Unpacking "Reconciliation": Contested Meanings of a Constitutional Norm

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While the concept of reconciliation has become ubiquitous in contemporary Canadian politics, its importation into the political sphere is still a relatively recent phenomenon and is complicated by the ambiguity that surrounds the term as a result of its multifaceted etymology. Reconciliation is widely critiqued for being ambiguous, tinged with religious meanings, and susceptible to political manipulation. While many scholars have critically analysed how the term has been used by the Canadian government in recent years, this work has yet to be complemented by a genealogical analysis that asks when, why, and how reconciliation was brought into discussions of political relationships between Canada and Indigenous peoples in the first place. This article sketches out the beginning of a genealogy of reconciliation in relations between Indigenous peoples and Canada through 1) an examination of the concept as it was introduced in decisions of the Supreme Court and the work of the Royal Commission on Aboriginal Peoples, and 2) an investigation of how the concept came to be included in these key texts. By exploring these deployments of the term, and the conceptual confusion that has surrounded them, this article aims to shed some light on the foundations upon which contemporary debates over reconciliation rest and to offer some tools for assessing rhetorical deployments of the term.

Bien que le concept de la réconciliation soit devenu omniprésent en politique canadienne contemporaine, son importation dans le domaine politique est encore un phénomène relativement récent et elle est compliquée par l'ambiguïté qui entoure le terme résultant de son étymologie à multiples facettes. La réconciliation est largement critiquée comme étant ambiguë, teintée de significations religieuses et prédisposée aux manœuvres politiques. Quoique de nombreux chercheurs aient analysé d'un œil critique la façon dont le terme a été utilisé par le gouvernement canadien au cours des dernières années, ce travail n'a pas encore été complété par une analyse généalogique qui demande quand, pourquoi et comment la réconciliation fut introduite dans des discussions sur les rapports politiques entre le Canada et les peuples autochtones. Dans cet article, l'auteure dessine les grandes lignes d'un début d'une généalogie de la réconciliation dans les rapports entre les peuples autochtones et le Canada par 1) un examen du concept tel qu'il fut introduit dans les décisions de la Cour suprême et le travail de la Commission royale sur les peuples autochtones et 2) une enquête de la manière dont le concept en est venu à être inclus dans ces textes fondamentaux. En examinant ces utilisations du terme, ainsi que la confusion conceptuelle qui les entoure, cet article vise à éclairer les bases sur lesquelles reposent les débats contemporains portant sur la réconciliation et suggérer quelques outils pour évaluer les utilisations purement rhétoriques du terme.

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Introduction

While the concept of reconciliation has become ubiquitous in contemporary Canadian politics, its importation into the political sphere is still a relatively recent phenomenon and is complicated by the ambiguity that surrounds the term as a result of its multifaceted etymology. Reconciliation is widely critiqued by political theorists and transitional justice scholars for being ambiguous, tinged with religious meanings, and susceptible to political manipulation. While many scholars have critically analysed how the term has been used by the Canadian government in recent years, this work has yet to be complemented by a genealogical analysis asking when, why, and how reconciliation was first brought into discussions of political relationships between Canada and Indigenous peoples. This article seeks to remedy this gap in historical understanding by sketching out the beginning of a genealogy of reconciliation through 1) an examination of the concept as it was introduced in decisions of the Supreme Court and the work of the Royal Commission on Aboriginal Peoples, and 2) an inquiry into how the concept came to be included in these key texts. By exploring these early deployments of the term and considering how they are reflected in the scholarship on constitutional reconciliation, I hope to shed some light on the foundations of contemporary debates over reconciliation.

The paper is comprised of three main sections. The first grapples with the concept of reconciliation, explores various definitions of the concept and debates over its use in politics, and presents a variety of distinctions drawn from the literature that are useful for parsing the differing rhetorical deployments of reconciliation as a political concept. The second section explores the invocations of reconciliation in the Aboriginal rights jurisprudence of the Supreme Court of Canada and the work of the Royal Commission on Aboriginal Peoples and considers how these conceptions of reconciliation can be understood in the light of the definitional distinctions. The third section explores how the conceptual variation between different invocations of this contested term is also reflected in some of the scholarship on constitutional reconciliation that has emerged in response to the Supreme Court's Aboriginal rights jurisprudence. The paper concludes with some reflections on what can be gleaned from this exercise of tracing the beginnings of a genealogy of reconciliation in Indigenous — non-Indigenous relations in Canada and on the implications of the conceptual confusion that has surrounded the use of the language of reconciliation in this context since its emergence.

I. Reconciliation: Engaging with a Multifaceted and Contested Concept

The concept of reconciliation has given rise to many debates about its meaning and practice — abstract and theoretical as well as practical and contextually specific. As Erin Daly and Jeremy Sarkin remark, "[i]t is certainly ironic that a word that is fundamentally about cohesion can have so many different and at times competing meanings."[1] Yet, the most widespread consensus that seems to exist about reconciliation is that the concept is rife with an excess of meanings, to the point where some argue this leaves it devoid of meaning.[2] Many authors raise concerns about this multiplicity of meanings, fearing it leaves the concept open to exploitation.[3] This ambiguity around the concept of reconciliation points to how critical it is to investigate the use of the term in order to understand its effects in Canadian politics. Indeed, Erik Doxtader suggests that reconciliation can be understood as a rhetorical concept in the sense that the idea of reconciliation cannot be divorced from the practice of reconciliation; its meaning is embodied in and created through its mobilization in discourse.[4]

A. Dimensions of Reconciliation

1. Definitions

The concept of reconciliation is rooted in several places outside the political sphere — in family law, finance, and theology, for instance. Its many meanings turn around a common core linked to the notion of harmony; its most general sense is "[t]he action of restoring estranged people or parties to friendship."[5] In law, this is applied as "[t]he settlement of differences after an estrangement," [6] or as "[t]he renewal of amicable relations between two persons who had been at enmity or variance; usually implying forgiveness of injuries on one or both sides."[7] In family law in particular it refers to the "[v]oluntary

1 Erin Daly & Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press, 2007) at 181.

2 See e.g. Jens Meierhenrich, "Varieties of Reconciliation" (2008) 33:1 Law & Soc Inquiry 195 at 196; Jonathan VanAntwerpen, "Reconciliation Reconceived: Religion, Secularism, and the Language of Transition" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 25 at 46.

3 Daly & Sarkin, *supra* note 1 at 12; Erik Doxtader, "Reconciliation — A Rhetorical Concept/ion" (2003) 89:4 QJ Speech 267 at 268.

4 Doxtader, *supra* note 3 at 286.

5 *The Oxford English Dictionary*, 2nd ed, *sub verbo* "reconciliation."

6 *Pocket Dictionary of Canadian Law*, 3rd ed, *sub verbo* "reconciliation."

7 *Black's Law Dictionary*, 4th ed, *sub verbo* "reconciliation."

resumption, after a separation, of full marital relations between spouses."[8] In financial accounting, the type of harmony implied is that of consistency or sameness rather than amicability; there, reconciliation refers to "the process of comparing information that exists in two systems or locations, analyzing differences and making corrections so that the information is accurate, complete and consistent in both locations."[9] In Christian theological understandings, the harmony in question pertains to the relationship between a person and God or the Church, where reconciliation refers to "[t]he action of restoring humanity to God's favour, esp. as through the sacrifice of Christ; the fact or condition of a person's or humanity's being reconciled with God."[10] This takes particular form in the Catholic Church in the Sacrament of Reconciliation, where a person who has sinned undertakes a process of confession, penance, and absolution to re-establish the relationship that was previously established with God and the Church "through the contracts of Baptism, Confirmation, and Communion."[11]

While "harmony" runs through differing instantiations of the concept of reconciliation, its implications vary. The power relations that surround what is being reconciled, who is doing the reconciling, how reconciliation is pursued, and the nature of the desired outcome of reconciliation are not at all the same in the different contexts where the concept is used. Further complicating the discussion, "reconciliation" can refer to a process or to an outcome. Finally, there is another way of understanding reconciliation that is not so harmony-centred: as Paulette Regan notes, "*Webster's Dictionary* defines 'reconcile' in two ways: 'to restore to friendship or harmony' or 'to cause to submit to or accept something unpleasant'."[12] The stark difference between these understandings, more so than the nuances between the other definitions, highlights how much the implications can differ depending on how, when, and why the concept is used.

2. Contested Meanings

Many difficulties arise in taking the concept of reconciliation out of these definitional contexts and seeking to apply it in politics. Resolving interpersonal disputes between two people — reconciliation between formerly estranged

8 *Black's Law Dictionary*, 10th ed, *sub verbo* "reconciliation."

9 University of Minnesota "Administrative Procedure: Reconciliation of Balance Sheet Accounts", *University Policy Library*, online: <policy.umn.edu/finance/reconciliation-proc03>.

10 *The Oxford English Dictionary*, *supra* note 5.

11 David Garneau, "Imaginary Spaces of Conciliation and Reconciliation" (2012) 46:2 West Coast Line 28 at 36.

12 Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010) at 60.

spouses, for instance — is one thing, but it cannot be equated with resolving disputes between large groups of people. This is particularly the case as groups cannot be assumed to be internally homogeneous or mutually exclusive, so it is not as simple as saying the difference lies in reconciling two sets of interests rather than two people. If one were trying to transpose the financial conception of reconciliation to politics, there would be a host of factors regarding relations of power to take into account. Finally, though not all scholars agree,[13] some take issue with making room for religion in political reconciliation, and question whether reconciliation is even appropriate for politics. This stems from concerns that a religious understanding of reconciliation rests on a sense of submissiveness, penance, or pre-emptive harmony,[14] and more broadly that it violates the separation of religion and politics.[15] Discomfort over the religious associations have led some to push for secularizing political reconciliation.[16]

Reconciliation as a political concept has been further challenged for being a tool of political manipulation wielded in the service of power to legitimize the status quo. While reconciliation may be constructively linked to legitimization in the establishment of a new democratic regime following civil conflict, it can have problematic implications in non-transitional polities characterized by large disparities in political power between the victims and perpetrators of historical injustice. There, reconciliation discourse may be deployed to legitimize the existing structure of power by dissociating it from the injustices of the past and the colonial foundations of the state.[17]

This is indeed one of several concerns raised in recent years regarding the use of the concept of reconciliation in the Canadian context, which effectively pits the state's desire for closure against Indigenous peoples' desire for justice.

13 Susan Dwyer, "Reconciliation for Realists" (1999) 13:1 Ethics & Intl Affairs 81 at 82-83, 97; Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford: Oxford University Press, 2012).

14 Meierhenrich, *supra* note 2 at 203; Brandon Hamber & Gráinne Kelly, "Beyond Coexistence: Towards a Working Definition of Reconciliation" in Joanna R Quinn, ed, *Reconciliation(s): Transitional Justice in Postconflict Societies* (Montreal: McGill-Queen's University Press, 2009) 286 at 287.

15 Darrel Moellendorf, "Reconciliation as a Political Value" (2007) 38:2 J Social Philosophy 205 at 213; VanAntwerpen, *supra* note 2.

16 VanAntwerpen, *supra* note 2 at 45.

17 Brenna Bhandar, "Anxious Reconciliation(s): Unsettling Foundations and Spatializing History" (2004) 22 Environment & Planning D: Society & Space 831; Michael McCrossan, "Contaminating and Collapsing Indigenous Space: Judicial Narratives of Canadian Territoriality" (2015) 5:1 Settler Colonial Studies 20 [McCrossan, "Indigenous Space"]; Paul Muldoon & Andrew Schaap, "Aboriginal Sovereignty and the Politics of Reconciliation: the Constituent Power of the Aboriginal Embassy in Australia" (2012) 30 Environment & Planning D: Society & Space 534.

There are many, inter-related elements to this critique of the use of reconciliation with respect to relations between Indigenous peoples and the state. Talk of reconciliation has been criticized for being overly and narrowly focused on redress for the residential schools policy to the exclusion of addressing the broader scope and structures of colonial injustice.[18] It has also been criticized for imposing an unwarranted sense of closure,[19] eliding a proper acknowledgement and understanding of past injustices and continued wrongdoing,[20] and avoiding the need for material reparations and structural transformation.[21] A key example is the notion that state apology discursively manufactures temporal boundaries that separate contemporary Canadian society from its past colonial injustices. In the process, the state erases links between historical and contemporary colonial violence and the continuing harms, benefits, and responsibilities that stem from that violence, and produces a narrative of Canadian progress and benevolence.[22] The result, Pauline Wakeham argues, is that "an emerging dominant formulation of reconciliation works to secure a belief in a national imaginary of Canadian civility that overwrites ongoing power asymmetries and gross inequities."[23]

A further concern is that discourses of reconciliation delegitimize contemporary and future Indigenous resistance to state actions,[24] while challenging and reframing these discourses drains time and energy that could be spent on rebuilding and resurgence within Indigenous communities.[25] Also, there is contestation of the "re" in reconciliation, as some argue that conciliation must precede reconciliation and that this has never truly taken place in the

18 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 108-109; Jennifer Henderson & Pauline Wakeham, "Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada" (2009) 35:1 English Studies in Can 1 at 2, 4 [Henderson & Wakeham, "Colonial Reckoning"].

19 Penelope Edmonds, *Settler Colonialism and (Re)conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings* (Hampshire, UK: Palgrave Macmillan, 2016) at 17; Henderson & Wakeham, "Colonial Reckoning", *supra* note 18 at 7; Leanne Simpson, *Dancing On Our Turtle's Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence* (Winnipeg: ARP Books, 2011) at 22.

20 Simpson, *supra* note 19 at 21.

21 Coulthard, *supra* note 18 at 120; Pauline Wakeham, "The Cunning of Reconciliation: Reinventing White Civility in the 'Age of Apology'" in Smaro Kamboureli & Robert Zacharias, eds, *Shifting the Ground of Canadian Literary Studies* (Waterloo: Wilfrid Laurier University Press, 2012) 209 at 211.

22 Eva Mackey, "The Apologizers' Apology" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: University of Toronto Press, 2013) 47 [Henderson & Wakeham, *Reconciling Canada*]; Wakeham, *supra* note 21 at 209.

23 Wakeham, *supra* note 21 at 210.

24 Edmonds, *supra* note 19 at 17; Simpson, *supra* note 19 at 22.

25 Simpson, *supra* note 19 at 24.

Canadian context.[26] Many scholars have pointed out that reconciliation seems to come at the expense of a meaningful recognition of Indigenous sovereignty and autonomy.[27] Not wholly unlike concerns about religious articulations of reconciliation, this suggests that where both Canadian state and Indigenous sovereignties are at stake, reconciliation rests on a requirement of submission.

The discussion above highlights how fraught the term "reconciliation" can be depending on how, why, and in which context it is used. So, why start using reconciliation with respect to relationships between Indigenous peoples and the Canadian state in the first place? To understand that, we need to know who started using that term, and when and how, before we can work to understand the discursive life the concept has taken on in the Canadian political landscape.

B. Unpacking Reconciliation: Some Analytical Tools

1. Resignation, Consistency, or Relationship?

Legal scholar Mark Walters suggests that reconciliation can be understood as broadly having three main meanings: "reconciliation as resignation," "reconciliation as consistency," and "reconciliation as relationship." All three involve some form of striving for harmony, but differ in being more or less one-sided.[28] The first, which refers to "people being reconciled to their fate, in the sense of accepting or being resigned to a certain state of affairs that is unwelcome but beyond their control," is necessarily an asymmetrical form of reconciliation.[29] Reconciliation as consistency refers to the process of "reconciling propositions, facts, ideas, statements, interests, or rights, rather than people,"[30] exemplified in the form involved in financial accounting. This can be symmetrical or asymmetrical, depending on whether adjustments or compromises are made on one or both sides.[31] This form thus entails "rendering inconsistencies consistent."[32] Contrary to the first two forms, "reconciliation as relationship," which refers to the restoration of amicable relations between people or communities, must

26 Garneau, *supra* note 11 at 35. On conciliation and reconciliation as concepts for framing political relationships in Canada, see Hannah Wyile, "Lost in Translation? Conciliation and Reconciliation in Canadian Constitutional Conflicts" (2016) 54 *Intl J Can Studies* 83.

27 Coulthard, *supra* note 18 at 127; Dale Turner, "On the Idea of Reconciliation in Contemporary Aboriginal Politics" in Henderson & Wakeham, *Reconciling Canada*, *supra* note 22, 100 at 110-111 [Turner, "Idea of Reconciliation"].

28 Mark D Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Kymlicka & Bashir, *supra* note 2, 165 at 167.

29 *Ibid* at 167.

30 *Ibid* at 168.

31 *Ibid* at 167.

32 *Ibid* at 167.

to some extent be symmetrical or reciprocal, for relations cannot be restored without the parties agreeing the conflict has been resolved.[33]

The distinctions drawn by Walters are similar to those developed by Daly and Sarkin.[34] Religious understandings of reconciliation, "which demand[] change from one side — the penitent — to permit embrace by the other side,"[35] could signify resignation or consistency; reconciliation may speak to an individual's relationship with God or the church, but the form in question is not reciprocal or symmetrical. Daly and Sarkin refer to what Walters calls reconciliation as consistency as "[r]econciliation as unity," also pointing to the example of financial accounting, where "[t]he goal here is to match the two items and to eliminate the difference between the two" out of which results an equal balance, a "perfect unity."[36] When this kind of reconciliatory logic is applied to a group of people, the result of the adjustments required to address conflict is that "the boundaries between the different groups erode and their distinctive qualities meld together" — a prospect that may not be palatable to conflicting groups in diverse societies.[37] Daly and Sarkin point to family law for examples of what Walters calls reconciliation as relationship, a form that requires compromises on both sides and yet "does not require the two sides to give up their identity."[38] Lastly, Daly and Sarkin introduce a fourth mode of reconciling inconsistencies, drawn from the theory of cognitive dissonance, that involves seeking to "find some overarching theory that allows both to flourish as they are," such that "[t]he reconciliation is the overarching idea that accommodates both: while the items have not changed, the disjunction — the source of the conflict — has disappeared because the new principle suits both comfortably."[39] This approach might be understood as another form of reconciliation as relationship which rather than making adjustments to one or both sides, reframes the nature of the relationship between them.

Walters makes a further distinction between his three forms: while reconciliation as consistency "is a process that can take place independently of the attitudes of people who might be affected (although those people may or may not accept the results)…[r]econciliation as either resignation or relationship cannot be imposed from without; it is a condition at which people arrive themselves."[40]

33 *Ibid* at 168.
34 *Supra* note 1.
35 *Ibid* at 182.
36 *Ibid* at 181.
37 *Ibid* at 182.
38 *Ibid* at 182.
39 *Ibid* at 187.
40 Walters, *supra* note 28 at 168.

Walters notes that reconciliation may be deployed as either an empirical or a normative concept:

> It may be possible to say of two former adversaries that they came to an agreement and are now, as a matter of fact, reconciled. But it may also be possible to say that good relations between two peoples with opposing cultural traditions necessitate an indefinite search for reconciliation, so that reconciliation in this case is not a fact as much as a normative principle that guides decision-making on an ongoing basis.[41]

Of the three forms, Walters describes reconciliation as relationship as "a morally rich sense of reconciliation."[42]

2. Relations of Opposition and Relations of Oppression

Bert van Roermund explains that to understand the meaning of reconciliation, we must consider the context in which it is being used, specifically, whether the concept is being applied within "a relation of *opposition*" or a "relation of *oppression*."[43] He presents "reconciling contradictory statements," "reconciling seemingly unbridgeable positions in negotiations," and "reconciliation between former friends who became alienated" as constituting examples of reconciliation in relations of opposition.[44] These all differ in nature from relations of oppression, which are characterized by the exercise of power.[45] Van Roermund further distinguishes between two types of oppression: criminal oppression, where an offender exercises power over a victim, which might be addressed through a form of social reconciliation; and political oppression, characterized by a claim "to further the *whole* of … a polity by oppressing *part* of it. In politics, oppression is accompanied invariably by the claim that it occurs *on behalf of* the public order or the general interest."[46] Van Roermund writes:

> political oppression operates at the level of representation. It relies on ideology to legitimise its action. It addresses itself to the oppressed as subjects of law, only to deny them their very status as legal subjects. Political oppression, therefore, is cynical on the part of the perpetrators and humiliating for their victims.[47]

41 *Ibid* at 169.
42 *Ibid* at 168.
43 Bert van Roermund, "Rubbing Off and Rubbing On: The Grammar of Reconciliation" in Emilios Christodoulidis & Scott Veitch, eds, *Lethe's Law: Justice, Law and Ethics in Reconciliation* (London, UK: Hart Publishing, 2001) 175 at 175 [emphasis in original], DOI: <10.5040/9781472562326.ch-010>.
44 *Ibid* at 175.
45 *Ibid* at 175.
46 *Ibid* at 175-176 [emphasis in original].
47 *Ibid* at 176.

As distinct from both the social reconciliation in contexts of criminal oppression and the forms of reconciliation relevant to relations of opposition, relations of political oppression require a political form of reconciliation that address all the components that characterize it — not only the injustices in question but the ideologies that justified it and the "cynicism and humiliation" to which it has given rise.[48]

3. Political Reconciliation vs. Ideological Reconciliation

Andrew Schaap offers further insight regarding the relation between political reconciliation and the workings of ideology, elucidating how reconciliation itself can be wielded as an ideological tool. Schaap sees the promise of reconciliation in the possibility that

> in contesting the significance of the social world according to the conflicting perspectives brought to bear on it, that world might become more common to those engaged in struggle. When brought to bear on political relations between indigenous and settler societies in Australia, for instance, the distributive, reparative and constitutional conceptions of reconciliation might intersect to reveal what is at stake in coming to terms with the legacy of colonization.[49]

This is only one form that reconciliation may take in the political realm. Enabling this political variety requires engaging in resistance to the ways reconciliation may instead manifest in more ideological forms. For Schaap, a single, united, socially harmonious political community cannot be taken for granted, and approaches that conceive of reconciliation as "'settling accounts', 'healing nations' and 'restoring community'" [50] belie an ideological tendency towards re-inscribing assumed commonality, which constitutes an injustice towards those who have not consented to the polity's terms of association.[51] In distinguishing between ideological reconciliation that reinforces the status quo and political reconciliation that challenges it, we must be attentive to the ways in which

> reconciliation often becomes ideological precisely to the extent that it domesticates or elides those antagonistic social relations that are constituted through material relations of power. Politicization depends on contesting the political unity in which

48 *Ibid* at 176.

49 Andrew Schaap, "Reconciliation as Ideology and Politics" (2008) 15:2 Constellations 249 at 251 [Schaap, "Reconciliation"].

50 Andrew Schaap, "Agonism in Divided Societies" (2006) 32:2 Philosophy & Social Criticism 255 at 258.

51 *Ibid*; Schaap, "Reconciliation", *supra* note 49 at 259.

> the terms of recognition are inscribed, the possibility of making visible a rival image of the common.[52]

Understanding the nature of claims of reconciliation thus requires analyzing their orientation towards both the symbolic and material dimensions of power and whether they seek to reify unity within a singular political community or allow for contestation of the terms of political association.

II. Reconciliation in Indigenous — Settler Relations in Canada

Many of the critiques of reconciliation in the Canadian context were elaborated in response to political debate focused on redress for the residential schools policy, under which more than 150, 000 Indigenous children were removed from their families, communities and lifeways and sent to state-funded, church-run boarding schools to be assimilated into Christian and European ways of being. Debate centred on the 2006 Indian Residential Schools Settlement Agreement and the redress measures that stemmed therefrom, including the establishment of the Truth and Reconciliation Commission (TRC). The turn to reconciliation within the movement for redress came as calls for a public inquiry into residential schools were met with political intransigence, and grassroots organizers were increasingly influenced by the proceedings of the South African TRC in the mid-1990s.[53] However, use of the concept also predates the establishment of the South African TRC, which tells us that the South African influence cannot be wholly responsible for the advent of reconciliation discourse in Canada. Indigenous people remind us that "reconciliation is not new": Leanne Simpson notes that "Indigenous Peoples attempted to reconcile our differences in countless treaty negotiations, which categorically have not produced the kinds of relationships Indigenous Peoples intended,"[54] and in an interview with Rosemary Nagy, Kwakwaka'wakw Hereditary Chief Robert Joseph explains that "Aboriginal people, throughout time, have known and practiced reconciliation, long before the experts ever came, long before the truth commissions were ever set up. Through the millennia we have had ceremonies and rituals

52 Paul Muldoon & Andrew Schaap, "Confounded by Recognition: The Apology, the High Court and the Aboriginal Embassy in Australia" in Alexander Keller Hirsch, ed, *Theorizing Post-Conflict Reconciliation: Agonism, Restitution and Repair* (London: Routledge 2012) 184 at 193.

53 Rosemary Nagy, "The Truth and Reconciliation Commission of Canada: Genesis and Design" (2014) 29:2 CJLS 199 at 209-210.

54 Simpson, *supra* note 19 at 21.

that attempt to bring about that reconciliation."[55] Of course, such practices engaged in by Indigenous peoples over the millennia were not called "reconciliation," but had their own names in Indigenous languages and thus did not come with the same etymological baggage that surrounds what we are calling reconciliation today. So, where do we look to understand how this conversation about reconciliation, that is taking place in the languages of the European colonizers, took shape?

The scholarship on reconciliation with Indigenous peoples in Canada points to two main sources for contemporary use of the term: the Supreme Court of Canada's jurisprudence on Aboriginal rights,[56] and the Royal Commission on Aboriginal Peoples (RCAP).[57] In both cases, the development of a conception of reconciliation can be traced to the early 1990s. The significance of these developments can be seen in the central place that reconciliation has come to occupy in Aboriginal rights jurisprudence, and in the fact that a key component of the government's response to the RCAP final report was issuing a Statement of Reconciliation, following which the term "reconciliation" has appeared year after year in the previously-titled Department of Indian Affairs and Northern Development's departmental plans.[58]

A. The Supreme Court of Canada, Section 35 and Reconciliation

A search of the Supreme Court of Canada's decisions pertaining to Aboriginal rights and title reveals that the two earliest instances where the Court invoked the concept of reconciliation came in *R v Sparrow* in 1990 and in *R v Van der Peet* in 1996.[59] While the latter more clearly highlights reconciliation as a nor-

55 Nagy, *supra* note 53 at 213. On Haudenosaunee traditions of reconciliation from before contact with Europeans, see Walters, *supra* note 28 at 170-171.

56 See e.g. Bhandar, *supra* note 17; Dwight G Newman, "Reconciliation: Legal Conception(s) and Faces of Justice" in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008) 80; Turner, "Idea of Reconciliation", *supra* note 27 at 106-108.

57 Coulthard, *supra* note 18 at 108; Turner, "Idea of Reconciliation", *supra* note 27 at 102-106.

58 Government of Canada, "Departmental Plans and Results Reports for Indigenous and Northern Affairs Canada" (9 November 2017), *Indigenous and Northern Affairs Canada*, online: <aadnc-aandc.gc.ca/eng/1359569600624/1359569658365>.

59 Given the genealogical focus of this article on understanding where reconciliation first came from, the analysis here is limited to these earliest cases. The Court has extended, shifted and elaborated on the reconciliation doctrine in many subsequent cases. For analyses of more recent uses, see John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17; Constance MacIntosh, "The Reconciliation Doctrine in the McLachlin Court: From a 'Final Legal Remedy' to a 'Just and Lasting Process'" in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 201 [MacIntosh, "The Reconciliation Doctrine"]; Constance MacIntosh, "*Tsilhqot'in Nation v*

mative goal, scholarship has addressed both cases in analysing Court doctrine on reconciliation.[60]

1. R v Sparrow (1990)

Aboriginal and treaty rights were enshrined in section 35 of the *Constitution Act, 1982*; however, the document did not provide a substantive definition of these rights. A series of First Ministers' Conferences aimed at elucidating the details of section 35 ended in failed negotiations in 1987.[61] Indigenous nations then turned to litigation, and it was left to the courts to interpret the meaning of section 35. The Supreme Court's first decision on the matter came in 1990 in *R v Sparrow*.[62] The passage from the decision that deals with reconciliation reads:

> Section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts aboriginal rights. The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*, but must be read together with s. 35(1). 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.[63]

Where exactly the term reconciliation, and where the meaning given by the Court, comes from is unclear. There is no mention of reconciliation in the earlier 1986 decision of the BC Court of Appeal in *R v Sparrow*.[64] The term ap-

BC: Reconfiguring Aboriginal Title in the Name of Reconciliation" (2014) 47:1 UBC L Rev 167 [MacIntosh, "Reconfiguring Aboriginal Title"]; Michael McCrossan, "Shifting Judicial Conceptions of 'Reconciliation': Geographic Commitments Underpinning Aboriginal Rights Decisions" (2013) 31 Windsor YB Access to Just 155 [McCrossan, "Shifting Judicial Conceptions"]; McCrossan, "Indigenous Space", *supra* note 17; Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2:1 Indigenous LJ 1; Newman, *supra* note 56.

60 Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993; Brian Bird, "Federal Power and Federal Duty: Reconciling Sections 91(24) and 35(1) of the Canadian Constitution" (2011) 16 Appeal 3; McCrossan, "Shifting Judicial Conceptions", *supra* note 59; McNeil, *supra* note 59; Newman, *supra* note 56.

61 Gina Cosentino & Paul LAH Chartrand, "Dream Catching Mulroney Style: Aboriginal Policy and Politics in the Era of Brian Mulroney" in Raymond B Blake, ed, *Transforming the Nation: Canada and Brian Mulroney* (Montreal: McGill-Queen's University Press, 2007) 294 at 297-298.

62 [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* SCC cited to SCR]. See generally Bird, *supra* note 60 at 8.

63 *Ibid* at 1077.

64 *R v Sparrow* (1986), 26 DLR (4th) 246, [1987] 2 WWR 557 (BCCA).

pears three times in the Supreme Court hearing transcript, but in none of these instances is it used in the same fashion as in the decision. One is a question about consistency, with Justice Sopinka querying a lawyer about how two arguments in his submissions could be reconciled.[65] The other uses refer to the reconciliation of interests: the lawyer for the National Indian Brotherhood, an intervenor in the case, referred to the reconciliation of the interests of Indigenous peoples and the interests of others,[66] and the lawyer for the Attorney General of Québec spoke of reconciliation by federal fisheries officials of the interests of Indigenous and non-Indigenous fishers.[67]

The version of reconciliation put forth by the Supreme Court in *Sparrow* presents a formulation that "functions as a restraint on governmental action."[68] It is rooted in an approach to section 35 that is analogous to the justification test for section 1 of the *Charter*, inspired by the scholarship of Brian Slattery,[69] and reflected the shift in the balance between parliamentary supremacy and judicial review embodied generally by the 1982 constitutional changes.[70] While this reconciliation requirement in *Sparrow* mitigated the impacts of parliamentary supremacy on Aboriginal rights, it did not eradicate them entirely. Reading the passage about reconciliation with sections of the decision that renounce the "old rules of the game" in relations between Canada and Indigenous peoples, on one side, and sections that pronounce sovereignty to be vested in the Crown on the other, has led to questions about the transformative potential of the vision of reconciliation in *Sparrow*. Some suggest that even though the Court maintained colonialist attitudes about sovereignty, "the decision nevertheless provides an opening to question the legitimacy of Crown sovereignty over Aboriginal peoples."[71] For Minnawaanagogiizhigook, though, this still falls far short of a reconciliation shaped by the goal of engagement between Canadian law and Indigenous legal orders in their own right, as it only initiates a shift within a form of Canadian law that continues to subjugate Indigenous legal orders.[72]

65 *R v Sparrow*, [1990] 1 SCR 1075 (Transcript, 3 November 1988, at 101).

66 *Ibid* at 48.

67 *Ibid* at 130-131.

68 Newman, *supra* note 56 at 82; McCrossan, "Shifting Judicial Conceptions", *supra* note 59 at 155.

69 McCrossan, "Shifting Judicial Conceptions", *supra* note 59 at 166; Newman, *supra* note 56 at 81.

70 McNeil, *supra* note 59 at 2-3.

71 Kiera L Ladner & Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 263 at 272.

72 Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions*

Recalling Walters's different forms, then, the reconciliation advanced in *Sparrow* appears to be reconciliation as consistency, where the exercise of federal power must be consistent with federal duty, the two being in a relation of opposition. As Minnawaanagogiizhigook's critique highlights, *Sparrow's* reconciliation as consistency is not a form of reconciliation that meaningfully and substantively engages with the relations of oppression between Indigenous peoples and the Canadian state,[73] even if, as McCrossan writes, *Sparrow* "presents a vision of reconciliation that is underscored by federal duty (and responsibility) to protect the interests of Aboriginal people."[74]

2. R v Van der Peet (1996)

Six years later, reconciliation was given a different, more central place in the Court's interpretation of section 35 in *R v Van der Peet*.[75] The term appears many more times in this decision, with key passages stating:

> 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.[76]
>
> …
>
> The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.[77]

As with *Sparrow*, the meaning reconciliation is given in the Supreme Court's decision is not foreshadowed in the lower court decision, wherein the only ref-

(Vancouver: UBC Press, 2007) 77 at 84. The limitations of the vision in *Sparrow* cannot necessarily be merely attributed to attitudes held by the Court however, as McCrossan has shown in his analysis of the hearing transcripts in "Shilfting Judicial Conceptions", supra note 59 at 165, "it would appear that Sparrow's own lawyer, in his submissions to the judiciary, unwittingly opened the door to the continuation of governmental regulatory regimes."

73 *Supra* note 72 at 80.

74 McCrossan, "Shifting Judicial Conceptions", *supra* note 59 at 160.

75 [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet* cited to SCR].

76 *Ibid* at para 31.

77 *Ibid* at para. 49.

erence to reconciliation is a direct quotation of the passage from *Sparrow*,[78] nor in the Supreme Court hearing transcripts, where the term does not appear at all.[79] Rather, this conception of reconciliation appears to be drawn from scholarship and jurisprudence in Canada, the United States, and Australia.[80] Chief Justice Lamer (as he then was) referred to the French text of section 35, *Calder v Attorney-General of British Columbia*, *Guerin v The Queen*, and the academic writings of Brian Slattery, David Elliot, Patrick Macklem, William Pentney, and Mark Walters in Canada; to the decisions of Chief Justice Marshall (as he then was) in *Johnson v M'Intosh* and *Worcester v Georgia* in the US; and to *Mabo v Queensland (No 2)* and statutory fishing rights in Australia.[81] Interestingly, none of these sources used the term "reconciliation," except for an excerpt from *Mabo* regarding the reconciling of customary rights with Western law and institutions.[82]

Thus, it seems to be largely an understanding of the exercise of reconciliation rather than the word itself that has been drawn from these sources. The use of reconciliation in *Van der Peet* represents a shift from *Sparrow*, "a changed emphasis on who must undertake accommodations to enable … reconciliation,"[83] which scholars have explained in varying ways. Jonathan Rudin argues that "the decision in *Van der Peet* is best understood as a reaction to the federal government's rejection of the Court's invitation to enter into substantive negotiations with Aboriginal people contained in *Sparrow*,"[84] suggesting that the institutional limitations on the role of the courts are such that "if the Court sees that the government will not even come to the table after they have managed to deal the Aboriginal players a bigger hand [to play at the negotiating table], then the pressure rises on the Court to retrench when the Aboriginal litigants return for even better cards."[85] Michael McCrossan, conversely, points to internal rather than external limitations on the Court's role, arguing that the shift is a reaction to the introduction of Indigenous territorial claims. He writes, "it is at the very moment in which Aboriginal rights … are linked to alternate conceptions of territorial space … that a majority of the Court shifts its understanding

78 *R v Van der Peet*, [1993] 5 WWR 459 at para 74, 80 BCLR (2d) 75 (CA), citing *Sparrow, supra* note 62 at 1109.

79 *R v Van der Peet*, [1996] 2 SCR 507 (Transcription of Tapes, 27 November 1995).

80 *Van der Peet*, *supra* note 75 at para 43; McNeil, *supra* note 59 at 5.

81 *Van der Peet*, *supra* note 75 at paras 32-42.

82 *Supra* note 75 at para 40, citing *Mabo v Queensland (No 2)* (1992), 175 CLR 1, 107 ALR 1 (HCA).

83 MacIntosh, "The Reconciliation Doctrine", *supra* note 59 at 205.

84 Jonathan Rudin, "One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada's Decisions in *R v Sparrow*, *R v Van der Peet* and *Delgamuuku v British Columbia*" (1998) 13 JL & Soc Pol'y 67 at 68.

85 *Ibid* at 86.

of reconciliation, offering instead a unified vision of sovereignty which ensnares Aboriginal peoples within 'Canadian' territorial and social space."[86]

The vision of reconciliation in *Van der Peet* is rife with assumptions about the nature of sovereignty, the right of the Crown to claim it, and the requirements of temporality that surround such claims.[87] A common concern is that, as Michael Asch argues, "the political rights of Indigenous peoples already existed at the time that Crown sovereignty was asserted and, therefore, it is the question of how the Crown gained sovereignty that requires reconciliation with the pre-existence of Indigenous societies and not the other way around."[88] In applying his analysis of different forms of reconciliation to *Van der Peet*, Walters concludes the Court implied reconciliation as consistency rather than as relationship, or even, "[t]o the extent that people are implicitly involved, … the formulation may suggest reconciliation as resignation [to Crown sovereignty]."[89] This too, in failing to grapple meaningfully with the issues that stem from the relations of oppression between Indigenous peoples and Canada, can be understood as an ideological form of reconciliation that reinforces a unitary political community rather than allowing for substantive contestation of the terms of association.

B. The Royal Commission on Aboriginal Peoples

Called in 1991 following the conflict at Kanehsatake and the collapse of the Meech Lake Accord, the work of the RCAP took place during the period between *Sparrow* and *Van der Peet*. The word "reconciliation" occupies a fairly prominent place in the final report issued in 1996, appearing over a hundred times. The term appears in some form in twenty-one supporting documents over the course of the Commission's mandate, including hearing transcripts, commissioned research studies, and publications issued by the Commission.[90] While these may have had an impact on the focus on reconciliation in its final

86 McCrossan, "Shifting Judicial Conceptions", *supra* note 59 at 157.

87 Bhandar, *supra* note 17; Coulthard, *supra* note 18 at 106-107; Ladner & McCrossan, *supra* note 71; McCrossan, "Shifting Judicial Conceptions", *supra* note 59; McNeil, *supra* note 59.

88 Michael Asch, *On Being Here To Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 11.

89 Walters, *supra* note 28 at 178.

90 This includes some duplicates due to translation. The documents containing references to reconciliation are items 103, 118, 200, 203, 219, 278, 279, 299, 303, 306, 332, 380, 468, 481, 504, 509, 517, 529, 530, 539, and 579 in the RCAP database available through Library and Archives Canada: Government of Canada, "Royal Commission on Aboriginal Peoples" (2 November 2016), *Library and Archives Canada*, online: <bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/introduction.aspx>.

report, it is also significant that the concept was present from the outset in the Commission's mandate.

The mandate was based on a report presented to Prime Minister Brian Mulroney by former Supreme Court Chief Justice Brian Dickson, who was appointed to consult on the terms of reference and membership of the Commission. In his report, Dickson notes that he "firmly believe[s] the proposed Royal Commission has the potential to be an important instrument of education and reconciliation,"[91] and says the proposed commissioners "share a common determination to make this Royal Commission a positive force for change and reconciliation."[92] The proposed terms of reference, which were adopted verbatim as the Commission's mandate, stated:

> the Commission may make recommendations promoting reconciliation between aboriginal peoples and Canadian society as a whole, and may suggest means by which aboriginal spirituality, history and ceremony can be better integrated into the public and ceremonial life of the country.[93]

Several references in the transcripts from public hearings and in RCAP publications suggest that the Commission embraced reconciliation from the outset, as pointed to in Dickson's report, and sought guidance on the topic from those who made submissions. For instance, during one hearing, Commissioner Mary Sillett stated, "[w]e are in the business of reconciliation, so I was wondering if you could offer any advice on public education or what can be done to address the different types of understanding that exist, particularly with the non-Aboriginal people, on these kinds of issues."[94] A year earlier, RCAP Co-Chair René Dussault said in opening remarks that:

> The Commission's primary objective is, in essence, to attempt to achieve a reconciliation but also to ensure that a much more adult and mature, a much more enlightened, relationship or vision is created between the aboriginal population, the aboriginal peoples and Canadians and the governments of this country that will

91 Canada, *Report of the Special Representative Respecting the Royal Commission on Aboriginal Peoples*, by Brian Dickson, *The Mandate Royal Commission on Aboriginal Peoples: Background Documents* (Ottawa, 1991) at 29.

92 *Ibid* at 20-21.

93 *Ibid* at 11.

94 Canada, Royal Commission on Aboriginal Peoples, Hearing Transcript (English Translation) 29 November 1993-3 December 1993 vol 1 (Le Nouvel Hôtel, Montreal, Québec: StenoTran, 1993), online: <data2.archives.ca/rcap/pdf/rcap-411.pdf> at 903.

> ensure that government policies are good policies rather than bad policies such as have, unfortunately, been all too common in the past.[95]

A discussion paper issued by the Commission in 1993 stated that "reconciliation between Aboriginal and non-Aboriginal people is at the heart of the mandate of the Royal Commission."[96] The document includes a chapter entitled "The Relationship" with a subsection called "The Goal: Equality, Respect and Reconciliation" in which the Commission discusses various aspirations and challenges linked to reconciliation.[97] Concluding with a series of questions for consideration at the next round of hearings, the discussion paper asserts that "[t]he goal for change is twofold: transformation in Aboriginal lives and reconciliation with non-Aboriginal people."[98]

This embrace of the concept of reconciliation did not go wholly unquestioned. Several concerns similar to those discussed above were raised by Commissioner Paul Chartrand in a question to representatives of the Christian Reformed Church in Canada:

> My last question has to do with […] a proposed need for reconciliation between Aboriginal peoples and other peoples. I confess nervousness with the idea and, before I can defend it with conviction, I would like to invite people's views about it.
>
> I am worried that the idea of reconciliation might be a second-best, perhaps second-best to a notion of true justice.
>
> I noted that in Australia, for example, some years ago there was a proposal for a national treaty […] that wasn't accepted by the government, purportedly on their view of what the country was prepared to accept. Instead, they established a Council for Reconciliation.
>
> When I see those sorts of things and when I am reminded that one scholar said, "Reconciliation means that one party has all the power, and the other side had better reconcile itself to that," I wonder if there might be a touchstone that might be more appealing. It […] is the notion of justice.[99]

95 Canada, Royal Commission on Aboriginal Peoples, Hearing Transcript 17 November 1992 vol 1, (Wendake, Québec City, Québec: StenoTran 1992), online: <data2.archives.ca/rcap/pdf/rcap-284.pdf> at 31-32.

96 Canada, Royal Commission on Aboriginal Peoples, *Focusing the Dialogue: Discussion Paper 2,* Public Hearings (Ottawa, Communications Group, 1993), online: <data2.archives.ca/rcap/pdf/rcap-445.pdf> at 18.

97 *Ibid* at 5.

98 *Ibid* at 63.

99 Canada, Royal Commission on Aboriginal Peoples, Hearing Transcript 15 November 1993 vol 1 (Chateau Granville, Vancouver, British Columbia: Stenotran 1993), online: <data2.archives.ca/rcap/pdf/rcap-399.pdf> at 86-88.

We can see from this and other statements made over the course of the Commission's mandate, that its conceptions of reconciliation were more attentive to critiques of the term, and also significantly more attentive to questions of relationality. This is borne out in the final report as well, which speaks of the importance of recognizing historical and ongoing injustices against Indigenous peoples and promising that they will not be continued or repeated.[100] The RCAP's vision of reconciliation is rooted in treaty relations and highlights the responsibilities of both Indigenous and non-Indigenous people for enacting reconciliation.[101] Foundational to this understanding of reconciliation are the principles of sharing and mutual respect.[102] Compared to the conceptions of reconciliation put forward by the Supreme Court, RCAP's vision is significantly more one of reconciliation as relationship, as it aims to enable a transformation of structural relations that brings about justice for Indigenous peoples and improves the relationship between Indigenous and non-Indigenous people.

III. Conceptual Confusion and Constitutional Reconciliation

Reconciliation can mean many different things to different people, and thus be used in different ways to serve varying political purposes. In the Canadian context, this is demonstrated by the way these two different visions of reconciliation, RCAP's and the Supreme Court's, appeared in discourse about Indigenous-Settler relations around the same time. The scholarship on Aboriginal rights and constitutional reconciliation is illustrative of this, as it employs the term in various ways, perhaps partly a reflection of the fact that the jurisprudence of the Supreme Court on reconciliation and Aboriginal rights[103] has shifted over the last three decades. Some scholars have adopted the phrase "constitutional reconciliation" as a general label for this jurisprudence, enveloping the Court's shifts within this label. For example, Jaime Battiste identifies constitutional

100 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Communication Group, 1996), online: <data2.archives.ca/e/e448/e011188230-01.pdf > at 7, 603.

101 *Ibid* at 7; Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Communication Group, 1996), online: <data2.archives.ca/e/e448/e011188230-02.pdf> at 17 [Canada, *Report of the RCAP*, vol 2].

102 *Supra,* Canada, *Report of the RCAP,* vol 2, note 101 at 430; Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol 5 (Ottawa: Communication Group, 1996), online: <data2.archives.ca/e/e448/e011188230-05.pdf> at 93.

103 McNeil, *supra* note 59; Newman, *supra* note 56; D'Arcy Vermette, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" (2011) 29:1 Windsor YB Access Just 55.

reconciliation, for the Court, as "a political process involving fair negotiations between holders of constitutional rights and powers, rather than constituting a final judicial remedy,"[104] a process that requires "understanding and respecting aboriginal rights and the search for a positive, durable, and living constitutional relationship."[105] In Battiste's assessment, the Court has provided ample guidance on this; the onus is on the Crown to fulfill its obligation to pursue constitutional reconciliation.[106]

James (Sákéj) Youngblood Henderson also draws attention to constitutional reconciliation as something that has been mandated through the entrenchment of Aboriginal and treaty rights in section 35. He describes it as follows:

> It is an ongoing constitutional process that involves converging different overlapping constitutional regimes with distinct epistemologies and legal traditions, to establish an enduring postcolonial constitutional relationship between the Aboriginal peoples and the divided Crown of the federal and provincial governments that corrects past wrongs. … [C]onstitutional reconciliation — literally, the reconciling of Canadian law with the Aboriginal and treaty rights entrenched within it — is an integral starting point for the overarching political, social, cultural, and economic process of reconciliation between Aboriginal peoples and the Canadian state.[107]

This take is grounded in a very particular reading of section 35. When Henderson writes of treaties reconciling "pre-existing Indigenous sovereignty with assumed Crown sovereignty" and refers to the reconciliation of Indigenous rights with constitutional supremacy, he is clear that section 35 constitutionalized the rights of Indigenous peoples but did not *create* them.[108] Henderson sees promise for a form of *sui generis* and treaty citizenship recognized through the embedding of Aboriginal and treaty rights in the Constitution,[109] but is not uncritical of the Court's approach to reconciliation, noting that it has at times wielded the concept in "strange and contradictory ways,"[110] because "[n]o consensus exists between the Crown and Aboriginal peoples" regarding meanings of reconciliation, and that the case law on Aboriginal and treaty rights reveals

104 Jaime Battiste, "Understanding the Progression of Mi'kmaw Law" (2008) 31 Dal LJ 311 at 346.
105 *Ibid* at 344.
106 *Ibid* at 346-347.
107 James (Sa'ke'j) Youngblood Henderson, "Incomprehensible Canada" in Henderson & Wakeham, *Reconciling Canada*, *supra* note 22, 115 at 115.
108 James (Sa'ke'j) Youngblood Henderson, "O Canada: 'A country cannot be built on a living lie'" in Kiera L Ladner & Myra J Tait, eds, *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal*, (Winnipeg: ARP Books, 2017) 277 at 284.
109 James (Sákéj) Youngblood Henderson, "*Sui Generis* and Treaty Citizenship" (2002) 6:4 Citizenship Studies 415.
110 *Supra* note 107 at 118.

significant limitations in the Court's interpretation.[111] Henderson calls for "a more radical transformation" that requires stepping outside Eurocentric and colonial epistemologies, conventions, practices, and institutions.[112] The insufficiency of narrow interpretations of section 35 is clear in his statement that "[c]onstitutional reconciliation requires more than an ex post facto assessment of the constitutionality of legislative action or the Crown's justified interest based on some contrived superiority."[113]

Kiera Ladner, though critical of the Court's interpretation of reconciliation, concurs with the reading in Battiste and Henderson's work that, as she puts it, "the courts have opened the door in making reconciliation a constitutional requirement,"[114] but adds the caveat that this is not currently reflected in state practice. Ladner challenges the notion that "culturally grounded Aboriginal rights claims have already been reconciled with the sovereignty of the state and have, thus, fortified the ultimate sovereignty of the Crown,"[115] and presents criteria for a more transformative understanding of reconciliation rooted in revitalizing original treaty relationships founded on principles of sharing, mutual respect, and mutual benefit that requires non-Indigenous people to acknowledge the violent foundations of the status quo and to give up privileges obtained through the violence of colonialism.[116] Reconciliation holds potential as a principle of legal interpretation applied alongside the interpretive principle of the honour of the Crown, but only if the aim is the implementation of treaty constitutionalism and the refusal of "the Court-spun Canadian fantasy of reconciliation known as merging the remnants of Indigenous sovereignty under the sovereignty of the Crown."[117] Ladner also draws a distinction between different forms of reconciliation, suggesting that reconciliation as a legal interpretive framework is a precursor to a broader process of political reconciliation, which she envisions as the "implementation [of treaty constitutionalism] without the limitations imposed by the standard interpretation of Section 35 or the defense of absolute Canadian sovereignty (de facto or de jure)."[118]

111 *Ibid* at 119.

112 *Ibid* at 119, 121, 123.

113 *Ibid* at 122.

114 Kiera L Ladner, "Take 35: Reconciling Constitutional Orders" in Annis May Timpson, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (Vancouver: UBC Press, 2009) 279 at 295.

115 Kiera L Ladner, "150 Years and Waiting: Will Canada Become an Honourable Nation?" in Ladner & Tait, *supra* note 108, 398 at 405-406.

116 *Ibid* at 407.

117 *Ibid* at 408. See also *ibid* at 410.

118 *Ibid* at 410.

Dale Turner provides a complementary analysis to Ladner's, challenging *Van der Peet*'s conception of Aboriginal rights as tied to distinctive cultures. He emphasizes that the differences between Canadian and Indigenous societies "are cultural *and* political," and that constitutional reconciliation must situate Indigenous cultural practices within Indigenous epistemologies and political practices.[119] He also challenges the Court's requirement that Indigenous claims be presented in terms cognizable to the common law, emphasizing that "characterizing Aboriginal rights as a form of reconciliation between pre-contact Aboriginal cultures and the unilateral assertion of state sovereignty *is not cognizable to Aboriginal ways of understanding the world*."[120] Thus, Henderson, Ladner, and Turner all seize on the Court's concept of constitutional reconciliation, but are critical of its particular vision of reconciliation. Emerging from their analyses are visions of constitutional reconciliation that foreground Indigenous philosophies and political systems and are much more transformative than the approaches of the Court or the Crown.

D'Arcy Vermette presents an account that is similarly critical of the Court's use of reconciliation, but uses the phrase "constitutional reconciliation" in a different fashion.[121] To him, "constitutional reconciliation" is the first of three components of the Court's reconciliation doctrine. He associates this with the form of reconciliation presented in *Sparrow*, calling it "constitutional reconciliation" because of its focus on federal powers and duties.[122] The other two forms he calls "historical reconciliation" and "contemporary reconciliation," which he associates with *Van der Peet* and *R v Gladstone* respectively, referencing the focus on the historical relationship between the Crown and Indigenous nations and the distinctive culture test in the former, and the contemporary relationship with non-Indigenous Canadian society in the latter.[123] Vermette is discernibly skeptical about the Court's approach, which he suggests merely puts a sheen on continuing to undermine Indigenous rights:[124]

> While reconciliation is undoubtedly a nice, attractive word, no reconciliation is actually taking place or being built as a result of or in relation to Canada's laws concerning the rights of Aboriginal peoples. … Canada's courts have created and interpreted

119 Dale Turner, "Indigenous Knowledge and the Reconciliation of Section 35(1)" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: University of Toronto Press, 2016) 164 at 175 [emphasis in original].

120 *Ibid* at 178 [emphasis in original].

121 Vermette, *supra* note 103.

122 *Ibid* at 58-59.

123 *Ibid* at 58, 60, 61-62.

124 *Ibid* at 71.

> a principle of reconciliation which embodies (some) nice language but offers little reconciling substance.[125]

In making this assessment, Vermette engages with Walters's description of the three forms of reconciliation. He argues that the emphasis on harmony in Walters's account "does not reflect the content found in the practice of the Supreme Court of Canada. Indeed, little harmony is brought […] through the Supreme Court's use of the principle of reconciliation."[126] While Vermette's overall point about the ramifications of the Court's approach may hold true, his etymological analysis is indicative of how deeply conceptual confusion pervades the conversation around reconciliation, as his point assumes a particular understanding of the idea of harmony.

The three forms of reconciliation that Walters outlines can be understood as each being geared at different meanings of harmony: in reconciliation as resignation, harmony is the absence of conflict, as choosing to reconcile oneself to a situation entails choosing not to contest or challenge it. Reconciliation as consistency is geared towards harmony as unity, identity, sameness, embodied in the image of columns of numbers tallying up to an identical result. Reconciliation as relationship, conversely, rests on a very different kind of harmony embodied in the unique way parties to a relationship seek a balanced way to live together amid their differences. This form of harmony does not necessitate sameness nor agreement in perpetuity. A more apt metaphor might be the form of harmony found in music, whereby two or more different notes pair to create sound that is both composed of and more than the sum of its parts. On this understanding, it is not the case that there is *no* rendering of harmony to be found in the Court's doctrines. Instead, there is a *particular* understanding of harmony advanced through a *particular* form of reconciliation — a substantively different form of harmony than we might find in Indigenous epistemologies, for example,[127] advanced through a process that conflicts with other understandings and practices of reconciliation.[128] The kind of harmony implied in any given invocation is of significant import. Vermette raises critical questions on this front, including why the Court invokes reconciliation with respect to the infringement of Aboriginal rights but does not do so with respect to non-Aboriginal rights.[129]

125 *Ibid* at 56.

126 *Ibid* at 58.

127 See e.g. Aaron Mills / Waabishki Ma'iingan, "What Is a Treaty? On Contract and Mutual Aid" in Borrows & Coyle, *supra* note 59, 208 at 236.

128 Coulthard, *supra* note 18 at 107.

129 *Supra* note 103 at 67.

Within this scholarship, then, we see varying uses of the concept of "constitutional reconciliation." It serves as a label for Court doctrine on Aboriginal and treaty rights, or for a segment of this doctrine, as in Vermette's work, but is also applied in countervailing ways that challenge Court doctrine and promote much more transformative visions of Indigenous-Settler relations. As such, Henderson seems quite right in suggesting that "it is clearer what constitutional reconciliation is not than what it will become."[130] Indeed, reconciliation discourse gets used to promote visions as widely divergent as, on the one hand, a reorientation towards a holistic order of treaty relationships that recognizes relationality and responsibility not just between all humans but between all beings,[131] and on the other, the mere invitation to Indigenous communities to sign agreements allowing them to participate in resource extraction within existing economic relations.[132] There is a distinct risk of reconciliation discourse allowing more powerful parties to claim changes are happening even though actual substantive transformations in relationships are not taking place. Amidst this political and conceptual murkiness, the work of these Indigenous scholars is emphatic about certain clear requirements for a just transformation of relationships. Their analyses are critical in considering political mobilizations of reconciliation discourse to determine whether they constitute political reconciliation of the kind described by Schaap and van Roermund, or the relational variety described by Walters, or are instead ideological efforts to protect the power relations of the status quo.

Conclusion

This initial foray into the early days of the emergence of reconciliation discourses in Canada shows that the concept's political life in this context has always been multifaceted. As Wakeham writes, "[d]espite the fact that the dominant discourse of reconciliation is framed as the product of a united national vision, the question of what reconciliation putatively means and what it wants is, in fact, deeply contested terrain."[133] Reconciliation can mean many different things and be put to many different uses, as is highlighted in the contrast between the pursuit of consistency embodied in Supreme Court jurisprudence and the more transformative relational vision put forward by the Royal

130 Henderson, *supra* note 107 at 122.

131 Mills, *supra* note 127 at 242; Simpson, *supra* note 19 at 109.

132 Guillaume Peterson St-Laurent & Philippe Le Billon, "Staking Claims and Shaking Hands: Impact and Benefit Agreements as a Technology of Government in the Mining Sector" (2015) 2 Extractive Industries & Society 590. For more on the encounter between these differing perspectives, see Coulthard, *supra* note 18 at ch 2.

133 Wakeham, *supra* note 21 at 211.

Commission. The former might be understood as more ideological, seeking to reinforce a pre-existing notion of a united political community.[134] The latter is more political in pushing back against this vision, highlighting the need for justice and structural transformation. This divergence of visions is also reflected in the scholarship around these political and legal developments, where constitutional reconciliation has become both a label for the Supreme Court's position on Indigenous-Crown relations and a banner for counter-visions that challenge Court doctrine and state practice.

With the relationship between Indigenous peoples and Canada, we are undeniably dealing with relations of oppression, and reconciliation in such a context, van Roermund reminds us, must address the power structures in which those relations are framed and the ideological justifications of violence that hold them in place. This is not a simple challenge. It requires building and maintaining political relationships, and also fighting back against ideological uses of reconciliation. These contradictory impulses have both shaped the rise of reconciliation discourses in Canada from early on, and have promoted using the same concept. Developing a better understanding of how, when and why "reconciliation" was drawn into the political sphere by various actors for different purposes will allow us to reflect on "what could be done with it that could not be done in its absence,"[135] to consider how reconciliation as a political concept both enables and limits our ability to transform relations between Indigenous and non-Indigenous peoples, and to understand the work of political contestation in challenging ideology oriented towards maintaining relations of oppression. In the meantime, considering the confusion that surrounds reconciliation and the varying ways it is deployed in Canadian constitutional law and politics, it is incumbent on those of us engaging with the concept to be attentive, self-reflexive, and specific in the ways we use the language of reconciliation.

134 Despite indications of a potentially promising shift away from the *Van der Peet* approach to reconciliation during the early years of Chief Justice McLachlin's (as she then was) tenure (see MacIntosh, "The Reconciliation Doctrine," *supra* note 59), assessments of recent judgements demonstrate reason for continued concern about the Crown and the Court seeking to fortify the supremacy of Crown sovereignty (see Borrows, *supra* note 59 at 20-21, 28-30, 33, 37; MacIntosh, "Reconfiguring Aboriginal Title", *supra* note 59 at 173-175).

135 Quentin Skinner, *Visions of Politics: Regarding Method*, vol 1 (Cambridge: Cambridge University Press, 2002) at 178.