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FEDERAL POWER AND FEDERAL DUTY: RECONCILING SECTIONS 91(24) AND 35(1) OF THE CANADIAN CONSTITUTION

By Brian Bird*

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I. INTRODUCTION

From 1867 to 1982, the relationship between the Crown and the Aboriginal peoples of Canada unfolded primarily through section 91(24) of the *Constitution Act, 1867*, which provides Parliament with exclusive legislative authority over "Indians, and lands reserved for the Indians."[1] Indeed, s. 91(24) was the only reference to Aboriginal peoples in the Canadian Constitution until s. 35(1) of the *Constitution Act*, *1982* came into force, recognizing and affirming the aboriginal and treaty rights of Aboriginal peoples in Canada. In the words of Charlotte Bell, s. 35(1) "was profoundly important in strengthening and protecting the rights of Aboriginal peoples in Canada and demanded a new model for the relationship between governments and Aboriginal peoples."[2]

Since 1982, a question has arisen as to whether s. 35(1) superseded s. 91(24) in terms of "mediating the relationship of Aboriginal peoples with the Crown — including rights protection — or whether section 91(24) of the *Constitution Act*, *1867* remains relevant in this relationship."[3] This paper proposes that s. 35(1) has not superseded s. 91(24) in the context of Crown-Aboriginal relations in Canada. In *R. v. Sparrow*, the Supreme Court of Canada held that the two provisions are to be read together; "federal power must be reconciled with federal duty".[4] This statement by the Court reveals that s. 91(24) is by no means irrelevant in the context of Crown-Aboriginal relations after 1982. Indeed, this paper argues that the coexistence of s. 91(24) and s. 35(1) translates into an obligation upon the federal

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1. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No 5.
2. Charlotte A Bell, "Beyond Space and Time — A Purposive Examination of Section 91(24) of the *Constitution Act, 1867*" in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin law, 2008) 95 at 96.
3. *Ibid*.
4. *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385, [1990] SCJ No 49 at para 62 (QL) [*Sparrow*].

government to exercise its exclusive legislative jurisdiction over Aboriginal peoples in Canada in order to fulfill the constitutional promise embedded within s. 35(1), namely the affirmation and recognition of aboriginal and treaty rights. This federal obligation comes into clearer focus when one considers the duty of the Crown to act honourably in all its dealings with Aboriginal peoples and the responsibility of the Crown to act as a fiduciary towards Aboriginal peoples in particular circumstances.

Section 91(24) of the *Constitution Act, 1867* provides the Parliament of Canada with "exclusive Legislative Authority" in relation to the classes of subjects "Indians, and Lands reserved for the Indians."[5] There is little evidence to indicate why the Fathers of Confederation opted to assign the federal government exclusive legislative authority in this domain, but the most plausible explanation appears to be the nation-to-nation relationship that characterized dealings between Aboriginals and the Crown in British North America since contact.[6] From the outset of Crown-Aboriginal relations in British North America, the Crown found itself responsible for protecting Aboriginals and their lands from the encroachment of settlers and exploitation by colonial governments. A renowned articulation of this responsibility and relationship is found in the *Royal Proclamation of 1763*, wherein King George III decreed that Aboriginals living under British rule "should not be molested or disturbed" by colonial governments or settlers with respect to lands "reserved to them."[7] The Crown responsibility to ensure the welfare and protection of the Aboriginal peoples under its rule emanated from the perception of Aboriginals as "victims of colonial expansion" and the belief that "a more distant level of government would better protect Indians against the interests of the local settlers."[8] At Confederation, this responsibility of the British Crown succeeded to the Crown in right of Canada by virtue of s. 91(24) of the *Constitution Act*, *1867*.

Until 1982, section 91(24) was the only reference to the Aboriginal peoples of Canada in the Canadian Constitution. The enactment of section 35(1) of the *Constitution Act, 1982* recognized and affirmed the existing aboriginal and treaty rights of the Aboriginal peoples of Canada. The Supreme Court of Canada first addressed the relationship between s. 91(24) and s. 35(1) in the 1990 decision of *R. v. Sparrow*. Acknowledging that the exclusive federal power to legislate in relation to "Indians, and Lands reserved for the Indians" continued after 1982, the Supreme Court of Canada held that this power "must, however, now be read together with s. 35(1)."[9] This requirement led the Court to acknowledge that s. 35(1) mandates that the power of the federal government pursuant to s. 91(24) be reconciled with the federal duty "to act in a fiduciary relationship with respect to aboriginal peoples" that is "trust-like, rather than adversarial".[10]

Since *Sparrow*, an increasingly broad conception of reconciliation emerged as the fundamental objective of s. 35(1). In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, Binnie J. held that "the fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[11] Charlotte Bell argues that "the scope

5. *Supra* note 1.
6. Bell, *supra* note 2 at 100.
7. *Royal Proclamation of 1763*, RSC, 1985, App II, No 1.
8. Douglas E Sanders, "Prior Claims: Aboriginal Peoples in the Constitution of Canada", in SM Beck and I Bernier, eds, *Canada and the New Constitution: The Unfinished Agenda*, vol 1 (Montreal: Institute for Research on Public Policy, 1983) 225 at 238.
9. *Sparrow*, *supra* note 4 at para 62.
10. *Ibid* at para 59.
11. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388, at para 1 [*Mikisew Cree*].

of section 35 may not be sufficient" to facilitate such an all-embracing form of reconciliation; the ability to do so may require turning to another constitutional source.[12] This paper proposes that the duty of the federal Crown inhered within s. 91(24) of the *Constitution Act, 1867* to provide for the welfare and protection of the Aboriginal peoples of Canada is that source. The broad and historical duty underlying s. 91(24) mandates the federal government to lead the way in pursuing the reconciliation of Crown sovereignty with the prior inhabitation of the Aboriginal peoples of Canada. This historic responsibility of the federal Crown in relation to the Aboriginal peoples of Canada must now assume its modern function in the determination, recognition and respect of the aboriginal and treaty rights protected by s. 35(1) of the Canadian Constitution.

In support of this assertion, this paper first outlines the legal interpretation of s. 91(24) in Part I and of s. 35(1) in Part II. Part III then addresses the reading of the two provisions together as outlined in *Sparrow* and the requirement for s. 91(24) to adapt itself to the broadening reconciliatory objective of s. 35(1) after *Sparrow*. Parts IV and V explore the honour of the Crown and the fiduciary duty of the Crown towards Aboriginal peoples and the support that these principles provide to the notion that s. 91(24) should be read in light of s. 35(1) to obligate the federal government to negotiate reconciliation with Aboriginal peoples. Finally, Part VI calls for recognition of the principle that reconciling federal power and federal duty" translates into an obligation upon the federal government to exercise its legislative jurisdiction over Aboriginal peoples in Canada under s. 91(24) to recognize and affirm the aboriginal and treaty rights protected under the s. 35(1) through honourable processes of negotiation.

II. SECTION 91(24) OF THE *CONSTITUTION ACT, 1867*

Section 91(24) contains two distinct classes of subjects: "Indians *and* Lands reserved for the Indians, not Indians *on* Lands reserved for the Indians."[13] Therefore, s. 91(24) applies to Aboriginals generally, whether on or off reserve, status or non-status. Section 91(24) also incorporates the Inuit[14], but it remains unresolved as to whether the Métis people of Canada fall under the authority of s. 91(24).[15] The Supreme Court of Canada has held that the class of subjects "Lands reserved for the Indians" in s. 91(24) "encompasses not only reserve lands, but lands held pursuant to aboriginal title as well."[16] In keeping with the historical origins of the provision, the Court has also acknowledged that the federal Crown bears unique "responsibilities flowing from s. 91(24) of the *Constitution Act, 1867*."[17] In its broadest terms, the federal Crown alone bears the responsibility "to provide for the welfare and protection of native peoples" in Canada.[18] In *Mitchell v. Peguis Indian Band*, the Supreme Court of Canada acknowledged that

12. Bell, *supra* note 2 at 117.
13. *Four B Manufacturing Ltd v United Garment Workers of America*, [1980] 1 SCR 1031 at 1049-50, 102 DLR (3d) 385, 30 NR 421 [*Four B Manufacturing*].
14. *Reference Re British North America Act, 1867 (UK), s 91*, [1939] SCR 104 at 134-135, [1939] 2 DLR 417, [1939] SCJ No 5 (QL) [*Reference Re British North America Act*].
15. *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236 at para 36 [*Blais*].
16. *R v Delgamuukw*, [1997] 3 SCR 1010, 153 DLR (4th) 193, [1997] SCJ No 108 at para 174 (QL) [*Delgamuukw*].
17. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193, [1990] SCJ No 63 at para 78 (QL) [*Peguis Indian Band*].
18. *Ibid* at para 121.

> …since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples.[19]

In *Ontario v. Bear Island Foundation*, the Ontario Court of Appeal lends additional support to the principle enunciated in *Peguis Indian Band*:

> Ordinarily, the affirmative obligation to provide for the welfare of aboriginal peoples and to implement the terms of treaties belongs to the federal Crown.[20]

These judicial pronouncements acknowledge that the broad federal responsibility embedded within s. 91(24) represents the continuation of the nation-to-nation Crown-Aboriginal relationship that existed prior to Confederation.

The proposition that s. 91(24), read in conjunction with s. 35(1), places a positive duty upon the federal government to seek reconciliation with the Aboriginal peoples of Canada may be perceived as ascribing a quality to s. 91(24) that is conceptually incoherent. Those who support this argument submit that s. 91(24) grants exclusive legislative jurisdiction to the federal government over "Indians, and lands reserved for the Indians." As a mere grant of legislative jurisdiction, the provision does not impute a positive duty on Parliament to exercise its jurisdiction or to exercise it in a particular way.

Writing one year before the decision of the Supreme Court of Canada in *Sparrow*, Bradford Morse addressed the potential impact of s. 35(1) on the traditional conception of s. 91(24) as an exclusive grant of authority to Parliament to legislate in relation to Aboriginal peoples. Morse observed that after 1982, the perception of the federal government towards s. 91(24) had been "extensively revised" due to a number of factors.[21] Among these factors, s. 35(1) appeared to reduce the "room for federal action" in relation to aboriginal and treaty rights now protected under the Constitution.[22] The decision of the Supreme Court of Canada in *R. v. Guerin*[23] also affected the perception of s. 91(24). In *Guerin*, the Court held that where the federal government manages the surrender of reserve land pursuant to its authority under s. 91(24), it owes a fiduciary duty to act in the best interests of the Aboriginal people in question.[24] As will be discussed later, the fiduciary duty of the Crown also serves as a guiding principle in the interpretation of s. 35(1). Morse concludes his assessment of how s. 91(24) is to be perceived in light of s. 35(1) and the decision in *Guerin*:

> It is also possible that the fiduciary relationship in conjunction with s. 35 may have an impact upon s. 91(24). It may create a more proactive obligation on the Government of Canada in which it must seek to "affirm" aboriginal and treaty rights through suitable means. Although legislative action may not be imposed, executive action might take place. For example, a court might declare that it is a violation of s. 91(24) respon-

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19. *Ibid* at para 35.
20. *Ontario v Bear Island Foundation*, 126 OAC 385, [2000] 2 CNLR 13, [1999] OJ No 4290 at para 35 (CA) (QL) [*Bear Island Foundation*].
21. Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*" in David C Hawkes, ed, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 59 at 75.
22. *Ibid.*
23. *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321, [1984] SCJ No 45 (QL) [*Guerin* cited to SCR].
24. *Ibid* at 385.

> sibility and a breach of a fiduciary obligation for the Department of Indian Affairs and Northern Development to refuse to negotiate comprehensive land claims with more than six aboriginal groups at a time, thereby causing a backlog for decades. Likewise, it could be a similar violation to fail to resolve expeditiously the presence of hundreds if not thousands of specific claims regarding reserve lands.
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> In other words, even if s. 91(24) provided a discretionary power to legislate prior to 1982, it still possessed within it a restraint not to violate aboriginal interests as part of mandatory fiduciary duties once those duties had become concrete in a given situation. It is conceivable that as a result of the *Constitution Act, 1982*, the former discretionary authority has been slightly transformed so as to be subject to some active duties. The nature of these obligations might be similar to those imposed upon a trustee regarding the necessity to take action to preserve and protect trust assets, as well as to maintain the beneficiary at an appropriate standard of living.[25]

In a more recent article, Morse argues that s. 91(24) has "had a profound impact upon the evolution of the Crown-Aboriginal relationship since 1867."[26] The inclusion of s. 91(24) at Confederation sustained the presumption "that all of the major responsibilities that had been held exclusively by the Colonial office, including obligations under pre-Confederation treaties and the power to negotiate new ones, were simply transferred to the government of Canada."[27] In essence, the inclusion of s. 91(24) embodied the assumption by the federal Crown of the responsibilities formerly held by the British Crown towards Aboriginal peoples, including the provision for their welfare and protection. From 1867 to 1982, the utilization of s. 91(24) ultimately depended on the will of Parliament. With the enactment of the *Constitution Act, 1982*, however, constitutional supremacy supplanted parliamentary supremacy in Canada. The inclusion of s. 35(1) in the *Constitution Act, 1982* means that this paradigm shift also governs the determination of aboriginal and treaty rights in Canada after 1982.

III. SECTION 35(1) OF THE *CONSTITUTION ACT, 1982*

Prior to 1982, the aboriginal and treaty rights of the Aboriginal peoples of Canada were vulnerable to governmental extinguishment by way of clear and plain legislative action. With the enactment of the *Constitution Act*, *1982*, such rights received constitutional protection by virtue of s. 35(1):

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.[28]

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25. Morse, *supra* note 22 at 87.
26. Bradford W Morse, "Are the Métis in Section 91(24) of the *Constitution Act, 1867*? An Issue Caught in a Time-Warp" in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Law, 2008) 121 at 126.
27. *Ibid* at 126-127.
28. *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Immediately following the enactment of s. 35(1) as part of the *Constitution Act, 1982*, the import of the provision was unclear. A series of First Ministers' Conferences during the 1980s failed to clarify the content of the provision. In 1990, the Supreme Court of Canada interpreted s. 35(1) for the first time in *R. v. Sparrow*. Speaking to its content and the scope of its protection for aboriginal and treaty rights, the Court also assessed the effect of s. 35(1) on s. 91(24) of the *Constitution Act, 1867*:

> Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, *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*.[29]

In the *Sparrow* decision, the Supreme Court of Canada made a point of discussing the impact of s. 35(1) on the exclusive legislative authority of the federal government over "Indians, and Lands reserved for the Indians" in s. 91(24). In *Sparrow*, this meant that the exclusive federal power to legislate in relation to Aboriginals now had to be reconciled with the federal duty to act in a fiduciary relationship with respect to the Aboriginal peoples of Canada. This reconciliation dictates that by virtue of s. 35(1), the meaning of s. 91(24) must transform itself from a constitutional grant of legislative authority permitting Parliament to do as it wishes in regards to Aboriginal peoples and their lands, to the constitutional vehicle for accomplishing reconciliation between Aboriginals and non-Aboriginals. This transformation is conceptually achievable by virtue of the broad duty that underlies s. 91(24) to ensure the welfare and protection of the Aboriginal peoples of Canada. In essence, the *Sparrow* decision dramatically recast the constitutional understanding of "welfare and protection" in relation to the Aboriginal peoples of Canada to mean the determination, recognition and affirmation of their constitutionally protected aboriginal and treaty rights.

IV. FEDERAL POWER AND FEDERAL DUTY

The Court in *Sparrow* held that s. 35(1), at the very least, provides "a solid constitutional base upon which subsequent negotiations can take place" to determine and recognize the still unproven aboriginal rights embedded within the provision.[30] While the Court states that s. 35(1) provides the constitutional base for Crown-Aboriginal negotiation, it does not go so far as to identify s. 35(1) as the constitutional mechanism that triggers Crown-Aboriginal negotiations in relation to aboriginal and treaty rights protected under the provision. Indeed, the Court does not identify a constitutional source of governmental power that occupies this role. However, it is logical to conclude that s. 91(24) is that source. Negotiations consecrated to determine aboriginal and treaty rights fall under the classes of subjects "Indians, and Lands reserved for the Indians", and therefore under the exclusive legislative jurisdiction of the federal government. Furthermore, reading s. 91(24) together with s. 35(1) illustrates that the former provision must also serve as the constitutional vehicle by which Crown-Aboriginal negotiations will transpire. The engagement of s. 91(24) in realizing mutual reconciliation between Aboriginal peoples and the Crown is unavoidable, as treaty ne-

29. *Sparrow*, *supra* note 4 at para 62 [emphasis added].
30. *Ibid* at para 53.

gotiations pertaining to Aboriginal rights will undoubtedly fall under the classes of subjects "Indians, and Lands reserved for the Indians." Simply put, the provinces do not possess the constitutional jurisdiction to finalize treaties; s. 91(24) requires the involvement of the federal government. While the constitutional division of legislative powers in the *Constitution Act, 1867* does not bar the provinces from participating in processes of negotiations, the ratification of any tripartite process between the provinces, federal government and Aboriginals requires the final approval of Parliament under its exclusive legislative authority over "Indians, and Lands reserved for the Indians." One must recall that s. 35(1) delivers the constitutional base for negotiation; it gives Aboriginal peoples a constitutional bargaining chip at the negotiating table, but not the negotiating table itself. As the provider for the welfare and protection of Aboriginal peoples and the level of government with the appropriate legislative jurisdiction, the federal Crown by virtue of s. 91(24) is obligated to fulfill the promise of s. 35(1) through honourable negotiation, so that the aboriginal and treaty rights of the Aboriginal peoples of Canada are "recognized and affirmed" both in letter and reality.

Since the *Sparrow* decision, the Supreme Court of Canada has, from time to time, readdressed the reconciliatory objective of s. 35(1). From its focus in *Sparrow* on the reconciliation of federal power with federal duty, the Court held six years later in *R. v. Van der Peet* that "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."[31] In *Haida Nation v. British Columbia (Minister of Forests)*, the Court held that in this area of the law, reconciliation is "not a final legal remedy in the usual sense"; instead it is "a process flowing from rights guaranteed by s. 35(1)".[32] Finally, the Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* held that the fundamental modern objective of s. 35(1) is "the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[33] The development of the reconciliatory objective of s. 35(1) by the Supreme Court of Canada since *Sparrow* has resulted, according to Charlotte Bell, in the gradual imputation of a "much broader objective" to the provision.[34] Bell argues however that the purpose of s. 35(1) is "limited to setting parameters around the Crown's ability to infringe or extinguish Aboriginal rights" and that the scope of the provision "may not be sufficient to permit the courts to accomplish the reconciliation of the claims, interests, and ambitions of the Aboriginal and non-Aboriginal peoples of Canada."[35] Prior to Confederation, the British Crown assumed the responsibility "to define and reconcile the relationship between First Nations and others" by ensuring the welfare and protection of Aboriginal peoples in the face of colonial expansion.[36] This responsibility of the British Crown found its inheritor in the federal Crown at Confederation by virtue of s. 91(24) of the *Constitution Act, 1867*. In order for this broad duty to find relevance today, the understanding of what constitutes the welfare and protection of Aboriginal peoples must adapt itself to the reconciliatory objective of s. 35(1) of the *Constitution Act, 1982*. As s. 91(24) and s. 35(1) must be read together, so must their underlying rationales.

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31. *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289, [1996] SCJ No 77 at para (QL) [*Van der Peet*].
32. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 32 [*Haida Nation*].
33. *Mikisew Cree*, *supra* note 11 at para 1.
34. Bell, *supra* note 2 at 116.
35. *Ibid* at 117.
36. *Ibid.*

V. THE HONOUR OF THE CROWN

Writing for a unanimous Supreme Court of Canada in *Haida Nation*, McLachlin C.J. held that the Crown — federal or provincial, depending on the circumstances — has a duty to consult and potentially to accommodate the interests of Aboriginals when it "has knowledge, real or constructive, of the potential existence" of an "Aboriginal right or title and contemplates conduct that might adversely affect it".[37] These duties are "grounded in the honour of the Crown", which is "always at stake" when the Crown engages with Aboriginal peoples.[38] The honour of the Crown mandates that "in 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."[39] The Court in *Haida Nation* acknowledges that "nothing less is required" in order to achieve the reconciliatory objective of s. 35(1) of the *Constitution Act, 1982*.[40] The principle also "infuses the processes of treaty making and treaty interpretation", obligating the Crown to "act with honour and integrity" so as to avoid the appearance of "sharp dealing".[41] The honour of the Crown also — in limited circumstances — gives rise to a fiduciary duty on the part of the Crown to act in the best interests of Aboriginal peoples.[42]

The relationship between the honour of the Crown and s. 91(24) of the *Constitution Act, 1867*, while not explicitly addressed in *Haida Nation*, can be inferred. As the honour of the Crown permeates all aspects of the Crown-Aboriginal relationship, the principle encompasses the federal exercise of its legislative authority under s. 91(24). Whether the federal government has actually upheld the principle in relation to its exercise of s. 91(24) since Confederation is a separate matter. Indeed, Binnie J. begins his judgment in *Mikisew Cree* by acknowledging that the Crown-Aboriginal relationship in Canada features a "long history of grievances and misunderstanding", "indifference of some government officials to aboriginal people's concerns", and a "lack of respect inherent in that indifference".[43]

In *Haida Nation*, the Supreme Court of Canada also discusses the honour of the Crown in relation to s. 35(1) of the *Constitution Act, 1982*. In what Mark Walters considers "one of the most important Canadian judicial statements on aboriginal rights since 1982,"[44] the Court in *Haida Nation* held:

> Where treaties between aboriginal peoples and the Crown remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims…Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.
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> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others,

37. *Haida Nation*, *supra* note 32 at para 35.
38. *Ibid* at para 16.
39. *Ibid* at para 17.
40. *Ibid*.
41. *Ibid* at para 19.
42. *Ibid* at para 18.
43. *Mikisew Cree*, *supra* note 11 at para 1.
44. Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470 at 513.

> notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[45]

The language in *Haida Nation* is momentous; it places upon the Crown an obligation to determine, recognize and respect the still unproven rights of Aboriginal peoples through honourable negotiation. Notably, the Court does not identify s. 35(1) as the constitutional vehicle for determining aboriginal and treaty rights. Instead, the rights of Aboriginal peoples are "protected by s. 35" and, as mentioned previously, the provision delivers the constitutional base wherefrom negotiations can arise.[46] Brian Slattery describes s. 35(1) as a "springboard for negotiations leading to just settlements".[47] *Haida Nation* reveals that after jumping off the springboard, the honour of the Crown requires that Aboriginal rights "be determined, recognized and respected."[48] Section 91(24) obligates the federal government to exercise leadership in this process not only because of its exclusive legislative jurisdiction over the subject matter, but also because the negotiations mandated by *Haida Nation* require a "form of mutual reconciliation" between Aboriginal peoples and the Crown so as to "reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty".[49] This mutual reconciliation of two sovereignties hearkens back to and calls for a renewal of the genuine nation-to-nation relationship between the Crown and Aboriginal peoples in British North America that would find its codification at Confederation in s. 91(24) of the *Constitution Act, 1867*. Though the original nation-to-nation relationship was forged between the British Crown and Aboriginal peoples "during times of war out of the need for protection from a common external enemy"[50] — namely France — the renewed nation-to-nation relationship envisioned in *Haida Nation* seeks to reestablish the "respect of territories and rights" and "the relationship between friends" which "characterized the Crown's inclinations from the first formative days of Crown-First Nations relations in Canada" so as to facilitate meaningful reconciliation between the parties in the present era.[51]

The need for a renewed nation-to-nation relationship between the Crown and Aboriginal peoples is evident in the context of the modern treaty process in British Columbia. Established in 1992 by an agreement between Canada, British Columbia and the First Nations Summit, the process is overseen by the British Columbia Treaty Commission, an "independent and neutral body responsible for facilitating treaty negotiations" between the three parties.[52] Notably, participation in the process is voluntary. Nearly twenty years after its inception, the process has only yielded two final agreements that have been ratified by Canada and British Columbia. Of course, the federal government is not solely to blame for this result. Indeed, the Commission has recently urged all parties to "publicly re-affirm their commitment to completing treaties" within the treaty process and has called for "clear

45. *Haida Nation*, *supra* note 32 at paras 20, 25.
46. *Ibid* at para 25.
47. Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 435 at 445.
48. *Haida Nation*, *supra* note 32 at para 25.
49. *Ibid* at para 20.
50. Bell, *supra* note 2 at 101.
51. *Ibid* at 106.
52. "About Us", online: British Columbia Treaty Commission <http://www.bctreaty.net/files/about_us.php.>.

statements from the Principals — the prime minister, premier and First Nation Summit leaders — recommitting the parties to the BC Treaty Process, and committing them to renewing mandates, and removing obstacles in the way of completing treaties."[53] The Commission has also observed that because "First Nations continue to launch legal actions to preserve their aboriginal rights when a perceived threat exists", litigation "has informed treaty negotiations and continues to do so."[54] Nevertheless, the Commission advocates for "a government-to-government relationship, with all its complexities" to be negotiated between the parties.[55] The challenges facing the modern treaty making in British Columbia illustrates a need for the federal government to fulfill its historical responsibility under s. 91(24) to provide for the welfare and protection of Aboriginal peoples in Canada by taking up the mantle of leadership in the processes of negotiation to determine, recognize and respect aboriginal and treaty rights which are protected by s. 35(1).

Ultimately, the endorsement in *Haida Nation* of a genuine nation-to-nation Crown-Aboriginal relationship, in conjunction with s. 35(1), requires the federal Crown to reaffirm in the post-1982 era the responsibilities it inherited from its imperial predecessor at Confederation. As the provider of the welfare and protection of Aboriginal peoples, the honour of the Crown informed the Crown responsibility before Confederation to protect Aboriginals and their lands from colonial expansion and settler encroachment. This historical role of the British Crown in relation to Aboriginal peoples preserved in s. 91(24) must become relevant in the context of s. 35(1) of the *Constitution Act, 1982*. This requires federal leadership in seeking mutual reconciliation of pre-existing Aboriginal and asserted Crown sovereignty by way of determination, recognition and respect of unproven Aboriginal rights through honourable negotiation.

VI. THE FIDUCIARY RELATIONSHIP

As held in *Haida Nation*, when dealings occur between the Crown and Aboriginal peoples the honour of the Crown is always at stake. A subset of the honour of the Crown is the fiduciary duty of the Crown towards Aboriginal peoples that arises in limited circumstances, namely where the Crown assumes discretionary control over specific Aboriginal interests such as the surrender or expropriation of reserve land. The fiduciary duty pertains to a relationship in which the fiduciary — the Crown — must act in the best interests of the beneficiary — Aboriginal peoples — in particular situations. The judicial acknowledgement of the fiduciary relationship between the Crown and Aboriginal peoples occurred in the *Guerin* decision. Before *Guerin*, the Crown-Aboriginal relationship was traditionally seen to be a "political trust" or a "trust in the higher sense".[56] In *St. Catherines Milling and Lumber Co. v. The Queen*, Taschereau J. of the Supreme Court of Canada described the Crown's obligation towards Aboriginals as "a sacred political obligation, in the execution of which the state must be free from judicial control."[57] The *Guerin* decision reversed this line of jurisprudence in dramatic fashion. In *Guerin,* a case that involved the

53. British Columbia Treaty Commission, 2009 Annual Report, pg 12, <http://www.bctreaty.net/files/pdf_documents/2009_Annual_Report.pdf.>.
54. British Columbia Treaty Commission, 2010 Annual Report, pg 9 <http://www.bctreaty.net/files/pdf_documents/2010_Annual_Report.pdf>.
55. *Ibid*.
56. *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 at para 73 [*Wewaykum*].
57. *St Catherines Milling and Lumber Co v The Queen* (1887), 13 SCR 577 at 649 [*St Catherines Milling*].

mishandling by the federal Crown of a land surrender agreement by the Musqueam Band in British Columbia, the Court held that:

> Section 18(1) of the *Indian Act* confers upon the Crown a broad discretion in dealing with surrendered land. In the present case, the document of surrender…by which the Musqueam Band surrendered the land at issue, confirms this discretion in the clause conveying the land to the Crown "in trust to lease...upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people". When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.[58]

The majority in *Guerin* held that the fiduciary relationship between Aboriginals and the Crown is *sui generis* — "of its own kind" — and is not akin to a trust or an agency relationship. The Court in *Sparrow* traces the origin of this fiduciary relationship to the "*sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown"; the same powers and responsibility contained within s. 91(24) of the *Constitution Act, 1867*.[59] The Court in *Sparrow* further stated that the fiduciary duty of the Crown serves as a "general guiding principle for s. 35(1)", mandating the Crown "to act in a fiduciary relationship with respect to aboriginal peoples" that is "trust-like, rather than adversarial."[60] The fiduciary duty thus reflects "the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada".[61] The duty of the Crown to act in a fiduciary capacity when it assumes control over specific Aboriginal interests is a particular expression of the historical responsibility of the British Crown to provide for the welfare and protection of Aboriginal peoples in Canada. This responsibility, inherited by the federal Crown through the inclusion of s. 91(24) in the *Constitution Act, 1867*, continues to be relevant to the Crown-Aboriginal relationship after the enactment of s. 35(1). Indeed, as the relationship between Aboriginal peoples and the Crown is "trust-like, rather than adversarial," it is fitting that the "contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship" between Aboriginal peoples and the Crown.[62]

The Court in *Sparrow* declared that s. 91(24) of the *Constitution Act, 1867* must be read together with s. 35(1) of the *Constitution Act, 1982*, that "federal power must be reconciled with federal duty".[63] The federal power under s. 91(24) to legislate exclusively in relation to "Indians, and Lands reserved for the Indians" must be reconciled with the federal duty to maintain a fiduciary relationship with Aboriginal peoples of Canada. More importantly, this reconciliation reveals that the federal government bears the responsibility to lead the way in fulfilling the promise of s. 35(1) to recognize and affirm the aboriginal and treaty rights of the Aboriginal peoples of Canada.

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58. *Guerin*, *supra* note 23 at 385.
59. *Sparrow*, *supra* note 4 at para 59.
60. *Ibid*.
61. *Ibid* at para 62.
62. *Ibid*.
63. *Ibid*.

VII. RECOGNITION AND RECONCILIATION

Since the *Sparrow* decision, there has been an obvious silence by the Supreme Court of Canada on the relationship between s. 91(24) and s. 35(1) that has inadvertently caused s. 91(24) to appear irrelevant in the post-1982 era of Crown-Aboriginal relations. Perhaps the silence persists because the Supreme Court felt that it sufficiently enunciated the federal power-duty relationship in *Sparrow*, or because the modern role of s. 91(24) as prescribed in this work has been implied by the reasoning of the Court ever since. Either way, the modern function of s. 91(24) must be reasserted and reaffirmed. In *Sparrow*, the Court held that for federal power to be reconciled with federal duty, "the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights."[64] It is possible to recast this statement with the language used in *Haida Nation* fourteen years later, where a unanimous Supreme Court of Canada held that unresolved Aboriginal rights protected by s. 35(1) must cross the divide into legal existence; it is incumbent upon the Crown that these rights be "determined, recognized and respected" through honourable "processes of negotiation."[65] If one reaffirms in *Haida Nation* the principle that federal power under s. 91(24) must be reconciled with the federal duty to act in a fiduciary relationship with respect to the Aboriginal peoples of Canada, the "best way to achieve that reconciliation" is to obligate the federal Crown in its capacity as the provider of the welfare and protection of the Aboriginal peoples of Canada to diligently pursue honourable processes of negotiation to determine these rights. The unequivocal statement by McLachlin C.J. in *Haida Nation* supporting this position is worth repeating:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. *The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.*[66]

This truth must remain at the forefront in the quest for mutual reconciliation of Crown sovereignty and prior Aboriginal sovereignty in Canada. Otherwise, Canada will not accomplish the recognition and affirmation of aboriginal and treaty rights promised by s. 35(1) of the *Constitution Act, 1982*. The time for indifference and inactivity has passed; the time for recognition and reconciliation has come.

64. *Ibid*.
65. *Haida Nation*, *supra* note 32 at para 25.
66. *Ibid* [emphasis added].