

SOLEMN PROMISES: TREATY RIGHTS IN THE SHADOW OF SPARROW

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Abstract

Aboriginal rights are rooted in the historical relationship between the Indigenous peoples of Canada and the British Crown and attempt to reconcile the prior occupation of lands by the Aboriginal peoples with claims of Crown sovereignty. In *Van der Peet*, Lamer C.J.C. stated Aboriginal rights enjoy constitutional status because of one simple fact, “when the first Europeans arrived in North America, aboriginal peoples were already here, living in organized communities on the land, and participating indistinctive cultures as they had done for centuries.”

Treaty rights on the other hand, owe their existence to a series of consensual agreements between the signatories and represent an ongoing relationship between the parties. Treaties represent an integral part of the early Indigenous-European relationship, initially offering peace and friendship and later a vehicle through which the Europeans could acquire lands from the Aboriginal peoples for settlement.

Over a period spanning the past three decades, the Supreme Court of Canada has struggled to alter their interpretation of the nature and content of Aboriginal and treaty rights in Canada. Over the last decade alone, the Court has addressed such issues as the Aboriginal right to fish commercially, high-stakes gambling as an incident of self-government, Aboriginal interests in lands, and recently the right of an Aboriginal group to transport goods internationally exempt from duties or taxes.

In the seminal decision *R. v. Sparrow*, the Supreme Court of Canada attempted for the first time to address the scope and content of constitutionally protected Aboriginal rights. Having determined that Canada held sovereignty over and therefore was entitled to legislate in relation to Aboriginal peoples, the Court concluded that Aboriginal rights existed at common law and that these common law rights, whatever they may be, received constitutional protection by virtue of s. 35(1). Thus any legislative enactment designed to infringe on these rights must meet constitutional standards for justification.

Despite the fact these rights fall outside the parameter of the *Canadian Charter of Rights and Freedoms*, the Court proceeded to apply a *Charter-like* limitation on these rights, holding them subject to reasonable regulation, so long as the legislation in question was capable of meeting a stringent test for justification. While in *Sparrow*, the issue before the Court was the infringement of constitutionally protected Aboriginal rights, subsequently courts at all levels adopted the test designed to justify infringements to treaty rights protected by s. 35(1) as well.

However, in the period following *Sparrow*, the Court has watered down the effects of this decision by diluting the legislative intent portion of the test to such a degree that it risks becoming a non-factor in the justification process. In this paper I contend that the use of the *Sparrow* test, particularly as that test has been interpreted by the Court in the period following *Sparrow* is flawed and to use this test as a tool for determining when constitutionally protected Aboriginal treaty rights might be infringed multiplies this flaw to a critical point.

INTRODUCTION

Over a period spanning the past three decades, the Supreme Court of Canada has struggled to alter their interpretation of the nature and content of Aboriginal and treaty rights in Canada. Over the last decade alone, the Court has addressed such issues as the Aboriginal right to fish commercially,¹ high-stakes gambling as an incident of self-government,² Aboriginal interests in lands,³ and recently the right of an Aboriginal group to transport goods internationally exempt from duties or taxes.⁴

This struggle has benefited from the fact that, unlike earlier periods in Canadian-Aboriginal history, the settler society is not attempting to suppress the goals of the Indigenous peoples.⁵ In aid of this, the Court has determined that the Aboriginal and

¹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289, 4 C.N.L.R. 177, 1996 SCJ 77 (S.C.C.) [*Van der Peet*, cited to S.C.R.]; *R. v. N.T.C. Smokehouse*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528, 4 C.N.L.R. 130, 1996 SCJ 78 (S.C.C.) [*N.T.C. Smokehouse*, cited to S.C.R.]; *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648, 4 C.N.L.R. 65, 1996 SCJ 79 (S.C.C.) [*Gladstone*, cited to S.C.R.].

² *R. v. Pamajewon*, [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204, 4 C.N.L.R. 164, 1996 SCJ 20 (S.C.C.) [*Pamajewon*, cited to S.C.R.].

³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, [1998] 1 C.N.L.R. 14, 1997 SCJ 108 (S.C.C.) [*Delgamuukw*, cited to S.C.R.].

⁴ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385, 3 C.N.L.R. 122, 2001 SCJ 33 (S.C.C.) rev'g 167 D.L.R. (4th) 702 (F.C.A.) [*Mitchell v. M.N.R.*, cited to S.C.R.].

⁵ There are abundant examples of the oppression of the Indigenous peoples at the hands of first the British Crown and later the Canadian government. For early examples of this see generally, E.B. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs In Canada*. (Vancouver: U.B.C. Press, 1986) [Titley, *A Narrow Vision*]; also, J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian White Relations in Canada* (Toronto: University of Toronto Press, 1991) [Miller, *Skyscrapers Hide the Heavens*], citing Duncan Campbell Scott, (then Deputy Minister of the Indian Department) at 207:

I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone...But after one hundred years, after being in close contact with civilization it is enervating to the individual or to a band to continue in a state of tutelage, when he or they are able to take their position as British citizens or Canadian citizens, to support themselves, and stand alone. That has been the whole purpose of Indian education and advancement since the earliest times...Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question and no Indian department.

For a modern example see the famous 1969 Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Canadian Indian Policy, 1969* (Ottawa: Queen's Printer, 1969) [*White Paper*]; Also, see Kent McNeil "Aboriginal Title and Section 88 of the Indian Act" (2000) 34 U.B.C.L. Rev. 159 [McNeil, *Aboriginal Title and Section 88 of the Indian Act*] at 163 Professor McNeil stated:

treaty rights protected by virtue of s. 35(1) of the *Constitution Act, 1982*,⁶ should be interpreted in a purposive manner; one that reconciles prior Aboriginal occupation of lands with the Crown sovereignty.⁷

For the most part, the judicial interpretations during this period have been positive in nature. However, despite their recognition in the *Constitution Act, 1982*,⁸ colonial doctrine and British values continue to shape the ways in which the legal system interprets these rights, resulting in a restrictive interpretation of the rights protected, and a liberal interpretation on ways in which those rights may be limited by governmental regulation.⁹ Mary Ellen Turpel warned of this more than a decade ago, stating:

Because the rights regime is dominant, sanctioned and elevated as the supreme law, it must filter all conflicts through its categories and conceptual apparatus. The rights regime dominates the culturally different interpretive communities by using its own conceptual framework to apply the provisions of the Charter to "others" even though these provisions may be interpreted in a "special" way. It decides for those it doesn't understand, using a framework which undermines their objectives. It performs a levitation trick by transforming differences into rights within the supreme law of Canada.¹⁰

The pre-*Calder* lack of judicial acknowledgment of common law Aboriginal rights may explain why s. 88 accorded protection against provincial laws of general application to treaties, but not to Aboriginal rights, as the federal government was probably of the view that no such right existed.

⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, (U.K.), 1982, c. 11 [*Constitution Act, 1982*]. Section 35(1) states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.

⁷ *Van der Peet*, *supra* note 1 at 539.

⁸ *Constitution Act, 1982*, *supra* note 6.

⁹ See, Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) [Bakan, *Just Words*] at 24.

¹⁰ Mary Ellen Turpel "Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y. B. 3 [Turpel, *Aboriginal Peoples and the Canadian Charter*] at 10.

For several years following their elevation to constitutional status in 1982, it was unclear what, if anything, was protected.¹¹ Finally, in the seminal decision *R. v. Sparrow*,¹² the Supreme Court attempted for the first time to address the scope and content of constitutionally protected Aboriginal rights.

First, the Court concluded that Canada held sovereignty over and therefore was entitled to legislate in relation to the Aboriginal peoples.¹³ Next, the Court concluded that Aboriginal rights existed at common law and that these common law rights, whatever they may be, received constitutional protection by virtue of s. 35(1). Thus, any legislative enactment designed to infringe on these rights must meet constitutional standards for justification. Despite the fact that these rights fall outside the parameter of the *Canadian Charter of Rights and Freedoms*,¹⁴ the Court proceeded to apply a *Charter*-like limitation on these rights, holding them subject to reasonable regulation, so long as the legislation in question was capable of meeting a stringent test for justification.¹⁵

¹¹ See, Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) [Schwartz, *First Principles, Second Thoughts*] at c. 24.

¹² *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, 3 C.N.L.R. 160, 1990 SCJ 49 (S.C.C.) [*Sparrow*, cited to S.C.R.].

¹³ *Ibid.* at 1103 Dickason C.J. and La Forest J. stated:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed underlying title to such lands was vested in the Crown.

¹⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, (U.K.), 1982, c. 11. [*Charter*].

¹⁵ Section 1 of the *Charter* provides for the limitation of the enumerated rights. It states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

For an outline on the test designed to determine when rights guaranteed by the *Charter* are subject to limitation see, *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, 1986 SCJ 8 (S.C.C.) [*Oakes*, cited to S.C.R.].

While in *Sparrow*,¹⁶ the issue before the Court was the infringement of constitutionally protected Aboriginal rights, subsequently courts at all levels adopted the test designed to justify infringements to treaty rights protected by s. 35(1) as well. In *R. v. Joseph*,¹⁷ the accused, members of the Tsawout Indian Band, were arrested while fishing at a location closed by the Department of Fisheries and Oceans. Citing a treaty signed in 1852 between James Douglas and the Saanich Indians, the accused argued a treaty right as their defense. In applying the *Sparrow* test to the case, Murphy J. acknowledged that the case [*Sparrow*] dealt with Aboriginal rather than treaty rights. Despite this distinction, he proceeded to determine the case at bar on the premise that, “[T]he foregoing applies as well to treaty rights.”¹⁸ Similarly, in *R. v. Bombay*,¹⁹ Austin J.A. dealt with the issue of applying the *Sparrow* test to treaty rights in the following manner:

The *Sparrow* case dealt with aboriginal rights. The language of the decision of the Supreme Court of Canada in that case, however, is equally applicable to treaty rights. In *R. v. Joseph*, [1990] 4 C.N.L.R. 59 (B.C.S.C.) Murphy J. held that the framework provided by the Supreme Court in *Sparrow*, “applies also to treaty rights.” I agree.²⁰

No reason for this has been forthcoming to support these conclusions. It may be deduced that the logic is that both Aboriginal and treaty rights are linked by s. 35(1). The connection of Aboriginal and treaty rights to the *Sparrow* justificatory test has resulted in considerable criticism of the Court. Professor Leonard Rotman stated:

The failure of case law to explain why the *Sparrow* test ought to apply to treaty rights posits either of two scenarios; that the application of the *Sparrow* test to treaty rights is so obvious as to negate the need for

¹⁶ *Sparrow*, *supra* note 12.

¹⁷ *R. v. Joseph*, [1990] 4 C.N.L.R. 59, 1990 BCJ 1749 (B.C.S.C.) [*R. v. Joseph*].

¹⁸ *Ibid.* at 69.

¹⁹ *R. v. Bombay*, [1993] 1 C.N.L.R. 92, 61 O.A.C. 312, OJ 164 (Ont. C.A.) [*R. v. Bombay*].

²⁰ *Ibid.* at 94.

explanation, or that there is no informed basis upon which to apply the *Sparrow* test to treaty rights. It is suggested that the latter is the more accurate statement. There are significant distinctions between Aboriginal and treaty rights, which militate against the same justificatory standard for the limitation of those rights.²¹

Aboriginal rights are rooted in the historical relationship between the Indigenous peoples and the British Crown and attempt to reconcile the prior occupation of lands by the Aboriginal peoples with claims of Crown sovereignty.²² However, they are founded in the works of Spanish theologian, Francisco de Vitoria.²³ Vitoria claimed “certain basic rights inhere in men as men, not by reason of their race, creed or colour, but by reason of their humanity.”²⁴ Vitoria asserted the principle that the Indigenous peoples were the true owners of the lands of North America, from both a private and public point of view.²⁵ While the dominant theory of the day was that, “Indians stood in the way of civilization and that progress demanded that they be pushed from the lands they claimed,”²⁶ Vitoria argued that “all people, whatever their religion or creed or perceived level of civilization, were entitled by virtue of their humanity to respect for their possessions.”²⁷

²¹ Leonard Rotman. “Defining Parameters: Aboriginal Rights, Treaty Rights and the *Sparrow* Justificatory Test” (1997) 36 Alta. L. Rev. 149 [Rotman, *Defining Parameters*] at 155. Also, see the comments of W.J. Sheffer “R. v. Marshall: Aboriginal Rights and Treaty Wrongs” (2000) 10 W.R.L.S.I. 77 [Sheffer, *R. v. Marshall: Aboriginal Rights and Treaty Wrongs*] at 99.

²² *Van der Peet*, *supra* note 1 at 548.; *Gladstone*, *supra* note 1 at 774-775; *Delgamuukw*, *supra* note 3 at 1107.

²³ Francisco de Vitoria gave two lectures in 1534, *De Indis* and *De Jure Belli*, during which he dealt with the nature of Indigenous rights. These are reproduced in Ernest Nys ed., *Francisci de Victoria De Indis et De Ivre Belli Relectiones* (Washington: The Carnegie Institute of Washington, 1917) [Nys, *Francisci de Victoria*]; also, *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185, 3 W.W.R. 97, 1991 BCJ 525 (B.C.S.C.) var’d. 104 D.L.R. (4th) 470 (B.C.C.A.) [*Delgamuukw v. British Columbia*, cited to D.L.R.].

²⁴ Felix Cohen, “The Spanish Origin of Indian Rights in the Law of the United States.” (1942) 31 Geo. L. J. 1 [Cohen, *The Spanish Origin of Indian Rights in Law of the United States*] at 11-12.

²⁵ Peter Cumming & Neil Mickenberg, *Native Rights in Canada* 2d. ed. (Toronto: The Indian-Eskimo Association of Canada in Association with General Publishing Co. Ltd., 1972) [Cumming & Mickenberg, *Native Rights in Canada*] at 14.

²⁶ Cohen, *The Spanish Origin of Indian Rights in Law of the United States*, *supra* note 24 at 44.

²⁷ William Pentney. “The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982: Part II Section 35, The Substantive Guarantee” (1988) 22:2 U.B.C.L. Rev. 207 [Pentney, *The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982*] at 224.

Judicial recognition of these rights dates back to the eighteenth century. In 1773 the British Privy Council concluded that the Mohegan Indians: “were a distinct nation and therefore exempt from the municipal legal system established by the colonial settlers” in Connecticut.²⁸ This case concerned a series of land transactions between the colonists and the Indians dating back to 1640. One member of the Royal Commission, Daniel Horsmanden, offered the opinion that,

The Indians were a distinct people, that the property of the soil was in the Indians, and that royal charters did not *ipso facto* appropriate lands delimited therein to subjects until fair and honest purchases thereof were made from the natives.²⁹

In *Van der Peet*,³⁰ Lamer C.J.C. asserted the principle that Aboriginal rights enjoy constitutional status, “because of one simple fact; when Europeans arrived in North America, aboriginal peoples were already here, living in organised communities on the land, and participating in distinctive cultures as they had done for centuries.”³¹ Similarly, in their report, the *Royal Commission on Aboriginal Peoples*, [RCAP] affirmed this principle, stating:

[b]efore the arrival of Europeans, virtually all of Canada was inhabited and used by Aboriginal peoples. Whether they were comparatively settled fishers, or horticulturalists, or wide-ranging hunters, each people occupied specific territories and had systems of tenure, access and resource conservation that amounted to ownership and governance—although those systems were not readily understood by Europeans, in part because of language and cultural differences.³²

²⁸ *Mohegan Indians v. Connecticut (1705-1773)* (P.C.) unreported. See, Joseph Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950) [Smith, *Appeals to the Privy Council*] at 422-442; also see generally, Mark Walters “Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America” (1995) 33 *Osgoode Hall L. J.* 785. [Walters, *Mohegan Indians v. Connecticut*].

²⁹ Smith, *Appeals to the Privy Council*, *ibid.* at 434. The Privy Council affirmed this conclusion.

³⁰ *Van der Peet*, *supra* note 1.

³¹ *Ibid.* at 538.

³² Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) [RCAP, vol. 2] at 452.

Treaty rights on the other hand, have historically owed their existence to a series of consensual agreements between the signatories and represent an ongoing relationship between the parties. Treaties signify an integral part of the early Indigenous-European relationship, initially offering peace and friendship and later a vehicle through which European settlers acquired lands from the Aboriginal peoples.³³ They represent historical negotiated compacts between first the British Crown and later the Canadian government on the one hand, and the Aboriginal signatories on the other. As such, the terms of these historic agreements varied considerably, and their interpretation must be carried out in a manner consistent with the context in which they were created. In certain circumstances treaty rights simply affirmed existing Aboriginal rights, such as the right to hunt, gather and fish, while in other circumstances, treaties created specific new rights and obligations or altered the historic rights of the Aboriginal nation involved.

In the period following the Supreme Court of Canada decision in *Sparrow*,³⁴ the Court has expanded the legislative objectives it is willing to accept as valid for infringing upon constitutionally protected Aboriginal rights and, as a result of their inclusion by the courts, treaty rights as well. As will be identified, the Courts' decisions in *Gladstone*,³⁵ and *Delgamuukw*,³⁶ represent a dramatic shift from the strict criteria of legislative objectives envisioned by Dickson C.J.C. and La Forest J. in *Sparrow*.³⁷

As part of the supreme law of Canada, s. 35(1) demands that the rights therein be recognised and given priority over other non-constitutionally protected rights. As a

³³ Sebastien Grammond "Aboriginal Treaties and Canadian Law" (1994-1995) 20 Queen's L. J. 57 [Grammond, *Aboriginal Treaties and Canadian Law*] at 57-58.

³⁴ *Sparrow*, *supra* note 12.

³⁵ *Gladstone*, *supra* note 1.

³⁶ *Delgamuukw*, *supra* note 3.

³⁷ *Sparrow*, *supra* note 12.

result, courts have both the authority and a legal obligation to strike down legislative enactments inconsistent with those rights protected by virtue of s. 35(1).

Rights, we may conclude, are not zero sum in nature. In other words, they are not something we either enjoy in their entirety or not at all. As a result, it may be reasonable to conclude that inherent Aboriginal rights are not absolute and therefore infringement of these rights may be justified in certain, carefully defined, circumstances.³⁸ However, it is doubtful that the same can be said of constitutionally protected Aboriginal treaty rights. If we are to presume these historic treaties represented solemn promises invoking the honour of the Crown, if we are to presume that the Crown always intends to fulfill its obligations, and finally, if we are to take as a given that no sharp dealing would be sanctioned, it seems reasonable to conclude that any attempt to infringe on the rights provided in those treaties should be subjected to utmost scrutiny and regulation.³⁹ If my presumption is correct, the use of the *Sparrow* test, particularly as that test has been interpreted by the courts since *Sparrow*, is an inappropriate tool of analysis for justifying infringements of constitutionally protected treaty rights and may lead to an overriding of those rights in a manner not envisioned by its authors in the Supreme Court of Canada.

This work will undertake an examination of the Aboriginal and treaty rights in Canada as well as a critical examination of the test designed to justify infringements of these rights. Chapter I will examine the historical foundations of British common law in Canada. Beginning with an examination of the early periods of North American

³⁸ I use the term “inherent” to acknowledge the fact that Aboriginal rights originate within the various Aboriginal nations and thus stem from sources that existed prior to contact with the Europeans. This principle was recognised in *Calder v. British Columbia*, [1973] S.C.R. 313 at 390, 34 D.L.R. 145, 7 C.N.L.C. 91 (S.C.C.) [*Calder*, cited to S.C.R.].

³⁹ This criteria of assessment reflects the modern theory of treaty interpretation as outlined in *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324, 2 C.N.L.R. 77, 1996 SCJ 39 (S.C.C.) [*Badger*, cited to S.C.R.].

exploration, the chapter will attempt to identify the evolution of British law in North America. The chapter will address several important questions such as the theoretical basis of the claims of European sovereignty over regions that had, for time immemorial, been occupied by thousands if not millions of Indigenous people. Under what authority did these Europeans believe they held the power to possess and claim underlying title to the lands?

Chapter II will explore the nature and content of Aboriginal rights. Where do these rights stem from and what is the nature of the rights? The chapter will attempt to outline the principles behind which the courts have explained these inherent rights and the ways in which the courts have interpreted the rights, past and present.

Chapter III will explore the nature of treaty rights. The chapter will outline the historical background surrounding treaty rights, both before and after confederation as well as the terms of treaty interpretation as outlined by the Supreme Court of Canada. The chapter will attempt to illustrate the sacred nature of these rights, allowing the reader to understand why it is difficult to reconcile their infringement with the constitutional status afforded them by s. 35(1).

Any examination of the Aboriginal peoples must include a discussion of the nature of the fiduciary relationship between the Crown and these peoples. Chapter IV will undertake such a discussion, exploring ways in which this relationship has developed and what it means to the dynamic of the Crown-Native relationship. Beginning with an illustration of the nature of fiduciary obligations, the chapter will explore how these principles have been applied to the Indigenous peoples of Canada, first on the basis of a political trust and more recently on the basis of a fiduciary obligation.

Chapter V will provide an in depth discussion of the *Sparrow* case. Beginning with an examination of the lower court rulings, the chapter will attempt to provide an understanding of the nature of permissible infringement as outlined in this seminal decision. The chapter will illustrate how the Supreme Court of Canada came to their conclusion that only compelling and substantial legislative enactments should qualify to infringe Aboriginal rights and the methods by which these rights may be impeded.

Chapter VI will outline how the strict principles guiding infringement have been negated in the years following *Sparrow*. The chapter will attempt to illustrate how the courts have watered down the effects of this decision by diluting the legislative intent portion of the test to such a degree that it risks becoming a non-factor in the justification process, leaving only the honour of the Crown to be considered in any examination of the infringement of treaty rights.

CHAPTER I

Introduction

When the first Europeans arrived on the shores of North America, rather than finding a vast emptiness and a land *terra nullius*, they discovered a land populated by an Indigenous people living in organised societies. These societies were both self-governing and self-sufficient.⁴⁰ In *Gladstone*,⁴¹ Lamer C.J.C. stated, “[A]boriginal rights are recognised and affirmed in s. 35(1) in order to reconcile the existence of distinctive societies prior to the arrival of the Europeans in North America with the assertion of Crown sovereignty over that territory.”⁴²

It is uncertain how many Indigenous people inhabited North America prior to European contact. Estimates range from 500,000 to 2 million.⁴³ For the most part these people survived by hunting, fishing and gathering, however along the St. Lawrence River and in what is now southern Ontario, pockets of agricultural societies developed as well.⁴⁴

Prior to contact, these Indigenous people enjoyed an independent status with a legal as well as a just claim of right to possession of their lands. This status and principle

⁴⁰ See *Van der Peet*, *supra* note 1 at 537-538; also Bruce Wildsmith, “The Mi’kmaq and the Fishery: Beyond Food Requirements” (1995) 18 Dal. L. J. 116 [Wildsmith, *The Mi’kmaq and the Fishery: Beyond Food Requirements*] at 116.

⁴¹ *Gladstone*, *supra* note 1.

⁴² *Ibid.* at 682.

⁴³ Olive Patricia Dickason, *Canada’s First Nations: A History of the Founding People From the Earliest Times* 2d. ed. (Oxford: Oxford University Press, 1997) [Dickason, *Canada’s First Nations: A History of the Founding People*] at 43; See also H.E. Driver, *Indians of North America*, 2d. ed. (Chicago: University of Chicago Press, 1969) [Driver, *Indians of North America*] at 64. Professor Driver suggests that the total Indigenous population may have been as high as 30 million throughout North America and Mexico combined.

⁴⁴ Margaret Conrad *et al.*, *The History of the Canadian Peoples: Beginnings to 1867* vol. 1 (Toronto: Copp, Clark Pitman Ltd., 1993) [Conrad *et al.*, *The History of the Canadian Peoples*].

was recognised in *Calder*,⁴⁵ where, in his dissenting opinion Hall J. cited with approval the words of Marshall C.J. in *Johnson and Graham Lessee v. McIntosh*,⁴⁶ stating:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded: but were necessarily, to a considerable extent, impaired. *They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and use it according to their discretion*, but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.⁴⁷

Each individual nation claimed exclusive right to the lands they occupied, often in conjunction with another Indigenous nation. Title was vested with the nation and was communal in nature.⁴⁸ Thus, when in the *Treaty of Paris*,⁴⁹ France ceded its claims to lands in Canada to the British, it did not cede authority over the Indigenous population or the lands held by these people, having never claimed such authority to begin with. Olive Dickason stated:

⁴⁵ *Calder*, *supra* note 38.

⁴⁶ *Johnson and Graham Lessee v. McIntosh* 21 U.S. (8 Wheat.) 543 (1823) (U.S.S.C.) [*Johnson v. McIntosh*]

⁴⁷ *Calder*, *supra* note 38 at 382 (Emphasis added).

⁴⁸ Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (D. Phil. Thesis, Oxford University, 1979; Reprinted Saskatoon: University of Saskatchewan Native Law Centre, 1979) [Slattery, *The Land Rights of Indigenous Canadian Peoples*] at 2.; also, *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.) [*Amodu Tijani v. Southern Nigeria*] at 403-404:

In India, as in Southern Nigeria, there is yet another fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves a study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

⁴⁹ *The Definitive Treaty of Peace and Friendship Between His Britannick Majesty, The Most Christian King, and the King of Spain, 10 February, 1763*. [*Treaty of Paris*] reprinted in Fred L. Israel ed., *Major Peace Treaties of Modern History: 1649-1967* vol. 1 (New York: Chelsea House Publishers, 1967) [Israel, *Major Peace Treaties*] at 305.

Far from having been subjects of the French, the Mi'kmaq and Wuastukwiuk had developed them as friends and allies. They had accepted the French King as their father because he sent missionaries to teach them their new religion, but the idea that they had any claims to their lands, or that they owed him any more allegiance than they owed their own chiefs, did not make sense to them. Periodically, they reminded the French that they had only granted usage and usufruct of their lands, which still belonged to the Mi'kmaq.⁵⁰

While this examination begins with recognition of the Indigenous peoples as self-governing and self-sufficient prior to European contact, by the end of the nineteenth century this reality had been transformed. By that time the Indigenous people had become a minority, while those of European heritage had come to dominate all aspects of

⁵⁰ Dickason, *Canada's First Nations: A History of the Founding People*, supra note 43 at 85. However this point is controversial and was a subject of dispute in the cases of *R v. Adams*, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657, 4 C.N.L.R. 1, 1996 SCJ 87 (S.C.C.) and its companion case *R v. Cote*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385, 4 C.N.L.R. 26, 1996 SCJ 93 (S.C.C.). In each of these cases the Crown took the position that the Aboriginal peoples could not assert the existence of Aboriginal title in light of the process of French colonisation and the transition of British sovereignty following the capitulation of the French. The Crown in both cases argued that no Aboriginal right survived claims of French sovereignty. This argument was rejected by the Supreme Court of Canada, Lamer C.J. stating in *Cote* at 170-171:

To begin, I am not persuaded that the status of French colonial law was as clear as the respondent suggests. As H. Brun admitted in "Les droits des Indiens", supra at p. 442, while French law never explicitly recognised the existence of a sui generis aboriginal interest in land, "nor did it [explicitly] state that such an interest did not exist." Indeed, some legal historians have suggested that the French Crown never assumed full title and ownership to the lands occupied by aboriginal peoples in light of the nature and pattern of French settlement in New France.

According to this historical interpretation, from the time of Champlain to 1763, French settlement within New France fell almost exclusively within the St. Lawrence Valley. At the date of Champlain's arrival in the Montreal area in 1603, the surrounding region was largely devoid of indigenous inhabitants. In one of the mysteries of the history of New France, the Iroquois people who occupied the region at the date of Jacques Cartier's visit in 1534 had simply disappeared by 1603. The French colonists thus claimed and occupied this particular area as *terra nullius*. But these historians argue that the French chose not to further encroach on the traditional lands of the aboriginal peoples surrounding the valley. In the west of New France, for instance, French seigneuries did not extend further than the Long-Sault, stopping well before the vague eastern boundary of the ancestral lands of the Algonquins. The French, of course, had good reason for not encroaching upon those lands, as they were both outnumbered and surrounded by potentially hostile forces in the Valley. Content with occupation of the *terra nullius* of the Valley, the French thus never engaged in a pattern of surrender and purchase similar to British colonial policy. In this interpretation, it is argued that the French Crown only assumed ownership of the lands lining the St. Lawrence River which it actually occupied and organised under the *Seigneurial* system.

life on this continent. Where the relationship between the Indigenous peoples and the settler nation began on a nation-to-nation basis, so too the nature of the relationship evolved. No longer did members of the settler nation recognise the Indigenous people as independent nations. Rather, they became a group governed by a branch of the common law known as the doctrine of Aboriginal rights.⁵¹

i. Origins of British Authority

With the development of the nation state came a corollary development of theories of international law. “International law began to develop in the fifteenth and sixteenth centuries, at the same time as the rise of the modern nation state.⁵² Prior to this, the Pope as head of the Holy Roman Empire, often mediated relations between European states.⁵³

During this period, there was an expanding community of sovereign states. The nexus connecting these states was a series of treaties or alliances, all based on the natural law theories that equality was essential to the continued balance of power. This system

⁵¹ Brian Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 Can. Bar Rev. 196 [Slattery, *Making Sense of Aboriginal and Treaty Rights*] at 198.

⁵² Sharon A. Williams & Armand L.C. de Mestral. *An Introduction to International Law: Chiefly Interpreted and Applied in Canada* (Toronto: Butterworths, 1979) [Williams & de Mestral, *An Introduction to International Law*] at 1.

⁵³ An example of this can be seen in the issuance of the Papal Bull *Inter Caetera*, 4 May, 1493. This edict was designed to resolve any dispute between Spain and Portugal over title over lands “found or to be found.” They not only allocated exclusive powers to pursue missionary activities to both states, they also drew an imaginary north-south boundary line 100 leagues west of the Azores between the present and future possessions of the two nations. This line was amended in the Spanish-Portuguese *Treaty of Tordesillas*, 6 June, 1494 to a line 370 leagues west of the Cape Verde Islands, which according to Robert Williams Jr. secured Spain’s title to most of the Americas as well as guaranteeing Portuguese control over the eastern most part of South America, now constituting Brazil. This agreement was later extended to the Pacific Ocean in the *Treaty of Zaragoza*, 22 April, 1529. See, William R. Morrison, *Under The Flag: Canadian Sovereignty and the Native People of Northern Canada* (Ottawa: Research Branch Indian and Northern Affairs, 1984) [Morrison, *Under The Flag*] at 4; also Francis Gardner Davenport ed., *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (Washington: Carnegie Institute, 1917) [Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies*] at 75-78.; also Robert Williams Jr. “The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought” (1983) 57 S. Cal. L. Rev. 1 [Williams: *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*] at note 133.

reached its apex during the nineteenth century, when treaties linked more than 1,000 European and Indigenous nations globally.⁵⁴

With the evolution of the nation state came a code of rules, developed to regulate relations. Initially these rules pertained only to the civilized or “Christian states,” of Western Europe, “for pagans and barbarians were felt by many to have few or no rights.”⁵⁵ The powers of Europe felt themselves superior to various non-Christian Indigenous populations, and they relied on the papacy, as well as royal charters to assume authority over these people.

In accordance with the principles of international law developed at this time, there were several methods by which a European nation might claim authority over a colonial acquisition; discovery, conquest, annexation or cession.⁵⁶ All represented a manifestation on the part of the colonizing nation to assume authority over the colony in question and while all are equally effective, the manner of acquisition is important when considering the development of law in the colony acquired.

Discovery, including settlement, referred to the acquisition by one Christian sovereign of a territory that was not under the authority of another Christian sovereign. Such a land was declared to be *terra nullius*.⁵⁷ With lands acquired by discovery or

⁵⁴ James Y. Henderson *et al.* *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell Publishing, 2000) [Henderson *et al.*, *Aboriginal Tenure in the Constitution of Canada*] at 89.

⁵⁵ *Ibid.* at 5.

⁵⁶ See, Sir W. Blackstone, *Commentaries on the Laws of England* vol. 1 (Philadelphia: Rees Welsh and Co., 1897) [Blackstone, *Commentaries on the Laws of England*] at 107-08.; also, Sir K. Roberts-Wray, *Commonwealth and Colonial Law* (New York: Frederick A. Praeger, Publishers, 1966) [Roberts-Wray, *Commonwealth and Colonial Law*] at 99-106.

⁵⁷ This does not necessarily mean that the land in question was uninhabited at the time of discovery. The distinction being that the lands had not been claimed by a Christian sovereign of Europe. Indigenous lands were held to be unoccupied as the Indigenous peoples were not considered civilized and thus *terra nullius* by European nations and therefore the doctrine of discovery applied to these lands. See, *Cooper v. Stuart*, [1889] 14 App. Cas. 286 (P.C.) [*Cooper v. Stuart*]. Lord Watson, citing Blackstone, *Commentaries on the Laws of England*, *Ibid.* at 107 stated:

settlement, English law was considered in force at the time of acquisition. Roberts-Wray stated:

If a colonizing project is undertaken with the prior authority of the Crown, the settlers take possession on behalf of the Crown, and the territory becomes *ipso facto* a part of the Sovereign's dominions. The fact that settlement, coupled with the anterior manifestation of the will of the Crown, establishes sovereign title.⁵⁸

Conquest, as the name suggests, referred to the physical taking of a territory under the authority of another sovereign. However, as Roberts-Wray pointed out:

Conquest in the strict sense involves the military subjugation of a territory. But the mere fact of conquest does not in itself render the territory part of the Sovereign's domains. A clear expression of the Crown's intent to assume sovereignty on a permanent basis is requisite, such as the provision of a civil government to replace military rule.⁵⁹

Cession refers to the transfer of territory from one sovereign authority to another. This often followed conflicts and was normally marked with a treaty of some form or other. Domestic courts gave full effect to cession in favour of the sovereign claiming it without any further acts or legislation on the part of the sovereign.⁶⁰ Annexation referred to the occupation of territories under the authority of another sovereign. This could be done in conjunction with cession or conquest, or simply as a unilateral assertion of the intent of the British sovereign. British courts have held that they must accept the unequivocal assertion of sovereignty by the British Crown.⁶¹ This was clearly expressed by the British courts in *R v. Kent Justices*.⁶² Lord Parker C.J. stated:

For it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.

⁵⁸ Roberts-Wray, *Commonwealth and Colonial Law*, *supra* note 56 at 99.

⁵⁹ *Ibid.* at 105-107.

⁶⁰ Slattery, *The Land Rights of Indigenous Canadian Peoples*, *supra* note 48 at 10.

⁶¹ See, *Sobhuza II v. Miller*, [1926] A.C. 518 (P.C.) [*Sobhuza v. Miller*].

⁶² *R. v. Kent Justices*, [1967] 1 All E.R. 560 (Q.B.D.) [*R. v. Kent Justices*].

Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the courts and the executive on such a matter, where foreign interests are concerned, and where responsibility for protection and administration is of paramount importance to the government of the country.⁶³

While with each of these methods of acquisition title to the colonial territory would revert to the sovereign claiming such, the method of acquisition was important in determining the law in place. With any territory acquired through discovery, the law of the sovereign would come into being immediately. However, with territories acquired either through conquest, annexation or cession, the sovereign would hold the prerogative authority to change or abrogate existing laws; however in the absence of any overt acts, the original laws in place at the time of acquisition remained in force.

Recognised as the doctrine of continuity, this stood for the principle that the English common law incorporated the laws of the place (*lex loci*) or territory acquired at the time of conquest, annexation or cession.⁶⁴ In other words, the local laws in place at the moment of conquest, annexation or cession remained in place and valid until they were clearly altered or abrogated by the Crown as part of the exercise of its prerogative jurisdiction. British courts first acknowledged this principle in *The Case of Tanistry*,⁶⁵ where the question of the Irish customary law of inheritance was raised. The court concluded the Indigenous laws of a nation survived British authority, so long as the laws were reasonable, certain and compatible with the premise of Crown sovereignty.⁶⁶ But what of lands occupied by non-Christian princes? As noted, the development of

⁶³ *Ibid.* at 564.

⁶⁴ See, *Re: Southern Rhodesia*, [1919] A.C. 211 (P.C.) [*Re: Southern Rhodesia*] at 233; also, *Amodu Tijani v. Secretary, Southern Nigeria*, *supra* note 48 at 407.

⁶⁵ *The Case of Tanistry* (1608), 80 Eng. Rep. 516 (K.B.) [*The Case of Tanistry*].

⁶⁶ *Ibid.* at 520.

international law was initially designed towards the organization of relations between the various Christian leaders of Europe. What effect then did the exploration of non-Christian lands have on the principles of international law being developed? While it is clear as evidenced by their interaction, that the European powers, particularly those of France and Britain, treated the Indigenous peoples as independent and sovereign, can it actually be said that they considered them as such? If they did, then under what authority would they think to declare lands possessed by the Indigenous peoples as their own? One author has suggested that the European powers saw no contradiction in their actions.

At the time of conquest, in the sixteenth to eighteenth centuries, the European powers did not see any contradiction between their actions and their recognition of native sovereignty. Although many aboriginal peoples, such as the Aztec or the Iroquois, had complex governing systems covering large areas and numbers of people, the European powers used the notion of *res nullius* (or *terra nullius*) and asserted their right as “civilized” and Christian states to impose their authority on those who did not (to them) fit that description. Thus, the Europeans saw no contradiction between interacting with these tribal governments, or even a local band’s chief, and at the same time declaring huge swaths of territory as belonging to a particularly colony or trading company, despite the obvious and permanent aboriginal habitation of such territory.⁶⁷

*Calvin’s Case*⁶⁸ examined the question of whether Scots, born after the accession of James VI of Scotland to the English throne were to enjoy the benefits of English law. The court held that subjects of the King, regardless of their place of birth, were benefactors of the protection of English law, though they were not subject to the authority of Parliament. During the course of his decision, Sir Edward Coke stated:

And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath

⁶⁷ Jeffrey Wutzke, “Dependent Independence: Application of the Nunavut Model To Native Hawaiian Sovereignty and Self-Determination Claims” (1998) 22 Am. Indian L. Rev. 509 [Wutzke, *Dependent Independence*] at 520.

⁶⁸ *Calvin’s Case* (1608), 7 Co. Rep. 1a; 77 E.R. 377 (K.B.) [*Calvin’s Case*, cited to Co. Rep].

vitae et necis potestatem, he may at his pleasure alter and change the laws of that kingdom; but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said. But if a King hath a Christian kingdom by conquest, as King Henry the Second had Ireland, after King John had given unto them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding King could alter the same without Parliament.⁶⁹

It should be noted that Coke claimed that infidels were perpetual enemies (*perpetus inimica*) of the Crown and therefore upon acquisition of territories occupied by such groups the sovereign automatically abrogated their laws, as if the lands were *terra nullius*. However, this presented a problem. How could the sovereign conduct foreign relations or enact valid treaties with such groups if they were perpetual enemies?

This view held by Coke found little support and was dismissed in an untitled judgment authored by Sir Edward Littleton in 1640.⁷⁰ In this case, Littleton, Chief Justice of the Court of Common Pleas, showed more humanity towards non-Christian nations, stating:

Turks and infidels are not *perpetui inimica*, nor is there a particular enmity between them and us; but this is a common error founded on a groundless opinion of Justice Brooks; for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons.⁷¹

⁶⁹ *Ibid.* at 17b.

⁷⁰ *Anonymous* (1640), 1 Salk. 46, 91 E.R. 46 (C.P.) [*Anonymous*, cited to Salk.].

⁷¹ *Ibid.* at 46.

This principle was refined in *Blankard v. Galdy*.⁷² At issue was whether a British statute was in force in Jamaica, an island acquired through conquest in 1655. It was agreed that the colony had been acquired by conquest. The plaintiff argued that since conquest, its own laws had governed the colony, whereas the defendants argued that English law had replaced the *lex loci* upon conquest. Holt C.J. rejected the opinion of the defendants, claiming that the laws in place at the time of conquest had remained in place and that English law had never been formally introduced. In asserting this position, Holt C.J. stated:

[I]n the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and, in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.⁷³

Thus, by the time of the case *Campbell v. Hall*,⁷⁴ came before the courts, the views initially expressed by Coke C.J. had been rejected. At issue in this case was whether the British Crown held a prerogative power to impose duty upon the conquered colony of Grenada, having promised a legislative assembly in the colony. Lord Mansfield took the position that with a conquered colony there were certain prerogative powers initially granted to the Sovereign, however these powers were forfeited upon the calling of an Assembly.

Mansfield accepted the argument of the plaintiff that the tax in question was *ultra vires* the prerogative powers of the King. He then proceeded to outline the legal principles relative to the property rights of inhabitants of conquered or ceded nations,

⁷² *Blankard v. Galdy* (1693), 2 Salk. 411, 91 E.R. 356 (K.B.) [*Blankard v. Galdy*, cited to Salk.].

⁷³ *Ibid.* at 412.

⁷⁴ *Campbell v. Hall* (1774), Lofft 655, 1 Cowp. 204, 98 E.R. 1045 (K.B.) [*Campbell v. Hall*, cited to Cowp.]

principles that became part of the common law of England and later Canada. Lord Mansfield stated:

A great deal has been said, and many authorities have been cited relative to propositions in which both sides seem to be perfectly agreed; and which, indeed are too clear to be controverted. The stating some of those propositions which we think is quite clear, will lead us to see with greater perspicuity what is the question upon the first point, and upon what hinge it turns. I will state the proposition at large, and the first is this:

A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.

The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d is, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca or the Isle of Man, or the plantations, has no privilege distinct from the natives.

The 5th, that the laws of the conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in Calvin's case, shews the universality of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Croisades...[sic]

The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and introduce new laws, he cannot make any change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament,

or give him privileges exclusive of his other subjects; and so in many other instances which might be put.⁷⁵

In the course of his decision, Lord Mansfield took the opportunity to address the earlier views of Lord Coke regarding infidel kingdoms, rejecting them as “wholly groundless and most deservedly exploded.”⁷⁶ Lord Mansfield continued, stating that Lord Coke’s “strange extrajudicial opinion, as to a conquest of a pagan country, will not make reason not be reason, and law not to be a law.”⁷⁷ As a result, Mansfield concluded, “the articles of capitulation upon which the country was surrendered, and the articles of peace by which it was ceded are sacred and inviolable according to their true intent and meaning.”⁷⁸

A.J. Chitty adopted this principle concluding, “[N]or can the King legally disregard or violate the articles on which a country is surrendered or ceded; but such articles are sacred and inviolable, according to their true meaning and intent.”⁷⁹ Chitty rationalised that the conquered nation must have some laws in place prior to acquisition by the British Crown, and that until these laws are changed they must, by default, remain intact. “It is necessary and fit that a conquered country should have some laws; and, therefore, until the laws of the country thus acquired are changed by the new Sovereign, they shall continue in force.”⁸⁰

It appears safe to conclude that with lands acquired either through conquest, cession or annexation, the British sovereign held a power to make laws, alter existing

⁷⁵ *Ibid.* at 208-209.

⁷⁶ *Campbell v. Hall*, *supra* note 74 at 744.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 208.

⁷⁹ Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject*. (London: Butterworths & Son, 1820) [Chitty, *A Treatise on the Law of the Prerogatives of the Crown*] at 29.

⁸⁰ *Ibid.* at 29-30.

laws, or override current legislative enactments, subject to the authority of Parliament. However, in lieu of this, the laws in place at the time of acquisition remained in force, except to the extent that these laws were unconscionable or inconsistent with the change in sovereignty itself. Professor Peter Hogg stated:

When a colony was acquired by British conquest (or cession), as opposed to settlement, the rule of common law was that the colony of the conquered people continued in force in the colony, except as to matters involving the relationship between the conquered people and the British sovereign. The effect of this rule was that the pre-existing private law (including criminal law) of the colony continued in force, while the public laws of the colony (establishing British governmental institutions) was replaced by English law.⁸¹

This principle was held applicable in the pre-confederation province of Lower Canada. In *Stuart v. Bowman*,⁸² at issue was whether English civil law had ever been introduced into Lower Canada, either at the time of cession or subsequently by the British Crown. At the trial level it was held that this had never taken place. Vanfelson J. stated:

It is true that the Crown has the right, by virtue of its prerogative, to provide for the Government of, and administration of justice in a conquered or ceded country, but in the silence of the Crown on this point, the laws of the conquering country are not introduced, but those of the conquered people stay in force.⁸³

While initially it was the Spanish and Portuguese who dominated the colonial landscape in North America, by the seventeenth century these two Iberian powers had been replaced by France and England. Between 1603 and 1763 it would be these two northern European nations that attempted to gain a stranglehold over the coveted lands of North America.

⁸¹ Peter Hogg, *Constitutional Law of Canada* Student ed., 2003 (Toronto: Carswell Publishing, 2003) [Hogg, *Constitutional Law of Canada*] at 363.

⁸² *Stuart v. Bowman* (1852), 2 L.C. Rep. 369 (S.C.) rev'd (1853), 3 L.C. Rep. 309 (Q.B.) [*Stuart v. Bowman*].

⁸³ *Ibid.* at 401-402. But see the terms of the *Royal Proclamation*, *infra* note 117. Under the terms of the proclamation, it would appear that both a government and administration of justice were provided for in the colony.

French claims dated back to the middle of the sixteenth century when Jacques Cartier travelled to the shores of Canada. During his first mission Cartier left France in April 1534, arriving on the coast of Labrador in late May of that year. From here he sailed inland, reaching the Gaspé region in July where he planted a cross. Records of that voyage noted:

On [Friday] the twenty-fourth of the said month [of July], we had a cross made thirty feet high, which was put together in the presence of a number of Indians on the point at the entrance of the harbour, under the cross-bar of which we fixed a shield with three *fleurs-de-lys* in relief, and above it a wooden board, engraved in large Gothic characters, where was written, *Vive Le Roy de France* (Long Live the King of France). We erected this cross on the point in their presence and they watched it being put together and set up. And when it had been raised in the air, we all knelt down with our hands, joined, worshipping it before them; and made signs to them, looking up and pointing to the heaven, that by means of this we had our redemption, at which they showed many marks of admiration, at the same time turning and looking at the cross.

When we had returned to our ships, the chief, dressed in an old black bear-skin, arrived in a canoe with three of his sons and his brother; but they did not come so close to the ships as they had usually done. And pointing to the cross he [the chief] made us a long harangue, making the sign of the cross with two of his fingers; and then he pointed to the land all around about, as if he wished to say that all the region belonged to him and that we ought not to have set up this cross without his permission...; And then we explained to them by signs that the cross had been set up to serve as a land-mark and guide post on coming into the harbour, and that we would soon come back.⁸⁴

There appears to be some dispute as to the meanings of this action by Cartier, conflict that may reflect nothing more than a debate regarding legalistic and historic points of view. For example, legal expert Leonard Rotman suggested that, “symbolic acts such as these were performed to deter other European nations interested in laying

⁸⁴ G.D. Warburton, *Conquest of Canada* (New York: Harper & Brothers, 1850) [Warburton, *Conquest of Canada*] at 66-67; also, H.S. Burrage ed., *Early English and French Voyages, Chiefly from Hakluyt, 1534-1608* (New York: Charles Scribner’s, 1906) [Burrage, *Early English and French Voyages*]. See also Brian Slattery, “French Claims in North America 1500-59” (1978) 59 *Can. Historical Review* 139. [Slattery, *French Claims in North America*].

claim to the territory; they were not intended to demonstrate to the Aboriginal peoples that the European nations thereby claimed the lands.”⁸⁵ Meanwhile, historian G. D. Warburton suggested that Cartier’s actions reflected a taking of the lands for the King of France. Warburton believed that Cartier’s suggestion to the Indian leader that this was merely a religious ceremony was designed to avoid conflict with the Indians of the region. “This was ingeniously represented to the natives as a religious ceremony, and, as such, excited nothing by the “grandissima ammirazion” of the natives present; it was, however, differently understood by the Chief.”⁸⁶ Whether these acts were symbols of religious expression or acts of discovery, it should be noted they were not designed to illustrate domination or annexation of the Aboriginal peoples living in the territories.

From the time of their arrival, alliances between the Aboriginal peoples on the one hand and the French and English on the other, took place, mainly on an informal basis. As Professor Rotman noted:

Alliances of a less formal nature existed between the early English colonists and the Aboriginal peoples of Virginia. The early 17th century alliance between the Virginia colonists and the Powhatans is one of the more notable of these early alliances, owing to the legend of Pocahontas, daughter of Powhatan.⁸⁷

During the early stages of European colonisation, the Europeans were fewer in number and unfamiliar with the lands, the Indigenous languages and the methods of survival required in the North American climates. As a result, they found it more practical to befriend the Aboriginal people than to engage in warfare against them. For

⁸⁵ Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) [Rotman, *Parallel Paths*] at 107.

⁸⁶ Warburton, *Conquest of Canada*, *supra* note 84 at 56.

⁸⁷ Leonard Rotman. “Taking Aims at the Canons of Treaty Interpretations in Canadian Aboriginal Rights Jurisprudence.” (1997) 46 U.N.B. L. J. 11 [Rotman, *Taking Aims at the Canons of Treaty Interpretation*] at note 10.

their part, the Aboriginals shared their food, ways of life and lands with the newcomers. The Europeans quickly understood that successful alliance with the Indigenous population could be a key to domination of the new lands in relation to other European powers.⁸⁸

After more than a century of intermittent warfare, Britain gained a stranglehold on North American colonisation. In the *Treaty of Utrecht*,⁸⁹ France ceded the bulk of its holdings in Acadia (Nova Scotia), with the exception of Cape Breton Island, to the British, thus providing the British sovereign with claimed title to the Maritime region. Further, France relinquished her interests in Newfoundland and recognised British rights to Rupert's Land.⁹⁰

The *Treaty of Utrecht*⁹¹ resulted in the cession of Acadia from France to Britain. In addition, Article XV of the treaty provided for protection of the Indian allies of both France and Britain.

The subjects of France inhabiting Canada and others, shall hereafter give no Hindrance or Molestation to the Five Nations or Cantons of Indians, subject to the Dominion of Great Britain, nor to the other Natives of America, who are Friends to the same.⁹²

While this treaty declared British suzerainty over the Aboriginal peoples of the Maritime region, it was designed primarily to resolve conflicts between France and Britain. At the same time, the treaty appeared to recognise the sovereignty of the Aboriginal peoples as nations among themselves.

⁸⁸ Rotman, *Parallel Paths*, *supra* note 85 at 107.

⁸⁹ *Treaty of Peace and Friendship Between the Most Serene and Most Potent Princess Anne, By the Grace of God, Queen of Britain, France and Ireland, and the Most Serene and Most Potent Prince Lewis XIV, the Most Christian King, 31 March & 12 April, 1713 [Treaty of Utrecht]*.

⁹⁰ This reversed the effects of the *Treaty of Breda, 1667* whereby Britain had restored to France all the lands known as Acadia and previously held by the French.

⁹¹ *Treaty of Utrecht*, *supra* note 89.

⁹² *Ibid.* Article XV.

Despite these efforts, animosity between the two European nations continued, with both Acadian and Aboriginal populations living under what may be classified as a military dictatorship, with British leaders asserting both political and judicial supremacy over the region.⁹³

During the next half century, Britain worked to consolidate its power in North America. While the *Treaty of Utrecht*, provided the British with the opportunity to trade with the Aboriginal people without interference from the French, this was not always the case. English authority in the region can be described as tenuous at best, and French influence continued to play a major role in the relationship between the British and Aboriginal peoples of the region.

Acadia was part of Britain's empire, but it was a poor part. The colonial office's decision to rename "Acadia" Nova Scotia was no more than a symbolic gesture: Nova Scotia remained what it had been before 1713, Acadian and Mi'kmaq.

British efforts to exert control in Acadia were undermined by the French military presence at Ile Royale and by the close political relationship the French enjoyed with the Mi'kmaq on the mainland and elsewhere. That the French provided aid to the Mi'kmaq during the 1722-25 war is an indication of these lingering ties.⁹⁴

English domination would not be complete until nearly a half-century later. It was not until the fall of Quebec and Montreal.⁹⁵ This was followed by the *Treaty of Paris*,⁹⁶ whereby the British were able to force the French to cede their remaining claims

⁹³ D. Bell. "Maritime Legal Institutions Under the Ancien Regime, 1710-1850" in D. Guth & W. Pue eds., *Canada's Legal Inheritances* (Winnipeg: Canadian Legal History Project, 2001) [Bell, *Maritime Legal Institutions Under the Ancien Regime*] at 204.

⁹⁴ William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002) [Wicken, *Mi'kmaq Treaties on Trial*] at 99-100.

⁹⁵ These victories were marked by *Articles of Capitulation* signed in Quebec City on 18 September, 1759 and Montreal on 8 September 1760, as cited in A. Shortt & A. Doughty eds., *Documents Relating to the Constitutional History of Canada, 1759-1791* 2d. ed. (Ottawa: King's Printer, 1918) [Shortt & Doughty, *Documents Relating to the Constitutional History of Canada*] at 1-36.

⁹⁶ *Treaty of Paris*, *supra* note 49.

to the North American continent.⁹⁷ The effect of the treaty was to establish Crown title to those parts of Canada previously held by the French, a territory “which stretches from the Maritime Provinces in the east as far west and north-west as French Canada extended in 1763.”⁹⁸

While these treaties consolidated British authority vis-à-vis other European nations, what did they mean to the Aboriginal peoples living in Canada? The Indigenous population did not concede authority over their territories or their persons to the British, nor did they accept the premise of British sovereignty over their affairs at this time.

Article 40 of the *Articles of Capitulation* provided for protection of the ways of life of the Indigenous peoples surrounding the region of Montreal. It stipulated:

The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chuse to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty. They shall have, as well as the French, liberty of religion, and shall keep their missionaries.⁹⁹

This article clearly illustrates recognition by both the British and perhaps more importantly, the French, that the Aboriginal inhabitants of the region were autonomous and they should remain on their lands without interference. John Borrows has stated:

This article verified French and English policy that First Nations should be maintained in their lands and not be molested in the use of their lands. The capitulation agreement represented the promise that First Nations sovereignty would not be subsumed, by alliance with either the French or the English.¹⁰⁰

⁹⁷ *Ibid.* Articles IV & VII.

⁹⁸ Slattery, *The Land Rights of Indigenous Canadian Peoples*, *supra* note 48 at 165.

⁹⁹ Shortt & Doughty, *Documents Relating to the Constitutional History of Canada*, *supra* note 95 at 33.

¹⁰⁰ John Borrows. “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government.” [Borrows, *Wampum at Niagara*] In M. Asch ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference*. (Vancouver: U.B.C. Press, 1997) [Asch, *Aboriginal and Treaty Rights in Canada*] at 159.

Sir William Johnson, the Superintendent General of the Indian Department for Upper and Lower Canada, lived in close proximity to the Mohawk Indians of New York. It has been suggested that Johnson's opinions developed the foundation for Indian policy following the fall of the French.¹⁰¹ Johnson offered the opinion, later to resemble that of the Chief Justice of the United States, that discovery provided Britain with rights as against other European states. However, Johnson was of the opinion that the Indigenous nations of the region retained their legal rights to lands as well as their ability to govern themselves until divested of these by law or conquest.¹⁰²

There remains some confusion as to when British sovereignty was asserted on Canadian soil. Any such analysis must take into consideration not only the dealings of the British with their neighbouring nations in Europe, but also the dealings of the British *vis-à-vis* the Indigenous peoples of Canada. Despite the claims of the British, vast expanses of Indian territories remained, "open to movement and change, where the land rights of a native group rested on possession, and title was gained by appropriation or agreement and lost on abandonment."¹⁰³

¹⁰¹ D.C. Scott. "Indian Affairs, 1763-1841" [Scott, *Indian Affairs, 1763-1841*] in A. Shortt & A. Doughty ed., *Canada and Its Provinces: A History of the Canadian People and Their Institutions* vol. 3 (Toronto: Publishers Association of Canada, 1913-1917) [Shortt & Doughty, *Canada and Its Provinces*] at 698.; For more on the importance of this individual to Indian policy in the territory see, R. S. Allen, *A History of the British Indian Department in North America, 1755-1830* (Ottawa: National Historic Site Services, Department of Indian Affairs and Northern Development, 1971) [Allen, *A History of the British Indian Department in North America*] at 14.; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1053, 70 D.L.R. (4th) 427, 3 C.N.L.R. 127, 1990 SCJ 48 (S.C.C.) Lamer C.J.C. stated:

The papers of Sir William Johnson ...who was in charge of Indian Affairs in British North America, demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians.

¹⁰² Letter from Sir William Johnson to J.T. Kempe, Attorney-General of New York, 7 September 1765, as cited in J. Sullivan ed. *The Papers of Sir William Johnson* vol. 11 (Albany: State University of New York, 1921-1965) [*The Papers of Sir William Johnson*] at 923-927

¹⁰³ Brian Slattery. "Understanding Aboriginal Rights." (1987) 66 Can. Bar Rev. 728 [Slattery, *Understanding Aboriginal Rights*] at 742.

Certainly at some point prior to contact with Europeans the Indigenous peoples of Canada were sovereign and lived as independent nations, in control of the regions they inhabited and making laws by which they lived their lives. In *Calder*,¹⁰⁴ Hall J. adopted the opinion of John Marshall, Chief Justice of the United States in *Worcester v.*

Georgia.¹⁰⁵ In his dissenting opinion, Hall J., citing Marshall C.J., stated:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws.*¹⁰⁶

More recently, in *Sioui*,¹⁰⁷ Lamer C.J.C. stated:

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated into treaties of alliance and neutrality. This clearly indicates that the Indian nations were regarded in their relations with European nations which occupied North America as independent nations.¹⁰⁸

It must be acknowledged that at some point, and often at different stages depending on the Indigenous nation being examined, these once independent peoples had their sovereignty taken away by the Crown and their members are now members of the larger society of Canadians. Despite this, these Indigenous people retained a series of inherent rights known as Aboriginal rights, rights which were not the creation of the Canadian state but which were recognised under the Canadian common law.¹⁰⁹

¹⁰⁴ *Calder*, *supra* note 38.

¹⁰⁵ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (U.S.S.C.) [*Worcester v. Georgia*] at 542.

¹⁰⁶ *Calder*, *supra* note 38 at 383. [Emphasis in original text].

¹⁰⁷ *Sioui*, *supra* note 101.

¹⁰⁸ *Ibid.* at 1053.

¹⁰⁹ Brian Slattery. "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 [Slattery, *First Nations and the Constitution: A Question of Trust*] at 263.

ii. The Royal Proclamation, 1763

With the *Treaty of Paris*,¹¹⁰ the British Crown gained sovereign European authority over the territories representing most of what is now modern day Canada.¹¹¹ Having disposed of their European rivals, the British Crown turned its attention to the governing of the newly ceded colonies. Among concerns was the maintaining of peaceful relations with the Indigenous population living there.

Government concerns included encroachment upon historic Indian lands by speculators and settlers. In 1749, for example, a group of Virginia entrepreneurs organised the Ohio Company to purchase and sell lands for settlement in what was recognised as historic Indian lands.¹¹² This caused tremendous tensions among the Indigenous peoples of the region. One clear example of this was the revolt led by Ottawa Chief Pontiac. In the spring of 1763 Pontiac led a coalition of tribes in an uprising against the British. Each member of the coalition was to rise against a British post proximate to them. This proved a successful strategy with many posts falling to the Indigenous warriors, with the exception of Fort Detroit. Here the attack was foiled and a siege began that would last for several months. This would eventually conclude with a peace treaty between Pontiac and the British.¹¹³ Despite the ultimate failure of the

¹¹⁰ *Treaty of Paris*, *supra* note 49.

¹¹¹ Slattery, *The Land Rights of the Indigenous Canadian Peoples*, *supra* note 48. See Chapter X, “The West and North West”; also B. Donovan. “Common Law Origins of Aboriginal Entitlements to Land.” (2003) 29 Man. L. J. 289 [Donovan, *Common Law Origins of Aboriginal Entitlements to Land*] at 298.

¹¹² J. R. Miller, *Skyscrapers Hide the Heavens*, *supra* note 5 at 69-70; also, B. Slattery. “The Hidden Constitution: Aboriginal Rights in Canada” (1984) 32 American J. Comp. L. 361 [Slattery, *The Hidden Constitution*] at 369.

¹¹³ Miller, *Skyscrapers Hide the Heavens*, *supra* note 5 at 74.

uprising, there can be little question that this reflected the animosity the Indigenous peoples felt towards the British and the encroachments on their lands.

Prior to the capitulation and surrender of the French, the Aboriginal population had played a vital role in maintaining the military balance between the French and English. While warring continued, the British recruited Indigenous peoples as their allies. For their part, the Aboriginals used their position as a possessor of the balance of power to further their lot in life. Leonard Rotman stated,

Until the British conquest of the French in 1760-1, aboriginal groups had played a vital role in maintaining the delicate military balance between Britain and France in the struggle for supremacy in North America in the seventeenth and eighteenth centuries. With both Britain and France present as military powers in North America, aboriginal groups utilized the opportunity to serve their own interests by playing one nation off against the other for their own political, military and commercial benefit.¹¹⁴

During the spring and summer of 1763 the Board of Trade considered different proposals for the colonies, with the issue of the Indians living in the newly acquired territory. Lord Egremont wrote to Sir Jeffrey Amherst, Commander-In-Chief of North America, referring to concerns of an Indian war, stating:

The King has it much at heart to conciliate the Affection of the Indian Nations, by every Act of strict Justice, and by affording them His Royal Protection from any Incroachment on the lands they have reserved for themselves, for their hunting Grounds, & for their own Support and Habitation.¹¹⁵

Over the course of the next several months, Lord Egremont corresponded with the various governors of the colonies, soliciting their ideas on how best to administer to the colonies. It is with this in mind that Egremont prepared a letter for the Board of Trade on

¹¹⁴ Rotman, *Parallel Paths*, *supra* note 85 at 27-28.

¹¹⁵ Lord Egremont to Sir Jeffrey Amherst, 27 January 1763 in "Fitch Papers." 18 Collections of the Connecticut Historical Society, 224 as cited in Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra* note 48 at 192.

5 May, 1763, outlining his ideas. Included in this were suggestions on how to deal with the Indians in the region, that outlined what had come to be the government policy.

Tho' in order to succeed eventually on this Point, it may become necessary to erect some Forts in the Indian Country, with their Consent, yet His Majesty's Justice & Moderation inclines Him to adopt the more eligible Method of conciliating the Minds of the Indians by the Mildness of His Government, by protecting their Persons & Property & securing to them all the Possessions, Rights and Priviledges they have hitherto enjoyed, & are entitled to, most cautiously guarding against any Invasion or Occupation of their Hunting Lands, the Possession of which is to be acquired by fair Purchase only; and it has been thought so highly expedient to give them the earliest and most convincing Proofs of His Majesty's Gracious and Friendly Intentions on His Head...¹¹⁶

It appears that the British government was, even at this point, considering a policy towards the Indigenous peoples that respected their rights to lands directly and their rights to historic practices generally. This suggested that these rights existed prior to the cession of Canada from the French to the English and that the British sovereign and government recognised the inherency of these rights. Over the course of the next several months' correspondence moved between the Board of Trade and the Sovereign (through Egremont). Among the various topics discussed, the administration of Indian lands remained an important issue.¹¹⁷

After some delay, including the untimely death of Lord Egremont in August of that year, the government issued the *Royal Proclamation of October 7, 1763*.¹¹⁸ This document addressed constitutional arrangements in the colonies, as well as providing

¹¹⁶ Lord Egremont to the Lords of Trade, May 5, 1763 as cited in Shortt & Doughty, *Documents Relating to the Constitutional History of Canada*, *supra* note 95 at 127-128.

¹¹⁷ See, for example, the letter from Egremont to the Lords of Trade, July 14, 1763 as cited in Shortt & Doughty, *Documents Relating to the Constitutional History of Canada*, *supra* note 91 at 147-48.

¹¹⁸ *Royal Proclamation of October 7, 1763*, (U.K.), 3 Geo.3, Reprinted R.S.C. 1985, App. II, No. 1 [*Royal Proclamation, 1763*] Reprinted in C.S. Brigham ed., *British Proclamations Relating to America, 1603-1783 in Transactions and Collections of the American Antiquarian Society* Vol. 12 (Worcester: American Antiquarian Society, 1911) [Brigham, *British Proclamations Relating to America*] at 212-228. All reference to this document shall be cited to this source.

measures specifically designed to protect Indian lands.¹¹⁹ A full one-third of the document related to matters concerning the Indigenous inhabitants of North America.

The *Royal Proclamation, 1763* is a document divided into four distinct sections, concerning a variety of matters dealing with the newly acquired colonies. First, the document dealt with the disposition of the territories formerly occupied by the Spanish and French and ceded to the British by the *Treaty of Paris*.¹²⁰ Second, the document outlined the constitutional principles of the new colonial governments, including empowering the various governors, “with the Advice of Our said Councils respectively, Courts of Judicature and Publick Justice, within Our said Colonies, for the hearing and determining all Causes, as well Criminal as Civil.”¹²¹ It would seem that the provisions introduced English law into the colonies, however this is not certain. Slattery wrote,

On the face of it, these provisions appear to have the effect of introducing English law in a qualified form, so that existing laws are, *pro tanto*, superseded, and this seems to have been the view taken in Grenada. But as regards Quebec, so drastic was the effect on the large settled French population, and so great the resulting confusion, that this intent was soon doubted by relevant authorities, later denied by a party to the Proclamation’s drafting, and long after disputed in the courts. Whether customary systems of Indian law were likewise affected is a still more complex question. Whatever the effect of the Royal Proclamation existing laws in Quebec, the original position in civil matters was largely restored by the *Quebec Act of 1774*.¹²²

Regardless of whether this introduced English law to the colonies, it did nothing to introduce English law to the vast regions of Canada, regions occupied primarily by

¹¹⁹ *Constitution Act, 1982*, *supra* note 6. Section 25 states:

The guarantee in this Charter of certain rights and freedoms shall not be construed to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including; a) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763.

¹²⁰ *Treaty of Paris*, *supra* note 49. It is of no value to this paper to go into details on those sections of the document, which do not deal directly with the Aboriginal peoples, and as a result I will not do this.

¹²¹ *Royal Proclamation, 1763*, *supra* note 118 at 214.

¹²² Slattery, *The Land Rights of the Indigenous Canadian Peoples*, *supra* note 48 at 206-07.

Aboriginal peoples that lie beyond the territory outlined in the Royal Proclamation 1763.

Thus, in *Connolly v. Woolrich*,¹²³ Monk J. stated,

Abolishing or changing the customs of the Indians or the laws of the French settlers, whatever they may have been; nothing which introduced the English common law into these territories. When Connolly came to Athabaska, in 1803, he found the Indian usages as they had existed for ages, unchanged by European power or Christian legislation.¹²⁴

Third, the *Royal Proclamation, 1763* provided for the granting of lands to former military personnel as a reward for service in the name of the Crown. Finally, the document dealt with issues relating to the Indigenous peoples and it is this section of the *Royal Proclamation, 1763* that this work will focus on. To begin, the section recognised and acknowledged abuses by European settlers on the Indian people living in the colonies.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of Our Justice and determined Resolution to remove all reasonable Cause of Discontent, We Do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of the Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander In Chief of our Colonies respectively, within which they shall lie.¹²⁵

¹²³ *Connolly v. Woolrich* (1867) L.C.J. 197 (Que. S.C.) [*Connolly v. Woolrich*].

¹²⁴ *Ibid*, at 214.

¹²⁵ *Royal Proclamation, 1763*, *supra* note 118 at 216.

This paragraph imposed specific conditions on the purchase of Indian lands and acted as a disability on non-Aboriginal would be purchasers of these lands.¹²⁶ As a result, no private person would be allowed to purchase land directly from Indian holders of this land. Rather, any such transfer must take place through the agency of the Crown. More importantly, this provision allowed the British government to maintain a buffer region between the remaining French, the Aboriginal peoples and the British colonists in America who, at the time, were becoming unsettled with their colonial status. Along with this, the prohibition on settlement allowed Britain to maintain control over the North American fur trade.¹²⁷

Protecting lands possessed by Indians was essential to British commercial interests and to the security of British North American colonies. The benefit of the commercial empire it had gained could be best accomplished in an atmosphere of inter-racial cooperation rather than confrontation. To encourage peace on the American colonial frontier, Indians had to be provided with some basic guarantee that the land they occupied and hunted upon would not be unilaterally seized or altered in such a way as to deprive them of a livelihood.¹²⁸

The *Royal Proclamation, 1763* recognised that lands possessed by Aboriginal peoples were reserved to them until those lands were ceded to the Crown or its representatives.

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our

¹²⁶ B. Donovan. "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of Delgamuukw" (2001) 35 U.B.C. L. Rev. 43 [Donovan, *The Evolution and Present Status of Common Law Aboriginal Title in Canada*] at 49.

¹²⁷ See, generally, C. Alvord, *The Illinois Country, 1673-1818* (Chicago: Loyola University Press, 1965) [Alvord, *The Illinois Country*].

¹²⁸ Jack Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October, 1763*. (Ottawa: Research Branch, Indian and Northern Affairs, 1981) [Stagg, *Anglo-Indian Relations in North America to 1763*] at 356.

Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...¹²⁹

The document itself protected those lands reserved to Indigenous peoples from settlement, or delivery by way of grant or purchase in any manner other than that prescribed. Rather than offering the lands up to the Indigenous peoples, the document recognised the fact that these lands were rightfully the possession of the Indians living on the lands and attempted to provide a safeguard against encroachment. In *St. Catherine's Milling and Lumber Co. v. The Queen*,¹³⁰ Strong J. of the Supreme Court of Canada, stated in dissent:

It appears, however, that a much stronger case than this is made in favour of the construction contended for by the appellants, for we find that in the proclamation of King George the 3rd, already incidentally alluded to, which had the force of a statute and was in the strictest sense a legislative act, and which had never, so far as I can see, been repealed, but remained, as regards so much of it as is now material, in force at the date of confederation, Indian lands not ceded to or purchased by the king, i.e., lands not surrendered, are expressly described in terms as lands "reserved to the Indians;" the two expressions, "lands not ceded to or purchased "by the king," and "lands reserved to the Indians," being expressly treated as convertible terms.¹³¹

Along with acknowledging certain lands as having been reserved for the Indigenous peoples, the document placed a restriction on the migration of settlers into those regions. Certain areas of North America were designated as being open for settlement to Europeans, with the remainder of the lands segregated from the European population, considered "Indian lands."

And we do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not

¹²⁹ *Royal Proclamation, 1763, supra* note 118 at 215.

¹³⁰ *St. Catherine's Milling and Lumber Co. v. The Queen* (1887) 13 S.C.R. 577 (S.C.C.) aff'd (1888) 14 App. Cas. 46 (P.C.) [*St. Catherine's Milling and Lumber*].

¹³¹ *Ibid*, at 623-24.

included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained.¹³²

The text of the document indicated those areas where European settlement could not take place. By restricting the regions in which settlement could take place, the British Crown provided that all other regions were to be reserved for Indigenous settlement. The document further acknowledged that the Indigenous people held rights over lands that were not expressly ceded to the Crown. As noted earlier, in those lands the only way settlement could take place was through express acts of the British Crown, all purchases having to be made through that organ.

K. M. Narvey has suggested that this might have meant, "all lands in the possession of the Indians as their hunting grounds were intended to be *ipso facto* reserved to them, until ceded to or purchased by competent authority."¹³³ If Narvey is accurate in his assessment, an argument can be made that the prohibition extended to all unceded lands in possession of Indians at the time of the *Royal Proclamation, 1763*, regardless of where within the British Empire these lands stood.¹³⁴ Further, the *Royal Proclamation, 1763* ordered the removal of all persons settled either in reserve areas or "upon any other

¹³² *Royal Proclamation, 1763*, *supra* note 118 at 216.

¹³³ K. M. Narvey. "The Royal Proclamation of 7 October 1763: The Common Law, and Native Right to Land Within the Territory Granted to the Hudson's Bay Company." (1973-74) 38 Sask. L. Rev. 123 [Garvey, *The Royal Proclamation of 7 October 1763*] at 134.

¹³⁴ See the argument put forth by D. Johnston, *The Taking Of Native Lands in Canada: Consent or Coercion?* (Saskatoon: University of Saskatchewan Native Law Centre, 1989) [Johnston, *The Taking of Native Lands in Canada*] at 5.

Lands, which not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid.”¹³⁵

Was the *Royal Proclamation, 1763* a success? I think that this depends on the standpoint from which one views the document. Clearly, it must be considered as one of the “fundamental documents”¹³⁶ in the historical relationship between the Indigenous and European peoples. The document itself had its genesis in the relationship that was developing between the Indigenous peoples and the European settlers following the defeat of the French. The document, it seems clear, attempted to alleviate the fears of the Indigenous peoples that their lands would be taken over by settlers while at the same time setting the stage for British sovereignty. While articulating a principle that unceded Indian lands were to be used for the use and pleasure of the Indians, the document made clear that the British Crown held underlying title to these lands.

Following the issuance of the *Royal Proclamation, 1763* vast tracts of the territories remained in the possession of the Indian tribes. It might be argued that for the British Crown the document held self-serving ends. While protecting the Indian lands and the nations therein from unscrupulous land merchants, the document also ensured that the Crown could control the parceling out of these lands for settlement and colonisation. By doing this, the Crown could determine what regions of Canada would be colonised and at what rate.

¹³⁵ *Royal Proclamation, 1763*, *supra* note 118 at 216.

¹³⁶ *Calder*, *supra* note 38 at 395. Hall J. in dissent stated:

The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.

The *Royal Proclamation, 1763* has been recognised as an “Indian Bill of Rights.”¹³⁷ In reality, it was an extensive piece of legislation, designed to both organise the British colonial acquisitions from the French as well as well as the land rights of the Aboriginal peoples in the colony. However, it may be a mistake to classify this document as a “Bill of Rights.” In *Bear Island Foundation v. Ontario (Attorney-General)*¹³⁸ the Ontario Court of Appeal affirmed a lower court ruling that the *Royal Proclamation, 1763*. In so doing, the Court stated,

It is clear that aboriginal rights at common law alone (which may pertain to a small part of the Land Claim Area) and aboriginal rights recognised by the *Royal Proclamation*, (which may apply to most of the Land Claim Area) exist at the pleasure of the Crown.¹³⁹

In *Chippewa of Sarnia Band v. Canada (Attorney-General) et. al.*¹⁴⁰ the Ontario Court of Appeal determined that while little in their decision relied on the terms of the *Royal Proclamation, 1763*, it was bound by the earlier court ruling in *Bear Island Foundation*, to conclude that the surrender provisions of the *Royal Proclamation, 1763* were revoked by the *Quebec Act, 1774*.¹⁴¹

Conclusion

In the course of this chapter I have examined the origins of British authority in North America. I have attempted to examine the historical foundations of this authority and the affect it had on the Indigenous population living in Canada at the time of French cession to the British. While it is clear that cession transferred title to the lands from the

¹³⁷ *St. Catherine’s Milling and Lumber, supra* note 130 at 652.

¹³⁸ *Bear Island Foundation v. Ontario (Attorney-General)* (1989), 58 D.L.R. (4th) 117, 68 O.R. (2d) 394, 2 C.N.L.R. 73 (Ont. C.A.) aff’g. (1984), 15 D.L.R. (4th) 321. 49 O. R. (2d) 353, [1985] C.N.L.R. 1 (Ont. H.C.) [*Bear Island Foundation*, cited to D.L.R.].

¹³⁹ *Ibid.* at 135.

¹⁴⁰ *Chippewa of Sarnia Band v. Canada (Attorney-General) et. al.* (2000), 195 D.L.R. (4th) 135, 51 O.R. (3d) 641, [2001] 1 C.N.L.R. 56, 2000 OJ 4804 (Ont. C.A.)

¹⁴¹ *Ibid.* at 150; *Quebec Act, 1774*, (U.K.), 14 Geo. III, c. 83 (R.S.C. 1985, App. II, No. 2) [*Quebec Act, 1774*].

French to the British, it would appear also to be clear that, in lieu of any direct abrogation of the customary laws of the Indigenous peoples these laws remained intact subsequent to the transfer of authority to the colony.

Over the course of the early stages of the relationship between the Indigenous peoples and first the French and later the English, the parties dealt with each other on a nation-to-nation basis. Thus, in *Sioui*,¹⁴² Lamer J. (as he then was) stated,

I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.¹⁴³

The British Crown felt it necessary to resolve issues of land rights by way of the *Royal Proclamation, 1763*. As noted, this document reserved large tracts of lands to the Indigenous peoples, as well as providing a method by which those tracts of land might be alienated. Alienation was to take place only to the pleasure of the Crown and under those circumstances outlined in the document. Is this then an authoritative statement on the part of the British Crown? In *Oyekan v. Adele*,¹⁴⁴ the Privy Council dealt with the cession of Lagos to the British Crown circa 1861. Lord Denning stated,

In inquiring ... what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law¹⁴⁵

¹⁴² *R. v. Sioui*, *supra* note 101.

¹⁴³ *Ibid.*, at 1052-53.

¹⁴⁴ *Oyekan v. Adele*, [1957] 2 All E.R. 785 (P.C.) [*Oyekan v. Adele*].

¹⁴⁵ *Ibid.* at 788.

One clear consequence of the *Royal Proclamation, 1763* was that the Indigenous peoples of the colonies would not be immediately assimilated with the European settlers. Rather, they would have the opportunity to continue their traditional ways of life and live in accordance with their customary laws.

CHAPTER II

Introduction

Law represents both order and change. On the one hand, the rule of law represents a method by which the dominant values and rules of a society are maintained. The rule of law demands that the law apply equally to all citizens, regardless of their origin. By applying the rule of law equitably we concede that no person is above the law. This principle is so important to our system that it is recognised in the preamble to the *Constitution Act, 1982*.¹⁴⁶ Alternatively, the law represents a vehicle by which social change may take place. By challenging the existing values and norms of a society, those norms and values can, over a period of time, shift.

Since Confederation, the law has represented a means by which the settler society has been able to impose its will, values and institutions upon the original inhabitants of this nation. It did not happen all at once, and it took place at different times in different regions; however, over the course of time since first contact, the settler society has imposed its legal traditions upon the Indigenous peoples of Canada in an attempt until recently, to assimilate these people into the mainstream of Canadian society.

At the same time, the law has provided a vehicle through which Aboriginal people have been able to challenge the application of the law to their membership. One such moment took place in 1973, with the Supreme Court of Canada decision in *Calder*.¹⁴⁷ Here Hall J. in dissent acknowledged that Aboriginal title did not depend on any “treaty,

¹⁴⁶ *Constitution Act, 1982*, *supra* note 6.

¹⁴⁷ *Calder*, *supra* note 38.

executive order or legislative enactment,”¹⁴⁸ but rather flowed from the prior occupancy of the lands by the Aboriginal peoples.

Despite this, from its beginning Canadian law viewed settlement combined with the assertion of sovereignty as having extinguished Aboriginal title. In *Sparrow*,¹⁴⁹ Dickson C.J.C. and La Forest J. stated:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition which the *Royal Proclamation of 1763* bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed underlying title, to such lands was vested in the Crown.¹⁵⁰

i. Sovereignty and the Judicial Decisions of Chief Justice John Marshall

Both Canada and the United States have rationalised their treatment and domination of the Indigenous peoples by grounding their authority in the historical *doctrine of discovery*. The use of this doctrine in Aboriginal rights jurisprudence stems from the decisions of John Marshall, Chief Justice of the United States between 1803-1835. In a series of seminal decisions rendered nearly 200 years ago and recognised as the Marshall trilogy, the Chief Justice set the stage for contemporary jurisprudence in the field of Aboriginal rights.

In *Johnson v. McIntosh*,¹⁵¹ the Court introduced the doctrine of discovery into American law. The dispute in *Johnson v. McIntosh* arose from the purchase by Thomas Johnson of lands from the Illinois Tribe in 1775 in the region of Illinois.¹⁵² Following the American War of Independence the United States government acquired the same lands

¹⁴⁸ *Ibid.* at 390.

¹⁴⁹ *Sparrow*, *supra* note 12.

¹⁵⁰ *Ibid.* at 1103.

¹⁵¹ *Johnson v. McIntosh*, *supra* note 46.

¹⁵² This region was covered by the *Royal Proclamation, 1763*, *supra* note 118 and thus was purchased in defiance of the Proclamation; *Johnson v. McIntosh*, *ibid.* at 594.

and in 1818 granted them to William McIntosh. An ancestor of the original purchaser sued seeking an ejectment to regain control over the lands.

The case itself provided the Court with the opportunity to define Aboriginal rights to lands within the sovereign regions of the United States. Marshall C.J. first explained that the European nations had divided the New World among themselves using something called the doctrine of discovery.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.¹⁵³

The doctrine of discovery provided each nation with underlying title to the lands it discovered, as well as the exclusive authority to acquire new lands from the Indigenous occupants. This further provided the discovering European nation with the authority to convey Aboriginal territories, “subject only, to the Indian right to occupancy.”¹⁵⁴

Referring to the Indigenous peoples, Marshall explained,

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the

¹⁵³ *Johnson v. McIntosh*, *supra* note 46 at 572-573.

¹⁵⁴ *Ibid.* at 574.

soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.¹⁵⁵

Marshall provided the following justification for the restriction on Aboriginal land rights,

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.¹⁵⁶

Marshall C.J. concluded that Aboriginal title represented little more than a right to occupancy of the lands and not anything that could be considered a fee simple ownership.

In this case, the Chief Justice determined that the doctrine of discovery applied to Aboriginal lands as a result of the savage nature of the Indigenous peoples.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.¹⁵⁷

The second case of the trilogy was one in which the Cherokee peoples of the state of Georgia attempted to defend their rights against the state. In *Cherokee Nation v. State*

¹⁵⁵ *Ibid.* at 688-89.

¹⁵⁶ *Ibid.* at 591.

¹⁵⁷ *Ibid.* at 590.

of Georgia,¹⁵⁸ the Cherokee of Georgia applied for an injunction to restrain the state of Georgia, its Governor, Attorney-General, judges and others from executing and enforcing the laws of Georgia or serving process, or doing anything towards the execution or enforcement of the laws, within the Cherokee territory.

While displaying great empathy for the Cherokee people,¹⁵⁹ the Chief Justice concluded that they had no standing to bring a case forward to the Supreme Court.¹⁶⁰ The Court concluded that the Cherokee nation was not a foreign state, despite the fact that the Court concluded, the Cherokee was, “a distinct political society, separated from others, capable of managing its own affairs and governing itself.”¹⁶¹

In the course of his decision, Marshall C.J. described the Indigenous peoples as domestic dependent nations, whose relationship to the government was that of a ward to his guardian.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in

¹⁵⁸ *Cherokee Nation v. State of Georgia* 30 U.S. (5 Pet.) 1 (1831) (U.S.S.C.) [*Cherokee Nation v. Georgia*].

¹⁵⁹ *Ibid.* at 15. Chief Justice Marshall stated,

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

¹⁶⁰ *Ibid.* at 18. Marshall C.J. stated,

The framers of the U.S. Constitution must have thought that "the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government.

¹⁶¹ *Ibid.* at 16.

point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.¹⁶²

By assessing the relationship between the Indigenous peoples and the federal government in this manner, the Chief Justice established a trust relationship between the parties that remains to this day.

The third case in the trilogy, *Worcester v. Georgia*,¹⁶³ involved the arrest by the state of Georgia of non-Indigenous missionaries residing on Cherokee territory without the approval of the governor of the state. In this case the Marshall Court expanded the ratio of the earlier decision in *Cherokee Nation v. Georgia*,¹⁶⁴ by determining that the federal trade and intercourse acts:

Manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but also guaranteed by the United States.¹⁶⁵

Marshall C.J. also expanded on his decision in *Johnson v. McIntosh*,¹⁶⁶ by confirming the principle that discovery gave title to the lands discovered to the European power discovering the said lands. However, as Marshall C.J. pointed out, this doctrine of discovery was only valid as against other European powers. Also, although this doctrine of discovery impaired the right of the Indigenous nation with regard to alienation of the lands, it did not impair their right of possession to these lands. Referring to the doctrine of discovery, Marshall C.J. stated,

¹⁶² *Ibid.* at 17.

¹⁶³ *Worcester v. Georgia*, *supra* note 105.

¹⁶⁴ *Cherokee Nation v. Georgia*, *supra* note 158.

¹⁶⁵ *Worcester v. Georgia*, *supra* note 105 at 557.

¹⁶⁶ *Johnson v. McIntosh*, *supra* note 46.

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.¹⁶⁷

This decision has important significance in contemporary Aboriginal rights discourse. Marshall C.J. outlined the principle that the relationship between the Aboriginal peoples and the federal government was one of association. It was one where the individual Aboriginal nation retained a right to govern itself.

The settled doctrine of the law of nations is, that a weaker power does not surrender its independence -- its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state."¹⁶⁸

In *Worcester v. Georgia*,¹⁶⁹ the Court concluded that Aboriginal title was not dependent on a grant from the Crown; rather it arose from a point in time prior to contact with an outside nation. As a result, European discovery provided that nation only with an exclusive right to acquire title from the Aboriginal peoples, as against other European nations.

¹⁶⁷ *Ibid.* at 544.

¹⁶⁸ *Ibid.* at 561.

¹⁶⁹ *Worcester v. Georgia*, *supra* note 105.

This trilogy of decisions has significantly influenced the development of Canadian Aboriginal rights jurisprudence. In *Van der Peet*,¹⁷⁰ Lamer C.J.C. stated:

The view of aboriginal rights as based in the prior occupation of North America by distinctive aboriginal societies, finds support in the early American decisions of Marshall C.J. Although the constitutional structure of the United States is different from that of Canada, and its aboriginal law has developed in unique directions, I agree with Professor Slattery both when he describes the Marshall decisions as providing "structure and coherence to an untidy and diffuse body of customary law based on official practice" and when he asserts that these decisions are "as relevant to Canada as they are to the United States."¹⁷¹

Despite this endorsement, these decisions certainly are open to and have been criticised by many scholars. Kent McNeil has stated that Marshall C.J. came to his decision in *Johnson v. McIntosh*,¹⁷² having, "invented a body of law which was virtually without precedent."¹⁷³ Marshall C.J. appears to have made these decisions having concluded that European settlement was sufficient to legitimise claims of occupancy to the Indigenous lands. Catherine Bell and Michael Asch have stated:

The theory informing this analysis is that Aboriginal lands could be considered vacant and subject to discovery because of the method of Aboriginal land use and the superiority of English institutions. Cultivation and settlement was labour worthy of reward, but roaming the land as savages was not.¹⁷⁴

Despite the questionable legitimacy of these judicial edicts, as Kent McNeil has stated,

In practical terms, however, might made right, so that a sovereign who succeeded in exercising a sufficient degree of exclusive control was generally regarded as having acquired sovereignty and a declaration of

¹⁷⁰ *Van der Peet*, *supra* note 1.

¹⁷¹ *Ibid.* at 540-541.

¹⁷² *Johnson v. McIntosh*, *supra* note 46.

¹⁷³ Kent McNeil, *Common Law Aboriginal Title* (Oxford: Oxford University Press, 1989) [McNeil, *Common Law Aboriginal Title*] at 301.

¹⁷⁴ Catherine Bell & Michael Asch "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" [Bell & Asch, *Challenging Assumptions*] in Asch ed., *Aboriginal and Treaty Rights in Canada*, *supra* note 99.

sovereignty by the Crown, even if inconsistent with international law, is conclusive.¹⁷⁵

Taken together, these cases represent the foundation of Indigenous rights law as well as the dependency of the Aboriginal peoples on the state as “domestic dependent nations.” According to Marshall C.J., Aboriginal sovereignty was secondary to the sovereignty of the settler nation. He suggested that this created a trust between the settler nation and the Aboriginal peoples, something that would later evolve, as we will see, to a fiduciary duty on the part of the Crown towards the Indigenous peoples.

The legacy of the Marshall trilogy has played a significant role in Aboriginal rights development. Again, Catherine Bell and Michael Asch state:

Another important legacy of *Johnson v. McIntosh* is that Marshall’s conclusion on the effects of discovery have been adopted as fundamental principles in Canadian Aboriginal rights law. The effects of the doctrine of discovery on judicial analysis can be summarized in the following judicial presumptions.

1. Sovereignty and legislative power is vested in the British Crown.
2. Ownership of Aboriginal lands accompanies sovereignty over Aboriginal territory.
3. Aboriginal peoples have an interest in land arising from original occupation that is less than full ownership.
4. The British Crown obtained the sole right to acquire the Aboriginal interest.
5. Aboriginal sovereignty was necessarily diminished.¹⁷⁶

ii. British and Canadian Case Law

Early Aboriginal rights litigation dealt solely with the issue of Aboriginal title. In the first important case involving Aboriginal title, *St. Catherine’s Milling and Lumber v.*

¹⁷⁵ K. McNeil, *Common Law Aboriginal Title*, *supra* note 173 at 110-111.

¹⁷⁶ Bell & Asch, *Challenging Assumptions*, *supra* note 170 at 47.

The Queen,¹⁷⁷ at issue was a dispute between the newly formed province of Ontario and the federal government of Canada over the legality of a logging permit issued by the federal government to a private logging interest. The federal government asserted authority to issue the permit by virtue of having obtained title to the property in question from the Salteaux Tribe, as the result of a treaty entered into between the parties on 3 October, 1873.¹⁷⁸ In return, the Aboriginal tribes were to receive recognition of their rights to,

[p]ursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and accepting such tracts of land as may from time to time be required or taken up for settlement, mining and lumbering or other purposes, by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government.¹⁷⁹

The federal government further argued that it possessed authority to deal with the lands based on the *Constitution Act, 1867*.¹⁸⁰

The province argued that it held underlying title to the lands by virtue of s. 109 of the *Constitution Act, 1867*.¹⁸¹ The Privy Council sided with the province, concluding that

¹⁷⁷ *St. Catherine's Milling and Lumber v. The Queen*, *supra* note 130.

¹⁷⁸ The treaty in question was one of several numbered treaties. Treaty #3 (North West Angle Treaty), signed on 3 October, 1873. In paragraph six the Salteaux Indians agreed to “cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty, the Queen, and her successors forever, all their rights, titles, and privileges whatsoever to the lands included within the following limits...”. See A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North West Territories including the Negotiations on Which they were Based*. (Toronto: Belfords, Clarke & Co. Publishers, 1880) [Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*] at 322.

¹⁷⁹ *Ibid.* at 323. For an excellent analysis of the “tracts taken up” clause see, S. Imai. “Treaty Lands and Crown Obligations: The “Tracts Taken Up” Provision. (2001) 27 *Queen's L. J.* 1 [Imai, *Treaty Lands and Crown Obligations*].

¹⁸⁰ *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Section 91(24) provided exclusive jurisdictional authority to Parliament over “Indians and Lands reserved for Indians.”

¹⁸¹ *Ibid.* Section 109 states,

s. 109 of the *Constitution Act, 1867* transferred underlying ownership of all lands, mines and minerals to the province, subject to “any Interest other than that of the Province in the same.”

The treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that Province. The fact, that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario.¹⁸²

In rendering this decision, the Privy Council distinguished between the right of the federal government to legislate Native lands and the proprietary rights of the province, concluding the federal government had the right under s. 91(24) to enter into treaties with respect to Aboriginal lands and to extinguish Aboriginal title. However, once Aboriginal peoples divested their proprietary rights in the land, title to the said lands reverted to the province as a result of s. 109.

Lord Watson attempted to outline the nature of Aboriginal title under the English common law system. In contrast to conclusions reached by Marshall C.J. that Aboriginal title was an interest in the land, Lord Watson asserted the notion that Aboriginal title was little more than a right of possession and usage at the pleasure of the Crown.

Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living

All Lands, Mines, Minerals, and Royalties belonging to the Province of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces or Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

¹⁸² *St. Catherine's Milling and Lumber*, *supra* note 130 at 60.

under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never “been ceded to or purchased by” the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a *personal and usufructuary right, dependent upon the good will of the Sovereign*. The lands reserved are expressly stated to be “parts of Our dominions and territories;” and it is declared to be the will and pleasure of the sovereign that, “for the present,” they shall be reserved for the use of the Indians as their hunting grounds, under his protection and dominion.¹⁸³

According to Lord Watson, the source of Aboriginal interest in the land was the *Royal Proclamation, 1763*.¹⁸⁴ The document itself Lord Watson concluded, clearly asserted that Aboriginal occupancy rights were “dependent on the goodwill of the sovereign.”¹⁸⁵ In this case Lord Watson appeared to revert to the dependency analysis used by Marshall C.J. in *Johnson and Graham Lessee v. McIntosh*,¹⁸⁶ specifically that, despite the fact that Aboriginal peoples were original occupants of the lands, the Crown held underlying title and could extinguish Aboriginal interests to lands without the consent of the Aboriginal peoples.¹⁸⁷

This conclusion of the Privy Council was subsequently followed by the Supreme Court of Canada in *Province of Ontario v. Dominion of Canada*.¹⁸⁸ At issue was the previously mentioned treaty made between the Salteaux Tribe of the Ojibway Indians and the government of Canada in 1873,¹⁸⁹ by which the Salteaux surrendered their rights and privileges in land for compensation and reserve lands. E.L. Newcombe, representing the

¹⁸³ *Ibid.* at 54-55. [Emphasis added].

¹⁸⁴ *Royal Proclamation, 1763*, *supra* note 118.

¹⁸⁵ *St. Catherine's Milling and Lumber*, *supra* note 130 at 54.

¹⁸⁶ *Johnson v. McIntosh*, *supra* note 46.

¹⁸⁷ For an interesting discussion of the value of this decision by the Privy Council, see generally Donovan, *The Evolution and Present Status of Common Law Aboriginal Title in Canada*, *supra* note 116.

¹⁸⁸ *Province of Ontario v. Dominion of Canada*, (1909) 42 S.C.R. 1 (S.C.C.) [*Province of Ontario v. Dominion of Canada*].

¹⁸⁹ *Treaty No. 3*, *supra* note 178.

federal government, argued that the rights of the Indigenous peoples were more than usufructuary, as determined by Lord Watson in *St. Catherine's Milling and Lumber*.¹⁹⁰ The Court rejected this argument, affirming the decision of the Privy Council in *St. Catherine's Milling and Lumber* that the Aboriginal right to title was, in fact, nothing more than usufructuary.¹⁹¹

In *Re: Southern Rhodesia*,¹⁹² the British Privy Council addressed for the first time, the relationship between Indigenous law and the common law. In this case the Court responded to an argument put forth that the Indigenous peoples of Southern Rhodesia had owned the lands therein long before the arrival of the British. The Court addressed the issue of whether Indigenous peoples could be divested of their lands without their express consent. In describing Aboriginal rights to lands, Lord Sumner stated:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." On the other hand, there are Indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest...¹⁹³

¹⁹⁰ *St. Catherine's Milling and Lumber*, *supra* note 130.

¹⁹¹ *Province of Ontario v. Dominion of Canada*, *supra* note 188 at 125.

¹⁹² *Re: Southern Rhodesia*, *supra* note 64.

¹⁹³ *Ibid.* at 233-234.

Lord Sumner concluded that Indigenous claims to lands could only represent ownership if they conformed to the common law characteristics of private property as recognised by the courts. His Lordship stated:

It seems to be common ground that the ownership of the lands was "tribal" or "communal," but what precisely that means remains to be ascertained. In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.¹⁹⁴

In *Amodu Tijani v. Southern Nigeria Secretary*,¹⁹⁵ the Privy Council had to determine the nature of tribal interests with regard to lands traditionally held by the Oluwa community of Nigeria. The appellant was a Chief of the Oluwa Community and one of the land-owning White Cap Chiefs. Members of the community paid rents to him for the use of communal lands. The issue before the Court was the basis of calculating compensation awarded for the expropriation of the appellant's lands under the *Public Lands Ordinance, 1903*.¹⁹⁶ The Supreme Court of Nigeria concluded that the nature of the land holdings was:

[m]erely a seigneurial right giving the holder the ordinary rights of control and management of the land in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis, and not on the basis of absolute ownership of the land.¹⁹⁷

¹⁹⁴ *Ibid.* at 233.

¹⁹⁵ *Amodu Tijani v. Secretary, Southern Nigeria*, *supra* note 48.

¹⁹⁶ *Public Lands Ordinance, 1903 (No. 5, Lagos)*.

¹⁹⁷ *Amodu Tijani v. Secretary, Southern Nigeria*, *supra* note 48 at 402.

To the Privy Council the appellant argued that compensation should be based on the full value of the property in question. Their Lordships, citing their earlier decision in *St. Catherine's Milling and Lumber*,¹⁹⁸ noted:

There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada.¹⁹⁹

Despite this, the Court concluded that the rights of the holders of property were to be respected at all times, stating, “[T]his principle is a usual one under British policy and law when such occupations take place.”²⁰⁰ The Council concluded that following prior decisions, such as *Southern Nigeria v. Holt*,²⁰¹ the appellant should be awarded the full value of their lands.²⁰²

¹⁹⁸ *St. Catherine's Milling and Lumber*, *supra* note 130.

¹⁹⁹ *Amodu Tijani v. Secretary Southern Nigeria*, *supra* note 48 at 403.

²⁰⁰ *Ibid.* at 407.

²⁰¹ *Southern Nigeria v. Holt*, [1915] App. Cas. 599 (P.C.) [*Southern Nigeria v. Holt*].

²⁰² *Amodu Tijani v. Secretary Southern Nigeria*, *supra* note 48 at 411.

iii. Contemporary Canadian Case Law

Prior to 1973 very few cases regarding the rights of the Aboriginal peoples reached the Supreme Court of Canada. Brian Slattery notes that, between 1943 and 1959 the Court handed down only three decisions regarding Aboriginal rights.²⁰³

One exception was the 1964 case of *R. v. White and Bob*.²⁰⁴ In this case the respondents, members of the Saalequun Indian Band, were charged with possession of deer carcasses out of season without a valid permit under the British Columbia *Game Act*.²⁰⁵ The respondents framed their defense under two premises. First, they maintained a treaty right to fish based on an 1854 treaty signed between their ancestors and James Douglas. In the alternative, they argued an Aboriginal right to hunt on their traditional lands. Citing *Amodu Tijani v. Secretary Southern Rhodesia*,²⁰⁶ Norris J. stated: “[T]he aboriginal right is a very real right and is to be recognised although not in accordance with the ordinary conception of such under British law.”²⁰⁷

It was the modern day decision of the Court in *Calder*²⁰⁸ that ushered in a new era of Aboriginal rights jurisprudence. In *Calder*, the appellants, members of the Nisga’a nation, sought an order declaring the Crown had never extinguished their Aboriginal title. The Nisga’a, who it was accepted had lived on the lands since time immemorial, had never entered into treaties with representatives of the settler nation.²⁰⁹ They argued that

²⁰³ These were in chronological order: *Miller v. The King*, [1950] S.C.R. 168, 1 D.L.R. 513 (S.C.C.) [*Miller v. The King*, cited to S.C.R.]; *R. v. St. Ann’s Island Shooting and Fishing Club*, [1950] S.C.R. 211, 2 D.L.R. 225 (S.C.C.) [*R. v. St. Ann’s Island*, cited to S.C.R.]; and *Francis v. The Queen*, [1956] S.C.R. 618, 3 D.L.R. (2d) 641 (S.C.C.) [*Francis v. The Queen*, cited to S.C.R.].

²⁰⁴ *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193, (B.C.C.A.) aff’d, 52 D.L.R. (2d) 48. (S.C.C.) [*R. v. White and Bob*, cited to D.L.R.].

²⁰⁵ *Game Act*, R.S.B.C. 1960, c. 160 [*Game Act, 1960*]

²⁰⁶ *Amodu Tijani v. Secretary Southern Rhodesia*, *supra* note 48.

²⁰⁷ *R. v. White and Bob*, *supra* note 204.

²⁰⁸ *Calder*, *supra* note 38.

²⁰⁹ *Ibid.* at 317.

their title to the lands came as a result of their prior occupation, and that this principle was one recognised at common law. They further asserted their title to the lands was not dependent on treaty, executive order or legislative enactment; however in the alternative, if legislative recognition was required it was to be found in the words of the *Royal Proclamation, 1763*.²¹⁰ As a result, despite assertions of sovereignty on the part of the Crown, the appellants asserted their Aboriginal title had never been extinguished.

While the claims of the band were disallowed on a technical point,²¹¹ the Court's decision in *Calder* represented a dramatic shift as well as a tremendous step forward in the recognition of Aboriginal title. Despite the fact that the justices differed in their opinion of extinguishment, six of the seven Supreme Court justices agreed that Aboriginal title had existed in British Columbia and that this title was recognised at common law. Judson J., casting doubts on aspects of the decision of the Privy Council in *St. Catherine's Milling and Lumber*,²¹² stated:

Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organised in societies and occupying the lands as their forefathers had done for centuries. This is what Indian title means and it does not held one in the solution of this problem to call it a "personal or usufructuary right."²¹³

Judson J. relying in part on the decision in *St. Catherine's Milling and Lumber*, was of the opinion that Aboriginal title could be extinguished without compensation and that such extinguishment did not require an overt legislative enactment. To Judson J.

²¹⁰ *Ibid.* at 318.

²¹¹ Of the seven judges on the panel, three voted in favour of the Nisga'a claim, three voted against the Nisga'a claim and one, Pigeon J. concluded that the Supreme Court had no jurisdiction absent a fiat from the Lieutenant Governor of the Province.

²¹² *St. Catherine's Milling and Lumber*, *supra* note 130.

²¹³ *Calder*, *supra* note 38 at 328.

adverse dominion over the Aboriginal lands by members of the settler society was enough to constitute the taking of the lands from the original inhabitants.

A key insight into Aboriginal rights comes from the conclusion of Judson J. that Aboriginal rights existed without an executive enactment or an act of the legislature. Judson J. found precedent for this opinion from *United States v. Santa Fe Railroad*.²¹⁴

Citing this case as authority Judson J. stated:

Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive."²¹⁵

Hall J. concluded that Aboriginal title existed and that it was recognised at common law while recognizing that the terms of the *Royal Proclamation, 1763*,²¹⁶ applied to British Columbia. Hall J. disagreed with Judson J. on extinguishment, arguing that nothing less than "clear and plain" intent on the part of the government would serve to extinguish Aboriginal title.

While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. *In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the [claimants'] rights" in their property, Indian title continues.*²¹⁷

Hall J. added that the onus of proving the extinguishment of Aboriginal title lies with the Crown. In summary then, for Hall J. nothing less than voluntary surrender or legislative enactments that clearly and plainly indicated intent to expropriate Aboriginal lands would serve to prove the extinguishment of Aboriginal title.

²¹⁴ *United States v. Santa Fe Railroad* 314 U.S. 339 (1941) (U.S.S.C.) [*United States v. Santa Fe Railroad*].

²¹⁵ *Calder*, *supra* note 38 at 334.

²¹⁶ *Royal Proclamation, 1763*, *supra* note 118.

²¹⁷ *Calder*, *supra* note 38 at 393. [Emphasis added].

For the Nisga'a Nation the decision of the Court was bittersweet. Three judges determined that their Aboriginal title had been extinguished and thus they had no action while the technical determination of Pigeon J. that the necessary fiat was missing and therefore any action was precluded from the onset. As a result, they were not provided with the relief sought. However, the judgment represented a rejection of the earlier belief that Aboriginal title was nothing more than a personal and usufructuary right to be provided by the goodwill of the sovereign, as well as the notion that Aboriginal title did not exist at common law.

There can be little doubt that the Supreme Court of Canada decision in *Calder* represented a major step forward for the Aboriginal peoples of Canada. Six years following the Supreme Court decision in *Calder*, the federal court decided the case of *Hamlet of Baker Lake v. Minister of Indian Affairs*.²¹⁸ The case itself involved assertion of Aboriginal title over portions of the Northwest Territories surrounding Baker Lake. The Inuit of Baker Lake sought a declaration that the lands comprising the Baker Lake areas were subject to the Aboriginal right of the Inuit residing in the region to hunt and fish on the lands and waters therein, as well as being subject to Aboriginal title. The Inuit sought an injunction to stop mining exploration in the region on the grounds that these activities interfered with their Aboriginal right to hunt and fish. In rendering his decision, Mahoney J. was provided with the opportunity to determine who might bring forth an Aboriginal rights claim.

Mahoney J. asserted that for an Aboriginal rights claim to be put forth, the nation or group putting forth the claim must illustrate the following:

²¹⁸ *Hamlet of Baker Lake v. Minister of Indian Affairs* (1979), 107 D.L.R. (3d) 513, 3 C.N.L.R. 17, 1 F.C. 518, (F.C.T.D.) [*Hamlet of Baker Lake*, cited to D.L.R.].

1. That they and their ancestors were members of an organised society.
2. That the organised society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organised societies; and
4. That the occupation was an established fact at the time sovereignty was asserted by England.²¹⁹

In other words, the Aboriginal group claiming the right must be able to illustrate that they were organised as a society and occupying the land in question at the time of British sovereignty. Mahoney J. concluded that the Inuit did fit this criterion.²²⁰ Despite this, Mahoney J. was clear that the effect of competent legislation, in this case the *Canadian Mining Regulations*,²²¹ had the effect of diminishing the Aboriginal rights claimed.

Notwithstanding this decision, there was reason for encouragement. In *Guerin v. The Queen*,²²² the Court adopted the view that Aboriginal rights to property derived from their historical occupation and possession of their lands, while recognizing a fiduciary obligation on the part of the Crown when dealing with Aboriginal peoples.²²³ In the

²¹⁹ *Ibid.* at 542.

²²⁰ *Ibid.* at 544, Mahoney J. stated:

The fact is that the aboriginal Inuit had an organised society. It was not a society with very elaborate institutions but it was a society organised to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do; hunt and fish to survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.

²²¹ *Canadian Mining Regulations*, C.R.C. 1978, c. 1516 [*Canadian Mining Regulations*].

²²² *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120 (S.C.C.) [*Guerin v. The Queen*, cited to S.C.R.].

²²³ I will focus much more closely on this case in Chapter IV of this work where I discuss the Crown's fiduciary obligations towards the Aboriginal peoples of Canada.

course of his judgment, Dickson J. (as he then was), confirmed the ruling in *Calder*,²²⁴ that Aboriginal interest in land, “is an independent legal interest.”²²⁵

Dickson J. concluded that since these rights developed as the result of pre-existing Aboriginal organization, they should be classified in a different manner than common law property rights.

It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.²²⁶

Dickson J. concluded that the land rights of the Indigenous peoples lie somewhere in between ultimate title and a personal right. In an attempt to reconcile the existence of prior Aboriginal legal systems with Crown sovereignty, Dickson J. concluded that Aboriginal title was *sui generis* in nature.²²⁷

As indicated earlier in this work, in 1982 Aboriginal rights were elevated to constitutional status with the incorporation of s. 35(1) into the *Constitution Act, 1982*.²²⁸ Early decisions, such as that of *Guerin v. The Queen*,²²⁹ in which the Court recognised the fiduciary obligations of the Crown towards the Aboriginal peoples gave many Aboriginal groups encouragement that these rights were actually going to reflect their

²²⁴ *Calder*, *supra* note 38.

²²⁵ *Guerin v. The Queen*, *supra* note 222 at 385.

²²⁶ *Ibid.* at 382.

²²⁷ *Ibid.* See, John Borrows and Leonard Rotman. “The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?” (1997) 36 *Alta. L. Rev.* 9 [Borrows & Rotman, *The Sui Generis Nature of Aboriginal Rights*] at 21.

²²⁸ *Constitution Act, 1982*, *supra* note 6.

²²⁹ *Guerin v. The Queen*, *supra* note 222.

constitutional stature. However, as is often the case, advances in the area of Aboriginal rights in the courts has often been followed by a period of backsliding of these same rights. This often leads to a situation where the Aboriginal peoples are worse off than they were initially.²³⁰

Throughout 1996 and into 1997 the Supreme Court was extremely active in the area of Aboriginal and treaty rights litigation.²³¹ Perhaps the most significant of these decisions was rendered in *Van der Peet*²³² and its companion cases, *N.T.C. Smokehouse Ltd.*,²³³ and *Gladstone*,²³⁴ decided in August of that year.

In September of 1987 Dorothy Van der Peet, a member of the Sto:lo Indian band, was charged under s. 61(1) of the federal *Fisheries Act*²³⁵ with the offense of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*.²³⁶ At the provincial court level Scarlett Prov. Ct. J. concluded that the Sto:lo people fished for food and ceremonial purposes, but that any trade in salmon was “incidental and occasional only”, and that there was no trade in salmon in any regularized or market sense.²³⁷

²³⁰ For an excellent article on this issue see, Neil Jessup Newton “Whim of the Sovereign: Aboriginal Title Reconsidered” (1980) 31 *Hastings L. J.* 1215 [Newton, *Whim of the Sovereign*] Newton argues this point with regard to American Indigenous rights litigation but, as authors of Canadian Indigenous rights litigation point out the same is true in Canada. See, for example, Leonard Rotman, “Creating a Still Life out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada.” (1997) 36 *Alta. L. Rev.* 1. [Rotman, *Creating a Still Life out of Dynamic Objects*]. In this article Professor Rotman criticizes a series of decisions made during the 1990’s as regressive in light of earlier decisions following the entrenchment of Aboriginal rights in the Constitution.

²³¹ I have intentionally not touched on the 1990 Supreme Court decision in *Sparrow* at this time as Chapter v of this work is dedicated specifically to that case.

²³² *Van der Peet*, *supra* note 1.

²³³ *N.T.C. Smokehouse*, *supra* note 1.

²³⁴ *Gladstone*, *supra* note 1.

²³⁵ *Fisheries Act*, R.S.C. 1970 c. F. 14 [*Fisheries Act, 1970*].

²³⁶ *British Columbia Fishery (General) Regulations* SOR/84-248. Section 27(5) stated:

No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

²³⁷ *Van der Peet*, *supra* note 1 at 528.

At the Supreme Court of Canada, Chief Justice Lamer asserted that the purpose for enshrining Aboriginal rights was to reconcile the pre-existence of Aboriginal societies with assertions of Crown sovereignty.²³⁸ The Chief Justice concluded that not all practices, customs and traditions would give rise to Aboriginal rights warranting protection by virtue of s. 35(1). Only those rights integral to the distinctive culture of the aboriginal group, would generate s. 35(1) rights and protection. Lamer C.J. concluded that the Court should not look at practices, customs and traditions that all societies have in common, nor should the Court consider rights which are “incidental or occasional to that society.”²³⁹ Lamer C.J.C. concluded that these practices, customs or traditions which were integral to the distinctive culture of the Aboriginal group claiming the right, must also be traceable to the pre-contact period between the Aboriginal group and members of the European settler society.

The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.²⁴⁰

The *Van der Peet* test added two dimensions to the test initially created in *Sparrow*.²⁴¹ making it more difficult for a group to claim an Aboriginal right. First, the group claiming the right must show that the pre-existing right was central to the Aboriginal group claiming the right, something that might result in a much smaller

²³⁸ *Ibid.* at 539.

²³⁹ *Ibid.* at 553.

²⁴⁰ *Ibid.* at 554.

²⁴¹ *Sparrow*, *supra* note 12

bundle of practices being recognised. Second, the group claiming the right must show that the right existed prior to contact with Europeans.

In her dissent, McLachlin J. (as she then was), argued that the test proposed by the majority would be ultimately unworkable.

The tests proposed by my colleagues describe qualities which one would expect to find in aboriginal rights. To this extent they may be informative and helpful. But because they are overinclusive, indeterminate, and ultimately categorical, they fall short, in my respectful opinion, of providing a practically workable principle for identifying what is embraced in the term "existing aboriginal rights" in s. 35(1) of the Constitution Act, 1982.²⁴²

McLachlin J. argued that the Aboriginal people had the right to take from the land, the “modern equivalent of what by aboriginal law and custom they traditionally took.”²⁴³

On the same day the Court delivered their ruling in *Van der Peet*, it also issued its ruling in two companion cases, *N.T.C. Smokehouse*,²⁴⁴ and *Gladstone*.²⁴⁵ Using the newly developed *Van der Peet* test in *N.T.C. Smokehouse*,²⁴⁶ the Court concluded that any historic bartering or exchange of salmon prior to 1846 was only occasional in nature, and that the use of the salmon in the potlatch ceremonies was incidental.

The findings of fact made by the trial judge do not support the appellant's claim that, prior to contact, the exchange of fish for money or other goods was an integral part of the distinctive cultures of the Sheshaht or Opetchesaht. Sales of fish that were "few and far between" cannot be said to have the defining status and significance necessary for this Court to hold that the Sheshaht or Opetchesaht have an aboriginal right to exchange fish for money or other goods. Further, exchanges of fish at potlatches and at ceremonial occasions, because incidental to those events, do not have

²⁴² *Van der Peet*, *supra* note 1 at 640-641.

²⁴³ *Ibid.* at 650.

²⁴⁴ *N.T.C. Smokehouse*, *supra* note 1. In this case, the appellants had been charged with having purchased 119, 435 pounds of Chinook salmon, caught by members of the Sheshaht and Opetchesaht Indian Bands. The fish had been caught under the authority of a food fish license.

²⁴⁵ *Gladstone*, *supra* note 1.

²⁴⁶ *N.T.C. Smokehouse*, *supra* note 1.

the independent significance necessary to constitute an aboriginal right. Potlaches and other ceremonial occasions may well be integral features of the Sheshaht and Opetchesaht cultures and, as such, recognised and affirmed as aboriginal rights under s. 35(1); however, the exchange of fish incidental to these occasions is not, itself, a sufficiently central, significant or defining feature of these societies so as to be recognised as an aboriginal right under s. 35(1). The exchange of fish, when taking place apart from the occasion to which such exchange was incidental, cannot, even if that occasion was an integral part of the aboriginal society in question, constitute an aboriginal right.²⁴⁷

However, in *Gladstone*,²⁴⁸ the Court found that the Heiltsuk had an unextinguished constitutionally protected Aboriginal right to a commercial herring spawn-on-kelp fishery, and that the government's J-licensing scheme infringed upon this right.²⁴⁹ Lamer C.J.C. stated:

I would note that the significant difference between the situation of the appellants in this case, and the appellants in *Van der Peet* and *N.T.C. Smokehouse*, lies in the fact that for the Heiltsuk Band trading in herring spawn on kelp was not an activity taking place as an incident to the social and ceremonial activities of the community; rather, trading in herring spawn on kelp was, in itself, a central and significant feature of Heiltsuk society.²⁵⁰

The Court concluded that the Heiltsuk Band had a priority right to fish, but that this right was not absolute and must be examined regularly. As Barsh and Henderson have suggested, this creates a conflict of priorities. "If the Heiltsuk were indeed a mercantile people who lived by trading fish, should it not follow that they retain an Aboriginal right to harvest fish without external interference."²⁵¹ It would appear as if the Court were attempting to develop a theory of Aboriginal rights along the line that in

²⁴⁷ *Ibid.* at 690.

²⁴⁸ *Gladstone*, *supra* note 1.

²⁴⁹ *Ibid.* at 761. For more on the J-License scheme see Douglas C. Harris. "Territoriality, Aboriginal Rights and the Heiltsuk Spawn-on-Kelp Fishery." (2000) 34 U.B.C. L. Rev. 195 [Harris, *Territoriality, Aboriginal Rights and the Heiltsuk Spawn-On-Kelp Fishery*] at 198.

²⁵⁰ *Ibid.* at 748.

²⁵¹ Russell Lawrence Barsh & James Youngblood Henderson. "The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand." (1997) 42 McGill L. J. 993 [Barsh & Henderson, *The Supreme Court's Van der Peet Trilogy*] at 1003.

those cases where a clear case of Aboriginal rights cannot be demonstrated, there is no Aboriginal right. In those cases where it can be proven, it is a limited right based on other non-constitutionally protected criteria.²⁵²

Whereas Dickson C.J.C. and La Forest J. had used reconciliation in *Sparrow*, as a limitation on federal legislative powers *vis-à-vis* the Aboriginal peoples, the Lamer Court concluded that reconciliation may be used to limit the scope of Aboriginal rights protected by s. 35(1). Concerns were raised at the time that such a method of evaluation may have, “the effect of extinguishing everything that had not already been judicially recognised in 1982.”²⁵³

One clear problem with the *Van der Peet* test is that by attempting to reconcile Aboriginal rights with Crown sovereignty, the Court concluded that a Euro-centric rather than an Aboriginal perspective should be considered.

In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In *Sparrow*, supra, Dickson C.J. and La Forest J. held, at p. 1112, that it is “crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.” *It must also be recognised however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.*²⁵⁴

The *Van der Peet* trilogy suggested that Aboriginal rights were not universal and thus, it would seem, not necessarily inherent to Aboriginal groups as a result of their being here from time immemorial. Rather, the majority of the Court appears to have concluded that these rights are specific to groups and must be decided and evaluated on a case-by-case basis. Further, the rights being considered must have been integral to the

²⁵² In this author’s opinion, of great significance to the *Gladstone* decision is the way in which the Court dealt with the justification of infringement. I shall deal with this in Chapter VI of this work.

²⁵³ Barsh & Henderson. *The Supreme Court’s Van der Peet Trilogy*, supra note 251 at 999.

²⁵⁴ *Van der Peet*, supra note 1 at 550. (Emphasis added). See also note 10 of this work.

particular Aboriginal group claiming the right; and the right must have been integral in the period prior to European colonisation and, by definition, integral to the Aboriginal group in present times. How then are we to consider those Aboriginal practices that may have developed as a result of Indigenous contact with members of the settler community? If, for example, a practice, custom or tradition arose as a result of the interaction between the two groups would it not then have to be rejected as having not stood the test of being integral prior to contact and thus not entitled to constitutional protection?

Rather than being expansive, the *Van der Peet* test has restricted the constitutionally protected rights of the Indigenous peoples and, in those cases where the rights are accepted, they must be considered regularly to ensure that other, non-constitutionally protected rights, are not subjected to displacement.

In *Pamajewon*,²⁵⁵ the appellants, members of the Shawanaga First Nation, were found guilty of keeping a common gaming house, contrary to s. 201(1) of the *Criminal Code*.²⁵⁶ The charges themselves arose as a result of high stakes bingo and other gambling activities which took place on the reserve pursuant to the Shawanaga First Nation lottery law.²⁵⁷ The Court rejected the argument that the right to regulate high-stakes gambling was incident to the Aboriginal right of self-government claimed by the appellants. Using the *Van der Peet* test, the Court concluded that the Band could not trace high-stakes gambling as being integral to their existence prior to contact with Europeans.

²⁵⁵ *Pamajewon*, *supra* note 2.

²⁵⁶ *Criminal Code of Canada*, R.S.C. 1985, c. C-46 [*Criminal Code, 1985*] Section 201(1) states:
Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

²⁵⁷ It was noted at trial that this lottery was not a by-law passed pursuant to s. 81 of the *Indian Act*, R.S.C. 1985, c. I-5. [*Indian Act, 1985*]

While Mr. Morrison's evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, his evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community. His account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal.²⁵⁸

R. v. Adams,²⁵⁹ and its companion case, *R. v. Cote*,²⁶⁰ involved claims of an Aboriginal right to fish for food by members of the Mohawk and Algonquin Indians of Quebec. In both cases the Crown argued that the Indigenous parties held no Aboriginal title to the lands where the rights were claimed. In his decision, Lamer C.J.C. concluded that what must be determined was whether Aboriginal rights were based on Aboriginal title to the lands in question, or whether a claim to Aboriginal rights could be made absent a claim of Aboriginal title.

In resolving this appeal and the appeal in *Cote*, this Court must answer the question of whether Aboriginal rights are necessarily based in Aboriginal title to land, so that the fundamental claim that must be made in any Aboriginal rights case is to Aboriginal title, or whether Aboriginal title is instead one sub-set of the larger category of Aboriginal rights, so that fishing and other Aboriginal rights can exist independently of a claim to Aboriginal title.²⁶¹

The Chief Justice concluded that Aboriginal title was a sub-set of Aboriginal rights. As a result, a free-standing Aboriginal right could exist absent Aboriginal title as a result of the “integral to the distinctive culture” test first announced in *Van der Peet*.²⁶²

Lamer C.J.C. stated:

What this test, along with the conceptual basis which underlies it, indicates, is that while claims to Aboriginal title fall within the conceptual

²⁵⁸ *Pamajewon*, *supra* note 2 at 835.

²⁵⁹ *R. v. Adams*, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657, 4 C.N.L.R. 1, 1996 SCJ 87 (S.C.C.) [*Adams*, cited to S.C.R.].

²⁶⁰ *R. v. Cote*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385, 4 C.N.L.R. 26, 1996 SCJ 93 (S.C.C.) [*Cote*, cited to S.C.R.].

²⁶¹ *Adams*, *supra* note 259 at 107-108.

²⁶² *Van der Peet*, *supra* note 1.

framework of Aboriginal rights, Aboriginal rights do not exist solely where a claim to Aboriginal title has been made out. Where an Aboriginal group has shown that a particular activity, custom or tradition taking place on the land was integral to the distinctive culture of that group then, *even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land*, they will have demonstrated that they have an Aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the Aboriginal group claiming the right; it does not require that the group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to Aboriginal title to the land. *Van der Peet* establishes that s.35 [of the *Constitution Act, 1982*] recognises and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an Aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.²⁶³

In these cases, Lamer C.J.C. suggests that a claim for Aboriginal rights may, in certain circumstances, be made absent a claim of Aboriginal title to the lands in question. Citing his earlier decision in *Van der Peet*, the Chief Justice stated:

Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of Aboriginal peoples on that land. In considering whether a claim to an Aboriginal right has been made out, courts must look at both the relationship of an Aboriginal claimant to the land *and* at the practices, customs and traditions arising from the claimant's distinctive culture and society.²⁶⁴

Despite this, Lamer C.J.C. was clear that absent Aboriginal title such rights may still be site-specific, rather than a blanket right which may be exercised anywhere.

From the decisions of the Court in 1996 it would appear that one might conclude that Aboriginal rights have been developed along a line or spectrum. At the one extreme are rights which relate to the historic customs and practices of the Aboriginal band in question but have little or nothing to do with claims to the lands upon which the right is exercised. These free-standing rights can be exercised universally or they may be site-

²⁶³ *Ibid.* at 117-118. (Emphasis in original text).

²⁶⁴ *Ibid.* at 119.

specific. At the other end there is Aboriginal title, which is in a real sense, full ownership to the land itself. In *Delgamuukw*,²⁶⁵ Lamer C.J.C. stated:

The picture which emerges from *Adams* is that the aboriginal rights which are recognised and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the “*occupation and use of the land*” where the activity is taking place is not “*sufficient to support a claim of title to the land*” (at para. 26). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. I put the point this way in *Adams*, at para. 30:

“Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land.”

At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.²⁶⁶

The Court discussed the content of Aboriginal title at length in *Delgamuukw*.

This seminal case arose from claims of the Gitskan and Wet’suwet’en hereditary chiefs assertion of ownership to 58,000 square kilometres of lands in British Columbia. At trial, the plaintiffs asserted that their land rights were equivalent to fee simple ownership at common law. They further asserted a right to self-government. The trial took more than

²⁶⁵ *Delgamuukw*, *supra* note 3.

²⁶⁶ *Ibid.* at 1094-1095.

a year to conclude and culminated in a nearly four hundred page decision by McEachern C.J.B.C. The trial judge rejected the appellant's claims of self-government and land ownership, claiming that the Crown prior to the entry of British Columbia into Confederation had extinguished these rights.²⁶⁷

The Supreme Court of Canada decision in *Delgamuukw* included several important rulings regarding the nature of Aboriginal rights. First, the Court took a liberal approach to the introduction of and weight of oral evidence from the Aboriginal peoples.

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that the courts are familiar with, which largely consists of historical documents.²⁶⁸

The Court concluded that Aboriginal title arose “from the prior occupation of Canada by the aboriginal peoples,”²⁶⁹ and that it was communal in nature and thus a collective right held by all members of the Aboriginal nation.²⁷⁰ Despite the communal nature of the right, the Court concluded Aboriginal title included exclusive use and occupation of the lands and that this title could be used for a variety of purposes which need not be aspects of the historical use of the lands. However, such activity is, according to the Court, subject to two limitations. First, the use of the lands could not be irreconcilable with the nature of the group's attachment to the lands.²⁷¹ This could, in certain circumstances according to the Court, encompass mineral rights and their disposition.²⁷² Second, if the group choice to use the lands in a non-irreconcilable

²⁶⁷ *Ibid.* at 1035.

²⁶⁸ *Delgamuukw*, *supra* note 3 at 1069.

²⁶⁹ *Ibid.* at 1082.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.* at 1083.

²⁷² *Ibid.* at 1086. This would, of course, depend on whether the extraction of these minerals would inhibit or prevent traditional use of the lands by the Indigenous group in question.

manner, they must first surrender the lands and convert them to a non-title status before doing so. “If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.”²⁷³

Finally, citing *Sparrow*,²⁷⁴ the Court concluded s. 35(1), “provides a solid constitutional base upon which the subsequent negotiations can take place.”²⁷⁵ In keeping with their penchant for moralising, the Court concluded that the Crown had “a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.”²⁷⁶

It is clear from this decision that the Court has concluded that while it holds many of the same traits, Aboriginal title is not the same as title in fee simple. While it allows for diverse use of the land, not necessarily limited to those that may be traditionally proven, including the use of minerals on the lands, it does not allow for the disposal, as a fee simple title would suggest.

More recently, in *Mitchell v. M.N.R.*,²⁷⁷ Grand Chief Michael Mitchell, a Mohawk Indian from the Akwesasne First Nation crossed the international border from the United States into Cornwall Ontario. In his possession were several items he had purchased on his trip, including blankets, bibles, motor oil, food, clothing, and a washing machine. All but the motor oil was given as gifts to a neighbouring community. The motor oil was later offered for resale to members of the Akwesasne through a store in that community. Mitchell claimed the goods upon his entry; however, he refused to pay customs or duties

²⁷³ *Ibid.* at 1091.

²⁷⁴ *Sparrow*, *supra* note 12.

²⁷⁵ *Delgamuukw*, *supra* note 3 at 1123.

²⁷⁶ *Ibid.* See also, *Reference Re: Secession of Quebec*, [1998] 2 S.C.R. 217 at 266, 161 D.L.R. (4th) 385, 15 C.R.R. (2d) 1, 1998 SCJ 61 (S.C.C.) [*Reference Re: Quebec Secession*, cited to S.C.R.]. The Court in this case referred to the underlying “constitutional principles which give rise to the duty of negotiate: federalism, democracy, constitutionalism and rule of law, and the protection of minorities.”

²⁷⁷ *Mitchell v. M.N.R.*, *supra* note 4.

on the products, claiming he had an Aboriginal and treaty right to enter Canada from the United States with goods for trade with other Aboriginal peoples, without paying duty or customs on the products. He was informed he would be charged \$142.88 in duty and allowed to continue into Canada. Chief Mitchell was served notice of unpaid duty, taxes and penalties totaling \$361.64.

The trial judge applied the *Van der Peet* test and determined that, subject to limitations, Chief Mitchell had established an Aboriginal right to bring the goods into Canada duty free. The Federal Court of Appeal affirmed the decision of the trial court; however, the Supreme Court of Canada unanimously reversed these decisions.

In her reasons for judgment, McLachlin C.J.C. concluded that the rules of evidence did not support a finding that trade had been a defining feature of Mohawk society prior to European contact. McLachlin C.J.C. stated:

There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, “generous rules of evidence should not be confused with a vague sense of after-the-fact largesse.”²⁷⁸

The Chief Justice determined that the evidence did not support the claim of trade across the border vis-à-vis the *Van der Peet* test. In their reasons for judgment, both Binnie and Major JJ. agreed, but also determined that the doctrine of “sovereign incompatibility” would have prevented any right from being recognised, regardless of findings of fact concerning the *Van der Peet* test. Binnie and Major JJ. explained this meant that those rights protected by s. 35(1) must be compatible with the sovereignty of the Canadian state. Any right, such as the right to mobilize an army, that was

²⁷⁸ *Ibid.* at 939.

incompatible with the sovereignty of Canada could not be afforded constitutional protection.

Binnie J. stated:

In my opinion, sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied. For the most part, the protection of practices, traditions and customs that are distinctive to aboriginal cultures in Canada does not raise legitimate sovereignty issues at the definitional stage.²⁷⁹

Conclusion

In this chapter we have outlined the nature and content of Aboriginal rights. These rights are *sui generis* in nature, flowing from the Aboriginal peoples prior occupation to the lands. These rights may be either free-standing, such as an inherent right to fish or hunt, or they may be connected site-specific. In cases where the rights are sight specific, a degree of permanence to the land that constitutes something less than Aboriginal title may suffice.

The rights are collective in nature and they are inalienable except in favour of the Crown. Aboriginal rights lie on a spectrum with relation to their connection to lands, ranging from Aboriginal title at one end, to practices, customs and traditions at the other, rights that need not be supported by Aboriginal title to be claimed.

As has been illustrated, the case law over the past thirty years reflects an attempt on the part of the Court to correct the wrongs done the Aboriginal peoples of Canada in the past. Despite this, it is clear that there is a long way to go. While in *Calder*,²⁸⁰ the Court signaled an attempt to expand the way in which Aboriginal rights must be

²⁷⁹ *Ibid.* at 987.

²⁸⁰ *Calder*, *supra* note 38.

considered, by the conclusion of the *Van der Peet*²⁸¹ trilogy the Court had once more shifted towards a restrictive interpretation of these rights. For example, in *Pamajewon*,²⁸² rather than considering high-stakes gambling as an incident of self-government, the Court chose to isolate it as an activity to be considered under the *Van der Peet* test. By doing this, the Court was able to focus on that particular activity in the context of the pre-contact criteria required in *Van der Peet*, something destined in advance to lead to failure of the claim on the part of the Aboriginal group involved. By separating these rights from the larger context the judiciary appears to have reverted back to the “frozen rights” approach to interpretation rejected in *Sparrow*.²⁸³ In that case the Court determined that the rights protected by virtue of s. 35(1) required a purposive interpretation.

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.²⁸⁴

Despite this promise, the *Van der Peet* test, with its criteria that the right be a practice, custom or tradition integral to the group claiming the right prior to contact with Europeans strongly suggests a re-entrenching of the frozen rights approach to Aboriginal rights interpretation.

²⁸¹ *Van der Peet*, *supra* note 1.

²⁸² *Pamajewon*, *supra* note 2.

²⁸³ *Sparrow*, *supra* note 12.

²⁸⁴ *Ibid.* at 1106.

CHAPTER III

Introduction

Along with Aboriginal rights, the *Constitution Act, 1982*,²⁸⁵ provided for constitutional protection to Aboriginal treaty rights as well. Unlike the inherent nature of Aboriginal rights, treaty rights stem from a series of consensual agreements between the signatories and reflect the ongoing nature of the relationship between the parties. Prior to contact with Europeans, the independent peoples of North America engaged in treaty making as a method of establishing harmonious co-habitation of the lands and resources among themselves.²⁸⁶ The alternative was conflict, often culminating in inter-tribal warfare. These treaties were living agreements, designed to assist the evolving relationships between the parties involved. To further this goal, representatives from the various tribes involved would meet from time to time to renew friendships, exchange gifts, and forgive one another various transgressions. Bruce Trigger stated:

The suppression of blood feuds was supervised by a confederacy council made up of civil headmen from the member tribes, which gathered periodically for feasts and consultations, judged disputes, and arranged for reparation payments as the need arose. There is no evidence that the member tribes of a confederacy were bound to help one another in case of attack or to aid each other in their wars; often the foreign policies of the member tribes were very different from one another.²⁸⁷

Thus, when the Europeans arrived there was already a system in place to guide the interaction of separate and diverse nations and the Aboriginal peoples began their

²⁸⁵ *Constitution Act, 1982*, *supra* note 6.

²⁸⁶ See, V. Lytwyn. "A Dish Without a Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region" in D. Pentland ed. *Papers of the Twenty-Eighth Algonquin Conference* (Winnipeg: University of Manitoba Press, 1997) [Lytwyn, *A Dish Without A Spoon*] at 210 as cited in John Borrows "Domesticating Doctrines: Aboriginal Peoples After the Royal Commission" (2001) 46 McGill L. J. 615 [Borrows, *Domesticating Doctrines: Aboriginal Peoples After the Royal Commission*] at 622.

²⁸⁷ Bruce Trigger, *The Children of Aataentsic: A History of the Huron People to 1660*, vol. 1 (Montreal & Kingston: McGill-Queen's University Press, 1976) [Trigger, *The Children of Aataentsic*] at 162.

relationship with the Europeans as independent nations, exercising authority over their historic territories. It was through a mechanism of treaties that the French and British Crowns committed themselves to a relationship of co-existence with the Aboriginal peoples residing on the lands upon their arrival.²⁸⁸ Professor Bruce Wildsmith stated:

The aboriginal parties to treaties were considered to be distinct, self-governing nations, capable of making collective decisions, of establishing co-equal relationships (“alliances”) and of controlling their own affairs. They had the capacity to negotiate with the Crown, and to voluntarily agree or withhold consent. The Crown approached the aboriginal societies on the basis that problems were to be solved through co-operation, negotiation and *quid pro quo* bargaining, rather than unilateral imposition.²⁸⁹

i. North American Treaties and Their Effects on Indigenous Peoples

From the time of their arrival, alliances between the Indigenous population and Europeans took place, often on an informal basis. One of the earliest alliances took place in Albany in 1644, following the defeat of the Dutch in what was then called New Amsterdam. In that year, representatives from the Haudenosaunee Confederacy (*People of the Long House*) and the British colonial government met in Albany to confirm a treaty of peace and friendship between the two nations.²⁹⁰ The treaty itself was designed to secure the safety of the colonists, cement trade relations between the parties and ensure that the tribes of the Haudenosaunee Confederacy would not align themselves with the French.²⁹¹ Under the terms of the treaty the Haudenosaunee were to receive, “such wares and commodities from the English for the future, as heretofore they had enjoyed from the

²⁸⁸ RCAP, *supra* note 32 at 2.

²⁸⁹ Bruce Wildsmith. “Treaty Responsibilities: A Co-Relational Model” (1992) U.B.C. L. Rev. 324 [Wildsmith, *Treaty Responsibilities: A Co-Relational Model*] at 331.

²⁹⁰ Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation Of Indian Tribes and the English Colonies From Its Beginnings to the Lancaster Treaty of 1744*. (New York: W.W. Norton & Co., 1984) [Jennings, *The Ambiguous Iroquois Empire*] at 43.; also, Rotman, *Defining Parameters*, *supra* note 21 at 157.

²⁹¹ Robert B. Porter “Legalizing, Decolonizing, and Modernizing New York State’s Indian Law” (1990) 63 Alb. L. Rev. 125 [Porter, *Legalizing, Decolonizing, and Modernizing New York State’s Indian Law*] at 133.

Dutch.”²⁹² The treaty further provided for British military assistance against certain enemies of their new Indian allies. The treaty represented evidence of the fact that from early on the British dealt with the Indigenous people as independent nations.

The alliance entered into between Britain and the Five Nations of the Iroquois Confederacy (Now Six Nations) that resulted in the *Treaty of Albany, 1644*, is one of the earliest, and most noteworthy, examples of how Britain recognised aboriginal peoples as sovereign nations and treated them in an appropriate manner.²⁹³

Representative of this relationship was the *Covenant Chain*. This symbolic chain linked the two peoples together, both agreeing to respect the other’s vision.²⁹⁴ Francis Jennings wrote:

Out of the peacemaking a new organization emerged which was to maintain English-Indian peace and trade among its members for three-quarters of a century. Called the Covenant Chain, it was a multiparty alliance of two groupings of members: tribes under the general leadership of the Iroquois, and English colonies, under the supervision of New York. As in the modern United Nations, no member gave up its sovereignty. All decisions were made by consultations and treaty, and all were implemented by each member individually.²⁹⁵

As well as a treaty of peace and friendship, the chain represented a military and economic alliance between the Haudenosaunee Confederacy and first the Dutch and later the English. The *Gus-Wen-Tah*, or *Two-Row-Wampum* symbolized agreements between the two nations. The belts were passed down from generation to generation, along with

²⁹² E.B. O’Callaghan ed., *Documents Relative to the Colonial History of New York*, vol. 3 (Albany: Weed, Parsons & Co., 1856-61) [O’Callaghan, *Documents Relative to the Colonial History of New York*] at 67.

²⁹³ Rotman, *Parallel Paths*, *supra* note 85 at 32.

²⁹⁴ Robert Williams, Jr. “The Algebra of Indian Law: The Hard Trail of Colonisation, and Americanizing the White Man’s Jurisprudence” (1986) *Wisc. L. Rev.* 219 [Williams, *The Algebra of Indian Law*] at 291.

²⁹⁵ Francis Jennings “Iroquois Alliances in America” in Francis Jennings et al, ed. *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse: Syracuse University Press, 1985)

the memory of what it recorded.²⁹⁶ The nature of the relationship and significance of the belt was recorded in the following passage:

When the Haudenosaunee first came in contact with the European nations, treaties of peace and friendship were made. Each symbolized by the *Gus-Wen-Tah* or *Two-Row-Wampum*. There is a bead of white wampum, which symbolizes the purity of the agreement. There are two rows of purple, and those rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or vessels, traveling down a river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall travel down the river together, side-by-side, but in our own boat. Neither of us will try to steer the other's vessel.²⁹⁷

As a result of the pattern of the belt, the treaty came to be recognised as the *Two-Row Wampum Treaty*. The three beads of wampum separated by two separate rows, represented nations working in concert but each the master of its own destiny.

While the Covenant Chain began as a symbol of peace between the various nations of the Haudenosaunee Confederacy, it quickly evolved to symbolize the relationship between the Aboriginal peoples of North America and first the Dutch and then later the British Crowns.²⁹⁸ Professor Rotman stated: “[T]he Covenant Chain was a mutual protectorate, in which the individual nations were like links in a chain, each gathering strength from its connection with the others while maintaining its individual existence as a nation.”²⁹⁹

The idea of the Covenant Chain as a symbol of peace was also seen in the alliances between the British and the Aboriginal peoples in the Maritime region during

²⁹⁶ D. Johnston. “The Quest of the Six Nations Confederacy for Self-Determination” (1986) 44 U. T. Fac. L. Rev. 1 [Johnston, *The Quest of the Six Nations Confederacy for Self-Determination*] at 9.; also, J.M. Matchewan. “Mitchikanibikonginik Algonquins of Barriere Lake: Our Long Battle to Create a Sustainable Future” in B. Richardson ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1979) [Matchewan, *Mitchikanibikonginik Algonquins of Barriere Lake*] at 14.

²⁹⁷ Canada, Report of the Special Committee. *Indian Self-Government in Canada* (Ottawa: Queen's Printers, 1983) [Report of the Special Committee, *Indian Self-Government*] at back jacket.

²⁹⁸ See, L. Rotman, *Parallel Paths*, *supra* note 85 at 32.

²⁹⁹ *Ibid.* at 33.

the next hundred years. In a century marred by warfare, the treaties attempted to establish peace and friendship between the Aboriginal and British nations.

The eighteenth century agreements between the Mi'kmaq nation and British were, and still are, regarded by us as a form of brotherhood. When there was some injury or threat of conflict we met to exchange reassurances and renew our engagements. That is why, over several decades, one finds a dozen or more seemingly separate treaties between the Mi'kmaq and the British Crown. The surviving documents are often incomplete summaries of meetings that typically required many days and were repeated every few years as necessary. By themselves, the documents are fragments; considered together, they constitute a great chain of agreement. In other words, the treaty documents should be seen not as distinct treaties but as stages and renewals of a larger agreement or pact that developed during the 1700's between the Mi'kmaq and the British.³⁰⁰

While in the seventeenth century both France and Britain vied for sovereignty over the Maritime region, with the *Treaty of Utrecht*³⁰¹ France ceded the bulk of their claims in Atlantic Canada to the British.³⁰² The British however, were faced with the problem of attempting to govern a French and Indian population that was reluctant to accept their governance. W. Daugherty stated:

When the British assumed administrative control of the newly acquired territory of Acadia, renamed Nova Scotia, they were faced with two intractable problems: the sullen diffidence of the French Acadians and the open hostility of the Indians.³⁰³

³⁰⁰ See, Union of Nova Scotia Indians, *The Mi'kmaq Treaty Handbook* (Sydney & Truro, N.S.: Native Communication Society of Nova Scotia, 1987) Preface, i. As cited in L. Rotman, *Parallel Paths*, *supra* note 84 at 34-35.

³⁰¹ *Treaty of Utrecht*, *supra* note 89.

³⁰² S. Patterson. "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context." (1999) 48 U.N.B.L.J. 41 [Patterson, *Anatomy of a Treaty*] at 45. Professor Patterson stated:

The French called it Acadie; the English, Nova Scotia. French sovereignty was dramatically reduced to Isle Royale (Cape Breton) and Isle St. Jean (Prince Edward Island) by the Treaty of Utrecht in 1713, and removed completely in the Treaty of Paris in 1763. As New Brunswick was not to be set off from Nova Scotia until 1784, it was Nova Scotia which dealt with the issue of establishing relations with the native people of the region, and it was Nova Scotia which signed all the treaties we now recognise, starting early in the 18th century and ending at the time of the American Revolution.

³⁰³ W. Daugherty. *Maritime Treaties in Historical Perspective* 2d. ed. (Canada: Treaties and Historical Research Centre Research Branch: Dep't of Indian and Northern Affairs Canada, 1983) [Daugherty, *Maritime Treaties*] at 19.

As early as 1719 the British Crown instructed the Governors of the region to deal with the Aboriginal population in a manner that would entice them away from their alliance with the French. Upon receiving his Commission as Governor of Nova Scotia Richard Phillips was provided the following:

And whereas we have judged it highly necessary for His Majesty's service that you should cultivate and maintain a strict friendship and good correspondence with the Indian nations inhabiting within the precincts of your Govt that they may be reduced by degrees not only to be good neighbours to his Majesty's subjects but likewise themselves become good subjects of His Majesty. We do therefore direct you upon your arrival in Nova Scotia to send for the several heads of the said Indian nations or Clans and promise them friendship and protection on His Majesty's part. You will likewise bestow on them as your discretion shall direct, such presents as you shall carry from hence in His Majesty's name for their use.³⁰⁴

Over the next half-century several treaties of peace and friendship would be signed between the British and the Aboriginal peoples of the Maritime regions. Despite differences in terminology, all were designed to ensure peaceful co-existence between British settlers and the Aboriginal peoples living in the region. This, then, was the mark of these early treaties designed towards peace and friendship, and not towards the taking of lands for settlement, something indicative of the post *Royal Proclamation, 1763*³⁰⁵ period.

With consolidation of her position in North America, Britain shifted the focus away from peace and friendship treaties with the Aboriginal people, with the British

³⁰⁴ L. W. Labaree. *Instructions to the British Colonial Governors, 1670-1776* vol. 2 (New York: Appleton-Century, 1935) [Labaree, *Instructions to the British Colonial Governors*] at 469.

³⁰⁵ *Royal Proclamation, 1763*, *supra* note 118.

Crown beginning to implement legislation in relation to these perceived tenants of their newly acquired lands.³⁰⁶

Over the next century the nature of the treaties between the parties shifted as well. No longer needing the security of peace and friendship, the British Crown began looking at these treaties as land acquisition opportunities. Frank Cassidy has written:

England, France and then Canada engaged in treaty making for several reasons. At first, the aim was to establish exclusive trading relations. Then the objective was to secure the assistance or neutrality of Indian nations in warfare between the European powers. Eventually, treaties were used as a device for enabling settlement and resource development by non-Indians and to extinguish the land claims of Indian peoples.³⁰⁷

Shortly after consolidation in Canada, Britain faced a large influx of settlers to the new colony as a result of the American Revolution. Named United Empire Loyalists, these families migrated north rather than living in the newly formed United States of America.³⁰⁸

As a result of this influx, treaties became popular in those regions where settlement necessitated action on the part of the Crown. Generally, the Crown offered Aboriginal peoples goods, such as ammunition, money, annuities, medicine chests and so forth, along with reserved territories, in exchange for the surrender of title to large tracts of lands possessed by the Indians. Despite this, the representatives of the Crown

³⁰⁶ Rotman, *Parallel Paths*, *supra* note 85. See Chapters III and IV.

³⁰⁷ Frank Cassidy, *Indian Government: It's Meaning In Practice*. (Lantzville: B.C. Institute for Research on Public Policy and Oolichan Books, 1989) [Cassidy, *Indian Government: It's Meaning In Practice*] at 13.

³⁰⁸ The American Revolution ended two centuries of British sovereignty in what would become the United States. Beginning in the winter of 1775, the conflict lasted more than a year, culminating in the *Treaty of Paris, 3 September, 1783*; see, *Lac La Ronge Indian Band v. Canada* (1999), 188 Sask. R. 1 at 22, [2000] 1 C.N.L.R. 245, 1999 SKQB 218 (SKQB) [*Lac La Ronge Indian Band*, cited to Sask R.]; also, *R. v. Bernard* (2003), 230 D.L.R. (4th) 57 at 208, 4 C.E.L.R. (3d) 1, 4 C.N.L.R. 48, 2003 NBJ 320 (N.B.C.A) [*Bernard*, cited to D.L.R.]; Dickason, *Canada's First Nations*, *supra* note 34 at 204.

continually assured the Aboriginal people that their sovereignty and rights would not be ignored or displaced.³⁰⁹

At the same time another dynamic was taking place. No longer requiring the assistance of the Aboriginal people to swing the balance of power, Britain now came to see these commitments as a burden to their growth. While Article 40 of the *Articles of Capitulation of Montreal*,³¹⁰ guaranteed the protection of the Indigenous peoples and their land rights, British forces allocated few resources in an attempt to enforce these protections. As a result, almost from the beginning encroachment on Aboriginal lands became the norm.³¹¹

Beginning in 1760 and over the course of the next century the relationship between the British Crown and the Aboriginal peoples continued along this theme. It would appear clear that during this period the British began to no longer consider the Aboriginal peoples as independent nations deserving of deferential treatment as earlier promised. Rather, the Crown, in attempting to settle their newly acquired colony, began to see the Indigenous residents as nothing more than a burden to their plans and a group that should be assimilated into the European way of life.

Along with this, the shifting balance of power began to favour the Europeans. The treaties negotiated during the nineteenth century, both prior to and following confederation, reflected this imbalance. Often the treaties were written in such a way that

³⁰⁹ For example, in *Benoit v. Canada* (2003), 228 D.L.R. (4th) 1, 307 N.R. 1, 3 C.N.L.R. 20, FCJ 923, rev'g. [2002] 2 C.N.L.R. 1 (F.C.A.) [*Benoit*, cited to D.L.R.] Nadon J. A. cites the Treaty Commissioner's Report at 9 stating,

We assured them that the Treaty would not lead to any forced interference with their mode of life...

³¹⁰ See note 99.

³¹¹ Dickason, *supra* note 43 at 153.

the on-site terms did not necessarily reflect the written terms of the treaty.³¹² In many cases the Aboriginal signatories were not aware of the terms of the agreements. Even in those situations where interpreters were provided:

[S]imple translation was neither possible nor adequate, for the very concepts Crown negotiators employed often had no counterparts in the Aboriginal languages, the interpreters' skills were often lacking and the interpreters themselves were usually government representatives.³¹³

Tensions increased during the nineteenth century as more and more the Indigenous peoples came in contact with the settlers coming to this new land. With Confederation and the acquisition by Canada of Rupert's Land and the North-West Territories in 1870, along with a rapidly increasing need for lands, the treaty process increased. The federal government came to see the commitments of the *Royal Proclamation, 1763*,³¹⁴ as burdens to growth. While underlying title to the lands may lie with the Crown, the possession and control of those lands remained with the Aboriginal peoples. Negotiators for the Crown often used coercion as a means of acquiring lands from the Aboriginal inhabitants. A letter from Lt. Gov. Archibald dated 29 July 1871 illustrates this. In this letter, referring to the negotiations of *Treaties 1 & 2*,³¹⁵ Archibald stated:

We told them that whether they wished it or not, immigrants would come in and fill up the country; that every year from this one twice as many as their whole people there assembled would pour into the Province, and in a little while would spread over it, and that now was the time for them to

³¹² For a thorough analysis of this see, W. Hildebrandt *et al.* *The True Spirit and Original Intent of Treaty 7* (Montreal & Kingston: McGill-Queen's University Press, 1996) [Hildebrandt *et al.* *The True Spirit and Original Intent of Treaty 7*].

³¹³ Gordon Christie "Justifying Principles of Treaty Interpretation." (2000) 26 *Queen's L. J.* 143 [Christie, *Justifying Principles of Treaty Interpretation*] at 159.

³¹⁴ *Royal Proclamation, 1763*, *supra* note 118.

³¹⁵ *Treaties 1 & 2 Between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent With Adhesions, 3 August, 1871 (Treaties 1 & 2)*.

come to an arrangement that would secure homes and annuities for themselves and their children.³¹⁶

These changes in Crown policy towards the Aboriginal peoples paralleled a policy designed towards assimilation of the Indian culture into a Eurocentric North American lifestyle. Key to this was development of the Indian reserve system. In a letter to Lt. Gov. Colborne, Sir J. Kempt stated:

The most effectual means of ameliorating the condition of the Indians, of promoting their religious improvement and education, and of eventually relieving His Majesty's Government from the expense of the Indian department are—1st. To collect the Indians in considerable numbers, and to settle them in villages, with due portion of land for their cultivation and support. 2d. To make such provisions for their religious improvement, education and instruction in husbandry, as circumstances may from time to time require. 3d. To afford them such assistance in building their houses, rations, and in procuring such seed and agricultural implements as may be necessary, commuting where practicable, a portion of their presents for the latter.³¹⁷

Along with this, legislation enacted by the Canadian government was designed to ensure the assimilation of the Aboriginal people into Canadian society following Confederation. Primary among these legislative enactments was the *Indian Act*.³¹⁸

Leonard Rotman stated:

The Indian Act had no respect for aboriginal peoples or their institutions, whether governmental or cultural. It eliminated traditional forms of aboriginal governments, at least in an official sense, and replaced them with an artificial, non-aboriginal form which neither reflected the cultures nor the requirements they were intended to govern.³¹⁹

³¹⁶ Letter from Lt. Gov. Archibald to the Secretary for the Provinces dated 29 July, 1871, as cited in A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North West Territories*, *supra* note 174.

³¹⁷ Sir J. Kempt to Lt.-Gov. J. Colborne, 16 May 1829, British Parliamentary Papers (Irish University Press Series), "Correspondence and other Papers Relating to the Aboriginal Tribes in British Possessions", 1834, no. 617, pp. 40-41 as cited by Miller, *Skyscrapers Hide the Heavens*, *supra* note 5 at 99.

³¹⁸ *Indian Act*, S.C. 1876 c. 18. [*Indian Act*, 1876].

³¹⁹ Rotman, *Parallel Paths*, *supra* note 85 at 53.

By 1930, a large portion of the Aboriginal lands in Canada had become the subject of treaties between the Canadian government and the various Aboriginal nations. For close to a century, little regard was given to the nature of these treaties or the sanctity with which they were created. For example, in *Attorney General Ontario v. Attorney General Canada: Re Indian Claims*,³²⁰ Lord Watson rejected the notion that treaty promises reflected the honour of the Crown: “Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities...beyond a promise and agreement, which was nothing more than a personal obligation by its governor.”³²¹ Similarly, in *R. v. Syliboy*,³²² the defendant was convicted of having muskrat and fox pelts, contrary to the *Lands and Forests Act*.³²³ In rejecting a defense based on a pre-existing treaty right, Patterson J. (Acting Co. Ct. J.) stated,

"Treaties are unconstrained Acts of independent powers." But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognised. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.³²⁴

Looking at these early judicial interpretations of treaties, it is not unfair to declare that treaty interpretation has come a long way. By the time the Supreme Court of Canada rendered its decision in *Badger*,³²⁵ the established principle was that treaties should be given a large, liberal and generous interpretation.

³²⁰ *Attorney General Ontario v. Attorney General Canada Re: Indian Claims* [1897] A.C. 199 (P.C.) [*Re: Indian Claims*].

³²¹ *Ibid.* at 213.

³²² *R. v. Syliboy* [1929], 1 D.L.R. 307 (N.S. Co. Ct.) [*R. v. Syliboy*].

³²³ *Lands and Forests Act*, S.N.S. 1926 c. 4 [*Lands and Forests Act, 1926*].

³²⁴ *R. v. Syliboy*, *supra* note 322 at 313.

³²⁵ *Badger*, *supra* note 39.

ii. The Nature and Judicial Interpretation of Treaty Rights

What are these rights we speak of and how are they formed? We have already stated that often treaty rights did nothing more than re-affirm existing Aboriginal rights of the Indigenous signatories to the treaty. However, does this mean that treaty rights are merely Aboriginal rights re-affirmed in contract form? Or are they something more significant and unique than this? We know that treaties, by their very nature, are consensual agreements between the parties. As such, there was a tremendous difference between the bargaining positions of the parties to these agreements. As a result, the courts have concluded in recent years that every opportunity should be afforded the Aboriginal group in interpreting the nature and content of these consensual agreements.

In the 1964 case of *R. v. White and Bob*,³²⁶ the British Columbia Court of Appeal examined the validity of a treaty entered into between members of the Saalequun Tribe of Vancouver Island and Governor Douglas, dated 23 December 1854 pertaining to the sale of land to the Hudson Bay Company. In accordance with the terms of that agreement, the Saalequun Tribe was to have the right to hunt for food on the land in question.³²⁷ The Crown submitted that the document in question did not fit within s. 87 (now s. 88) of the *Indian Act*.³²⁸ The Crown argued that representatives of the Hudson's Bay Company rather than the Crown signed the document and thus it had no legitimacy. In rejecting this argument, the majority of the Court of Appeal concluded that in considering a treaty:

...regard ought to be paid to the history of our country; its original occupation and settlement; the fact that the Hudson's Bay Co. was the proprietor, and to use a feudal term contained in its charters, the Lord of

³²⁶ *R. v. White and Bob*, *supra* note 204.

³²⁷ *Ibid.* at 615.

³²⁸ *Indian Act*, R.S.C. 1952 c. 149 [*Indian Act*, 1952].

the lands in the Northwest Territories and Vancouver Island; and, the part that company played in the settlement and development of this country.³²⁹

Norris J. described the value of a treaty as representing the “words of the white man, the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and cooperation of the native tribes.”³³⁰

In *R. v. George*,³³¹ Cartwright J. in dissent stated:

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.³³²

In *R. v. Taylor and Williams*,³³³ the accused were charged with having taken bullfrogs from an unoccupied Crown territory during a closed season. The bullfrogs were taken for personal consumption and not for commercial purposes. The accused defended their actions by relying on a treaty between the Deputy Superintendent of Indian Affairs and the Chiefs of the Chippewa Nation in 1818. In accordance with this treaty, the Aboriginal nation ceded a tract of land to the British Crown. In exchange the members of the nation were to receive a compensation of \$10.00 per individual then living. The payments, it was conceded, had long expired. The question raised in the proceedings was whether the Chippewa had retained their historic right to hunt and fish on the tracts of land surrendered to the Crown. Speaking for the Court, MacKinnon A.C.J.O., stated:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of

³²⁹ *R. v. White and Bob*, *supra* note 204 at 617.

³³⁰ *Ibid.* at 649.

³³¹ *R. v. George*, [1966] S.C.R. 267, 55 D.L.R. (2d) 386, 3 C.C.C. 137, 6 C.N.L.C. 360 (S.C.C.) [*R. v. George*, cited to S.C.R.].

³³² *Ibid.* at 279.

³³³ *R. v. Taylor and Williams*, (1981) 34 O.R. (2d) 360, 62 C.C.C. (2d) 227, 3 C.N.L.R. 114 (Ont. C.A.) [*R. v. Taylor and Williams*, cited to O.R.].

the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.³³⁴

The Court concluded that in determining the effect of a treaty the Court must examine the history and oral traditions of the Aboriginal parties involved. As a result of notes kept, along with the fact that the tribe had continued to hunt and fish on the lands without Crown interference in the period following the signing of the treaty, the Court concluded that a treaty right did exist and that this right was protected by the *Indian Act*.

The Ontario Court of Appeal attempted to clarify the manner in which Aboriginal treaties should be interpreted. MacKinnon A.C.J.O., stated:

The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned... We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such a manner that the honour of the Sovereign may be upheld and Parliament not made subject to reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty...Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible...Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms. As already stated, counsel for both parties to the appeal agreed that recourse could be had to the surrounding circumstances and judicial notice could be taken of the facts of history. In my opinion, that notice extends to how, historically, the parties acted under the treaty after its execution.³³⁵

³³⁴ *Ibid.* at 364.

³³⁵ *Ibid.* at 367.

In accord with the principles established in this case, Aboriginal treaties were to be interpreted in a manner that reflected the sacred nature of these agreements.

In *Nowegijick v. The Queen*,³³⁶ Dickson J. (as he then was) concluded that treaties with the Indians should be construed in a manner to provide the largest benefit to the Aboriginal signatories. Citing the American case of *Jones v. Meehan*,³³⁷ Dickson J. stated:

It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.³³⁸

To show how far treaty interpretation has come since the case of *R. v. Syliboy*,³³⁹ one need only look at the Supreme Court of Canada decision in *R. v. Simon*.³⁴⁰ The appellant, a registered Mi'kmaq Indian, was convicted under s. 150 of the *Nova Scotia Lands and Forests Act*,³⁴¹ for having in his possession a shotgun and cartridges, contrary to the Act. The appellant admitted all the salient facts of the case, relying on a right to hunt as set out in a treaty signed in 1752 and executed between the then governor of

³³⁶ *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, 46 N.R. 41, 2 C.N.L.R. 89, 1983 SCJ 29 (S.C.C.) [*Nowegijick*, cited to S.C.R.].

³³⁷ *Jones v. Meehan*, 175 U.S. 1 (1899) (U.S.S.C.) [*Jones v. Meehan*].

³³⁸ *Nowegijick*, *supra* note 336 at 36.

³³⁹ *R. v. Syliboy*, *supra* note 322.

³⁴⁰ *R. v. Simon*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390, 62 N.R. 366, [1986] 1 C.N.L.R. 153, 1985 SCJ 67 (S.C.C.) [*Simon*, cited to S.C.R.].

³⁴¹ *Lands and Forests Act*, R.S.N.S. 1967, c. 163 [*Lands and Forests Act, 1967*] Section 150(1) stated, Except as provided in this Section, no person shall take, carry or have in his possession any shot gun [shotgun] cartridges loaded with ball or with shot larger than AAA or any rifle,

- a) In or upon any forest, wood or other resort of moose or deer; or
- b) Upon any road passing through or by any such forest, wood or resort; or
- c) In any tent or camp or other shelter (except his usual and ordinary permanent place of abode) in any forest, wood or other resort

Nova Scotia P.T. Hobson and various Mi'kmaq Indian chiefs.³⁴² Article IV of the treaty stated,

Article IV

It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual: and that if they shall think a Truckhouse needful at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper Merchandize lodged therein, to be Exchanged for what the Indians shall have to dispose of, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage.³⁴³

The appellant claimed that in light of this treaty and s. 88 of the *Indian Act*,³⁴⁴ he was exempt from the provincial legislation with which he was charged. Among the primary issues was the capacity of the parties to enter into such an agreement. In coming to his conclusion, Dickson C.J.C. reflected on the conclusions of Patterson, Act. Co. Ct. J., in *R. v. Syliboy*,³⁴⁵ stating that “the language used by Patterson J...reflects the biases and prejudices of another era of our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.”³⁴⁶

The Court concluded that, while the principles of international treaties may be a consideration in the assessment of Aboriginal treaties, because of their *sui generis* nature

³⁴² *Treaty or Articles of Peace and Friendship, 1752.*

³⁴³ *Simon, supra* note 340 at 393-394.

³⁴⁴ *Indian Act*, R.S.C. 1970 c. I-6 [*Indian Act, 1970*] Section 88 states,

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

³⁴⁵ *R. v. Syliboy, supra* note 322.

³⁴⁶ *Simon, supra* note 340 at 399.

they were neither created nor governed by the principles of international treaties.³⁴⁷

Dickson C.J. concluded that the rules governing Aboriginal treaties reflected the normative order of the historic relationship between the Crown and the Aboriginal peoples; and therefore the issue of the capacity of the parties to enter into such an agreement must be considered within the historical context of the treaty.

Having concluded that the treaty had been validly enacted, the Court turned its attention to whether or not the treaty had ever been terminated. The Crown argued that the treaty had terminated with the reinstatement of hostilities by the parties or that in the alternative the treaty right to hunt had been terminated by the creation of the Shubenacadie Reserve. The Court refused to rule on these arguments, relying instead on the words of Douglas J. in *United States v. Santa Fe. Pacific Rwy. Co.*,³⁴⁸ who stated, “extinguishment cannot be lightly implied.”³⁴⁹

The Court concluded that the appellant did possess a valid treaty right to hunt in the area, that this right had been infringed by the provincial legislation and that the legislation in question was subject to the federal legislation of the *Indian Act*. As a result, an acquittal was entered.

In *Simon*,³⁵⁰ the Court concluded that the treaty had been entered into for the “benefit of both the British Crown and the Micmac people, to maintain peace and order as well as to recognise and confirm the existing hunting and fishing rights of the

³⁴⁷ *Ibid.* at 404.

³⁴⁸ *United States v. Santa Fe Pacific Rwy. Co.*, *supra* note 214.

³⁴⁹ *Ibid.* at 354.

³⁵⁰ *Simon*, *supra* note 340.

Micmac.”³⁵¹ Gordon Christie has suggested that this is problematic because the Court came to the question of the benefit of the parties from a Eurocentric point of view.

In interpreting Maritime treaties, however, the Court came to the task with the assumption that the intent of the Crown was to facilitate the expansion of settlement on Aboriginal lands. When the Court spoke of peace and order, it clearly had in mind the peaceful and orderly expansion of the British presence in the Maritimes. Rather than see a conflict between this sort of peace and order and the simultaneous recognition and confirmation of Mi'kmaq hunting and fishing rights, the Court aimed at what it later termed a conciliation. This conciliation, however, was fundamentally biased in favour of the Crown, for it began with the premise that expansion of settlement must be permitted, and so tried to imagine how Aboriginal interests could be accommodated within this expansion. The only possible rationale for this premise lies in a view of treaties as surrenders, such that Aboriginal parties have no absolute powers after the treaties are signed. The result is treaty interpretation which is flawed from the outset, for it consistently fails to pay heed to the fundamental intentions of the Aboriginal parties. The Court assumes that Crown sovereignty is paramount, and that Aboriginal sovereignty (if the Court should feel there ever was such a thing) is subservient to this higher power.³⁵²

This is clearly a primary concern with treaty interpretation. We must continue, and the Court has in the period following *Simon*³⁵³ attempted, to interpret these treaties in a manner that reflects the Aboriginal point of view.

Despite this, the Supreme Court had drawn a line regarding the interpretation of these treaties. In *R. v. Horse*,³⁵⁴ Estey J. concluded that rules of interpretation used in contracts might be appropriate for treaty interpretation.

I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the

³⁵¹ *Ibid.* at 401.

³⁵² Christie, *Justifying Principles of Treaty Interpretation*, *supra* note 313 at 159.

³⁵³ *Simon*, *supra* note 340.

³⁵⁴ *R. v. Horse*, [[1988] 1 S.C.R. 187, 47 D.L.R. (4th) 526, 2 C.N.L.R. 112, 1988 SCJ 2 (S.C.C.) [*Horse*, cited to S.C.R.].

terms of a document by adding to or subtracting from the written agreement.³⁵⁵

In 1990 the Supreme Court of Canada again was asked to consider the nature of Aboriginal treaties and the capacity of the parties to enter into these treaties. In *R. v. Sioui*,³⁵⁶ the respondents, members of the Huron Indian nation, were charged with cutting trees, camping and making fires in a provincial park, contrary to ss. 9 and 37 of the Regulations of the *Quebec Park Act*.³⁵⁷ As in most cases, the individuals admitted to the facts of the case, arguing instead a treaty right dating back to 1760 and signed by Brig. Gen. James Murray on behalf of the British Crown. In part the agreement read that the Aboriginal signatories would be allowed the: “free Exercise of their Religion, their Customs, and Liberty of trading with the English.”³⁵⁸

The Court confirmed their findings from *Simon*,³⁵⁹ concluding that the parties had the capacity to enter into the treaty agreement. In examining the legal nature of the treaty in question, Lamer J. (as he then was) focused on the relationship of the parties leading up to the signing of the treaty, concluding that: “At the time with which we are concerned relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.”³⁶⁰ Complicating the matter slightly was the fact that, at the time of the agreement, the British Crown was not sovereign in the colony. Further confusing the issue was the simple fact that the Huron had allied themselves with the French and while the lands were in the hands of the British, it was not at the time certain they would remain so.

³⁵⁵ *Ibid.* at 202.

³⁵⁶ *Sioui*, *supra* note 101.

³⁵⁷ *Quebec Park Act*, R.S.Q. c. P-9.

³⁵⁸ *Sioui*, *supra* note 101 at 1031.

³⁵⁹ *Simon*, *supra* note 340.

³⁶⁰ *Sioui*, *supra* note 101 at 1038.

Clearly France would not have been obligated by any treaty made by their enemy and the Indigenous peoples, thus had the lands transferred back to the French the treaty would have been null *ab initio*.

In dealing with this issue, the Court stated,

Both *Simon and White and Bob* make it clear that the question of capacity must be seen from the point of view of the Indians at the time, and the Court must ask whether it was reasonable for them to have assumed that the other party they were dealing with had the authority to enter into a valid treaty with them. I conclude without any hesitation that the Hurons could reasonably have believed that the British Crown had the power to enter into a treaty with them that would be in effect as long as the British controlled Canada. France had not hesitated to enter into treaties of alliance with the Hurons and no one ever seemed to have questioned France's capacity to conclude such agreements. From the Hurons' point of view, there was no difference between these two European states. They were both foreigners to the Hurons and their presence in Canada had only one purpose, that of controlling the territory by force.³⁶¹

The Court then outlined several factors that should be considered in attempting to determine whether a document might be classified as a treaty. Among these were:

1. Continuous exercise of a right in the past and at present;
 2. The reasons why the Crown made a commitment;
 3. The situation prevailing at the time the document was signed;
 4. Evidence of relations of mutual respect and esteem between the negotiators;
- and
5. The subsequent conduct of the parties.³⁶²

The Court concluded that, in the absence of any specific territorial limitations, the treaty was intended to reconcile a desire of the Aboriginal peoples to protect their historic customs with the desire of the British conquerors to expand their empire.³⁶³

³⁶¹ *Ibid.* at 1038-39.

³⁶² *Ibid.* at 1045.

In *R. v. Horseman*,³⁶⁴ the Supreme Court was called upon to render an interpretation of Treaty No. 8. The Court acknowledged that the treaty provided the Aboriginal signatories the right to hunt on a commercial basis. However, the Court determined that this right was not unlimited and therefore was subject to government regulation, in the form of the *Natural Resources Transfer Agreement*³⁶⁵ and later in the *Wildlife Act*.³⁶⁶ Together these acts appeared to have terminated the treaty right to hunt for commercial purposes.³⁶⁷ The dissenting opinion of Wilson J. stated in part:

These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.³⁶⁸

Finally, in 1996, the Court faced determining the nature of treaty rights vis-à-vis s. 35(1) of the *Constitution Act, 1982*,³⁶⁹ in *Badger*.³⁷⁰ The appellants, all members of the Cree Indian nation with status under Treaty No. 8, were charged with offenses under the *Alberta Wildlife Act*.³⁷¹ *Badger*, was charged with having shot a moose on scrub lands near a run-down but occupied house outside the permitted hunting season contrary to s. 27 (1) of that Act and with hunting without a licence. The appellant Kiyawasew, hunting

³⁶³ *Ibid.* at 1071.

³⁶⁴ *R. v. Horseman*, [1990] 1 S.C.R. 901, 55 C.C.C. (3d) 353, 3 C.N.L.R. 95, 1990 SCJ 39 (S.C.C.) [*Horseman*, cited to S.C.R.].

³⁶⁵ *Natural Resources Transfer Agreement*, S.C. 1930 c. 9.

³⁶⁶ *Wildlife Act*, R.S.A. 1980 c. W-9.

³⁶⁷ *Horseman*, *supra* note 364 at 936.

³⁶⁸ *Ibid.* at 907.

³⁶⁹ *Constitution Act, 1982*, *supra* note 6.

³⁷⁰ *Badger*, *supra* note 39.

³⁷¹ *Wildlife Act*, S.A. 1984 c. W-9.

on posted grounds that had recently been harvested was charged with hunting without a licence as was the appellant, Ominayak. The lands in question were privately owned.

Again, the appellants did not dispute the facts of the case, claiming instead that they had status under Treaty No. 8 to hunt in that region without a license and therefore were exempt from the provincial legislation.

In this case the Supreme Court of Canada attempted to examine an issue left unanswered in *Sioui*,³⁷² that being the authority of the Crown to interfere with Aboriginal treaty rights. In his reasons for judgment, Cory J. began by outlining the meaning of the promises made to the Aboriginal signatories of Treaty No. 8. He concluded that the treaty guaranteed that the signatories “shall have the right to pursue their usual vocations of hunting, trapping and fishing.”³⁷³ Cory J. then outlined two restrictions on these rights. First, the rights of the Aboriginal peoples were subject to what may be classified as a geographical limitation. The agreement called for the Aboriginal signatories to have the right to hunt and fish as usual on the tracts surrendered, “saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.” Secondly, the right could be restricted by governmental regulation designed for conservation.³⁷⁴

Purporting to use liberal and generous interpretive techniques, Cory J. concluded that the Aboriginal signatories would have considered the tracts to have been “taken up” when they were no longer compatible with the exercising of the right to hunt. In coming to this conclusion he stated,

³⁷² *Sioui*, *supra* note 101.

³⁷³ *Badger*, *supra* note 39 at 793.

³⁷⁴ *Ibid.*

An interpretation of the Treaty properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the Treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the *Alberta Wildlife Act* itself.³⁷⁵

The second issue to be addressed was that of restriction for conservation. The Court had already concluded that Treaty 8 had been modified by the *Natural Resources Transfer Agreement*.³⁷⁶ In *Horseman*,³⁷⁷ the Court concluded that this agreement had modified the right to hunt by taking away the right of the Aboriginal people to hunt commercially and including an expansion of the territorial right to hunt and fish for food. However, what should be noted is that modification is not elimination.

In interpreting the meaning of these actions, Cory J. outlined the principles of treaty interpretation to be followed.

First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred...Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned... Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed...Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.³⁷⁸

³⁷⁵ *Ibid.* at 800.

³⁷⁶ *Natural Resources Transfer Agreement*, *supra* note 365.

³⁷⁷ *Horseman*, *supra* note 364.

³⁷⁸ *Badger*, *supra* note 39 at 793-4.

By the time this case reached the Court a clear test had been established for the extinguishment of Aboriginal rights.³⁷⁹ The Court concluded that this test also applied to treaty rights. As a result, if the government could prove a clear and plain intent to extinguish the treaty right in the *Natural Resources Transfer Agreement* this would suffice. The Court concluded that paragraph 12 of the agreement clearly extinguished the right to hunt commercially, however it left intact the right to hunt and fish for food.³⁸⁰

Despite the fact that this case dealt with treaty rights, the Supreme Court concluded that the *Sparrow* justificatory test was applicable in determining the infringement. In outlining his reasons for doing so, Cory J. stated:

There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in *Calder*...they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.

This said, there are also significant aspects of similarity between aboriginal and treaty rights. Although treaty rights are the result of mutual agreement, they, like aboriginal rights, may be unilaterally abridged...It follows that limitations on treaty rights, like breaches of aboriginal rights, should be justified.

In addition, both aboriginal and treaty rights possess in common a unique, sui generis nature...In each case, the honour of the Crown is engaged through its relationship with the native people...The wording of s. 35(1) of the Constitution Act, 1982 supports a common approach to infringements of aboriginal and treaty rights. It provides that "the existing aboriginal and

³⁷⁹ *Calder*, *supra* note 38, Hall J. stated at 404,

The onus of proving that the sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'.

³⁸⁰ *Badger*, *supra* note 39 at 796.

treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed".³⁸¹

In other words, Cory J. acknowledged that treaty and Aboriginal rights were different. However, he was willing to overlook these differences due to the fact that they were unique, they could be infringed by government action and they were linked in the wording of s. 35(1) of the *Constitution Act, 1982*.³⁸² With respect to the Court, this seemed like a less than compelling argument for the infringement of what had been classified as a solemn promise that invoked the honour of the Crown.

The Court once more considered the nature and interpretation of treaties in *R. v. Sundown*.³⁸³ In this case the respondent, a Cree Indian and a member of the Joseph Bighead First Nation that was a part to Treaty 6, cut down trees in a provincial park to be used in the building of a log cabin. Pursuant to terms of the treaty, the respondent was permitted to hunt on unoccupied Crown lands. He testified that he needed the cabin to provide shelter and as a place to smoke meat and skin pelts as part of the hunting process.

As noted by the Court, Treaty 6 was one of eleven numbered treaties aimed at facilitating European settlement in western Canada shortly after Confederation.³⁸⁴ The terms of this treaty, like that of some of the others, was modified by the *Natural Resources Transfer Agreement*.³⁸⁵ This agreement was given constitutional status pursuant to s. 1 of the *Constitution Act, 1930*.³⁸⁶ As noted in *Horseman*,³⁸⁷ this

³⁸¹ *Ibid.* at 812-813.

³⁸² *Constitution Act, 1982*, *supra* note 6.

³⁸³ *R. v. Sundown*, [1999] 1 S.C.R. 393, 170 D.L.R. (4th) 385, 2 C.N.L.R. 289, 1999 SCJ 13 (S.C.C.) [*Sundown*, cited to S.C.R.].

³⁸⁴ *Ibid.* at 398.

³⁸⁵ *Natural Resources Transfer Agreement*, *supra* note 365. For example, Treaties 3 and 9 are not affected by the *Natural Resources Transfer Agreement*.

³⁸⁶ *Constitution Act, 1930*. R.S.C. 1985, App. II, No. 26 Section 1 states,

The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the Constitution Act, 1867, or any Act

agreement extinguished any treaty right to hunt commercially but expanded the geographic limits in which the treaty right to hunt might be exercised.

Cory J. delivered the judgment of the Court. First he reiterated the principles of treaty interpretation as outlined in *Badger*.³⁸⁸ Cory J. then examined the words of Dickson C.J. in *Simon*,³⁸⁹ where the Chief Justice concluded: “It should be clarified at this point that the right to hunt to be effective, must embody those activities reasonably incidental to the act of hunting itself.”³⁹⁰

Cory J. concluded that the hunting cabin was reasonably incidental to the act of hunting itself. Without the use of a shelter it would be impossible for the First Nation to exercise their traditional method of hunting and their members would be denied their treaty right to hunt.³⁹¹

During his reasons for judgment, Cory J. discussed the nature of treaty rights, emphasizing that they were *sui generis* agreements of a collective nature.

The issue of the permanency of the cabin was raised by the Crown in this appeal and was a key point in the dissent of Wakeling J.A. It was argued that, by building a permanent structure such as a log cabin, the respondent was asserting a proprietary interest in parkland. For a First Nation member to assert a proprietary right would, it is said, be contrary to the essential purpose of the Crown in negotiating the treaty and contrary to its terms. I cannot accept this argument. Treaty rights, like aboriginal rights, must not be interpreted as if they were common law property rights. Chief Justice Dickson and La Forest J. made this point in *Sparrow*, supra at pp. 1111-12:

"Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in

amending the same or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

³⁸⁷ *Horseman*, supra note 364.

³⁸⁸ *Badger*, supra note 39.

³⁸⁹ *Simon*, supra note 340.

³⁹⁰ *Ibid.* at 403.

³⁹¹ *Sundown*, supra note 382 at 411.

keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 382 referred to as the "sui generis" nature of aboriginal rights."

Aboriginal and treaty rights cannot be defined in a manner which would accord with common law concepts of title to land or the right to use another's land. Rather, they are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories.

Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional expeditionary method of hunting. It belongs to the Band as a whole and not to Mr. Sundown or any individual member of the Joseph Bighead First Nation. It would not be possible, for example, for Mr. Sundown to exclude other members of this First Nation who have the same treaty right to hunt in Meadow Lake Provincial Park.³⁹²

The evolving rules of treaty interpretation were brought to the fore in the case of *R. v. Marshall*.³⁹³ Donald Marshall, a Mi'kmaq Indian from Nova Scotia, was charged and convicted of fishing without a licence, fishing with an illegal net during a closed season and selling eels without a licence. Marshall, along with an associate, had fished for eels in Pomquet Harbour in Antigonish County Nova Scotia. As noted by Binnie J., though not explicitly noted in the agreed to facts, the parties were involved in a "small-scale commercial activity...."³⁹⁴

Initially counsel for Marshall attempted to introduce the treaty of peace and friendship from 1752 as a defense. This had been successful in *Simon*;³⁹⁵ however the Court in that case had left open the question of whether subsequent hostilities between the Mi'kmaq and the British had effectively terminated that treaty. As a result, the

³⁹² *Ibid.* at 411-412.

³⁹³ *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513, 4 C.N.L.R. 161, 1999 SCJ 55 (S.C.C.) [*Marshall*, cited to S.C.R.].

³⁹⁴ *Ibid.* at 470.

³⁹⁵ *Simon*, *supra* note 340.

defense team shifted the focus to later treaties signed in 1760 and 1761. Counsel for Marshall focused on a particular phrase used in that treaty, that included the “truckhouse clause.” This clause, in a treaty signed on 10 March, 1760 between Governor Charles Lawrence and the head of the Le Have Indian Tribe, Paul Laurent, stated:

I, Paul Laurent do for myself and the tribe of LaHave Indians of which I am Chief do acknowledge the jurisdiction and Dominion of His Majesty George the Second over the Territories of Nova Scotia or Accadia and we do make submission to His Majesty in the most perfect, ample and solemn manner...And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any ill designs which may be formed or contrived against His Majesty's subjects. And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenburg or Elsewhere in Nova Scotia or Accadia.³⁹⁶

Binnie J. concluded that this provision resulted in a treaty right to trade in fish. From this, he concluded that the right to trade in fish would be empty without a corollary right to fish.³⁹⁷ The Crown argued that recognition of a right with a trading aspect would open the floodgates to exploitation of natural resources. Referring to the documentation submitted with regard to notes of the treaty signing, Binnie concluded that this provided an internal limitation, permitting the Aboriginal signatories not to fish commercially but rather to fish for necessities. “The treaty right is a regulated right and can be contained by regulation within its proper limits.”³⁹⁸

As a result, Binnie J. concluded that the imposition of a closed fishing season, a discretionary licensing system and a ban on the sale of fish was an infringement on the

³⁹⁶ Cited in *Marshall I*, *supra* note 393 at 468.

³⁹⁷ *Ibid.* at 486.

³⁹⁸ *Ibid.* at 501.

rights of Mr. Marshall to exercise his treaty rights and that this infringement was not justifiable under the *Sparrow* test.

In her dissenting opinion, McLachlin J. (as she then was) outlined the principles of treaty interpretation as developed by the case law over a series of years:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
4. In searching for the common intention of the parties, the integrity and honour of the Crown should be presumed.
5. In determining the signatories respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time
7. A technical or contractual interpretation of treaty wording should be avoided
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic.
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the time of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.³⁹⁹

For McLachlin, the treaty rights could not be expanded or interpreted beyond the terms as the parties would have understood them in 1760, whereas for Binnie to interpret

³⁹⁹ *Ibid.* at 511-513.

the treaty in such a manner would be to leave the Aboriginal people with “an empty shell of a treaty promise.”⁴⁰⁰

Conclusion

The treaties between the British and Canadian governments and the Aboriginal peoples were written in a language unknown to the Aboriginal peoples. Often the wording of the treaties did not necessarily reflect the Indigenous understanding of what had been agreed to. To compound the problem the treaties were often a last resort as the Aboriginal peoples attempted to retain their lands and ways of life in the wake of settlement across the newly developed nation. As Leonard Rotman stated: “The fact that treaties were sometimes prepared in advance and later not altered to reflect changes made during treaty negotiations also supports this conclusion.”⁴⁰¹

As has been documented, the understanding of these treaties has undergone considerable change over the past century. Whereas initially the treaties were perceived to be little more than mere agreements between parties,⁴⁰² now those same treaties are considered *sui generis* promises whose interpretation should be large, liberal and generous and done in favour of the Indigenous peoples.

It is clear that such interpretation requires that courts at all levels take a step back from their normal methods of analysis. Rather than examining treaties as technical documents and in a legalistic way, judges must look at creative methods of interpretations, methods that will assist in ensuring that these treaties continue to be executed according to their spirit and intent. In *R. v. Ireland*,⁴⁰³ Gauthreau, J. stated:

⁴⁰⁰ *Ibid.* at 499.

⁴⁰¹ Rotman, *Taking Aims At the Canons of Treaty Interpretation*, *supra* note 87 at 35.

⁴⁰² *R. v. Syliboy*, *supra*, note 322.

⁴⁰³ *R. v. Ireland*, [1991] 2 C.N.L.R. 120, 1 O.R. 577 (Ont. Gen. Div.) [*R. v. Ireland*, cited to C.N.L.R.].

It is clear that treaties with Indians should be given a liberal interpretation in favour of the Indians. Treaty provisions should not be whittled down by technical excuses; the honour of the Crown is at stake. They are to be construed "not according to the technical meaning of the words, but in the sense that they would naturally be understood by the Indians."⁴⁰⁴

In *R. v. Bartleman*,⁴⁰⁵ the appellant, a member of the Tsartlip Band, was convicted of using rim-fire ammunition when hunting big game, contrary to the *Wildlife Act*.⁴⁰⁶ The appellant was hunting on private lands at the time of his arrest, though he was unaware of this at the time. Further, there were no signs indicating that the site was private property, nor that hunting was not allowed.

Bartleman argued that the *North Saanich Indian Treaty, 1852*,⁴⁰⁷ permitted him to hunt on unoccupied Crown lands as they had prior to the treaty. The land, it was acknowledged, was within the traditional hunting grounds of the Saanich Indians. While there were several interpretations open to him, Lambert J.A. chose an interpretation of the treaty that was consistent with the Saanich traditions and interpretations of the treaty at the time. In doing so, he stated:

I think that the third interpretation is the correct interpretation. That is, that the treaty itself confirmed all the traditional hunting rights; and that it did not set aside the hunting rights outside the ceded land, leaving them to be dealt with at some other time, in some other way. I think the conclusion I have reached is similar to the conclusion of the Ontario Court of Appeal in *Taylor and Williams*. I have reached that conclusion for six reasons.⁴⁰⁸

Despite these words however, courts have continued to interpret treaties in a manner inconsistent with their nature. As will be seen in Chapter VI, this has led to considerable criticism of the courts, specifically the Supreme Court of Canada.

⁴⁰⁴ *Ibid.* at 128.

⁴⁰⁵ *R. v. Bartleman* (1984), 12 D.L.R. (4th) 73, 55 B.C.L.R. 78, 3 C.N.L.R. 114 (B.C.C.A.) [*Bartleman*, cited to D.L.R.].

⁴⁰⁶ *Wildlife Act*, S.B.C. 1982, c. 57. [*Wildlife Act, 1982*]

⁴⁰⁷ *North Saanich Indian Treaty, 1852*.

⁴⁰⁸ *Bartleman*, *supra* note 405 at 89.

CHAPTER IV

Introduction

As illustrated throughout the course of this work, the very fact that the Indigenous peoples of Canada have survived into the twenty-first century speaks volumes. Despite attempts by the government to assimilate the Aboriginal peoples, the reallocation of Aboriginal children to off-reserve residential schools, the banning of practices traditional to Aboriginal ways of life, the Indigenous people have survived and continued to develop a vibrant and ever more present culture within the framework of Canadian federalism.⁴⁰⁹ It is only in the past thirty years that Canadian society has attempted to work along with rather than in conflict with the Aboriginal peoples, resulting in considerable advances in all aspects of Aboriginal rights.

Along with this evolution in the relationship between the parties has come the recognition of a fiduciary relationship between the Aboriginal peoples and the Crown, something that was not acknowledged in the historic relationship between the parties. This fiduciary relationship arises in part, from the historic relationship between the Aboriginal peoples and the Crown and the fact that, to a large extent, the sovereignty of the Aboriginal people is limited by the overpowering sovereignty of the Crown. This relationship suggests that the Crown has a responsibility to act in the interest of the Aboriginal peoples subject to judicial obligations; and the judiciary has a responsibility to interpret the law in a manner that reflects the nature of the relationship. The

⁴⁰⁹ For a detailed review of the historic limitations placed upon the Aboriginal peoples see, Canada, *Report of the Royal Commission on Aboriginal Peoples* vol. 1. *Looking Forward, Looking Back*. (Ottawa: Supply and Services Canada, 1996) [RCAP Vol. 1] at 179-199, 263-313, 333-382.

incorporation of Aboriginal and treaty rights into the *Constitution Act, 1982*,⁴¹⁰ has enhanced this obligation. Thus, in *Sparrow*,⁴¹¹ Dickson C.J.C. and La Forest J. stated:

In our opinion, *Guerin*, together with *R v. Taylor and Williams*...ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.⁴¹²

i. The Elements of Fiduciary Duty

The law pertaining to fiduciary duty pre-dates the common law. Under Roman law, the transferee of ownership promised to convey back the property upon discharge of a mortgage. The transferee remained the owner, but with a fiduciary obligation.⁴¹³ By the fifteenth century English common law courts of Equity were willing to accept claims and award relief provided the claimant was able to show that there was a fiduciary relationship between the parties, something the courts concluded which would create a use or what is now called a trust.⁴¹⁴ Historically, the fiduciary duty requires one to act in the interests of another. A fiduciary obligation arises when, having regard for all the circumstances, one party stands in relation to another that it would be logical to expect that party to either act or refrain from acting in a manner contrary to the interests of the

⁴¹⁰ *Constitution Act, 1982*, *supra* note 6.

⁴¹¹ *Sparrow*, *supra* note 12.

⁴¹² *Ibid.* at 1108.

⁴¹³ D.W.M. Waters, *Trust Law in Canada*. (Toronto: Carswell Publishing, 1984) [*Waters, Trust Law in Canada*] at 15.

⁴¹⁴ *Ibid.* at 404.

other party.⁴¹⁵ It has been seen in such circumstances as a bank providing advice in a corporate takeover,⁴¹⁶ and to advice provided by a mortgagee's solicitor.⁴¹⁷

While the Court has made clear that there is no uniform test for determining when a fiduciary duty exists, modern day cases appear to use the framework developed by Madame Justice Wilson in *Frame v. Smith*.⁴¹⁸ In the course of her judgment, Madame Justice Wilson set out a guideline for determining when a fiduciary relationship might exist. She stated:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.⁴¹⁹

Subsequently, in *Hodgkinson v. Simms*,⁴²⁰ La Forest J. concluded that the nature of the fiduciary duty is dependent on the nature of the relationship between the parties involved.⁴²¹

⁴¹⁵ *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 663, 61 D.L.R. (4th) 14, 44 B.L.R. 1, 1989 SCJ 83 (S.C.C.) [*Lac Minerals v. International Corona*].

⁴¹⁶ *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1985) 52 O.R. (2d) 633 (Ont. C.A.). Leave to appeal to Supreme Court denied (1986), 53 O.R. (2d) 633 (S.C.C.) [*Standard Investments*, cited to O.R.].

⁴¹⁷ *Jacques v. Seabrook*, [1982] 4 W.W.R. 167 (B.C. Co. Ct.) [*Jacques v. Seabrook*, cited to W.W.R.].

⁴¹⁸ *Frame v. Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152, 1987 SCJ49 (S.C.C.) [*Frame v. Smith*, cited to S.C.R.].

⁴¹⁹ *Ibid.* at 136.

⁴²⁰ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161, 97 B.C.L.R. (2d) 1, 1994 SCJ 84 (S.C.C.) [*Hodgkinson v. Simms*, cited to S.C.R.].

⁴²¹ *Ibid.* at 413.

For more than a hundred years it has been recognised that the Crown has held some form of responsibility to Aboriginal peoples that at least in some ways resemble a fiduciary liability. For example, in *Sheldon v. Ramsay*,⁴²² Burns J. stated:

There seems to have been no trust created in these lands in any person or body of persons for the Indians, neither was it necessary there should be, for it was more natural the crown should be in a position to protect their interests and treat them as a people under its care, not capable of disposing of their possessions.⁴²³

In these early dealings the Crown was said to have a trust like relationship with the Aboriginal peoples.⁴²⁴ In *St. Catherine's Milling and Lumber*,⁴²⁵ Taschereau J. stated:

The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.⁴²⁶

However, Taschereau J. warned against considering the obligation of the Crown as a trust.

The word "trusts" would not be an appropriate expression to apply to the relation between the crown and the Indians respecting the unceded lands of the latter. As will appear hereafter very clearly, such relationship is not in any sense that of trustee and *cestui que* trust, but rather one analogous to the feudal relationship of lord and tenant, or, in some aspects, to that one, so familiar in the Roman law, where the right of property is dismembered and divided between the proprietor and a usufructuary.⁴²⁷

In *Attorney-General Canada v. Giroux*,⁴²⁸ Duff J. stated: "[T]he Indian interest being, as I have pointed out, ownership is by terms of the surrender a surrender to Her

⁴²² *Sheldon v. Ramsay* (1852), 9 UC.Q.B. 105.

⁴²³ *Ibid.* at 134.

⁴²⁴ *Church v. Fenton* (1880), 5 S.C.R. 239 (S.C.C.) [*Church v. Fenton*].

⁴²⁵ *St. Catherine's Milling and Lumber*, *supra* note 130.

⁴²⁶ *Ibid.* at 649.

⁴²⁷ *Ibid.* at 604.

⁴²⁸ *Attorney-General Canada v. Giroux*, (1916), 53 S.C.R. 172, 30 D.L.R. 123 (S.C.C.) [*Attorney-General Canada v. Giroux*].

Majesty in trust to be dealt with in a certain manner for the benefit of the Indians.”⁴²⁹

Similarly, in *Re: Kane*,⁴³⁰ the issue before the court was whether Indians should be subject to a poll tax and imprisoned for failure to pay that tax. McCarthur, Co. Ct. J., stated:

For reasons which are quite apparent, the Indian has been placed under the guardianship of the Dominion Government. He is its ward, so long as he remains unenfranchised, and the Minister of Interior, as Superintendent General of Indian Affairs, is given the control and management of all lands and property of Indians in Canada. They are looked upon and treated as requiring the friendly care and directing hand of the Government in the management of their affairs. They and their property are, so to speak, under the protecting wing of the Dominion Government, and I do not think in such circumstances, it was ever contemplated that the body of an Indian should be taken in execution under a civil process pure and simple.⁴³¹

The British Columbia Court of Appeal continued this theme in *Armstrong Grower's Association v. Harris*.⁴³² Addressing the nature of the Aboriginal-Crown relationship McPhillips, J.A. stated:

The Indians are wards of the National Government (The Government of Canada) and the statutory provisions are aimed to provide statutory protection to the Indians -- and the public must govern itself accordingly, otherwise we would see the Indians over-reached on every hand and the Government required, in even a greater degree, to provide for and protect the Indians from the rapacious hands of those who ever seem ready to advantage themselves and profit by the Indian's want of business experience and knowledge of world affairs.⁴³³

Guerin v. The Queen,⁴³⁴ represented the first judicial sanction of a fiduciary duty owed by the Crown to the Aboriginal peoples of Canada. In January, 1958, the Musqueam Indian Band signed a lease with Shaughnessy Heights Golf Club whereby

⁴²⁹ *Ibid.* at 196.

⁴³⁰ *Re: Kane*, [1940] 1 D.L.R. 390 (N.S. Co. Ct.) [*Re: Kane*].

⁴³¹ *Ibid.* at 397.

⁴³² *Armstrong Growers Association v. Harris*, [1924] 1 D.L.R. 1043, 33 B.C.R. 285, 1 W.W.R. 729 (B.C.C.A.) [*Armstrong Growers Association v. Harris*].

⁴³³ *Ibid.* at 1046.

⁴³⁴ *Guerin v. The Queen*, *supra* note 222.

they agreed to lease 162 acres of their lands to the golf club in exchange for rents to be paid as per the terms of the agreement.⁴³⁵ At trial it was accepted that the Chief, Councillors and Band members were wholly excluded from negotiations between the Golf Club and the Indian Affairs Branch, and in fact the Band did not even receive a copy of the lease.⁴³⁶ Collier J. found the Crown to be in breach of their duty as a trustee for having leased the lands in question on terms and conditions that were less favourable and not known to the Musqueam Indian Band.⁴³⁷ Damages were fixed at ten million dollars. (\$10,000,000).

At the Federal Court of Appeal the decision of the trial judge was overturned.⁴³⁸ Le Dain J. asserted that the action was based on the creation of a statutory trust, created by virtue of s. 18(1) of the *Indian Act*.⁴³⁹ Section 18(1) stated:

Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Le Dain J. concluded that this created a political obligation rather than a true trust, stating, “I am of the opinion that the surrender did not create a true trust, and does not, therefore, afford a basis for liability based on a breach of trust.”⁴⁴⁰ Le Dain J. concluded

⁴³⁵ The initial lease called for \$29,000 per annum to be paid for the first 15 years. Following this there were to be four further 15-year leases on terms to be agreed. (Failing such agreement there was an arbitration clause incorporated into the lease). See, *Guerin v. The Queen*, *Ibid.* at 347-348.

⁴³⁶ *Guerin v. The Queen* [1982] 2 C.N.L.R. 83, 2 F.C.85 (F.C.T.D.) [*Guerin Trial Division*, cited to C.N.L.R.].

⁴³⁷ *Ibid.* at 109.

⁴³⁸ *Guerin v. The Queen* (1982), 143 D.L.R. (3d) 416, [1983] 2 F.C. 656, [1983] 1 C.N.L.R. 20 (F.C.A.) [*Guerin Court of Appeal*, cited to D.L.R.].

⁴³⁹ *Indian Act, 1985*, *supra* note 257.

⁴⁴⁰ *Guerin*, *supra* note 438 at 471.

that the term “in trust” used in the surrender document merely conferred upon the federal Crown the authority to deal with the lands for the benefit of the Band.⁴⁴¹

At the Supreme Court of Canada eight of the nine justices concluded that the Crown was subject to a fiduciary duty towards the Aboriginal peoples with respect to their lands.⁴⁴² Dickson J. (as he then was), stated:

In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.⁴⁴³

Wilson J. concluded that while s. 18 did not *per se* create a fiduciary obligation on the part of the Crown, it did however, recognise the existence of such an obligation.⁴⁴⁴

Both Dickson J. and Wilson J. appeared to agree in this case that the fiduciary obligation of the Crown to the Aboriginal peoples lay in the nature Aboriginal title and the statutory framework developed to protect and dispose of that title. “[T]he surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.”⁴⁴⁵

A strict interpretation of the decision in *Guerin v. The Queen* at the time would have suggested that any fiduciary obligation on the part of the Crown to the Aboriginal

⁴⁴¹ *Ibid.* at 470.

⁴⁴² *Guerin v. The Queen*, *supra* note 222. Estey J. declined. While he agreed with the conclusion reached, he was of the opinion that the *Indian Act*, created a statutory agency. Citing *Halsbury’s Laws Of England* 4th ed. Vol. 1 page 418, Estey stated at 394-395:

For these reasons, I would, with great respect to all who hold a contrary view, hesitate to resort to the more technical and far-reaching doctrines of the law of trusts and the concomitant law attaching to the fiduciary. The result is the same but, in my respectful view, the future application of the Act and the common law to native rights is much simpler under the doctrines of agency.

⁴⁴³ *Guerin v. The Queen Ibid.* at 376.

⁴⁴⁴ *Ibid.* at 346-348.

⁴⁴⁵ *Ibid.* at 376.

peoples was limited to cases dealing with Aboriginal lands and Aboriginal title. The case itself dealt with the surrender of lands. Shortly after this decision, the Federal Court of Appeal ruled in *Kruger et. al. v. The Queen*.⁴⁴⁶ In his reasons for judgment, Heald, J. attempted to expand the recent ruling in *Guerin v. The Queen*.⁴⁴⁷ Heald J., comparing this case to *Guerin v. The Queen*, stated:

I am of the view that the factual differences in the two cases do not detract from the persuasive value of the *Guerin* reasons when applied to the case at bar. In the case at bar, there were two expropriations. In one expropriation there was no surrender. In the other, the expropriation was followed by the execution of a surrender. *I do not think, however, that what was said by Mr. Justice Dickson relative to the fiduciary relationship arises only where there is a surrender of Indian lands to the Crown.*⁴⁴⁸

Brian Slattery addressed this issue, stating: “[T]he Crown has a general fiduciary duty towards the native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands.”⁴⁴⁹ For Slattery, this fiduciary obligation came from the initial promise of the British Crown to protect the Aboriginal peoples from the inroads being made by British settlers during the eighteenth century and the need to develop peaceful relations with the Indigenous peoples, relations that would benefit the British in their wars against the French. Finding support in the *Royal Proclamation, 1763*,⁴⁵⁰ Slattery wrote:

The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a “weaker” or “primitive” people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.⁴⁵¹

⁴⁴⁶ *Kruger et al. v. The Queen* (1985), 17 D.L.R. (4th) 591 (F.C.A.) [*Kruger et al.*, cited to D.L.R.].

⁴⁴⁷ *Guerin v. The Queen*, *supra* note 222.

⁴⁴⁸ *Kruger et al.*, *supra* note 446 at 597. (Emphasis added).

⁴⁴⁹ Slattery, *Understanding Aboriginal Rights*, *supra* note 103 at 753.

⁴⁵⁰ *Royal Proclamation, 1763*, *supra* note 118.

⁴⁵¹ Slattery, *Understanding Aboriginal Rights*, *supra* note 103 at 753.

In *Attorney-General Ontario v. Bear Island Foundation*,⁴⁵² the Court, while rejecting the claim of the Aboriginal applicants on the basis that any rights had been extinguished by way of a treaty signed in 1850,⁴⁵³ expanded the scope of fiduciary obligations to include the provincial Crown. In their reasons for judgment, the Court stated:

It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians. These matters currently form the subject of negotiations between the parties.⁴⁵⁴

As the province of Ontario was the only body involved in negotiations with the Bear Island Foundation, one may logically infer the Crown referred to in the judgment is the provincial Crown of Ontario.

Blueberry River Indian Band v. Canada,⁴⁵⁵ altered the landscape of fiduciary obligations between the Aboriginal peoples and the Crown in a clear manner. The Court concluded that, where the purchase or lease of the Band's lands or mineral rights was at stake, the Crown had an absolute obligation to act in the Band's interest. The facts of *Blueberry River Indian Band* are thus: In 1916 the Beaver Band entered into a treaty with

⁴⁵² *Attorney-General Ontario v. Bear Island Foundation*, [1991] 2 S.C.R. 570, 83 D.L.R. (4th) 381, 3 C.N.L.R. 79, 1991 SCJ 61 (S.C.C.) [*Bear Island Foundation*, cited to S.C.R.].

⁴⁵³ *Robinson Treaty With the Ojibewa Indians of Lake Huron, 9 September, 1850* [*Robinson-Huron Treaty*].

⁴⁵⁴ *Bear Island Foundation*, *supra* note 452. The fiduciary obligation of the provincial Crown has been expanded during this decade by a series of decisions by the British Columbia Court of Appeal. See for example, *Taku River Tlingit First Nation* (2002), 211 D.L.R. (4th) 89, 98 B.C.L.R. (3d) 16, 2 C.N.L.R. 312, 2002 BCJ 155 (B.C.C.A.) [*Taku River Tlingit First Nation*, cited to D.L.R.]; *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121, 6 W.W.R. 243, 99 B.C.L.R. (3d) 209, 2002 BCJ 378 (B.C.C.A.) leave to appeal to S.C.C. granted, S.C.C.A. 417 online Q.L. [*Haida First Nations*, cited to C.N.L.R.]. However, in cases such as *Mikisew Cree First Nation v. Canada*, [2004] 2 C.N.L.R. 74, 317 N.R. 258, 2004 FCJ 277 (F.C.A.) online Q.L. [*Mikisew Cree First Nations*], the Federal Court of Appeal merely indicated that may be limited to consultation only without providing direction as to the nature of that consultation at para. 147 Sharlow J.A. stated in dissent:

The obligation of the Crown in this regard requires, at least, meaningful consultation before a decision is made that will infringe an Aboriginal right.

⁴⁵⁵ *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193, [1996] 2 C.N.L.R. 25 1995 SCJ 99 (S.C.C.) [*Blueberry River Indian Band*, cited to S.C.R.].

the Crown. In exchange for surrendering their Aboriginal title to lands the Band was given a plot of land in British Columbia. The Beaver Band was a nomadic tribe, subsisting primarily through trapping and hunting. The Band used the reserve in the summer as a campground, while in the winter the band traveled further north to hunt and trap. In 1940, the Band surrendered the mineral rights on the reserve to the Crown in trust to lease for the benefit of the Band. The agreement was altered following World War II, and the Crown was authorized to lease or sell the lands. The Department of Indian Affairs transferred the lands to the Director of the *Veteran's Land Act*⁴⁵⁶ for \$70,000 in 1948. Through a clerical error, the Director of the Veteran's Land Act also received the mineral rights to the lands. In 1949 gas was discovered on the former reserve and oil companies expressed interest in exploration.

In 1977 the Beaver Band was divided into the Blueberry Band and Doig River Indian Bands. The appellants discovered the clerical error and commenced action against the Crown, claiming damages for allowing the improvident surrender of the reserve and for the clerical error which led to the loss of mineral rights. The Court rejected the Band's arguments as they related to the pre-surrender fiduciary obligations of the Crown. McLachlin J. (as she then was), concluded that while there was a duty on the Crown, according to the Court's decision in *Guerin v. The Queen*,⁴⁵⁷ that duty was founded on "preventing exploitative bargains."⁴⁵⁸ In her opinion, the Band had neither been the victim of an exploitative bargain, nor had the Department of Indian Affairs representative provided them with misinformation. However, McLachlin stated that the fiduciary obligation of the Crown did not conclude with the sale of the surface rights. Rather, the

⁴⁵⁶ *Veteran's Land Act*, S.C. 1942 c. 280 [*Veteran's Land Act*].

⁴⁵⁷ *Guerin v. The Queen*, *supra* note 222.

⁴⁵⁸ *Blueberry River Indian Band*, *supra* note 455 at 370.

fiduciary duty also encompassed dealings with regard to mineral rights on the lands. As a result, McLachlin J. stated:

I conclude that the Crown, having first breached its fiduciary duty to the Indians by transferring the minerals to the DVL A, committed a second breach by failing to correct the error on August 9, 1949 when it learned of the error's existence and the potential value of the mineral rights.⁴⁵⁹

In his reasons for judgment, Gonthier J. stated:

The terms of the 1945 surrender transferred I.R. 172 to the Crown "in trust to sell or lease the same to such person or persons, and upon such terms, as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people." By taking on the obligations of a trustee in relation to I.R. 172, the DIA was under a fiduciary duty to deal with the land in the best interests of the members of the Beaver Band. This duty extended to both the surface rights and the mineral rights.⁴⁶⁰

In *Semiahmoo Indian Band v. Canada*,⁴⁶¹ the Court addressed the issue of the fiduciary obligation of the Crown as it applied to surrendered lands. In 1889 the federal Crown established a reserve for the use and benefit of the Semiahmoo Indian Band. The initial land allotment was 382 acres, located near the international border between Canada and the United States along Semiahmoo Bay. On several occasions the Crown exercised a clause permitting them to take back lands including the surrender of some twenty-two acres in the fall of 1951 for the development of a custom facility at the Douglas Border Crossing. As the Court of Appeal noted, "[S]ince then, the respondent has retained title to the Surrendered Land, but most of it remains unused for customs facilities or any other public purpose."⁴⁶² Beginning in 1967, the Band began to initiate negotiations for the return of the surrendered lands, however these proved futile as the

⁴⁵⁹ *Ibid.* at 406.

⁴⁶⁰ *Blueberry River Indian Band*, *supra* note 455 at 363.

⁴⁶¹ *Semiahmoo Indian Band v. Canada* (1997), 143 D.L.R. (4th) 523, 215 N.R. 241, [1998] 1 C.N.L.R. 250, 1997 FCJ 842 (F.C.A.) [*Semiahmoo Indian Band*, cited to D.L.R.].

⁴⁶² *Ibid.* at 528.

Public Works department cited the future foreseeable use of the lands. In July 1990, the counsel for the Band filed a statement of claim alleging that the respondent had breached its fiduciary duty to the band with the surrender of 1951.

The trial judge, Reed J., found no evidence to support a claim that the price paid for the lands in question was below fair market value. She further concluded that there was no term, either express or implied, in the surrender agreement which required the return of the lands if they were not used for the purposes claimed. With regard to a fiduciary obligation, Reed J. concluded the Crown had failed to live up to its fiduciary obligation by not ensuring the surrender impeded on the rights of the Band in as minimal a way as was possible.⁴⁶³ However, the trial judge concluded that the actions of the Band were statute barred, having exceeded both the six-year and ultimate thirty year limitation period found in the *British Columbia Limitations Act, 1979*.⁴⁶⁴

The Federal Court of Appeal unanimously overturned this decision. Speaking for the Court, Isaac C.J. stated, “[T]he authorities indicate that the surrender requirement [in the Indian Act] is the source of the Crown’s obligations.”⁴⁶⁵ The Court then cited with approval a passage from McLachlin J. in *Blueberry River Indian Band*,⁴⁶⁶ wherein Justice McLachlin stated the nature of the fiduciary relationship was such that the Crown had a positive obligation to stop exploitative bargains.⁴⁶⁷

In dealing with the issue of the limitation clause, Isaac J. concluded that prior to the mid-seventies, the Band had been unable to exercise the same diligence towards their legal rights as would other members of society.

⁴⁶³ *Ibid.* at 534.

⁴⁶⁴ *British Columbia Limitations Act*, R.S.B.C. 1979, c. 236 [*British Columbia Limitations Act*]

⁴⁶⁵ *Semiahmoo Indian Band*, *supra* note 461.

⁴⁶⁶ *Blueberry River Indian Band*, *supra* note 455.

⁴⁶⁷ *Semiahmoo Indian Band*, *supra* note 461 at 536.

Like victims of childhood sexual abuse, the appellants were simply unable to appreciate the fact that when the Crown "suggested" that they surrender their native rights to lands, they might be giving up something of legal value. Moreover, I think that one can draw an analogy between the coercion involved in the concealment of sexual abuse cases and the Crown's failure here to raise the issue of mineral rights when it was discussing the merits of the 1945 surrender. In both cases, the superior party to a fiduciary relationship is playing on the dependence and trust of the disadvantaged party. Finally, it seems to me that much the same thing could be said about the real ability of most of the appellants to take legal action to enforce their rights prior to the 1970s as the Supreme Court said about the social "taboo" against actions of the sort in issue in *M.(K.)*.⁴⁶⁸

In *Osoyoos Indian Band v. Oliver (Town)*,⁴⁶⁹ Iacobucci J. made clear that the fiduciary duty was not restricted to lands surrendered to the Crown but rather applied also to lands expropriated by the Crown. Iacobucci J. also rejected the argument that there could be no fiduciary duty to the Aboriginal peoples when such duty conflicted with the public law duties of the Crown.

In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.⁴⁷⁰

⁴⁶⁸ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1993) 100 D.L.R. (4th) 504, 538, 151 N.R. 241, 2 C.N.L.R. 20, 1993 FCJ/A 116 (F.C.A.) [*Blueberry River Indian Band*, cited to D.L.R.]

⁴⁶⁹ *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 206 D.L.R. (4th) 385, 1 C.N.L.R. 271, 2001 SCJ 746 (S.C.C.) [*Osoyoos Indian Band*, cited to S.C.R.].

⁴⁷⁰ *Ibid.* at 772. See also the remarks of Leonard Rotman. "Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004) 37 U.B.C.L. Rev. 219 [Rotman, *Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?*] at 225.

In *Haida First Nations*,⁴⁷¹ the Crown in right of British Columbia issued a tree-farming license to a private consideration, Weyerhaeuser. The Haida nation sought an injunction prohibiting the operation on the basis of an unresolved claim of Aboriginal title. The Haida claimed that the Crown had violated its fiduciary obligation by not consulting with the Haida prior to issuing the license. The Crown countered that no such obligation was owing until a court had declared an Aboriginal right existed.⁴⁷² The British Columbia Court of Appeal was unanimous, Lambert J. delivering the decision, that while no encumbrance could arise prior to the resolution of the question of Aboriginal title, the duty to consult created a fiduciary obligation prior to this.

In the 2002 decision, *Wewaykum Indian Band v. Canada*,⁴⁷³ the Court attempted to clarify its position with regard to Aboriginal-Crown fiduciary obligations. In this case, two Aboriginal bands laid claim to each other's reserve lands located within five kilometres of each other. As a result of conflicts dating back to the nineteenth century, the government of the day intervened and allocated reserves to the bands involved. Neither band claimed title based on either inherent Aboriginal or treaty rights, arguing instead that, but for breaches of the fiduciary duty of the Crown, the lands would be allocated to them. In 1907 the Cape Mudge Band ceded claims over Reserve 11 to the Campbell River Band, subject to the retention of common fishing rights. The name "Weway-akum band" was noted under Reserve 11, however as the result of a clerical error it appeared as if the band had also been allocated Reserve 12.⁴⁷⁴ This error was recognised

⁴⁷¹ *Haida First Nations*, *supra* note 454.

⁴⁷² *Ibid.* para. 9.

⁴⁷³ *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 220 D.L.R. (4th) 1, [2003] 1 C.N.L.R. 341, 2002 SCJ 79 (S.C.C.) [*Wewaykum Indian Band*, cited to S.C.R.].

⁴⁷⁴ The clerical error in question consisted of a failure on the part of the departmental employee to remove ditto marks below the information on Reserve 11. As a result, it appeared the band was in control of both Reserve 11 and Reserve 12.

by the McKenna McBride Commission in 1912 and recommended its correction. The Crown accepted the recommendations of the Commission in 1924 and in 1928 the Reserve was officially recognised as belonging to the Cape Mudge Band. In 1938 administration and control of the lands was turned over to the federal government and in 1943 Indian Affairs published a corrected list of the reserves in question.

Binnie J. delivered the unanimous decision of the Court. In rendering this decision, Binnie J. attempted to address the scope of the Crown's fiduciary duties as they apply to reserve lands, whether the actions of the Crown constituted a breach of the fiduciary duty and finally what if any remedies were available to the litigants. Binnie J. concluded that the fiduciary obligations of the Crown were not limited to existing reserves as in *Guerin v. The Queen*,⁴⁷⁵ nor was it restricted to those rights recognised in s. 35(1) as stated in *Sparrow*.⁴⁷⁶ Citing Slattery's article, *Understanding Aboriginal Rights*,⁴⁷⁷ Binnie J. concluded: "[T]he fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples."⁴⁷⁸ Despite this, Binnie J. was clear that a fiduciary duty did not signify an unlimited duty on the Crown. "But there are limits...The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."⁴⁷⁹ Having chastised groups he felt "seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship,"⁴⁸⁰ Binnie J. concluded,

⁴⁷⁵ *Guerin v. The Queen*, *supra* note 222

⁴⁷⁶ *Sparrow*, *supra* note 12.

⁴⁷⁷ *Understanding Aboriginal Rights*, *supra* note 103. See also note 447.

⁴⁷⁸ *Wewaykum Indian Band*, *supra* note 472 at 286.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.⁴⁸¹

Binnie J. concluded that prior to the creation of the reserve in question, the Crown had acted in a fair and equitable manner to the parties. He agreed with the trial judge that prior to creation of the reserve all obligations had been fulfilled.⁴⁸² With development of the reserve, the responsibility on the Crown was, “the protection and preservation of the band’s quasi-proprietary interest in the reserve from exploitation.”⁴⁸³

Conclusion

Despite steps in the right direction, the scope of the fiduciary duty owed by the Crown to the Aboriginal peoples of Canada remains uncertain. It is clear that this duty, whatever it may be, derives from the historical relationship between the parties. Initially, the Court took the position that the trust-like relationship between the Aboriginal peoples and the Crown was more of a “political trust” and as a result they were reluctant to intervene. However the Supreme Court decision in *Guerin v. The Queen*,⁴⁸⁴ introduced a new era in the relationship between these two parties. While this case introduced a fiduciary obligation on the part of the Crown with regards to Aboriginal lands, subsequent decisions have illustrated that this duty relates subsurface rights as well as surface rights that Aboriginal and treaty rights are included within the scope of s. 35(1), as well as actions that may have an effect on future claims of rights belonging to the Aboriginal peoples. This fiduciary obligation does not merely lie with the federal Crown. As the courts have shown, the fiduciary obligation also includes actions taken by

⁴⁸¹ *Ibid.* at 288.

⁴⁸² *Ibid.* at 295.

⁴⁸³ *Ibid.* at 290.

⁴⁸⁴ *Guerin v. The Queen*, *supra* note 222.

provincial Crowns in their dealings with the Aboriginal peoples. The fiduciary duty owed by the Crown is not unlimited. It cannot be used as a blanket claim of liability on the Crown; however, in those circumstances where the Crown exercises its discretionary powers over the lands and rights of Aboriginal peoples, both founded and asserted, it must act in such a manner so as to discharge its fiduciary obligation.

CHAPTER V

Introduction

The Musqueam Indian Band reserve is located on the north shore of the Fraser River, within the limits of the city of Vancouver British Columbia. From long before the arrival of Europeans, the Musqueam Indian Band had fished these waters and the taking of salmon was an integral part of their life at that time and remains so today.

Prior to the province of British Columbia entering Confederation in 1871, there was little regulation of fishing and no federal regulations until the introduction of the first Fisheries Act in 1876. The first Salmon Fisheries Regulations were made in 1878, and it was not until the Regulations of 1888 that the Aboriginal peoples were discussed.⁴⁸⁵ In 1917 the regulations were altered so that they were similar to those of the present day. The Regulations of 1917 empowered the chief inspector to make regulations to limit the place, means and time by which fish were caught.⁴⁸⁶

In 1978 the Department of Fisheries and Oceans altered their practice of issuing specific day fishing licences, replacing this with an annual system. During the first five years of the scheme, the length of drift nets was restricted to 75 fathoms. However, for

⁴⁸⁵ These regulations stated:

Fishing "Fishing by means of nets or other apparatus without leases or licences from the Minister of Marine and Fisheries is prohibited in all waters of the Province of British Columbia.

Provided always that Indians shall, at all times, have liberty to fish for the purpose of providing food for themselves but not for sale, barter or traffic, by any means other than with drift nets, or spearing.

⁴⁸⁶ *R. v. Sparrow* (1986), 36 D.L.R. (4th) 246 at 253, 9 B.C.L.R. (2d) 300, [1987] 1 C.N.L.R. 145 (B.C.C.A.) [*Sparrow.*, cited to D.L.R.]

the year beginning 31 March 1983, the Department began to restrict the length of drift nets to 25 fathoms.⁴⁸⁷

On 25 May 1984, Ronald Sparrow, a member of the Musqueam Indian Band of British Columbia, was arrested while fishing in the waters of Canoe Passage on the Fraser River for fishing with a drift net longer than that permitted in his Band's food fishing licence.⁴⁸⁸ At no time did Sparrow deny the factual basis for the charges against him. Rather his counsel asserted in his defense that Sparrow was exercising a constitutionally protected Aboriginal right to fish pursuant to s. 35(1) of the *Constitution Act, 1982*.⁴⁸⁹ Sparrow claimed the *Constitution Act, 1982* limited the ability of the federal government to regulate Aboriginal fishing. For the first time since the inception of s. 35(1), the Court had the opportunity to deal with the scope and content of Aboriginal rights.

i. British Columbia Court of Appeal

At the lower court levels, both the trial judge Goulet J. and the appeal judge Lamberson J. found themselves bound by the British Columbia Court of Appeal case in *Calder*.⁴⁹⁰ As a result, both concluded there was no Aboriginal right to fish, a conclusion the Court of Appeal in *Sparrow* determined was incorrect. "Not even this court's judgment in *Calder* supports the conclusion that the Musqueam do not have an existing aboriginal right to fish."⁴⁹¹ The court then distinguished *Calder*⁴⁹² on its facts stating:

⁴⁸⁷ See letter from the area manager of the Ministry to the Musqueam Indian Band dated 8 February, 1984, as cited in *Sparrow, Ibid.* at 258-259.

⁴⁸⁸ At the time of his arrest, Sparrow was fishing with a drift net 45 fathoms in length. However, the terms of the Band's food fishing licence set out a number of restrictions, one of which limited drift nets to 25 fathoms in length.

⁴⁸⁹ *Constitution Act, 1982, supra* note 6.

⁴⁹⁰ *Calder v. British Columbia* (1970), 13 D.L.R. (3d) 64, 74 W.W.R. 481 (B.C.C.A.).

⁴⁹¹ *Sparrow, supra* note 486 at 262.

⁴⁹² *Calder, supra* note 38.

The second error in relation to *Calder* is in failing to have regard to the fundamental distinctions in the facts. The claim in *Calder* was not particularized but clearly the essence of it was the broadly based claim affecting title to land. The right to fish may have been an aspect of the claim but was so incidental an aspect as to be given virtually no attention in any of the judgment. The whole emphasis was on land and upon title. The issue upon which the Supreme Court divided was whether the general land legislation of the colony had the effect of extinguishing any title to the land which the Nishga may have had.⁴⁹³

Next, the court rejected the Crown's argument that restrictions imposed upon the Aboriginal right to fish over the course of the century by Crown regulation had, in effect, extinguished the Aboriginal right to fish. In response to this argument the court stated:

In our view, the "extinguishment by regulation" proposition has no merit. The short answer to it is that regulation of the exercise of a right presupposes the existence of the right. If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have consistently recognised the Indian right to fish, are strong evidence that the right does exist. It is clear that here was an aboriginal right. It is equally clear that such right has not been extinguished, either expressly (as Hall J. would require) or by implication (as Judson J. held).⁴⁹⁴

The court also rejected the reasoning put forth by the Crown, that either *R. v. Derricksan*,⁴⁹⁵ or *Kruger and Manuel v. The Queen*,⁴⁹⁶ supported such a proposition as extinguishment by regulation.

The result is said to somehow follow from the decision in *R. v. Derricksan*, *supra* and *Kruger and Manuel v. The Queen*, *supra*. Those cases provide no support for the proposition. *Derricksan* makes it clear that, before April 17, 1982, the right to fish, even if they were aboriginal rights were subject to regulation. It decides nothing about extinguishment and nothing about the effect of constitutional recognition of aboriginal rights. *Kruger* established that an Indian's right to hunt in British Columbia is subject to regulation by the provincial *Wildlife Act* in so far as it is a "law of general application." Mr. Kruger therefore could be

⁴⁹³ *Sparrow*, *supra* note 486 at 264.

⁴⁹⁴ *Ibid.* at 266.

⁴⁹⁵ *R. v. Derricksan* (1976), 71 D.L.R. (3d) 159, 31 C.C.C. (2d) 575, 9 C.N.L.C. 512 (S.C.C.) [*Derricksan*, cited to D.L.R.].

⁴⁹⁶ *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104, 75 D.L.R. (3d) 434, 34 C.C.C. (2d) 377 (S.C.C.) [*Kruger and Manuel*, cited to S.C.R.].

convicted of hunting without the permit required by that act, even if he was hunting on land which was the traditional hunting ground of his band. Again the case was not about extinguishment or the effect of constitutional recognition of aboriginal rights. On the other hand, the language of Dickson J. quoted earlier, referring to aboriginal title, is inconsistent with the notion that regulation of the kind dealt with in that case could have had the effect of extinguishing aboriginal rights.⁴⁹⁷

The court concluded that the Aboriginal right to fish was one which received constitutional protection by virtue of s. 35(1). Having done this, the court then addressed the issue of regulation. Counsel for the appellant put forth the argument that any restriction on the Aboriginal right to fish was inconsistent with s. 35(1), whereas counsel for the respondent based their argument on the theory that s. 35(1) merely served as a preamble of the good intent of the Crown to hold a conference following April 17, 1982. As such, the provincial Crown held no intrinsic ability to restrict governmental regulation in any manner.

The court rejected both of these polar arguments concluding that the Aboriginal right to fish was one that enjoyed constitutional protection; however, it was subject to limited federal regulation. “Section 35(1) of the *Constitution Act, 1982*, does not purport to revoke the power of Parliament to act under heads 12 or 24. The power to regulate fisheries, including Indian access to the fisheries, continues subject only to the new constitutional guarantee that aboriginal rights existing on April 17, 1982, cannot be taken away.”⁴⁹⁸ The court concluded by determining:

Regulations which do bear on the exercise of the right may nevertheless be valid, but only if they can be reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest. These purposes are not limited to the Indian food fishery.⁴⁹⁹

⁴⁹⁷ *Sparrow*, *supra* note 486 at 266.

⁴⁹⁸ *Ibid.* at 276-277.

⁴⁹⁹ *Ibid.* at 277.

ii. Supreme Court of Canada Decision

On 31 May 1990, after having considered the case for more than a year, the Supreme Court of Canada delivered its decision in *Sparrow*.⁵⁰⁰ In a judgment co-authored by Dickson C.J.C. and La Forest J. the Court upheld the conclusion of the British Columbia Court of Appeal; there was a constitutionally protected Aboriginal right to fish, the Aboriginal right to fish had been infringed and the infringement was inconsistent with s. 35(1) of the *Constitution Act, 1982*.⁵⁰¹

In *Sparrow*,⁵⁰² the Court began by providing a working definition of the term “existing” in s. 35(1), concluding that rights protected by virtue of this section were those in effect on 17 April 1982 and therefore were those rights which had not been extinguished prior to 1982. Thus, s. 35(1) did not serve to revive rights extinguished before that date. Neither should those rights determined to be protected be considered as frozen so as to incorporate only the manner in which they were applied as of 17 April 1982.⁵⁰³

The Court rejected the Crown’s position that any Aboriginal right to fish had been extinguished by virtue of governmental regulation of these Indigenous fishing practices over the past century. Citing Hall J. in *Calder*,⁵⁰⁴ that the, “onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be clear and plain,”⁵⁰⁵ the Court concluded that nothing in the *Fisheries Act, 1970*⁵⁰⁶ reflected such an intent. According to the Court the regulations, including the

⁵⁰⁰ *Sparrow*, *supra* note 12. The Supreme Court hearing on the case had taken place in November of 1988.

⁵⁰¹ *Constitution Act, 1982*, *supra* note 6.

⁵⁰² *Sparrow*, *supra* note 12.

⁵⁰³ *Ibid.* at 1091.

⁵⁰⁴ *Calder*, *supra* note 38.

⁵⁰⁵ *Sparrow*, *supra* note 12 at 1099.

⁵⁰⁶ *Fisheries Act, 1970*, *supra* note 235.

requirement for permits, “were simply a manner of controlling the fisheries, not defining underlying rights.”⁵⁰⁷ Despite this assertion, the Court was clear about the act of extinguishment with regard to Aboriginal rights prior to 1982. Referring to legislation enacted prior to 1982 and citing with approval Mahoney J. in *Hamlet of Baker Lake*,⁵⁰⁸ the Court stated:

Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the Courts must give it. That is as true of an aboriginal title as of any other common law right.⁵⁰⁹

iii. Extinguishment and the Sparrow Test

Having rejected the government’s presumption that Aboriginal rights might be extinguished by statute or regulation on the one hand, and the appellants’ presumption that all regulation of Aboriginal rights was unconstitutional on the other, the Court set out to establish a test to determine when infringement of Aboriginal rights might be justified.⁵¹⁰

The Court proposed a generous approach be taken to the interpretation of s. 35(1), one that provided Aboriginal rights with protection against government action designed to legislate against those rights:

The constitutional recognition afforded by the provision, therefore, gives a measure of control over government conduct and a strong check on

⁵⁰⁷ *Sparrow*, *supra* note 12 at 1099.

⁵⁰⁸ *Hamlet of Baker Lake*, *supra* note 218.

⁵⁰⁹ *Sparrow*, *supra* note 12 at 1098. It should be noted that *Hamlet of Baker Lake* represents a pre-1982 decision and thus did not trigger a s. 35(1) analysis.

⁵¹⁰ *Ibid.* at 1109. The Court stated:

In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the Constitution Act, 1982. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognised and affirmed under s. 35(1).

legislative power. While it 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, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).⁵¹¹

The Court then proceeded to outline the framework of a test to be used to determine the justification of infringement of Aboriginal rights protected by s. 35(1). First, it must be determined that the legislative enactment has the effect of infringing upon an existing Aboriginal right. If the legislation does have the effect of interfering with a s. 35(1) right, it represents a *prima facie* infringement.⁵¹² The onus at this point lies with the Aboriginal group asserting the claim.⁵¹³ In assessing infringement, the Court should take into consideration the characteristics or instance of the right at stake. The Court warned that, because of the communal nature of Aboriginal rights, “applications of traditional common law concepts of property,”⁵¹⁴ should be avoided. Without being overly specific, the Court attempted to provide guidance for assessing *prima facie* infringement. The Court suggested the following questions should be considered; “First, is the limitation reasonable? Second, does the regulation impose an undue hardship? Third, does the regulation deny the holders of the right their preferred means of exercising that right?”⁵¹⁵

⁵¹¹ *Ibid.* at 1110.

⁵¹² *Ibid.* at 1111.

⁵¹³ *Ibid.* at 1120-1121.

The appellant would bear the burden of showing the net length restriction constituted a *prima facie* infringement of the collective aboriginal right to fish for food. If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation was justifiable.

⁵¹⁴ *Ibid.* at 1112.

⁵¹⁵ *Ibid.*

In the case before it, the Court concluded that a *prima facie* infringement would be found if the regulation created an adverse restriction on the Musqueam right to fish for food.⁵¹⁶

In coming to this conclusion, the Court stated:

We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather, the test involves asking whether either the purpose or the effect of the restriction on the net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught, or if the net length reduction resulted in a hardship in the Musqueam in catching fish, then the first branch of the test of the s. 35(1) analysis would be met.⁵¹⁷

Once a *prima facie* case of infringement was determined to have taken place, the onus shifts to the Crown to justify the infringement. Here two questions are asked. First, does the legislative enactment in question have a valid objective? In *Sparrow* the Court offered the following guidance on this issue, stating:

Here the court would inquire into whether the objective of Parliament in authorizing the depart to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s.35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s.35(1) rights that would cause harm to the general populace or to the aboriginal peoples themselves, or other objectives found to be compelling and substantial.⁵¹⁸

The Court served notice that generalized objectives, vague in nature, would not satisfy the criteria for valid legislative objectives. “We find the “public interest” justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for justification of a limitation on constitutional rights.”⁵¹⁹

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid.* at 1112-1113.

⁵¹⁸ *Ibid.* at 1113.

⁵¹⁹ *Ibid.*

Once a valid legislative enactment was justified, the analysis shifted to the second part of the test. In this section, the Court said, the honour of the Crown was at stake. As a result the question to be asked at this stage of the analysis was whether the actions of the Crown were consistent with the fiduciary nature of the Crown-Aboriginal relationship. The Court recommended that inquiry into whether the honour of the Crown had been satisfied might be concluded by the following evaluation: Has there been as little infringement as possible, in order to effect the desired result? In cases of expropriation, has fair compensation been provided and finally whether the Aboriginal group in question had been consulted.⁵²⁰

In the context of the case at bar, the Court concluded that the test developed required that, following conservation, top priority is given to the Aboriginal food fishers. Following this, resources should be allocated to non-Aboriginal commercial and sport fishers.⁵²¹ With regard to the test established, the Court recognised that this placed a heavy burden on the Crown.

We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.⁵²²

⁵²⁰ *Ibid.* at 1119.

⁵²¹ *Ibid.* at 1116.

⁵²² *Ibid.* at 1119.

Conclusion

Sparrow represented a landmark case in the field of Aboriginal rights law. While the case itself dealt with the right of the Musqueam Indian Band to fish and whether the regulations instituted by the regulatory scheme interfered with those rights, examined more broadly the case was about whether constitutionally protected Aboriginal rights could be infringed upon and if so under what circumstances.

The test developed allowed infringement of these rights only in certain, very carefully assessed, circumstances. The legislative enactments applied must first be assessed as being both compelling and substantial in nature. Once this was done, the legislation must be able to pass a series of checks designed to ensure that the fiduciary obligation owed to the Aboriginal peoples by the Crown was upheld. In cases where both of these tests could not be passed, the legislation in question was to be determined of no force and effect. The Court concluded that only a clear and plain intent to have extinguished an Aboriginal right prior to 17 April 1982 would be accepted as proof of extinguishment. The fact that legislation might be incompatible with the exercise of Aboriginal rights would not, in itself, be enough to constitute extinguishment.

Subsequent to the Court's decision in *Sparrow*, some commentators have suggested that the range of valid legislative objectives appropriate to uphold the spirit of the *Sparrow* test would be those limiting the government objectives to conservation, public safety and the ensuring of the future exercise of the Aboriginal rights in question.⁵²³

⁵²³ Kent McNeil. "How Can the Infringement of the Constitutional Rights of the Aboriginal Peoples Be Justified." (1997) 8 Const'l. For. 33 [McNeil, *How Can the Infringement of the Constitutional Rights of the Aboriginal Peoples be Justified*].

Since the ruling in *Sparrow*, two issues have developed which will provide the topic for the final chapter of this work. First, despite the notion that any legislative enactment designed to infringe upon an Aboriginal right was to have satisfied a stringent test of being both compelling and substantial, courts at all levels have interpreted this portion of the test in such a manner that it is all but lost. Secondly, despite the fact that *Sparrow* dealt specifically with Aboriginal rights, courts at all levels have adopted the test created for determining when infringements of constitutionally protected treaty rights may be justified as well.

CHAPTER VI

Introduction

Throughout the course of this paper I have attempted to bring the reader to a point of understanding with regard to both the Aboriginal and treaty rights of the Aboriginal peoples of Canada. I began by outlining the sources of British authority in Canada from the time of contact between the Indigenous peoples and the Europeans. Next I outlined the doctrine of Aboriginal rights as it has developed in the last two centuries. Beginning with the decisions of Chief Justice Marshall of the United States,⁵²⁴ the chapter attempted to outline the development of Aboriginal rights in Canada from something considered personal and usufructuary, subject to the prerogative of the sovereign,⁵²⁵ to the present day location of those rights along a spectrum; rights which range from Aboriginal title at the one end to free-standing site specific rights at the other.⁵²⁶

As indicated, the doctrine of Aboriginal rights has its beginnings in the customs, practices and traditions integral to the Aboriginal group claiming the right.⁵²⁷ These rights do not depend on legislative enactment, treaty or executive order, but rather flow from the fact that when the Europeans arrived on the shores of North America the Aboriginal peoples were here, living as they had for centuries.⁵²⁸

In contrast to this, the historic treaties between the Indigenous peoples and first the French and English and later the government of the Dominion of Canada stem from consensual agreements, based on covenants made and accepted. Initially these covenants

⁵²⁴ See the decisions classified as the “Marshall Trilogy,” *Johnson v. McIntosh*, *supra* note 46, *Cherokee Nation v. Georgia*, *supra* note 158 and *Worcester v. Georgia*, *supra* note 105.

⁵²⁵ *St. Catherine’s Milling and Lumber*, *supra* note 218.

⁵²⁶ See, *Delgamuukw*, *supra* note 3 and the *Van der Peet Trilogy*, *supra* note 1.

⁵²⁷ *Van der Peet*, *supra* note 1.

⁵²⁸ *Calder*, *supra* note 38.

represented agreements between independent nations; however, over the course of time and with assertions of sovereignty on the part of the British Crown, the treaty process evolved to its present nature. Despite this, both parties shared the belief that these documents represented sacred promises made to one another to be honoured, “as long as the sun rises over our head,” and “as long as the water runs.”⁵²⁹ In *Sioui*,⁵³⁰ Lamer J. stated, “[I]t must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred.”⁵³¹

The Crown owes a fiduciary duty to the Aboriginal peoples, based on the historic nature of the relationship between the parties and due in large part to the wording of the *Royal Proclamation, 1763*.⁵³² The nature of this relationship was first considered a political trust, one to be negotiated by politicians rather than judges, however over the past twenty years beginning with the Supreme Court of Canada’s decision in *Guerin v. The Queen*,⁵³³ the nature of this trust-like relationship has shifted. It is now recognised that the Crown, as the benefactor of the alienation of Aboriginal rights, owes a fiduciary obligation that encompasses land, resources and other free standing Aboriginal rights.

In *Sparrow*,⁵³⁴ the Court attempted for the first time to address the scope and content of the rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.⁵³⁵ It was concluded in that case that inherent Aboriginal rights were subject to infringement in certain, strictly examined, cases. In cases where those rights were restricted the

⁵²⁹ This was a statement by the Cree Chief Mis-tah-wah-sis during the signing of Treaty #6, as cited in Morris, *The Treaties of Canada with the Indians of Manitoba and the North-west Territories*, *supra* note 178 at 213.

⁵³⁰ *Sioui*, *supra* note 101.

⁵³¹ *Ibid.* At 1063.

⁵³² *Royal Proclamation*, *supra* note 118.

⁵³³ *Guerin v. The Queen*, *supra* note 222.

⁵³⁴ *Sparrow*, *supra* note 12.

⁵³⁵ *Constitution Act, 1982*, *supra* note 6.

Aboriginal group claiming the right must first provide *prima facie* evidence that the right in question has been subject to infringement. Once this was done, the onus shifted to the Crown to justify this infringement. First, the Crown must illustrate that the legislation in question was compelling and substantial. The Court was clear that vague objectives would not satisfy this section of the test. Rather, goals such as the conservation of the resource or the protection of the future of the right would be considered within the scope of compelling and substantial legislation. Once this was done, the focus would shift to the second portion of the test, what has come to be considered an assessment of the fiduciary duty owed by the Crown to the Aboriginal peoples. To satisfy this section of the test, the Crown would have to show that the right in question had been subject to minimal infringement, that the Crown had consulted with the Aboriginal group prior to the infringement of the right and finally that, in the case of expropriation of the right, compensation had been paid. As was noted earlier in this work, the *Sparrow* test applied to Aboriginal rights. However, subsequently, courts at all levels began to apply the test created to determine when treaty rights may be subject to infringement.

In this chapter I will address two points. First, I contend that the way in which the *Sparrow* test has been administered has led to a watering down of that test in a manner not envisioned by its authors at the Court. Second, applying the *Sparrow* test to justify infringement of treaty rights is inappropriate because of the difference in the two types of rights.

i. The Application of the Sparrow Test Part I (Compelling and Substantial Legislation)

The *Sparrow* test was designed as a method of aiding the courts in circumstances where they had to determine the validity of a legislative infringement to an Aboriginal

right. In certain circumstances, it was suggested, the *Sparrow* test may even lead to the absolute protection of an Aboriginal right.⁵³⁶ The Court in *Sparrow* was careful to clarify the type of legislative activities they would be willing to accept as valid within the scope of “compelling and substantial” legislative enactments.

However, in the period following, the Court particularly under the leadership of Lamer C.J.C., watered down this aspect of the test to the point where it is threatened with obsolescence. This deconstruction of the “compelling and substantial” portion of the *Sparrow* test began with the Court’s decision in *Gladstone*.⁵³⁷ In the course of his judgment, Lamer C.J.C. suggested that the Court would be willing to accept a lower threshold as being acceptable under this portion of the test. Because of its importance I will cite the passage in its entirety.

The recognition of conservation as a compelling and substantial goal demonstrates this point. Given the integral role the fishery has played in the distinctive cultures of many aboriginal peoples, conservation can be said to be something the pursuit of which can be linked to the recognition of the existence of such cultures. Moreover, because conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. In this way, conservation can be said to be a compelling and substantial objective which, provided the rest of the *Sparrow* justification standard is met, will justify governmental infringement of aboriginal rights.

⁵³⁶ *Delgamuukw*, *supra* note 3. In his discussion of the duty to consult Lamer C.J.C. stated at 1113: The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

⁵³⁷ *Gladstone*, *supra* note 1.

Although by no means making a definitive statement on the issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the types of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.⁵³⁸

In 1997 *Delgamuukw*,⁵³⁹ made its way to the Court. Despite the fact that the Chief Justice concluded that a, “defect in the pleadings prevents the Court from considering the merits of this appeal,”⁵⁴⁰ Lamer C.J.C. determined that the importance of the case required input from the Court as to why a new trial should be ordered.⁵⁴¹

In the course of this judgment Lamer C.J.C. took the opportunity to expand on his theory of what might constitute “compelling and substantial legislation” under the *Sparrow* test. As a result, Lamer C.J.C. stated:

Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, *equally* a necessary part of that reconciliation

The conservation of fisheries, which was accepted as a compelling and substantial objective in *Sparrow*, furthers both of these purposes, because it simultaneously recognises that fishing is integral to many aboriginal cultures, and also seeks to reconcile aboriginal societies with the broader community by ensuring that there are fish enough for all. But legitimate government objectives also include “the pursuit of economic and regional fairness” and “the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups” (Para. 75). By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component would fail this aspect of the test of justification.

⁵³⁸ *Ibid.* at 775.

⁵³⁹ *Delgamuukw*, *supra* note 3.

⁵⁴⁰ *Ibid.* at 1063.

⁵⁴¹ *Ibid.*

The broadening of the legislative objectives the Court is willing to accept as compelling and substantial has led to a watering down of the first section of the *Sparrow* test, to the point where it is of very little assistance in the preservation of constitutionally protected Aboriginal rights.

In essence, what Lamer C.J.C. did was take the notion that compelling and substantial legislation should be used as a shield for the protection of Aboriginal rights and dilute it to the point where almost any legislative enactment is likely to pass this portion of the test, leaving only the honour of the Crown and their fiduciary obligations therein to be upheld. The assessment then turned away from whether the Crown had the right to infringe on the Aboriginal right and focuses instead on whether the right is infringed upon the right in a manner prescribed by law.⁵⁴²

The relaxation of the first part of the *Sparrow* justification test is open to considerable criticism. In her dissenting opinion in *Van der Peet*,⁵⁴³ McLachlin J. argued against the expansion of legislative enactments recommended by the Chief Justice. McLachlin J. argued that the legislative objectives described in *Sparrow* as compelling and substantial, “may be seen as united by a common characteristic; they constitute the essential pre-conditions of any civilized exercise of the right.”⁵⁴⁴ McLachlin J. continued

⁵⁴² Imai, *Treaty Lands and Crown Obligations*, *supra* note 179. Professor Imai makes an argument similar to this at 19:

But if the courts take an expansive view of valid objectives, the first stage will disappear. A First Nation challenging the infringement would be left to articulate its concerns in the context of the second stage of the justification test - upholding the honour of the Crown. The only issues left open for challenge would be such questions as whether there had been adequate consultation, whether the right had been infringed as little as possible and whether compensation had been paid. Consequently, the legal challenge would be centered on whether the Crown was infringing treaty rights in the proper manner, and not on whether the Crown was permitted to infringe on them in the first place.

⁵⁴³ *Van der Peet*, *supra* note 1.

⁵⁴⁴ *Ibid.* at 661.

by arguing that the range of limitation should be confined to the exercise of the right and not the “diminution, extinguishment or transfer of the right to others.”⁵⁴⁵ Any limitations considered, McLachlin J. stated, “do not negate the right, but rather limit its exercise.”⁵⁴⁶

McLachlin J. concluded by stating:

This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.⁵⁴⁷

For McLachlin J. the limitation of rights as suggested in *Sparrow*, referred to the limitation of the exercise of the rights by the Aboriginal peoples and not a divesting of these rights to non-Aboriginal interests. Madame Justice McLachlin summarised her principled approach to the infringement of Aboriginal rights by concluding that any limitation of an Aboriginal right must flow from the framework of compelling and substantial legislative enactments as envisioned by Dickson C.J.C. and La Forest J. in *Sparrow*.

I therefore conclude that a government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Specifically, limits that have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified. Short of repeal of s. 35(1), such transfers can be made only with the consent of the aboriginal people. It is for the governments of this country and the aboriginal people to determine if this should be done, not the courts. In the meantime, it is the responsibility of the Crown to devise a regulatory scheme which ensures the responsible use of the resource and provides for the division of what remains after conservation needs have been met between aboriginal and non-aboriginal peoples.⁵⁴⁸

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.* at 668.

By divesting the Aboriginal people of these rights, rather than merely limiting the use of the right within the Aboriginal community, the Court appeared to be attempting to balance constitutionally protected interests with other non-constitutionally protected interests. This is something that has led to criticism of the Court. Professor Kent McNeil perhaps summed it up best when he asked:

Since when can constitutional rights be overridden for the economic benefit of private persons who do not have equivalent rights? Isn't this turning the Constitution on its head by allowing interests that are not constitutional to trump rights that are?⁵⁴⁹

Finally in her judgment in *Van der Peet*,⁵⁵⁰ McLachlin J. warned against equating the guarantees provided to the Aboriginal peoples of Canada in a manner similar to the guaranteed protection of individual rights under the *Charter*.⁵⁵¹ *Charter* rights, as McLachlin J. stated, are subject to “such reasonable limitations as can be demonstrably justified in a free and democratic society.”⁵⁵² However, as McLachlin J. stated, the framers of s. 35(1) intentionally placed the rights protected under that section outside the scope of rights subject to the limitations of s. 1. As a result, McLachlin J. concluded:

In the absence of an express limitation on the rights guaranteed by s. 35(1), limitations on them under the doctrine of justification must logically and as a matter of constitutional construction be confined, as *Sparrow* suggests, to truly compelling circumstances, like conservation, which is the *sine qua non* of the right, and restrictions like preventing the abuse of the right to the detriment of the native community or the harm of others -- in short, to limitations which are essential to its continued use and exploitation. To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the Constitution.⁵⁵³

⁵⁴⁹ Kent McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?* (Toronto: Robarts Centre For Canadian Studies, 1998) [McNeil, *Defining Aboriginal Title in the 90's*] at 19.

⁵⁵⁰ *Van der Peet*, *supra* note 1.

⁵⁵¹ *Charter*, *supra* note 14.

⁵⁵² See Section 1 of the *Charter*, *supra* note 15.

⁵⁵³ *Van der Peet*, *supra* note 1 at 663.

Despite the above criticisms, for one living on the west coast it is at least defensible to understand why the Chief Justice thought it necessary to expand the justification test in *Gladstone*,⁵⁵⁴ to protect the Aboriginal fishery to the exclusion of all others; specifically non-Aboriginal fishers could readily result in the demise of the non-Aboriginal fishery industry on the west coast at a great social expense. However, the further expansion of interests applicable in *Delgamuukw*,⁵⁵⁵ is much more difficult to rationalise. The Court's expansion of public interest objectives in *Delgamuukw* represented nothing less than a shameful courting of big business interests at the expense of the Aboriginal culture. Professor McNeil was blunt in his criticism of the Court.

Development of forestry and mining are two more examples Lamer C.J. gave of objectives that would justify infringing Aboriginal title. Now we all know who, for the most part, engages in these kinds of resource development today—large, usually multinational, corporations. So what the Chief Justice appears to have envisaged here is government authorized intrusion onto Aboriginal lands to serve the economic interests of large corporations.⁵⁵⁶

ii. The Application of the Sparrow Test Part Two: (The Honour of the Crown)

Presuming the Crown is able to satisfy the first part of the justification test, it must then illustrate that the actions in question uphold the fiduciary responsibility of the Crown to the Aboriginal peoples of Canada. This, as discussed in Chapter IV of this work, places a high burden on the Crown to prove they are operating in the best interests of the Aboriginal group, even if it is to the detriment of their own or outside interests.⁵⁵⁷

In *Sparrow*,⁵⁵⁸ the Court concluded that the Crown could uphold their fiduciary obligation to the Aboriginal peoples by ensuring that Aboriginal rights were given

⁵⁵⁴ *Gladstone*, *supra* note 1.

⁵⁵⁵ *Delgamuukw*, *supra* note 3.

⁵⁵⁶ McNeil, *Defining Aboriginal Title in the 90's*, *supra* note 549 at 20.

⁵⁵⁷ See, *Lac Minerals v. International Corona*, *supra* note 415.

⁵⁵⁸ *Sparrow*, *supra* note 12.

priority over other, non-constitutionally protected rights. To do this, the right should be impaired in a minimal fashion, the Aboriginal group involved should be consulted in a meaningful way and in the event of expropriation, and compensation should be available to the Aboriginal group. However, as with the first section of the test, the Courts decisions in *Gladstone*,⁵⁵⁹ and *Delgamuukw*,⁵⁶⁰ have all but vanquished this section of the test, leaving it a hollow shell of a promise.

In *Gladstone*,⁵⁶¹ the issue before the Court was the ability of an Aboriginal group to sell fish commercially. As a result, Lamer C.J. distinguished this case from *Sparrow*, arguing that “*Sparrow* has an inherent limitation which the right recognised and affirmed in this appeal lacks.”⁵⁶² Lamer C.J. claimed that with a commercial right, the only limitation involved would be saturation of the market place and the availability of the resource. As a result, giving priority to the Aboriginal peoples could easily lead to an exclusive right, exercised solely by the Aboriginal peoples.

Where the aboriginal right has no internal limitation, however, what is described in *Sparrow* as an exceptional situation becomes the ordinary: in the circumstance where the aboriginal right has no internal limitation, the notion of priority, as articulated in *Sparrow*, would mean that where an aboriginal right is recognised and affirmed that right would become an exclusive one. Because the right to sell herring spawn on kelp to the commercial market can never be said to be satisfied while the resource is still available and the market is not sated, to give priority to that right in the manner suggested in *Sparrow* would be to give the rightholder exclusivity over any person not having an aboriginal right to participate in the herring spawn on kelp fishery.⁵⁶³

The Court concluded that this could not be the intent of the *Sparrow* test. The Chief Justice concluded that any assessment of this section of the test must remain

⁵⁵⁹ *Gladstone*, *supra* note 1.

⁵⁶⁰ *Delgamuukw*, *supra* note 3.

⁵⁶¹ *Gladstone*, *supra* note 1.

⁵⁶² *Ibid.* at 764.

⁵⁶³ *Ibid.* at 765.

elusive and be done on a case-by-case basis. Lamer C.J. equated this section of the test to the minimal impairment section of the *Oakes* test.⁵⁶⁴

Just as the doctrine of minimal impairment under s. 1 of the *Canadian Charter of Rights and Freedoms* has not been read as meaning that the courts will impose a standard “least dramatic means” requirement on the government in all cases, but has rather been interpreted as requiring the courts to scrutinize government action for reasonableness on a case-by-case basis...priority under *Sparrow*’s justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights.⁵⁶⁵

Lamer C.J. then stated that as the *Oakes* test was designed to balance the competing interests in society, so too the *Sparrow* test must be designed to do the same. At the end of the day, according to Lamer C.J. the interests of the non-Aboriginal, non-constitutionally protected rights must be balanced with those that are constitutionally protected. This, I would suggest, represented a first step towards placing the minimal impairment criteria of the *Sparrow* test on the endangered species list.

From this point, Lamer C.J. moved on to expand on the notion of a watered down priority assessment in *Delgamuukw*.⁵⁶⁶ In this decision the Chief Justice concluded that the minimal impairment function of the *Sparrow* test required that the government demonstrate that “both the process by which it allocated the resource and the actual allocation of the resources which results from that process reflect the prior interest of the aboriginal holders of the land.”⁵⁶⁷ For example:

By analogy with Gladstone, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining

⁵⁶⁴ *R. v. Oakes*, *supra* note 15.

⁵⁶⁵ *Gladstone*, *supra* note 1 at 767.

⁵⁶⁶ *Delgamuukw*, *supra* note 3.

⁵⁶⁷ *Ibid.* at 1112.

reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced.⁵⁶⁸

The Chief Justice then began the process of deconstructing the prioritisation of Aboriginal rights in the justification of infringements.

First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands.⁵⁶⁹

If the first section of the fiduciary test is removed, this simply leaves the duty to consult along with the compensation for rights expropriated as remaining from the initial *Sparrow* justificatory test. The Chief Justice suggested that the duty to consult might range from discussing important issues to a full-blown rejection of the expropriation of the right. However, the latter seems unlikely if courts are going to take the lead of the Chief Justice.

What remained of the *Sparrow* test following these two decisions reflected poorly on the original test as developed by Dickson C.J.C. and La Forest J. Rather than compelling and substantial legislation, almost any legislative enactment would fulfill the first portion of the test, leaving us with not whether the right may be infringed but how. If the right may be infringed without consideration to minimal impairment this leaves us only with a duty to consult and compensation for expropriation of the resource. As a result, it stands to reason that it is possible to project a situation where, so long as a group is willing to write a cheque to compensate the Aboriginal group for the taking of the

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.* at 1113.

resource, little will be done to preserve that resource or stay that non-Aboriginal group from their goals.

The next stage in this part of the test involves the consultation process between the parties. In *Delgamuukw*,⁵⁷⁰ the Chief Justice stated:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.⁵⁷¹

From this assessment it is clear that the Court contemplated a spectrum of consultation requirements. At the one end was discussion to clarify important actions to be taken in relation to infringement of Aboriginal rights, while at the other the Chief Justice held out the hope that Aboriginal groups may be able to veto an activity that infringed upon their rights entirely. If this is looked at from the perspective of the Crown this could mean the duty to consult ranges in nature from a responsibility to simply inform, on the one hand, to accommodation of Aboriginal interests in the middle and consent of the Aboriginal groups at the other end of the spectrum.⁵⁷²

⁵⁷⁰ *Delgamuukw*, *Ibid.*

⁵⁷¹ *Ibid.* at 1113.

⁵⁷² See, Thomas Issac & Anthony Knox. "The Crown's Duty to Consult Aboriginal People" (2003) 41 *Alta. L. Rev.* 49 [Issac & Knox, *The Crown's Duty to Consult Aboriginal People*] at 61.

To date there is conflicting jurisprudence as to when the duty to consult is triggered. For example, the Ontario Court of Appeal concluded in *Ontario (Minister of Municipal Affairs and Housing) v. Trans Canada Pipelines Ltd.*,⁵⁷³ concluded:

[w]hat triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognised and affirmed by s. 35(1) of the Constitution Act, 1982. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.⁵⁷⁴

Conversely, in British Columbia it has been concluded that the duty to consult begins much earlier. For example, in *Taku River Tlingit First Nation*,⁵⁷⁵ the Court of Appeal concluded that to wait until the right is established “would effectively end any prospect of meaningful negotiation or settlement of aboriginal land claims.”⁵⁷⁶ In *Haida First Nations*,⁵⁷⁷ indicated the duty to consult arose prior to the confirmation of an existing Aboriginal or treaty right. The court based this decision on their concern that by placing impediments on the treaty process, the Crown could force litigation and judgment prior to their accessing the duty to consult. By the time the duty arose, there may well be nothing to consult over.⁵⁷⁸

As more time transpires we will be more aware of the value of the duty to consult and whether this will serve to protect the interests of the Aboriginal peoples. However, there is one concern that must be addressed and that is the result of negotiations that do not culminate in agreement. In such cases, the parties will be forced to litigate,

⁵⁷³ *Ontario (Minister of Municipal Affairs and Housing) v. Trans Canada Pipelines Ltd.* (2000), 186 D.L.R. (4th) 403, 137 O.A.C. 201, 3 C.N.L.R. 153, 2000 OJ 1066 (Ont. C.A.) [*Ontario v. Trans Canada Pipelines*, cited to D.L.R.]

⁵⁷⁴ *Ibid.* at 454.

⁵⁷⁵ *Taku River Tlingit First Nation*, *supra* note 454.

⁵⁷⁶ *Ibid.* at 165.

⁵⁷⁷ *Haida First Nations*, *supra* note 454.

⁵⁷⁸ *Ibid.* at para. 10.

something that plays into the hands of the vast corporations attempting to infringe on the Aboriginal and treaty rights of the Indigenous peoples. Sonia Lawrence and Patrick Macklem addressed this point with regard to the Kitkatla First Nation. Despite negotiations with the Crown, court proceedings followed.

[T]he Kitkatla litigation suggests that the duty to consult has produced the very effect that it was designed to minimize, namely excessive reliance on the judiciary to reconcile competing interests of the parties. Consultation processes, by and large, have not led to lasting settlements. Instead, consultations increasingly serve as a kind of pre-trial discovery process, closely resembling the litigation they were intended to forestall, and constituting the first step in protracted legal disputes.⁵⁷⁹

Clearly as a negotiation strategy this is something that is likely to strengthen the position of businesses negotiating with the Aboriginal peoples. If allowed to continue, it could easily affect the ability of the duty of consultation to play a positive role in the protection of Aboriginal and treaty rights in the manner envisioned by Dickson C.J. and La Forest J.

iii. Interpreting Sparrow in Relation to Treaty Rights

As indicated earlier in this work, *Sparrow*,⁵⁸⁰ dealt with the infringement of constitutionally protected Aboriginal rights. However, subsequently courts at all levels began to use the test designed to justify infringements to Aboriginal treaty rights as well. In this section I will argue that the flaws illustrated in the *Sparrow* test as the result of its application in later cases is multiplied when the test is used to assess infringements of treaty rights.

⁵⁷⁹ Sonia Lawrence & Patrick Macklem “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 70 Can. Bar Rev. 252 [Lawrence & Macklem, *From Consultation to Reconciliation*] at 254.

⁵⁸⁰ *Sparrow*, *supra* note 12.

Unlike Aboriginal rights, which flow from the fact that the Aboriginal peoples were here prior to the arrival of Europeans, treaty rights stem from agreements made between the parties. Initially it was the French and later the British. Finally the Canadian government negotiated agreements with the Aboriginal peoples.

At first these treaties were designed to sustain peaceful relations and, in some cases, military and economic alliances. Eventually with the withdrawal of the French as a force in the colony, the goals of the Imperial Crown turned to settlement. At this time the treaties between the Crown and the Indigenous people took the form of land transfers, whereby the Aboriginal peoples were commonly provided with a plot of land recognised as the reserve.

Along with this, it was common in most treaties for the Crown to authorise the Aboriginal peoples to continue their traditional ways of living on unoccupied Crown lands. These rights were subject to two limitations. First, the Crown retained the right to have portions of the tract surrendered, *subject to such regulations as may from time to time be made by the government of the country, acting under the authority of [His] Majesty.*⁵⁸¹ Second, the lands were subject to what has been classified as the “taking up” clause. By this, the government provided free reign to the Aboriginal peoples on unoccupied tracts of government lands, *saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.*⁵⁸²

⁵⁸¹ For an examination of this see, Imai, *Treaty Lands and Crown Obligations*, *supra* note 175.

⁵⁸² *Ibid.*

In 1996 the Court finally had the opportunity to address the issue of the *Sparrow* test in relation to treaty rights. In *Badger*,⁵⁸³ the Court addressed the application of the *Sparrow* test to treaty rights and acknowledged the difference in the two types of rights:

There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in *Calder, supra* at p. 328, they embody the right of the native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.⁵⁸⁴

Despite this, Cory J. concluded that there were enough similarities between Aboriginal and treaty rights to allow for the exercise of the *Sparrow* test in concluding when abridgment might take place.⁵⁸⁵

Cory J. based this conclusion by referring to his earlier decision in *Horseman*,⁵⁸⁶ where the Court concluded that *Treaty 8* did not provide an “unfettered right to hunt.”⁵⁸⁷ Cory J. came to this conclusion by referring to the limitations clauses in *Treaty 8*.⁵⁸⁸

There are, I would like to suggest, problems with this line of thinking. First, it is entirely possible that *Treaty 8* did not provide for limitations on the right to hunt within the scope of the treaty. This would be something the parties could agree to in the course of treaty negotiations. However to presume that the rights negotiated in one treaty

⁵⁸³ *Badger, supra* note 39.

⁵⁸⁴ *Ibid.* at 812.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Horseman, supra* note 364.

⁵⁸⁷ *Ibid.* at 936.

⁵⁸⁸ See note 571. As further evidence of the unilateral right of abridgment, Cory J. offered two cases which pre-dated the *Constitution Act, 1982, supra* note 6. *R v. Sikyey* (1964) 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325. (N.W.T. C.A.) aff'd [1964] S.C.R. 642 (S.C.C.) and *R. v. Moosehunter*, [1981] 1 S.C.R.282, 123 D.L.R. (3d) 95, 59 C.C.C. (2d) 193 (S.C.C.)

automatically apply to treaties in general appears to fly in the face of the later Court decision in *Sundown*.⁵⁸⁹ In this case, also authored by Cory J., the Court concluded:

Treaty rights, like aboriginal rights, are specific and may be exercised exclusively by the First Nation that signed the treaty. The interpretation of each treaty must take into account the First Nation signatory and the circumstances that surrounded the signing of the treaty.⁵⁹⁰

It would appear that Cory J. gave little more consideration to the relationship between Aboriginal and treaty rights and the exercise of the *Sparrow* test to those rights than did either Murphy J. in *R. v. Joseph*,⁵⁹¹ or Austin J.A. in *R. v. Bombay*.⁵⁹² As a result, it would appear that the connection of the *Sparrow* test to treaty rights infringement comes from nothing more than the fact that these rights are connected in s. 35(1) of the *Constitution Act, 1982*.⁵⁹³

More recently in *Cote*.⁵⁹⁴ Lamer C.J. stated:

As a general rule, where a claimant challenges the application of a federal regulation under s. 35(1), the characterization of the right alternatively as an aboriginal right or a treaty right will not be of any consequence once the existence of the right is established, as the *Sparrow* test for infringement and justification applies with the same force and the same considerations to both species of constitutional rights.⁵⁹⁵

Like the earlier decisions referred to, the Chief Justice in this case links Aboriginal and treaty rights to the *Sparrow* test without providing any justification for the connection. In *Harrison v. Carswell*,⁵⁹⁶ an employee of a tenant of a shopping centre in Manitoba continued to picket despite the fact that she was notified that picketing was not

⁵⁸⁹ *Sundown*, *supra* note 383.

⁵⁹⁰ *Ibid.* at 407.

⁵⁹¹ *R. v. Joseph*, *supra* note 17.

⁵⁹² *R. v. Bombay*, *supra* note 19.

⁵⁹³ *Constitution Act, 1982*, *supra* note 6.

⁵⁹⁴ *Cote*, *supra* note 260.

⁵⁹⁵ *Ibid.* at 164.

⁵⁹⁶ *Harrison v. Carswell*, [1976] 2 S.C.R. 200, 62 D.L.R. (3d) 68, 25 C.C.C. (2d) 186 (S.C.C.) [*Harrison v. Carswell*, cited to S.C.R.].

permitted in any area of the shopping centre and that if she did not leave she would be charged with trespass. She was charged under the *Petty Trespass Act*,⁵⁹⁷ and the case made its way to the Supreme Court of Canada. In the course of his judgment, Dickson J. (as he then was), had the opportunity to consider the role of the judiciary under the Constitution. Dickson J. stated:

The duty of the Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the Court to act creatively—it has done so on countless occasions; but manifestly one must ask—what are the limits of the judicial function?

Dickson J. then cited with approval the words of Justice Cardozo who stated:

This judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.⁵⁹⁸

In applying the *Sparrow* justificatory test to treaty rights, courts at all levels have been guilty of the precise free wheeling judicial decision-making warned of by both Dickson J. and Cardozo J. I would contend that in attempting to link treaty rights to Aboriginal rights and the *Sparrow* test based solely on their connection in s. 35(1), courts at all levels have gone beyond the limits of judicial function.

Unlike inherent Aboriginal rights, treaty rights stem from consensual agreements made between the parties. Despite this, treaties between the Crown and the Aboriginal peoples have run the gambit from being classified as unenforceable as nothing more than a personal obligation by the territorial governor,⁵⁹⁹ to being classified as “tantamount to a

⁵⁹⁷ *Petty Trespass Act*, R.S.M. 1970, c. P-50. [*Petty Trespass Act*].

⁵⁹⁸ *Harrison v. Carswell*, *supra* note 596.

⁵⁹⁹ *Re: Indian Claims*, *supra* note 317 at 213.

contract.”⁶⁰⁰ With the entrenchment of treaty rights in the *Constitution Act, 1982*,⁶⁰¹ the nature of these agreements shifted. As indicated in *Badger*,⁶⁰² treaties reflect, “an exchange of solemn promises...whose nature is sacred.”⁶⁰³ In recognising these documents as constitutional in nature, they can no longer be interpreted as contracts and terminated by government legislative activity. James Henderson stated:

As part of the supreme law of Canada, section 35 specifically directs and mandates recognition and affirmation of existing Aboriginal and treaty rights at every level of Canadian society, creating new contexts for interpretation of governmental responsibility and treaty rights in Canada.⁶⁰⁴

Treaties confer rights and obligations. It has been asserted by the courts that these rights conferred are sacred in nature, that they are to be interpreted liberally in favour of the Aboriginal peoples that no sharp dealing on the part of the Crown is to be condoned and finally that the honour of the Crown is at stake in its dealings with the Aboriginal peoples.⁶⁰⁵ All of these words suggest a high standard of responsibility on the part of the government. As a result of the fiduciary nature of the Crown-Aboriginal relationship, the Crown is to act in the best interest of the Aboriginal peoples, even when that acts to the disadvantage of the Crown. In exchange, these treaties have conferred obligations on the Aboriginal peoples. Commonly, the obligations conferred upon the Aboriginal people has been the transferring of their historic lands in return for certain considerations past and present.

⁶⁰⁰ *Pawis v. The Queen* (1979) 102 D.L.R. (3d) 602 at 607, [1980] 2 F.C. 18 (F.C.T.D.) [*Pawis v. The Queen*, cited to D.L.R.].

⁶⁰¹ *Constitution Act, 1982*, *supra* note 6.

⁶⁰² *Badger*, *supra* note 39.

⁶⁰³ *Ibid.* at 793.

⁶⁰⁴ James [Sakej] Henderson. “Empowering Treaty Federalism” (1994) 58 Sask. L. Rev. 241 [Henderson, *Empowering Treaty Federalism*] at 244.

⁶⁰⁵ *Badger*, *supra* note 39 at 332.

As a result of having fulfilled their obligations, it seems unfair that treaty rights should now be, somewhat retroactively, restricted by governmental action. However, if this is to be so, it seems clear from the evaluation of the *Sparrow* test and the way in which it has been deconstructed by the Court in the last several years, that using the *Sparrow* test as a tool for justifying infringement of Aboriginal rights is inappropriate.

In *R. v. Marshall*,⁶⁰⁶ the Supreme Court of Canada had the opportunity to outline the principles of infringement. Known as *Marshall II*, this case arose as the result of a request for a rehearing and stay of judgment in the original case of *Marshall I*.⁶⁰⁷ Rather than taking the opportunity to re-iterate a stringent test for infringement as had been suggested in *Sparrow*,⁶⁰⁸ the Court concluded that infringement should be examined on the wider path outlined by Lamer C.J. in *Gladstone*⁶⁰⁹ and *Delgamuukw*.⁶¹⁰ The Court stated:

The Minister's authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups. The Minister's regulatory authority is not limited to conservation.⁶¹¹

What should concern us is the fact that the Court in this case concluded that only treaty rights dealing with the ability of the Aboriginal group to “produce a moderate livelihood,”⁶¹² need be considered within the framework of the test for infringement. Any treaty rights outside that scope, it would appear, are subject to limitation without consideration of the *Sparrow* or any other test designed to protect the rights of the

⁶⁰⁶ *R. v. Marshall*, [1999] 3 S.C.R. 533, 179 D.L.R. (4th) 193, 4 C.N.L.R. 301, 1999 SCJ 66 (S.C.C.)

[*Marshall II*, cited to S.C.R.]

⁶⁰⁷ *Marshall I*, *supra* note 393.

⁶⁰⁸ *Sparrow*, *supra* note 12.

⁶⁰⁹ *Gladstone*, *supra* note 1.

⁶¹⁰ *Delgamuukw*, *supra* note 3.

⁶¹¹ *Marshall II*, *supra* note 606 at 562.

⁶¹² *Ibid.* at 561.

Aboriginal peoples. This, it would seem, flies in the face of what we consider constitutional protection to regulate.

Conclusion

This chapter has examined the use of the *Sparrow* justificatory test for the justification of infringements of constitutionally protected Aboriginal and treaty rights. As has been illustrated, since its introduction the Supreme Court of Canada has revised this test to the point where the compelling and substantial legislative enactments envisioned by its authors is no longer applicable.

Because of the deconstruction done at the Court almost any legislative enactment is going to fulfill the requirements as outlined by Lamer C.J., leaving only the fiduciary responsibility of the Crown as an applicable shield against unjustified infringement. However, as has been shown, this portion of the test is fraught with problems as well. The Court has concluded that giving priority to Aboriginal rights does not necessarily require the Court to consider them in a minimalist fashion. Rather, with certain rights holding no internal limitation, the Court has concluded the right in question must be balanced against the general rights of society.

Similarly, the second section of the honour of the Crown portion of the test has demonstrated clear flaws. First, it is not yet conclusive as to when the duty to consult is triggered. Perhaps it is when there is the potential for infringement of an Aboriginal right, but perhaps it is much later, specifically when the right has already been established in court. If this is the case then delays could result in situations where there is no right left to discuss or, alternatively, stalled negotiations may lead to costly litigation, something many Aboriginal groups can ill afford. If these two protections are discarded

we are left only with compensation and tragically this may be where the entire process is heading. Professor Imai warned against this very thing.⁶¹³

I have attempted to illustrate the effect of this test on treaty rights. I have pointed out that these rights are of a different nature than inherent Aboriginal rights, stemming from consensual agreements between the parties. I have illustrated throughout this work the differences between treaty and Aboriginal rights. Whereas the latter stem from the original occupation of the lands by the Aboriginal peoples, the former stems from agreements made, first between nations, then later by members of a state and its government. For the considerations given, the Indigenous peoples have relinquished much. In some cases it was their land, in others it was their sovereignty. They have paid a heavy price as members of these treaties. Alternatively, first the Imperial Crown and later the Canadian government has received consideration for these treaties. Is it really acceptable that they can now infringe upon them in the manner prescribed by the revised *Sparrow* examination. I respectfully submit that using the *Sparrow* test, particularly as that test has been altered by the Supreme Court of Canada, will have the effect of infringing on those rights in a manner not envisioned by its authors at the Court.

⁶¹³ Imai, *Treaty Lands and Crown Obligations*, *supra* note 179 at 19.

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