

# Creating Common Measure: The importance of developing a language other than litigation

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*“No problem can be solved from the same level of consciousness that created it.”*  
-- Albert Einstein

## Introduction

It is almost impossible to avoid the clichéd approach to what has been termed Canada’s “Indian Problem.” It is a complex and multifaceted problem that continues to fester despite the numerous attempts by academics, politicians and community groups to address the many different issues. It is perpetuated by a series of misunderstandings between Aboriginal and non-Aboriginal Canadians, which seems to be magnified under the lens of the media.

Still, it is important that the overwhelming nature of the problem does not dissuade those committed to alleviating some of the issues that form the basis of this so called “Indian Problem.” This essay addresses one specific element of the larger interwoven “problem” -- the constitutional litigation of aboriginal and treaty rights. While being cognizant of the complexities and different elements of the problem, in this essay I argue that it is only by persuading those to *bona fide* participation in a structure that enables communication to occur, that aboriginal constitutional issues will begin to be resolved. After giving contextual information surrounding the aboriginal peoples and constitutional litigation, I will illustrate the perpetual incommensurability existing within the jurisprudential approach to aboriginal and treaty rights. To investigate how the language of constitutional litigation fosters incommensurability, I present a rhetorical analysis of *R. v. Powley*.<sup>1</sup> Finally, after finding the normative aspects of constitutional litigation negate the possibility to effectively respond to parties seeking to assert their constitutionally protected aboriginal and treaty rights, I suggest an alternative approach namely, mediation.

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<sup>1</sup> [2003] 2 S.C.R 207 [*Powley*].

## Creating Context: Public Opinion, s.35, and the Legacy of Marshall

Creating context of public opinion of the Supreme Court is important for an analysis of the incommensurable effect of constitution litigation because it identifies the context constitutional litigation occurs in. This context conflates the incommensurability existing between aboriginal groups and the Crown. The term incommensurability is one that has been appropriated from mathematics,<sup>2</sup> and has been adopted through the philosophy of science to represent two opposing paradigms that cannot be reconciled.<sup>3</sup> The thrust of this essay is to illustrate how constitutional litigation perpetuates incommensurability for aboriginal and Crown parties and offer an alternative resolution. However, it is also important to highlight all the elements that foster this incommensurability. Here that includes the purpose and effect of s.35, the conception of ‘rights’, and the relationship the Supreme Court of Canada has to the public. Because the *Marshall 1* and *Marshall 2* are the quintessential representation of this infusion of incommensurability, a treatment of the cases will be included for context.<sup>4</sup>

### Purpose & effect:

Section 35 of the Constitution Act, 1982 reads:

s.35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

This section was the subject of much debate in academic circles before the Supreme Court definitively stated its purpose in the 1993 decision of *R. v. Van der Peet*.<sup>5</sup> Academics such as William Pentney undertook to analyze the language of the section. Relying on previous analysis produced by Brian Slattery, Pentney indicated that given the contrasting *Charter* language, the current dictionary definition of the words “recognized” and “affirmed”, and given the French

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<sup>2</sup> Where there is no common measure between two numbers.

<sup>3</sup> Thomas S. Kuhn and Paul K. Feyerabend have been named the founding fathers of incommensurability. See Paul K. Feyerabend, "Explanation, reduction, and empiricism?" (1962) 1 *Philosophical Papers* 44. See also Thomas S. Kuhn, *Commensurability, comparability, communicability: The road since structure*, (Chicago: University of Chicago Press, 1982) for thought on the evolution of incommensurability.

<sup>4</sup> The original case *R. v. Marshall* [1999] 3 S.C.R. 456, tends to be referred to as *Marshall 1*, while the reasons given for a motion for rehearing and stay is referred to as *Marshall 2*.

<sup>5</sup> [1996] S.C.R. 507 [*Van der Peet*].

version, the section “formally acknowledged [aboriginal rights] as valid in law and [were to be] rendered sure an unavoidable.”<sup>6</sup> He continued:

“If these rights were merely to be taken notice of, without being accorded increased legal status or made enforceable, a positive statement such as that in s.35 was not required. Instead a mere statutory enactment or mention in the preamble would have sufficed. The purpose of including a statement of rights in a constitution must surely be to ensure that the rights are given a higher status than enjoyed previously and to protect them from encroachment by other laws or practices.”<sup>7</sup>

The Supreme Court considered the background of s.35(1) in *R. v. Sparrow*<sup>8</sup> to find its “appropriate interpretive framework.”<sup>9</sup> Dickson C.J. and LaForest J. wrote for a unanimous Court on s.35(1):

It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.<sup>10</sup>

The Supreme Court did not stop there. The Court indicated that the significance of s.35(1) went beyond the “fundamental effects” noted above, and relied on Professor Lyon who indicated that s. 35 called for “a just settlement for aboriginal peoples” and a renouncement of “the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”<sup>11</sup>

But in 1993, Chief Justice Lamer for the majority of the Supreme Court, articulated the purpose of s.35(1) that has created a legacy of incommensurability in aboriginal litigation.

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<sup>6</sup> William Pentney, “The Rights of the Aboriginal Peoples of Acanada in the Constitution Act, 1982 Part II: Section 35: The Substantive Guarantee” (1988) 22 U. Brit. Colum. L. Rev. 207 note 8 at p.209.

<sup>7</sup> *Ibid.*

<sup>8</sup> [1990] 1 S.C.R. 1075 [*Sparrow*].

<sup>9</sup> *Ibid.* at ¶48.

<sup>10</sup> *Ibid.* at ¶53.

<sup>11</sup> *Ibid.* at ¶54.

Referring not to the passage from *Sparrow* outlined above, but to a passage discussing rights,<sup>12</sup> Lamer C.J. held that the purpose of s. 35(1) of the *Constitution Act, 1982* was to reconcile the pre-existence of Aboriginal societies with the sovereignty of the Crown.<sup>13</sup> This reconciliation motif has continued to haunt aboriginal litigants. Although a further analysis of how the test for aboriginal rights (as articulated in *Van der Peet*) fosters incommensurability is included below, it is important to note the reconciliation motif is a driving force in the landscape of aboriginal litigation. The effect of this motif has been to reduce aboriginal and treaty rights -- once thought to be given super-added constitutional protection -- to practices that can be infringed by federal legislation justifiable by means of economic fairness.<sup>14</sup>

### **Conception of Aboriginal Rights:**

There is a distinct tension between the conceptualization of aboriginal rights and those rights and freedoms outlined in the *Charter of Rights and Freedoms*. There inherent incommensurability is partially constructed by the majority in *Van der Peet*, who define aboriginal rights in opposition to *Charter* rights. Lamer C.J. writes:

Section 35(1), it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal. In the liberal enlightenment view, reflected in the American Bill of Rights, and more indirectly, in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the “inherent dignity” of each individual in society is respected. Aboriginal rights cannot, however be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights

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<sup>12</sup> we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. 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.” in *Van der Peet* ¶74 (emphasis added)

<sup>13</sup> *Van der Peet*, *supra* at ¶30, 31, 74.

<sup>14</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723 at ¶64 [*Gladstone*].

held only by aboriginal members of Canadian society, they arise from the fact that aboriginal people are aboriginal.<sup>15</sup>

The consequence of this treatment results in a discourse of *sui generis*. *Sui generis* is a Latin term that means “one of a kind; unique”. The phrase is often imported when the Supreme Court engages in aboriginal litigation. Again, the consequence this conceptual incommensurability creates will be discussed below. However, the interaction between the Supreme Court’s definition of aboriginal rights, and public perception of aboriginal rights, is a significant element to the context that aboriginal litigation exists in.

There is a great deal of misunderstanding about aboriginal and treaty rights that continues to exist in Canada. The above definition of an aboriginal right by Lamer C.J. does not have a parallel case dealing with treaty rights. Treaty rights tend to be defined by the sacred texts that still exist, making the concept of treaty rights more tenable. Still the misunderstanding continues, and the combined protection of aboriginal rights and treaty rights had led to a series of consequences discussed below. One thing is clear, the general public’s knowledge of aboriginal and treaty rights do not represent the treatment given by the Supreme Court. One only needs to look to the *Marshall* cases to verify this sweeping generalization. Unfortunately, such generality needs to be taken when approaching this aspect of the incommensurability because the misunderstanding is generated from any one of regional, social, or personal conceptions of aboriginal peoples and corresponding rights. Furthermore, from aboriginal community to aboriginal community, rights and the conception of rights differ as well. The problem is exacerbated by unfair portrayals of aboriginal people in the media.

### **Public Opinion and the Supreme Court:**

In 1999 Joseph Fletcher and Paul Howe completed a comprehensive analysis of Canadian attitudes towards both the *Charter* and the Courts. After conducting a regional analysis of their collected polls, Fletcher and Howe found that “overall the majority in every region favours the

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<sup>15</sup> *Van der Peet, supra* at ¶17-18.

Courts.”<sup>16</sup> But in a footnote to this statement, Howe and Fletcher compare their regional analysis to a November 1999 Angus Reid poll printed in *The Globe and Mail*. They noted that the tension created by the results of these surveys. While Howe and Fletcher had found the highest level of support for the courts to come from the Atlantic region, the Angus Reid poll found the opposite. The Angus Reid poll had specifically asked people if “they felt that judges in Canada have too much power.”<sup>17</sup> Howe and Fletcher ascribed the difference to a dissatisfaction the public had with the *Marshall* decision, noting the impact specific cases can have on public attitude to the Courts.<sup>18</sup> Unfortunately Howe and Fletcher’s later analysis, which examined three highly controversial Supreme Court rulings, did not engage in an analysis of *Marshall*. However, their investigation of *R v. Feeney*,<sup>19</sup> *Vriend v. Alberta*,<sup>20</sup> and *Reference re Secession of Quebec*,<sup>21</sup> did support the hypothesis that “support for the courts and the constitutional arrangements that empower them does relate to issues of the day.”<sup>22</sup>

To explore the dissatisfaction of the public and highlight the context the incommensurability is perpetuated in, I offer a brief recap of *Marshall 1* and *Marshall 2*.

### **The *Marshall* Legacy:**

The *Marshall* decisions are excellent examples of the complicated context that aboriginal litigation exists in and the unsatisfactory results that consequentially occur. Essentially the *Marshall* decisions serve to illustrate the ineffectiveness of aboriginal litigation in the constitutional realm.

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<sup>16</sup> Joseph Fletcher & Paul Howe, “Public Opinion and the Courts” (May 2000) 6 IRPP at 14.

<sup>17</sup> *Ibid.* at p.28.

<sup>18</sup> *Ibid.*

<sup>19</sup> [1997] 2 S.C.R. 13. The Supreme Court excludes evidence under s.24(2) of the Charter because it was collected from an unreasonable search and seizure.

<sup>20</sup> [1998] 1 S.C.R. 493. The Supreme Court orders the provincial government to include sexual orientation into the protected characteristics listed under their Human Rights legislation. Joseph Fletcher & Paul Howe, “Supreme Court Cases and Court Support: The State of Canadian Public Opinion” (May 2000) 6 IRPP at p.38)

<sup>21</sup> [1998] 2 S.C.R. 217. The Supreme Court holds that unilateral provincial secession is not legally permissible. (*Ibid.* at p.43)

<sup>22</sup> *Ibid.* at p. 31.

In the original *Marshall* decision, the majority of the Supreme Court held that the regulations authorizing the Minister to exercise absolute discretion when issuing licenses infringed the appellant's treaty rights, and without any justification of these regulatory prohibitions he was entitled to an acquittal.<sup>23</sup> Donald Marshall Jr. had been charged with three offences contrary to provincial legislation including: selling eels without a licence, fishing without a licence, and fishing during the closed with illegal nets.<sup>24</sup> The treaty right found by the majority after a close analysis was "a treaty right to continue to **obtain necessities** through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test."<sup>25</sup> This reference to the *Badger* test indicated, once again, that treaty rights could be infringed if justified.<sup>26</sup>

Shortly after the Supreme Court's decision on *Marshall I* aboriginal communities "hailed the decision as a major victory and began to exercise their newly recognized [fishing] rights by setting traps for lobster despite the season being closed."<sup>27</sup> Sloppy reporting of the Supreme Court's decision failed to stress the majority's section entitled: "Limited Scope of the Treaty Right." This specifically dealt with the Crown's concerns that recognizing the treaty right as a right to trade would lead to "uncontrollable and excessive exploitation of the natural resources."<sup>28</sup> The Court pointed to the clause in the Treaty of 1760 that allowed trading that "furnish[ed] them with necessities," and emphasized the similarities between the concept of necessities and moderate livelihood as discussed in *Van der Peet*. Furthermore the Court noted the distinction

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<sup>23</sup> *Marshall I*, *supra* at ¶63-66.

<sup>24</sup> *Ibid.* at ¶62.

<sup>25</sup> *Ibid.* at ¶56 [emphasis added].

<sup>26</sup> [1996] 1 S.C.R. 771 [*Badger*] In *Badger*, Cory J. for a slim majority indicated that *Sparrow's* scheme for infringement and justification applied to treaty rights as well. (cf ¶96)

<sup>27</sup> Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada*, (Vancouver: UBC Press, 2006) at 137 [*The Last Word*].

<sup>28</sup> *Marshall I*, *supra* at ¶57.

between commercial rights and the right to trade for necessities or sustenance as discussed in *R.*

*v. Gladstone*.<sup>29</sup> Binnie J., for the majority explicitly wrote:

Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would not constitute an infringement that would have to be justified under the *Badger* standard.<sup>30</sup>

Non-Aboriginal fishers were angry at the decision and the fact that aboriginal fishers had engaged in lobster fishing despite the closed season.<sup>31</sup> A series of violent acts ensued, which were reported heavily by the media.<sup>32</sup> The entire case had been heard in the media who represented Marshall as a hero, standing up for the rights of his people to fight injustice again after enduring 11 years in prison for a wrongful conviction.<sup>33</sup>

Two months after *Marshall 1*, the West Nova Fishermen's Coalition, an intervener in *Marshall 1* received an answer to their application to the Supreme Court for a rehearing of the appeal in *Marshall 1*, and stay for the judgment contained therewith. The Supreme Court went further than to simply respond to the Coalition's motion, and shockingly returned to its decision on treaty rights discussed in *Marshall 1*. This motion for rehearing and stay, which provided lengthy reasons became known as *Marshall 2*. The Supreme Court's response to the Coalition reflects two important aspects regarding the incommensurability perpetuated by litigation. First, it indicated that the Court's subconscious is tuned to public opinion given its need to issue reasons referring back to the *Marshall 1* decision. It also indicates the tenuous relationship between aboriginal and non-aboriginal groups that the Supreme Court must be cognizant of when it adjudicates aboriginal and treaty rights. As will be discussed below, the Supreme Court in "resolving" issues brought through constitutional litigation does not alleviate the incommensurability between aboriginal and non-aboriginal groups, but reinforces the

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<sup>29</sup> *Gladstone* cited in *Marshall 1*, *supra* at ¶58-9.

<sup>30</sup> *Marshall 1*, *supra* at ¶61.

<sup>31</sup> *The Last Word*, *supra* at 137.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at 146-7.

impossibility to achieve a common measure by adjudicating in a process that has structurally reinforced incommensurability into the system.

## **Incommensurability Re-inforced: The Perils of Aboriginal Litigation**

In an article that undertakes to illustrate how the structure of public law litigation has evolved past the bipolar aspect of the traditional lawsuit, Abram Chayes indicates:

the characteristic features of the public law model are very different from those of the traditional model. The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point.<sup>34</sup>

Effectively then, the public law model does not necessarily foster incommensurability because the model has deviated from the traditional bipolar model found in private litigation. However, with respect to Chayes' thesis, and despite the admittance of parties as intervenors or *amicus curiae* and opportunities for negotiation and mediation, I argue that the litigation structure as a whole necessarily fosters an incommensurability between the parties. Furthermore, I argue that the judges who sit at the apex of this division are not able to resolve the incommensurability in aboriginal litigation of constitutional questions. This is illustrated in the Supreme Court's development of tests for determining aboriginal and treaty rights.

A series of Supreme Court considerations of s.35(1) in the 1990s have generated tests for the definition of aboriginal rights,<sup>35</sup> content of aboriginal title,<sup>36</sup> and adjudicating infringement of said rights,<sup>37</sup> and justifying said infringement.<sup>38</sup> The jurisprudence is confusing, referencing contemporary decisions and deflecting new issues for a later date. It makes articulating the perils of the litigation process quite difficult. The following analysis focuses on the incommensurability that is necessarily maintained as a result of the tests. This incommensurability refers both to that

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<sup>34</sup> Abram Chayes "The Role of the Judge in Public Law Litigation" (1976) 89 Harvard Law Review 1281 at 1281.

<sup>35</sup> *Van der Peet, supra*.

<sup>36</sup> [1997] 3 S.C.R. 1010 [*Delgamuukw*].

<sup>37</sup> *Sparrow, supra*.

<sup>38</sup> *Sparrow, supra* and *Gladstone, supra*.

existing between aboriginal groups and the Crown, as well as the consequential incommensurability between aboriginal and non-aboriginal groups. This consideration of the perpetuated incommensurability is especially interesting given the reconciliation motif that occurs throughout the jurisprudence penned by Lamer C.J.

Initially this reconciliation strategy seemed valid, as the court sought to “reconcile” aboriginal rights with Crown sovereignty. In fact, one could point to this process as an attempt to alleviate incommensurability. However, to yield to this reconciliation motif, would only provide a cursory analysis of the incommensurability that is fostered by aboriginal litigation. Two excellent examples of this cursory treatment would be to look to the test for proof of aboriginal title, and to the definition of aboriginal rights.

In *Delgamuukw v. British Columbia*,<sup>39</sup> Lamer C.J. for the majority outlined the test for proof of aboriginal title.<sup>40</sup> First the litigant had to illustrate that the land was **occupied** prior to **sovereignty**.<sup>41</sup> Sovereignty as a time frame was chosen by the court because they found that aboriginal title arose “out of prior occupation of the land and out of the prior relationship between the common law and pre-existing systems of aboriginal law.”<sup>42</sup> A further attempt to find some common measure is seen in the Court’s treatment of occupation, which came from demonstrated physical presence and existence of recognition of the claimed rights by the regime that prevailed before.<sup>43</sup> Second, if the litigant relied on present occupation for proof of occupation pre-sovereignty, there had to be a continuity demonstrated. The third aspect of the test emphasizes a final attempt to find common measure. This required the litigant to illustrate that at sovereignty, that occupation must have been **exclusive**. However, the Court was quite clear that “proof of

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<sup>39</sup> *Delgamuukw, supra*.

<sup>40</sup> *Ibid.* at ¶143.

<sup>41</sup> Each of the boldface terms represents a place where the Supreme Court made a concerned attempt to foster adjudication that would foster coming to a common measure, this alleviating incommensurability.

<sup>42</sup> *Delgamuukw, supra* at ¶145.

<sup>43</sup> *Ibid.* at ¶147.

exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each.”<sup>44</sup>

In *Van der Peet* Lamer C.J. outlined the test for defining aboriginal rights. “For the majority he wrote: “in order to be an aboriginal right an activity must be an element of a practices, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>45</sup> In considering these elements Lamer C.J. highlighted a commensurate approach to perspective and characterizing the right. While noting that the aboriginal perspective of the right needed to be taken into account, that perspective had to be “framed in terms cognizable to the Canadian legal and constitutional structure.”<sup>46</sup> To characterize the right, he indicated that the court should look to factors including the “nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, state, or action being impugned and the practice, custom, or tradition being relied up on establish the right.”<sup>47</sup> These considerations seem to represent a *bona fide* interest to resolve the opposite positions litigants would bring to the Court in aboriginal litigation of constitutional issues.

However, when looking at the tests as a whole, which enable the adjudication of infringements of aboriginal and treaty rights, the perpetual incommensurability becomes more clear. This adjudication parses out to four stages (which correspond to the approach outlined in *Sparrow*) After the characterization of an existing aboriginal or treaty right is considered (the onus of which is borne by the aboriginal litigant), the Court considers where there is a *prima facie* infringement of said right. Here the court asks whether the limitation is unreasonable, imposes undue hardship, denies to the holders of the rights their preferred means of exercising that right.<sup>48</sup> The onus of this stage lies on the aboriginal litigant as well.<sup>49</sup> The burden then shifts to the

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<sup>44</sup> *Ibid.* at ¶156.

<sup>45</sup> *Van der Peet, supra* at ¶46.

<sup>46</sup> *Ibid.* at ¶49.

<sup>47</sup> *Ibid.* at ¶53.

<sup>48</sup> *Sparrow, supra* at ¶70.

<sup>49</sup> *Ibid.*

government to justify “any legislation that has some negative effect on any aboriginal right protected under s.35(1).”<sup>50</sup> This very structure reinforces the incommensurate positions of aboriginal litigants and the Crown. That there is a shifting burden seems to be incongruous with the pre-existing special relationship the Crown and aboriginal groups maintain. It seems odd to entrench such a division within the very test itself when the larger issue demands a more comprehensive resolution and reparation of the relationship between the Crown and aboriginal groups.

The tests also further instantiate the incommensurability between aboriginal and non-aboriginal groups. Looking closely at the jurisprudence on the justification test it is clear that the test has developed to such an extent that almost any legislative objective for infringing aboriginal or treaty rights can be deemed as valid. In *Delgamuukw*, Lamer C.J. summarizes in light of earlier jurisprudence:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the **reconciliation** of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that ‘distinctive aboriginal societies exist within, and are a part of, a broader social, political, and economic community.’ In my opinion 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 settlement of foreign populations to support those aims**, are the kinds of objectives that are consistent with this purpose and, in principle **can justify the infringement of aboriginal title**.<sup>51</sup>

The difference between reconciliation and commensurability may seem slight, but here it represents the conundrum that exists between aboriginal and non-aboriginal people and aboriginal groups and the Crown. To reconcile is defined as: “to restore friendship or harmony; settle, resolve” or “to make consistent or congruous.”<sup>52</sup> Here the Court does just that: it creates a variety

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<sup>50</sup> *Ibid.* at ¶65.

<sup>51</sup> *Delgamuukw, supra* at ¶165. (emphasis added) NB: although here Lamer C.J. references aboriginal title specifically the same is true for the conceptually larger “aboriginal rights” as well as treaty rights (which *Badger* indicated could be infringed by justifiable legislation as well)

<sup>52</sup> *Merriam-Webster Online Dictionary, s.v.* “reconcile”

of tests that *make* the litigants claims congruous, but the effect of the litigation does not go to alleviate the inability of the parties to find a common measure to resolve the issue at hand. The very fact that the Supreme Court's treatment of aboriginal and treaty rights did not alleviate the incommensurability is demonstrated by *Marshall 1* and *Marshall 2*, which occur in 1999, only two years from the culmination of s.35(1) consideration of litigating aboriginal rights in *Delgamuukw*. It is also demonstrated in the case of *R. v. Powley*, which I present below as a case study that explores the incommensurability perpetuated by the litigants by examining their presentation on the definition of Métis for the purposes of s.35(1).

It is important to note, that as a creation of the Crown, the Supreme Court of Canada can never question the sovereignty of the Crown without entering an existential crisis. However, many aboriginal claims such as those to title and rights are based on a notion of aboriginal sovereignty. To alleviate the incommensurability between these parties the conflict between aboriginal and Crown sovereignty must be addressed. The fact that the judges are unable to pose this question illustrates the need for a new structure.

### ***R. v. Powley*, and incommensurate case study:**

Having already indicated how the Supreme Court perpetuates incommensurability, it is important to illustrate how incommensurability is maintained by the litigants as well. In an effort to demonstrate the process, I engaged in a rhetorical analysis of the facta submitted by the appellant, respondents, and the interveners in *Powley*. Steven and Roddy Powley were charged with unlawfully shooting and killing a bull moose,<sup>53</sup> but what makes *Powley* is an exceptionally interesting case to rhetorically analyze, is the added complexity the litigants had to navigate with respect to the term "Métis", as included in the term "aboriginal" pursuant s.35(2) of the *Constitution Act, 1982*. The terms "Indian" and "Inuit" were less controversial, but the group of people that fell under the rubric of "Métis" was a question that had been left unanswered by political considerations. *Powley* also considered the question of the timeframe outlined in the *Van*

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<sup>53</sup> *Powley*, *supra* at ¶6.

*der Peet* test for aboriginal rights.<sup>54</sup> The Supreme Court's finding that the relevant timeframe for Métis people was "pre-control" was important, but the litigants' presentations on who should be identified as Métis represented something much more significant at stake. Adding to the complexity of the situation was the commonly understood but seldom articulated rivalry between Métis organizations regarding who would regulate membership given the determined definition. Some of these organizations intervened in the *Powley* case.

Rhetorical analysis is a critical tool that illustrates the mechanisms that act to persuade the receiver of the text into identifying with whatever message is being portrayed. It was my hypothesis that a rhetorical analysis using Kenneth Burke's *grammar* would illustrate conflicting ratios, which in turn would show how each litigant perpetuated an incommensurability that could be overcome if the language was permitted become more malleable through an alternative dispute resolution structure. Ratios are elicited through Burke's pentadic analysis, which identifies how representations are being cast. They are "principles of 'determination' and 'selectivity'."<sup>55</sup> Therefore, when analyzing texts Burke's *grammar* helps illustrate how the structures in the text construct different realities.<sup>56</sup> This kind of analysis can be done on any representation from a conversation between a mother and daughter to more formal constructions, such as legal submissions.

The expected tensions in the ratios were forthcoming. For example, in the appellant's factum, the Crown construed the ratios within its argument on the definition of Métis in *scene: agent* and *act: scene* ratios.<sup>57</sup> In fact, the factum presents an unusual ratio to begin the argument, one that creates an intentional barrier:

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<sup>54</sup> There Lamer C.J. for the majority had indicated the relevant time frame for considering aboriginal rights was pre-contact. The Métis who were a post-contact people, presented a challenge for this test.

<sup>55</sup> Glenn Stillar, *Analyzing Everyday Texts; Discourse, Rhetoric and Social Perspectives*, (California: Sage Publications Inc., 1998) at 64 [Stillar].

<sup>56</sup> *Ibid.* at 63-4.

<sup>57</sup> The ratios simply represent that the latter is dominated by the former. Here the agent governs the scene and the scene governs the act. This identifies how the text is being constructed.

“There is no evidence of a Sault Ste. Marie Métis community until the 1800s.”<sup>58</sup>

ratio - **scene** (≥ 1800s): **scene** (Sault Ste. Marie Métis community)

Here the text frames the Métis community by intentionally leaving the agent out. Another important ratio found in the appellant’s factum is found as the act of Crown’s sovereignty (**act**) is represented as characterizing the Métis community (**scene**).<sup>59</sup> The respondent’s representation was much different. When discussing the Métis, the factum is framed in *scene: agent, scene: scene*, and *scene: act* ratios.

- The Métis (**agent**) are part of a dynamic and complex Aboriginal landscape in Canada (**scene**).
- [The landscape has been affected by] (**scene**) Changes to the *Indian Act* (**scene**).
- [The *Indian Act*] (**scene**) can be directly attributed to the arrival of Europeans (**act**).<sup>60</sup>

These ratios work together to select the notion that the Métis’ identity, which is admittedly complicated in the context of “aboriginal,” is caused by the *Indian Act*. This is then framed in terms of the arrival of the Europeans.

The ratios clearly illustrate different selections and deflections of reality. The appellant, the Crown, selects the notion that “Métis” is subject to a date, while the respondent selects the notion that the current complications for defining Métis exist *because of* the Europeans. Despite the tension in the ratios, the larger question was why these differences were occurring. The ratios illustrated that communication was not occurring, but there seemed to be a larger force constraining the kinds of ratios that were being produced. Typically a rhetorical analysis will start with the micro considerations of the text and given this data as a base, the analysis will consider

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<sup>58</sup> “Appellant’s Factum in the Supreme Court of Canada between Her Majesty the Queen and Steven Powley and Roddy Charles Powley” online: Congress of Aboriginal People <<http://www.abo-peoples.org/programs/Powley%20Implementation/Crown%20Factum%20scc.pdf>> at ¶65 [Appellant’s Factum].

<sup>59</sup> *Ibid* at ¶68.

<sup>60</sup> “Respondents’ Factum on Appeal in the Supreme Court of Canada between Her Majesty the Queen and Steven Powley and Roddy Charles Powley” online: Congress of Aboriginal People <<http://www.abo-peoples.org/programs/Powley%20Implementation/Powley%20SCC%20Factum.pdf>> at ¶21 [Respondents’ Factum]

what other elements of the situation affect the negotiation between the text and its reader. Here Burke's notion of terministic screens helps to identify the constraint.

The terministic screen is a conceptual term for those situations that bring with them an expected discourse. The key is to recognize that all situations are accompanied by their own terministic screens.

We must use terministic screens, since we can't say anything without the use of terms; whatever terms we use, they necessarily construe a corresponding kind of screen; and any such screen necessarily directs the attention to one field rather than another. Within that field there can be different screens, each with its way of directing attention and shaping the range of observations implicit in the given terminology.<sup>61</sup>

For the general rhetorical analysis these screens are often a little more difficult to identify than in the current situation. Litigation as a terministic screen is modified through other terministic screens that also participate in this situation. So while the facts must be presented through the screen of litigation, they also must be framed in terms of the previous tests from earlier jurisprudence, rules of evidence and so forth. To increase the complexity, the facts enable each litigant to lobby to create their own terministic screens. For example, in the respondents' factum: "While most of the English language historical and legal documents refer to the Métis as 'half-breeds,' they are also referred to in the historical record as freemen, Canadian, *voyageur*, *chicot*, *mischief*, or *bois brulé*. All witnesses at trial used the term Métis in preference to the pejorative and misleading term 'half-breed'."<sup>62</sup> This passage illustrates two significant points. First, it illustrates the adhesion to a screen of litigation while attempt at creating a terministic screen to considering the definition of Métis. Although the respondents' clearly admit that in most of the historical record the Métis are represented by "half-breed" (thus acknowledging the role the historical record will play for the consideration of aboriginal rights), they intentionally indicate that this term is pejorative and thus inappropriate for use by the Supreme Court. This affords the respondents' the opportunity to cast the definition of Métis through the screen of "*voyageur*,

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<sup>61</sup> Kenneth Burke in Stillar, *supra* at 61.

<sup>62</sup> Respondents' Factum, *supra* at ¶22.

*chicot, mischief, or bois brulé*” each of which speak to a distinct Métis culture historically from the Red River area. Consequentially, those aboriginal people of mixed descent, who could be characterized as “half-breeds” are deflected.

But more significantly this passage illustrates that the respondents’ attempt to get the Supreme Court to identify with their notion of Métis. As social beings “we are divided in interest, ability, access to resources, attitude, and so on. To this end, the function of rhetoric is to overcome division through identification and consubstantiality.”<sup>63</sup> Much like the consequence of the ratios, the attempt to persuade the Supreme Court to identify with the respondents is easier to identify than in a typical rhetorical analysis because the genre of litigation requires this to occur. We are not surprised that a litigant is attempting to persuade the judges because this marks the entire purpose of litigation. What the rhetorical analysis indicates then is that the genre of litigation is constraining language in such a way that never allows the true motivation to be articulated.

Furthermore, the rhetorical analysis also identifies the fact that the rhetorical act (as represented via the factum) is addressed to the Court and not the other party or interveners. This is especially clear upon analysis of the interveners’ facta. Although the controversial issue at hand for the Supreme Court as litigated by the parties is the definition of Métis, the Métis Nation Council attempt to persuade the Court to leave the definition to the community.<sup>64</sup> The factum of the Congress of Aboriginal People shows a significant attempt to persuade the Court to reframe the *Van der Peet* test for defining aboriginal rights.<sup>65</sup> The factum of Aboriginal Legal Services Toronto attempts to persuade the Court not to adopt a definition of Métis based on “persons of

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<sup>63</sup> Consubstantiality refers to the sharing of substance (here the motives indicated by the ratios) Stillar, *supra* at 73.

<sup>64</sup> “Factum of the Intervener Métis National Council in the Supreme Court of Canada between Her Majesty the Queen and Steven Powley and Roddy Charles Powley” online: Congress of Aboriginal People <[http://www.abo-peoples.org/programs/Powley%20Implementation/MNC\\_POWLEY\\_SCC\\_FACTUM.pdf](http://www.abo-peoples.org/programs/Powley%20Implementation/MNC_POWLEY_SCC_FACTUM.pdf)> [MNC Factum] at ¶3-9; ¶59-66.

<sup>65</sup> “Factum of the Intervener Congress of Aboriginal Peoples in the Supreme Court of Canada between Her Majesty the Queen and Steven Powley and Roddy Charles Powley” online: Congress of Aboriginal People <<http://www.abo-peoples.org/programs/Powley%20Implementation/CAPsccPowleyFactum.pdf>> at 7-15 [CAP Factum].

mixed ancestry,”<sup>66</sup> as well as also attempting to reframe the *Van der Peet* test based on the dissents of McLachlin J. (as she then was) and L’Heureux-Dubé J.<sup>67</sup> Each of these attempts to have the Court identify with their submissions illustrates that there is a lack of inter-communication between the various groups.

Therefore, the rhetorical analysis indicates that the structure of the litigation refuses to allow communication to occur between litigants or interveners. These are the groups, which if able to find common measure, can work to resolve various issues in a meaningful way. Thus, the rhetorical analysis illustrated that litigation necessarily perpetuates the incommensurability that exists between aboriginal groups and the Crown.

The Supreme Court refused to issue a precise definition for Métis. Instead, a unified Court was persuaded that the term “Métis” in s.35(1) did not “encompass all individuals with mixed Indian and European heritage,”<sup>68</sup> and indicated that a claimant would only need to illustrate that he or she “belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right.”<sup>69</sup> The Court would not “enumerate various Métis peoples that may exist,”<sup>70</sup> but required a claimant to “self-identify as a member of a Métis community,”<sup>71</sup> “present evidence of an ancestral connection to a historic Métis community,”<sup>72</sup> and demonstrate acceptance by the “modern community whose continuity with the historic community provides the legal foundation for the right being claimed.”<sup>73</sup> The

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<sup>66</sup> “Factum of the Intervener Aboriginal Legal Services Toronto in the Supreme Court of Canada between Her Majesty the Queen and Steven Powley and Roddy Charles Powley” online: Congress of Aboriginal Peoples <<http://www.abo-peoples.org/programs/Powley%20Implementation/SCC%20Factum%20Toronto%20Legal%20Services.pdf>> at ¶9-10 [ALST Factum].

<sup>67</sup> *Ibid.* at ¶21-22.

<sup>68</sup> *Powley, supra* at ¶10.

<sup>69</sup> *Ibid.* at ¶12.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.* at ¶31.

<sup>72</sup> *Ibid.* at ¶32.

<sup>73</sup> *Ibid.* at ¶33.

Court also found that “members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food under s.35(1).”<sup>74</sup>

What then did the litigation resolve? An official frequently asked questions page hosted by Indian and Northern Affairs Canada addresses whether the *Powley* decision recognized harvesting rights for the Métis throughout Canada and whether the decision included a legal definition of Métis. Both answers are cast in the negative, reinforcing the specificity the *Powley* decision had to the Sault Ste. Marie Métis community.<sup>75</sup> The site also indicates that the provincial governments will be those most affected by the decision and that “overlapping or competing rights involving First Nations, Inuit, and Métis can only be resolved through negotiation.”<sup>76</sup> In the Ontario Secretariat for Aboriginal Affairs publication “A New Approach to Aboriginal Affairs” Métis “harvesting regimes” are identified as an area where the negotiation and implementation of agreements with Métis communities needs to occur. However, other than the general call for negotiation, need to conduct research, and the inclusion of the federal government when appropriate, there are no “new approaches.”<sup>77</sup> There is no consensus on which aboriginal community groups are recognized as legitimate. In Ontario there are at least two Métis organizations that purport to authorize a registered membership and issue cards signifying “Métis status.”<sup>78</sup> Various pamphlets have been issued by these organizations in attempt to educate the community of what the Court found in *Powley*. Unfortunately without more rigorous harvesting agreements there is no definitive answer for the average Métis person seeking to harvest food. Given this was the initial charge of Mr. Powley, it seems quite clear that constitutional litigation

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<sup>74</sup> *Ibid.* at ¶53.

<sup>75</sup> Federal Interlocutor for Métis and Non-Status Indians, “The Supreme Court of Canada’s *Powley* Decision: Frequently Asked Questions” online: Indian and Northern Affairs Canada <[http://www.ainc-inac.gc.ca/interloc/pow\\_e.html](http://www.ainc-inac.gc.ca/interloc/pow_e.html)>.

<sup>76</sup> *Ibid.*

<sup>77</sup> Ontario Native Affairs Secretariat, “Ontario’s New Approach to Aboriginal Affairs” (Toronto, Queen’s Printer for Ontario, 2005) online: Ontario <<http://www.aboriginalaffairs.osaa.gov.on.ca/english/news/brochure.html>>.

<sup>78</sup> Ontario Métis Council (in alliance with the Métis National Council) and the Ontario Métis Aboriginal Association.

of aboriginal issues only serves to perpetuate incommensurability instead of addressing each party's interests and mediating a solution accordingly.

## **From Litigation to Mediation: Changing Our Level of Consciousness**

It is important to recall at this point that this essay focuses specifically on the constitutional litigation of aboriginal and treaty rights. This is a specific engagement of aboriginal people in the Canadian justice system where typically the disputant has been charged pursuant a federal or provincial regulatory offence and seeks to defend his or her action by relying on aboriginal or treaty rights. This litigation ensues to establish if there is an existing aboriginal or treaty right and whether any regulatory infringement is justifiable. As such, the following suggestion on the role mediation should play in aboriginal and Crown resolutions, does not extend to other ways the Canadian law affects aboriginal people. For example, I am not suggesting that mediation is a better answer for aboriginals charged with criminal offences or seeking to resolve issues in property or family law. Some academics have argued that a separate aboriginal justice system would be the ideal structure within which aboriginal groups could adjudicate based on principles of aboriginal law.<sup>79</sup> This suggestion is accompanied by its own set of conceptual dilemmas that arise out of a concern of potential cultural clashes. However, the litigation of aboriginal and treaty rights merits a reconsideration of litigation to enable parties to articulate their underlying interests. Because mediation does just that, I suggest that mediation should be required as a structure that the Crown and affected parties must enter if litigation is pursued.

This suggestion also does not go so far as to posit that mediation should replace the role that negotiation plays in aboriginal and Crown relations. Negotiations continue to make progress, yielding self-government agreements and resolving comprehensive claims over land and the

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<sup>79</sup> See for example John Borrows "A Separate Peace: Strengthening Shared Justice" in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver, UBC Press, 2004) at 343-361.

Supreme Court has acknowledged the importance and preference of negotiations.<sup>80</sup> However, the failure of the negotiation structure to enable the parties to engage in a common language and articulate their interests is evident in cases like *Powley* and the *Marshall* decisions. Constitutional litigation of aboriginal and treaty rights represent a unique subset of cases that specifically reflect the failure of negotiations to resolve the incommensurability between the Crown and aboriginal groups because the charge reflects the Crown's unwillingness to recognize the aboriginal practice(s) as valid. The litigation commences because of the intentional prosecution of the aboriginal litigant *instead of* negotiating with the affected aboriginal group to address the Crown's underlying concern and identify a mutually acceptable solution. Given that Crown prosecution of aboriginal peoples asserting their aboriginal or treaty rights will continue, I suggest a "lengthy" mandatory mediation should be required to foster commensurability and resolve the issue before a court adjudicates the issue based on a rigid tests coming from the aboriginal constitutional jurisprudence.

Mediation offers a better structure for the disputants to resolve their issue in three main ways: it enables the disputants to communicate in a way that does not have to adhere to the genre of litigation, it is not predicated with a purpose of adjudication, and it is potentially the only space where Crown sovereignty does not have to be assumed. If we recall the rhetorical analysis of the facts submitted to the Supreme Court in *Powley*, which indicated the language of litigation disabled the disputants from communicating their issue to each other, mediation presents a stark contrast. In her characterization of mediation Julie Macfarlane writes: "Mediation emphasizes the role of the parties themselves in reaching their own agreed solution."<sup>81</sup> Furthermore, she indicates the difference a mediator plays to that of a judge: "because the third party in a mediation process is not a decision maker the discussion can include not only the entitlements asserted by each of the parties, but also an examination of their interests and needs -- what lies behind each of the

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<sup>80</sup> *Delgamuukw, supra* at ¶186.

<sup>81</sup> J. Macfarlane, "The Mediation Alternative" in Julie Macfarlane, ed., *Dispute Resolution: Readings and Case Studies*, 2nd ed (Toronto: Emond Montgomery Publications Ltd, 2003) 282 at 282 [Macfarlane].

positions they have taken.”<sup>82</sup> Thus instead of the third party acting as a divisive factor, to whom positions are argued and then adjudicated, a mediator fosters a common language by exploring each disputants motivations behind their positions. As a further benefit the disputants can communicate this motivation themselves instead of through a lawyer, which illustrates that at least some of the terministic screens required by litigation have been disabled in the space of mediation. In fact, the only screens enabled are those that seek to deflect the *position* of the disputants while selecting their *interests*. This deconstructs the litigation structure.

The flexibility of mediation should be able to accommodate interveners. Any group granted intervener status for the litigation should be able to participate in the mediation. Because the structure is used to generate interests, and interveners operate as groups representing relevant interests, they should be included in the discussion. This also enables an agreement to be made as a consensus between all of the parties instead of just between the disputants.

Finally the sovereignty question, which animates aboriginal constitutional litigation, if it can ever be asked, can be asked in a mediation. A mediation that organically generates communication on this question does not necessarily bring the same kind of conceptual existential crisis the Supreme Court would face if it considered the question. Although mandatory mediation would have to be required through statute, the role of the mediator is not adjudicative like the role of the judge. Instead, the mediator facilitates an agreement between the disputants. It is the disputants that shape the consensual agreement.

For this reason it is important that the mediator does not choose to conduct an “evaluative” mediation,<sup>83</sup> but is a facilitative mediator who starts with a broad orientation. It is important, especially in the complex context of aboriginal and Crown relations that the mediator is not one that is required to have extensive knowledge of the relationship and consequentially affect his or her impartiality. The issue of potential bias, appropriate training, and a mechanism

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<sup>82</sup> *Ibid.*

<sup>83</sup> C. Menkel-Meadow, “The Many Ways of Mediation” in Macfarlane 290 at 290.

for agreeing on an appropriate mediator are all issues that will need to be addressed. But these potential issues are not insurmountable, nor are they particularly specific for aboriginal and Crown disputants.

The most difficult aspect of utilizing mediation as an effective structure to resolve the aboriginal constitutional issues being litigated is overcoming the profound mistrust between aboriginal groups and the Crown. Inevitably this mistrust will initially be brought to the mediation. However, I do not believe that overcoming this mistrust is insurmountable. It is because of this mistrust that I have advocated for a “lengthy” mandatory mediation in an effort to address the significant amount of time I believe it will take to disputants to truly articulate their interests and motivations. I believe being enabled through the mediation to actually articulate these interests and come to a consensus on the solution should overcome, in some way, this mistrust. Although a mandatory mediation period of a few hours might not compel disputants into communication, two or three weeks of required mediation before litigation continues should foster some communication.

Admittedly, the cost of a lengthy mediation will increase proportionately, but considering the cost of litigation this can hardly be a sufficient reason to deter the entire process. Furthermore, the cost of such mediation needs to be considered in the context of the cost of litigating each aspect aboriginal and treaty rights. Again the context of *Powley* is helpful. As noted above, the Supreme Court did not resolve the definition of Métis or the extent to which the Métis could harvest for food. With the added insights of the interveners, these issues could have come to bear out of mediation. The cost of litigating each of these aspects is far greater than the cost of a longer mediation.

## **Conclusion**

In this essay, I have illustrated the perpetual incommensurability created by the jurisprudential consideration of s.35(1) aboriginal and treaty rights. I have highlighted how the

incommensurability between aboriginal groups and the Crown is entrenched through the language of litigation. Finally, I have suggested that mediation is a viable alternative that would enable communication between these groups and find a common measure to resolve aboriginal and treaty rights issues.

However, while legislating a mandatory mediation, even a “lengthy” one should help generate a common measure through which to resolve issues through consensus, this can only ever actualize if the participants are willing to engage in such a structure. It is my hope that by illustrating how litigation necessarily fosters incommensurability, which negates the possibility of a satisfying resolution, aboriginal groups and the Crown will consider this specific constitutional issue at hand in a new consciousness.