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TWO VISIONS OF RECONCILIATION IN CANADA

Sarah Nixon *

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ABSTRACT

Reconciliation has become a popular and contentious term in Canadian politics, media, jurisprudence, and legal education. In this paper, I explore what is at stake in our approach to reconciliation by contrasting two prevailing forms. The first is a form pursued in Canadian jurisprudence which I refer to as "reconciliation to Crown sovereignty." The second is a form advocated by numerous scholars and Indigenous leaders which I call "reconciliation as treaty." Reconciliation to Crown sovereignty is a process whereby Indigenous polities' interests in political autonomy and control of land are systematically undermined or rendered legally inert, thereby reconciling these interests with the sovereignty of the Crown. Reconciliation as treaty, by contrast, entails building and renewing treaty relationships through Crown engagement with Indigenous peoples robustly constrained by a principle of non-domination. I argue that these two forms of reconciliation are mutually exclusive and that reconciliation as treaty should be preferred because it respects and protects Indigenous peoples' law and ontologies. I use the recent Federal Court of Appeal decision in *Coldwater et al v Canada (Attorney General)* as a case study to explore these two approaches to reconciliation.

* Sarah Nixon is in her third year of the BCL/JD program at McGill's Faculty of Law. Many thanks to Professor Kirsten Anker for her feedback and guidance in the writing of this paper.

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INTRODUCTION

Reconciliation has become a popular and contentious term in Canadian politics, media, jurisprudence, and legal education. Some invoke it as an aspiration essential to mending Canada's relationship with Indigenous peoples, while others vehemently criticize it as a modern form of colonization.[1] Controversy surrounds not only its implementation but also its basic meaning, to the extent that editors of a recent book on reconciliation refuse to assign it a definition altogether.[2] In this paper, I[3] explore what is at stake in Canada's approach to reconciliation by contrasting two prevailing forms. The first is a form pursued in Canadian jurisprudence, which I refer to as "reconciliation to Crown sovereignty." The second is a form advocated by numerous scholars and Indigenous leaders, which I call "reconciliation as treaty."[4] Broadly, reconciliation to Crown sovereignty is a process whereby Indigenous peoples' political autonomy is forcibly diminished or extinguished, while reconciliation as treaty is a process of constant relationship-building and renewal between equally powerful parties. I argue that Canada should pursue reconciliation as treaty because this form of reconciliation respects and protects Indigenous law and ontologies. In so doing, it also begins to resolve a persistent tension underlying Canadian sovereignty—the tension between recognizing Indigenous peoples' inherent rights and asserting Canada's ultimate authority over Indigenous peoples.

This paper proceeds in three main parts. In Part I, I describe reconciliation to Crown sovereignty and reconciliation as treaty. In Part II, I analyze the recent Federal Court of Appeal decision in *Coldwater et al v Canada (Attorney General)*[5] as a case study. In this recent decision, the Court demonstrates how the asserted opposition of Indigenous communities to a major extractive project which severely impacts their interests becomes legally inconsequential within the framework of reconciliation to Crown sovereignty. In Part III, I explore what reconciliation as treaty would demand in the context of a dispute like that which gave rise to the *Coldwater* decision.[6]

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1 See e.g. Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota, 2014).

2 John Borrows & James Tully, "Introduction," in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) 3 at 9.

3 Throughout, I use first person pronouns rather than writing with a disembodied voice. As a settler, I will use 'we' predominantly to refer to settler people, but occasionally, to refer to both Indigenous and non-Indigenous peoples together. I think it is also important to be clear that what I offer is only my understanding: that of a settler and student very early on in my legal education, and with a particularly novice understanding regarding Indigenous perspectives.

4 For example, John Borrows, James Tully, Aaron Mills, Michael Asch, Harold Cardinal, and Elder Danny Musqua, whom I cite throughout.

5 *Coldwater et al v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater*].

6 The drive to write this paper arose from the jarring experience I had reading the *Coldwater* decision. I spent my first year of law school in classrooms where professors, classmates, and the authors of the decisions and commentaries we studied respectfully discussed Indigenous law and ontologies. Upon reading *Coldwater*, I felt that the decision did not reflect this same respect for Indigenous perspectives that I believed was integral to Aboriginal law in Canada, and I wanted to understand why.

Before continuing, I would like to acknowledge that the two approaches to reconciliation developed in this paper are not watertight compartments, to borrow a judicial phrase.[7] Although the argument presented in this paper is that reconciliation to Crown sovereignty is the overarching trend that characterizes jurisprudence on Aboriginal law, Canadian courts have also been nimble and creative in their approaches to reconciliation.[8] In particular, the Supreme Court of Canada (the "Court") has repeatedly recognized the importance of treaty.[9] Yet, while many judges have made an earnest effort to assist in healing the relationship between Indigenous peoples and the Crown, members of the bench also find themselves in a constrained position. Not only is the legitimacy of their authority intimately bound up with the legitimacy of Canadian sovereignty (which, as I will show, is in the crosshairs here), but further, judges must apply the law as it is rather than as they might like it to be. While the Court could develop jurisprudence that would more effectively honour the treaty relationships Canada is founded upon, it may not be the best-suited institution to lead the renewal of this relationship.[10] Ultimately, reconciliation as treaty cannot be achieved through bold jurisprudence alone.

I. MAPPING RECONCILIATION

Reconciliation is a word with many meanings.[11] It refers to activities as disparate as: creating consistency between incompatible facts, making up after a fight between close friends, and acquiescing to an unfair situation.[12] In recent decades, the concept of reconciliation has animated the political discourse of many nations that have experienced grave injustice.[13] Notably, in 1997, the Truth and Reconciliation Commission invoked the concept to guide South Africa's response to the severe, state-sanctioned oppression enacted by the apartheid regime.[14] In the political context, the term has a distinctively grand and emotive quality. Depending on the listener, it may conjure the image of an egalitarian society where diverse and previously antagonized groups live peacefully alongside one another. Yet, for others, the term rings hollow.[15]

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7 *Canada (Attorney General) v Ontario (Attorney General)*, [1937] 1 DLR 673 at 684, [1937] 1 WWR 299 (PC)

8 See e.g. *R v Van Der Peet,* [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van Der Peet*] (where Chief Justice Lamer asserts, in concurring opinion, that Aboriginal law is a form of "intersocietal law" at para 42).

9 See e.g. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida Nation]; *Coldwater*, *supra* note 5; see also Ryan Beaton, "*De facto* and *de jure* Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Const Forum Const 25.

10 The Right Honourable Beverley McLachlin, PC Chief Justice of Canada, "Respecting Democratic Roles" (2005) 14:3 Const Forum Const 15.

11 Donna Pankhurst, "Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace" (1999) 20:1 Third World Q 239 at 240–1.

12 *Ibid*. See also Mark Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) at 165.

13 *Ibid*.

14 *Ibid* at 165.

15 See e.g. Brian Egan, "Sharing the colonial burden: Treaty-making and reconciliation in Hul'qumi'num territory" (2012) 56:4 The Can Geographer 398 at 412, DOI: <10.1111/j.1541-0064.2012.00414.x.>.

In Canada, the Trudeau government has relied heavily upon commitments to reconciliation and a "nation-to-nation" relationship in political discourse.[16] However, the government has been subject to harsh criticism for various failures to act in a manner that is consistent with this rhetoric.[17] In early 2020, anger and frustration over the Trans Mountain Pipeline Expansion and the government's treatment of Indigenous rights catapulted the sentiment that "reconciliation is dead" into mainstream media.[18] While numerous flashpoints have highlighted the mounting tensions regarding Indigenous rights in Canada in recent years, this political controversy is by no means new or sporadic.[19] Indeed, struggle has marked Indigenous-settler relations for centuries.

Approaches to reconciliation have significant consequences for Indigenous rights in the realms of both politics and law. In 1982, Indigenous rights in Canada were constitutionally entrenched under section 35 of the *Constitution Act, 1982*, which states: "[t]he existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed."[20] Jeremy Webber, an expert in constitutional law, recounts that many Indigenous peoples opposed the wording of this provision for its vagueness on the content of rights and the limiting use of the word "existing."[21] However, after four ensuing conferences failed to produce agreement on revised wording, section 35 was implemented in its original form.[22] As a result, interpretation of the rights protected by section 35 has fallen to the courts.[23]

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16 Sheryl Lightfoot, "A Promise Too Far? The Justin Trudeau Government and Indigenous Rights" in Norman Hillmer & Philippe Lagacé, eds, *Justin Trudeau and Canadian Foreign Policy* (Cham, Switzerland: Palgrave Macmillan, 2018) 165.

17 *Ibid*. See also Hayden King and Shiri Pasternak, "A Different PM Trudeau, Same Buckskin Jacket, But Where is the 'Real Change' for Indigenous Peoples?" (2018) 29:1 Indigenous Policy J.

18 Riley Yesno, "Is reconciliation dead? Maybe only government reconciliation is", *The Star* (19 February 2020) online: < https://www.thestar.com/opinion/contributors/2020/02/19/is-reconciliation-is-dead-maybe-only-government-reconciliation-is.html> [perma.cc/Q9XH-ZQ7K]; Alex Ballingall, "Reconciliation is dead and we will shut down Canada", *The Star* (11 February 2020) online:<https://www.thestar.com/politics/federal/2020/02/11/reconciliation-is-dead-and-we-will-shut-down-canada-wetsuweten-supporters-say.html> [perma.cc/N77T-ZWVC].

19 See generally Jeremy Webber, *Constitutional Law of Canada: A Contextual Approach* (Oxford: Hart Publishing, 2015) (for example, an infamous 1969 White Paper "provoked a very strong reaction" at 231); Todd Gordon, "Canada, empire and indigenous Peoples in the Americas," (2009) 47:1 Socialist Studies ("[t]he last fifteen years have also been witness to a renewal of Indigenous militancy [with the] increasing resort by Indigenous communities to road blocks, occupations, and armed standoffs like those at Oka, Gustafson Lake and Burnt Church" at 62).

20 *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Section 35*].

21 Webber, *supra* note 19 at 232. See also Kiera L Ladner & Michael McCrossan "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order," in James B Kelly and Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2010) 263 (authors state that the majority of First Nations representatives opposed the wording of s. 35(1) at 267).

22 *Ibid* at 232.

23 *Ibid* at 233. These three minor amendments had the effect of "clarifying that land claims agreements would benefit from constitutional protection, specifying that aboriginal and treaty rights were guaranteed equally between men and women, and providing for the subsequent conferences on Aboriginal rights" which failed to produce further amendments (see Webber, *supra* note 19 at 47–48).

Courts are institutions where disputes between parties are heard by one or more judges who decide how the relevant law applies to settle the parties' conflict. Hearings are adversarial—parties are pitted against one another in a process that produces a winner and a loser. These institutions were not designed to assist in processes of reconciliation between states and Indigenous peoples in colonial contexts. However, determination of the content and import of Indigenous rights and treaties has been largely left to the courts through the broad wording of section 35. Therefore, the courts have become pivotal sites of influence over the rights of Indigenous peoples from the perspective of the Canadian legal system.[24] Court decisions thus have immense consequences for the lives and lands of Indigenous peoples.[25] Since the Court has asserted that the process of interpreting section 35 is informed by the pursuit of reconciliation,[26] the Court's approach to reconciliation is crucially important.

In Mark Walters' seminal essay on reconciliation, he identifies three types united by a common theme: "all involve finding within, or bringing to, a situation of discordance a sense of harmony."[27] His typology of reconciliation has inspired fruitful analysis in the rapidly expanding body of scholarship on Indigenous rights in Canada, helping to expose critical conceptual and legal challenges in the process of improving the Crown's relationship with Indigenous peoples.[28] His three forms of reconciliation are: 1) reconciliation as consistency; 2) reconciliation as resignation; and 3) reconciliation as relationship. First, reconciliation as consistency is the process by which incompatible facts are brought into alignment. This form of reconciliation can be arrived at mutually or unilaterally and requires no particular state of mind from either party.[29] Second, reconciliation as resignation is "a one-sided or asymmetrical process in which one adopts an attitude of acceptance about circumstances that are unlikely to change."[30] It requires that the party being reconciled reach a particular mental state: that of resignation. Third, and by contrast, reconciliation as relationship requires active, mutual engagement in determining a voluntarily agreed-upon resolution. Walters elaborates on this third form, writing that it has an "intrinsic moral worth" and "involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations for a harmonious relationship."[31]

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24 Beaton, *supra* note 9.

25 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [Tsilhqot'in]; *Haida Nation*, supra note 9; Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justi- fied?" (1997) 8:2 Const Forum Const 33 [McNeil, "How Can Infringements"].

26 *Van Der Peet, supra* note 8 ("[t]he Aboriginal rights recognized and affirmed by s. 35(1) must be directed toward the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" at para 31).

27 Walters, *supra* note 12 at 167.

28 Fraser Harland, "Taking the 'Aboriginal Perspective' Seriously: The (Mis)use of Indigenous Law in *Tsilhqot'in Nation v British Columbia*" (2018) 16/17:1 Indigenous LJ 21 at 44–5; Aaron Mills, "Rooted Constitutionalism: Growing Political Community" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings,* (Toronto: UTP, 2018) 133 at 139–40; Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation" (2017) 13:1 JSDLP 1 at 11–16.

29 Walters, *supra* note 12 at 167.

30 *Ibid*.

31 *Ibid* at 168.

The analysis of reconciliation to Crown sovereignty in this paper is informed by reconciliation as consistency. The two are similar in that both aim to produce cohesion of 'facts' regardless of the attitudes of parties to the process. Of course, when applied to individuals or peoples, reconciliation as consistency may be perceived as involving domination through the exercise of arbitrary power, especially from the perspective of the party whose interests are forcibly reconciled with another divergent set of interests. I explore the tensions that arise as a result of this process in the following section, as I demonstrate how the Canadian jurisprudential approach to reconciliation takes the form of reconciliation to Crown sovereignty.

Reconciliation as relationship, by contrast, resembles and inspires what I call reconciliation as treaty. Both processes are designed to foster mutual respect and to genuinely heal a damaged relationship, and therefore require that the parties to be reconciled foster attitudes of care, trust, and mutual respect toward one another. This demanding approach to reconciliation is developed in the third section of this paper.

A. Reconciliation to Crown Sovereignty

This section characterizes the stated purpose of reconciliation in Canadian jurisprudence as "reconciliation to Crown sovereignty." It then explores how this form of reconciliation is supported through the test for Aboriginal rights infringement established in *R v Sparrow*,[32] the duty to consult established in *Haida Nation v British Columbia (Minister of Forests)*,[33] and the structure of Aboriginal title as developed in *Delgamuukw v British Columbia*.[34]

In *R v Van der Peet*, the Court determined that the purpose of section 35 is reconciliation—but of a particular sort. Former Chief Justice Lamer wrote that "[t]he Aboriginal rights recognized and affirmed by section 35(1) must be directed toward the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[35] As Walters observes, this passage is plainly worded: the fact of pre-existing, never-conquered,[36] complex polities must be brought into alignment with the now-existing "immutable fact" of Crown sovereignty.[37]

To understand reconciliation under section 35 in depth, it is critical to know what interests[38] are incompatible with the sovereignty of the Crown. This implies a need to understand what sovereignty is and what it requires. However, this is notoriously difficult due to the amorphous nature of the concept of sovereignty and its contestation over time.[39] If state sovereignty

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32 *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

33 *Haida Nation*, *supra* note 9.

34 *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

35 *Van Der Peet, supra* note 8 at para 31.

36 *Haida Nation, supra* note 9 at para 25.

37 Walters, *supra* note 12 at 180.

38 Here and throughout, I adopt the language of the Court in *Mitchell v MNR,* 2001 SCC 33 at para 10. However, I recognize that referring to Indigenous claims as 'interests', 'rights', or for that matter, 'claims' all give rise to due controversy.

39 Kent McNeil, "Sovereignty and Indigenous Peoples in North America," (2016) 22:2 U.C. Davis J. Int'l L. & Pol'y at 82–87.

simply denotes "the supreme political authority of an independent state,"[40] then exercising political independence and control over land through any structure other than the state is incompatible with state sovereignty. Yet these are precisely the interests many Indigenous communities assert as their right.[41] It follows that if the purpose of section 35 is to reconcile these pre-existing societies with the sovereignty of the Crown, then section 35 must extinguish these interests. To this end, the goal of reconciliation in Canadian law is to produce consistent facts. I refer to this as "reconciliation to Crown sovereignty" because Canadian sovereignty is the fact to which Indigenous peoples and their claims to jurisdiction must be reconciled.

i. *R v Sparrow*

The Court pursued reconciliation to Crown sovereignty from the outset of section 35 jurisprudence. In *Sparrow*, the Court found that the words "recognition and affirmation" in section 35 incorporate a fiduciary duty owed by the Crown to Indigenous peoples.[42] This duty restrains the exercise of sovereign power.[43] The Court stated: "[f]ederal 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."[44] Here, the Court asserts that reconciliation of federal power and duty can be achieved by using a test for the justification of rights infringements, which the Court modeled after section 1 of the *Canadian Charter of Rights and Freedoms*.[45] Under this test, infringement of Aboriginal rights by the Crown may be justified if there is: (a) a "compelling and substantial" objective; (b) that objective is pursued in a manner consistent with the honour of the Crown; and (c) the rights are minimally impaired in order to achieve that objective.[46] At the third stage of this analysis, the Court considers "whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the … measures being implemented."[47]

That the Court developed a test to justify infringements on Aboriginal rights as a means of pursuing reconciliation indicates the dynamics of the form of reconciliation the Court envisions. This test enables Canadian courts to unilaterally judge which infringements of Indigenous rights are justified by pressing and substantial objectives and the execution of particular obligations consistent with the honour of the Crown. The Court declares that Indigenous rights can be legitimately contravened based on the objectives of the Crown, so long as the Crown discharges a duty to infringe minimally, compensate where possible,

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40 Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, Minnesota: Thomson Reuters, 2019) sub verbo "state sovereignty."

41 Webber, *supra* note 19; Coulthard, *supra* note 1. See also Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: UTP, 2014) at 77 [Asch, "*On Being Here to Stay*"].

42 *Sparrow, supra* note 32 at 1109.

43 *Ibid.*

44 *Ibid*.

45 Webber, *supra* note 19 at 237; Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

46 *Sparrow*, *supra* note 32 at 1111–1119.

47 *Ibid* at 1119.

and consult. Where courts judge the Crown to have executed these obligations, Indigenous opposition to rights infringements is no longer of legal consequence. This arrangement is standard in the adjudication of legally recognized rights.[48]

Section 35 is meant to protect a distinct set of rights stemming from the pre-existence of Indigenous societies.[49] And yet, there is nothing distinct about the way the Court proposes to evaluate infringements on Indigenous rights. The infringement test performs reconciliation to Crown sovereignty by treating Indigenous rights the same as any other constitutional right, and by entrenching in law the requirement that Indigenous peoples accept rights infringements by the Crown based on the rulings of Canadian courts.

ii. *Haida Nation v British Columbia*

The duty to consult and accommodate is another aspect of Aboriginal law jurisprudence that performs reconciliation to Crown sovereignty. As laid out in *Haida Nation*, the duty to consult and accommodate is a procedural duty to engage with Indigenous communities where proposed state action may affect Indigenous rights prior to their 'establishment' by courts.[50]

In *Haida Nation*, the Court determined that obligations arising under the Crown's duty to consult will vary based on the strength of the *prima facie* right claimed and the severity of potential impacts on that right.[51] Where claims are strong and potential impact on Indigenous rights is severe, deep consultation is required. Deep consultation is a process "aimed at finding a satisfactory interim solution" where an action has the potential to significantly infringe Indigenous rights.[52] Deep consultation does not entail a "duty to agree."[53] Where claims are relatively weak and potential impact minor, the duty to consult may require providing notice, disclosing information, and discussing issues raised.[54] Consultation must always be meaningful and carried out in good faith, with the goal of addressing the concerns of the relevant communities.[55] The dual aims of the duty to consult are to provide Indigenous communities with a role in decisions that affect their interests and, by welcoming this participation, to facilitate reconciliation between Indigenous peoples and the Crown.[56]

The duty to consult has been subject to criticism at the levels of design and implementation. While the jurisprudential approach to reconciliation is arguably not related to issues with the implementation of the duty to consult, these critiques are relevant for two reasons. First, courts created the duty to consult under section 35.[57] Therefore, issues of its

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48 See e.g. *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

49 *Sparrow, supra* note 32 at 1112.

50 *Haida Nation*, *supra* note 9 at paras 42–44.

51 *Ibid*.

52 *Ibid* at paras 43–44.

53 *Ibid* at para 42. See also *Coldwater*, *supra* note 5 at para 119.

54 *Haida Nation*, *supra* note 9 at para 43.

55 *Ibid* at para 42.

56 *Delgamuukw*, *supra* note 34 at para 168. See also Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2009) 23:1 Can L Admin L & Prac 93 at 101.

57 *Haida Nation*, *supra* note 9.

implementation reflect the courts' approach to reconciliation. Second, as courts evaluate whether discharge of the duty to consult is meaningful—and therefore legal—on a case-by-case basis, they are responsible for enabling or constraining particular means of implementing the duty.

At the level of design, the duty to consult has been criticized based on its inherent power imbalance. The critique is simple: consultation cannot foster healthy relations between the Crown and Indigenous communities because it is structured such that "one party, the Crown, has the ability to outwardly reject Indigenous initiatives, but Indigenous peoples do not have the ability to stop the Crown's initiatives."[58] Therefore, the duty assists in reconciliation to Crown sovereignty because it enables the Crown to impose initiatives despite Indigenous opposition. Section five will explore this process in more depth.

At the level of implementation, lawyer Kaitlin Ritchie organizes issues arising from the duty to consult into three useful categories, those resulting from: (1) delegation of the duty; (2) resourcing the consultation process; and (3) cumulative effects of consultation.[59]

Although delegation is an essential activity in modern governance, it increases the complexity of government functions. As Ritchie explains, in the context of the duty to consult, complexity resulting from delegation can impede meaningful consultation.[60] The duty to consult is increasingly being delegated to a variety of entities: some agents of the Crown, some not (for example, project proponents), and some falling in between the two (including entities created by legislation that are not themselves 'government').[61] While delegation offers the advantage of increasing opportunities for relationship-building between Indigenous communities and the various entities whose actions may affect their interests, it also diminishes the opportunities for Indigenous communities to consult directly with the Crown. Each loss of direct engagement erodes opportunities for reconciliation between the Crown and Indigenous communities.[62] Delegation can also constrain possible accommodations. For instance, desired accommodations may exceed the financial or administrative capacity of project proponents.[63] Finally, delegation can increase confusion about what activities form part of formal consultation, particularly when the Crown delegates consultation to other entities in an informal way.[64] All these features of delegation erode the capacity for the duty to consult to ensure meaningful engagement between Indigenous communities and the Crown. As such, delegation of the duty to consult supports reconciliation to Crown sovereignty.

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58 Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Risa Schwartz et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 65 at 69.

59 Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46 UBC L Rev 397 at 400–401.

60 *Ibid* at 407–408.

61 *Ibid* at 408–409.

62 *Ibid* at 413–416.

63 *Ibid* at 420.

64 *Ibid* at 423.

With respect to resourcing the consultation process, the duty to consult places significant strain on Indigenous communities' financial and human resources through requirements to review, research, and develop a response to every proposed project.[65] Proposed projects can number in the hundreds or even thousands for some communities.[66] Developing responses to proposals may involve significant expenses, such as the hiring of experts to conduct assessments of potential impacts on land, water, and ecological health.[67] While courts have occasionally ordered the Crown to provide resources to communities to support consultation, the Crown is not yet legally obligated to do so in every case.[68] Some provinces have attempted to remedy this issue by creating funding opportunities themselves, but this move has not remedied resourcing inequalities in a uniform way.[69] As the duty to consult is a creature of jurisprudence, courts are implicated in the ramifications of under-resourcing, whereby Indigenous communities are placed at a disadvantage in the defence of their interests.

Last, the duty to consult creates problems at the level of implementation because of the cumulative effects of this process, which Ritchie identifies as the most troubling of her three categories. She puts the case plainly: "more consultations will lead to more development, and more development will lead to a reduced land base upon which a First Nation is able to exercise its traditional practices and Aboriginal or treaty rights."[70] Thus, pre-existing Aboriginal societies are reconciled to Crown sovereignty by the erosion of the contested land base that challenges that sovereignty.

iii. *Delgamuukw v British Columbia*

The structure of Aboriginal title within Canadian jurisprudence also illustrates how reconciliation to Crown sovereignty takes place under section 35. In *Delgamuukw*, the Court established that Aboriginal title is a right "to exclusive use and occupation of the land."[71] However, even where the Court has confirmed Aboriginal title, the Crown retains the underlying title.[72] In *Tsilhqot'in*, former Chief Justice McLachlin wrote that underlying title confers "the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35."[73] Underlying title also creates "a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands."[74] This approach to underlying title limits the autonomy conferred by Aboriginal title.

As highlighted by legal scholar, Kent McNeil, the Court has shifted its position on the proper deployment of the slippery notion of the 'public interest' in Aboriginal rights adjudication

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65 *Ibid* at para 56.
66 Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Prurich Publishing Ltd, 2014) at 71.
67 Ritchie, *supra* note 59 at 423.
68 Newman, *supra* note 66 at 71.
69 *Ibid*.
70 Ritchie, *supra* note 59 at 429.
71 *Delgamuukw*, *supra* note 34 at para 117.
72 *Ibid* at para 145.
73 *Tsilhqot'in, supra* note 25 at para 71.
74 *Ibid*.

from outright rejection in *Sparrow* to tacit acceptance in *R v Gladstone*.[75] In *Tsilhqot'in*, there is explicit endorsement of the role of public interest in evaluating the parameters of Indigenous rights. Importantly, the Court also elaborated on projects that might justify title infringements if in the public interest. These include: "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations."[76] Regarding this passage, Walters observes: "[f]or judges to say that Aboriginal societies must be reconciled to 'the settlement of foreign populations' who desire to exploit their lands and resources does seem an odd approach to reconciliation as a mechanism of decolonization."[77] Through this approach, the Court endorses the deployment of the notion of the 'public interest' under section 35 in a manner that implicates the courts in reconciliation to sovereignty. The Court does this by enabling the notion of the public interest to function such that the interests of a predominately settler population override Indigenous claims to full jurisdiction on Aboriginal title lands.

According to legal scholar, Jeremy Webber, the fiduciary duty owed by the Crown to Indigenous communities as a result of underlying title "requires that the non-Aboriginal governments act in the Aboriginal party's interest, as trustees act in the interest of beneficiaries."[78] By contrast, the Court defines the fiduciary duty as a procedural duty that can be discharged by the fulfillment of the third prong of the *Sparrow* test for rights infringement, which again, imposes an obligation to infringe Aboriginal rights minimally, compensate where possible, and consult.[79] As a preliminary observation, it is difficult to see how the fulfillment of these obligations is the same as an obligation to act *in* Indigenous peoples' interests.

At the same time, the Crown's fiduciary duty has teeth. Communities have received remedies where Courts have found the duty to consult (which arises from the fiduciary duty) to be breached.[80] But the mere existence of the fiduciary duty indicates that Aboriginal title does not confer the exclusive right to use and occupation of land asserted in *Delgamuukw*. Instead, fiduciary duty is a mechanism that exists to justify infringements upon a purportedly exclusive right—that of the use and occupation of Aboriginal title lands. From the perspective of reconciliation as treaty, the fiduciary duty is weak: it is evaluated as discharged even in the face of ongoing opposition from Indigenous communities to proposed infringements.[81] Discharge of the fiduciary duty makes Indigenous opposition to Crown action irrelevant where the action is found to be in the public interest. In this way, the duty preserves Crown sovereignty and undermines Indigenous political autonomy even as it emerges from the recognition of Indigenous polities' land rights. Therefore, the fiduciary duty is also implicated in reconciliation to sovereignty. As a whole, the legal structure of Aboriginal title and the test

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75 McNeil, "How Can Infringements", *supra* note 25 at 33–35. See also *R v Gladstone,* [1996] 2 SCR 723, 137 DLR (4th) 648.

76 *Delgamuukw, supra* note 34 at para 165.

77 Walters, *supra* note 12 at 182.

78 Webber, *supra* note 19 at 246.

79 *Sparrow*, *supra* note 32 at 1111–19.

80 See e.g. *Mikisew Cree First Nation v Canada,* 2005 SCC 69.

81 *Coldwater*, *supra* note 5 at 54; *Haida Nation, supra* note 9 at paras 62–63.

to justify its infringement leave Aboriginal title lands vulnerable to encroachment in a manner that reconciles the pre-existence of Aboriginal societies to Crown sovereignty.

These illustrations of reconciliation to sovereignty in section 35 jurisprudence are particularly troubling because the Court itself has recognized the 'imperfection' of Canadian sovereignty, and yet upholds its legality.[82] The Court acknowledged this tension in *Haida* with its reference to Crown sovereignty as "*de facto*," and its indication that reconciliation requires the honourable negotiation of treaties to 'perfect' Canadian sovereignty.[83] In *Tsilhqot'in*, the Court clarified that the Crown has not only a moral but also a legal duty to negotiate agreements in good faith; however, by *Tsilhqot'in*, the agreements to be negotiated became land claim settlements rather than treaties.[84] The Court's assertions about the importance of negotiation between the Crown and Indigenous peoples hold something in common with reconciliation as treaty: namely, the idea that Crown sovereignty lacks legitimacy if it is not grounded in treaties with those who were here before us. However, a legal duty to negotiate land claims settlements is a narrower obligation than what reconciliation as treaty would demand. Land claims processes have been criticized for their inherent power imbalance, their unilateral design and implementation, and their inability to support the full political autonomy of Indigenous peoples.[85] Notably, the modern British Columbia Treaty Process has been subject to similar criticisms.[86] The Court's indication that reconciliation requires the negotiation of new treaties overlooks the fact that Crown sovereignty cannot be 'perfected' simply by covering remaining geographic spaces with treaties. As will be shown, reconciliation as treaty demands more transformative action on the part of the Crown to renew and honour existing but gravely damaged treaty relationships, and action aimed at an outcome very different from 'perfect' Crown sovereignty.

B. Reconciliation as Treaty

This section explores a form of reconciliation advanced by certain scholars and Indigenous leaders that I call "reconciliation as treaty." I begin with essential elements of Indigenous perspectives on treaty-making. Then, I outline how early settlers recognized these perspectives and committed themselves to a relationship of sharing and non-domination with Indigenous

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82 Beaton, *supra* note 9 at 28.

83 *Ibid* at 28 to 31. See also Kent McNeil, "Indigenous and Crown Sovereignty in Canada" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) 293 at 302 [McNeil, "Indigenous and Crown Sovereignty in Canada"].

84 *Tsilhqot'in*, *supra* note 25 at para 17. See also Beaton, *supra* note 9 at 29.

85 Colin Samson, "Canada's Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims" (2016) 31:1 Can JL & Soc'y 87, DOI: <10.1017/cls.2016.2>; Jennifer E Dalton, "Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements" (2006) 22 Windsor Rev Legal Soc Issues 29; Colin Samson, "The dispossession of the Innu and the colonial magic of Canadian Liberalism," (1999) 3:1 Citizenship Studies 5, DOI: <10.1080/13621029908420698>.

86 See e.g. Egan, *supra* note 15 ("it is hard to consider treaty making as fair or even a process of negotiations at all, where the parties are on a somewhat equal footing and engage in a process of give and take … Aboriginal groups have very little ability to shift the Crown from its negotiating position" at 414).

peoples. Last, I explain how these commitments inform reconciliation as treaty today.

To develop this argument, I draw primarily upon scholars who write about Anishinaabe history and law. This is the result of three factors. First, there are practical academic constraints which are themselves rooted in colonization. So far as I am familiar with the burgeoning body of legal scholarship on Indigenous treaties in Canada, it is predominately rooted in Anishinaabe perspectives.[87] However, what qualifies as 'legal scholarship' is structured by colonization and racism, as Indigenous peoples and their legalities have been systematically excluded from and devalued within legal education, practice, and law-making. Second, the early treaties through which the Crown committed itself to a relationship of non-domination with Indigenous peoples were created with First Nations in the territory surrounding the Great Lakes.[88] Much of this land mass is historically Anishinaabe territory.[89] Finally, the authors I cite indicate that even where treaty relations were never historically established (including much of British Columbia where the *Coldwater* dispute is based), reconciliation as treaty should nonetheless be preferred across Turtle Island[90] as a means of rejecting further domination and assimilation of Indigenous peoples.[91]

i. Indigenous Perspectives on Treaty

A growing body of evidence demonstrates that Indigenous peoples have lived on Turtle Island for more than 10 thousand years.[92] Indigenous peoples were organized in diverse and often

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87 John Borrows, *Canada's Indigenous Constitution* (Toronto: UTP, 2010); Aaron Mills, "What is a Treaty? On Contract and Mutual Aid" in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 208 [Mills, "What is a Treaty?"]; Heidi Kiiwetinepinesiik Stark, "Changing the Treaty Question: Remedying the Right(s) Relationship," in John Borrrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: UTP, 2017) 248.

88 See e.g. the *Treaty of Niagara, 1764* which was created with representatives of the following Nations: Algonquins, Chippewas, Crees, Foxes, Hurons, Menominees, Nipissings, Odawas, Sacs, Toughkamiwons, Winnebagoes, Cannesandagas, Caughnawagas, Cayugas, Conoys, Mohawks, Mohicans, Nanticokes, Oniedas, Onondagas, Senecas, and, it is believed, the Lokata, MicMac, and Pawnee Confederacies. See John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 163, n 68 [Borrows, "Wampum at Niagara"].

89 Kenneth C Favrholdt, *Indigenous Peoples Atlas of Canada* (Ottawa: Royal Canadian Geographical Society, 2018).

90 Turtle Island is the name used by some Indigenous peoples to refer to the continent of North America, including Alongquin and Haudenosaunee peoples in particular. See e.g. Eldon Yellowhorn & Kathy Lowinger, *Turtle Island: The Story of North America's First People* (Toronto: Annick Press, 2017).

91 James Tully, "Reconciliation Here on Earth" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) 83 [Tully, "Reconciliation Here on Earth"]; Michael Asch, "Confederation Treaties and Reconciliation: Stepping Back into the Future" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) 29 [Asch, "Stepping Back"]; Mills, "What is a Treaty?" *supra* note 87 at 219.

92 It is also important to recognize that Indigenous oral histories assert presence on Turtle Island since "time immemorial." See Kerry M. Abel, *Drum Songs – Glimpses of Dene History* (Montreal: McGill-Queen's University Press, 1993) at 5.

non-hierarchical political structures upheld by unique systems of constitutionalism and law.[93] Treaties were the means through which many distinct peoples entered into relationships with one another.[94] The meaning and function of treaty as a legal mechanism varies based on the ontology and constitutionalism within which it is formed.[95] For instance, Aaron Mills argues that within Anishinaabe constitutionalism, a treaty is not akin to a contract.[96] Instead, from an Anishinaabe perspective, a treaty embodies a commitment to extend mutual aid relationships at the intra-group level to the inter-group level.[97] While I recognize that glossing over a description of Anishinabe constitutionalism is problematic, I rely on Mills' own sketch of the logic of this constitutionalism to frame the pre-colonial history of treaty. This context will be essential to exploring settlers' own foundational legal commitments on Turtle Island.

According to Mills, a basic tenet of Anishinaabe ontology is "radical interdependence."[98] Radical interdependence refers to an understanding of personhood as constituted by and through relationships.[99] The logic of mutual aid is also central to Anishinaabe constitutionalism. Mills describes this logic as grounded in the notion of our inherent interdependence on the other gifts of Creation for our survival.[100] From this premise, he draws the humility thesis, which proposes that each element of Creation has been bestowed a gift and needs, as well as the corresponding responsibility to share both.[101] Within this ontology of interdependence, treaty becomes intelligible only as an extension of the logic of mutual aid—that is, "the sharing of our gifts to meet each other's needs."[102] As such, Indigenous treaties can only be understood within Anishinaabe ontology as representations of commitments to a "living relationship" wherein peoples mutually support one another by sharing gifts and presenting needs.[103] Crucially, if treaty is understood as a living relationship, it requires constant engagement, renewal, and collaboration between parties.[104] Mills puts it this way:

> Treaties aren't [strictly] legal instruments; they're frameworks for right relationships: the total relational means by which we orient and reorient ourselves to each other through time, to live well together and with all our relations within creation. They have a legal

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93 Aaron Mills, *Miinigowiziwin: All That Has Been Given for Living Well Together: One vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished] [[Mills, *Miinigowiziwin*].

94 Asch, *On Being Here to Stay, supra* note 41 at 75. See also William N Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman, Oklahoma: University of Oklahoma Press, 1998).

95 Mills, "*Miinigowiziwin*", *supra* note 93; McNeil, "Indigenous and Crown Sovereignty in Canada," *supra* note 83.

96 Mills, "What is a Treaty?" *supra* note 87.

97 *Ibid.*

98 Mills, *Miinigowiziwin, supra* note 93 at 79–84.

99 *Ibid* at 79–82.

100 *Ibid* at 100–14.

101 *Ibid* at 68–84.

102 Mills, "What is a Treaty?" *supra* note 87 at 233.

103 *Ibid* at 241.

104 *Ibid* at 225.

> quality in the sense that they constrain behaviour and they are at once political, social, economic, spiritual, and ecological.[105]

This perspective on treaty as an ongoing relationship crafted to facilitate mutual aid is critical to understanding what reconciliation as treaty demands.

ii. Settlers Adopt Commitments to Non-Domination

John Borrows documents how early settlers recognized Indigenous peoples' relationships to land and their political institutions by participating in "councils, feasts, ceremonies, orations, discussion, treaties, intermarriage, adoptions, games, contests, dances, spiritual sharing, boundaries, buffer zones, occupations, and war."[106] He describes a history of French and Anishinaabe treaty-making through ceremony and represented by wampum belts spanning from 1693 to 1779.[107] Michael Asch also demonstrates how, since our arrival, settlers "have recognized that Indigenous peoples were living in societies at the time of contact with Europeans, and that as a consequence we were required to gain their assent to settle on their lands."[108] He uses the *Royal Proclamation of 1763* to support this claim. Specifically, Asch relies upon language in the *Royal Proclamation* guaranteeing "that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds." He takes this as a clear commitment to refrain from taking up Indigenous peoples' lands without their consent—a commitment to non-domination.[109] Asch explains that hundreds of treaties were negotiated between settlers and Indigenous peoples under this commitment, including the numbered treaties that cover much of the land mass now called Canada.[110] Numerous scholars have offered compelling accounts of how the *Treaty of Niagara*, 1764, the Covenant Chain, and the Twenty-Four Nations Belt also indicate that treaty was a means of committing the Crown and Indigenous peoples to a relationship of non-domination.[111]

However, today, settler and Indigenous views on the import of the numbered treaties are often in "diametric opposition."[112] From a settler perspective, these treaties are viewed as valid contractual cessions of land. Indeed, Treaty 4 includes a clearly worded clause, replicated almost exactly throughout the numbered treaties:

> The Cree and Salteaux Tribes of Indians, and all other the [sic] Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and

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105 *Ibid.*

106 Borrows, *Canada's Indigenous Constitution, supra* note 87, page number unavailable due to online format.

107 *Ibid*.

108 Asch, *On Being Here to Stay*, *supra* note 41 at 73.

109 Asch, "Stepping Back," *supra* note 91 at 33.

110 Asch, *On Being Here to Stay, supra* note 41 at 74–76.

111 Mills, "What is a Treaty?" *supra* note 87 at 238–41; Asch, *On Being Here to Stay, supra* note 41; John Borrows, "Wampum at Niagara," *supra* note 88.

112 Asch, *On Being Here to Stay, supra* note 41 at 76.

> yield up to the Government of the Dominion of Canada, for Her Majesty the Queen, and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits.[113]

And yet, Asch writes, Indigenous parties to the numbered treaties "speak with one voice in asserting that what the Crown asked for was permission to share the land, not to transfer the authority to govern it."[114] In fact, many Indigenous leaders and scholars assert that the prospect of selling or ceding land is completely unintelligible within Indigenous ontologies.[115] Instead, Indigenous parties to treaties "unanimously hold that [settlers] pledged to enter into the kind of caring relationship that one associates with close family members such as 'first cousins'"[116] and that settlers would not wield power over Indigenous peoples or bring them harm.[117] Instead, they "would be free to continue as they always had; no changes would be forced on them."[118] Lending support to this perspective, Saulteaux Keeseekoose Elder Danny Musqua refers to treaties as a "relationship, a perpetual land-use agreement" between the parties.[119] Therefore, the plain wording of these treaties contrasts entirely with the perspectives of Indigenous parties to them.

Although there is extensive evidence to demonstrate that the Crown did not respect treaty commitments to build and honour kin-like relationships of non-domination, close study of the historical record indicates that settlers did not enter into treaties with the intention of domination. For example, Commissioner Alexander Morris (who represented the Crown in the negotiations of Treaties 3, 4, 5, and 6) approached treaty negotiation with the understanding that treaties were a necessary precursor to settlement. He wrote of treaty negotiations that "their purpose [was] to build relationships with those already here, not impose our ways on them."[120] His approach indicates a significant degree of respect for the autonomy of Indigenous peoples who were already living here, and an understanding of the advantages to be gained by the Crown through development of healthy relationships with these peoples.

However, even if relationship-building was initially desired, the Crown did not sustain this goal. J.R. Miller attempts to explain this transition, arguing that the Crown's indisputable retreat from its commitments likely resulted from somewhat benign political incentives. As settler populations on Turtle Island grew and their political institutions were consolidated, Miller explains that "it became all too easy in a parliamentary democracy in which votes—something First Nations did not have, of course—were what counted for politicians to drop treaty obligations down the priority list when it came to allocating resources."[121]

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113 *Treaty No 4 Between Her Majesty the Queen and the Cree and Saulteaux tribes of Indians at Qu'Appelle and Fort Ellice*. (Ottawa: Queen's Printer and Controller of Stationery, 1966).

114 Asch, *On Being Here to Stay, supra* note 41 at 77.

115 Mills, *Miinigowiziwin*, *supra* note 93 at 121–25; Asch, "Stepping Back," *supra* note 91 at 35.

116 Asch, *On Being Here to Stay, supra* note 41 at 78.

117 *Ibid*.

118 *Ibid*.

119 *Ibid*.

120 *Ibid* at 162.

121 J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: UTP, 2009) at 296.

Therefore, divergent interpretations of the numbered treaties may not result from the Crown's representatives' insidious intentions at the time of their creation, nor misunderstandings on the part of Indigenous negotiators, but instead, from prevailing political perspectives and priorities as they shifted over time.

Alternatively, if one accepts that treaties were the product of diametrically opposed views from the outset, they become highly vulnerable to perceptions of invalidity under common and civil law rules of contractual interpretation.[122] This vulnerability is exacerbated by the plain unfairness of the terms of the numbered treaties, and the Crown's historical failure to fulfill even these extremely weak commitments.[123] Therefore, it is actually advantageous for the Crown to heed the advice of the Royal Commission on Aboriginal Peoples and "reach a shared agreement as to the treaties' meaning based on the assumption that both interpretations carry equal weight."[124] Mills goes further, explaining why accepting treaty as the authorizing mechanism for Canadian statehood is, in fact, preferable for all Canadians:

> Treaty, we are breathless from saying, constitutes political community without predication on violence… On the contract story, citizenship is violent from the outset: instead of sharing, disagreeing, and slowly learning with and from one another—the treaty story—[proponents of treaties as land cession agreements] strive to erase the existence of Indigenous peoples. Canadians have settled *on* Indigenous peoples' lands, *over* their existing constitutional orders, and hence *for* violence to Indigenous peoples. In excluding the peoples who were already here from the formation of our political community, they've accepted violence as a foundational constitutional principle.[125]

Rather than accept this foundational constitutional principle, the historical context offered in this section illuminates an alternative approach. The logic of that approach is as follows: in the earliest interactions between settlers and Indigenous peoples on Turtle Island, settlers recognized Indigenous peoples' political structures and relationships to land. Through the formation of historical treaties, settlers committed themselves to relationships of non-domination over Indigenous peoples. Therefore, if Indigenous perspectives are to be taken seriously in Canadian law,[126] and the historical record of treaty formation to be respected, historical treaties should not be interpreted as contracts for land cession that made way for Canada's assertion of sovereignty. Instead, treaties found the shared political community of Canada upon a commitment to non-domination of Indigenous peoples. According to this perspective on treaty, the Crown is under both an ethical and legal obligation to create, renew, and honour relationships of non-domination with Indigenous peoples.

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122 *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 20–33.

123 Asch, "Stepping Back," *supra* note 91 at 33–35.

124 Asch, *On Being Here to Stay*, *supra* note 41 at 140–49.

125 Mills, "What is a Treaty?" *supra* note 87 at 219 [emphasis in original].

126 That the "Aboriginal perspective" must be used to approach questions of law alongside the common law perspective, and that this perspective included "laws, practices, customs and traditions of the group" was confirmed in *Tsilhqot'in Nation*, *supra* note 25 at paras 34–35.

iii. Defining Reconciliation as Treaty

So, how does this understanding of the role of treaty in the founding of Canada inform reconciliation? This perspective leads to the conclusion that reconciliation will only take place through the creation and renewal of a relationship of non-domination between Indigenous peoples and the Crown. Here, Walters' concept of reconciliation as relationship comes squarely into view. If that form of reconciliation "involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations for a harmonious relationship,"[127] it bears great resemblance to reconciliation as treaty. Both reconciliation as relationship and as treaty demand that parties in the process of reconciliation respect one another's autonomy as they work together to develop mutually agreed upon solutions to conflict and harm in their relations. Stated bluntly, reconciliation as treaty demands that nothing happens on Indigenous land without Indigenous consent. It demands that representatives of the Crown and Indigenous communities reach agreement before an action that affects Indigenous interests is carried out. In practice, this means recognizing Indigenous communities' right to veto Crown action that would affect their land and interests—a possibility repeatedly denied under section 35.[128] Reconciliation as treaty is a radical perspective because it seeks to fundamentally alter the distribution of political power in Canada. Today, it also requires a great deal of work and reckoning on the part of the Crown to begin to heal a relationship gravely harmed through 250 years of domination.[129]

iv. Bracketing Earth Reconciliation

The authors I relied upon in this paper to trace reconciliation as treaty assert that reconciliation between peoples also requires a commitment to reconciliation with the earth.[130] James Tully explains:

> If we try to reconcile Indigenous and non-Indigenous people with each other without reconciling our way of life with the living earth, we will fail, because the unsustainable and crisis-ridden relationship between Indigenous and non-Indigenous people that we are trying to reconcile has its deepest roots in the unsustainable and crisis-ridden relationship between human beings and the living earth. To put it more strongly, as long

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127 Walters, *supra* note 12 at 168.

128 *Coldwater*, *supra* note 5 at para 53; *Haida Nation,* supra note 9 at paras 62–63; *R v Nikal*, [1996] 1 SCR 1013, 133 DLR (4th) 658 at para 110; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 59; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 83.

129 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 130–76. See also Shin Amai, "Consult, Consent, and Veto: International Norms and Canadian Treaties" in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 370 at 372.

130 John Borrows, "Earth-Bound: Indigenous Resurgence and Environmental Reconciliation" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Re- lations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 49; Tully, "Reconciliation Here on Earth," supra note 91; Mills, *Miinigowiziwin, supra* note 93.

> as our unsustainable relationship to the living earth is not challenged, it will constantly undermine and subvert even the most well-meaning, free-standing efforts to reconcile the unsustainable relationship between Indigenous and non-Indigenous peoples through modern treaties and consultations, as we have seen over the last thirty years.[131]

These observations lead Tully to conclude that reconciliation between peoples and our reconciliation with the earth are in a state of "interconnected 'dual crisis'" which can only be addressed holistically.[132] In a related way, Mills concludes that reconciliation requires settlers to renew and honour relationships of mutual aid with all of Creation.[133] Understanding this commitment to reconciliation with the earth is integral to a deeper understanding of reconciliation as treaty. This matter is, however, bracketed because it is beyond the scope of this paper to explore the complexity of this argument and its implications in the depth they deserve.

C. The Difference Between the Two Forms of Reconciliation

Reconciliation to Crown sovereignty is a process whereby Indigenous polities' interests in political autonomy and control of land are systematically undermined or rendered legally inert, thereby reconciling these interests with the sovereignty of the Crown. Reconciliation as treaty is a process of renewing the treaty relationship through Crown engagement with Indigenous peoples—a process robustly constrained by a principle of non-domination. The outcomes envisioned by these two forms of reconciliation are, therefore, fundamentally different. The former aims to create a state of uncontested Crown sovereignty by providing a limited set of Indigenous rights that will not, in any combination, support Indigenous peoples' political independence from the Crown. As Asch puts it, "[o]ur sovereignty comes first; their rights come second."[134] Reconciliation as treaty recognizes the violence done to Indigenous peoples through the erasure of their sovereignty, and calls upon the Crown to honour its commitment to treaty relations with Indigenous peoples on equal footing.

The difference between the origins of these two perspectives is this: the first is premised on the validity of a unilateral assertion of authority over Indigenous peoples; the second on the treaty process whereby settlers recognized and committed to Indigenous peoples' non-domination. The difference between the two perspectives is the chasm between recognizing the validity of Indigenous peoples' law, ontologies, and their humanity, or denying them altogether. Therefore, the logics underlying each perspective are incompatible—we must choose one or the other.[135]

II. RECONCILIATION TO SOVEREIGNTY IN COLDWATER

In this section, I attempt to bolster the claim that Canadian jurisprudence engages in a process of reconciliation to sovereignty through an analysis of the *Coldwater* decision.

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131 Tully, "Reconciliation Here on Earth," *supra* note 91 at 84.

132 *Ibid*.

133 Mills, *Miinigowiziwin*, *supra* note 93 at 281.

134 Asch, *On Being Here to Stay*, *supra* note 41 at 149.

135 This conclusion is inspired by Mills' thesis that we must avoid attempting to forge a 'middle path.' See Mills, *Miinigowiziwin*, *supra* note 93.

This decision is the most recent substantive[136] judicial response to efforts by several Indigenous communities to challenge the construction of the Trans Mountain Pipeline Expansion project ("the Project") in Canadian courts. The Project would increase capacity for the transport and export of Alberta tar sands oil from 300,000 to 890,000 barrels per day, with a corresponding increase from five to 34 oil tankers in the Vancouver port per month.[137] The legal dispute over this project entered the courts in 2017, when several applicants challenged the Federal Cabinet's ("Cabinet") approval of the Project in the Federal Court of Appeal ("FCA").[138] Before the release of the FCA's decision regarding the Project, the Trudeau government announced it would purchase the Project from its proponent, Kinder Morgan.[139] Three months later, the FCA issued its decision to remit the approval of the Project to Cabinet due to defects in both the environmental assessment process and in consultations with affected Indigenous communities.[140] Specifically, the court found that the environmental assessment was inadequate because it failed to study the impacts of increased marine shipping that would result from the project. It also found that the duty to consult was inadequate at its third stage, where the court ruled that Canada failed to "engage in a considered, meaningful two-way dialogue."[141] Cabinet was required to remedy these flaws before making its decision on the project anew.[142]

Consultation began again in October 2018.[143] After less than five months—and before renewed consultation was complete—the National Energy Board issued the Reconsideration Report that would form the basis of Cabinet's decision.[144] Cabinet approved the Project again in June 2019.[145] Again, 12 communities applied to have Cabinet's approval of the Project reviewed by the FCA. The leave to appeal process eliminated six applications.[146] Two applicants subsequently withdrew. The remaining four applicants were barred from presenting arguments based on the environmental effects of the pipeline, because this issue was deemed to have been resolved during the process of leave to appeal.[147] The FCA ruled, instead, solely on the question of whether Cabinet's decision to approve the Project was unreasonable on its merits. These four applicants maintained that consultation was insufficient, and

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136 I say substantive because the Supreme Court dismissed the applications for leave to appeal this decision on 2 July 2020, without releasing reasons, as is customary.

137 Trans Mountain Expansion Project, "Expansion Project," (2020) online: *Trans Mountain* <https://www.transmountain.com/project-overview> [perma.cc/PSP7-6WEK].

138 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*TWN*].

139 Steven Chase, Kelly Cryderman & Jeff Lewis, "Trudeau government to buy Kinder Morgan's Trans Mountain for $4.5 billion", *The Globe and Mail* (29 May 2018), online: <https://www.theglobeandmail.com/politics/article-trudeau-government-to-buy-kinder-morgans-trans-mountain-pipeline/> [perma.cc/4PQY-BQGG].

140 *TWN, supra* note 138 at paras 5–6.

141 *Ibid* at para 558.

142 *Coldwater, supra* note 5 at para 2.

143 *Ibid* at para 19.

144 *Ibid*.

145 *Ibid.*

146 *Raincoast Conservation Foundation v Canada (Attorney General),* 2019 FCA 224.

147 *Ibid*.

therefore, that Cabinet's decision was unreasonable. In *Coldwater*, the FCA ruled against the applicants and upheld Cabinet's decision.[148]

The FCA referred to reconciliation as a "controlling concept" in its reasons.[149] Interestingly, in characterizing reconciliation, the court explicitly invoked Walters' concept of reconciliation as relationship, and referred to the centrality of modern treaties in "creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities."[150] The court neglected to mention that none of the four applicants have ever signed a treaty with the Crown.[151] It asserted that reconciliation is "meant to be transformative, to create conditions going forward that will prevent recurrence of harm and dysfunctionality."[152] Yet the way the relevant legal framework managed Indigenous opposition to the Project in question did not align with these assertions. Instead, the FCA engaged in reconciliation to Crown sovereignty by applying a framework for evaluating consultation and accommodation that effectively rendered Indigenous opposition legally inconsequential. The decision demonstrates that the form of reconciliation underlying the FCA's reasons is reconciliation to Crown sovereignty, despite the court's assertions about the importance of preventing harm and dysfunctionality in Crown-Indigenous relations.

A. Issues with Consultation

In *Coldwater,* the FCA stated that for consultation to support reconciliation, the Crown must proceed "by listening to, understanding and considering the Indigenous peoples' points with genuine concern and an open mind throughout."[153] Yet, this decision provides specific examples of just how frustrating the duty to consult can be for Indigenous parties who oppose the matter subject to consultation. For example, Coldwater First Nation asserted that the renewed consultation process was inadequate because it was concluded prior to the execution of a hydrogeological study that would assess the pipeline's potential impacts on their aquifer.[154] On this basis, the Nation claimed that consultation was flawed because it was concluded while "essential information was lacking."[155]

Here, the issue is obvious: how can meaningful consultation and accommodation take place when the impacts of the Project on Coldwater First Nation's aquifer are not yet known? From the perspective of the Nation, it was unable to engage in meaningful consultation in the absence of this information. The Court of Appeal responded to this concern by explaining that once the study is complete, the National Energy Board (now the Canadian

148 *Coldwater*, *supra* note 5 at para 65.

149 *Ibid* at para 47.

150 *Ibid* at para 47, 50, quoting from *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53 at para 10.

151 Indigenous and Northern Affairs Canada, "Pre-1975 Treaties Map in British Columbia," (2014) online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1371838763214/1611593372816> [perma.cc/B8YQ-JYPB]. Additionally, these communities have not signed a modern treaty.

152 *Coldwater*, *supra* note 5 at para 49.

153 *Ibid* at para 56.

154 *Ibid* at para 95.

155 *Ibid*.

Energy Regulator) would have "the occasion to inform itself of the impact to the aquifer and take the rights and interests of Coldwater First Nation into account before making a final decision."[156] Here, the Nation was told that while they may perceive the hydrogeological study as essential to meaningful consultation, the law on consultation was not on their side. Instead, the FCA asserted that the mere opportunity given by the Crown in taking Coldwater First Nation's interests into account—even when making a decision that may critically affect their interests—must suffice. This demonstrates how the duty to consult can be too weak to foster a Crown-Indigenous relationship characterized by mutual respect.

Multiple applicants also alleged that consultation was inadequate due to the short timeline within which it was conducted.[157] They asserted that the Crown's commitment to post-approval consultation did not assuage their concerns.[158] Indeed, it is difficult to understand how a commitment to post-approval consultation could enhance the meaningfulness of consultation from the applicants' perspective: post-approval, the Crown's options for mitigation are significantly constrained. Further, it seems problematic that renewed consultations were not yet complete at the time that the National Energy Board issued the Reconsideration Report upon which the Cabinet based its decision to approve.[159] The meaningfulness of consultation seems severely impaired if it occurs after crucial decisions about the matter subject to consultation have already been made.

B. Issues with Accommodation

The *Coldwater* decision also provides examples of how the duty to accommodate is implicated in reconciliation to Crown sovereignty. On the matter of accommodations, Squamish Nation submitted that "proposed measures were unilaterally developed by Canada, without any effort by Canada to collaborate with Squamish in developing them so as to address Squamish's concerns."[160] The FCA found that Canada did, in fact, make modifications designed to address Squamish Nation's concerns.[161] However, the Squamish Nation maintained that these accommodations were not successful in *actually addressing* their concerns. Fortunately for the Crown, "accommodation cannot be dictated by Indigenous groups,"[162] meaning that whether or not Squamish Nation felt that the accommodations addressed their concerns was not necessarily of legal consequence. What mattered was whether the Crown can demonstrate responsiveness to these concerns.

The dispute over the Crown's proposed Quiet Vessel Initiative elucidates the tensions that arise in this context. This project is aimed at "examin[ing] how quieter tankers can be made"[163] in order to mitigate the impact of shipping on endangered Southern Resident killer whales

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156 *Ibid* at para 97.
157 *Ibid* at paras 20, 150, 231.
158 *Ibid* at para 60.
159 See e.g. *ibid* at para 142, 168 (consultations continued with Squamish and Tsleil-Waututh well past February, 2019).
160 *Ibid* at para 130.
161 *Ibid* at para 131.
162 *Ibid* at para 58.
163 *Ibid* at para 128

living near Vancouver's ports.[164] Squamish Nation opposed this "inadequate" measure because it is "untested and unproven" to actually mitigate negative impacts on the whale population.[165] Yet, perplexingly, the FCA relied upon this accommodation as an example of the Crown's responsiveness to Indigenous interests, alongside the Crown's commitment that "there would be no net noise increase from vessel traffic associated with the Project."[166] The FCA failed to address how the Crown can make good on this commitment through an initiative designed merely to explore quieter vessel technology. The FCA also did so in the face of a finding in the Reconsideration Report that the Project "is likely to cause significant adverse environmental effects" on these whales.[167] Reconciling conflicting perspectives on this crucial accommodation measure by accepting that the Crown has been responsive to Indigenous concerns—despite Squamish Nation's ongoing opposition—is a flawed approach to preventing the recurrence of harm and supporting the development of mutual respect in Crown-Indigenous relations.

Further, the disagreement in *Coldwater* about whether a commitment to "develop baseline information" qualified as an accommodation also elucidates the tensions that result from the structure of the duty to consult and accommodate.[168] Both Squamish Nation and Tsleil-Waututh Nation asserted that the Crown's commitment to gather information about the pipeline's potential impacts on their interests did not constitute a meaningful response to their concerns, and should not be taken as an indicator that their concerns were accommodated.[169] Certainly, it seems illogical that a commitment to gather information about how a Crown initiative will affect Indigenous interests *once implemented* can assist in the accommodation of Indigenous concerns *prior to* the approval of the initiative. But the Court has stated that the development of baseline information is, in fact, an appropriate accommodation measure.[170] In the eyes of the FCA, this settles the matter.

These observations expose the paradox in claiming that reconciliation aims to foster a mutually respectful relationship while also asserting this can be achieved within a dynamic where only one party to the relationship has the power to say 'no'. A relationship characterized by this dynamic does not foster mutual respect, nor does it prevent harm or dysfunctionality. To this end, Tsleil-Waututh Nation explicitly asserted that "Canada's mandate [in consultation] should have included seeking or obtaining [their] consent."[171] The FCA replied by repeating the assertion that mandating consent would equate to providing Indigenous groups a veto that they do not—and cannot—have.[172] In a sense, the two forms of reconciliation I have traced throughout this article can be reduced to this question of a veto power. Under reconciliation to

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164 Christopher Clark, "Potential Acoustic Impacts of Vessel Traffic from the Trans Mountain Expansion Project on Southern Resident Killer Whales" (Vancouver: Raincoast Conservation Foundation, 2015) at 4.

165 *Coldwater*, *supra* note 5 at para 128.

166 *Ibid* at paras 131–32.

167 *Ibid* at para 165.

168 *Ibid* at para 134.

169 *Ibid* at para 134, 181–82.

170 *Ibid* at para 134; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74 at paras 43–44.

171 *Coldwater, supra* note 5 at para 194.

172 *Ibid*.

Crown sovereignty, the veto must be denied: to grant it would pose a fundamental challenge to Canadian sovereignty, because it would enable Indigenous polities to assert authority over their land and thereby disrupt the jurisdiction of the state. Under reconciliation as treaty, a veto is implicit: the Crown and Indigenous peoples would renew their commitments to a relationship of non-domination by reaching agreement about initiatives that would affect Indigenous interests. In the absence of agreement, the Crown would not proceed. I develop this framework further in the following section.

III. RECONCILIATION AS TREATY IN *COLDWATER*

If reconciliation as treaty were pursued in the context of the *Coldwater* dispute, it would entail the *building* of a treaty relationship between the Crown and the applicants, followed by negotiations on the Project *until an agreement is reached*. It would mean that a court could not declare accommodations to be adequate in the face of the 'accommodated' party's ongoing assertions that these measures are inadequate. In effect, this framework would amount to recognizing a veto power held by Indigenous polities. While this is a radical perspective, there are three compelling reasons to support it.

First, reconciliation as treaty is truly "inter-societal."[173] It takes Indigenous legal orders seriously by, for example, rejecting the notion that negotiations can foster mutual respect and exemplify good faith regardless of whether an agreement is reached.[174] In the context of *Coldwater*, this approach would remedy the tension that is caused by claiming both that reconciliation aims to foster mutual respect and that this respect can be achieved while only one party has the power to reject the initiatives of the other. Reconciliation as treaty would, instead, foster mutual respect by inviting in and addressing the concerns of Indigenous communities who oppose projects on their unceded land, rather than barring their applications for judicial review and unilaterally narrowing the arguments they may bring forward. Essentially, it would mean that Indigenous opposition to Crown initiatives would always be legally consequential.[175]

Second, reconciliation as treaty is consistent with Canada's international commitments. When Canada adopted the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"), the federal government signalled its commitment to respect Indigenous peoples' rights to self-determination, cultural preservation, and interests in traditional territories.[176] Crucially, *UNDRIP* endorses the notion that free, prior, and informed consent would be required for projects such as the Trans Mountain Pipeline Expansion to proceed.[177] As Aboriginal law practitioner and professor Shin Amai explains, if Canada is to honour *UNDRIP*, it must

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173 *Van Der Peet*, *supra* note 8 at para 42.

174 Morales, "Braiding the Incommensurable," *supra* note 58 ("[t]his notion that a good faith negotiation process is not dependent on reaching an agreement runs counter to several Indigenous legal principles" at 69).

175 Notably, an innovative model has been pursued in New Zealand that bears some resemblance to what I suggest here. See generally *Te Awa Tupua (Whanganui River Claims Settlement) Act* (NZ), 7/2017.

176 Amai, *supra* note 129 at 376.

177 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) at Article 32.

change its approach from one that is "Crown-centric"—focussed on evaluating whether Crown action that impacts Indigenous peoples is justified—to one that centres on Indigenous communities' provision of consent.[178] While this international instrument does not give rise to legal obligations, Canada finds itself in an openly contradictory position by endorsing these commitments internationally, but failing to honour them domestically. Implementing the standard of free, prior, and informed consent would greatly advance the Crown's ability to renew its treaty relationship with Indigenous peoples.

Third, reconciliation as treaty is consistent with emerging industry best practices which increasingly strive for Indigenous consent.[179] It seems that Indigenous-led activism has begun to tip the scales so that fossil fuel projects often entail too much uncertainty and economic risk in the absence of Indigenous consent.[180] Leaders in extractive industries have already begun to adopt the standard of obtaining consent from potentially affected Indigenous communities in order to proceed with their projects. Therefore, although implementation of reconciliation as treaty would certainly be radical, it may not be as destructive to extractive industries and Canada's economy as opponents might allege.

Further, at the level of implementation, it is possible that the ambiguous wording of section 35 could be employed to the advantage of Indigenous peoples: courts could lend a new interpretation to Aboriginal treaty rights that reflects this commitment to non-domination.[181] In so doing, the courts would effectively rule themselves out of the equation, to be replaced by treaty relations between Indigenous and Crown representatives.

IV. ACKNOWLEDGING COUNTER CLAIMS

There are doubtlessly multiple grounds upon which one may oppose the way I have characterized these two forms of reconciliation and asserted their incompatibility. This section focusses on two key objections: that this analysis is inattentive to the role of democracy in Canada, and that it requires an impossible approach to settling land questions.

The democracy objection might be framed like this: in a democracy, the interests of a small minority should not eclipse the interests of a majority. In Canada, Indigenous peoples constitute about 4.9 percent of the population.[182] Their interests, while important, should not dictate the nation's agenda nor justify a transformative redistribution of political power. One way of responding to this objection is by relying upon the Court's recognition that

178 Amai, *supra* note 129 at 391–92.

179 *Ibid*.

180 Winona LaDuke and Deborah Cowen, "Beyond Wiindigo Infrastructure" (2020) 119:2 The South Atlantic Q 243 at 255; George Hoberg, "How the Battles over Oil Sands Pipelines have Transformed Climate Politics (2019) (Working Paper delivered at Annual Meeting of the American Political Science Association, 2019, Washington, DC) at 4–7.

181 Amai, *supra* note 129 (Amai suggests courts could reinterpret section 35 such that a standard of free, prior and informed consent could be implemented domestically).

182 Statistics Canada, *Aboriginal Peoples in Canada: First Nations People, Métis, and Inuit National Household Survey 2016* (Ottawa, Statistics Canada catalogue no 11-001-X, 2016).

the protection of minority rights is an underlying constitutional principle.[183] While this underlying constitutional principle certainly does not support an assertion that minority rights are or ought to be absolute, it does indicate that majority interests should not always outweigh minority interests. Recognition of this constitutional principle indicates that determining how and when minority rights can be limited in favour of a majority is a deeply moral, political, and complex process, rather than one that can be settled through the simple and clear-cut application of legal principles. Therefore, the assertion that the primacy of democracy defeats the proposal for reconciliation as treaty is overly simplistic, insofar as it is inattentive to the interaction between minority and majority rights and interests within democracies.

The second way to respond to the democracy objection relates to the first: if determining when majority interests ought to outweigh minority interests is a morally and politically charged task, then the morality and politics of Canada's claim to sovereignty over Indigenous peoples ought to matter. For some, this may not be enough to justify the prospect of recognizing an Indigenous veto power, but for others, it certainly would be.[184]

The second objection has to do with the impossibility of demarcating land under reconciliation as treaty. The question here is: if nothing happens on Indigenous land without Indigenous consent, how do we go about determining 'what land is Indigenous'? One way to resolve this dilemma is very partial—by suggesting that the process to determine land demarcation would resemble negotiation on equal footing rather than the unbalanced dynamic inherent in current land claims processes. Another response, which is more radical still, is to suggest that land demarcation is not, in fact, necessary under reconciliation as treaty, at least as it is espoused by Mills and Tully. In their view, reconciliation does not require the erection of borders between Indigenous polities and Canada to enable treaty commitments to non-domination to be honoured.[185] Instead, reconciliation requires settlers to adopt politics, economies, and ontologies of non-domination that would make these borders obsolete. Of course, neither response to the land objection definitively settles the matter, but either response may offer a viable way to begin to think through the mechanics of reconciliation as treaty.

CONCLUSION

The deployment of reconciliation in Canadian jurisprudence runs contrary to the form of reconciliation advocated by numerous jurists, scholars, and Indigenous leaders. This tension is illustrated by comparing how Indigenous rights claims are handled in Canadian jurisprudence with what it would mean for the Crown to honour Canada's foundational treaty

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183 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 49.

184 Mia Rabson, "Without Indigenous consent for pipelines, more protests to be expected: experts," *The Canadian Press* (5 March 2020), online:< https://globalnews.ca/news/6634179/indigenous-consent-pipeline-protests/> [perma.cc/QZ6D-ZPKJ]; Laura Kane "Protests against TMX pipeline expansion expected to ramp up in BC", *CTV News* (5 February 2020), online: <https://bc.ctvnews.ca/protests-against-tmx-pipeline-expansion-expected-to-ramp-up-in-b-c-1.4799129> [perma.cc/EC8U-KVKX] ; Victoria M Massie, "To understand the Dakota Access Pipeline protests, you need to understand tribal sovereignty", *Vox* (28 October 2016), online: <https://www.vox.com/2016/9/9/12851168/dakota-access-pipeline-protest> [perma.cc/R5HG-G335].

185 Mills, *Miinigowiziwin, supra* note 93 at 121–25; Tully, "Reconciliation Here on Earth," *supra* note 91.

commitments. As land and jurisdiction continue to be passionately and violently contested, it is clear that the Supreme Court of Canada's approach to reconciliation throughout the past 30 years has not successfully fostered healing in Crown-Indigenous relations. Perhaps progress has been made, and certainly there is no reason to think that reconciliation could be 'completed' in a few decades. Indeed, the question of how Canada should pursue reconciliation is one with which many more capable jurists have grappled throughout their long careers.[186] Today, reconciliation is not yet dead; it is alive and well, in multiple forms. But if Crown-Indigenous relations are to be truly healed, we must reanimate reconciliation in a form that rejects domination and embraces treaty relationships.

186 Here I think of, for example, John Borrows, Mark Walters, and Justices Lance Finch and John Reilly who have written and spoken on these matters (quoted in Mills, "What is a Treaty?," *supra* note 87 at 226–28), among many others.