Recognized but Infringed

by

Eric Leslie Pentland

A thesis submitted in partial fulfillment of the requirements for the degree of

Master of Laws

Faculty of Law

University of Alberta

Abstract

In *Mikisew Cree First Nation v Canada,* 2018 SCC 40 a majority of the Justices on the Court agreed that the duty to consult does not arise in the legislative process. Running up against the limit of consultation the Justices turned to consider whether the doctrine of justified infringement, which has included consultation as a substantive consideration from its inception and as a preliminary procedural step since *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, provided sufficient and effective protection to Aboriginal and Treaty rights in circumstances where the duty to consult did not arise. The Justices were split five to four signaling that there is doctrinal reform or entrenchment on the horizon.

In this thesis I analyze the doctrine of the justified infringement of Aboriginal and Treaty rights to assess whether it is internally consistent, fit for its purported purposes, and sufficiently protects Aboriginal and Treaty rights independently of the procedural duty to consult and accommodate. In my analysis: the doctrine is not internally consistent, fails to hold up to a number of its purported purposes, and does not provide sufficient protection to Aboriginal and Treaty rights.

The scope of the thesis is restricted to doctrinal analysis, where shortcomings are identified only doctrinal reform that might be accomplished within the judicial process is advocated. As a rule, calls for reform are implicit in the identification of legal and logical inconsistencies. As an exception, I argue for the development and extension of the *Tsilhqot'in* principle that Courts must take the Aboriginal perspective on whether an objective is compelling into account to include a requirement of Nation-to-Nation reciprocity. This requirement is intended to respond to the uneven balancing of the public's interest in dispossession and the interests of Indigenous communities.

Preface

This thesis is an original work by Eric Leslie Pentland. No part of this thesis has been previously published.

Acknowledgment

I would like to thank my supervisor Professor Annalise Acorn, I could not have completed this thesis without her steadfast encouragement, practical wisdom, and insightful comments. I would like to thank Doctor George Pavlich for the time he took to read works on reconciliation and resurgence with me and discuss my research as I developed the idea for this project. I would like to thank Doctor Hadley Friedland and Doctor Darcy Lindberg for their knowledge and expertise as examiners. I am appreciative of all the support that I have received from the Faculty of Law throughout my Masters, with particularly thanks to Gloria Strathern and Doctor Matthew Lewans for helping me to navigate my way through the program.

TABLE OF CONTENTS

PART I: Introduction

Aboriginal and Treaty rights, although recognized and affirmed, are not absolute.[1] In order to establish what sort of limitations might be legitimate the Supreme Court of Canada has developed the doctrine of justified infringement. Since *Haida* that doctrine has been overshadowed, and substantive infringement claims pre-empted, by the development of a stand-alone procedural right to consultation and accommodation.[2] In *Mikisew Cree First Nation v Canada*, 2018 SCC 40 a majority of the Justices on the Court agreed that the duty to consult does not arise in the legislative process.[3] Running up against the limit of consultation the Justices turned to consider whether the doctrine of justified infringement, which has included consultation as a substantive consideration from its inception and as a preliminary procedural step since *Tsilhqot'in*, provided sufficient and effective protection to Aboriginal and Treaty rights in circumstances where the duty to consult did not arise. [4] The Justices were split five to four signaling that there is doctrinal reform or entrenchment on the horizon.

The aim of this thesis is to analyze the doctrine of justified infringement to assess whether it is internally consistent, fit for its purported purposes, and sufficiently protects Aboriginal and Treaty rights independently of the procedural duty to consult and accommodate. In my analysis: the doctrine is not internally consistent, fails to hold up to a number of its purported purposes, and does not provide sufficient protection to Aboriginal and Treaty rights. In particular, the criteria and standards for assessing the validity for legislative objectives fail to protect Aboriginal and Treaty rights from superficially neutral objectives that constitute *de facto* threats, treat the assertion of sovereignty over territories and subjects inconsistently, fail to provide a venue for the questioning of the assertion of sovereignty over peoples by treating the assertion as justificatory, and fail to affirm rights *as* rights.

---

[1] *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 s. 35 [*Constitution Act, 1982*]; *R v Sparrow*, [1990] 1 SCR 1075 at 1109; 70 DLR (4th) 385 [*Sparrow*].
[2] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 [*Haida*].
[3] *Mikisew Cree First Nation v (Canada Governor General in Council)*, 2018 SCC 40 [*Mikisew 2018*]
[4] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].

In *Tsilhqot'in* the Court held that the Aboriginal perspective must be taken into account when assessing whether a legislative objective is compelling. In additional to my underlying argument that the doctrine should be reformed to be internally consistent and better suited to serve its purported purpose, I argue that Nation-to-Nation reciprocity ought to be a requirement of taking the Aboriginal perspective into account. A requirement of Nation-to-Nation reciprocity directed at determining whether the community 'as a whole' would be willing to accept a like detriment for the like benefit to the Indigenous community would mitigate the risk of the benefits of infringement being weighed with a heavy hand and bolster the protection of Aboriginal and Treaty rights.

Section I: Structure & Summary of Arguments

Structure

This thesis is divided into five parts. In this first Part, I introduced my research problem, summarize my arguments, outline my methodology and limitations, and clarify my use of key terms. In the second Part, I survey the development of the doctrine of justification in the Supreme Court of Canada's jurisprudence and provide an account of the conflicting positions the Justices took in *Mikisew 2018* on the sufficiency of the doctrine of justification as a protection for Aboriginal and Treaty rights in situations where the duty to consult does not arise. In the third and fourth Parts, I analyze the doctrine of justification and assess whether it is internally consistent and fit for the purpose of balancing federal power and federal duty in the regulation of Aboriginal and Treaty rights. In the last Part, I consider two structural implications of the existing doctrine and lay out my conclusions.

Summary of Arguments

The core of my argument begins in Part III **Compelling Colonialism** where I focus my analysis on the requirement of a valid legislative objective in the doctrine of justification.

In Section I **Compelling Colonial Content** I argue that reconciliation, as articulated in the doctrine of justification by the Supreme Court of Canada, fails to provide any coherent basis for

disqualifying objectives as invalid. Further, subordinating the compelling and substantial criteria to their articulation of reconciliation would leave validity untethered from any meaningful standard of assessment. Moreover, in setting out a list of pre-approved compelling objectives that were not at issue, the *Delgamuukw* majority insulated a list of disconcertingly colonial objectives from scrutiny into the merits of their content.[5]

In Section II **Validating Dispossession** I argue that justificatory reconciliation, as articulated in *Gladstone* and *Delgamuukw*, licenses economic and developmental objectives that are difficult to distinguish from the aims of dispossession.[6] Further, dispossession being not only justifiable as an infringement but itself affirmed as a valid legislative objective suggests that the validity criteria are not satisfying the Court's intended purpose of guarding Indigenous rights and interests from superficially neutral objectives that constitute *de facto* threats.

In Section III **Taking Account of Indigenous Interests in Infringement** I first argue that, while territorial sovereignty has been problematized in justification, sovereignty over peoples has been naturalized in a manner that functions to give systems of domination a sense of inevitability and secure compliance through resignation. Further, sovereignty over peoples ought to be equally problematized. Moreover, the underlying values of section 35 ought to be treated as the ultimate standard against which a limit is shown to be justified rather than as a source of limits. Even moreover, treating reconciliation as a source of limits results in the assertion of sovereignty providing its own justification with the assertion of sovereignty over territory as the basis of rights and the assertion of sovereignty over peoples as the basis for their limitation. Still further yet, the assertion of sovereignty being treated as its own justification suggest that the doctrine has not met the call of section 35 as a departure from 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.

I then argue that the empty rhetoric of formal and substantive representation shrouds the material reality of unaccountability and majority tyranny. Further, a doctrine that treats the representation

---

[5] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; DLR 153 (4th) 193 [*Delgamuukw* cited to SCR].
[6] *R v Gladstone*, [1996] 2 SCR 723 at paras 21, 56; 137 DLR (4th) 648 [*Gladstone* cited to SCR].

of rights-bearing minority in the community as a basis for not protecting that minority's rights from majority interests fundamentally fails to affirm those rights *as* rights. Moreover, a test that includes an inquiry into whether a limitation is in the claimant's interest contrary to the claimant's assertion amounts to historic-paternalism rebranded as false-consciousness.

My arguments in Section III are ultimately directed at answering the question of whether taking into account that Indigenous societies are *de facto* a part of society as a whole lends some legitimacy to infringing upon their particular interests in favour of the public interest in the negative.

In Section IV **Putting Validity in Perspective** I first argue that the *Tsilhqot'in* Court's direction to take the Aboriginal perspective into account in assessing the validity of an objective must mean, at minimum, taking into account the Aboriginal position. Further, if Indigenous values and laws (i.e. 'Aboriginal understanding') are not considered and applied from the Aboriginal position, then some other relevant aspect of the Aboriginal position must provide the basis for the recalibration called for by taking the Aboriginal perspective into account. Moreover, the historical, political, and material position of Indigenous peoples in relation to the Crown are relevant aspects of the Aboriginal position. Even moreover, the Crown has consistently failed to meet its moral obligations and the historical, political, and material relationship between the Crown and Indigenous peoples is characterized by systemic wrongdoing.

I then argue that the failures of justification in the doctrine of justified infringement are analogous to the failures of justification Rainer Forst levels against the permission conception of tolerance. Further, the mutual acceptability indicative of the respect conception of tolerance that Rainer Forst endorses is consistent with the Court's reliance on normative consensus in finding conservation compelling in *Sparrow*. Moreover, the criteria of 'reciprocity of contents' for mutual acceptability can be integrated into the justification analysis as a question of Nation-to-Nation reciprocity directed at determining whether the community 'as a whole' would be willing to accept a like detriment for the like benefit to the Indigenous community. Even moreover, integrating a principle of Nation-to-Nation reciprocity into justification would mitigate the risk of courts weighing the interests of the sovereign majority with a heavy hand.

I also consider the implications of taking Indigenous values and laws into account and argue that based on the precedent for taking the Aboriginal perspective into account in rights-recognition, each layer of the compelling standard ought to be subject to reinterpretation and in the absence of unforced or overlapping consensus Indigenous values and laws ought to be preferred as a basis for grounding external limits on rights.

In Part IV **Justification without Honour** I turn my analysis to the requirement that the Crown achieve its objectives honorably and in keeping with its unique fiduciary relationship with Indigenous peoples.

In Section I **Limitless Limits** I argue that the adaptability of the inquiry into whether the Crown's means are honorable is a source of uncertainty and unpredictability. Further, applying different standards to rights based on whether or not the courts find them to be internally limited or externally limited has extended that uncertainty to circumstances of resource-conservation where a predictable precedent might have otherwise been relied upon.

In Section II **The Rise of the Honour of the Crown Doctrine** I argue that the strong distinction that the Court has drawn between a fiduciary relationship and the specific circumstances in which a fiduciary duty arises suggests that the Courts are unlikely to draw justificatory standards directly from the legal duties of a fiduciary in future cases. Further, the ascendency of the honor of the Crown doctrine as an organizing principle for the Crown's concrete duties to Indigenous peoples may indicate that it will also supplant the fiduciary relationship as the principle standard for assessing the Crown's means of achieving its objectives. Moreover, the honour of the Crown giving rise to concrete duties and being the standard that must be met in order to justify infringements suggests that infringements that arise from the Crown's failure to uphold its honour cannot be justified.

In Section III ***Sui Generis* Calls for more than Universal Proportionality** I argue that if the universally applicable standard of proportionality alone satisfied the *sui generis* standard it would render it meaningless. Further, Hogg and Styler's argument that proportionality captures

all considerations that would be relevant under either fiduciary duty or honour the Crown ought to be rejected on the basis that it fails to account for the fact that even in the *Tsilhqot'in* precedent proportionality did not capture all considerations relevant to fiduciary duty. Moreover, a consideration directly addressing the honour of the Crown is necessary not only for the internal consistency of the doctrine but also because the *Ktunaxa* minority has demonstrated how strongly proportionality alone may favour colonial dispossession at the expense of Aboriginal traditions and culture.[7]

In Part V **Implications and Conclusion** I conclude that in its current state, the doctrine of justified infringements does not offer sufficient and effective protection to Aboriginal and Treaty rights in circumstances where the duty to consult does not arise.

Section II: Method, Limitations, & Definitions

Method and Limitations

The scope of this thesis is delimited by its genre and my decision not to challenge two of the foundational assumptions structuring the doctrine of justification.

Within the broad genre of law reform there are calls for legislative reform and calls for doctrinal reform. The later may be expressed as an analysis that discovers the true form of the doctrine or clarifies ambiguities rather than a call for reform.[8] However framed, the (notional) addressee of a call for doctrinal reform is the legal profession – particularly the judiciary – and the aim is to describe a doctrine that is internally consistent and fit for the purpose it is intended to serve. This is the task that I have taken up in this thesis and, writing from this perspective, I have limited myself to what it is within the power of the judiciary to accomplish without legislative or

[7] *Ktunaxa Nation v British Columbia (Forests, Lands, and Natural Resource Operations)*, 2017 SCC 54 at para 71 [*Ktunaxa*].
[8] *See* Richard A Posner "The Present Situation in Legal Scholarship" (1980) Yale LJ 1113 at 1115 for an account of doctrinal analysis as "The clarification of legal doctrine" which "has always been at once positive and normative. It analyzes what the law is but often it also advocates changing some rule of law to make it conform better to central trends, themes, or concepts…"

political reform. This excludes all reforms that may be accomplished exclusively by political means such as Constitutional amendment or succession.[9]

The doctrine of justification is structured by a number of foundational assumptions, two of which I acknowledge in this thesis but do not challenge: the justiciability of sovereignty and that Aboriginal and Treaty rights are not absolute. The non-justiciability of the Crown-in-Parliament's sovereignty is deeply entrenched legal *dogma*, arguments might be made for its justiciability, but I have not made them here. The assertion that Aboriginal and Treaty rights are not absolute is first made in *Sparrow*. There is a persuasive argument to be made that Treaty rights are absolute and that no limitation of them is legitimate absent Constitutional amendment by both Treaty partners. I have not made that argument here: assuming that limits are going to be set, I have set out to assess when those limits are legitimate. These constraints are consistent with the incremental development of legal doctrine within its institutional constraints, but also mark this as a significantly less ambitious justice project than more politically focused works.[10]

Definitions

Claimant – I use the term claimant to refer to a rights-holder seeking recognition and affirmation of their right whether they are doing so as a plaintiff, defendant, appellant, or respondent.

Crown – I use the term Crown to refer to the sovereign without distinguishing between the state, the sum of the political institutions of the state, the executive branch of government, and the

---

[9] *Reference Re Succession of Quebec*, [1998] 2 SCR 217; 161 DLR (4th) 385.

[10] *See especially,* Arthur Manuel, *The Reconciliation Manifesto: Recovering the Land and Rebuilding the Economy* (Toronto: James Lorimer, 2017) at 277: "In concrete Canadian terms, Section 35 of the Canadian Constitution must be made to comply with Article 1 of the ICCPR/ICESCE and Article 3 of UNDRIP and all of the colonial laws must be struck from Canadian books, thereby implementing the Indigenous right to freely determine our own political status and freely pursue our economic, social and cultural development." *See* also: Sylvia McAdam (Saysewahum) *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich, 2015) at 83-84. *Cf* works centred on resurgence within Indigenous communities as political contestation of Canadian sovereignty: Leanne Betasamosake Simpson, *Dancing on Our Turtles Back* (Winnipeg ARP, 2011); Taiaiake Alfred, *Peace, Power, Righteousness* (Oxford University Press, 2009) at 71 "We must deconstruct the notion of state power to allow people to see that the settlor state has no right to determine indigenous futures."

legislative branch of government in the sense of Crown-in-Parliament unless greater specificity is called for to provide clarity.

Doctrine of Justification – the phrases doctrine of justification, justification doctrine, justificatory doctrine, and doctrine of justified infringement without further qualification are always intended to refer to the doctrine of the justified infringement of Aboriginal and Treaty rights.

Indigenous – Aboriginal – Indian – I have preferred the term Indigenous to refer to First Nation, Métis, and Inuit peoples in most cases. Where I have used the terms Aboriginal or Indian my intention is to reference the use of these terms in legal doctrines such as Aboriginal Rights and legislation such as the *Indian Act*.

Non-Indigenous – I have used the term non-Indigenous throughout most of this thesis to draw a distinction between Indigenous communities and other communities. Michael Asch has argued that the term settlor is more appropriate because it identifies these other communities on the basis of a positive quality and signals their stake in Treaty relationships and reconciliation.[11] In a similar vein, J.R. Miller has used the term newcomers. I view these distinctions as primarily important given their audience – lay settlors and newcomers that may want to be identified based on a quality they have instead of lack – and aims – ethical appeals to settlors and newcomers. For the purpose of addressing a legal audience from a primarily doctrinal perspective I prefer the broad application and consistent accuracy of non-Indigenous for describing things that are not Indigenous.

Test v Doctrine – The distinction between the justification test and the justification doctrine is rarely at issue in this thesis. Where it is necessary to draw a distinction the test refers to the legal criteria that must be satisfied or the established structure and methods for implementing the doctrine, while the doctrine includes the test but also refers more expansively to the principles, reasons, judicial history, developmental trajectories, external and disciplinary constraints, and

[11] Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014 at 8-9.

other factors that make sense of the test in the context of a legal decision, situate it within the legal system as a whole, and enable and constrain its development.

PART II – Doctrine of Justified Infringement

The first section of this Part is a survey of the doctrine of justification developed by the Supreme Court of Canada. The second section sets out the sides of the *Mikisew 2018* schism on the bench. The objective of this Part is to provide a faithful account of the Supreme Court of Canada's doctrine of justification that will serve as a foundation for the analysis in Parts III and IV.

Section I: Development of the Doctrine

In this section, I trace the development of the doctrine of justified infringement through the Supreme Court of Canada's jurisprudence from its pronouncement in *Sparrow* through to the *Mikisew Cree 2018* schism. Although there have been a number of significant revisions to the doctrine of justification, the Court has consistently built upon, or purported to build upon, its initial reasoning in *Sparrow*. While subsequent decisions are summarized briefly in this section and expanded upon in later Parts, it is useful to set out in detail the principles and reasoning the Court relied upon to arrive at the justificatory test in *Sparrow* at this point in order to provide a solid foundation for discussion.

Sparrow: Justifying Justification

In *Sparrow* the Supreme Court of Canada had the opportunity to "explore for the first time the scope of s.35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada."[12] In doing so a unanimous Court set out a comprehensive legal framework for the recognition and affirmation of Aboriginal and Treaty rights.

[12] *Sparrow*, *supra* note 1, at 1082-1083.

The primary issue of dispute in *Sparrow* was whether rights recognized and affirmed by section 35 were subject to Parliamentary regulation.[13] The corresponding framework for *Charter* rights and freedoms had been set out in section 1 of the *Constitution Act, 1982* which first "guarantees the rights and freedoms set out" in the *Charter* and then subjects them to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[14] Without this touchstone to delimit the rights the Crown and Sparrow made the two extreme arguments: the Crown that the rights were not guaranteed and could be freely regulated;[15] Sparrow that the rights were not subjected to any limits and were immune to regulation.[16] The Court rejected both arguments and adopted a framework modeled after the balance struck by section 1 of the *Charter.* [17] In doing so it adapted the justified infringement test to the section 35 context: requiring Sparrow to demonstrate that his Aboriginal right had been infringed and the Crown to demonstrate that any infringement was justified.

In determining "that these two extreme positions must be rejected in favour of a justificatory scheme" the Court reasoned that "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."[18] On the side of federal power, the Court considered the authority to legislate in accordance with s. 91(24) of the *Constitution Act, 1867* and – despite *Sparrow* raising the principle of constitutional supremacy expressed by s. 52 of the *Constitution Act*, *1867* – the apparent absence of any explicit language authorizing the Court to assess the legitimacy of government legislation that restricts Aboriginal rights.[19] On the side of federal duty, the Court considered that "s. 35 (1) is a solemn commitment that must be given meaningful content", the historic relationship between the Crown and Indigenous peoples (at that time referred to as 'trust-like'), principles of interpretation developed in prior Aboriginal law cases (including a principle akin to the contractual doctrine of *contra proferentem*)[20], and the

---

[13] *Ibid* at 1083, 1085.
[14] *Constitution Act, 1982*, *supra* note 1, s. 1.
[15] *Sparrow supra* note 1, at 1097.
[16] *Ibid* at 1102.
[17] *Ibid* at 1108-1109.
[18] *Ibid* at 1110, 1109.
[19] *Ibid* at 1109.
[20] See, *R v Marshall*, [1999] 3 SCR 456 at paras 10, 51; 177 DLR (4th) 513 [*Marshall no. 1*]. *Cf Beattie v Canada,* 2002 FCA 105 at paras 11, 15 where the principles of Treaty interpretation are distinguished from the contractual rule of *contra proferentem*, but note that this distinction has no practical effect: since the Crown is the author of the

then 'concept' (and incipient honour of the Crown doctrine) of holding the Crown to a high standard of honourable dealing.[21]

Sparrow: Justificatory Framework

The Court then established the framework for a two-part justificatory test. First, the Crown "regulation must be enacted according to a valid objective."[22] Second, the "way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples."[23] The Court adds "The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation" but did not specify a precise role for this scrutiny in the justificatory test.[24]

The first part of justification test is directed at the Crown's objective. To determine whether regulations have a valid objective a court must consider both the objective of Parliament in authorizing the enactment of regulations and the objective of the person or body enacting the regulations.[25] While the Court reasoned that preserving section 35(1) rights through conservation and management is a valid objective and asserted that preventing harm to people is a valid objective it did not set out its approach to determining whether other objectives are valid in detail, it simply said "also valid would be … other objectives found to be compelling and substantial."[26] However, in establishing this criteria the court both signaled a measure of similarity to the 'pressing and substantial' standard that it had recently established in s.1 jurisprudence[27] and rejected 'the public interest' as "so vague as to provide no meaningful guidance and so broad as to be unworkable" as a basis for validity.

---

written text of every historical Treaty, resolving ambiguity in the favour of the Indigenous adherent will always result in ambiguities being construed against the author.

[21] *Sparrow, supra* note 1, at 1108-1109.

[22] *Ibid* at 1110.

[23] *Ibid* at 1110.

[24] *Ibid* at 1110.

[25] *Ibid* at 1113.

[26] *Ibid* at 1113.

[27] *R v Oakes*, [1986] 1 SCR 103 at 138-139; 26 DLR (4th) 200 [*Oakes*]; *Irwin Toy v Quebec (Attorney General),* [1989] 1 SCR 927 at 986; 58 DLR (4th) 577: "Without such a high standard of justification, enshrined rights and freedoms would be stripped of most of their value."

The second part of the justification test is aimed at the Crown's means of achieving its objective. While the Court had proposed to set out the test for justification it cautioned that "Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case."[28]

In its application of the framework to the factual context of *Sparrow*, the Court reasoned that because conservation and allocation objectives blur in a heavily used modern fishery "this context demands that there be a link between the question of justification and the allocation of priorities"[29] and "the constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing."[30]

Although the Court did not rely upon them in its reasons, it provided examples of further questions that could be addressed in the second part of the test "depending on the circumstances of the inquiry":[31] "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."[32] The Court was clear that it did not "wish to set out an exhaustive list of factors to be considered in the assessment of justification."[33]

Ultimately the Court found that the findings of fact on first instance provided an insufficient basis for a decision on the appeal and ordered a retrial. In doing so it provided further instruction

[28] *Sparrow*, *supra* note 1, at 1111.
[29] *Ibid* at 1114-1115.
[30] *Ibid* at 1116.
[31] *Ibid* at 1119.
[32] *Ibid* at 1119.
[33] *Ibid* at 1119.

on the test for justification: the Crown "would have to show that the regulation sought to be imposed is required to accomplish the needed limitation."[34]

Development from Badger through Tsilhqot'in

The Court's next foray into justification significantly extended the doctrine's scope of application. While *Sparrow* had dealt with an Aboriginal right and Federal regulatory power, *Badger* dealt with a Treaty right and provincial regulatory power. The majority decision reasoned that, despite Treaty rights already being limited by the terms of the solemn agreement, further limits could be justified.[35] They also reasoned that the Natural Resource Transfer Act placed the Provincial Crown "in exactly the same position which the Federal Crown formerly occupied" with respect to the power to regulate hunting rights guaranteed under Treaty No. 8 for the purpose of conservation.[36] Since the Natural Resource Transfer Agreements are constitutional documents this conferred sufficient power to legitimately limit the exercise of Treaty rights. In this case, the Crown had not led evidence of justification, so there was limited consideration of the *Sparrow* test: the majority affirmed its general applicability and reiterated that the factors are not exhaustive.[37] Two noteworthy exceptions to this continuity were the majority's addition that "it can be properly inferred that reasonableness forms an integral part of the *Sparrow* test"[38] and, with respect to the Crown's legislative objective, the affirmation of a standard that "requires that the Crown demonstrate that the legislation in question advances important general public objectives in such a manner that it ought to prevail."[39]

---

[34] *Ibid* at 1121: this could suggest either a high standard of rational connection (if the 'needed limitation' is the objective of conservation) or a non-deferential standard of minimum impairment (if the 'needed limitation' is the degree of impingement on the exercise of the right).
[35] *R v* Badger, [1996] 1 SCR 771 at paras 75, 80-82, 85; 113 DLR (4th) 324 [*Badger*]. The implications of justifying further limitations are considered *below* in Part V Section I.
[36] *Ibid* at para 96.
[37] *Ibid* at para 85.
[38] *Ibid* at para 73.
[39] *Ibid* at para 80: the majority cites to *R v Agawa*, (1988), 65 OR (2d) 505 (CA); 53 DLR (4th) 101 [*Agawa*] in favour of this standard rather than to the *Sparrow* rejection of this standard.

In *R v Nikal*,[40] the majority of the Court once again affirmed the *Sparrow* test in circumstances where the Crown "did not adduce any evidence that might justify" the limitation of the Aboriginal right the decision turned on. Although the majority did not reference *Badger* it introduced the *Sparrow* test with nearly identical wording, in both cases stating "the following questions should be answered sequentially" before setting out the considerations of: first, a valid legislative objective; then the special trust relationship and responsibility of the government; and finally the further questions that may arise in the circumstances (minimal impairment, compensation, and consultation). [41] This seemed to signal the cementing of, at least in circumstances calling for the further questions, a three-part test. The majority in *Nikal* more clearly integrated reasonableness into the justification doctrine by indicating that "in these last three questions reasonableness will be a necessary aspect of the inquiry into justification."[42]

In undertaking to clarify the *Sparrow* framework the majority in *R v Gladstone* revisited and adapted the justification test in order to apply it to the circumstances of the appeal.[43] The majority clarified the justification test in three ways. First, it established that in the circumstance where a right is infringed by the cumulative effect of a regulatory scheme each of the constituent parts of the scheme, rather than the regulations it is comprised of, should be justified.[44] Second, it situated the further questions in the second step of the "two-part test" explicitly linking them to the inquiry into the Crown's compliance with its fiduciary duty.[45] Third, it qualified the requirement that the Crown demonstrate that conservation measures are necessary, reasoning that in the context of uncertainty "this Court must grant a certain level of deference to the government's approach."[46] The majority then adapted the *Sparrow* test by: contemplating the broader interests of the community as a whole (economic and regional fairness; historic reliance of non-Indigenous people on a resource) as a basis for identifying legitimate limitations

---

[40] *R v Nikal*, [1996] 1 SCR 1013; 133 DLR (4th) 658 [*Nikal* cited to SCR]: while *Nikal* was heard at the same time as *Gladstone, Van der Peet* and *NTC Smokehouse*, the decision was rendered four months earlier.
[41] *Ibid* at para 109; *Badger*, *supra* note 35 at para 97.
[42] *Nikal*, *supra* note 40 at para 110.
[43] *Gladstone*, *supra* note 6 at paras 21, 56.
[44] *Ibid* at paras 51, 52.
[45] *Ibid* at para 54; see also *ibid* at para 64: where, in applying the further questions, the majority expanded upon them, however, the additional considerations of accommodation of the right and the importance of the right to the right-holders economic and material well-being are introduced as being specific to the circumstances of determining allocation in the context of a less than exclusive priority,
[46] *Ibid* at para 83.

necessary for "the reconciliation of Aboriginal societies and the rest of Canadian society";[47] and significantly qualifying the doctrine of priority.[48] While McLachlin did not find it necessary to consider justification in her *Gladstone* dissent, she strongly critiqued the *Gladstone* majority approach to identifying compelling and substantial objectives (and its adaptation of the priority doctrine) in her dissenting reasons in the companion cases to *Gladstone*: *R v Van der Peet* and *R v NTC Smokehouse*.[49]

In the concurrent decisions *R v Côté* and *R v Adams* the majority of the Court affirmed "the reconciliation of the prior occupation by aboriginal peoples with the assertion of Crown sovereignty" as a purpose of rights recognition and affirmation and reasoned that this same purpose must inform the legitimate limitation of those rights.[50] In applying this principle the *Adams* majority reasoned (and the *Côté* majority affirmed) that "sport-fishing, without evidence of a meaningful economic dimension, is not 'of such overwhelming importance to Canadian society as a whole' … to warrant the limitation of aboriginal rights."[51]

The majority in *Delgamuukw v British Columbia* reviewed the general principles of justification[52] and considered whether aboriginal title "mandates a modified approach to the test for justification first laid down in *Sparrow* and elaborated on in *Gladstone*."[53] In reviewing the general principles it reasoned that the requirements that must be satisfied at the second step of justification "are a function of the 'legal and factual context' of each appeal."[54] In all cases the Court must assess whether the "infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples" although the form of the assessment will vary with the circumstances: where the doctrine of priority is ill-suited the assessment might take the form

---

[47] *Ibid* at para 75.
[48] *Ibid* at para 69-73, 62.
[49] *R v Van der Peet*, [1996] 2 SCR 507 at paras 227-313; 137 DLR (4th) 289 [*Van der Peet*]; *R v NTC Smokehouse,* [1996] 2 SCR 672 at paras 93-98; 137 DLR (4th) 528 [*NTC Smokehouse*]: the majority judgements in *Van der Peet and Smokehouse* do not reach the justification stage.
[50] *R v Côté*, [1996] 3 SCR 139; 138 DLR (4th) 385 [*Côté* cited to SCR]; *R v Adams*, [1996] 3 SCR 101 at para 57; 138 DLR (4th) 657 [*Adams*].
[51] *Adams*, *supra* note 50 at para 58; *Côté, supra* note 50 at para 82. *See also Adams* at para 59 and *Côté* at para 82: in both cases the majority would have also held the regulatory scheme unjustified for failing to accord priority to the Aboriginal right to fish for food.
[52] *Delgamuukw, supra* note 5 at para 160.
[53] *Ibid* at para 2.
[54] *Ibid* at para 162

of the further questions.[55] The majority then considered justification in the context of Aboriginal title reasoning that, on the basis of the reconciliation defined in *Gladstone,* "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."[56] In considering the second step the majority contemplated different articulations depending on the infringement but held that "there is always a duty of consultation" and "fair compensation will ordinarily be required when aboriginal title is infringed."[57] The minority agreed with the consideration of consultation and fair compensation but differed in describing the underlying principle as "accommodation of the aboriginal peoples' interests … in accordance with the honour and good faith of the Crown" rather than 'the special fiduciary relationship'.[58]

Following *R v Delgamuukw* there were no substantial shifts in the Court's justification jurisprudence until its decision in *R v Haida*. In the interim the Court affirmed its existing doctrine and continued to extend the scope of its application. In *R v Sundown* the Court affirmed the *R v Badger* approach in requiring the justification of provincial conservation regulations enacted pursuant to a Natural Resource Transfer Agreement.[59] In *R v Marshall* (No. 1) the majority confirmed that Federal regulations infringing a Treaty right must be justified.[60] In *R v Marshall* (No. 2) the Court reiterated this aspect of the *Marshall* (No. 1) majority decision with an emphasis on the fact that Federal regulations infringing a Treaty right *can* be justified.[61] In *R v Powley* the Court extended the existing justification doctrine to the Aboriginal rights of Métis peoples without modification and applied the doctrine of priority as set out in *Sparrow*.[62] In *Paul*

---

[55] *Ibid* at para 162-163.
[56] *Ibid* at para 165; see also *ibid* at para 202 where the minority agrees that these are "valid legislative objectives that, in principle, satisfy the first part of the justification analysis."
[57] *Ibid* at paras 168-169.
[58] *Ibid* at para 203.
[59] *R v Sundown*, [1999] 1 SCR 393 at paras 38, 46; 170 DLR (4th) 385 [*Sundown*].
[60] *Marshall no. 1*, *supra* note 20 at paras 7, 55.
[61] *R v Marshall*, [1999] 3 SCR 533 at paras 24-25; 179 DLR (4th) 193 [*Marshall no. 2*].
[62] *R v Powley*, 2003 SCC 43 at para 48-50.

v British Columbia the Court held that a provincial administrative decision-maker may determine questions of Aboriginal rights that arise in the exercise of its authority.[63]

In its concurrent decisions *Haida v British Columbia* and *Taku River v British Columbia* the Court extricated a doctrine of consultation from its justification jurisprudence. Contrary to the Crown's argument that it was only required to consult Indigenous people with respect to their proven rights, the Court reasoned that the consultation it had contemplated in *Sparrow*, *Nikal*, and *Gladstone* referred to the Crown's "behavior before determination of the right"[64] and held that "the obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement … the duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them."[65] This duty to consult "requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances"[66] and "the effect of good faith consultation may be to reveal a duty to accommodate"[67] in which case "the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests."[68]

In *Mikisew Cree v Canada (2005)* the Court held that the duty to consult applied to contemplated Crown conduct that might adversely affect Treaty rights. In doing so it distinguished between the procedural right to consultation and corollary substantive Treaty rights and reasoned that the Crown could breach its procedural obligations "quite apart from" and "whether or not the facts would otherwise support a finding of infringement" of a substantive right.[69] This requires a court to consider whether the duty to consult has been met before it considers whether infringement is justified under "a *Sparrow* analysis".[70] While this went a long way in clarifying the relationship between consultation and justification, the Court added a new layer of complexity in finding a

---

[63] *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para 34.
[64] *Haida, supra* note 2 at para 34 (emphasis in original).
[65] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director*), 2004 SCC 74 at para 25 [*Taku River*].
[66] *Haida*, *supra* note 2 at para 41.
[67] *Ibid* at para 46.
[68] *Ibid* at para 50.
[69] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 57, 59 [*Mikisew 2005*].
[70] *Ibid* at para 59.

procedural right to consultation: Aboriginal and Treaty rights are not absolute, "their breach may be justified by the Crown in certain defined circumstances" suggesting that the Crown may "seek to justify in Sparrow terms shortcomings in its consultation."[71] The majority decision in *Beckman v Little Salmon/Carmacks* came just short of overturning this 'procedural right' characterization of consultation, however, despite its negative treatment, its *ratio* on the point at issue does not go beyond determining that: since all that the duty to consult requires is a level of consultation the circumstances give rise to, not consulting more deeply is not an infringement in need of justification.[72]

The Court did not revisit justification until *Tsilhqot'in*, in which a unanimous Court adapted the doctrine to the context of Aboriginal title.[73] In doing so the Court cemented the role of consultation in its justification doctrine: rather than being one aspect of the means inquiry, it serves as an independent initial step. The government must first show that it has discharged its procedural duty to consult and accommodate,[74] then that "the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*."[75] Reconciliation was affirmed as the principled basis for identifying valid legislative objectives. While the *Gladstone* and *Delgamuukw* lists of potentially compelling and substantial objectives were also affirmed, the Court further developed the reconciliatory aspect of the objectives inquiry by requiring that the Aboriginal perspective be considered when assessing whether an objective is compelling and substantial and (to the extent that the two are distinct) when considering whether an objective furthers the goal of reconciliation.[76] Finally, the Court held that, in the context of Aboriginal title, the Crown's fiduciary duty[77] prevents the Crown from justifying incursions on Aboriginal title that would "substantially deprive future generations of the benefit of the land" and requires it to demonstrate that its means of achieving its objective are proportionate: i.e. rationally connected, minimally impairing, and proportional with respect to

---

[71] *Ibid* at para 58.
[72] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 44 [*Little Salmon/Carmacks*].
[73] *Tsilhqot'in, supra* note 4.
[74] *Ibid* at paras 77-78.
[75] *Ibid* at para 80.
[76] *Ibid* at paras 81-82.
[77] Reliance on the concept of fiduciary duty, which, in most contexts other than Aboriginal title has been eclipsed by the honour of the Crown, is consistent throughout the decision. The uncertainty that this raises for justifying infringements of rights in the absence of a *sui generis* fiduciary duty is discussed *below* in Part IV Section II.

beneficial and adverse effects.[78] While the substantial-deprivation limit on justification is specific to Aboriginal title, it is unclear whether the requirement of proportionality is intended to have a broader application.[79] The Court also held that interjurisdictional immunity did not immunize Aboriginal rights from provincial infringements that could be justified, a development that was affirmed and applied to Treaty rights in *Grassy Narrows*.[80]

Section II: Doubting the Doctrine

Post-*Haida*, litigation over the duty to consult has eclipsed substantive infringement claims.[81] To some extent this reflects a legal and political paradigm shift from unilateral prioritization to bilateral participation in decision-making where Aboriginal and Treaty rights are at stake. The shift can also be attributed to the cost of proving rights and the risk of rights not being recognized (or, for the Crown, the cost of disproving rights and the risk of rights being recognized).[82] Whatever the cause, the effect on the development of the doctrine of justified infringements has been nearly total stagnation.[83]

In *Mikisew 2018* the Court was faced with the legal issue of whether the duty to consult applied to the legislative process. The Court was unanimous in disposing of the case on procedural grounds: it had been brought as a judicial review application in the Federal Court but was not properly within the Federal Court's statutory jurisdiction. There was also significant agreement that the duty to consult did not apply to the legislative process, with Abella and Martin issuing a

---

[78] *Tsilhqot'in*, *supra* note 4 at paras 86-87.
[79] *See ibid* at para 125: the Court sets out to describe the general case in this section but had turned to consider the specific case of Aboriginal title at the end of the previous paragraph. *See also* Peter W Hogg and Daniel Styler, "Statutory Limitation of Aboriginal and Treaty Rights: What Counts as Justification" (2015-2016) 1:1 Lakehead Law Journal 3 (discussed *below* in Part IV Section III): for an argument that proportionality as set out in Tsilhqot'in was meant to have a broad application.
[80] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 53.
[81] Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) at 169.
[82] See for instance, *Mikisew 2018*, *supra* note 3 at para 26 per Karakatsanis: "The duty to consult ensures that the Crown acts honourably by preventing it from acting unilaterally … encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims."
[83] The *Tsilhqot'in obiter* being the primary exception, with other cases merely clarifying the relationship between the doctrines of consultation and justification (which *Tsilhqot'in* also does).

strong dissent. It was the efficacy of the justification in the absence of a duty of consultation that marked a serious schism in the Court.

Abella and Martin were least confident that the doctrine of justified infringement affords sufficient protection to Aboriginal and Treaty rights. Dissenting on the basis that the duty to consult is a constitutional imperative limiting the exercise of parliamentary sovereignty,[84] Abella and Martin reasoned that consultation and justification are complementary obligations that work together to ensure that the honour of the Crown is upheld.[85] They reasoned that excluding legislative action from an independent duty to consult would leave "rights-holders vulnerable to the same government objectives carried out through legislative, rather than executive, action" by: requiring those with established rights "to meet the more onerous infringement threshold in order to access consultation rights"; excluding those with unproven rights from consultation obligations entirely; and leaving "adverse effects which do not rise to the level of a prima facie infringement … without remedy".[86] They were also concerned that justification without consultation is exclusively backward-looking leaving rights unprotected from irreversible harms.[87] They contended that justification without consultation was inconsistent with consultation being set out as a preliminary procedural step of the justification framework in *Tsilhqot'in*[88] and rejected "an approach that replaces an enforceable legal right to consultation, with a vague and unenforceable right to 'honourable dealing'."[89]

Karakatsanis, Wagner, and Gascon also expressed significant doubt that the doctrine of justification offers sufficient protection for Aboriginal and Treaty rights. Having found that the duty to consult plays a critical role in upholding the honour of the Crown but cannot be applied to legislative action, these Justices went on to consider other means of ensuring rights are equally protected from administrative and legislative action.[90] Acknowledging that justification may not

---

[84] *Mikisew 2018*, *supra* note 3 at paras 55, 85-86, 88: while Abella and Martin concurred with the dismissal on procedural grounds, they were dissenting on the issue of whether the duty to consult applied to the legislative process (to the extent that writing in opposition to presumptively binding *obiter* constitutes dissent).
[85] *Ibid* at para 76.
[86] *Ibid* at para 79.
[87] *Ibid* at para at para 78.
[88] *Ibid* at para 77.
[89] *Ibid* at para 84.
[90] *Ibid* at para 1, 43.

provide sufficient protection where adverse effects do not rise to the level of infringement or right-holders have unproven rights,[91] these Justices contemplated two solutions to ensure that right-holders are not left without a remedy: additional doctrines may be developed to uphold the honour of the Crown;[92] declaratory relief may be available for failures of to uphold the duty of honourable dealing.[93]

Rowe, Côte, and Moldaver fell on the other side of the spectrum: confident that justification affords sufficient protection to Aboriginal and Treaty rights,[94] with the caveat that "where new situations arise that require the adaptation or extension of this jurisprudence, the courts provide a means for such development of the law."[95] Although these Justices were, for the most part, in substantial concurrence with Justice Brown, they provided separate reasons for their conclusion that "the fact that the duty to consult has not been recognized as a procedural requirement in the legislative process does not leave Aboriginal claimants without effective means to have their rights, which are protected under s. 35 of the *Constitution Act, 1982*, vindicated by the courts."[96] These reasons included the confirmation that prior consultation remains a factor in the determination of whether an infringement can be justified.[97]

Brown, authoring a concurring-critique of Karakatsanis "in an attempt to bring some analytical clarity to the matter",[98] was the least concerned that justification might insufficiently protect Aboriginal and Treaty rights. Brown was highly critical of the suggestion that other doctrines may be developed on the basis that it introduced uncertainty into the jurisprudence.[99] He also reasoned that the same principles that exclude the duty to consult from the legislative process would insulate it from declarations of inconsistency with the duty of honourable dealing and from other enforceable obligations arising from the honour of the Crown.[100]

---

[91] *Ibid* at paras 43, 44.
[92] *Ibid* at para 45.
[93] *Ibid* at para 47.
[94] *Ibid* at para 171 "…no such gap exists. Vindicating s. 35 rights does not require imposition of a duty to consult in the preparation of legislation."
[95] *Ibid* at para 159.
[96] *Ibid* at para 149.
[97] *Ibid* at para 154.
[98] *Ibid* at para 103-105.
[99] *Ibid* at para 142.
[100] *Ibid* at para 140.

PART III: Compelling Colonialism

Section I: Compelling Colonial Content

The requirement of a valid legislative objective is the sole constant in a test intended to be responsive to the complexity of Indigenous history, society, and rights in specific factual contexts.[101] Based upon the precedent set by *Sparrow*, the content of each objective plead by the Crown ought to have been subject to judicial scrutiny on its merits. The *Delgamuukw* majority critically compromised the coherence of this constant by issuing an extensive list of objectives it felt were consistent with the principle of reconciliation espoused in *Gladstone* and compelling in the right circumstances.[102] Although Gladstone provided little foothold for understanding the significance reconciliation was purported to play in justification, it had maintained the compelling and substantial standard as the measure of validity for the content of objectives. The trouble with the *Delgamuukw* list is that none of the objectives contemplated were at issue and the Court provided no reasons for its assertion of their consistency with reconciliation or their compelling content. Despite this *obiter*'s failure to provide reasoned guidance for the development of the doctrine or the application of the test, the *Delgamuukw* minority concurred in it without bolstering it with any reasons of its own.[103]

Compelled by the Public's Interests

In *Sparrow* the Court identified preserving rights through conservation measures and preventing people from being harmed as valid legislative objectives, adding that "other objectives found to be compelling and substantial" would also be valid.[104] The language of 'finding' further valid objectives invokes the familiar terms of the common law, suggesting careful reasoning against a factual backdrop in the context of legal argument. Ideally, objectives would be scrutinized on

---

[101] *Sparrow*, *supra* note 1 at 1111.
[102] See *Delgamuukw*, *supra* note 5 at para 165.
[103] *Ibid* at para 202.
[104] *Sparrow*, *supra* note 1 at 1113.

their merits. This reflects the cautious incremental approach that the *Sparrow* Court took in identifying conservation as a valid objective and, to a lesser extent, in its implicit reliance on well-established legal principles in identifying harm to others as a valid objective.

The majority decision in *Gladstone* introduced the organizing principle of "the reconciliation of aboriginal prior occupation with the asserted sovereignty of the Crown" into the justification jurisprudence.[105] The majority intended this to serve as a principled basis for assessing the legitimacy of objectives analogous to what 'can be demonstrably justified in a free and democratic society' in the *Charter* context.[106] Had the majority succeeded this would have improved upon the justificatory doctrine by providing a rubric for measuring the consistency or discordance of objectives with the underlying values of section 35.[107] Unfortunately, the majority's articulation of reconciliation defeated its purported purpose: rather than providing reconciliation with meaningful core content it reasoned counterproductively that "Aboriginal rights are a necessary part of … reconciliation" and "limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the community as a whole, equally a necessary part of that reconciliation."[108] Read in context, 'sufficient importance' is a referent for 'compelling and substantial importance'.[109] This provides no basis for disqualifying objectives as illegitimate or invalid because they are discordant with reconciliation: reconciliation is invoked as a measure only to assert that all compelling objectives are consistent with it. Since the compelling standard is already in place, reconciliation adds nothing. The covert effects of this reconciliatory façade become clear in juxtaposition. In *Sparrow* the Court rejected not only public interest as a stand-alone self-sufficient validity criterion but also the Crown's argument that the reasonable needs of other user groups was a valid objective;[110] in *Gladstone* the majority suggests that "objectives such as the pursuit of economic and regional fairness, and the recognition of the historic reliance upon, and participation in, the fisheries by non-aboriginal

---

[105] *Gladstone*, *supra* note 6 at 71.
[106] *Ibid.*
[107] *Oakes*, *supra* note 27 at 138: "The standard must be high in order to ensure that objectives that are trivial or discordant with the principals integral to a free and democratic society do not gain s. 1 protection."
[108] *Gladstone*, *supra* note 6 at para 73.
[109] *Ibid*.
[110] *Sparrow*, *supra* note 1 at 1087. This is not to say that the Sparrow Court held that public-interest objectives would never be valid, only that they were not valid by virtue of being in the public interest and would need to be demonstrated to be compelling and substantial according to some other criteria.

groups" are valid objectives in the right circumstances because they are "in the interest of all Canadians".[111] An otherwise meaningless reconciliation plays the role of misdirection in the *Gladstone* majority's substitution of the *Sparrow*-approved compelling standard with the *Sparrow*-rejected public interest standard, rebranded as the interest of the 'community as a whole'.[112] The public interest isn't the standard, but the public's interest satisfies the compelling standard.[113]

Pre-approved for Compelling Circumstances

While the *Gladstone* majority's articulation of the validity criteria permits seemingly any limit to claim consistency with reconciliation; the *Delgamuukw* majority's restatement threatens the complete erasure of the validity aspect of the test. After *Gladstone* it was clear that compelling and substantial persisted as criteria for validity. In *Delgamuukw* these criteria were subordinated and subsumed by the empty conception of reconciliation articulated in *Gladstone*. In the *Delgamuukw* majority's formulation: compelling and substantial objectives *are* those directed at reconciliation.[114] If this articulation of reconciliation had any substance, then it might function as the rubric for identifying compelling objectives, but, since reconciliation is invoked only to license limitations, subordinating the compelling criterion to it would leave validity untethered from any meaningful standard of assessment. The dangers of this (re)formulation are clear: if compelling and substantial fail to hold up as meaningful tenants of scrutiny the first step of the test will fail to restrict the kinds of reasons that can be given for infringing upon Aboriginal and Treaty rights – significantly undermining their protection.[115]

---

[111] *Gladstone, supra* note 6 at para 75.
[112] *See* Kent McNeil "How Can the Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997) 8:2 Constitutional Forum 33 at 35.
[113] *See also Badger*, *supra* note 35 at para 80 where the Court circumvents *S*parrow to reinvigorate the public interest standard by citing *Agawa, supra* note 39. *Agawa* does not provide a workable precedent for such a broad assertion. While the ONCA does cite legal commentary suggesting that there may be a need to limit Treaty rights in the public interest, the specific examples given are limited to health and safety.
[114] *Delgamuukw*, *supra* note 5 at para 161.
[115] *See generally* Richard H Pildes, "The Structural Conception of Rights and Judicial Balancing" (2002) 6:2 Rev Const Stud 179 at 184: "Rights are not general trumps against appeals to the common good or anything else; instead, I believe they are better understood as channelling the *kinds of reasons* government can invoke when it impinges on rights. Moreover, this is not an exceptional doctrine for aberrational contexts, but a defining element of rights adjudication."

Although *Gladstone* did not ascribe any meaningful content to the compelling criterion, it was clear that a reconciliatory purpose was not sufficient for validity: the majority found that pursuit of economic and regional fairness and historic reliance of non-Indigenous people on the resource could be valid objectives "in the right circumstances."[116] That the right circumstances are compelling circumstances was made clear in *Côté* and *Adams*. In both cases the majority decisions assessed whether facilitating sport-fishing was a valid objective. In *Côté*, the majority reasoned that "without any evidence of a meaningful economic dimension" a scheme "driven by the desire to facilitate sport-fishing … could not be said to have been based on a compelling and substantial objective."[117] In *Adams*, the majority reasoned that "*since* sport-fishing, without evidence of a meaningful economic dimension is not 'of such overwhelming importance to Canadian society as a whole' to warrant the limitation of Aboriginal rights" it is not "aimed at reconciliation."[118] While *Côté* speaks to the independent importance of the compelling and substantial criteria, *Adams* suggests that an objective cannot be aimed at reconciliation unless it has been found to be compelling and substantial. The *Delgamuukw* majority represents an objective merely being directed at reconciliation as an answer to whether or not its content is compelling and substantial, foreclosing the inquiry into whether this necessary condition has been satisfied. The *ratio decedendi* from *Adams* might have been more appropriately reiterated in the *Delgamuukw obiter* if the majority had said *only* objectives found to be compelling and substantial are directed at reconciliation. Although *Delgamuukw* may have articulated the relationship between compelling and reconciliation differently, it affirmed the reasoning in *Adams* suggesting that they did not intend to overturn the relationship set out in its *ratio*.[119] This supports the view that the *ratio* in *Adams* represents the best articulation of the law, compelling and substantial remain the principle criteria, and *only* compelling and substantial criteria are aimed at reconciliation. Nevertheless, the *Delgamuukw* majority set out a list of objectives that it felt were consistent with reconciliation and could, in principle, justify infringement. In setting out its list of pre-approved compelling objectives it deferred judicial scrutiny from the compelling content of the objective to the compelling circumstances in which the objective is

---

[116] *Gladstone*, *supra* note 6 at 69-75.
[117] *Côté, supra* note 50 at 82.
[118] *Adams, supra* note 50 at 58.
[119] *Delgamuukw*, *supra* note 5 at 161. Arguably *Adams* and *Côté*, which have the uncommon feature of addressing the issue of justification in their *ratios*, would have survived the Court's *obiter* even if they had not been affirmed in *Delgamuukw.*

sought.[120] This insolates a list of disconcertingly colonial objectives from scrutiny into the merits of their content. As a result, the *Delgamuukw* decision has solidified the Court's tentative *Gladstone* departure from the doctrinal method for identifying further valid objectives and has left a lasting precedent of dispossessory objectives that are supposedly compelling.

Section II: Validating Dispossession

There is a wealth of commentary on the meaning of reconciliation from semantic,[121] historical,[122] religious,[123] and Indigenous perspectives.[124] The semantic richness of reconciliation opens a wide horizon of possibility for the development of Aboriginal and Treaty rights jurisprudence. Not everything on this horizon reflects the aspirations of decolonization or social and historical justice that dominate the discourse of reconciliation. Borrows and Tully draw a helpful distinction between forms of reconciliation that "perpetuate unjust relationships of dispossession, domination, exploitation, and patriarchy" and forms "that are empowered by robust practices of resurgence" and "have the potential to transform these unjust relationships."[125] This second sense of reconciliation, which they refer to as 'transformative reconciliation', is what social, political, and legal commentators seem to have in mind when discussing the need for, and promise of, reconciliation. [126] In the rest of this thesis I refer to the principle of reconciliation as

[120] It is also possible to read *Delgamuukw* as obliterating any inquiry into what is compelling and instead pushing the inquiry directly into the means-ends question of rational connection: "Whether a particular measure or government act *can be explained by reference to one of those objectives*, however, is ultimately a question of fact that will have to be examined on a case-by-case basis" (at para 165 [emphasis added]). However, I view it as inconsistent with *Adams*, and *Delgamuukw*'s affirmation of *Adams*, to read 'compelling' and 'in the right circumstances' out of the test.

[121] *See e.g.* Mark D Walters, *The Morality of Aboriginal Law* (2006) 31:2 Queen's LJ 470 at 499 to 501.

[122] See *e.g.* Truth and Reconciliation Commission of Canada, *Final Report Volume One* (Toronto: Lorimer, 2015), but note that the Commission's views reconciliation as both historically situated and as an ongoing process. *See also,* Hanna Wylie, *Unpacking "Reconciliation": Contested Meanings of a Constitutional Norm* (2017) 22:3 Rev Const Stud 379 for a genealogy of the term in Canadian Aboriginal law

[123] *See e.g.* The *Kiaros Documents* compiled and edited by Gary SD Leonard (Ujamaa Centre, 2010) at page 55.

[124] *See e.g.* John Borrows, "Earth Bound: Indigenous Resurgence and Environmental Reconciliation" in *Resurgence and Reconciliation* (Toronto: University of Toronto Press, 2018).

[125] John Borrows and James Tully, "Introduction" in *Resurgence and Reconciliation* (Toronto: University of Toronto Press, 2018).

[126] *Cf* commentators who see reconciliation as a failing promise *e.g.* Taiaiake Alfred, *Wasáse: indigenous pathways of action and freedom* (University of Toronto Press, 2009) at 265 and as a false-promise, *e.g.* Anna Carastathis, "The Non-Performativity of Reconciliation" in *Reconciling Canada Critical Perspectives on the Culture of Redress* (University of Toronto, 2013) at 236; Audra Simpson, "Sovereignty, Sympathy and Indigeneity" in *Ethnographies of US Empire* (Durham: Duke University Press, 2018).

it functions within the justified infringement test as 'justificatory reconciliation' in order to distinguish it from other conceptions of reconciliation. I particularly want to draw a distinction between justificatory reconciliation and 'transformative reconciliation': this aspirational sense of reconciliation is not coextensive with the term's legal meanings or functions.[127] However, in drawing this distinction I do not mean to suggest that justificatory reconciliation categorically or definitionally perpetuates unjust relationships, although I will argue that it does *in fact* perpetuate unjust relationships in its current iteration.

Dispossessory Reconciliation

Justificatory reconciliation, as articulated in *Gladstone* and *Delgamuukw*, licenses economic and developmental objectives that are difficult to distinguish from the aims of dispossession. In *Gladstone* the objective of 'economic fairness' for non-Indigenous people 'historically' reliant upon a resource that Indigenous people have a right to is deemed valid 'in the right circumstances': justifying the continued dispossession of Indigenous resources.[128] In *Delgamuukw* the Court determines that Aboriginal Title includes the "right to choose what ends a piece of land can be put"[129] but also determines that valid objectives for infringing upon that right include "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims"[130]: justifying every conceivable choice that the Crown may make to dispossess Indigenous peoples of their lands.[131]

---

[127] See for instance D'Arcy Vermette, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" (2011) 29 Windsor Y B Accss Just 55 at 57: "reconciliation represents an arbitrary creation of the court. As a principle, it remains disconnected from Aboriginal aspirations".
[128] *Gladstone*, *supra* note 6 at para 75.
[129] *Delgamuukw, supra* note 5 at para 168.
[130] *Ibid.*
[131] *See* Peter H Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61:2 Sask L Rev 247 at 273: "It is difficult to think of any use of native title lands favoured by the non-Aboriginal society that is not included in this list."; *See also* Lisa Dufraimont, "From regulation to recolonization: Justifiable infringement of aboriginal rights at the Supreme Court of Canada" (2000) 58:1 UT Fac L Rev 1. *See e.g. ibid* at para 204 for a sense of the inevitability of Crown dispossession captured in the language used by the Court: "…in developing vast tracts of land, the government is expected to consider…"

Dispossession is the core structural constant of settlor-colonialism.[132] Whatever rhetorical trappings it is cloaked in, settlor-colonialism functions, in material terms, to dispossess Indigenous peoples of their resources and their lands and transfer possession to non-Indigenous peoples.[133] The settlor's refrain remains "the just demands of the human *collectivity*" and "a kind of expropriation for *public* purposes" of 'unutilized' (or 'under'-utilized) Indigenous land and resources.[134] A half-century before *Delgamuukw*, this refrain had already been thoroughly critiqued by Césaire in his seminal anticolonial discourse *Discourse on Colonialism*. Under its thin ideological veneer of a just public these demands of expropriation amount to 'plundering colonialism'.[135] There is no doubt that this plundering is chief among the great frauds and abuses that the *Royal Proclamation, 1763* aimed to – read with the presumption of honour – mitigate or – read with hindsight of its historical material effect – monopolize. I wade into this polemical language to emphasize this point: dispossession is not an amoral economic process; it is the inaugural wrongdoing of the Crown. It is the basis of the great frauds and abuses[136] and of the treatment "we cannot recount with much pride."[137]

Despite these circumspect avowals the common law's clear conscience response to the Crown's assertion of sovereignty (which, in law, dispossessed Indigenous people of ultimate title to their lands) is styled as an assumed duty giving rise to a 'special' relationship. This same assertion is the implicit locus for the conversion of the collective liberty[138] of Indigenous peoples into Aboriginal rights.[139] This transformation results in parallel justice claims. On the one hand, one

---

[132] Patrick Wolfe, "Settlor Colonialism and the Elimination of the Native" (2006) 8:4 Journal of Genocide Research 387 at 388.
[133] Glen Sean Coulthard, *Red Skins White Masks* (Minneapolis: University of Minnesota Press, 2014) at 6-7.
[134] Aimé Césaire, *Discourse on Colonialism,* translated by Joan Pinkham (New York: Monthly Review Press, 2000) at 39.
[135] *Ibid* at 55.
[136] *Royal Proclamation of 1763*.
[137] *Sparrow*, *supra* note 1 at 1103.
[138] I.e. sovereignty in terms not claimed by Euro-modern exceptionalism. *See e.g.* Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990). *See also* Dimitrios Panagos, *Indigenous Rights and Claims for Freedom in Settlor States*, (2018) 69 UNBLJ 305 for the argument that the conception of liberty as mobility is a better foundation for meaningful Aboriginal rights than negative liberty or liberty as non-domination.
[139] *See* Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*" (1991) 29:2 Alberta Law Review 498 at 502-503 for a distinction between contingent and inherent rights. Considered in these terms, I am not suggesting that Aboriginal rights are contingent rights, what I am suggesting is that inherent rights are recognized by the judiciary (and Crown) in a limited and partial form *as* Aboriginal rights.

"cannot not want" rights when faced with the alternative of unmitigated majority tyranny,[140] a reality that effectively channels robust justice-claims into limited claims for rights recognition and honourable treatment.[141] On the other hand, claims for the foundational wrongdoing to be righted persist in – purportedly non-justiciable – justice-claims for decolonization.[142] In these circumstances, the distance between the outcomes of rights-claims and the aim of decolonization becomes significant for assessing the measure of justice which can be achieved through the courts.[143]

Doubling Down on Dispossession

For Indigenous people aiming for decolonization through transformative reconciliation or resurgence, the sustained and further dispossession of land and resources through justificatory reconciliation is just more of the same wrongdoing.[144] The potential for dispossession to undermine the possibility of transformative reconciliation is also evident from a non-Indigenous perspective. For instance, Ian Binnie, despite his maintained commitment to a reconciliation characterized primarily by social harmony (rather than social justice), recently concluded that "it seems clear that reconciliation will only occur when Indigenous communities have the opportunity to manage and grow a sustainable economic base."[145] Sustained and further dispossession denies many Indigenous communities that opportunity and offers others the

---

[140] Wendy Brown, "Suffering the Paradoxes of Rights" *in Left Legalism/ Left Critique* (Durham: Duke University Press, 2002) at 421.
[141] See Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 Alta L Rev 817 at 824-225.
[142] *See e.g.* Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom Through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017) at 44: "Because settler colonialism is the system that maintains this dispossession in the present, we need to be clear that our attachment to land is not up for negotiation and that radical resurgence within grounded normativity necessarily means the dismantling of settler colonialism and the return of Indigenous lands."
[143] *See* Thomas McMorrow, "Upholding the Honour of the Crown" (2018) 35:1 Windsor YB Access Just 311 at 318. *See also*, D'Arcy Vermette, "Colonialism and the Suppression of Aboriginal Voice" 40:2 Ottawa Law Review 225 at 257, 262.
[144] Simpson, *supra* note 142 at 46: "The structure shifts and adapts, however, because it has one job: to maintain dispossession…".
[145] Ian Binnie, "Business and Indigenous Rights: Reflection after 35 Years of Talking about Section 35" (2018) 83 Supreme Court Law Review (2d) 19 at paras 72- 73.

opportunity only through limited-participation in colonial-capitalist extraction projects that cannot be legally or practically refused: consultation is not a veto.[146]

While effecting dispossession and dispossession's effects are the inescapable contextual backdrops of Aboriginal and Treaty rights, the scope of these considerations surpass what I have set out to analyze in this Part. For the purpose of assessing whether the doctrine of justification offers sufficient protection to Aboriginal and Treaty rights, it is useful to reorient the discussion to the validity of legislative objectives. For the purpose of an inquiry into the basic protections offered by the compelling standard and principle of reconciliation, the crucial issue is not that dispossession can be justified as an infringement and may be sustained and furthered in that way: the issue is that dispossession itself is affirmed as a valid legislative objective.

In *Sparrow* the first thing that the Court had to say about the need for a valid legislative objective in order to justify an infringement was "our history has shown, unfortunately all too well, that Canada's aboriginal people are justified in worrying about government objectives that are superficially neutral but which constitute *de facto* threats to Aboriginal rights and interests."[147] While the *Gladstone* majority turned that worry into a doctrinal certainty, McLachlin sought to preserve the integrity of the validity criterion in her *Van der Peet* dissent.[148] McLachlin was concerned that the majority had "adopt[ed] a broad justification test which would go beyond limiting the use of the right in ways essential to its exercise (as envisioned in *Sparrow*), to permit partial reallocation of the aboriginal right to non-natives."[149] She was also highly critical of the majority claiming that this reallocation (and likewise diminution, extinguishment, or transfer to others) was "required for reconciliation and social harmony."[150] In her view "the extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers … would negate the very aboriginal right to fish itself, on the grounds that this is required for the reconciliation of aboriginal rights and other interests and the

---

[146] *Mikisew 2005*, *supra* note 69 at para 66. *See also* Michel Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNBLJ 235.
[147] *Sparrow*, *supra* note 1 at 1110.
[148] Although McLachlin is responding to the *Gladstone* majority, the relevant aspects of her dissent are found in *Van der Peet*, which was released alongside *Gladstone* (and *NTC Smokehouse*).
[149] *Van der Peet*, *supra* note 49 at para 259.
[150] *Ibid* at para 302.

consequent good of the community as a whole."[151] She also rejected limitation "on the basis of the economic demands of non-aboriginals" on the basis that "it is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement."[152] Notably, McLachlin would not have adopted the principle (or rhetoric) of reconciliation into the justification framework at all, preferring to unite legitimate limitations through the organizing principle of the responsible exercise of rights.[153]

This alternate organizing principle and McLachlin's fierce defence of the integrity of the compelling content criterion would have provided much more protection for Aboriginal and Treaty rights, particularly from dispossession. Limits based on responsibility for one another are not readily bent to include all forms of dispossession the other desires. Unfortunately, McLachlin did not maintain her commitment to this alternate framework and, when the *Delgamuukw* majority doubled down on dispossession, rather than dissent she concurred with the majority.[154] However, in her role as Chief Justice and author of *Haida* and *Tsilhqot'in* she has revised justificatory reconciliation in two potentially significant ways: recognizing the legal significance of pre-existing Aboriginal sovereignty[155] and incorporating the consideration of the Aboriginal perspective into the validity assessment.[156]

Section III: Taking Account of Indigenous Interests in Infringement

Reconciliation, as something other than a judicial procedure for resolving discrepancies,[157] first takes root in the Aboriginal and Treaty rights jurisprudence in the majority decision in *Van der Peet*.[158] From this outset reconciliation has been inseparably linked with Crown sovereignty.

---

[151] *Ibid* at para 309.
[152] *Ibid* at paras 306, 309.
[153] *Ibid* at paras 305-306.
[154] *Delgamuukw*, *supra* note 5 at 209.
[155] *Haida,* supra note 2 at para 20.
[156] *Tsilhqot'in, supra* note 4 at para 81.
[157] For example, in *Sparrow*, between federal power and federal duty by establishing the doctrine of justified infringement.
[158] *See* Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993 at 999: "the Dickson Court used "reconciliation" to refer to a limitation on federal power, while the Lamer Court uses the same term to limit further the scope of Aboriginal rights."

According to the *Van der Peet* majority: "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."[159] The double aspect of this sovereignty is plainly stated in section 91(24) of the *Constitution Act, 1867* which posits Federal jurisdiction over "Indians, and Lands reserved for the Indians."[160]

Problematized Territorial Sovereignty*; *Naturalized Subjection

Justificatory reconciliation is premised on an inaugural internal inconsistency between the problematization of territorial sovereignty and naturalization of subjection (in the sense of sovereignty over subjects). This inconsistency was introduced into the law by the *Gladstone* majority bifurcating reconciliation along the axis of territory and subject.

First, the *Gladstone* majority identifies "the reconciliation of aboriginal *prior occupation* with the assertion of the sovereignty of the Crown" as the underlying purpose of Aboriginal and Treaty rights recognition and affirmation.[161] This assertion is clearly established as the problem of reconciliation, likely identifies the Crown as the cause of the event to be reconciled, and perhaps even indicates some aspect of blameworthiness, but the qualification that territorial sovereignty is "asserted" is ultimately a semantic focal point with negligible legal significance. It casts doubt on the *de jure* nature of *de facto* Crown sovereignty, [162] but this critical socio-political insight cannot surmount juridical dogma or exploit the juridical aporia it identifies:[163]

---

[159] *Van der Peet*, *supra* note 49 at para 31.
[160] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, no 5 [*Constitution Act, 1867*]. *See also*, *Gladstone*, *supra* note 6 at para 16: "The claim to jurisdiction was understood by the trial judge as comprising jurisdiction over land and people in the territory, and amounted to aboriginal sovereignty…"
[161] *Gladstone*, *supra* note 6 at 72 [emphasis added]. This is in apparent keeping with the *Charter* jurisprudence as discussed *above*.
[162] *See* also Mark D Walters "'Looking for a knot in the bulrush': Reflections on Law, Sovereignty, and Aboriginal Rights" in *From Recognition to Reconciliation* (Toronto: University of Toronto Press, 2008) at 39 for a discussion of the significance of characterizing Crown sovereignty as *de facto.*
[163] *Cf ibid* at 40. Walters is less deferential to institutional constraints in his essay than I am in this thesis, but I fully agree with his position that "even if judges cannot undo the Canadian state, as McEachern CJ said, injustice cannot hide behind the concept of Crown sovereignty."

the entire schema of Aboriginal and Treaty rights rests upon the non-justiciability of Crown sovereignty.

This is a limitation that I have acknowledged and accepted in setting out the scope and purpose of this thesis.[164] Within their current institutional constraints, the courts may consider the implications and consequences of Crown sovereignty, but they cannot declare that the Crown is not sovereign. In response to the problematization, but ultimate affirmation,[165] of territorial sovereignty, reconciliation is posed to play the role evoked by Blaise Pascal in his contemplation of the combination of justice and power: "we cannot give might to justice, because might has gainsaid justice, and has declared that it is she herself who is just. And thus being unable to make what is just strong, we have made what is strong just."[166]

Second, the *Gladstone* majority identifies "the reconciliation of aboriginal *societies* with the broader political community of which they are part" as the rationale for the legitimate limitation of Aboriginal and Treaty rights.[167] There is no intimation in this formation that aboriginal societies are part of a broader political community because it has asserted sovereignty over them, although the *de jure* nature of this *de facto* sovereignty is equally doubtful.[168] Two different theories inform my characterization of this juridical *fait accompli* as naturalization: Barthes' "Myth Today" and Latour's *We Have Never Been Modern.*

In analysing modern myth as a form of motivated speech, Barthes defines naturalization as the transformation of history into nature.[169] This concise definition is sufficient to cover my use of

---

[164] *See above* Part I Section II *Methods and Limitations*.
[165] *See* John Borrows, *The Durability of Terra Nullius* (2015) 48:3 UBC Law Review 701 at 723-234 for the position that this affirmation "rests on an empty incantation" and "is a restatement of the doctrine of *terra nullius,* despite protestations to the contrary", but note that he does not take the stance on the content or scope of non-justiciability that I have accepted as a limitation.
[166] Blaise Pascal, *Pensées* (New York: Dutton, 1956) at no. 298. *See also* Ryan Beaton, "De Facto and De Jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 26:4 Constitutional Forum 25 at 25: "the Court intends nonetheless to treat Crown assertions of sovereignty as though they were legally valid, while providing the Crown … time and guidance to perfect those assertions" through "forward-looking procedural legitimation."
[167] *Gladstone, supra* note 6 at 73: I have selected the political version of this formulation, the Court reiterates this in purely social terms in the following paragraph as "the reconciliation of aboriginal *societies* with the larger Canadian society of which they are a part" further erasing the assertion of sovereignty along with the political dimension.
[168] *Cf Mitchell v MNR*, 2003 SCC 33 per Binnie J (dissenting): for a pronounced disavowal.
[169] Roland Barthes, *Mythologies* translated by Annette Lavers (New York: Hill and Wang, 1972) at 129.

the term but in describing the motivation of naturalization he captures a negative connotation that I also intend to convey. He sees naturalization as the innocent appearance of an intentional glossing over: a duplicitous distortion that neither hides nor formulates the socio-historical cause of what it presents as natural fact.[170] Although the *Gladstone* majority's naturalization of subjection is not as complexly formulated as a modern myth, its ahistoricism shares in these negative traits.

In his critique of modernity, Latour uses the term naturalization to refer to a broad spectrum of socio-historic processes and scientific practices. The scope of his discussion exceeds my purposes but captures an additional valence of innocence that is useful to consider. He summarizes the naturalization of the socio-historical as making the claim: "society is not our construction; it is transcendent and surpasses us infinitely."[171] In this formulation there is duplicity in disavowing the social cause of socio-material effects.[172] This might be more poetically characterized as a tragic fatalism[173] or more philosophically characterized as "functionalist and evolutionary determinism in social and historical explanation."[174] In political terms, this disavowal of social constructs (here in the form of an asserted sovereignty over subjects) functions to give systems of domination a sense of inevitability and secure compliance through resignation[175]— "Let us face it, we are all here to stay."[176]

Contrary to the naturalization of Indigenous societies as a part of a broader political community, the Crown's assertion of sovereignty over Indigenous peoples is a problem in its own right.[177] The implication of the Crown failing to provide, and the courts failing to find, a basis for the

---

[170] *Ibid* at 129, 131: I have substituted socio-historical for artificial.
[171] Bruno Latour, *We Have Never Been Modern*, (Cambridge: Harvard University Press, 1993) at 32.
[172] *Ibid*: Latour acknowledges this duplicity at 37; for evidence that Latour sees this as a negative aspect of naturalization see his characterization of it as an excess at 35 and, ultimately, his rejection of it in favour of the immanence of society.
[173] GWF Hegel, *Natural Law* translated by TM Knox (University of Pennsylvania, 1975) at page 105.
[174] Roberto Mangaberia Unger, *What Should Legal Analysis Become?* (London: Verso, 1996) at 9.
[175] Göran Therborn, *The Ideology of Power and the Power of Ideology* (London: Verso, 1980) at 94.
[176] *Delgamuukw, supra* note 5 at para 186.
[177] *See* Robert Hamilton and Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729 at 730: "Aboriginal peoples have consistently maintained that they are not subjects of the Crown; rather, they have nation-to-nation relationships with the Crown … By reflexively accepting one vision of a contested constitutional relationship [sovereign-to-subjects], the Supreme Court has generated a series of complicated legal processes and tests that are weighted towards fitting Aboriginal peoples into a constitutional relationship that they have consistently rejected for the last 150 years."

subjection of Indigenous societies other than assertion is that subjection ought to be equally problematized as an underlying purpose of rights recognition and affirmation rather than naturalized as a rationale licensing limitations on those rights.

The Self-Justifying Assertion of Sovereignty

Although justificatory reconciliation has the potential to serve as a transformative principle aimed at making the Crown's *de facto* sovereignty more just this potential is stymied in its current iteration. I have argued that one of the principal reasons for this shortcoming is that the *Gladstone* majority's articulation of justificatory reconciliation failed to provide any basis for disqualifying objectives as discordant with the underlying values of section 35. This failure to articulate a coherent test is evident when section 35 justification is compared to the analogous section 1 justification test in the *Charter* jurisprudence. The *Gladstone* majority cites the *Oakes* principle that "the underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and *the ultimate standard against which a limit* on a right or freedom, despite its effect, must be shown to be reasonable and demonstrably justified" as the model for its development of the section 35 justification test.[178] But, instead of maintaining the logic of underlying values serving as a standard against which limits must be justified, they distort this into the principle that "the purposes underlying rights must inform not only the definition of rights but also *the identification of the limits* on those rights which are justifiable."[179] Had they applied the *Charter* principle directly the justificatory formula would have been: reconciliation (as the underlying value of section 35) is the ultimate standard *against* which a limit on an Aboriginal and Treaty right, despite its effect, must be shown to be compelling and substantial. Instead, their distortion resulted in the dubious formula: reconciliation is the basis for legitimate limitations on Aboriginal and Treaty rights.[180] The combination of this dubious formula and the naturalization of subjection results in the assertion of sovereignty providing its own justification. Reconciliation of prior occupation with "the assertion of Crown sovereignty over that territory" is the basis for rights recognition and

[178] *Gladstone, supra* note 6 at para 71 [emphasis added].
[179] *Ibid* at para 71 [emphasis added].
[180] *Ibid* at para 73.

affirmation. Indigenous societies being subjected to the Crown is the basis for rights limitation – as the *Gladstone* majority put it: "because … distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable."[181]

Asserted sovereignty over territory is the basis for rights; asserted sovereignty over subjects is the basis for their limitation. This self-justifying assertion has persisted even as the Court has acknowledged the Crown's assertion of sovereignty over Indigenous peoples in contexts other than justification. For instance, in the context of describing the background justification for the honour of the Crown, the Court reasoned, in *Haida*, that the "process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty *over an Aboriginal people* and *de facto* control of land and resources that were formerly in the control of that people."[182] This was reaffirmed by the Court in *Manitoba Metis Federation*.[183] Similarly, in both of these cases the Court affirmed the pre-existence of Aboriginal sovereignty in the context of describing the function of Treaties and the role of the honour of the Crown in its Treaty relationships, further underlining the significance of the Crown's assertion of sovereignty over Indigenous peoples.[184] Despite this increasing legal problematization of the assertion of Crown sovereignty over subjects, the Court has not re-examined its function within the doctrine of justification since *Gladstone.* Yet, in *Sparrow*, the court had indicated that "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."[185] It is clear that the assertion of sovereignty cannot justify itself within the section 35 jurisprudence without re-establishing the status quo ante: justificatory reconciliation is in need of doctrinal

---

[181] *Ibid* at para 73.
[182] *Haida*, *supra* note 2 at para 32.
[183] *Manitoba Métis Federation v Canada (Attorney General)*, 2013 SCC 14 at para 66 [*Manitoba Métis*]. *See also Mikisew 2018, supra* note 3 for *Karakatsanis*' affirmation of the principle.
[184] *Haida, supra* note 2 at para 20; *Manitoba Métis, supra* note 183 at para 67.
[185] *Supra* note 1 at 1105-1106 citing Noel Lyon, "An Essay on Constitutional Interpretation" (1988), 26:1 Osgoode Hall LJ 95 at p 100 with approval.

reform. The problematization of the Crown's assertion of sovereignty over Indigenous peoples calls for reforms aimed at ensuring the internal coherence of the doctrine. Given that McLachlin authored both *Haida* and *Manitoba Métis* it might have been expected that she would address the implications of for the doctrine of justification in her subsequent decision in *Tsilhqot'in*. Here, as with the abandonment of her dissenting views in *Van der Peet*, her justification decision disappointed: without any discussion on how nearly two decades of developments in the jurisprudence might impact *Gladstone* and *Delgamuukw*, she affirmed the doctrine of justification as set out in these precedents. However, she did so with the caveat that the Aboriginal perspective should be taken into account, opening up possibilities for reform that I will return to in Section IV. While this may make the invocation of Aboriginal sovereignty and avowal of the Crown's assertion of sovereignty over Indigenous peoples seem like an insignificant rhetorical gloss that will not lead to any reform in the justification jurisprudence, the Court's schism over whether the justification test offers sufficient protection to Aboriginal and Treaty rights may provide the impetus for the Court (or at least certain Justices) to more closely and critically examine the test in the future. For instance, in *Mikisew 2018* both sets of reasons casting doubt on whether the doctrine of justification provides sufficient protection for Aboriginal and Treaty rights either avow the assertion of sovereignty over peoples – Karakatsanis *et al*, affirming *Haida*[186] – or invoke Aboriginal sovereignty – Abella and Martin, characterizing the *Haida* trilogy as representing "a shift towards mutual reconciliation between Aboriginal and Crown sovereignty."[187]

Taking Account of Unaccountability

In their development of the justification doctrine the *Gladstone* majority asserted that Aboriginal societies are part of the 'community as a whole' and Aboriginal people are part of 'society as a whole'.[188] "Taking into account" that Aboriginal societies and people are part of the benefited public was integrated into the public interest standard they revived to legitimize willfully bypassing an Indigenous community's particular interests in favour of its alleged share in the public interest. I

[186] *Mikisew 2018*, *supra* note 3 at 21.
[187] *Ibid* at para 70. *See also ibid* at para 87.
[188] *Gladstone*, supra note 6 at paras 73-74.

have already argued for a problematization of the subjection of Indigenous peoples that would require this 'taking into account' to treat the assertion of sovereignty over Indigenous peoples as a basis for rights recognition rather than as a basis for legitimizing limitations on rights. Having already approached the problem from a *de jure* perspective concerned with doctrinal consistency (problematization of both sovereign assertions) and the integrity of juridical principles across similar doctrines (justificatory reconciliation ought to be a measure not a license), I turn now to consider whether taking into account that Indigenous societies are *de facto* a part of society as a whole lends some legitimacy to infringing upon their particular interests in favour of the public interest.

One dimension to consider is Indigenous people's representation in political institutions. Hanna Pitkin has provided a lasting classification of the differing ideals of representation: formal (authorized and accountable); symbolic (embraced); descriptive (alike); and substantive.[189] Whether a representative is embraced by their constituents or alike their constituents will vary by representative and over time. Although measures may be put in place to promote these forms of representation, formal and substantive representation remain the most significant consideration in terms of structural legitimacy of institutions. From a political perspective, infringing Indigenous rights in favor of the public interest may (arguably) be legitimate if representatives are accountable to Indigenous peoples and act in their best interests.[190] The antithesis of representation is oppression: unaccountable rulers acting against the best interests of the oppressed. Or, put differently with a greater emphasis on substantive representation, the antithesis is tyranny: "since a tyrant looks to his own advantage, while the King looks to that of those who are ruled."[191]

There are clear structural limitations on Indigenous people holding their representatives accountable. The Canadian first-past-the-post system favors majoritarian candidates. If the plurality continues to endorse a representative, a minority will not be able to hold them to account. Only 4 of Canada's 338 ridings are Indigenous-majority ridings, and only another 12 are more than twenty-

[189] Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California, 1967).
[190] *See e.g.* Alain C Cairns *Citizen's Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) for the argument that Indigenous peoples are formally and substantively represented in Canadian politics.
[191] Aristotle, *Nicomachean Ethics* translated by Joe Sachs (Indianapolis: Focus, 2002) at 1160B.

percent Indigenous.[192] As a marked minority in the vast majority of ridings, even a unified Indigenous electorate would be hard pressed to oust candidates actively working against their interests. In these circumstances, Indigenous peoples' representation is dependent upon representatives looking out for their substantive interests and vulnerable to Members of Parliament only looking out for the interests of the majority who can hold them to account. This vulnerability is not coincidental: it has been the need and desire to protect the interests of individuals and minority groups from the interests of the ruling class (in democracies: the majority) that has led to the proliferation of rights.[193]

It is in this sense that accounts like Binnie's dissenting opinion in *Mitchell v MNR* miss the mark. Reflecting upon the circumscribed powers of Indigenous self-government protected by section 35, Binnie reasons: "Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it."[194] First, self-governance rights, *as* rights, reflect not only a 'shared Canadian sovereignty' but also the vulnerability of Indigenous self-governance interests to the tyranny of the non-Indigenous majority. Second, self-governance rights can absolutely be opposed, and their rights-holders (further) subjugated, by (un)justified infringement. Ultimately, the rhetoric of formal and substantive political representation functions not only to shroud the material reality of unaccountability and majority tyranny but also as a productive mechanism of subjection: effecting ideological domination through a 'sense of representation'.[195] To return to the legal and rational basis of legitimating limitations through representation: in the very adjudication where the strength of rights as a protection from majority interests are being tested, the minority's formal and substantive representation in the community is raised as a basis for not needing to protect the minority interests from the majority of the community. If there is any circumstance where taking into account that Indigenous people are part of the community as a whole *adds* legitimacy to a limit on their Aboriginal and Treaty rights, it must be where the limit is actually, demonstrably, in their substantive interests.

---

[192] Andrew Griffith, "Indigenous Voters and the 2019 Election" February 1 2018 online: *Policy Options* <policyoptions.irpp.org/magazines/february-2018/indigenous-voters-and-the-2019-election/>.
[193] Hanna Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1951). *See also* Brown, *supra* note 140.
[194] *Mitchell v MNR, supra* note 168 at para 135.
[195] Therborn, *supra* note 175 at 94-96.

The fundamental challenge of this sort of an assessment is clear: Indigenous claimants would not be in Court if they agreed that the limit was in their substantive interests. The challenges of demonstrating that a limit is in the substantive interests of Indigenous peoples varies depending on whether it is taken into account that: the Indigenous society claiming their interests are protected shares in the public interest in infringement; other particular Indigenous societies share in the public interest in infringement; or all Indigenous societies share in the public interest in infringement. In the first instance, the 'whole' is entirely reducible into its parts and the Crown's submissions regarding the Indigenous society's public interest contrary to the particular interests it asserts is nothing more than a reformulation of historic paternalism (the Crown knows what's best) as false-consciousness (Indigenous people don't know what's good for them). In the second instance, the 'whole' is manufactured to pit the interests of Indigenous societies against Indigenous societies, as the *Gladstone* majority makes explicit when it suggest that recognition of a priority commercial interest for one Indigenous society would eliminate purported 'common law' commercial fishing rights that other Indigenous societies "hold in common with other Canadians."[196] This is the same judicially constructed internecine conflict that can be seen in the in the requirement of exclusivity for Aboriginal Title, especially before the divide and conquer imperialism of this restricted recognition was mitigated by taking the Aboriginal perspective on exclusivity into account. The third instance is a composite. Alternately, the third instance is taking into account interests at a level of generality that does not reflect any particular Indigenous community's substantive interests. In which case, the Crown's demonstration, and Court's determination, that a limit is in the substantive interests of Indigenous peoples is based upon what is good for the public in general and taking into account that Indigenous people are a part of that public functions only to add weight to the public interest without any legitimate political underpinning.

In *Tsilhqot'in* the Court broadened the role of normative pluralism in its Aboriginal law doctrine: affirming *Gladstone* with the qualification that "the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public."[197] If this element of the doctrine is properly developed the pitfalls of paternalism, the attribution of false-consciousness, and divide-and-conquer colonialism might be

[196] *Gladstone, supra* note 6 at para 68.
[197] *Tsilhqot'in*, *supra* note 4 at para 81.

avoided (in the context of justification). The ameliorative potential of considering the Aboriginal perspective in assessing the validity of legislative objectives is discussed in the next Section.

Section IV: Putting Validity in Perspective

Taking the Aboriginal perspective into account has been a part of the Supreme Court's Aboriginal and Treaty rights jurisprudence from the outset. In *Sparrow*, the Court reasoned that when defining the characteristics and incidents of an Aboriginal right Courts cannot restrict themselves to a common law perspective: "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[198] In *Mitchell v Peguis*, Dickson gave a clearer indication of what this sensitivity would entail: "reference to the notion of 'aboriginal understanding', which respects the unique culture and history of Canada's aboriginal peoples, is an appropriate part" of the generous liberal approach to interpretation of Treaties and statutes relating to Indigenous peoples dictated by *Nowegijick*.[199] Although he wrote alone at the time, his views have now been affirmed by the majority of the Court in *Williams Lake*.[200] As the Aboriginal and Treaty rights jurisprudence has developed, the Court has consistently invoked the Aboriginal perspective to temper the common law perspective on the definition and interpretation of rights.[201] In *Tsilhqot'in* the Court invoked the Aboriginal perspective to temper the non-Indigenous public's perspective[202] on whether an objective is compelling and substantial.

Weighing Detriments or Reinterpreting Compelling

Although it may ultimately be a promising development, the integration of the Aboriginal perspective into the doctrine of justification in *Tsilhqot'in* is not straightforward. Part of the difficulty in understanding the scope and trajectory of this integration stems from the Court's treatment of the lower courts' decisions. The *Tsilhqot'in* Court claimed to be affirming an

---

[198] *Sparrow, note* 1 at 1111-1112.
[199] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at para 135; 71 DLR (4th) 193 [*Mitchell v Peguis*] at paras 108-109. *Nowegijick v the Queen*, [1983] 1 SCR 29 at 36-37; 144 DLR (3d) 193.
[200] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 130.
[201] *Van der Peet*, *supra* note 49; *NTC Smokehouse*, *supra* note 49; *Delgamuukw*, *supra* note 5; *Marshall No. 1*, *supra* note 20; *Mitchell v MNR*, *supra* note 168.
[202] *Tsilhqot'in, supra* note 4 at para 127: in this case, the "sole perspective of the tenure holder".

underlying decision, stating "I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public."[203] However, the Court of Appeal had not actually invoked the Aboriginal perspective in its justification analysis.[204] Rather, it had upheld (as reasonable) the trial judge's decision that the detrimental effects of the infringement were disproportionate to the potential economic benefits.[205] The trial judge had followed the precedent set out in *Adams*, finding that the objective was not compelling in the circumstances because of the low benefit to the public, but integrated an explicit weighing of the detrimental effects to the Indigenous community into his analysis.[206] Arguably, in keeping with the precedent set for justification in the *Charter* jurisprudence, the weighing and balancing of benefits and detriments inherent in proportionality should take place at the second step of the test where the means of achieving the objective are considered and, in the context of Aboriginal and Treaty rights, where the honour of the Crown (or its special fiduciary relationship) is at stake. Ambiguously, the Court of Appeal's reasoning that it was "not persuaded that the judge erred in his analysis of the importance of the government objective" did not make it clear whether justification had failed at step one because the objective was not compelling in the circumstances or at step two because disproportionality between the benefits of the objective and detriments of the infringement is inconsistent with the honour of the Crown (or its special fiduciary relationship).[207] However, the Supreme Court affirmed that they "agree with the courts below that no compelling and substantial objective existed in this case"[208] and that it was appropriate when assessing whether the objective was compelling in the circumstances for "the focus [to be] the economic value of logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder."[209]

---

[203] *Ibid* at para 81.
[204] *William v British Columbia*, 2012 BCCA 285 [*William*].
[205] *Ibid* at paras 332, 335.
[206] *Ibid* at para 332. Whereas, in *Adams*, *supra* note 50 the detriment to the Indigenous community was implicit in the Court's decision that without evidence of a meaningful economic dimension the objective of sports fishing was not of "overwhelming importance." However, in *Adams* it is not clear whether what is overwhelmed is actual material detriments rather than 'federal obligation' to recognize and affirm constitutionally protected rights and not infringe upon them for trivial reasons (*Sparrow, supra* note 1).
[207] *William, supra* note 204 at paras 332, 336.
[208] *Tsilhqot'in, supra* note 4 at para 126.
[209] *Ibid* at para 127.

The first challenge inherent in the Supreme Court's affirmation is that it also adapted the justification test to the context of Aboriginal Title by including a proportionality analysis at the second step of the test which requires the same balancing of detrimental and beneficial effects. Whether this is unnecessarily duplicative depends in part on whether the second step proportionality analysis is particular to Title or ends up being applied consistently for all Aboriginal and Treaty rights, an issue that I will return to in Part IV.[210] It also depends on whether taking detrimental effects into account is one aspect of a greater consideration of the Aboriginal perspective or merely a reiteration of the Sparrow principle that "the extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation", [211] which depends on whether the Aboriginal perspective is confined to detrimental impacts or accounted for more comprehensively (as in the context of rights recognition where the Court has claimed that "the Aboriginal perspective grounds the analysis and imbues its every step"[212]).

The second challenge is that the Supreme Court emphatically affirms the consideration of the Aboriginal perspective but does not actually subject the objective (of economic profits from forestry) to an 'aboriginal understanding' in order to determine if it is compelling: the content of the objective is presumed to be compelling on the basis of the non-Indigenous public's perspective[213] — just not in these circumstances — and is only questioned on the basis of material advantage and detriment, a consequential mode of judgement that cannot be said to be an understanding particular to Aboriginal peoples.[214]

At stake in both of these challenges is a fundamental ambiguity over the extent to which Indigenous values and laws are being incorporated into justification. In order to address this

---

[210] Arguably, in circumstances where the duty to consult applies this may also be duplicative of the duty to accommodate in which the "Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests" (*Haida, supra* note 2 at para 50). Since the stimulus for this thesis is the exclusion of the duty to consult and independent protective force of substantive justification this potential for balancing interests in triplicate is beyond the scope of my analysis.
[211] *Sparrow, supra* note 1 at 1110.
[212] *R v Marshall*; *R v Bernard,* 2005 SCC 43 at para 50 [*Marshall; Bernard*].
[213] Both *Gladstone* and the *Delgamuukw*-list of objectives are affirmed.
[214] *See also Tsilhqot'in* at paras 126-127: The objective was also unevidenced, which contributed to the Court's decision that it was not compelling (as in *Adams*), but requiring evidence does nothing to question the *content* of the objective.

ambiguity, it is helpful to draw a preliminary distinction between considering the Aboriginal position and an Aboriginal understanding. At minimum, taking the Aboriginal perspective into account must mean considering things from the position of the impacted Indigenous community or the 'Aboriginal position',[215] even if it is a common law understanding of advantages and detriments that is applied from that vantage (as in the *Tsilhqot'in*). In keeping with the precedent set in rights-recognition, taking the Aboriginal perspective into account could also mean considering the Indigenous community's values and laws – an 'Aboriginal understanding' – in the assessment of whether the content or circumstances of an objective are compelling.

In their discussion of the incidents of exclusivity for proof of Aboriginal Title, the *Delgamuukw* majority demonstrated the potential for a consideration of the Aboriginal perspective to mitigate the harsh assumptions of a common law perspective: "a consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title."[216] However, the *Delgamuukw* majority also observed the limit established in *Van der Peet* to "take into account the aboriginal perspective, yet do so in terms that are cognizable to the non-aboriginal legal system."[217] This is evident in the focus of their examples and explication: "trespass laws", "aboriginal laws", "permission … granted", and "treaties between the aboriginal nations" – all of which are cognizable to the common law as incidents of jurisdiction and control.[218] Although the Courts reference to 'aboriginal laws' and 'treaties between aboriginal nations' indicates that – in the context of rights-recognition – the Court intends to take the Aboriginal understanding into account, this does not fully resolve the issue of the manner and extent that Indigenous values and laws are being incorporated into the common law.[219]

---

[215] My use of Aboriginal here is in keeping with the Court's use of the terms Aboriginal perspective and Aboriginal understanding.
[216] *Delgamuukw, supra* note 5 at para 157.
[217] *Van der Peet, supra* note 49 at para 49.
[218] *Delgamuukw, supra* note 5 at para 157.
[219] *See* Fraser Harland, *Taking the "Aboriginal Perspective" Seriously* (2018) 16/17:1 Indigenous LJ 21 for a critique of the manner and extent that Indigenous laws were relied upon in the context of rights-recognition in *Tsilhqot'in* with emphasis on the fact that they are not treated *as* laws.

Andrée Boisselle draws a helpful distinction between (a) setting a standard and determining the content of a test and (b) interpreting the meaning of a standard and what counts as good evidence that a standard has been met.[220] Boisselle points out that, despite the Court's claim to put the Aboriginal perspective on equal footing with the common law (in the context of rights recognition), Indigenous values and laws are not taken into account when "setting the standards shaping the content of title itself."[221] In the context of justification, this precedent implies that taking an Aboriginal understanding into account might include considering Indigenous values and laws when interpreting the meaning of 'compelling and substantial'[222] and what counts as good evidence of an objective being 'compelling and substantial',[223] but not in order to set a standard other than 'compelling and substantial'.[224]

The delimitations of taking an Aboriginal position into account are less distinct. Any claimant would make submissions on the significance and interpretation of facts for the purpose of a finding of mixed fact and law. This leaves a narrow margin for discerning the Aboriginal position from the position of an ordinary claimant. In order to have doctrinal significance, taking the Aboriginal position into account must permit some degree of recalibration of the test. In the absence of a consideration of Indigenous values and laws, some other relevant aspect of the Aboriginal position must inform that recalibration. For example, the historical, political, and material position of Indigenous peoples in relation to the Crown.

The *Tsilhqot'in* Court taking detrimental effects on the claimant into account could fall on either side of the line between an insignificant consideration of the claimant's position and significant consideration of the Aboriginal position: taking the claimant's submissions on why the objective isn't compelling in the circumstances seriously by considering evidence of particular detriments countering the overall public benefit; or reconsidering what counts as compelling by requiring

---

[220] Andrée Boisselle, "To Dignity Though the Back Door: Tsilhqot'in and the Aboriginal Title Test" (2015) 71 SCLR (2d) 27 at 27, 28, 38fn38.
[221] *Ibid* at 27.
[222] As with the corresponding standard of 'exclusivity' for occupation.
[223] As with the corresponding evidence of 'treaties between aboriginal nations' for exclusivity.
[224] Despite working with this restriction as a starting point, I agree with Boiselle's criticisms of this limitation: *supra* note 220 at 30: "if the Court took seriously the parity suggested by its acknowledgment that true reconciliation requires that "equal weight" be placed on "Aboriginal perspectives" and on the common law, it would seek to formulate standards derived from a true normative dialogue between Euro-Canadian and Indigenous perspectives."

the public's benefit to be proportionate to the Indigenous community's detriment. The first of these options is not an Aboriginal perspective in any meaningful sense, just the claimant's perspective in circumstances where the claimant happens to be Aboriginal. I prefer to take the Court's invocation of the Aboriginal perspective as a meaningful signal that it intended to recalibrate the test. Read in this way, the firmly stated principle provides a point of departure for considering some trajectories for recalibration that might be more fruitful than duplicating the proportionality analysis.

Delegitimating Limitations

In the preceding sections I have given a number of reasons for concluding that the requirement of a valid objective, as it currently stands in the jurisprudence, provides insufficient protection to Aboriginal and Treaty rights and lacks even the limited efficacy that the Court has alleged. The Court has touted reconciliation as the underlying value of Aboriginal and Treaty rights but failed to provide any effective standard for assessing whether objectives are consistent or discordant with reconciliation culminating in the Court's suggestion that objectives which perpetuate historical injustices (such as dispossession) are a valid basis for infringing upon protected rights. The Court has taken into account that Indigenous peoples are part of the 'general' public interested in infringing upon their own rights in order to legitimize limitations that serve the interests of the non-Indigenous majority. I return now to the discussion the historical, political, and material position of Indigenous peoples in relation to the Crown in order to discuss an objective and ubiquitous element of the Aboriginal position that can provide a basis for considering how the test might be recalibrated by taking the Aboriginal position into account.

The constitutional recognition and affirmation of Aboriginal and Treaty rights is not a precautionary measure following centuries of respect and solemn promises faithfully fulfilled. The magnitude and moral culpability of the Crown's systemic wrongdoing is difficult to comprehend. One place that the Crown (in Parliament) has been the most forthcoming about its culpability is in legislation immunizing itself from monetary liability. For instance, Parliament empowered the Specific Claims Tribunal to adjudicate the Crown's failure to fulfil its Treaty promises to provide lands or assets to a First Nation and various other wrongdoings relating to its

dealings with a First Nation's assets and reserve lands, but prescribed telling limits on compensation: the Tribunal shall not "award total compensation in excess of $150 million" per claim and shall not "award any amount for punitive or exemplary damages."[225] Yet, even against the backdrop of these immunities the Specific Claims Branch settled nearly two hundred Specific Claims for $4,784,942,814.16 over the last decade.[226] From this there is only extrapolation: only a fraction of specific claims are settled; only a fraction of systemic wrongdoing is within the Tribunal's jurisdiction; only a fraction of systemic wrongdoing can be translated into a claim for monetary compensation.[227]

Justificatory reconciliation does not take systemic wrongdoing into account. The relationship between the Crown and Indigenous peoples is characterized as trust-like and the Crown as honourable. Both describe the Crown-Indigenous relationship on the basis of moral obligation rather than historical treatment. The Crown has consistently failed to meet its moral obligations, at times by an egregious margin that makes sense of its desire to immunize itself from punitive and aggravated damages: the historical relationship between the Crown and Indigenous peoples is between habitual wrongdoer and the customarily wronged. In the consequentialist calculus of justificatory reconciliation, the detriment to particular Indigenous interests is weighed against how advantageous the infringement is to the interests of the 'general' or 'broader' public, which is to say the interests of the non-Indigenous majority. Constitutional monarchical façade aside, in a representative democracy the interests of government are (or approximate[228]) the interests of the 'general' public. Yet, the Court's justification doctrine does not take into account that the objectives found compelling in *Gladstone* and *Delgamuukw* offer further advantages to the wrongdoer at the expense of further detriment for the wronged in the name of reconciliation of the wrongdoer-wronged relationship.

---

[225] *Specific Claims Tribunal Act,* SC 2008, c 22 ss. 20(1)(b), 20(1)(d)(i).
[226] Government of Canada, "Settlement Report on Specific Claims" online: *Reporting Centre on Specific Claims* <services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx>
[227] That equitable compensation may be assessed beyond the point of calculation (as in *Guerin v the Queen*, [1984] 2 SCR 335; 13 DLR (4th) 321 and *Southwind v Canada*, 2017 FC 906) does not capture all systemic wrongdoing: there are no remedies without a cause of action and not all of colonialism is actionable.
[228] Representatives are not perfect conduits of the public interest, for instance: they may do what they feel is right even when it is not in the interests of the majority of their constituents (acting out of a sense of moral, rather than political, obligation) or they may do what they know is wrong because it is in their personal interests (corruption).

Nation-to-Nation Reciprocity

I have argued that: (a) taking the Aboriginal perspective into account must mean, at minimum, taking into account the Aboriginal position; (b) if Indigenous values and laws are not considered and applied from the Aboriginal position, then some other relevant aspect of the Aboriginal position must provide the basis for recalibrating the test; (c) the historical, political, and material position of Indigenous peoples in relation to the Crown are relevant aspects of the Aboriginal position; and (d) the historical, political, and material relationship between the Crown and Indigenous peoples is characterized by systemic wrongdoing. In this subsection, I consider how the validity criterion might be recalibrated to take the Aboriginal position into account by addressing that systemic wrongdoing and the asymmetrical power dynamic that perpetuates and repeats it.

I view tolerance as a viable discourse to draw upon for potential solutions for addressing this systemic wrongdoing and asymmetrical power dynamic because toleration concerns the just treatment of others in situations of conflicting values and models of tolerance have developed largely in response to asymmetrical power dynamics. [229] I find Rainer Forst's work on tolerance particularly appropriate to the task of contemplating how justification can be recalibrated to take the Aboriginal perspective into account because he has devoted a great deal of effort to distinguishing between a 'permission' conception of tolerance in which justification is lacking and entirely self-interested and a 'respect' conception of tolerance in which justification is based upon mutually acceptable reasons. In this sub-section I outline the structural similarities between justified infringement and tolerance and then draw an analogy between the permission—respect conceptions of toleration and the current—recalibrated bases for finding objectives valid.

In suggesting tolerance as a model to draw upon in recalibrating justification, I am not advocating for a political practice of tolerance or suggesting that the Crown adopt a tolerant stance. I recognize that toleration is not the gold standard of relating to one another. I do not want to get mired in the pitfalls of tolerance discourse, so I want to clarify at the outset that I agree with the bulk of Wendy Brown's critique of tolerance as a strategy of governance.

---

[229] Rainer Forst, *Toleration in Conflict* (Cambridge University Press, 2003).

Including that: tolerance is not "a natural and benign remedy" for conflicts and tolerance discourse "does not explain why the proposed remedy for these conflicts is tolerance rather than emancipation …. autonomy or sovereignty";[230] "the promotion of tolerance … abandons participatory models of civic and political life";[231] and "the state places itself in a hostile relationship with the community being tolerated even while representing itself as that which … offers protections to minorities."[232] Each of these critiques is damning, but these bases for contesting tolerance are lost battles in the context of justification: the problems they identify are inherent in the foundational structure of justification. Indigenous sovereignty (as an Aboriginal right if recognized and affirmed at all) is subjected to justificatory reconciliation and cannot remedy its own infringement. Rights litigation is indicative of a failure to negotiate a political solution. The impetus for justification is the state infringing upon rights it has affirmed. Following Brown's critiques through to where they take root would require a much more ambitious (and political) reform of Aboriginal and Treaty rights recognition and affirmation at the structural level. The implications of the modest position that I am taking in drawing upon the model of tolerance are: justification should not be worse than toleration (which nobody likes best); and to the extent that justification is structured like tolerance it ought to be structured more like the respect model of tolerance.

Both the permission conception of tolerance that Forst rejects and the respect conception that he advocates for have three components: disapproval or opposition; acceptance (as toleration); and rejection (which is in need of justification).[233] In the permission conception the reasons for refusing to permit an opposed practice are arbitrary, "toleration, up to a certain limit of rejection … [is] in the hands of the sovereign or majority" and their reasons satisfy them alone.[234] This sense of arbitrariness in justification is distinct from the concept of an unjustifiable arbitrariness between chosen means and desired ends that is already at play in constitutional law: permissive

---

[230] Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006) at 86.
[231] *Ibid* at 87.
[232] *Ibid* at 95.
[233] Wendy Brown and Rainer Forst, "A Debate Between Wendy Brown and Rainer Forst" in *The Power of Tolerance: A Debate* (New York: Columbia University Press, 2014) (per Forst) at 23, 24.
[234] *Ibid* (per Forst) at 26.

arbitrariness is an insulting tyranny in which the sovereign majority's reasons for rejection (whether rational or irrational) are nothing other than what furthers their own desires.

I see the structure of toleration, and permissive toleration in particular, aligned with the limitation of Aboriginal and Treaty rights on two accounts: first, historically, a disapproval of Indigenous practices, acceptance through 'grace', 'goodwill' and 'benevolence' up to the arbitrary limits of sovereign will, colonial policies, and extinguishment; second, in the structuring of Aboriginal and Treaty rights jurisprudence, opposition to Indigenous practices in the form of an infringement, acceptance through recognition and affirmation of an existing Aboriginal right up to the arbitrary limits of any objective that the sovereign majority finds compelling (sufficiently desires).[235] Despite the rhetoric of reconciliation, the doctrine of justification maintains and enacts an asymmetrical power dynamic in a manner that mirrors the failures of justification under the 'permission conception' of tolerance: "the kind of toleration that Goethe has in mind when he speaks of an insult … and what Mirabeau means when he says that toleration is a sign of tyranny because the permission conception is a hierarchical one that rests on arbitrary rule."[236] In order to counter the caprices of toleration under the 'permission conception', Rainer Forst advocates for a justification of reasons for rejection (viz. justification of infringement) in accordance with the mutual acceptability of reasons indicative of the 'respect conception' of tolerance.

Rainer Forst's distinction between the permission conception and the respect conception of tolerance hinges on the distinction between arbitrariness and mutual acceptability. The key difference between the 'permission conception' and the 'respect conception' is in the type of reasons that are given in justification. While permissive tolerance is arbitrary with limits based upon the will, wants, and whims of the sovereign majority, the limits of respectful tolerance are based upon "mutually acceptable justifications."[237] Mutual acceptability suggests that an objective is compelling from both the Aboriginal and Non-Indigenous perspectives. The Court

---

[235] *See e.g.* Luca di Blasi and Christophe F E Holzhey, "Epilogue" in *The Power of Tolerance: A Debate* (New York: Columbia University Press, 2014) at 78: It is not surprising how easily this asymmetry maps on to Aboriginal and Treaty rights, as Luca Di Blasi notes "hierarchical power relations seem inevitable when someone (a superior power, a majority etc.) is granting someone (and inferior power, a minority, etc.) certain rights.".
[236] Brown and Forst, *supra* note 233 (per Forst) at 26.
[237] *Ibid* (per Forst) at 29.

has relied upon the legitimacy of this sort of normative consensus before: in *Sparrow* the Court found conservation to be compelling, in part, because "the conservation and management of our resources is consistent with aboriginal beliefs and practices."[238] As the Court's claim to unevidenced knowledge of pan-Indigenous values demonstrates, there is a clear risk of paternalism or false-consciousness in speaking about mutual acceptability without actually considering the impacted Indigenous community's values and laws.[239] In order to mitigate this risk, I want to restrict my discussion in this subsection to an aspect of Forst's account of mutual acceptability that can be partially distinguished from a normative consensus: reciprocity.[240] Forst considers both reciprocity of reasons and reciprocity of contents to be essential components of proper justification of rejection (viz. infringement). By reciprocity of reasons he means "that one may not simply assume that others share one's perspective, one's values, convictions, interests or needs … by claiming to speak in their 'real' interests."[241] By reciprocity of contents he means that no one may make validity claims that they would deny to others.[242] While, reciprocity of reasons will require taking Aboriginal understanding into account, the person making the validity claim (that infringement is justified) can demonstrate reciprocity of contents. Since it is the content of the validity claim that is at issue, this requires "distinguishing your reasons for objection from mutually justifiable reasons for rejection."[243] By analogy to tolerance, in the context of justification this means distinguishing the Crown's objective (or reasons for infringement) from the reasons that it is compelling (or reasons the infringement is justified).

In the Court's post-*Sparrow* justification jurisprudence, the reasons for the Crown's objective being compelling are layered: an objective is compelling 'in principle' if it is in the interest of the 'general' public (*Gladstone*, *Delgamuukw*); an objective is compelling 'in the circumstances' if the benefit to the 'general' public is evidenced and of overwhelming importance (*Côte, Adams*); and an objective is of overwhelming importance if the benefit to the 'general' public

---

[238] *Sparrow, supra* note 1 at 1114.
[239] *See e.g. R v Horseman,* [1990] 1 SCR 01 at 932-933; 55 CCC (3d) 353 for the majority's invention of a highly suspect unilateral *quid pro quo* licencing the modification (and partial extinguishment) of a Treaty right.
[240] *See* Forst *supra* note 229 at para 453: "In contrast to a pure consensus theory …. the criteria of reciprocity and generality permit substantive judgements concerning the justifiability of normative claims even in cases of (expectable) disagreements."
[241] *Ibid* at para 454.
[242] *Ibid* at para 454.
[243] Brown and Forst, *supra* note 233 (per Forst) at 31.

outweighs the detriments to the Indigenous community (*Tsilhqot'in*). In order for the community 'as a whole' to reciprocate these contents it must be willing to accept a like detriment for the like benefit to the Indigenous community. Given the alignment between the interests of the community 'as a whole' and the non-Indigenous majority, the reciprocal relationship could also be drawn with the non-Indigenous majority willing to accept a like detriment for the like benefit to the Indigenous community. The crucial element is that reciprocity is *between* the justifying person or group and the person or group being impacted. It is not helpful to know what detriments an individual member of the 'general' public (or the non-Indigenous majority) would be willing to accept for the benefit of the 'general' public. So, for example, common-law expropriation provides no useful insight into reciprocity because the detriment an individual is willing to accept for a benefit to their community is entirely different from a detriment that community would be willing to accept for the benefit of another community. Answering this question of Nation-to-Nation reciprocity presents a number of difficulties. First, there is a risk that alleged reciprocity is disingenuous: reciprocity should be evidenced to avoid empty claims that "one would be glad to be treated or coerced as they are."[244] Second, the community 'as a whole' has legal obligations to Indigenous communities under Treaty and, in the rare circumstances that Treaty promises are honored, [245] this cannot be counted as accepting a detriment. Third, the community 'as a whole' has legal obligations to individual members of Indigenous communities by virtue of asserting sovereignty over them and their communities and fulfilling those legal obligations (such as equality obligations under the *Charter*) cannot be counted as accepting a detriment. With these restrictions in mind, it is an open question what sort of detriments the Crown (on behalf of community as a whole) might actually be able to evidence its willingness to accept for the benefit of an Indigenous community. Undoubtably, this measure would be restrictive. It ought to be. The benefit of the non-Indigenous majority of a colonial state is a highly suspect justification for infringing upon the limited protection that rights afford to Indigenous communities. Requiring evidenced reciprocity would mitigate the risk of the courts weighing the interests of the sovereign majority with a heavy hand.[246]

---

[244] Forst, *supra* note 229 at para 454.

[245] *Sparrow, supra* note 1 at 1103: "there can be no doubt that over the years the rights of the Indians were often honoured in the breach".

[246] *See* at Michael McCrossan, "Eviscerating Historic Treaties: Judicial Reasoning, Settlor Colonialism, and 'Legal' Exercises of Exclusion" (2018) 45:4 Journal of Law and Society 589 at 614: "hearing transcripts reveal a privileging of non-Aboriginal developmental interests at the expense of treaty rights and the legal perspectives of Indigenous

Mutually Acceptable Understandings of 'Compelling'

It is difficult to say what the practical implications of taking Indigenous values and laws into account will be for justification. Based on the precedent for taking the Aboriginal perspective into account set in rights-recognition "the Aboriginal perspective grounds the analysis and imbues its every step"[247] opening each layer of the compelling standard up for reinterpretation. What sorts of benefits (or detriments) count as good evidence that an objective is (or isn't) compelling? Is a consequentialist weighing of benefits and detriments even consistent with an Aboriginal understanding? What sort of benefits are of overwhelming importance? Is overwhelming material benefit compelling? Are the *Delgamuukw*-list objectives compelling 'in principle'? The reasons for finding the Crown's objectives compelling have been developed on the basis of the common-law and non-Indigenous perspectives alone. Taking Aboriginal understanding into account requires fresh answers to these questions: "the criteria for measuring what is just, fair, and equitable should not solely be drawn from non-Indigenous sources" — "standards for judgement must not only flow from the common law but also from Indigenous legal values."[248]

The benchmark for incorporating Indigenous values and laws into justification is "mutual acceptability" or an "unforced" or "overlapping" normative consensus.[249] The level of consensus required for this standard is confined to the principles that ought to be applied (conservation, for instance).[250] There is no need for a consensus on the normative foundations for accepting those principles (normative plurality between Indigenous and non-Indigenous communities is accommodated), and no need for consensus on the outcome of the application (if overlapping consensus on outcomes is possible the parties should not be in court). While mutually acceptable

---

peoples. In this sense, the SCC's decision gives the appearance that the Court is continuing to act as a settler-colonial servant of the Crown by upholding the Crown's territorial and developmental desires."

[247] *Marshall; Bernard*, supra note 212 at para 50.

[248] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 218, 217.

[249] *See* Dwight G Newman, "You Still Know Nothin' 'Bout Me: Toward Cross-Cultural Theorizing on Aboriginal Rights" (2007) 52 McGill LJ 725 for a discussion of the promise and pitfalls of 'unforced' consensus. *See* John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) at 133-172 for the argument in favour of overlapping consensus.

[250] Although the mutual acceptability in *Sparrow* was unevidenced and not based on the *impacted* community's values and law.

principles for limitation lend limitations the most cross-cultural legitimacy and ought to be prioritized, in cases where there is no normative consensus Indigenous values and laws ought to be preferred. The reason for this is clear: some Aboriginal and Treaty rights are 'internally limited' (for instance, the right to trade to the internal limit of a moderate livelihood) and these internal limits are based upon the Indigenous community's traditional practices and agreements. Whether a right is (a) internally limited by traditional practices and agreements or (b) not internally limited by traditional practices and agreements but is subject to external limitations based in the right-holders values and laws is a common-law distinction imposing differential treatment on Indigenous rights-holders without any clear justification for where the line between specific practices and normative frameworks has been drawn.[251] Preferring principles for limitation found in Indigenous values and laws (in the absence of principles authorized by normative consensus) mitigates the arbitrary nature of this distinction by treating Indigenous norms more consistently across the line.

Revisiting Colonial Assumptions

In addition to taking the Aboriginal perspective into account when assessing whether an objective is compelling, courts should ensure the foundations of justification are not mired in social, historical, and political assumptions made from a non-Indigenous perspective. For instance, in *Sparrow* the initial balance between Federal power and Federal obligation was struck, in part, on the basis that the recognition and affirmation of Aboriginal and Treaty rights "does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management".[252] When the Aboriginal perspective is taken into account it becomes clear that the need for protection and management does not answer the question of whether it is the Federal government or Indigenous peoples who should protect and manage Indigenous resources. With the hindsight of thirty years it is similarly clear that complexity and sophistication

[251] See especially, McLachlin's *Van der Peet* dissent where she argues that a right is internally limited contrary to the majority finding no internal limit and diluting the doctrine of priority to calibrate the external limit accordingly.
[252] *Sparrow, supra* note 1 at 1110.

as a pretext for non-Indigenous management of resources is a new gloss on an old trope.[253] Where Indigenous people are already protecting and managing a resource more than the pretense of 'modern complexity' ought to be required in order to justify replacing their scheme with the Crown's. Taking this into account at this step of the test would mean accepting that (the Crown's) regulations aimed at conservation may not always be compelling. A similar balance could be struck at a different stage of the test by recognizing that Indigenous conservation schemes – like the Mi'kmaq Netukulimk Livelihood Fishery Plans[254] – may warrant accommodation and failing to accommodate them may not be consistent with the honour of the Crown.

PART IV: Justification without Honour

Section I: Limitless Limits

Unlike proportionality in the analogous test for *Charter* rights,[255] the second step of the justified infringement test set out in *Sparrow* was not subdivided into a specific set of requirements for the Crown to meet. Instead the Court cautioned that: "Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case."[256] The standard to be met is determined by reference to the unique historic relationship between the Crown and Indigenous peoples, requiring either that the Crown act in accordance with its fiduciary relationship or uphold its honour. In some circumstances this has required the Crown to give priority to an Aboriginal or Treaty right (ex. *Sparrow*) in others to ensure their infringement is proportional to the benefits of the Crown's objective (ex. *Tsilhqot'in*). The adaptability of the standard is a source of uncertainty in Aboriginal and Treaty

[253] This rhetoric of complexity and the inadequacy of social forms has also been leveled at socialist forms of production, it is a hallmark of modern imperialism that only the central bureaucracy is competent to govern. *See*, Noam Chomsky *On Anarchism* (New York: The New Press, 2103) at 61, 69.
[254] Assembly of Nova Scotia Mi'kmaw Chiefs "Moderate Livelihood Fishery Update, August 2020
[255] *See generally Oakes, supra* note 27.
[256] *See Sparrow*, *supra* note 1 at 1111. *Cf Sparrow, supra* note 1 at 1111: despite cautioning that the justificatory standard must be context specific the Court immediately turned to "set out *the* test" for justification.

rights litigation approaching (if not equaling (if not eclipsing)) the degree of uncertainty Brown decried in the development of new doctrines in *Mikisew 2018*.[257]

Further Questions

One element of uncertainty at the second step of justification is what role the further questions introduced in *Sparrow* have to play. In *Nikal* the Court reiterated that "further questions may arise depending on the circumstances of the inquiry" citing the further questions listed in *Sparrow*: minimal impairment; compensation; consultation.[258] Two aspects of the Court's reasons seemed to suggest that the further questions ought to play an integral role in the test. First, the Court introduced them as the last of "the following questions [that] should be addressed sequentially".[259] Second, the Court used the further questions to elaborate on its integration of the concept of reasonableness into the test, concluding that "in these last questions reasonableness will be a necessary aspect into the inquiry as to justification".[260] In the subsequent development of the jurisprudence the question of consultation became increasingly prominent to the point of being recognized as a preliminary procedural question to be dealt with before the substantive steps of the test in *Tsilhqot'in.*

Although the remaining further questions, and the potential for others, are reiterated throughout the Court's jurisprudence basic questions about their meaning, implication, and significance have been left open. It has never been made clear why the question of minimal impairment is raised in some circumstances but is not considered a general requirement of justification. And, the Court has given no guidance explaining why, if all the usual compensation is available after the breach, the Court can consider fair compensation as justification for the breach without effectively declaring all Aboriginal and Treaty rights to be infringeable for the price of compensation (i.e. licensing the efficient breach of constitutional rights).

---

[257] *Mikisew 2018, supra* note 3 at 142.
[258] *Nikal, supra* note 40 at para 109; see also *Badger, supra* note 35 at para 97 where the same wording is used.
[259] *Nikal, supra note* 40 at para 109; see also *Badger, supra* note 35 at para 97.
[260] *Nikal, supra note* 40 at para 110.

Despite deprioritizing the question of priority in *Gladstone* and adopting a proportionality inquiry in the circumstance of Aboriginal Title in *Tsilhqot'in*, the Court has not established a principled basis for determining when other further questions should be asked. Even in *Nikal* where the Supreme Court of British Columbia had considered the question of rational connection, the Supreme Court of Canada did not comment on whether it was appropriate (or necessary) to consider rational connection in that case.[261]

From Substantive Priority to Demonstrated Consultation & Accommodation

The doctrine of priority was the Court's initial answer to what the second step of justification called for in the context of resource conservation. In *Gladstone* the majority drew a distinction between Aboriginal rights to a resource that were 'internally limited' by the extent of pre-existing harvesting practices and those with no internal limitation. The majority was concerned that "where an Aboriginal right has no internal limitation, the notion of priority, as articulated in *Sparrow*, would mean that where an aboriginal right is recognized and affirmed that right would become an exclusive one."[262] The contention that the priority of a commercial fishing right implies exclusivity is not only loaded with a fundamental incredulity that colonial dispossession might be curtailed in even these limited circumstances but also leads the Court to consider two specious claims against exclusivity (and priority by extension). First, they contrive a hypothetical internecine conflict between different Aboriginal rights holders and suggest that the need to balance these rights must mean that no single right can be exclusive.[263] Although they recognize that this "does not lead automatically to the conclusion that, as between aboriginal rights holders and those who do not hold such rights, the notion of exclusivity must be rejected" they pursue this imperial divide-and-conquer line of reasoning between recognized aboriginal rights holders and aboriginal peoples "unable to demonstrate that their aboriginal rights include the right to sell fish on a commercial basis."[264] Second, they raise the issue of the common law right to fish in public waters as a reason not to substantively prioritize the Aboriginal right to fish in a manner that might imply exclusivity. Although they recognize that constitutional rights will impact

---

[261] *Ibid* at para 11.
[262] *Gladstone, supra* note 6 at para 59.
[263] *Ibid* at para 66.
[264] *Ibid* at paras 66, 68.

common law rights, they rely upon the lack of legislative intention to extinguish the right of public access to the fishery to justify curtailing priority. In their view, the fact that "since the time of Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation" is significant.[265] However, the Privy Council case that they cite, *British Columbia Fisheries (Re)*,[266] makes it clear that there are exceptions and exclusive rights to fish have been recognized when "the proof of the existence and enjoyment of the right has … gone back further than the Magna Charta" and it is clear from the Privy Council opining that "no such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before the Magna Charta" that this precedent did not account for Aboriginal rights and provides no real basis for upholding a public right to fish in the face of a pre-existing exclusive Aboriginal right.

As a result of these considerations the majority reasoned that, where a right has no internal limit, "the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users."[267] In her dissent, McLachlin was very critical of substituting the requirement of "taking into account the aboriginal right" for its substantive prioritization, in part, because it might render the doctrine of priority meaningless.[268] While the majority asserted that "the content of this priority … must remain somewhat vague pending consideration of the government's actions in specific cases",[269] they elaborated that this "should not suggest … that no guidance is possible or that the government's actions will not be subject to scrutiny."[270] Ultimately, the scrutiny that is substituted for a substantive requirement of priority is directed at "consultation, compensation, as well as questions such as whether the Crown has accommodated the exercise of the Aboriginal right".[271] This establishes *Gladstone* as an early precedent for the ascendency of consultation and accommodation to its place of central importance in protecting Aboriginal

---

[265] *Ibid* at para 67.
[266] [1914] AC 153; 15 DLR 308 at p 316
[267] *Gladstone, supra* note 6 at para 62.
[268] *Van der Peet*, *supra* note 49 at para 307.
[269] *Gladstone, supra* note 6 at para 63.
[270] *Ibid* at para 64.
[271] *Ibid* at para 64.

rights but, in circumstances where the duty of consult does not apply, also highlights the validity of McLachlin's concern that priority may be rendered meaningless.

Section II: The Rise of the Honour of the Crown Doctrine

In *Sparrow* the Court reasoned that "the "way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples."[272] Despite the honour of the Crown and the Crown's unique relationship with Indigenous peoples both being instituted as guiding principles for assessing whether the Crown's means of achieving its objective are justified, the Court has not provided any coherent guidance for applying these principles.

Fiduciary Relationship

In both *Adams* and *Côte* the Court referred to the Crown's fiduciary obligation as the standard for assessing whether its conduct could be justified.[273] In both cases the Crown failed to demonstrate that "the infringement is consistent with the Crown's fiduciary obligation to aboriginal peoples" because it had not given "requisite priority to the Aboriginal right to fish for food".[274] Similarly, in *Delgamuukw* the majority stated that "The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples."[275] Following the 'altered approach' set out in *Gladstone*, the Court contemplated priority of an exclusive right of Aboriginal title to require accommodation and reasoned that "the fiduciary duty may be articulated in a manner different than the idea of priority" requiring both consultation and compensation.[276] *Tsilhqot'in* provided a more conclusive answer to what the fiduciary duty

---

[272] Sparrow, *supra* note 1 at 1110.
[273] *Adams, supra* note 50 at paras 54, 56; *Côté supra* note 50 at paras 76, 82.
[274] *Adams supra* note 50 at paras 56, 59; *Côté supra* note 50 at para 82: "since the scheme provided no priority to aboriginal rights to fish, it failed to satisfy the Crown's fiduciary duty toward the Algonquin people."
[275] *Delgamuukw*, *supra* note 5 at para 162.
[276] *Ibid* at para 168.

required in order to justify an infringement of Aboriginal title: consultation and proportionality.[277] While these cases provide two clear precedents for the second substantive step of the test – internally limited rights to a resource must be prioritized; infringements to Aboriginal title must be proportional – they provide no insight into how these standards were drawn from the principle of respecting a fiduciary relationship or what standards will actually be required of Crown conduct in other circumstances.

Although both *Delgamuukw* and *Tsilhqot'in* dealt with circumstances where the Crown had a *sui generis* fiduciary duty to uphold, since the Court established that the Crown's fiduciary relationship with Indigenous peoples does not imply a ubiquitous fiduciary obligation, and only gives rise to *sui generis* fiduciary duty where the Crown has assumed discretionary control over a specific aboriginal interest, such circumstances are sharply curtailed.[278] After *Wewaykum* there won't be an actual fiduciary duty at stake in most circumstances and it would no longer make sense to take the sort of straightforward approach advocated by McLachlin in her *Van der Peet* dissent when she critiqued the standard for Crown conduct set out by the majority on the basis that "The duty of a fiduciary, or trustee, is to protect and conserve the interest of the person whose property is entrusted to him. In the context of aboriginal rights, this requires that the Crown not only preserve the aboriginal people's interest but also manage it well."[279] With the strong distinction the Court has now drawn between a fiduciary relationship and the specific circumstances in which a fiduciary duty arises within that relationship, it is unlikely that the justificatory standards imposed by the Crown's fiduciary relationship with Indigenous peoples will be borrowed directly from the legal duties of a fiduciary in future cases.

Honour of the Crown

Honourable dealing has always been an integral component of justification. In *Sparrow,* when the Court determined that the best way to reconcile federal power and federal duty "is to demand the justification of any government regulation or duty that infringes upon or denies aboriginal

[277] *Tsilhqot'in*, *supra* note 4 at para 87.
[278] *Wewaykum Indian Band v Canada,* 2002 SCC 79 at paras 81, 83.
[279] *Van der Peet, supra* note 49 at para 307.

rights" it reasoned that "such scrutiny is in keeping with … the concept of holding the Crown to a high standard of honourable dealing with respect to … aboriginal peoples."[280]

There have also been a number of indications that the honour of the Crown may be interchangeable with the Crown's fiduciary relationship as a standard for measuring Crown conduct. In *Delgamuukw*, the majority set out the fiduciary relationship as the standard, but in suggesting that "fair compensation will ordinarily be required when aboriginal title is infringed" noted that this was "in keeping with the duty of honour and good faith in the Crown".[281] Similarly, the *Delgamuukw* minority stated that section 35(1) "mandates basic fairness commensurate with the honour and good faith of the Crown"[282] although they also went further by positioning it as the principle standard for justification: "Under the second part of the justification test, these legislative objectives are subject to accommodation … this accommodation must always be in accordance with the honour and good faith of the Crown."[283] The honour of the Crown is also the basis for the duty of consultation which *Tsilhqot'in* confirmed still plays an integral procedural role in the justification test despite being developed into a free-standing duty.

Given that the bulk of the justification precedents predate the reduced emphasis on the fiduciary relationship following *Wewaykum* and the ascendency of the honour of the Crown as an organizing principle for the Crown's concrete duties to Aboriginal peoples in *Haida* (consultation), *Marshall no. 1* (treaty interpretation), *Mikisew, 2005* (treaty implementation) and *Manitoba Metis* (consolidation as organizing doctrinal principle through affirmation of these precedents) it is tempting to presume that the "Court has, over time, substituted the principle of the honour of the Crown for a concept — the fiduciary duty — that, in addition to being limited to certain types of relations that did not always concern the constitutional rights of Aboriginal peoples, had paternalistic overtones" as suggested by the minority in *Little Salmon/Carmacks* (although not specifically in reference to justification). The fact that it is "the honour of the Crown [that] gives rise to a fiduciary duty when the Crown assumes discretionary control over a

[280] *Sparrow, supra* note 1 at 1109.
[281] *Delgamuukw, supra* note 5 at para 169.
[282] *Ibid*.
[283] *Ibid* at paras 204 and 203.

specific Aboriginal interest"[284] and the lack of clear delineation between fiduciary relationship and fiduciary duty in the pre-*Wewaykum* cases seems to support a substitution. This conclusion is neither foreclosed nor borne out by *Manitoba Metis* and *Tsilhqot'in*. In *Manitoba Metis* the Court listed "at least four situations" where the honour of the Crown gives rise to concrete practices and different duties speaking "to *how* obligations that attract it must be fulfilled" – including consultation, but not justification more broadly. In *Tsilhqot'in* the Court referred to the honour of the Crown only in relation to consultation and maintained the language of fiduciary duty when referring to what justification called for in the circumstances (proportionality), but in the circumstances the Crown's discretionary control over Aboriginal title provided an actual basis for considering the requirements of a fiduciary duty.[285] Although it remains an open possibility that the honour of the Crown has supplanted (or will come to supplant) the fiduciary relationship as the standard for Crown conduct in the second step of the justification test, it is not clear that this would make the standard courts will apply outside of the established precedents of priority and proportionality any more predictable.

The basic premise that the honour of the Crown speaks to how obligations must be fulfilled is a ready fit for the obligation to justify infringements. And, complying with the established concrete duties set out in *Manitoba Metis – sui generis* fiduciary duty, honourable negotiation, avoiding the appearance of sharp dealing, acting in a manner that accomplishes the purpose of its promises[286] – could serve as indicia of justification. But, with the exception of the procedural requirement of consultation, each concrete duty could also be a substantive infringement in need of justification. Adopting the concrete duties into the justification test would either lead to the illogical result that an infringement that arises from the Crown's failure to uphold the honour of the Crown might be justified because the Crown's conduct is consistent with the honour of the Crown (albeit a different facet) or the logical result that infringements that arise from the Crown's failure to uphold the honour of the Crown cannot be justified because they are inconsistent with the honour of the Crown. This is not necessarily inconsistent with the overall scheme of infringements being justifiable and it is already that case that attempting to justify an

[284] *Manitoba Métis, supra* note 183 at para 73.
[285] *Tsilhqot'in*, *supra* note 4: honour at paras 78, 80, 95, 113; fiduciary duty in justification at 2, 80, 85, 88; fiduciary duty actually arose at 69, 85.
[286] *Manitoba Métis, supra* note 183 at para 73.

infringement arising from a fiduciary duty would illogically require demonstrating that it was consistent with the fiduciary relationship, although this situation may not pose a problem in practice because breaches of fiduciary duty (whether conventional, *sui generis*, or ad-hoc) may be pleaded as free-standing actions independent of or in addition to infringement claims. While it would certainly strengthen the protection offered to Aboriginal and Treaty rights to incorporate the concrete duties arising from the honour of the Crown into justification and follow through to the logical conclusion that no dishonourable conduct can be justified, it is still unclear how this principle will be developed or if it will be explicitly adopted at all.

Section III: *Sui Generis* calls for more than Universal Proportionality

In *Tsilhqot'in* the Court required the government to show "that it discharged its procedural duty to consult and accommodate" and "that the governmental action is consistent with the Crown's fiduciary obligation to the group" in order to justify an infringement.[287] It also established that, in the context of justifying an infringement of Aboriginal title, the Crown's fiduciary duty "infuses an obligation of proportionality into the justification process" and "means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations."[288]

The clarification that consultation and accommodation ought to serve as a preliminary procedural step in the justification test rather than being considered at the second substantive step is consistent with its development as an independent duty and goes a long way in establishing a coherent view of the overall structure of section 35(1). As the duty of consult has developed into a reciprocal duty and courts have held that right-holding groups "cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions"[289] a lingering concern has been that there may be circumstances where the second step of the justification test can be satisfied by consultation alone, implying that a rights-holding

---

[287] *Tsilhqot'in*, *supra* note 4 at para 77.
[288] *Ibid* at paras 86, 85.
[289] *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212 at 52-53 affirming *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 161; see also *R v Douglas et al,* 2007 BCCA 265 at paras 39-45.

group that refuses to meet and participate may have exhausted the requirements on Crown conduct and have their rights justifiably infringed by any valid legislative objective.[290] *Tsilhqot'in* alleviates this concern: since consultation is a separate preliminary step some further standard of honour or fiduciary duty will always be applied to the Crown's conduct. Given that the demands of consultation are overwhelming the capacity and resources of some First Nations this development provides reassurance that a lapse in vigilance does not mean that rights-holders will be entirely unprotected from infringements. Establishing consultation as a preliminary procedural step also ensures that the honour of the Crown is consistently accounted for in some form in justification, however, this will not be the case in circumstances where the duty to consult does not apply. This was one of Abella and Martin's concerns in *Mikisew 2018*: "to revive a pre-*Haida Nation* state of affairs in this [legislative] context would essentially extinguish the honour of the Crown in the legislative process by conflating the government's duty to consult with its distinct obligation to justify infringements."[291]

That the Crown's fiduciary duty calls for proportionality (including minimal impairment and rational connection) in the context of Aboriginal Title is not based on the explication of any aspect of fiduciary duty or a reliance on any established legal principle, but is also not an unprecedented development. Minimal impairment – "whether there has been as little infringement as possible in order to effect the desired result" – has been a potential 'further question' to be considered since *Sparrow*.[292] Rational connection was considered as an aspect of justification by the British Columbia Supreme Court in *Nikal*, although not explicitly by the Supreme Court of Canada which disposed of the issue on the basis that the Crown had not evidenced that its regulations were justified rather than on its regulations being arbitrary.[293] Proportionality was said to be an important factor in determining whether an infringement in the form of resource allocation to other user groups was justified in *Marshall no. 2*, not to mention having already been considered at the valid objective stage of *Tsilhqot'in*. Given that these

[290] This possibility was left open by *Mikisew 2005*, *supra* note 69.
[291] *Mikisew 2018*, *supra* note 3 at 78. The honour of the Crown going unaccounted for suggests that the standard contemplated for Crown conduct is consistency with the unique fiduciary relationship and not the honour of the Crown.
[292] *Sparrow, supra* note 1 at 1119.
[293] *Nikal, supra* note 40 at paras 11, 111.

precedents were already latent in the jurisprudence requiring a proportionality analysis could be viewed as affirming these considerations in the circumstances.

It is also worth noting that the Court was clear that the fiduciary duty implied proportionality, but that proportionality did not satisfy the requirements of the fiduciary duty. It is hard so see how it could: proportionality is the standard set for Crown conduct in circumstances outside of its special fiduciary relationship with Indigenous peoples where its honour is not at stake, if the universally applicable standard of proportionality alone satisfied the *sui generis* fiduciary duty it would render it meaningless. It is the additional requirement that the Crown "act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations" that raises the standard of Crown conduct above the general to meet with specific needs of its fiduciary relationship.[294] However, this additional requirement, and particularly its implication that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land" is intrinsically linked to the context of Aboriginal title where an actual *sui generis* fiduciary duty exists.[295]

Hogg and Styler have expressed a different view of the role proportionality should play in justification following *Tsilhqot'in*:

> It seems to us that these three *Oakes* tests [rational connection, minimal impact, and proportionality of impact], especially the last two, would capture all considerations that could be relevant under either fiduciary duty or honour of the Crown, and that at this point in the section 35 justification analysis it makes sense to move over to the safe and sure pathway marked by *Oakes*.[296]

This view fails to account for the fact that even in the *Tsilhqot'in* precedent they are relying upon, proportionality did not capture all considerations relevant under fiduciary duty.[297] Hogg and Styler also fail to provide any explanation of how the high standard of honourable dealing would be satisfied by a combination of: a rational connection between a regulation and its objective of dispossessing Indigenous peoples of their lands and resources; the erstwhile 'further

---

[294] *Tsilhqot'in, supra* note 4 at para 86.
[295] *Ibid*.
[296] Hogg and Styler, *supra* note 79 at 14.
[297] *Ibid* at 11: the requirement is acknowledged but never resolved.

question' of minimal impairment; and the proportionality of detriments to the Aboriginal people and benefits to the 'general' public.[298]

Proportionality may bolster the requisite standard by addressing arbitrariness, overbreadth, and trivial public benefits (gross disproportionality) but some further consideration actually directed at the honour of the Crown (or fiduciary duty) will always be necessary to justify the Crown's conduct as being "in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples."[299] Without an additional consideration directly addressing the honour of the Crown (or fiduciary duty) a proportionality analysis is at risk of strongly favoring colonial dispossession at the expense of Aboriginal traditions and culture.

Ktunaxa Nation serves as an indication of what proportionality alone may yield. While the majority held that freedom of religion extends no protection to the site-specific location of Grizzly Bear Spirit,[300] the minority demonstrated how little Indigenous people can hope to expect from justification without honour:

> The Ktunaxa believe that a very important spirit in their religious tradition, Grizzly Bear Spirit, inhabits Qat'muk, a body of sacred land that lies at the heart of the proposed ski resort. The development of the ski resort would desecrate Qat'muk and cause Grizzly Bear Spirit to leave, thus severing the Ktunaxa's connection to the land. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. All songs, rituals and ceremonies associated with Grizzly Bear Spirit would become meaningless.
>
> … The Minister's decision to approve the ski resort will render all of the Ktunaxa's religious beliefs related to Grizzly Bear Spirit devoid of any spiritual significance. Accordingly, the Ktunaxa will be unable to perform songs, rituals or ceremonies in recognition of Grizzly Bear Spirit in a manner that has any religious significance for them. In my view, this amounts to a s.2(*a*) breach
> .
> … I am of the view that the Minister proportionately balanced the Ktunaxa's s.2 (*a*) right with the relevant statutory objectives: to administer Crown land and

---

[298] *Cf* Bradford W Morse, *Tsilhqot'in Nation v British Columbia: Is it a Game Changer in Canadian Aboriginal Title Law and Crown-Indigenous Relations* (2017) 2:2 Lakehead LJ 64 at 76-77 for the proposition that proportionality might be informed by the fiduciary requirement to take respect the interests of future generations with the benefits and detriments weighted to reflect the long-term interests at stake.
[299] *Sparrow, supra* note 1 at 1112.
[300] *Ktunaxa, supra* note 7 at para 71.

> dispose of it in the public interest. The Minister was faced with two options: approve the development of the ski resort or grant the Ktunaxa a right to exclude others from constructing permanent structures on over 50 square kilometres of Crown land. This placed the Minister in a difficult, if not impossible, position. If he granted this right of exclusion to the Ktunaxa, this would significantly hamper, if not prevent, him from fulfilling his statutory objectives. In the end, it is apparent that he determined that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa the veto right that they were seeking.
>
> In view of the options open to the Minister, I am satisfied that his decision was reasonable. It limited the Ktunaxa's right "as little as reasonably possible" given these statutory objectives … and amounted to a proportionate balancing. I would therefore dismiss the appeal.[301]

In the *Charter* context, proportionality provided no meaningful protection: even the development of a recreational site outweighed all spiritual significance and practices relating to Grizzly Bear Spirit. If this had been a matter of justifying an infringement of Aboriginal Title after *Tsilhqot'in*, the minority would have had to contend with the additional requirement that the Crown cannot justify an infringement that would "substantially deprive future generations of the benefit of the land" and might have come to a significantly different conclusion.[302]

PART V: Implications and Conclusion

Section I: Structural Implications of the Justification Doctrine

Approaching the Limit of Effective Extinguishment

While not all Aboriginal rights in existence are recognized and affirmed and the modern forms of existing rights will continue to evolve, no new s.35(1) Aboriginal rights will come into existence under the current doctrine of Aboriginal rights. New Treaty rights may arise in the form of modern land claims, but these rights are likely to be limited and, in many cases, may be substituted for Aboriginal rights — Aboriginal title in particular.[303] The s.35(1) framework is

---

[301] *Ibid* at paras 117-120.
[302] *Tsilhqot'in, supra* note 4 at para 86.
[303] *See* Colin Samson, *Canada's Strategy of Dispossession Aboriginal Land and Rights Cessions in Comprehensive Land Claims* (2016) 31:1 Canadian Journal of Law and Society 87.

based upon a constitutional guarantee of recognition and affirmation, but from that baseline the framework is only subtractive. Over time the sum of justifying repeated intransient infringements will be a diminution approaching the limit of effective extinguishment.

In the case of site-specific harvesting rights this is already being felt. In response, courts have recognized that the cumulative effects of multiple infringements inform the scope of the duty to consult and must be taken into account. In some cases, particularly where the enjoyment of the right is site-specific, this may require accommodation that ensures the right can still be enjoyed. Consultation cannot rule out accommodation from the outset,[304] but accommodation is not always required and, even where it is required, accommodation does not entail immunity from adverse effects.

Whether rights are adversely affected by partial (or no) accommodation during consultation or are justifiably infringed there is no guarantee that the detrimental impacts will be reversed. After *Rio Tinto Alcan* there is a legal doctrine to support this: government action with no new adverse impact does not trigger consultation.[305] Worse, the detrimental impacts of unjustified infringements may also be irreversible. In her *Mikisew 2018* reasons, Abella warns that justification without prior consultation is exclusively backward-looking which leaves rights particularly vulnerable to irreversible harms.[306]

If the substantive aspects of justification are to serve as self-sufficient protection for Aboriginal and Treaty rights the courts may need to take a more lenient approach towards interlocutory injunctions in aid of unjustified infringement claims. Similarly, cumulative impacts ought to be taken into consideration in considering whether the Crown's conduct is consistent with its honour (or fiduciary duty) – in particular, by weighing the cumulative detrimental effects against the benefits of infringement in the consideration of proportionality.

Reconciling Reconciled Interests

[304] *Grassy Narrows, supra* note 80 at para 52.
[305] *Rio Tinto Alcan v Carrier Sekani Tribal Council,* 2010 SCC 43 at paras 48-49.
[306] *Mikisew 2018*, *supra* note 3 at para 78.

In *Haida*, the Court recognized that: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty".[307] The Court has also recognized that when a court is interpreting a Treaty it must "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the parties interests.[308] This reconciliation of sovereignties and interests is the basis for limits on Treaty rights that are licenced by the terms of the Treaty (rather than through justification).

In earlier editions of his compendium on constitutional law Hogg was critical of the justified infringements of Treaty rights on the grounds that the Crown ought to be expected to do exactly what it promised.[309] I agree with this moral claim and see it aligning neatly with the honour of the Crown, especially where the Crown serves as the only guarantor of its promise (pending divine retribution).[310] I also see the reconciling of interests during justification as inherently inconsistent with the purpose and nature of Treaties. If the parties reconciled their respective interest during the Treaty negotiations, then a second reconciling of interests during justification is between the First Nation interest in having an agreement that reconciles their interests respected and the Crown's interest in breaching that agreement in favour of its interests.

Indigenous interests and the Crown interests have already been reconciled during Treaty negotiations, resulting in Aboriginal harvesting rights guaranteed by Treaties being subjected to limits (allegedly) agreed to during the negotiations. These limitations on guaranteed harvesting rights permit rights-regulation without justification in accordance with the terms of the agreement, yet under the doctrine of justification the Crown is also permitted to justify further infringements.

---

[307] *Haida*, *supra* note 2 at para 20.
[308] *Marshall no.1*, supra note 20 at para 14.
[309] *See e.g.* Peter Hogg, *Constitutional Law of Canada* 5th ed (Scarborough: Thomson Carswell, 2007) at 28.8(g) "Before [*Badger*], it was arguable that treaty rights ought to receive absolute protection from s. 35, on the basis that the Crown's fiduciary duty is to do exactly what it bargained to do in the treaty. …We are left with the unsatisfactory position that treaty rights have to yield to any law that can satisfy the *Sparrow* standard of justification."
[310] *See generally* Alain Supiot, *Homo Juridicus* (London: Verso, 2007) at 89-100.

This reconciliation of reconciled interests is inherently unfair in all circumstances, but is particularly harsh in the context of a guarantee of continued enjoyment of a pre-existing Aboriginal right. If the Crown hadn't made the guarantee, then all infringements to the Aboriginal harvesting right would need to be justified. The Crown's Treaty guarantee is worse than nothing at all: the limits agreed to in Treaty negotiations are enforced permitting regulation in accordance with the Treaty, but further regulations not agreed to in the Treaty are also permitted as justified infringements.

In order for justification to provide effective protection to Treaty rights some account needs to be taken of the initial reconciliation of sovereignties and interests at the time the Treaty is negotiated when setting the standard for justification beyond the limits agreed upon.

Alternately, the Crown could be held to the higher moral standard of keeping its word with limits on Treaty promises restricted to what was agreed upon. The Court has left open the possibility that there may be some Treaty promises that cannot be justifiably infringed,[311] and in reference to positive finite obligations stated that where the obligations are clear the parties should get on with performance.[312]

Section II: Conclusion – Sufficiency and Efficacy

As Abella and Martin argue in their *Mikisew 2018* dissent, consultation and justification work together to make sure that the honour of the Crown is upheld. In this thesis I have analyzed the doctrine of justification apart from the procedural duty to consult and concluded that, in its current state, the doctrine of justified infringements does not offer sufficient and effective protection to Aboriginal and Treaty rights in circumstances where the duty to consult does not arise. Justificatory reconciliation provides no basis for disqualifying objectives as invalid and licenses dispossession, exposing Indigenous rights to *de facto* threats without justification. The empty rhetoric of formal and substantive representation shrouds the material reality of

[311] *Badger*, supra note 35 at para 75: "In *Sparrow …* certain criteria were set out pertaining to justification … While that case dealt with the infringement of aboriginal rights, I am of the view that these criteria should, in most cases, apply equally to the infringement of treaty rights" [emphasis added].
[312] *Mikisew 2005, supra* note 69 at para 63.

unaccountability and majority tyranny lending no legitimacy or weight to infringements that are in the public interest. The uncertainty of what criteria and standards will be applied to assess whether the Crown's conduct is honorable (or consistent with its fiduciary relationship with Indigenous peoples) is as daunting as the promise of entirely novel doctrines. And, the *sui generis* standards of honour or a special trust-like relationship are at risk of being rendered meaningless if no criteria other than generic proportionality is applied to the Crown's means of achieving its objectives (a risk that Abella and Martin point out is especially high in the absence of consultation).

The doctrine of justification is not internally consistent. Aspects of the doctrine are not fit to serve their purported purpose. In particular, the criteria and standards for assessing the validity for legislative objectives fail to protect Aboriginal and Treaty rights from superficially neutral objectives that constitute *de facto* threats, treat the assertion of sovereignty over territories and subjects inconsistently, fail to provide a venue for questioning the assertion of sovereignty over peoples by treating the assertion as justificatory, and fail to affirm rights *as* rights. Doctrinal reforms that correct these problems would go a long way in bolstering the protection of Aboriginal and Treaty rights. In addition to reforms aimed at correcting internal inconsistency and ensuring the doctrine is able to fulfill its purpose, I have argued that one way in which the doctrine of justification could be reformed to provide more effective protection to Aboriginal and Treaty rights is to include a requirement of Nation-to-Nation reciprocity directed at determining whether the community 'as a whole' would be willing to accept a like detriment for the like benefit to the Indigenous community as part of taking an Aboriginal perspective into account in the assessment of whether an objective is compelling. This would strike a more appropriate balance between federal power and federal duty and mitigate the risk of Court's weighing the public interest with a heavy hand by placing some principled limit on the public's desire for dispossession.

Works Cited

Legislation

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, no 5

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

Royal Proclamation of 1763

Specific Claims Tribunal Act, SC 2008, c 22

Jurisprudence

Ahousaht First Nation v Canada (Fisheries and Oceans), 2008 FCA 212

Beattie v Canada, 2002 FCA 105

Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53

British Columbia Fisheries (Re), [1914] AC 153; 15 DLR 308

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

Grassy Narrows First Nation v Ontario (Natural Resources), 2014 SCC 48

Guerin v the Queen, [1984] 2 SCR 335; 13 DLR (4th) 321

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73

Halfway River First Nation v British Columbia (Ministry of Forests), 1999 BCCA 470

Irwin Toy v Quebec (Attorney General), [1989] 1 SCR 927; 58 DLR (4th) 577

Ktunaxa Nation v British Columbia (Forests, Lands, and Natural Resource Operations), 2017 SCC 54

Manitoba Métis Federation v Canada (Attorney General), 2013 SCC 14

Mikisew Cree First Nation v (Canada Governor General in Council), 2018 SCC 40

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69

Mitchell v MNR, 2003 SCC 33

Mitchell v Peguis Indian Band, [1990] 2 SCR 85 at para 135; 71 DLR (4th) 193

Paul v British Columbia (Forest Appeals Commission), 2003 SCC 55

R v Adams, [1996] 3 SCR 101; 138 DLR (4th) 657

R v Agawa, (1988), 65 OR (2d) 505 (CA); 53 DLR (4th) 101

R v Badger, [1996] 1 SCR 771; 113 DLR (4th) 324

R v Côté, [1996] 3 SCR 139; 138 DLR (4th) 385

R v Douglas et al, 2007 BCCA 265
R v Gladstone, [1996] 2 SCR 723; 137 DLR (4th) 648
R v Horseman, [1990] 1 SCR 01; 55 CCC (3d) 353
R v Nikal, [1996] 1 SCR 1013; 133 DLR (4th) 658
R v NTC Smokehouse, [1996] 2 SCR 672; 137 DLR (4th) 528
R v Oakes, [1986] 1 SCR 103; 26 DLR (4th) 200
R v Marshall, [1999] 3 SCR 456; 177 DLR (4th) 513
R v Marshall, [1999] 3 SCR 533; 179 DLR (4th) 193
R v Marshall; *R v Bernard,* 2005 SCC 43
R v Powley, 2003 SCC 43
R v Sparrow, [1990] 1 SCR 1075; 70 DLR (4th) 385
R v Sundown, [1999] 1 SCR 393; 170 DLR (4th) 385
R v Van der Peet, [1996] 2 SCR 507; 137 DLR (4th) 289
Reference Re Succession of Quebec, [1998] 2 SCR 217; 161 DLR (4th) 385
Rio Tinto Alcan v Carrier Sekani Tribal Council, 2010 SCC 43
Southwind v Canada, 2017 FC 906
Taku River Tlingit First Nation v British Columbia (Project Assessment Director), 2004 SCC 74
Tsilhqot'in Nation v British Columbia, 2014 SCC 44.
William v British Columbia, 2012 BCCA 285
Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4

Secondary Material: Journal Articles

Asch, Michael, and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*" (1991) 29:2 Alberta Law Review 498
Beaton, Ryan, "De Facto and De Jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 26:4 Constitutional Forum 25
Binnie, Ian "Business and Indigenous Rights: Reflection after 35 Years of Talking about Section 35" (2018) 83 Supreme Court Law Review (2d) 19
Boisselle, Andrée, "To Dignity Though the Back Door: Tsilhqot'in and the Aboriginal Title Test" (2015) 71 SCLR (2d) 27

Borrows, John, *The Durability of Terra Nullius* (2015) 48:3 UBC Law Review 701

Coyle, Michel, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNBLJ 235

Dufraimont, Lisa, "From regulation to recolonization: Justifiable infringement of aboriginal rights at the Supreme Court of Canada" (2000) 58:1 UT Fac L Rev 1

Hamilton, Robert, and Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729

Hanna, Alan, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 Alta L Rev 817

Harland, Fraser, *Taking the "Aboriginal Perspective" Seriously* (2018) 16/17:1 Indigenous LJ 21

Hogg, Peter W and Daniel Styler, "Statutory Limitation of Aboriginal and Treaty Rights: What Counts as Justification" (2015-2016) 1:1 Lakehead Law Journal 3

Lyon, Noel, "An Essay on Constitutional Interpretation" (1988), 26:1 Osgoode Hall LJ 95

McMorrow, Thomas, "Upholding the Honour of the Crown" (2018) 35:1 Windsor YB Access Just 311

McCrossan, Michael "Eviscerating Historic Treaties: Judicial Reasoning, Settlor Colonialism, and 'Legal' Exercises of Exclusion" (2018) 45:4 Journal of Law and Society 589

McNeil, Kent "How Can the Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997) 8:2 Constitutional Forum 33

Morse, Bradford W, *Tsilhqot'in Nation v British Columbia: Is it a Game Changer in Canadian Aboriginal Title Law and Crown-Indigenous Relations* (2017) 2:2 Lakehead LJ 64

Newman, Dwight G "You Still Know Nothin' 'Bout Me: Toward Cross-Cultural Theorizing on Aboriginal Rights" (2007) 52 McGill LJ 725

Panagos, Dimitrios, *Indigenous Rights and Claims for Freedom in Settlor States*, (2018) 69 UNBLJ 305

Pildes, Richard H, "The Structural Conception of Rights and Judicial Balancing" (2002) 6:2 Rev Const Stud 179

Posner, Richard A "The Present Situation in Legal Scholarship" (1980) Yale LJ 1113

Russell, Peter H, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61:2 Sask L Rev 247

Samson, Colin, *Canada's Strategy of Dispossession Aboriginal Land and Rights Cessions in Comprehensive Land Claims* (2016) 31:1 Canadian Journal of Law and Society 87

Vermette, D'Arcy, "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" (2011) 29 Windsor Y B Accss Just 55
Vermette, D'Arcy "Colonialism and the Suppression of Aboriginal Voice" 40:2 Ottawa Law Review 225
Walters, Mark D, *The Morality of Aboriginal Law* (2006) 31:2 Queen's LJ 470 at 499 to 501.
Wylie, Hanna, *Unpacking "Reconciliation": Contested Meanings of a Constitutional Norm* (2017) 22:3 Rev Const Stud 379
Wolfe, Patrick, "Settlor Colonialism and the Elimination of the Native" (2006) 8:4 Journal of Genocide Research 387

Secondary Material: Essays

Blasi, Luca di and Christophe F E Holzhey, "Epilogue" in *The Power of Tolerance: A Debate* (New York: Columbia University Press, 2014)
Brown, Wendy, and Rainer Forst, "A Debate Between Wendy Brown and Rainer Forst" in *The Power of Tolerance: A Debate* (New York: Columbia University Press, 2014)
Borrows, John "Earth Bound: Indigenous Resurgence and Environmental Reconciliation" in *Resurgence and Reconciliation* (Toronto: University of Toronto Press, 2018).
Borrows, John, and James Tully, "Introduction" in *Resurgence and Reconciliation* (Toronto: University of Toronto Press, 2018).
Carastathis, Anna, "The Non-Performativity of Reconciliation" in *Reconciling Canada Critical Perspectives on the Culture of Redress* (University of Toronto, 2013)
Simpson, Audra "Sovereignty, Sympathy and Indigeneity" in *Ethnographies of US Empire* (Durham: Duke University Press, 2018).
Wendy Brown, "Suffering the Paradoxes of Rights" *in Left Legalism/ Left Critique* (Durham: Duke University Press, 2002)
Walters, Mark D, "'Looking for a knot in the bulrush': Reflections on Law, Sovereignty, and Aboriginal Rights" in *From Recognition to Reconciliation* (Toronto: University of Toronto Press, 2008)

Secondary Material: Monographs

Alfred, Taiaiake, *Peace, Power, Righteousness* (Oxford University Press, 2009)

Alfred, Taiaiake, *Wasáse: indigenous pathways of action and freedom* (University of Toronto Press, 2009)

Arendt, Hanna, *The Origins of Totalitarianism* (New York: Harcourt, 1951)

Aristotle, *Nicomachean Ethics* translated by Joe Sachs (Indianapolis: Focus, 2002)

Asch, Michael, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014

Barthes, Roland, *Mythologies* translated by Annette Lavers (New York: Hill and Wang, 1972)

Borrows, John, Canada's Indigenous Constitution (Toronto: University of Toronto Press, 2010)

Cairns, Alain C, *Citizen's Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000)

Césaire, Aimé, *Discourse on Colonialism,* translated by Joan Pinkham (New York: Monthly

Chomsky, Noam, *On Anarchism* (New York: The New Press, 2103)

Review Press, 2000)

Clark, Bruce, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990)

Coulthard, Glen Sean, *Red Skins White Masks* (Minneapolis: University of Minnesota Press, 2014)

Forst, Rainer, *Toleration in Conflict* (Cambridge University Press, 2003).

Hegel, GWF, *Natural Law* translated by TM Knox (University of Pennsylvania, 1975)

Hogg, Peter, *Constitutional Law of Canada* 5th ed (Scarborough: Thomson Carswell, 2007)

Latour, Bruno, *We Have Never Been Modern*, (Cambridge: Harvard University Press, 1993)

Leanord, Gary SD, *The Kiaros Documents* (Ujamaa Centre, 2010).

Manuel, Arthur *The Reconciliation Manifesto: Recovering the Land and Rebuilding the Economy* (Toronto: James Lorimer, 2017)

McAdam, Sylvia (Saysewahum) *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich, 2015)

Newman, Dwight G, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014)

Pitkin, Hanna Fenichel, *The Concept of Representation* (Berkeley: University of California, 1967).

Rawls, John *Political Liberalism* (New York: Columbia University Press, 2005)

Simpson, Leanne Betasamosake, *As We Have Always Done: Indigenous Freedom Through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017)

Simpson, Leanne Betasamosake, *Dancing on Our Turtles Back* (Winnipeg ARP, 2011)

Supiot, Alain *Homo Juridicus* (London: Verso, 2007)

Therborn, Göran, *The Ideology of Power and the Power of Ideology* (London: Verso, 1980)

Truth and Reconciliation Commission of Canada, *Final Report Volume One* (Toronto: Lorimer, 2015)

Unger, Roberto Mangaberia, *What Should Legal Analysis Become?* (London: Verso, 1996)

Secondary Materials: Other

Andrew Griffith, "Indigenous Voters and the 2019 Election" February 1 2018 online: *Policy Options* <policyoptions.irpp.org/magazines/february-2018/indigenous-voters-and-the-2019-election/>

Assembly of Nova Scotia Mi'kmaw Chiefs "Moderate Livelihood Fishery Update, August 2020

Government of Canada, "Settlement Report on Specific Claims" online: *Reporting Centre on Specific Claims* <services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx>