize industry to partner with and negotiate beneficial agreements with Indigenous communities with respect to resource development. For instance, government agencies could make demonstrated benefits to affected Indigenous communities requirements of the regulatory process. One example of a government program that provides incentives to industry to create meaningful partnerships with First Nations communities is the Ontario Feed-In Tariff (FIT) program, which pays a significantly higher rate to renewable energy generation projects where First Nations
own more than 51% of the project.\textsuperscript{50} As Gary Kissack, a partner at Fogler, Rubinoff LLP, explains:

For renewable energy generation projects under the Ontario Feed-in Tariff (FIT) program which pays renewable energy producers a fixed price for every kilowatt (kw)/hour of power they produce, the price-adder increases the price paid per kw/hour to the producer. The maximum amount of the adder is $0.015 (one and half cents). If a producer (or project) is owned 51% or more by a First Nation, then that producer will be paid the fixed price per kw/hour plus one and a half cents.\textsuperscript{51}

Kissack, who represents First Nations within Ontario in negotiations with respect to resource development projects, provides an instructive example:

The fixed price for wind under FIT 1.0 was $0.135 per kw/hour so a 51% owned wind project would get $0.15 per kw/hour, which in some cases I saw increased the profit of the project by up to 40%. The adder provided significant incentive to renewable energy developers to invite First Nations in as co-owners as it could potentially make them more money (in the sense of a better return on their invested capital), depending on the terms negotiated. Combined with other "Aboriginal-based incentives" and programs put in place by the Ontario Liberal Government (such as getting "priority points" which moved a project ahead in the queue for connecting to the grid, and others) this program will prove to have a significant economic impact on a lot of communities who were able to participate. As it is a competitive market driven landscape, I have generally seen a gradual improvement in the commercial terms that First Nations negotiate on these deals, to a point in many cases where the First Nations have almost zero risk on projects.\textsuperscript{52}

The Ontario FIT program provides a useful example of a government program designed specifically to increase the benefits and participation rate of First Nations within Ontario to participate in renewable energy projects. Where First Nations therefore choose to participate in such projects, significant economic benefits can

\textsuperscript{51} Gary F Kissack, Question re: Ontario Feed-In Tariff Program, Email Correspondence (1 Nov 2014).
\textsuperscript{52} Ibid. Kissack also notes: “[i]n a lot of cases, however, it isn’t just the adder which incentivizes project (not just renewable energy projects) developers to work cooperatively with First Nations including equity partnerships [i]t is formal and informal government policy which directly and indirectly fosters this climate. The market is always looking to reduce risk and partnering with First Nations reduces project risk.”
accrue to community members and the First Nation maintains decision-making authority.

Government processes also need to allow for appropriate amounts of time for Indigenous representatives to share the community’s perspectives on the issues raised, including addressing unresolved historical grievances. This process requires sufficient time and an appropriate forum for these discussions to take place prior to addressing the specific proposed government decision that has the potential to affect proven or not-yet-proven Aboriginal or treaty rights. Making room for a sharing of Indigenous perspectives on the larger history that has led to the current issue is important because it provides the necessary context to frame the way in which the Indigenous community is approaching consultations and provides notice to the government and industry of contentious issues that need to be dealt with during consultations.

In listening to Indigenous perspectives and stories, government officials might open themselves up to engage emotionally with Indigenous community members, empathize with their points of view and recognize the harm that the Indigenous community has experienced due to the legacy of colonization. They might also interrogate whether and how they personally have benefitted from the colonial legacy. In cases where previous government decisions continue to have a negative impact on Indigenous communities, government officials can commit to considering the community’s historical grievances in the course of the current decision-making and consultation processes. Such an approach requires a significant shift in government practices and would only likely take place were the duty to consult and accommodate
case law expanded to include considerations of historical grievances as appropriately within consultation processes.

Consultation processes need to provide opportunities for Indigenous and non-Indigenous people to meet face-to-face and to engage with another in respectful deliberation. The importance of personal interactions and discussions cannot be emphasized enough. Only through personal interactions and face-to-face discussions can people truly establish trust and move towards a point of mutual understanding.

The dispute resolution processes could also provide for negotiations to alternate between government offices and the Indigenous territory in question. The requirement for government officials to meet in the Indigenous territory might serve to engage their moral imaginations, develop an appreciation of the context of the dispute, and alter the balance of power. This shift in power and appreciation for the geography of the dispute may serve to increase the transformative potential of such interactions.

8.2 Concluding Thoughts

Significant attitudinal shifts need to take place across Canadian institutions and society to rebuild relationships between Indigenous and non-Indigenous communities. The duty to consult and accommodate provides a mechanism whereby Canadian judges and governments can begin to shift their attitudes and to take concrete actions to create a more solid grounding for Indigenous/non-Indigenous relationships within Canada. To implement this relational framework, many assumptions upon which both the Canadian legal system and governments are structured need to be interrogated and deconstructed to determine which are useful and which are damaging to Indigenous/non-Indigenous relationships. Once this hard work is completed, attitudes
and actions that are undermining the relationship need to be abandoned while those that are consistent with the principles of respect, recognition, reciprocity and reconciliation need to be engaged. Only in doing this hard work of rebuilding relationships at an individual and collective level will there be any significant changes in Indigenous/non-Indigenous relationships.
Chapter 9: Circling Back to the Beginning

Let us put our minds together and see what kind of future we can build for our children.¹

The duty to consult and accommodate under section 35 provides an opportunity for the Canadian government and Canadian courts to rebuild relationships with Indigenous communities within Canada. In this dissertation, I began by analyzing the reconciliation and duty to consult and accommodate case law and argued that the Supreme Court of Canada’s interpretations of the duty to consult and accommodate could be expanded to more effectively promote the grand purpose of section 35 – reconciliation. I argued that the duty to consult and accommodate jurisprudence pays insufficient attention to the quality and character of the relationship between the Canadian government and Indigenous community involved in the dispute. I then outlined why a bicultural, principles-based approach could provide a promising way forward to reconceptualizing the duty to consult and accommodate. In particular, I suggested that a principles-based approach is useful to guide a relational framework to the duty to consult and accommodate because it allows for continuous evolution, adaptation, and dialogue.

I then discussed possible interpretations of the four principles of respect, recognition, reciprocity, and reconciliation and highlighted practical strategies that could be implemented to support each of these principles. In discussing each principle I drew on both Indigenous and non-Indigenous laws and theories. Since the principles-based framework that I advocate is made up of four principles that find

support in both Indigenous and non-Indigenous legal traditions and philosophies, it addresses some of the shortcomings of current duty to consult and accommodate jurisprudence, including the exclusion of Indigenous legal principles from informing the development of that case law to date.

I then discussed what a substantive interpretation of each of the four principles might look like. The first principle of respect can be interpreted as including the ideas of respect for persons, respect for cultural difference, and respect for group difference. Indigenous philosophies and laws support an interpretation of respect that is based in relationships, including those between humans, non-humans, and past and future generations. The principle of respect as a governing aspect of Indigenous/non-Indigenous relations would impact all aspects of and support the continual adaptation and evolution of those relationships. As Webber highlights in the context of respectful Indigenous/non-Indigenous relationships: “[i]t is the overall character of the relationship that is protected – the obligations of respect and fidelity – and not a detailed code of rights and responsibilities. The relationship is thus open to evaluation and adaptation...”\(^2\) The principle of respect therefore allows for the flexibility necessary for innovative and contemporary solutions to be negotiated to ensure that the relationship between Indigenous and non-Indigenous people flourishes.

This expansive view of respect supports the idea that each of us is situated within a network of relationships and those relationships define who we are and our level of self-respect. Improving relationships on a personal, social, and political level

will correspondingly improve self-respect, for both Indigenous and non-Indigenous peoples. Practical strategies that arise from this expansive interpretation of respect include making interdependence and mutual responsibilities primary, rejecting colonial attitudes and stereotypes, and creating space for Indigenous communities to express and foster cultural difference.

The principle of recognition involves two interrelated aspects: acknowledgement and affirmation. ‘Recognition as acknowledgment’ involves acknowledging historic wrongs, taking responsibility for causing such wrongs, and moving forward together in light of the history. Acknowledgement requires non-Indigenous people to listen to Indigenous peoples about their experiences of colonialism and how assimilative policies have affected their lives. It also involves non-Indigenous peoples taking a close look at how they have benefited from the colonial laws and policies that have been imposed upon Indigenous communities both at a personal and collective level. Practical strategies to implement the principle of ‘recognition as acknowledgment’ include recognizing the value of Indigenous storytelling, creating spaces for meaningful listening and making a commitment to remember and change.

‘Recognition as affirmation’ involves formally entrenching in law the pre-existing, inherent rights of Indigenous communities. This sense of recognition includes the affirmation of Indigenous sovereignty and jurisdictional capacity and specifically rejects “the politics of recognition.” Affirmation involves rejecting the assumption of settler entitlement to Indigenous lands, being open to all issues during Indigenous/non-Indigenous political negotiations, and creating a sphere of recognition for Indigenous nations to revitalize appropriate forms of governance and legal systems.
The principle of reciprocity is a governing basis of social interaction, enabling people to initiate and sustain relationships with one another both within and across cultures. Reciprocity can take the form of more superficial exchanges, such as the exchange of goods, or it can include more meaningful forms, such as dialogue between people. Relational reciprocity involves engaging with cross-cultural others with a commitment to creating a relationship that is mutually beneficial, embodies equilibrium, and aimed at mutual understanding. Practical strategies that arise from the principles of reciprocity include dialogical engagement with no hidden agenda, starting from a point of wonder, humility and risk, and striving for embodied and emotional connections with cross-cultural others.

The principle of reconciliation is aimed at rebuilding damaged relationships. This includes a time and effort-intensive, long-term process designed to redefine ways to be in a constructive, positive relationship across all levels of society. Practical strategies include rebuilding trust in the relationship; developing a shared vision of the future; creating mutually agreed upon processes for managing relationships and conflicts as they arise; and implementing concrete actions to move towards the shared vision.

Finally, I outlined the attitudinal shifts and concrete actions that Canadian judges and the Canadian government can take in order to implement the relational framework to the duty to consult and accommodate. These attitudinal shifts include interrogating one’s complicity within settler colonial structures; embracing affect in decision-making; creating spaces for meaningful listening and interaction with Indigenous peoples; and working in partnership with Indigenous peoples to create
mutually agreeable consultation and negotiation frameworks, to name just a few. Concrete actions that both judges and government officials can take include changing evidentiary and court processes to facilitate Indigenous storytelling; supporting the creation of flexible dispute resolution processes, including hiring neutral facilitators where appropriate; increasing training for government workers; and adapting timelines to rebuild trust and enable meaningful engagement.

Currently, the duty to consult and accommodate case law relegates Indigenous thought and law to a mere “constitutional whisper.” By contrast, a relational approach to the duty to consult and accommodate explicitly seeks out Indigenous law and theory to inform both the selection and interpretation of principles. This approach therefore envisages a primary role for Indigenous legal thinkers and laws in determining how the doctrine of duty to consult and accommodate develops and the corresponding duties on the Canadian government in consulting with and accommodating Indigenous communities.

Implementing the four principles within this framework requires taking a step into the unknown; it requires a complete reshaping of Indigenous and non-Indigenous attitudes, approaches, and encounters with one another. In implementing this framework, Indigenous and non-Indigenous peoples (including judges and government officials) need to embrace their shared past, their shared present, and their shared future. Living up to the principles of respect, recognition, reciprocity and

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reconciliation requires a collective effort to steer our boats away from fear and violence and paddle fiercely towards interdependence and proactive engagement.

Cases involving the duty to consult and accommodate provide an opportunity to rebalance Indigenous/non-Indigenous relationships. A relational framework to the duty to consult and accommodate embraces considerations of fairness and justice in the context of the history of the relationship, the consultation process, and the decision-making with respect to whether and how a project might proceed. In contrast to the minimalist approach that is currently the standard, a relational approach to the duty to consult and accommodate provides a useful way forward for Indigenous and non-Indigenous peoples and more closely links the duty to consult and accommodate to the grand purpose of section 35 – reconciliation between Indigenous and non-Indigenous people within Canada.
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