HAS CONSTITUTIONALIZING ABORIGINAL AND TREATY RIGHTS MADE A DIFFERENCE?

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THE CONSTITUTION EXPRESS was the impetus for constitutional acknowledgment of Aboriginal and Treaty Rights in Canada.[1] Without it, these rights probably would have been left out of the *Constitution Act, 1982*. Instead, after intense Indigenous pressure, domestically and internationally, a special part dealing with Aboriginal Rights was inserted in the Act following the *Canadian Charter of Rights and Freedoms*. The most important provision in this part, section 35, recognized and affirmed the existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada, who are defined as including the Indian, Inuit, and Métis peoples.[2] In addition, section 25 was included in the Charter to shield the special rights of Aboriginal Peoples from abrogation and derogation by other Charter provisions, especially section 15's equality rights guarantee. To facilitate identification and definition of Aboriginal and Treaty Rights, section 37 (since repealed) provided for a constitutional conference to be held within a year. This conference, in March 1983, was chaired by Prime Minister Pierre Elliott Trudeau and was attended by the provincial premiers and representatives of four national Aboriginal organizations.[3] It resulted in two additions to section 35, clarifying that Treaty Rights include rights in modern land claims agreements and specifying that Aboriginal and Treaty Rights are guaranteed equally

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1 In this article, "Aboriginal" and "Indigenous" are used more or less interchangeably. The former term is unavoidable because it is used in the Constitution and most court cases dealing with Indigenous Rights.

2 Section 35 of the *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11. See Douglas E. Sanders, "The Indian Lobby," in *And No One Cheered: Federalism, Democracy, and the Constitution Act*, eds. Keith Banting and Richard Simeon (Toronto: Methuen, 1983), 302.

3 The Assembly of First Nations, Native Council of Canada, Inuit Committee on National Issues, and Métis National Council.

to men and women.[4] Beyond that, little progress was made on defining section 35 rights, so section 37.1 was added to mandate at least two more constitutional conferences on Aboriginal matters within five years of the enactment of section 35. In addition, a new section 35.1 committed Canada and the provinces to convene a constitutional conference with Aboriginal Peoples before making constitutional amendments relating to their rights.

Three more constitutional conferences were held from 1984 to 1987 to try to provide more clarity to section 35, without much being accomplished.[5] The major source of discord was Aboriginal Peoples' demand that their right of self-government be explicitly acknowledged, which the federal government would accept only if it were contingent on negotiated agreements, and which some provinces would not agree to without defining the right. Viewing the various positions as irreconcilable, the then prime minister, Brian Mulroney, terminated the final conference with no plan to continue discussions, to the disillusionment of the Aboriginal parties. Their skepticism only increased when Canada and the premiers, a scant few weeks later, agreed behind closed doors and without Aboriginal participation to acknowledge Quebec's special status as a distinct society in the Meech Lake Accord. That accord floundered when Elijah Harper, a Cree member of the Manitoba legislature, held up an eagle feather and blocked the vote on ratification by the legislative assembly, after which Premier Clyde Wells decided not to bring it to a vote in the Newfoundland legislature.[6] A further attempt at constitutional reform in the 1992 Charlottetown Accord also failed – this time because the electorate rejected it in a referendum – ensuring that the constitutional parameters of Aboriginal and Treaty Rights would be determined by judges rather than by politicians.[7]

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[4] *Constitution Act, 1982*, s. 35(3) and (4). An amendment was also made to section 25 to ensure the rights protected by it include rights in past and future land claims agreements.

[5] See David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston, ON: Institute of Intergovernmental Relations, 1989).

[6] See M.E. Turpel and P.A. (Trish) Monture, "Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord," *Queen's Law Journal* 15, no. 2 (1990): 345.

[7] See Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking, 1993), 207–28; Kent McNeil, "The Decolonization of Canada: Moving toward Recognition of Aboriginal Governments," *Western Legal History* 7, no. 1 (1994): 113.

THE PRE-SECTION 35 STATUS OF ABORIGINAL AND TREATY RIGHTS

To appreciate the significance of section 35, it is necessary to understand what legal protections Aboriginal and Treaty Rights enjoyed against *governments* (as opposed to *settlers*) prior to 17 April 1982 when the section came into force.[8] Although Indigenous land rights had been acknowledged by the US Supreme Court,[9] some case law from Canada was not encouraging. In an early decision, *St. Catherine's Milling and Lumber Company v. The Queen*,[10] Lord Watson set the tone by declaring, for the Judicial Committee of the Privy Council in London,[11] that Aboriginal Title to land is "a personal and usufructuary right, dependent upon the good will of the Sovereign," which is sourced, not in Indigenous occupation, use, and law, but in King George III's Royal Proclamation of 1763.[12] One interpretation of this is that: what the King had given he could take away at any time, though this depends on "Sovereign" meaning simply the King. If Lord Watson meant the King in Parliament instead, it would have required Imperial legislation to take away the rights recognized by the Proclamation. In another case, Lord Watson stated that, "under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province [of Canada], that the latter should pay the annuities as and when they became due."[13] However, this remarkable statement is not consistent with the honour of the Crown,[14] a fundamental constitutional principle that recent cases discussed below

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[8] The Royal Proclamation of 1763 affirmed Indigenous land rights and protected Indigenous occupation from settlers. See Jack Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Research Branch, Indian and Northern Affairs Canada, 1981); Brian Slattery, "Aboriginal Title and the Royal Proclamation of 1763: Origins and Illusions," December 2019, online: https://www.researchgate.net/publication/337821333_Aboriginal_Title_and_the_Royal_Proclamation_Of_1763_Origins_and_Illusions. For detailed analysis of the case law on Aboriginal Title before and after inclusion of section 35 in the Constitution, see Kirsten Matoy Carlson, "Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title," *Arizona Journal of International and Comparative Law* 22, no. 3 (2005): 449.

[9] See *Johnson v. M'Intosh*, 8 Wheat. (21 U.S.) 543 (1823); *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1 (1831); *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832).

[10] (1888) 14 App. Cas. 46.

[11] Until 1949, the highest appeal body for civil cases from Canada.

[12] *St. Catherine's Milling* at 54. However, as demonstrated in Kent McNeil, *Flawed Precedent: The* St. Catherine's *Case and Aboriginal Title* (Vancouver: UBC Press, 2019), no evidence of Indigenous law, occupation, or land use was presented in the case, so there was no factual basis to apply existing common law acknowledging land rights originating in these sources.

[13] *Attorney General for Canada v. Attorney General for Ontario*, [1897] A.C. 199 at para. 17.

[14] See *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, especially para. 87.

have held has applied to Crown-Indigenous relations ever since the Crown's assertion of sovereignty.

Matters improved somewhat in the 1960s, when the Supreme Court of Canada ("Supreme Court" or "Court"), in *R. v. White and Bob*,[15] agreed with the BC Court of Appeal that an 1854 agreement between the Crown and the "Nanaimo tribe" on Vancouver Island is a "treaty" within the meaning of section 87 (now section 88) of the *Indian Act*.[16] Section 87, added in 1951, made sure provincial laws of general application apply to "Indians," subject to certain exceptions, among them "the terms of any treaty."[17] In *White and Bob*, the accused were exempted from provincial game laws when hunting for food because they had a treaty right to hunt. Section 88 thus provides some protection to Treaty Rights – but not to Aboriginal Rights – through constitutional division of powers and the doctrine of paramountcy, whereby federal laws prevail over provincial laws in the event of operational conflict.[18] In addition, provincial laws that single Indigenous people out for special treatment so as to impair their status, capacity, or rights are invalid to that extent because they cross the line into exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians."[19] Provincial laws of general application that did not single out but crossed the line into the core federal jurisdiction by impairing the status and capacity of "Indians" or impacting them "qua Indians" were also inapplicable as provincial law to that extent (prior to the Supreme Court's decision in *Tsilhqot'in Nation v. British Columbia*, discussed below),[20] but after 1951 these laws would be incorporated into federal law by section 87 (now section 88). So that section could be a

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[15] (1964), 52 D.L.R. (2d) 481, affirming (1964), 50 D.L.R. (2d) 613.

[16] R.S.C. 1952, c. 149, now R.S.C. 1985, c. I-5, as amended.

[17] See Kerry Wilkins, "Still Crazy after All These Years: Section 88 of the *Indian Act* at Fifty," *Alberta Law Review* 38, no. 2 (2000): 458; Kent McNeil, "Aboriginal Title and Section 88 of the *Indian Act*," *University of British Columbia Law Review* 34, no. 1 (2000): 159.

[18] See *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *R. v. Sioui*, [1990] 1 S.C.R. 1025; Joshua Ben David Nichols, *A Reconciliation without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020), 217–24.

[19] *Constitution Act, 1867*, 30 & 31 Vict. (U.K.), c. 3, s. 91(24). See *Kruger and Manuel* at 110–11; *The Queen v. Sutherland*, [1980] 2 S.C.R. 451; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 179; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 at para. 67. Inuit and Métis are "Indians" within section 91(24): *Reference as to whether "Indians" in s. 91 (24) of the* B.N.A. Act *includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104; *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 S.C.R. 99.

[20] [2014] 2 S.C.R. 257. This was due to the constitutional doctrine of interjurisdictional immunity. See note 88 below and *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Dick v. The Queen*; *Delgamuukw* at paras. 177–81; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 at paras. 16, 33.

two-edged sword, protecting Treaty Rights while making other rights more vulnerable.

Prior to Confederation, this division-of-powers protection against provincial laws did not exist. Hence, the Supreme Court, while acknowledging that Aboriginal Title to land can exist as a legal right, split three-three in *Calder v. Attorney-General of British Columbia*[21] on whether it had been legislatively extinguished in British Columbia prior to the province joining Canada in 1871. Justices Judson, Martland, and Ritchie, who favoured extinguishment, did not question the authority of the colonial governor and legislative council to extinguish Aboriginal Title by proclamation and ordinance. Justices Hall, Spence, and Laskin, dissenting more generally, thought it was beyond the powers granted to the governor and council to extinguish Aboriginal Title and that any attempt by them to do so would have been invalid. However, none of the judges appear to have questioned the authority of the *Imperial* government to provide the governor and council with power to extinguish Aboriginal Title unilaterally – the Court's division was over whether that power had actually been conferred.

Prior to 1982, another constitutional provision of limited geographical scope provided Aboriginal and Treaty Rights with some protection against provincial laws. The Natural Resources Transfer Agreements (NRTA) of 1930 put Manitoba, Saskatchewan, and Alberta in the same position as the other provinces by transferring most public lands and natural resources to them.[22] These agreements contain a provision under which provincial game laws apply to "Indians," with the proviso "that the said Indians shall have the right, with which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."[23] In *Prince and Myron v. The Queen*,[24] the Supreme Court held that this proviso prevented Manitoba's prohibition against night hunting with lights from applying to Indians who are hunting for food on lands to which they have a right of access, as long as they do so safely.[25]

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[21] [1973] S.C.R. 313.

[22] These agreements are schedules to the *Constitution Act, 1930*, 20–21 Geo. V (U.K.) c. 26, in R.S.C 1985, App. II, No. 25, giving them constitutional status.

[23] At para. 13 (Manitoba NRTA), para. 12 (Saskatchewan and Alberta NRTA).

[24] [1964] S.C.R. 81.

[25] See also *Myran v. R.*, [1976] 2 S.C.R. 137. The NRTA rights of "Indians" to hunt, trap, and fish have been reaffirmed in numerous decisions; for example, see *R. v. Wesley*, [1932] 4 D.L.R. 774 (Alta. C.A.); *R. v. Strongquill*, [1953] 2 D.L.R. 264 (Sask. C.A.); *Frank v. The Queen*, [1978]

Neither section 88 of the *Indian Act* nor the NRTA provide Aboriginal and Treaty Rights with protection against federal laws.[26] Prior to the *Constitution Act, 1982*, the Canadian Parliament benefited from the British constitutional doctrine of parliamentary supremacy, whereby it could enact any law that did not violate the division of powers by encroaching on provincial jurisdiction in a way not allowed by the *Constitution Act, 1867*. Accordingly, in *Sikyea v. The Queen*[27] the Supreme Court held that the federal *Migratory Birds Convention Act*[28] had taken away Michael Sikyea's treaty right to kill a single duck for food out of season. Likewise, Aboriginal Rights could also be infringed by federal legislation.[29] The vulnerability of Aboriginal and Treaty Rights to federal legislation was a motivating factor behind the Indigenous Peoples' lobby to have them recognized and affirmed in the *Constitution Act, 1982*.

ABORIGINAL RIGHTS IN SECTION 35 OF THE CONSTITUTION ACT, 1982

Section 35, as enacted in 1982, provides:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed;
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> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

As originally proposed in January 1981, this section (then section 34) did not contain the word "existing" in subsection (1). At the time, Indigenous groups were sharply divided over whether to support the provision, which fell short of their demands for acknowledgment of their right of self-government and for a clause requiring their consent to any amendment of the provisions relating to their rights – a clause the Constitution Express lobbied hard for in Canada and the UK.[30] Intense political bargaining in November among the federal and provincial governments then led to section 34 being mysteriously dropped altogether, though no politicians

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1 S.C.R. 95; *The Queen v. Sutherland*. However, Métis do not enjoy this protection because they are not "Indians" for NRTA purposes. See *R. v. Blais*, [2003] 2 S.C.R. 236.

[26] *The Queen v. George*, [1966] S.C.R. 267; *Daniels v. White*, [1968] S.C.R. 517.

[27] [1964] S.C.R. 642.

[28] R.S.C. 1952, c. 179, now the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22, s. 2(3) of which, unlike the earlier Act, maintains existing Aboriginal and Treaty Rights.

[29] See *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159, affirming (1975), 60 D.L.R. (3d) 140.

[30] See Robert Manuel, *Minutes of the 13th Annual General Assembly, Union of BC Indian Chiefs* (Oct 28–30, 1981), Union of BC Indian Chiefs Constitution Express Digital Collection, 57, http://constitution.ubcic.bc.ca/node/138.

appear to have been willing to take responsibility for this. Only after intense pressure from Indigenous organizations and their supporters, including lobbying in London, was the section reinserted later in November as section 35, with the addition of the word "existing" before "aboriginal and treaty rights," apparently on the insistence of Premier Peter Lougheed of Alberta.[31]

As mentioned earlier, political negotiations at the highest level failed to provide further substance to section 35, apart from the addition in 1983 of subsections (3) and (4), providing that Treaty Rights include rights in modern land claims agreements and specifying that Aboriginal and Treaty Rights are guaranteed equally to male and female persons. Trial and appeal court judgments had already begun to interpret and apply section 35 in the 1980s,[32] but only when cases began to reach the Supreme Court were the parameters of the provision more definitively fleshed out. The first such case was *R. v. Sparrow*,[33] decided in 1990. But even before that, there was a hint in 1984 in *Guerin v. The Queen*[34] that the Court was going to move Canada into a new era in which the rights of Indigenous Peoples would be taken much more seriously. *Guerin* did not involve section 35, as the case's factual basis arose in the 1950s. Nonetheless, the Court decided that the Crown owes judicially enforceable fiduciary obligations to Indigenous Peoples and that federal Department of Indian Affairs' officials breached those obligations by leasing reserve lands of the Musqueam First Nation in British Columbia to a golf club on terms strikingly different from those the Musqueam had been willing to accept. In *Sparrow*, Dickson C.J. and La Forest J., in a unanimous judgment, remarked that "it is essential to remember that the Guerin case was decided after the commencement of the *Constitution Act, 1982*," even though the facts arose earlier.[35] I take this to mean that inclusion of section 35, although not relied upon in *Guerin*, nonetheless influenced the Court in deciding the case the way it did.

In *Sparrow*, the Court acknowledged that the rights of Indigenous Peoples had been largely disregarded:

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[31] Sanders, 315–21.

[32] For example, see *R. v. Eninew* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.); *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (Alta. Q.B.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (N.B.Q.B.); *R. v. Agawa* (1988), 28 O.A.C. 201 (C.A.); *R. v. Denny* (1990), 55 C.C.C. (3d) 322 (N.S.C.A.).

[33] [1990] 1 S.C.R. 1075.

[34] [1984] 2 S.C.R. 335. See James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich, 2005); and Jim Reynolds, *From Wardship to Rights: The* Guerin *Case and Aboriginal Law* (Vancouver: UBC Press, 2020).

[35] *Sparrow* at 1105.

> there can be no doubt that over the years the rights of the Indians were often honoured in the breach … As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country." … For many years, the rights of the Indians to their aboriginal lands – certainly as *legal* rights – were virtually ignored.[36]

The Court went on to emphasize the significance of section 35:

> 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.[37]

It quoted with approval from an article by constitutional law expert Noel Lyon:

> the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces 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.[38]

Sparrow involved a claim by a member of the Musqueam First Nation to an Aboriginal Right to fish for food, societal, and ceremonial purposes in traditional Musqueam territory on the Fraser River, exempting him from application of the federal *Fisheries Act*[39] and regulations, specifically a limitation on net length. The Supreme Court accepted the BC Court of Appeal's finding that Mr. Sparrow had met the burden of proving his Aboriginal Right to fish. That right was "existing" because the Crown had not proved extinguishment of it prior the enactment of section 35; in so deciding, the Court rejected the argument that extinguishment could

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[36] *Sparrow* at 1103 (emphasis in original).
[37] *Sparrow* at 1105.
[38] *Sparrow* at 1105–06, quoting Noel Lyon, "An Essay on Constitutional Interpretation," *Osgoode Hall Law Journal* 26, no. 1 (1988): 95 at 100.
[39] R.S.C. 1970, c. F-1, now R.S.C. 1985, c. F-14.

occur by legislative regulation. The legislative intention to extinguish Aboriginal Rights must be "clear and plain."[40] The Court also rejected the Crown's contention that the word "existing" in section 35 means Aboriginal Rights are recognized as regulated in 1982 as this interpretation "would incorporate into the Constitution a crazy patchwork of regulations."[41]

Once the Aboriginal Right had been established, the onus shifted back to Mr. Sparrow to prove it had been infringed by the federal legislation. In assessing whether infringement had occurred, certain questions need to be asked: "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?"[42] As the Court found insufficient evidence to determine whether an infringement had occurred, a new trial was necessary to address this issue.

The Supreme Court ordered a new trial for another reason as well, namely, to determine whether the infringement, if established, could be justified. Even though section 35 is not in the Charter and thus not subject to section 1, which makes Charter rights and freedoms subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,"[43] the Court created a similar justifiable infringement test for section 35 rights.[44] The reason the Court gave is that federal legislative jurisdiction over "Indians, and Lands reserved for the Indians"[45] continues, "but 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."[46] Although inclusion here of the word

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[40] *Sparrow* at 1099.

[41] *Sparrow* at 1091.

[42] *Sparrow* at 1112.

[43] *Constitution Act, 1982*, s. 1.

[44] For critical commentary, see Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments," *Queen's Law Journal* 19, no. 1 (1993): 95.

[45] *Constitution Act, 1867*, s. 91(24).

[46] *Sparrow* at 1109. Nichols, *Reconciliation*, 6–16, links Parliament's continuing section 91(24) jurisdiction with the Court's unquestioned assumption that the Crown has complete sovereignty over Indigenous Peoples, expressed in the bald statement that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands [Indigenous lands] vested in the Crown": *Sparrow* at 1103, citing *Johnson v. M'Intosh*, 8 Wheat. (21 U.S.) 543 (1823), where Marshall C.J. of the US Supreme Court used the now-discredited Doctrine of Discovery to explain European acquisition of sovereignty in North America. See Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

"denies" might suggest that unilateral *extinguishment* of section 35 rights can also be justified, in *R. v. Van der Peet*[47] Lamer C.J. made clear it cannot: "Subsequent to s.35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*."[48] The justification test is thus available only for infringements, though the line between extinguishment and infringement is not entirely clear, in part because it depends on how broadly or narrowly rights are defined in specific cases.[49]

The two-part test for justifiable infringement created by the Court requires, first, proof of a valid legislative objective that is compelling and substantial, such as safety or conservation,[50] and second, respect for the Crown's trust-like fiduciary obligations, which involve the honour of the Crown.[51] Questions to ask regarding the second requirement include "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 conservation measures being implemented."[52] Where fisheries are concerned, the Court decided that the Aboriginal Right to fish for food, societal, and ceremonial purposes has to be given priority over sports and commercial fishing. Consequently, "If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right."[53] Where commercial rights are involved, as was the case in *R. v. Gladstone*,[54] the Court altered this complete priority for Aboriginal fishing because commercial rights are not limited by a community's capacity to consume fish and so might end

[47] [1996] 2 S.C.R. 507.

[48] *Van der Peet* at para. 28. See also *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 11.

[49] For example, did the *Migratory Birds Convention Act* extinguish Mr. Sikyea's treaty right to hunt migratory birds out of season or just *infringe* his broader right to hunt? See text accompanying notes 27–28 above.

[50] *Sparrow* at 1113.

[51] *Sparrow* at 1108, 1114. These obligations were first identified in *Guerin*. See text following note 34 above. In *Sparrow* at 1108, the judges stated: "*Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for section 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."

[52] *Sparrow* at 1119.

[53] *Sparrow* at 1116.

[54] *R. v. Gladstone*, [1996] 2 S.C.R. 723.

up being exclusive. Lamer C.J. stated that government infringement of the Heiltsuk's Aboriginal Right to harvest and sell herring spawn on kelp in commercial quantities could be justified for broad objectives:

> objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment*.[55]

Justice McLachlin, as she then was, concurred in the result in *Gladstone* that a new trial should be ordered, without reaching the question of justification. However, in her dissent in *Van der Peet*, decided the same day, she said the majority's approach to justification in *Gladstone* was more political than legal and was unconstitutional because it involved reallocating part of the benefit of the Aboriginal Right to non-Aboriginal fishers, thereby diminishing its substance.[56]

The *Sparrow* decision explained the nature and extent of the constitutional protection accorded to Aboriginal Rights by section 35 but provided scant guidance on how to define these rights as the existence of the right to fish had not been seriously questioned. Another six years passed before the Supreme Court created a test for Aboriginal Rights in *Van der Peet*. This case also involved Aboriginal fishing rights, but, unlike Mr. Sparrow, Dorothy Van der Peet, a member of the Stó:lō Nation in British Columbia, was charged under the federal *Fisheries Act* with unlawfully *selling* fish caught pursuant to an Indian food fish licence. In deciding whether she had an Aboriginal Right to exchange fish for money or other goods, which is the way the Supreme Court characterized the claimed right, the judges adopted a purposive approach to the interpretation of section 35. Lamer C.J., writing for the majority,[57] put it this way:

> what s.35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The

[55] *Gladstone* at para. 75 (emphasis in original).

[56] *Van der Peet* at paras. 302, 315. See Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" *Constitutional Forum* 8, no. 2 (1997): 33.

[57] Including La Forest, Sopinka, Gonthier, Cory, Iacobucci, and Major JJ. Justices L'Heureux-Dubé and McLachlin wrote forceful dissents.

> substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[58]

Relying on the factual finding in *Sparrow* that fish had always been integral to the Musqueam's distinctive society, the chief justice transformed this *fact* into the *test* for section 35 Aboriginal Rights: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[59] Moreover, the time at which this test must be met is when the Indigenous Peoples in question first came into contact with Europeans.[60]

The contact timeframe obviously would not work for the Métis, given that they originated from relationships mainly between European men and Indigenous women.[61] Consequently, in *R. v. Powley*[62] the Supreme Court, in applying the *Van der Peet* test to Métis Rights, adopted imposition of effective European control as the time for proving that the relevant Métis practices, customs, and traditions were integral to their distinctive culture. In the area of Sault Ste. Marie where the case arose, the Court found this control had been established just before 1850. The right to hunt for food was proven in *Powley*, but in some subsequent cases it has been difficult to meet the Court's requirement of the existence of

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[58] *Van der Peet* at para. 31.

[59] *Van der Peet* at para. 46.

[60] *Van der Peet* at paras. 60–67. Among other criticisms, L'Heureux-Dubé and McLachlin JJ. found this time period to be flawed. L'Heureux-Dubé J., who preferred a "dynamic right" approach, referred to the contact period as a "frozen right" approach (*Van der Peet* at paras. 164–79). Lamer C.J. attempted to counter this accusation: "The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights" (*Van der Peet* at para. 64). However, the evolution the Court has allowed relates mainly to the *methods* for exercising rights; for example, use of vehicles, electric lights, and rifles for hunting. The furthest the Court appears to have gone in this direction was in *R. v. Sundown*, [1999] 1 S.C.R. 393, where it accepted that shelters for treaty hunting purposes had evolved from lean-tos to more permanent log cabins. In *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] 3 S.C.R. 535, the Court decided that a right to fish and exchange eulachon in commercial quantities could not evolve into a commercial right to catch and sell other species of fish.

[61] See *Van der Peet* at paras. 65 (Lamer C.J.), 169 (L'Heureux-Dubé J., dissenting). For an excellent recent history, see Jean Teillet, *The North-West Is Our Mother: The Story of Louis Riel's People, the Métis Nation* (Toronto: Patrick Crean, 2019).

[62] [2003] 2 S.C.R. 207.

a Métis community at the geographical location in question both at the time of European control and in the present.[63]

The "integral to the distinctive culture" test, as it has become known, has been applied in many other cases.[64] The day after *Van der Peet* was decided, the Supreme Court used it in *R. v. Pamajewon*[65] to deny two Ojibwa (Anishinaabe) First Nations in Ontario an Aboriginal Right to engage in and regulate high-stakes gaming on their reserves because gambling, even if occasionally practised, had not been high stakes and was not integral to Ojibwa society prior to European contact. The Court held that, assuming but not deciding that section 35 includes self-government rights, the existence of such a right must be proven in relation to the specific activity – in this case gaming – over which the right is claimed. It could not be subsumed under a broader right to manage the use of reserve lands, as the accused claimed. Remarkably, in applying section 35 the Court saw no difference between the fishing right asserted in *Van der Peet* and a right of self-government,[66] and so ruled that the same integral to the distinctive culture test applies to both.[67]

While the *Pamajewon* decision has made it difficult for self-government rights to be proven in court,[68] another approach proved successful in *Campbell v. British Columbia (Attorney General)*.[69] In that case, Williamson J. upheld the constitutional validity of the self-government provisions in the Nisga'a Final Agreement,[70] on the basis that the Nisga'a had a pre-existing, unextinguished right of self-government that the

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[63] For example, see *R. v. Hirsekorn*, [2013] 4 C.N.L.R. 244 (Alta. C.A.), leave to appeal refused, [2013] S.C.C.A. No. 398; *R. v. Hatfield* (2015), 357 N.S.R. (2d) 146 (S.C.); *R. v. Vautour*, 2017 N.B.C.A. 21, leave to appeal refused, [2017] S.C.C.A. No. 282. See Karen Drake, "*R v. Hirsekorn*: Are Métis Rights a Constitutional Myth?" *Canadian Bar Review* 92, no. 1 (2014): 149; Larry Chartrand, "The Constitutional Determination of a Métis Rights-Bearing Community: Reorienting the *Powley* Test," in *Renewing Relationships: Indigenous Peoples and Canada*, eds. Karen Drake and Brenda L. Gunn (Saskatoon: Native Law Centre, University of Saskatchewan, 2019), 169.

[64] In *Gladstone*, *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139, Aboriginal fishing rights were established. Compare *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *Mitchell v. M.N.R.*; *Lax Kw'alaams*.

[65] [1996] 2 S.C.R. 821.

[66] Compare *St. Catherine's Milling* and *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700, in which the Privy Council distinguished between proprietary rights in and legislative power over land and fisheries.

[67] See Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*," *McGill Law Journal* 42, no. 4 (1997): 1011.

[68] See also *Delgamuukw* at paras. 170–71.

[69] [2000] 4 C.N.L.R. 1 (B.C.S.C.). See Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence," in *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights*, eds. Hamar Foster, Heather Raven, and Jeremy Webber (Vancouver: UBC Press, 2007), 129.

[70] In effect 11 May 2000, http://www.nnkn.ca/files/u28/nis-eng.pdf.

agreement defined rather than created.[71] This decision is consistent with the Supreme Court's preference for Aboriginal Rights claims to be settled through negotiations and with federal policy since 1995 that has acknowledged Indigenous Peoples' inherent right of self-government.[72] Since the Nisga'a Final Agreement, other land claims agreements with self-government components have been negotiated.[73]

In *R. v. Sappier; R. v. Gray*,[74] the Supreme Court took the criticism of the *Van der Peet* test to heart and softened its application somewhat in deciding that the Maliseet and Mi'kmaq in New Brunswick have an Aboriginal Right to harvest timber from Crown lands for domestic purposes. Referring directly to criticisms expressed by L'Heureux-Dubé and McLachlin JJ. in their dissents in *Van der Peet* and by academics,[75] Bastarache J., for the Court,[76] observed:

> Culture, let alone "distinctive culture," has proven to be a difficult concept to grasp for Canadian courts. Moreover, the term "culture" as it is used in the English language may not find a perfect parallel in certain aboriginal languages … Ultimately, the concept of culture is itself inherently cultural.

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[71] Compare *House of Sga'nisim v. Canada (Attorney General)*, [2013] 2 C.N.L.R. 226, leave to appeal refused, [2013] S.C.C.A. No. 144, where the BC Court of Appeal relied on delegation of governmental authority to the Nisga'a Nation by the agreement rather than on its inherent right of self-government.

[72] See *Sparrow* at 1105, quoted in text accompanying note 37 above; *Delgamuukw* at para. 186; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras. 14, 20, 25, and 47; *Tsilhqot'in Nation*, esp. para. 118; Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (1995, as modified 15 September 2010), https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136; Canada, *Gathering Strength – Canada's Aboriginal Action Plan* (Ottawa: Minister of Indian Affairs and Northern Development, 1997), 13–15; Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, modified 14 February 2018, https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html.

[73] For example, see Inuit of Labrador Land Claims Agreement (2005), https://www.rcaanc-cirnac.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_labi_labi_1307037470583_eng.pdf; Tsawwassen First Nation Final Agreement (2009), http://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1_Tsawwassen_First_Nation_Final_Agreement.pdf; Maa-nulth First Nations Final Agreement (2011), https://www.uchucklesaht.ca/treaty/2010_maa-nulth_final_agreement_english.pdf.

[74] [2006] 2 S.C.R. 686.

[75] Specifically, Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand," *McGill Law Journal* 42, no. 4 (1997): 993; Chilwin Chienhan Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*," *University of Toronto Faculty of Law Review* 55, no. 2 (1997): 419; John Borrows and Leonard I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" *Alberta Law Review* 36, no. 1 (1997): 9. See also John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster," *American Indian Law Review* 22, no. 1 (1997): 37.

[76] Binnie J. concurred in the result but would have allowed exchange and sale of products from harvested wood within First Nation communities.

> The aboriginal rights doctrine, which has been constitutionalized by s.35, arises from the simple fact of prior occupation of the lands now forming Canada. The "integral to a distinctive culture" test must necessarily be understood in this context … The focus of the Court should therefore be on the nature of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct", and the notion of aboriginality must not be reduced to "racialized stereotypes of Aboriginal peoples."[77]

Nonetheless, the integral to the distinctive culture test, with its focus on integral practices, customs, and traditions at the time of contact (or effective European control where Métis Rights are concerned), has remained in place and continues to be applied.[78]

ABORIGINAL TITLE, SECTION 35, AND THE DUTY TO CONSULT

Where a claim is made to Aboriginal Title, which is one Aboriginal Right protected by section 35(1),[79] the Supreme Court has created a different test. In 1997 in *Delgamuukw v. British Columbia*, involving claims by the Gitxsan and Wet'suwet'en Nations, the Court determined that Aboriginal Title depends on exclusive occupation of land at the time of Crown assertion of sovereignty, which the Court took to have occurred in British Columbia in 1846. This was when Britain and the United States signed the Oregon Boundary Treaty, establishing the 49th parallel as the international boundary from the Rocky Mountains to the Salish Sea. The main reason the Court gave for making assertion of Crown sovereignty rather than European contact the time for proof of title was that title would only have crystalized as a burden on the Crown's underlying title at the moment of assertion of sovereignty.[80]

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[77] *Sappier*; *Gray* at paras. 44–45 (emphasis in original), quoting Borrows and Rotman, 36.

[78] For example, see *Lax Kw'alaams*; *R. v. Desautel*, 2021 SCC 17.

[79] See *Adams*; *Côté*; *Delgamuukw* at paras. 137–39; Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" *Alberta Law Review* 36, no. 1 (1997): 117.

[80] *Delgamuukw* at para. 145. The Supreme Court has never adequately explained how the Crown acquired sovereignty. See John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," *Osgoode Hall Law Journal* 37, no. 3 (1999): 537; Kent McNeil, "Indigenous and Crown Sovereignty in Canada," in *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings*, eds. Michael Asch, John Borrows, and James Tully (Toronto:

In addition to establishing the test for Aboriginal Title, the *Delgamuukw* decision provided clarification of other important legal and constitutional issues. The Court made it easier for Aboriginal Title and other Aboriginal Rights to be proven by relaxing the rules of evidence to admit Indigenous Oral Histories and give them as much weight as written histories.[81] It defined Aboriginal Title as "the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures," but subjected this right to an inherent limit, namely, "that those protected uses must not be irreconcilable with the nature of the group's attachment to that land."[82] In addition to surface rights, Aboriginal Title encompasses natural resources under the ground, including minerals and oil and gas.[83] However, Aboriginal Title is inalienable other than by surrender to the Crown.[84]

The Court also considered the constitutional protection provided to Aboriginal Title and other Aboriginal Rights. Quite apart from section 35, Lamer C.J., delivering the principal judgment,[85] observed that the provinces have always lacked the authority to extinguish Aboriginal Title because it is within exclusive federal jurisdiction over "Lands reserved for the Indians."[86] In the same way, other Aboriginal Rights are protected against provincial extinguishment because they are within the core of federal section 91(24) jurisdiction over "Indians."[87] So while section 35 was necessary to protect against *federal* extinguishment,

University of Toronto Press, 2018), 293; Gordon Christie, "Reconciliation in the Face of Crown Intransigence on Indigenous Sovereignty," in Drake and Gunn, *Renewing Relationships*, 37; Nichols, *Reconciliation*; Nicholas XEMŦOLW Claxton and John Price, "Whose Land Is It? Rethinking Sovereignty in British Columbia," *BC Studies* no. 204 (Winter 2019–20): 125. On the underlying title, see Kent McNeil, "The Source, Nature, and Content of the Crown's Underlying Title to Aboriginal Title Lands," *Canadian Bar Review* 96, no. 2 (2018): 275.

[81] Because the trial judge had not paid sufficient respect to the Oral Histories, the Supreme Court sent the case back to trial. The case has not been retried.

[82] *Delgamuukw* at para. 117. In *Tsilhqot'in Nation* at paras. 74–75 and 121, McLachlin C.J. modified the inherent limit somewhat by framing it in terms of sustainability for future generations. Importantly, she also said that government "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land" (*Tsilhqot'in Nation* at para. 86).

[83] *Delgamuukw* at paras. 120–24.

[84] *Delgamuukw* at para. 113.

[85] La Forest J. wrote a concurring judgment for himself and L'Heureux-Dubé J., and McLachlin J. simply stated, "I concur with the Chief Justice. I add that I am also in substantial agreement with the comments of Justice La Forest" (*Delgamuukw* at para. 209).

[86] *Constitution Act, 1867*, s. 91(24), relied upon by Lamer C.J., *Delgamuukw* at paras. 173–76.

[87] *Delgamuukw* at paras. 177–81. Additionally, section 88 of the *Indian Act* does not referentially incorporate into federal law provincial laws that would extinguish Aboriginal Rights (*Delgamuukw*. at paras. 182–83).

protection against *provincial* extinguishment has been in place ever since Confederation. However, the chief justice was unclear about provincial power to *infringe* (as opposed to *extinguish*) Aboriginal Rights, including title, prior to enactment of section 35. At one point he said these rights can be infringed by provincial governments, yet elsewhere he said they are within the core of federal section 91(24) jurisdiction and so are protected against provincial laws by the doctrine of interjurisdictional immunity.[88] Resolution of this contradiction would have to await *Tsilhqot'in Nation v. British Columbia*, discussed below.

Turning to section 35, Lamer C.J. stated:

> s.35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s.35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g., *Calder*, *supra*), s.35(1) has constitutionalized it in its full form.[89]

He then repeated what he had said in *Van der Peet*: "Through the enactment of s. 35(1), 'a pre-existing legal doctrine was elevated to constitutional status.'"[90]

On justifiable infringement, the chief justice relied upon his opinion in *Gladstone* that, to achieve reconciliation, compelling and substantial legislative objectives can impose limits on Aboriginal Rights that "are of sufficient importance to the broader community as a whole" and are "a necessary part of that reconciliation."[91] He went on to list some legislative objectives that might qualify:

> 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 the 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. Whether a particular measure or government act can be explained by reference to one of those

[88] *Delgamuukw* at paras. 160, 181. This doctrine provides that the core of some federal heads of power, including authority relating to "Indians, and Lands reserved for the Indians," is immune from provincial laws, even without federal laws occupying the field.

[89] *Delgamuukw* at para. 133.

[90] *Delgamuukw* at para. 134, quoting *Van der Peet* at para. 29.

[91] *Delgamuukw* at para. 161, quoting *Gladstone* at para. 73.

> objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.[92]

Where Aboriginal Title is concerned, he suggested that "conferral of fee simples for agriculture, and of leases and licences for forestry and mining," might have to "reflect the prior occupation of Aboriginal title lands."[93] It therefore appears that legislation can authorize conferral of ownership (fee simple) of Aboriginal Title lands to third parties, and give corporations the right to take natural resources from these lands, despite the fact that Aboriginal Title is constitutionally protected.[94] Comparing this situation with that of non-Indigenous farmers and ranchers, for example, whose land rights are *not* constitutionally protected, it is hard to imagine governments ever transferring these people's lands and resources to others for these kinds of purposes.[95] One can imagine the outrage and political fallout!

On the second part of the justification test, namely, whether the infringement is consistent with the Crown's fiduciary obligations, Lamer C.J. oddly opined that, because Aboriginal Title confers exclusive rights, the priority accorded to it is the limited priority accorded to the commercial fishing right in *Gladstone*, not the complete priority accorded to the food fishery in *Sparrow*.[96] I say "oddly" because Aboriginal Title to land entails *ownership* – in Lamer C.J.'s words, it "confers the right to the land itself."[97] The fishing right in *Gladstone* did not entail ownership of the resource but, rather, a right to gather herring spawn that belonged to no one before being collected. The infringement of the right envisaged in *Gladstone* involved government allocation of the unowned resource among Indigenous and non-Indigenous people, which could possibly be justified by taking into account "the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups."[98] The exclusivity that Aboriginal Title confers is like that enjoyed by fee simple owners, not the potential exclusive access to an unowned resource

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[92] *Delgamuukw* at para. 165.

[93] *Delgamuukw* at para. 167.

[94] Query how conferral of fee simples would not extinguish Aboriginal Title, which the Court has said even Parliament cannot do. See note 48 and accompanying text above. See Kent McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada," *Osgoode Hall Law Journal* 42, no. 2 (2004): 271 at 286–301.

[95] Federal and provincial expropriation statutes do allow private property to be taken but only for *public* purposes and upon payment of fair compensation. See Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Scarborough, ON: Carswell, 1992).

[96] *Delgamuukw* at para. 167.

[97] *Delgamuukw* at para. 138.

[98] *Gladstone* at para. 75, quoted in *Delgamuukw* at para. 161.

envisaged in *Gladstone*. The exclusivity of fee simple rights of possession and use are what *prevent* – not *permit* – government taking, even for public purposes, without clear statutory authority.[99] Aboriginal Title should enjoy even more protection against government taking because, unlike fee simple, it is constitutionally protected.

Nonetheless, because it has an economic aspect, "fair compensation will ordinarily be required when Aboriginal title is infringed."[100] The prospect of financial cost may well make governments think twice before infringing, especially when the benefits will go mainly to mining or forestry corporations. Governments also have a duty to consult with the Aboriginal titleholders before proceeding with infringement, which in some cases may require full consent.[101] But what about situations where Aboriginal Title is claimed but has not yet been established?

Prior to the Supreme Court's 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)*,[102] provincial governments continued to assume that claimed lands are Crown lands. On Haida Gwaii, for example, the province granted and transferred forestry licences to corporations, without even consulting the Haida Nation, who claim Aboriginal Title over the islands and surrounding waters as well as an Aboriginal Right to harvest red cedar. The Haida challenged the province's authority to do this, leading the Court to decide that British Columbia had to consult with them, and accommodate their interests in appropriate circumstances, before engaging in any action that might negatively affect their claimed rights. McLachlin C.J., delivering the unanimous opinion, based the duty to consult on the honour of the Crown, which she said arose with the Crown's unilateral assertion of sovereignty.[103] She said this:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances …,

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[99] See *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508, esp. 569; *Harrison v. Carswell*, [1976] 2 S.C.R. 200 at 219; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349 at 356–57 (L'Heureux-Dubé J, dissenting on other grounds).

[100] *Delgamuukw* at para. 169.

[101] *Delgamuukw* at para. 168.

[102] [2004] 3 S.C.R. 511. See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

[103] *Haida Nation* at para. 32.

> the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.[104]

The depth of the consultation in any particular case depends on the strength of the claimed right and the seriousness of the impact of the proposed government action.[105] Consultation requires good faith on each side, but "hard bargaining … will not offend an Aboriginal people's right to be consulted."[106] On the Indigenous side, "they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached."[107] They do not have a veto and so cannot prevent a project from proceeding as long as adequate consultation has taken place and accommodation has been provided in appropriate circumstances: "The Aboriginal 'consent' spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take."[108]

Significantly, in *Haida Nation* the Supreme Court explicitly acknowledged the pre-existing sovereignty of the Indigenous Nations for the first time. McLachlin C.J. stated:

> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s.35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, [*R. v. Badger*, [1996] 1 S.C.R. 771] at para. 41). This promise is realized and sovereignty claims reconciled

[104] *Haida Nation* at para. 27.
[105] *Haida Nation* at para. 39. In the case of the Haida, "there was a *prima facie* case in support of Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar" (*Haida Nation* at para. 71). The impact of logging on their rights would be serious (*Haida Nation* at paras. 72–77).
[106] *Haida Nation* at para. 42.
[107] *Haida Nation* at para. 42.
[108] *Haida Nation* at para. 48.

> through the process of honourable negotiation.[109]

While encouraging, this still leaves unanswered the question of how the Crown acquired sovereignty in British Columbia without conquest or cession of Indigenous sovereignty.[110]

The duty to consult that the Supreme Court acknowledged in *Haida Nation* is one of the most significant legal developments resulting from section 35.[111] McLachlin C.J. stated:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s.35(1) of the *Constitution Act, 1982*.[112]

So even though the duty apparently arose at the time of Crown assertion of sovereignty, the enactment of section 35 seems to have been the impetus for the Court's acknowledgment of it. Moreover, the recognition and affirmation of Aboriginal Rights in 1982 elevated the duty to a constitutional requirement.[113]

Space does not permit discussion of the numerous cases in which the duty to consult has arisen or of the many issues that have emerged.[114] Mention should be made, however, of two major issues, one resolved

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[109] *Haida Nation* at para. 40. Pre-existing Indigenous sovereignty was also acknowledged by Karakatsanis J. in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765 at para. 21. See also per Abella J. at paras. 70, 87. For insightful analysis, see Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 2012).

[110] In *Haida Nation* at para. 25, McLachlin C.J. acknowledged that the Indigenous Peoples have never been conquered and most in British Columbia have not entered into treaties (though where treaties were entered into, sovereignty was not ceded: see James [Sa'ke'j] Youngblood Henderson, *Treaty Rights in the Constitution of Canada* [Toronto: Thomson Carswell, 2007], esp. Part IV). See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims," *Osgoode Hall Law Journal* 29, no. 4 (1991): 681; Borrows, "Sovereignty's Alchemy"; McNeil, "Indigenous and Crown Sovereignty"; Nichols, *Reconciliation*.

[111] See Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich, 2012).

[112] *Haida Nation* at para. 32.

[113] *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 6; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* [2010] 2 S.C.R. 650 at para. 68 (see also, paras. 32–34, 38, 50, 60): *Beckman v. Little Salmon/ Carmacks First Nation*, [2010] 3 S.C.R. 103 at paras. 40–41.

[114] For recent decisions, see *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*, [2017] 1 S.C.R. 1069; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] 1 S.C.R. 1099; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 S.C.R. 386. For discussion, see Newman; Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation," *University of British Columbia Law Review* 46,

and the other ongoing. In *Mikisew Cree First Nation*,[115] the Supreme Court decided that the duty does not apply to Parliament because that would interfere with the legislative process. The other issue concerns the identity of Indigenous people with whom the Crown must consult. Recent events in Wet'suwet'en territory in central British Columbia have revealed that consultation with band councils is not necessarily adequate because their *Indian Act* authority is limited to reserve lands, whereas authority over the broader territory is vested in the Hereditary Chiefs.[116] Consultation must take place with the proper representatives of the holders of the rights that will be adversely affected by the government's proposed action, in this case pipeline construction.[117]

The Supreme Court first declared Aboriginal Title to exist in 2014 in *Tsilhqot'in Nation v. British Columbia*,[118] a unanimous decision that applied the principles from *Delgamuukw* and took a territorial rather than site-specific approach to proof of title.[119] Subject to the inherent limit and inalienability other than by surrender to the Crown,[120] it characterized Aboriginal Title as an all-encompassing property right, leaving the Crown's underlying title with no beneficial content. On infringement, McLachlin C.J. summarized the position as follows:

> Once Aboriginal title is established, s.35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of

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no. 2 (2013): 397; Robert Hamilton and Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult," *Alberta Law Review* 56, no. 3 (2019): 729.

[115] *Mikisew Cree First Nation*.

[116] See Justin Hunter, Brent Jang, Wendy Stueck, and Shawn McCarthy, "This Pipeline Is Challenging Indigenous Law and Western Law: Who Really Owns the Land?," *Globe and Mail*, 12 January 2019, https://www.theglobeandmail.com/canada/british-columbia/article-a-contested-pipeline-tests-the-landscape-of-indigenous-law-who; Shiri Pasternak, "No, Those Who Defend the Wet'suwet'en Territory Are Not Criminals," *Globe and Mail*, 15 January 2020, https://www.theglobeandmail.com/opinion/article-no-those-who-defend-the-wetsuweten-territory-are-not-criminals. On consultation over pipelines, see also *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, [2020] 3 F.C.R. 3. Compare *Coastal GasLink Pipeline Ltd. v. Huson*, 2019 BCSC 2264, commented on by Kent McNeil, "Indigenous Law, the Common Law, and Pipelines" (8 April 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/04/Blog_KM_Indigenous_Law_Pipelines.pdf.

[117] See Kent McNeil, "Aboriginal Title and Indigenous Governance: Identifying the Holders of Rights and Title," *Osgoode Hall Law Journal* 57, no. 1 (2020): 127.

[118] *Tsilhqot'in Nation*. For commentary, see the articles in *University of British Columbia Law Review* 48, no. 3 (2015), special issue: "*Tsilhqot'in Nation v British Columbia* Decision."

[119] Unlike *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220. See Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?" *Canadian Bar Review* 91, no. 3 (2012): 745.

[120] See notes 82–84 and accompanying text above.

> provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.[121]

So while *Tsilhqot'in Nation* was a major victory for Indigenous Peoples on proof and content of Aboriginal Title, it made Aboriginal Title and other Aboriginal Rights more vulnerable to provincial infringement by removing the division-of-powers protection they had previously enjoyed.[122] McLachlin C.J., writing the unanimous judgment, said that section 35 "provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds,"[123] without acknowledging that the protection under interjurisdictional immunity was greater because it was not subject to justifiable infringement by the provinces.[124]

TREATIES AND SECTION 35

The Supreme Court has dealt with section 35 Treaty Rights in much the same way as Aboriginal Rights, except respecting proof. As Treaty Rights are based on actual agreements between Indigenous Peoples and the Crown, the *Van der Peet* and *Delgamuukw* tests for proof of Aboriginal Rights and Title do not apply. Instead, after deciding a treaty exists, the Court ascertains the common intention of the parties, taking into account the historical context and any oral or implied terms not in the written document.[125] Thus, in *R. v. Marshall [No. 1]*,[126] the Court decided that a Mi'kmaq promise to trade only at British truck houses (trading posts) implied a right to obtain products from the forest and sea (in this case, eels) for trade purposes but limited the trading right to what was necessary for a "moderate livelihood."[127] In interpreting treaties, a number of principles

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[121] *Tsilhqot'in Nation* at para. 3.

[122] On the prior law, see Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction," *Saskatchewan Law Review* 61, no. 2 (1998): 431; Kerry Wilkins, "Of Provinces and Section 35 Rights," *Dalhousie Law Journal* 22, no. 1 (1999): 185. On what changed in 2014, see Kent McNeil, "Aboriginal Title and the Provinces after *Tsilhqot'in Nation*," *Supreme Court Law Review* 71 (2015): 67; Bruce McIvor and Kate Gunn, "Stepping into Canada's Shoes: *Tsilhqot'in*, *Grassy Narrows*, and the Division of Powers," *University of New Brunswick Law Journal* 67 (2016): 146; Kerry Wilkins, "Life among the Ruins: Section 91(24) after *Tsilhqot'in* and *Grassy Narrows*," *Alberta Law Review* 55, no. 1 (2017): 91.

[123] *Tsilhqot'in Nation* at para. 152.

[124] See cases cited in note 20 above.

[125] See *Simon*; *Sioui*; *R. v. Badger*, [1996] 1 S.C.R. 771.

[126] [1999] 3 S.C.R. 456.

[127] *R. v. Marshall [No. 1]* at paras. 58–61. However, in *R. v. Marshall; R. v. Bernard* the Court decided that the Mi'kmaq treaties do not include a right to trade logs.

apply: courts must be sensitive to linguistic and other cultural differences and interpret treaties as the parties would have understood them at the time; the honour of the Crown is involved and sharp dealing is not to be countenanced; treaties should be liberally construed and technical approaches avoided; ambiguities need to be resolved in the Indigenous party's favour; treaties must be interpreted to allow evolution in the methods for exercising the rights; though treaties should be generously interpreted, courts should not go beyond what is reasonable or possible from the language.[128] As with Aboriginal Rights, Treaty Rights that were validly extinguished before section 35 would not have existed when it was enacted and so would not have been recognized and affirmed, but the onus of proving extinguishment is on the government and the intention to extinguish must have been clear and plain.[129]

Regarding justifiable infringement, the Supreme Court in *R. v. Badger* decided that the *Sparrow* test applies equally to Aboriginal and Treaty Rights,[130] and this was affirmed in *R. v. Marshall [No. 1]*. Elaborating on the limitations on the treaty right in *R. v. Marshall [No. 2]*,[131] the Court applied the *Gladstone* approach to priority,[132] even though the right in the former case, unlike the commercial right in *Gladstone*, is limited to obtaining a moderate livelihood. Those cases both involved infringement by *federal* legislation, specifically the *Fisheries Act*. Although section 88 of the *Indian Act* would protect Treaty Tights against infringement by *provincial* legislation that would not apply to "Indians" of its own force,[133] without any possibility of the provinces avoiding this result by proving justification,[134] that protection was probably rendered irrelevant by the Supreme Court's rejection of the application of the doctrine of interjurisdictional immunity in *Tsilhqot'in Nation*.[135] In that case, the Court overruled its decision just eight years earlier, in *R. v. Morris*,[136] that Treaty Rights are within the core of federal jurisdiction over "Indians, and Lands reserved for Indians" and so are protected against provincial

[128] These principles are helpfully summarized, with case references, in McLachlin J.'s dissenting opinion, *R. v. Marshall [No. 1]* at para. 78. See also *Simon*; *Sioui*; *Badger*; *Sundown*.
[129] *Badger* at para. 41.
[130] *Badger* at para. 79.
[131] [1999] 3 S.C.R. 533. For criticism, see Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test," *Alberta Law Review* 36, no. 1 (1997): 149.
[132] See notes 54–55 and accompanying text above.
[133] See *Dick v. The Queen*.
[134] See *Simon*; *Sioui*; *Badger* at paras. 69, 88; *Sundown* at paras. 47–48; *R. v. Morris*, [2006] 2 S.C.R. 915 at paras. 54–55; McNeil, "Envisaging Constitutional Space," at 129–33.
[135] See Wilkins, "Life among the Ruins," at 121–22.
[136] *R. v. Morris*.

infringement by the doctrine of interjurisdictional immunity.[137] Two weeks later, in *Grassy Narrows First Nation v. Ontario (Natural Resources)*,[138] the Supreme Court confirmed that the doctrine no longer applies to shield Treaty Rights from provincial laws. Constitutional protection of these rights depends on section 35, exposing them to provincial infringement when that can be justified on the *Sparrow/Badger* test.[139]

After the Crown's duty to consult before taking action that could negatively affect claimed Aboriginal Rights was acknowledged in *Haida Nation*, a question arose over whether an equivalent duty applies to Treaty Rights. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,[140] the Supreme Court decided that it does. In that case, the federal government planned to build a winter road that would interfere with the Mikisew Cree's hunting and trapping rights under Treaty 8 (1899). Even though the treaty gave the government the right to take up lands for that purpose, it first had to engage in adequate consultation with the Mikisew Cree and accommodate their rights if appropriate.[141] A duty to consult before the province of Ontario takes up Treaty 3 lands (which the Court held does not require federal participation or consent) was affirmed in *Grassy Narrows*.[142] Consultation must also take place when governments contemplate action that could negatively affect rights in modern land claims agreements, which are protected as Treaty Rights by section 35(3) of the *Constitution Act, 1982*.[143]

CONCLUSIONS

Inclusion of section 35 in the *Constitution Act, 1982* was undoubtedly a significant victory for the Indigenous Peoples of Canada that probably would not have been achieved without the Constitution Express.

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[137] *Tsilhqot'in Nation* at paras. 132–52.

[138] [2014] 2 S.C.R. 447.

[139] *Grassy Narrows First Nation v. Ontario (Natural Resources)* at para. 53.

[140] [2005] 3 S.C.R. 388. For other treaty consultation cases, see *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, [2010] 2 C.N.L.R. 316 (Alta. C.A.); *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, [2011] 2 C.N.L.R. 71 (Alta. C.A.); *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, [2011] 3 C.N.L.R. 343 (B.C.C.A.); *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227; *Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)*, [2014] 2 C.N.L.R. 9 (Alta. C.A.).

[141] See also *Yahey v. British Columbia*, 2021 BCSC 1287, in which Burke J. decided that the taking up of lands in the Blueberry River First Nations territory by British Columbia infringed their Treaty 8 rights because "there are no longer sufficient and appropriate lands in Blueberry's territory to allow for the meaningful exercise by Blueberry of its treaty rights" and that the province had not justified the infringement (para. 3).

[142] *Grassy Narrows* at paras. 50–52.

[143] See *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557; *Beckman*; *Clyde River*.

Although constitutional negotiations in the 1980s and early 1990s failed to provide further definition of Aboriginal and Treaty Rights, the federal government's policy decision in the mid-1990s to include self-government provisions in land claims agreements was likely prompted by Indigenous insistence during the negotiations that section 35 includes governance rights. But section 35 has had the greatest impact in the courts, led by groundbreaking decisions of the Supreme Court. Starting with *Sparrow* in 1990, the Court has emphasized that Aboriginal and Treaty Rights have to be "taken seriously," which involves renouncing "the old rules of the game."[144] The section protects rights that existed in 1982 against unilateral extinguishment by any government. These rights can still be infringed but only if governments meet a fairly rigorous justification test, which they have so far generally failed to do.[145] But in a surprising reversal in 2014, the Court in *Tsilhqot'in Nation* and *Grassy Narrows* made Aboriginal and Treaty Rights subject to provincial infringement, discarding the division-of-powers protection against provincial laws that they previously enjoyed.[146] In this instance, the Court actually used section 35 to take away constitutional protection that existed before, which can hardly have been the legislative intention.

Establishing Aboriginal Rights in court is not easy. The *Van der Peet* test limits Aboriginal Rights apart from Title to practices, customs, and traditions integral to distinctive Indigenous cultures prior to European contact, which in eastern Canada can be over four hundred years ago.[147] Proof of the exclusive occupation at the time of Crown sovereignty required for Aboriginal Title involves enormous cost and extensive evidence in long trials – in *Tsilhqot'in Nation*, the only successful title case, 339 trial days spread over five years, not counting the appeals![148] The only way the Tsilhqot'in could afford this was by obtaining an interim cost order from the BC Supreme Court,[149] which is granted only in exceptional cases.

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[144] *Sparrow*, at 1119, 1106 (quoting Lyon, *"Constitutional Interpretation*, at 100).

[145] For a case in which the Crown did succeed in proving justification of infringement of an Aboriginal Right, see *Constant c. Québec (Procureur général)*, 2003 CanLII 47824, [2003] 2 C.N.LR. 240 (Q.C.C.A.), leave to appeal refused, [2003] S.C.C.A. No. 110, involving use of live bait for fishing.

[146] This is most evident in the overruling of *Morris*. See text accompanying notes 136–39 above.

[147] See *Adams*.

[148] *Tsilhqot'in Nation* at para. 7. On why Indigenous Peoples bear this burden, see Kent McNeil, "The Onus of Proof of Aboriginal Title," *Osgoode Hall Law Journal* 37, no. 4 (1999): 775.

[149] In *William v. Riverside Forest Products Ltd.*, [2002] 1 C.N.L.R. 375 at para. 35, affirmed *Tsilhqot'in Nation v. Canada (Attorney General)*, [2002] 4 C.N.L.R. 306 (B.C.C.A.), [2002] S.C.C.A. No. 295, Vickers J. ordered "that Canada and British Columbia must share equally in the payment of the plaintiffs' future costs."

Indigenous Peoples have not been very successful in having their claim to governance authority acknowledged by the courts. The Supreme Court avoided the issue in *Delgamuukw*. In *Pamajewon*, the Court was willing to assume, without deciding, that section 35 includes self-government rights but then went on to make proof of these rights virtually impossible.[150] The Court appears to be uncomfortable with addressing governance issues, perhaps because it regards them as too political. And yet the Court has never questioned the Crown's assertion of sovereignty over Indigenous Peoples and the authority of Parliament to legislate in relation to "Indians, and Lands reserved for the Indians," which are just as political.[151]

According to the Supreme Court, Indigenous consent is not required when governments authorize intrusion on claimed rights, as long as adequate consultation has taken place. After rights have been established, consent is desirable but not required if infringement can be justified.[152] The Court's approach to section 35 therefore appears inconsistent with the *UN Declaration on the Rights of Indigenous Peoples*,[153] which Canada and British Columbia have both adopted by legislation.[154] Article 19 of the Declaration, for example, provides: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Canada and British Columbia have a lot of work to do to make their laws conform with the provisions of the Declaration.

Since 1982, the public's perception of Indigenous Peoples' rights has changed, partly due to section 35 and the publicity the Supreme Court's interpretation of it has received. Indigenous Rights that were largely ignored before the political debate leading up to the *Constitution Act, 1982*, have been in the national spotlight ever since, changing the way

[150] Compare Article 20 of the *UN Declaration on the Rights of Indigenous Peoples*, https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf: "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions."

[151] The closest the Court has come to questioning Canadian sovereignty was in *Haida Nation*. See text accompanying notes 109–10 above and Hoehn, *Reconciling Sovereignties*.

[152] See *Tsilhqot'in Nation*, esp. paras. 88–90.

[153] *UN Declaration*. See Michael Coyle, "From Consultation to Consent: Squaring the Circle?," *University of New Brunswick Law Journal* 67 (2016): 235; *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo, ON: Centre for International Governance Innovation, 2018).

[154] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14; *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44, s. 2.

many Canadians view their country.[155] After her retirement, McLachlin C.J. referred to "the peaceful evolution of Indigenous Rights in a way that might foster reconciliation between Indigenous and non-Indigenous peoples" as "the grand project of my legal generation."[156] We still have a long way to go to achieve justice for Indigenous Peoples, but progress has been made, due in part to the Constitution Express and inclusion of section 35 in the Constitution.

[155] See Peter H. Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017).

[156] Beverley McLachlin, *Truth Be Told: My Journey through Life and the Law* (Toronto: Simon and Schuster Canada, 2019), 288.