DISPUTE RESOLUTION, THE DUTY TO CONSULT, AND “PARTNERSHIPPING” IN ABORIGINAL RIGHTS RECONCILIATION: A Comment on the Ways Forward in the Wake of the Truth and Reconciliation Commission’s “Calls to Action”

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ABSTRACT

As the Truth and Reconciliation Commission of Canada (TRC) noted in June of 2015, “(t)he promise of reconciliation, which seemed so imminent back in 2008 when the prime minister, on behalf of all Canadians, apologized to (Residential School) Survivors, has faded.” However, the TRC report as well as the election of new federal government have been the source of some renewed optimism. This paper deals with reconciliation in the context of the Crown’s “duty to consult” Aboriginal peoples in matters affecting the rights of Indigenous persons and communities. The central argument of this paper is that, to date, attempts at reconciliation through the existing Canadian Constitutional and legal paradigms have failed. This is partially because the guarantee of Aboriginal rights in the Constitution is under-inclusive, and partially because Aboriginal communities and the Crown generally ascribe different meanings to Treaty, reconciliation, and the substantive content of the duty to consult.

Addressing this, this paper considers the prospect for the design of alternative dispute resolution processes in Canada that could both honour Indigenous ways and understandings and not hamstring the Crown in its objectives. What will be required is the relaxation of assumptions about the scope of consultation imposed by the Crown as well as good faith by both the Crown and Aboriginal peoples in an interest-based
approach to dispute resolution. Consideration will need to be given to the interests of the parties and not only to the evident power adhering to sovereignty of the Crown over Aboriginal rights. Here, if one common overriding interest is reconciliation, and if reconciliation is about respect, then it is essential to design robust, inclusive, and contextually appropriate dispute resolution systems. The TRC report contains the general parameters of this, but the will to implement a genuine partnership between Aboriginal and non-Aboriginal Canadians is necessary. The ways forward are not easy but the promise of such a genuine partnership between First peoples and non-Aboriginal Canadians in a continuing conversation that moves toward sincere reconciliation, in the sense understood by the TRC, can be realized.
I. INTRODUCTION

It has been over 30 years since the entrenchment of Aboriginal rights in Canada under section 35 of the Constitution Act 1982. Yet, there appears to be little sense of rejoice in progress that has been made upholding, honouring, and giving those rights force and effect. For Jean Leclair (in 2006), “to encapsulate the last 24 years of interpretation of section 35, one could say that the Constitutionalization of aboriginal rights has led to an unfortunate and unsatisfactory reification of aboriginal identity by all concerned, natives and non-natives alike.” In the last decade, the situation, if anything, may have become worse. As the Truth and Reconciliation Commission of Canada (TRC) noted in June of 2015, “(t)he promise of reconciliation, which seemed so imminent back in 2008 when the prime minister, on behalf of all Canadians, apologized to (Residential School) Survivors, has faded.” Amidst all the talk of a new relationship, reconciliation, and inclusiveness, what really has changed? To the TRC,

Instead of moving towards reconciliation, there have been divisive conflicts over Aboriginal education, child welfare, and justice. The daily news has been filled with reports of controversial issues ranging from the call for a national inquiry on violence towards Aboriginal women and girls to the impact of the economic development of lands and resources on Treaties and Aboriginal title and rights. The courts continue to hear Aboriginal rights cases, and new litigation has been filed by Survivors of day schools not covered under the Indian Residential Schools Settlement Agreement, as

1. Throughout, the terms Aboriginal, First Nations, and Indigenous peoples are used synonymously (depending on context) to refer to the First Nations, Inuit and Metis peoples of Canada and, where not capitalized in the original work cited, are not capitalized here. The terms Indian and Native where present in original works have been retained.
well as by victims of the “Sixties Scoop,” which was a child-welfare policy that removed Aboriginal children from their homes and placed them with non-Aboriginal families.5

Clearly, there remain significant and seemingly intractable disputes between First Nations and the Crown, and, while Aboriginal rights are entrenched in the Constitution, the Crown is only required to “consult” First Nations in instances where its actions6 may impede Aboriginal rights. Further, the consultation process, itself, is largely designed by the Crown, and First Nations are in a necessarily reactive position to contemplated Crown actions. The sovereignty of the Crown dictates further that there is no inherent veto of Crown actions by Aboriginal peoples even where Aboriginal rights are significantly impeded. Rather, accommodation, to the extent that it is required at all, may be negotiated. Ultimately, the arbiter of the consultation process is the Supreme Court of Canada, which has no Aboriginal members.

What is required is a recast of dispute settlement mechanisms and processes pertaining to Aboriginal rights in Canada. This recast would need to involve Indigenous peoples in its design and implementation. It would need to begin with a full recognition of Aboriginal rights, not just those rights recognized in the existing Constitution, and end with an accountability of the Crown to honouring and respecting the objectives of reconciliation. This, obviously, is a large task calling for a paradigm shift in Crown-Aboriginal relations in Canada – from an adversarial paradigm to a paradigm of partnership and respect. It invokes what Elmer Ghostkeeper has identified as “partnershipping” which is a concept derived from the Woodland Cree traditions reflecting the actions, behaviours and conduct of parties to a partnership rather than merely the existence of a formal agreement. As such, it is process as opposed to ends oriented and is built on mutual respect.7 It is this shift that the “calls to action”8 of the TRC hold out as promise. At issue is the very nature and meaning of reconciliation as well as the means to achieve it.

5. Ibid at 7-8.
6. Crown actions are not constrained to direct actions of the Crown itself but also the Crown permitting actions of third parties to occur. Examples would include development, harvesting of resources, infrastructure construction, etc.
The central argument of this paper is that, to date, attempts at reconciliation through the existing Canadian Constitutional and legal paradigms have failed. This is partially because the guarantee of Aboriginal rights in the Constitution is under-inclusive in the first instance, and partially because Aboriginal communities and the Crown generally ascribe different meanings to both Treaty and reconciliation. The interplay of these two factors means the full realization of Aboriginal rights based on an under-inclusive guarantee of such rights is bound to fall short of the mark of reconciliation. Hence, incremental tinkering within the existing (Western) legal paradigm will not achieve the ends desired for reconciliation is “an ongoing process of establishing and maintaining respectful relationships”9 and not about forcing a Western paradigm on Indigenous communities. Simply put, reconciliation is a process and not an end state. Further, the process must include Aboriginal communities in its design, implementation, and oversight to have the legitimacy and “buy in,” not only of the Crown, but also of Aboriginal communities. This is an approach envisioned within the TRC “calls to action” and involves genuine “partnershiping” between the Crown and First Nations in Canada. As a serious alternative to the current situation, this is an approach that has been called for but not implemented since the original Constitutional discussions that excluded Aboriginal peoples from meaningful input but, nonetheless, resulted in the entrenchment of some Aboriginal rights.

This paper proceeds as follows. First, in section II and by way of contemporary context, I outline some of the principal “calls to action” of the TRC as they relate to reconciliation, recognition, and protection of Aboriginal rights and contrast these recommendations with the Crown’s actions, to date. This contemporary context is, of course, framed by historical experience including, but obviously not limited to, the content of section 35 of the Constitution Act, 1982.10 This is addressed in section III of the paper and contrasted with the recognition and protection of Aboriginal rights sought by Indigenous groups, themselves, in the Constitutional amendment process. In some ways, this begs the question of the meaning of Treaty and reconciliation. Taking this up in section IV, I argue that there are substantial differences in the meaning of these terms as understood by Aboriginal groups and the Crown and that these understandings may, in fact, be irreconcilable.

Given this context, in section V, I address the scope of section 35 as interpreted by the Courts in Canada and the emergence and content of the “duty to consult.” Last, given the differences between the Crown,

9. TRC, Honouring the Truth, supra note 4 at 16.