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British Columbia (2014),[15] the Supreme Court applied the principles laid down in *Delgamuukw* and made a finding of aboriginal title. The Tsilhqot'in Nation was a group of six bands who occupied the Cariboo Chilcotin region of central British Columbia. The issue of their title arose when the province granted to a private lumber company a licence to cut trees on provincial Crown land that was part of the First Nation's traditional territory. The First Nation brought legal proceedings against the province for a declaration of aboriginal title over the land.[16] *Delgamuukw* had decided that aboriginal title had to be established by proving that the First Nation occupied the land at the date of the British assumption of sovereignty over the territory of British Columbia in 1846. This case called for clarification of what was "sufficient" occupation. The evidence showed that the Tsilhqot'in people occupied the sites of villages "intensively" but were otherwise "semi-nomadic", ranging over the rest of the claimed land to forage, harvest, hunt, trap and fish according to the season. The trial judge concluded that the First Nation had established sufficient occupation over the entire territory which their ancestors had used regularly and exclusively. The Court of Appeal took a narrower view, holding that sufficient occupation would be established only over those sites that had been intensively occupied and that had reasonably definite boundaries in 1846. This would have resulted in "small islands of title" surrounded by larger territories over which the aboriginal people would have no title (although they would of course have rights to engage in their traditional activities). The Supreme Court sided with the trial judge. The sufficiency of occupation was a "context-specific inquiry".[17] The Tsilhqot'in land was extensive but it was harsh and could only support a small number of people; the semi-nomadic way of life was driven by the limited carrying capacity of the land. What amounted to sufficient occupation should reflect this reality and should acknowledge that semi-nomadic aboriginal people "might conceive of possession of land in a somewhat different manner than did the common law".[18] The pre-sovereignty occupation was "sufficient", not just over specific sites of settlement, but over the entire territory that their ances-

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[15]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44. McLachlin C.J. wrote the opinion of the Court. The implications of the decision for the development of land encumbered by aboriginal title or claims of title are well analyzed in H. Swain and J. Baillie, "*Tsilhqot'in Nation v. British Columbia*: Aboriginal Title and Section 35" (2015) 56 Can. Bus. L. J. 265.

[16]The First Nation also challenged the validity of the logging licence on the ground that, although their title had not been established at the time of issue, they had not been consulted; the Court upheld that claim as well as the claim of title: *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 153. See also § 28:38, "Duty to consult aboriginal people".

[17]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 37.

[18]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 41. This seems to be inconsistent with the Court's earlier decision in *R. v. Marshall*, [2005] 2 S.C.R. 220 (*Marshall No. 3*), where the Court relied on the common law of possession to deny aboriginal title to a semi-nomadic aboriginal nation. In *Tsilhqot'in*, para. 44, McLachlin C.J. distinguished the earlier decision on the ground that "regular and

tors had used regularly and exclusively. The Court also accepted the findings of the trial judge that the occupation had been "continuous" to the present day and that it had been "exclusive" to the Tsilhqot'in people. The three criteria of sufficiency, continuity and exclusivity were all satisfied, and the Court granted a declaration of title.

In *Delgamuukw*, Lamer C.J. frequently repeated the proposition, which is found in all the earlier cases,[19] that aboriginal title is sui generis (one of a kind). By this he meant that there are a number of important differences between aboriginal title and non-aboriginal title. There are five such differences. The first, which has already been discussed, relates to the source of aboriginal title, which derives from pre-sovereignty occupation rather than a post-sovereignty grant from the Crown.

The second difference relates to the range of uses to which aboriginal-title land may be put. Aboriginal title confers the right to exclusive use and occupation of the land, which includes the right to engage in a variety of activities on the land, and those activities are not limited to those that have been traditionally been carried on, and are certainly not limited to those that were integral to the distinctive culture. For example, the exploitation of oil or gas existing in aboriginal lands would be a possible use. However, the range of uses to which the land could be put is subject to the limitation that the uses "must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title".[20] This means that land occupied for hunting purposes could not be converted to strip mining, for example. Perhaps a better way of explaining this restriction on the use of aboriginal land is that the land is held "not only for the present generation but for all succeeding generations", and cannot be abused or encumbered "in ways that would prevent future generations of the group from using and enjoying it."[21] This inherent limit on the uses to which the land could be put may be contrasted with the lack of any comparable restrictions on a fee simple title (although there will usually be *statutory* restrictions on a fee simple title, such as zoning by-laws).

The third difference between aboriginal title and non-aboriginal title is that aboriginal title is inalienable, except to the Crown. This was well established in the prior case-law. The doctrine of inalienability means that the Crown has to act as an intermediary between the aboriginal owners and third parties.[22] In order to pass title to a third party, the aboriginal owners must first surrender the land to the Crown. The

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exclusive use" of the land had not been established in that case.

[19]E.g., *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 382 per Dickson J. See also *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 72 per McLachlin C.J.

[20]*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 111.

[21]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 74 per McLachlin C.J.

[22]La Forest, Natural Resources and Public Property under the Canadian Constitution (1969), 110–111, 120.

Crown then comes under a fiduciary duty to deal with the land in accordance with the best interests of the surrendering aboriginal people, for example, by ensuring that adequate compensation is received by the aboriginal owners.[23] During the period of European settlement, the doctrine of inalienability was a safeguard against unfair dealings by settlers trying to acquire aboriginal land and an encouragement to the process of treaty making. The doctrine also supplied certainty to land titles in Canada, because it made clear that a Crown grant was the only valid root of title for non-aboriginal people and for non-aboriginal land. In *Delgamuukw*, Lamer C.J. made the interesting suggestion that the doctrine of inalienability was a subset of the inherent limit on the uses permitted by aboriginal title. Alienation would be irreconcilable with the nature of the aboriginal attachment to the land—indeed, it would end the attachment—and was barred for that reason.[24] Of course, an aboriginal nation that wants to alienate its lands, or to use its lands in a way that aboriginal title does not permit, can do so indirectly by surrendering the lands to the Crown, which can convert them by grant to a fee simple.

The fourth difference between aboriginal title and non-aboriginal title is that aboriginal title can only be held communally. "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation."[25] Decisions with respect to the land are made by the community, not by an individual owner as would be the case with a fee simple title. In the previous section of this chapter, we noticed that the communal holding of land implies some mechanisms of governance to decide how the land is to be shared and used. This is an element of aboriginal self-government.

The fifth (and last) difference between aboriginal title and non-aboriginal title is that aboriginal title is constitutionally protected. As is explained in the next section of this chapter, even before 1982, aboriginal title could not be extinguished by provincial legislation, because provincial extinguishment would conflict with the exclusive federal power over "Indians, and lands reserved for the Indians" in s. 91(24) of the Constitution Act, 1867. Before 1982, aboriginal title could be extinguished by federal legislation, but the legislation would have that effect only if it showed a "clear and plain" intention to extinguish aboriginal title. In 1982, s. 35 of the Constitution Act, 1982 was adopted. The effect of s. 35 is to confer constitutional protection on any aboriginal title that was "existing" (unextinguished) in 1982.[26] The constitutional protection accorded by s. 35 is not absolute, but it does require that any infringement of the right must be enacted by the competent legislative body (which could be either the federal Parliament or a provincial

[23] *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Blueberry River Indian Band v. Can.*, [1995] 4 S.C.R. 344.

[24] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 129.

[25] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 115.

[26] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 133.

Legislature depending on the subject matter),[27] and must satisfy the *Sparrow* test of justification.[28] At a minimum, the test of justification would normally require prior consultation with the aboriginal owners before any of the incidents of their title was impaired as well as fair compensation for any impairment.[29] A fee simple, or any other non-aboriginal interest in land, has no constitutional protection.[30] It can be extinguished or impaired by the competent legislative body (which would usually be the provincial Legislature) without any constitutional obligation of prior consultation or compensation (or any other justification).

Despite the five important differences between non-aboriginal (fee simple) title and aboriginal title, the similarities must not be lost sight of. In particular, it goes without saying that any activity or development on aboriginal-title land requires the consent of the aboriginal title holders—just as consent would be required from fee simple title holders.[31] Of course, as explained in the previous paragraph, a refusal of consent can be overcome by legislation. In the case of fee simple title, legislation would be enacted by the normal legislative process, and (no constitutional rights being engaged) no special justification would be called for, and judicial review would not be available. In the case of aboriginal title (which is protected by s. 35 of the Constitution Act, 1982), any encumbering legislation would have to satisfy the *Sparrow* test of justification, a matter that if contested would be subject to judicial review.

Much land in Canada is subject to claims of aboriginal title that have not yet been proved. As long as a claim remains unproved, the aboriginal claimants have no right to insist on their consent to activity such as logging or hunting on the claimed land or to physical developments such as the building of a road or pipeline through the claimed land. However, because the claim is to a constitutionally protected right, the aboriginal claimants do have the right to be consulted by government and if necessary have their interests accommodated, and judicial review is available to determine the sufficiency of the consultation and accommodation.[32] But, if a court determines that consultation and accommodation have been sufficient on a standard of reasonableness, the proposed use of the land will be confirmed even if the aboriginal people are not satisfied with the outcome.[33] There is, however, some hazard in proceeding with a project in the absence of aboriginal consent. In *Tsilhqot'in Nation*,

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[27]*Tsilhqot'in Nation v. B.C.*, [2014] 2 S.C.R. 257, 2014 SCC 44, paras. 131–152, held (reversing prior decisions) that the doctrine of interjurisdictional immunity did not apply to block provincial laws that applied to aboriginal or treaty rights, and that the application of provincial laws to aboriginal or treaty rights was governed by the same s. 35 framework established in *Sparrow* for federal laws.

[28]The doctrine of justification is explained in § 28:34, "Recognized and affirmed".

[29]*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 168–169.

[30]See ch. 29, Public Property, under heading § 29:8, "Compensation".

[31]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 76.

[32]§ 28:38, "Duty to consult with aboriginal people".

[33]E.g., *Taku River Tlingit First Nation v. B.C.*, [2004] 3 S.C.R. 550 (approval of re-

McLachlin C.J. commented that, after the aboriginal people have succeeded in establishing their title, it may be necessary to "reassess" any project that was undertaken without consent: the Crown, she said, "may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing."[34] This comment was an obiter dictum, and it was made in a case where the issue was logging, but it would literally extend to a project involving the construction of a permanent facility such as a road or pipeline.

§ 28:22 Extinguishment of Aboriginal rights

Aboriginal rights (including aboriginal title) can be extinguished in two ways: (1) by surrender and (2) by constitutional amendment. As to the first way, the surrender of aboriginal rights must be voluntary, and must be to the Crown. Surrenders have occurred in treaties entered into between an aboriginal nation and the Crown.[1] A treaty will confer treaty rights on the aboriginal people in substitution for the surrendered aboriginal rights. The second way of extinguishing aboriginal rights is by constitutional amendment.[2] In the past, constitutional amendments affecting aboriginal or treaty rights have been enacted without the consent of the affected aboriginal people.[3] It is now clear that it would be a breach of the Crown's fiduciary duty to the aboriginal people to proceed with a constitutional amendment affecting aboriginal rights without at least the active participation of the affected aboriginal people.[4]

Before 1982, there was a third way of extinguishing aboriginal rights, and that was by legislation,[5] although after confederation only the federal Parliament was competent to enact an extinguishing law.[6] In 1982, the power to extinguish by legislation was removed by s. 35 of the Constitution Act, 1982. Section 35 (as interpreted in the *Sparrow* case) permits the *regulation* of aboriginal and treaty rights by a federal law

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opening of old mine confirmed despite aboriginal objection); *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 (land grant to non-aboriginal farmer confirmed despite aboriginal objection).

[34]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 92.

[Section 28:22]

[1]E.g., *Ont. v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *R. v. Howard*, [1994] 2 S.C.R. 299 (fishing right extinguished by treaty); *Grassy Narrows First Nation v. Ont.*, [2014] 2 S.C.R. 447, 2014 SCC 48, para. 2 (aboriginal title extinguished by treaty).

[2]*R. v. Horseman*, [1990] 1 S.C.R. 901 (treaty right).

[3]*R. v. Horseman*, [1990] 1 S.C.R. 901 (treaty right).

[4]Section 35.1 probably does not apply to constitutional amendments that make no direct change to any of the identified constitutional provisions but which do impair aboriginal or treaty rights. However, the fiduciary duty of the Crown recognized in *Sparrow* would, in my view, preclude such action without aboriginal participation.

[5]*Sikyea v. The Queen*, [1964] S.C.R. 642 (treaty right); *R. v. George*, [1966] S.C.R. 267 (treaty right); *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.) (aboriginal right); *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1111 (aboriginal right—obiter dictum).

[6]*Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, para. 178.

that satisfies strict standards of justification,[7] but does not permit the *extinguishment* of aboriginal and treaty rights.[8]

Extinguishment, whether by voluntary surrender or constitutional amendment, or (before 1982) by statute, will not be inferred from unclear language. Only a "clear and plain" intention to extinguish is accepted by the courts as having that effect. This was decided by the Supreme Court of Canada in the *Sparrow* case,[9] resolving the question that had caused the even division of the Court in *Calder*.[10]

VI. TREATY RIGHTS

§ 28:23 Introduction

Before 1982, Indian treaty rights[1] were explicitly protected from derogation by provincial law, but not federal law, by s. 88 of the Indian Act.[2] Since 1982, Indian treaty rights have been protected by s. 35 of the Constitution Act, 1982 from derogation by either federal or provincial law. Section 35 is discussed later in this chapter.[3]

§ 28:24 History

In eastern North America, from the earliest stages of French and English settlement, treaties of peace and friendship were entered into with the Indian nations. These treaties of the seventeenth and eighteenth centuries conferred (among other things) hunting and fishing rights in return for peace, and typically did not involve the cession by the Indians of their lands.[1] As European settlement moved westward, so did treaty-making. In 1850, the Robinson treaties were signed on the shores of

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[7]*Tsilhqot'in Nation v. B.C.*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 152, and *Grassy Narrows First Nation v. Ont.*, [2014] 2 S.C.R 447, 2014 SCC 48, para. 53, expanded the s. 35 capacity to regulate aboriginal and treaty rights to the provinces, acting on matters otherwise within provincial jurisdiction such as provincial forests, and subject to the same strict standards of justification.

[8]§ 28:36, "Application to extinguishment".

[9]*R. v. Sparrow*, [1990] 1 S.C.R. 1075. Folld. in *R. v. Gladstone*, [1996] 2 S.C.R. 723 (aboriginal right to sell herring spawn on kelp not extinguished by extensive regulation, including at times prohibition, of the trade); *R. v. Adams*, [1996] 3 S.C.R. 101 (surrender of aboriginal title did not demonstrate clear and plain intention to extinguish the "free-standing" aboriginal right to fish in water adjacent to the surrendered lands); *R. v. Sappier*, [2006] 2 S.C.R. 686 (aboriginal right to harvest timber on Crown land not extinguished by regulation through a licensing scheme).

[10]*Calder v. A.G.B.C.*, [1973] S.C.R. 313.

[Section 28:23]

[1]See Henderson, Treaty Rights in the Constitution of Canada (2007).

[2]§ 28:16, "Treaty exception". Treaty rights were also protected from provincial law by the "Indianness" exception: see § 28:9 note 5, above.

[3]§§ 28:29 to 28:40, "Section 35".

[Section 28:24]

[1]*Simon v. The Queen*, [1985] 2 S.C.R. 387 recognized a treaty of peace and friendship made in 1752.

Lakes Huron and Superior;[2] and, between 1871 and 1921, a series of 11 numbered treaties were entered into, covering a large part of Canada in Ontario and the prairie provinces.[3] These treaties do on their face cede Indian lands to the Crown[4] in return for (among other things) hunting and fishing rights, as well as the reservation of portions of the treaty lands for the Indians. By the 1920s, when the last of the numbered treaties had been entered into, there remained vast areas of Canada where no treaty-making had taken place. These included Inuit lands in Labrador, northern Quebec and the Northwest Territories, and Indian lands in northern Quebec, British Columbia, the Yukon and the Northwest Territories.

After the *Calder* case (1973)[5] recognized the validity of aboriginal rights, the Government of Canada reversed its policy of 50 years,[6] and resumed the process of treaty-making. Modern treaties—styled land claims agreements—have been entered into with the Inuit and Cree of the James Bay area of northern Quebec, with the Inuit of the eastern Arctic (now Nunavut), and with a number of the First Nations in the Yukon and Northwest Territories and British Columbia.[7] These land claims agreements reserve large areas of land (settlement land) to the aboriginal signatories as well as considerable sums of money in return for the surrender of aboriginal rights over non-settlement land. As well, however, the agreements constitute sophisticated codes with respect to such matters as development, land use planning, water management, fish and wildlife harvesting, forestry and mining. These codes assure a continuing role for the aboriginal people in the management of the resources of the entire region covered by the agreement, not just their own settlement land.[8]

Section 35 of the Constitution Act, 1982 explicitly includes rights acquired under modern land claims agreements in its protected treaty

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[2]*Ont. v. Bear Island Foundation*, [1991] 2 S.C.R. 570 recognized the Robinson-Huron Treaty of 1850.

[3]*R. v. Swimmer* (1971), 17 D.L.R. (3d) 476 (Sask. C.A.) recognized Treaty No. 6 of 1876.

[4]There is room for doubt as to whether the written terms of the numbered treaties accurately express the Indian understanding of their terms, and whether there was fully informed consent to the apparent extinguishment of rights: see, e.g., *Re Paulette* (1973), 42 D.L.R. (3d) 8 (N.W.T. S.C.).

[5]*Calder v. A.G.B.C.*, [1973] S.C.R. 313.

[6]Department of Indian Affairs and Northern Development, "Statement on Claims of Indian and Inuit People" (Queen's Printer, Ottawa, 1973).

[7]J. Merritt and T. Fenge, "The Nunavut Land Claims Settlement" (1990) 15 Queen's L.J. 255; A.R. Thompson, "Land Claim Settlements in Northern Canada" (1991) 55 Sask. L. Rev. 127.

[8]Self-government agreements have also been negotiated with some aboriginal nations. These have not formed part of constitutionally-protected land claims agreements, but have been separate agreements, implemented by federal legislation.

rights. Therefore, as land claims agreements are ratified, they acquire constitutional status.[9]

§ 28:25 Definition of treaty

An Indian treaty has been described as "unique" or "sui generis".[1] It is not a treaty at international law, and is not subject to the rules of international law. It is not a contract, and is not subject to the rules of contract law. It is an agreement between the Crown and an aboriginal nation with the following characteristics:

1. Parties: The parties to the treaty must be the Crown, on the one side, and an aboriginal nation, on the other side.[2]
2. Agency: The signatories to the treaty must have the authority to bind their principals, namely, the Crown and the aboriginal nation.[3]
3. Intention to create legal relations: The parties must intend to create legally binding obligations.
4. Consideration: The obligations must be assumed by both sides, so that the agreement is a bargain.
5. Formality: there must be "a certain measure of solemnity".

The foregoing characteristics are my extrapolation from the two leading cases on the meaning of a treaty. The cases are *Simon v. The Queen* (1985) and *R. v. Sioui* (1990). Both cases were applying s. 88 of the Indian Act, not s. 35 of the Constitution Act, 1982, but it is safe to assume that the word "treaty" would bear the same meaning in both instruments.

In *Simon v. The Queen* (1985),[4] the question arose whether legal recognition should be given to a "peace and friendship" treaty signed in 1752 by the governor of Nova Scotia and the Chief of the Micmac Indians. The document purported to guarantee to the Indians "free liberty of hunting and fishing as usual" in the treaty area. The Supreme Court of Canada held that this was a valid treaty, which, by virtue of s. 88 of the Indian Act, exempted the Micmac defendant from the game

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[9]Section 35(3) makes clear that modern land claims agreements are protected regardless of whether they were entered into before or after 1982, when s. 35 came into force: so held in *Que. v. Moses*, [2010] 1 S.C.R. 557, para. 15 (James Bay Treaty, signed by aboriginal and government signatories in 1975, has constitutional status under s. 35(3)).

[Section 28:25]

[1]*Simon v. The Queen*, [1985] 2 S.C.R. 387, 404; *R. v. Sioui*, [1990] 1 S.C.R. 1025, 1043. These two cases are fully examined in text accompanying § 28:25 notes 4 and 5, below.

[2]The argument that an Indian tribe was not an entity possessing the legal personality or the capacity to enter into treaties was summarily rejected in *Simon* (at 398–401) and not raised again in *Sioui*.

[3]This was in issue in both *Simon* and *Sioui*, and it was determined in both cases that the signatories possessed the requisite authority.

[4]*Simon v. The Queen*, [1985] 2 S.C.R. 387.

laws of Nova Scotia. Dickson C.J. for the Court indicated his definition of an Indian treaty in two passages. At page 401:

> In my opinion, both the Governor and the Micmac entered into the Treaty with the intention of creating mutually binding obligations which would be solemnly respected.

And at p. 410:

> The treaty was an exchange [of] solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man and, as such, falls within the meaning of the word "treaty" in s. 88 of the Indian Act.

In *R. v. Sioui* (1990),[5] what was in issue was a short document signed only by the Governor of Quebec in 1760, which "certified" that the Chief of the Huron Indians had come "in the name of his nation" to make peace, and henceforth the Huron Indians were under his protection and were to be allowed "the free exercise of their religion, their customs and liberty of trading with the English". The Supreme Court of Canada held that this was a valid treaty, which, by virtue of s. 88 of the Indian Act, exempted the Huron defendants, who were practising customary religious rites in a provincial park, from provincial park regulations. Lamer C.J. for the Court quoted the extracts from the *Simon* case, and said at p. 1044:

> From the extracts it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.

These elements, he held, were all satisfied by the document of 1760.

In both *Simon* and *Sioui*, the treaties did not involve a cession of land by the Indians; and in *Sioui*, the right to religious exercise that was successfully asserted by the Huron Indians was not even over their traditional territory. These cases make clear that the surrender of aboriginal rights is not a requirement of a valid treaty. Nor does a treaty have to be concerned with territory; it could be "an agreement about political or social rights".[6] In each case, however, there was consideration moving from the Indian side, namely, a promise to cease hostilities. The Indians had made a bargain, and the Crown should be held to its side of the bargain.

It is a well established principle of interpretation that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians".[7] The idea is to construe treaties "in the sense in which they would naturally be understood by the Indians". In *Sioui*, Lamer C.J. for the Court said that the same ap-

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[5] *R. v. Sioui*, [1990] 1 S.C.R. 1025.

[6] *R. v. Sioui*, [1990] 1 S.C.R. 1025, 1043.

[7] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 36 (statute); *Simon v. The Queen*, [1985] 2 S.C.R. 387, 402 (treaty); *R. v. Sioui*, [1990] 1 S.C.R. 1025, 1036 (treaty).

proach should be applied to the question whether a particular document constituted a treaty: "we should adopt a broad and generous interpretation of what constitutes a treaty",[8] and also "in examining the preliminary question of the capacity to sign a treaty".[9] The Court has to attempt to transport itself back to the time of signing the treaty to determine whether the Indians had reasonable grounds for believing that they were dealing with an authorized agent of the Crown, and that the resulting document created binding obligations. In *Sioui*, this approach helped the Court to resolve in favour of the Indians any doubt about the Governor's authority and the status of his rather informal certificate.

§ 28:26 Interpretation of treaty rights

The rule for the interpretation of treaties between the Crown and aboriginal nations is that they "should be liberally construed and doubtful expressions resolved in favour of the Indians".[1] The reasons for this rule include the unequal bargaining power of the Crown and the aboriginal people. As well, the representatives of the Crown typically created the written text and the written records of the negotiations, and those writings often differed from or did not fully express the Indians' oral understanding of the arrangement.[2] The honour of the Crown and the fiduciary duty of the Crown demand a rule that removes even the appearance or suspicion of sharp practice in treating with aboriginal people.

A clear example of the generous interpretation of a treaty is *R. v. Marshall (Marshall 1)* (1999).[3] The issue here was whether a Mi'kmaq man, who had been charged with fishing for eels and selling eels without a licence, had a treaty right to catch and sell eels. The applicable treaty was a brief "peace and friendship" treaty entered into in 1760 between the British Governor of Nova Scotia and the Mi'kmaq chief. The treaty said nothing directly about fishing, and with respect to trade said only that the Indians would no longer trade "any commodities in any man-

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[8]*R. v. Sioui*, [1990] 1 S.C.R. 1025, 1035.

[9]*R. v. Sioui*, [1990] 1 S.C.R. 1025, 1035, 1036.

[Section 28:26]

[1]*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 36 (statute); *Simon v. The Queen*, [1985] 2 S.C.R. 387, 402 (treaty); *R. v. Sioui*, [1990] 1 S.C.R. 1025, 1036 (treaty). See also *R. v. Sundown*, [1999] 1 S.C.R. 393 (treaty right to hunt in provincial park interpreted as including by implication right to construct log cabin in park, which overrode provincial regulation prohibiting construction of dwellings in park).

[2]"It has been held that it is unconscionable for the Crown to ignore oral terms and rely simply on the written words of a treaty": *Ermineskin Indian Band and Nation v. Can.*, [2009] 1 S.C.R. 222, para. 54 per Rothstein J. for the Court. In that case, it was held that the oral understanding of the Indian signatories, based on an oral statement by the Crown agent who negotiated the treaty, was to be treated as part of the treaty.

[3]*R. v. Marshall*, [1999] 3 S.C.R. 456. Binnie J. wrote the majority judgment, which was agreed to by Lamer C.J., L'Heureux-Dubé, Cory and Iacobucci JJ.; McLachlin J. wrote a dissenting judgment, which was agreed to by Gonthier J.

ner" except with the managers of "truck houses" established by the Governor. A truck house was a government trading post which existed in Nova Scotia in 1760, but which was discontinued in 1780. The point of the truck house clause was that the Indians, who had formerly been allies of the French, were now agreeing to trade only with the British. It was a considerable stretch to interpret this clause, in form nothing more than a negative restraint on the ability of the Mi'kmaq to trade with non-governmental purchasers, as a protection for the defendant's commercial fishing activity. But that is what the Supreme Court of Canada decided. The Court held, by a majority, that the clause should be interpreted as conferring a right to hunt, fish and gather, because only by hunting, fishing and gathering would the Indians be in a position to bring "commodities" to the truck house. The clause should also be interpreted as conferring a right to trade the products of hunting, fishing and gathering sufficiently to make "a moderate livelihood". The right to trade persisted after the abolition of truck houses, which the Court characterized as "a mere disappearance of the mechanism created to facilitate the right".[4] The defendant's rights to "moderate" fishing and trading were treaty rights within the meaning of s. 35 of the Constitution Act, 1982, and the rights prevailed over the statutory licensing regime that the defendant had not complied with. The defendant's activity was accordingly protected by the treaty, and he was entitled to be acquitted of the charges of fishing and trading without a licence.

The logic of *Marshall 1* seemed to confer an aboriginal treaty right over the commercial exploitation of most of the natural resources of Nova Scotia and New Brunswick, where truck house clauses were contained in Indian treaties of peace and friendship. In response to an application for a rehearing, the Court in *Marshall 2* (1999)[5] issued a second set of reasons, clarifying and somewhat narrowing its earlier reasons, but not changing the decision or the ratio decidendi, which was that the truck house clause conferred a modern right to hunt, fish and gather the things that in 1760 were to be traded at the truck house. Relying on this principle, the Mi'kmaq Indians in Nova Scotia and New Brunswick commenced commercial logging operations on Crown lands without the authorization required by statute in each province. They were charged with offending the forest management laws of the two provinces, and they invoked the truck house clause in defence. Their ancestors used wood in 1760 as firewood, and to make a variety of things, such as buildings, sleds, canoes, snowshoes and baskets. The things that they made of wood were occasionally traded. Logging, they argued, was simply a modern use of the same products and was therefore protected. In *Marshall 3* (2005),[6] the Supreme Court of Canada, now speaking through McLachlin C.J. (who had dissented in *Marshall 1*), rejected this argument. While modern eel fishing was the logical evolution of a

[4] *R. v. Marshall*, [1999] 3 S.C.R. 456, para. 54.

[5] *R. v. Marshall*, [1999] 3 S.C.R. 533. Binnie J. wrote the opinion of the Court.

[6] *R. v. Marshall*, [2005] 2 S.C.R. 220. McLachlin C.J. wrote the opinion of the majority. LeBel J., with the agreement of Fish J., wrote a concurring opinion.

traditional trading activity, as decided in *Marshall 1*, the same case could not be made for logging. Logging (unlike eel fishing) was not a traditional Mi'kmaq activity in 1760. And, while treaty rights are not frozen in time, modern logging activity could not be characterized as the natural evolution of the minor trade in wood products that took place at the time of the treaty. The Mi'kmaq defendants therefore had no treaty right[7] to cut down trees for commercial purposes without a licence.[8]

Another example of the progressive (or dynamic) interpretation of an Indian treaty is *R. v. Morris* (2006).[9] The treaty in that case had been made in 1852 by the Governor of the Colony of Vancouver Island with the Saanich Nation. In exchange for the surrender by the Saanich of their lands, the Crown promised (among other things) that the Indians would be "at liberty to hunt over the unoccupied lands" of the Island "as formerly". Two members of the Tsartlip Band of the Saanich Nation, who had been hunting in their traditional territory at night, driving a truck along a road, using a spotlight to identify game and a rifle to shoot the game, were charged with offences under British Columbia's Wildlife Act that prohibited hunting at night and hunting with a spotlight. Their defence was the treaty right in the 1852 treaty. They led evidence that the Saanich had traditionally hunted at night, using sticks with flaming pitch on the end of them. The Supreme Court of Canada had no difficulty in holding that "the use of guns, spotlights and motor vehicles is the current state of the evolution of the Tsartlip's historic hunting practices"; these modern ways of hunting "do not change the essential character of the practice, namely, night hunting with illumination".[10] The majority of the Court held that the practice was protected by the treaty, and the two accused were entitled to be acquitted.[11] The dissenting minority agreed that the treaty right should be adapted to modern methods of transportation, illumination and weaponry, but they held that the power of the modern rifle made hunting at night more dangerous than it had been in 1852. In the dissenting view, the treaty should not be interpreted as protecting an inherently dangerous activity, and the prohibition on night hunting was consistent with the treaty.[12] The dissenting view, although it did not prevail, makes clear that the pro-

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[7]They also claimed aboriginal title to the forest lands on which their logging took place, but this claim was also rejected: § 28:21, "Aboriginal title".

[8]Another example of the generous interpretation of Indian treaties is *Mikisew Cree First Nation v. Can.*, [2005] 3 S.C.R. 388; described in § 28:38, "Duty to consult aboriginal people".

[9]*R. v. Morris*, [2006] 2 S.C.R. 915. Deschamps and Abella JJ. wrote the majority judgment which was agreed to by Binnie and Charron JJ. McLachlin C.J. and Fish J. wrote a dissenting judgment which was agreed to by Bastarache J.

[10]*R. v. Morris*, [2006] 2 S.C.R. 915, para. 33 per Deschamps and Abella JJ.

[11]The Court relied on s. 88 of the Indian Act for this decision (§ 28:16, "Treaty exception"), not on s. 35 of the Constitution Act, 1982 (which would presumably have yielded the same result).

[12]*R. v. Morris*, [2006] 2 S.C.R. 915, paras. 116–119. The majority agreed that the treaty should not be interpreted as authorizing dangerous activity, but their answer to the dissenters (para. 59) was that not all night hunting, even with modern weaponry,

gressive (or dynamic) interpretation of treaty rights does not necessarily have the effect of expanding the rights.

In the case of "modern treaties", the rules of interpretation are much more straightforward. In *First Nation of Nacho Nyak Dun v. Yukon* (2017),[13] the treaty to be interpreted was the First Nation of Nacho Nyak Dun Final Agreement, which was concluded with Canada and Yukon in 1993. The Final Agreement was based on the Umbrella Final Agreement, also entered into in 1993 by Nacho Nyak Dun and all the other Yukon First Nations.[14] Karakatsanis J., for a unanimous Supreme Court, said that "[b]ecause modern treaties are 'meticulously negotiated by well-resourced parties', courts must 'pay close attention to their terms' ".[15] She also said that "[c]ompared to their historic counterparts, modern treaties are detailed documents and deference to their text is warranted".[16] However, she did acknowledge in an *obiter dictum* that even a modern treaty is "subject to such constitutional limitations as the honour of the Crown."[17] The question in the case was whether Yukon had the power unilaterally to adopt a regional land use plan for the Peel Watershed, a remote region of the territory, which would increase access to and development of the region. The answer to the question was no, because the Final Agreement stipulated in detail a robust process of consultation with the First Nation for a land use plan of this kind and Yukon had not followed that process. Karakatsanis J. quashed the Yukon plan, explaining that it could be revived only by following the Final-Agreement process of consultation with the First Nation.

§ 28:27 Extinguishment of treaty rights

Treaty rights may be extinguished in the same two ways as aboriginal rights, that is: (1) by voluntary surrender to the Crown, and (2) by constitutional amendment. Before 1982, there was a third way: treaty rights could also be extinguished by federal (but not provincial) legislation; but that possibility ended with the enactment of s. 35 of the Constitution Act, 1982. Extinguishment by any of these means will not be

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was dangerous, and "something less than an absolute prohibition of night hunting can address the concern for safety".

[13]*First Nation of Nacho Nyak Dun v. Yukon*, [2017] 2 S.C.R. 576, 2017 SCC 58. Karakatsanis J. wrote the opinion of the nine-judge court.

[14]*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, 2010 SCC 53 is another Yukon First Nation case in which the Final Agreement is also based on the Umbrella Final Agreement. I acknowledge that I played a minor role as one of the counsel advising the Yukon First Nations in the negotiation and drafting of the Umbrella Final Agreement.

[15]*First Nation of Nacho Nyak Dun v. Yukon*, [2017] 2 S.C.R. 576, para. 36, citing *Quebec v. Moses*, [2010] 1 S.C.R. 557, para. 7.

[16]*First Nation of Nacho Nyak Dun v. Yukon*, [2017] 2 S.C.R. 576, para. 36, citing J. Jai, "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2012) 26 Nat. J. Con. Law 25, 41.

[17]*First Nation of Nacho Nyak Dun v. Yukon*, [2017] 2 S.C.R. 576, 2017 SCC 58, para. 37, citing *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, 2010 SCC 53, para. 54.

lightly inferred; a "clear and plain" intention to extinguish must be established.[1]

In addition, if a treaty makes provision for its own amendment or repeal, then obviously the treaty can be amended or repealed as contemplated. Such a provision, which would of course have been agreed to by the aboriginal parties to the treaty, would establish a procedure for future amendment or repeal, and that procedure would normally include a requirement of aboriginal consent.

In addition, it is probable that treaty rights would be at least voidable in the event of a fundamental breach by one of the parties.[2] However, evidence of longstanding non-exercise of treaty rights does not cause an extinguishment.[3] Nor could international treaties or treaties with other Indian nations cause an extinguishment. Without competent legislation (before 1982) or a constitutional amendment, "a treaty cannot be extinguished without the consent of the Indians concerned".[4]

VII. THE NEED FOR CONSTITUTIONAL PROTECTION

§ 28:28 The need for constitutional protection

Aboriginal and treaty rights suffered from four serious infirmities. One was the uncertainty as to the precise legal status of the rights. Both the relationship of the aboriginal peoples to the land and the treaties between the Crown and the aboriginal peoples lacked close analogies in the common law. This uncertainty has been partially lifted by recent decisions recognizing aboriginal and treaty rights, but uncertainties persist, especially as to the definition of aboriginal rights. The second infirmity was the doctrine of parliamentary sovereignty, which meant that aboriginal rights were vulnerable to change or abolition by the action of the competent legislative body. The third infirmity was the liberal idea of equality, which gained increasing acceptance in Canada after the second world war. As well as creating a political climate unsympathetic to the recognition of special rights peculiar to a group defined by race, the idea of equality, when guaranteed by the Canadian Bill of Rights and, later, by the Charter of Rights, suggested that special status might actually be unconstitutional. The fourth infirmity was that aboriginal and treaty rights could be modified or extinguished by constitutional amendment, and the aboriginal peoples' representatives were not entitled to participate in the decisive phases of the amending process.

The Constitution Act, 1982, supplemented by an amendment adopted

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[Section 28:27]

[1]See § 28:22, "Extinguishment of aboriginal rights", where the authorities for treaty rights as well as aboriginal rights are cited.

[2]Cf. *Simon v. The Queen*, [1985] 2 S.C.R. 387, 404 (obiter dictum).

[3]*R. v. Sioui*, [1990] 1 S.C.R. 1025, 1066.

[4]*R. v. Sioui*, [1990] 1 S.C.R. 1025, 1063. Lamer C.J. does not qualify his assertion by reference to legislative extinguishments before 1982 or constitutional extinguishments, but he is not addressing those modes of extinguishment, and it is clear that they do not require the consent of the Indians.

in 1984, has taken steps to eliminate these four infirmities. Section 35 of the Constitution Act, 1982 provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". This gives constitutional recognition (but not definition) to "aboriginal and treaty rights", and protects them from legislative attack. Section 25 of the Constitution Act, 1982, which is part of the Charter of Rights, provides that the Charter of Rights is not to be construed as derogating from "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada". This makes clear that the equality guarantee in s. 15 of the Charter does not invalidate aboriginal or treaty rights. Finally, s. 35.1 declares that constitutional amendments to the native rights provisions of the Constitution Acts, 1867 and 1982 that directly apply to aboriginal peoples will not be made without a prior constitutional conference involving participation by representatives of the aboriginal peoples of Canada. These three provisions—ss. 35, 25 and 35.1—reinforce s. 91(24) in their recognition of special status for the aboriginal peoples.[1] They are discussed in more detail in the next three sections of this chapter.

VIII. SECTION 35

§ 28:29 Text of s. 35

Section 35 of the Constitution Act, 1982[1] provides as follows:[2]

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[Section 28:28]

[1]D.E. Sanders, "The Renewal of Indian Special Status" in Bayefsky and Eberts (eds.), Equality Rights and the Canadian Charter of Rights and Freedoms (1985), ch. 12, traces the history of special status in the face of these forces. As to the place of s. 35 in Canada's "constitutional culture", see B.L. Berger, "Children of two logics: A way into Canadian constitutional culture" (2013) 11 Int. J. of Con. Law 319, 333–336.

[Section 28:29]

[1]For commentary, see heading §§ 28:18 to 28:22 "Aboriginal rights".

[2]Section 35 was not in the October 1980 version of the Constitution Act, 1982. It was in the April 1981 version, but without the word "existing" in subsection (1). The entire section was dropped, apparently at the request of the Premiers of the resource-based provinces, in the November 5, 1981 federal-provincial agreement. This development attracted severe criticism and, later in November, the first ministers agreed to restore the section, but with the addition of the word "existing". Subsections (3) and (4) were not in the original version; they were added by the Constitution Amendment Proclamation, 1983.

§ 28:30 Outside Charter of Rights

Section 35 is outside the Charter of Rights, which occupies ss. 1 to 34 of the Constitution Act, 1982. The location of s. 35 outside the Charter of Rights provides certain advantages. The rights referred to in s. 35 are not qualified by s. 1 of the Charter, that is, the rights are not subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", although, as we shall see, they are subject to reasonable regulation according to principles similar to those applicable to s. 1. Nor are the rights subject to legislative override under s. 33 of the Charter. Nor are the rights effective only against governmental action, as stipulated by s. 32 of the Charter. On the other hand, the location of s. 35 outside the Charter carries the disadvantage that the rights are not enforceable under s. 24, a provision that permits enforcement only of Charter rights.

§ 28:31 "Aboriginal peoples of Canada"

The rights referred to in s. 35 are possessed by the "aboriginal peoples of Canada". That phrase, which is also used in ss. 25, 37 and 37.1, is defined in s. 35(2) as including "the Indian, Inuit and Métis peoples of Canada", but none of these three terms is given further definition. It is obvious that the phrase includes not only status Indians, but also non-status Indians, as well as the Inuit and Métis peoples. As noted earlier in this chapter,[1] the federal Parliament has the power under s. 91(24) to supply some degree of definition to the word "Indians" in s. 91(24), although it has never attempted a comprehensive definition. The courts would probably accept federally legislated definitions of the words "Indian", "Inuit" and "Métis" in s. 35(2), provided that the definitions employed reasonable criteria.[2]

Perhaps the most difficult of definition is the Métis people (or peoples), who originated from the intermarriage of French Canadian men and Indian women during the fur trade period. In *R. v. Powley* (2003),[3] a father and son, who lived in Sault Ste. Marie, Ontario, shot a moose for food. They had not obtained the hunting licence that was required by provincial law. They were charged with a breach of the provincial law. They defended the charge on the basis that they were Métis who had an aboriginal right to hunt for food in the Sault Ste. Marie area. In the

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[Section 28:31]

[1]Any liberalization of the definition of a status Indian, such as occurred in 1985 (previous note), has the effect of enlarging the population that is entitled to live on the reserves.

[2]The definition of "Indians" in s. 91(24) is discussed in § 28:2, "Indians", and the opinion offered that the term would extend to non-status Indians, Inuit and Métis peoples. In other words, the term "Indians" in s. 91(24) is just as wide as the term "aboriginal peoples of Canada" in s. 35(2). The word "Indian" in s. 35(2) has a narrower meaning than the word "Indians" in s. 91(24), because the Inuit and Métis peoples are separately identified in s. 35(2). The word "Indian" in the Natural Resources Agreements (§ 28:17) has been held to exclude the Métis people: *R. v. Blais*, [2003] 2 S.C.R. 236.

[3]*R. v. Powley*, [2003] 2 S.C.R. 207. The opinion was given by "the Court".

absence of any definition of "Métis" in s. 35 or anywhere else, the Supreme Court of Canada had to decide whether the defendants were in truth Métis. The Court held that:[4]

> The term "Métis" does not encompass all individuals with mixed Indian and European heritage; rather it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit or European forebears.

The Court made clear that it was not setting down a "comprehensive definition of who is Métis for the purpose of asserting a claim under s. 35", but the Court articulated "three broad factors as indicia of Métis identity".[5] The first factor was "self-identification", meaning that the claimant must self-identify as a member of a Métis community. The second factor was "ancestral connection", meaning that the claimant must trace his ancestry to an historic Métis community. The third factor was "community acceptance", meaning that the claimant must be a member of and participant in the modern Métis community.

The key to these vague factors was the existence, before the assumption of effective control by European settlers and continuing to the present, of a community of distinctive people of mixed ancestry with "their own customs, way of life, and recognizable group identity".[6] The Court in *Powley* concluded that there was a distinctive Métis community in Sault Ste. Marie which dated back to before the early nineteenth century, when effective control in the Upper Great Lakes area passed from the Indian and Métis people to the European settlers. The two defendants self-identified as members of that community, traced their ancestry back to the historic community and were accepted as members of the modern community. They therefore satisfied the three criteria, and were entitled to Métis rights, which, the Court went on to hold, included the claimed right to hunt for food. The provincial regulation of hunting did not therefore apply to their hunting (which was for food), and they were entitled to be acquitted.

§ 28:32 "Aboriginal and treaty rights"

The rights referred to in s. 35 are "aboriginal and treaty rights". The nature of these rights has been explained in earlier sections of this chapter.[1]

§ 28:33 "Existing"

Section 35 protects "existing aboriginal and treaty rights". What is the

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[4] *R. v. Powley*, [2003] 2 S.C.R. 207, para. 10.

[5] *R. v. Powley*, [2003] 2 S.C.R. 207, para. 30.

[6] *R. v. Powley*, [2003] 2 S.C.R. 207, para. 10.

[Section 28:32]

[1] § 28:21, "Definition of aboriginal rights"; § 28:25, "Definition of treaty".

force of the word "existing"? The word obviously has reference to April 17, 1982, which is when the Constitution Act, 1982 was proclaimed into force.

It is clear from the text of s. 35 itself that the word "existing" does not exclude rights that come into existence after 1982. Such rights could only be treaty rights, of course, since aboriginal rights pre-date European settlement. Subsection (3) of s. 35 provides:

> For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreement or may be so acquired.

The last phrase, "or may be so acquired", makes clear that treaty rights acquired after 1982 are protected by s. 35. The first phrase, "For greater certainty", makes clear that, although "land claims agreements" are the only kind of modern treaties expressly mentioned, future treaty rights derived from treaties that did not settle land claims would also be protected.

What is the status of aboriginal or treaty rights that had been extinguished or regulated before 1982? This was the issue that had to be resolved in *R. v. Sparrow* (1990).[1] In that case, a member of the Musqueam Indian Band was charged under the federal Fisheries Act with the offence of fishing with a drift net that was longer than permitted by the Band's Indian food fishing licence, which had been issued under regulations made under the Fisheries Act. The Supreme Court of Canada, as noted earlier,[2] held that the Indian defendant was exercising an aboriginal right to fish within the meaning of s. 35. However, the question remained: was it an "existing" right? The right to fish had for many years before 1982 been subject to a system of discretionary licensing under the Fisheries Act that, the Crown argued, was inconsistent with the continued existence in 1982 of any right to fish.

The Supreme Court of Canada in *Sparrow* held that the word "existing" in s. 35 meant "unextinguished".[3] A right that had been validly extinguished before 1982 was not protected by s. 35.[4] In other words, s. 35 did not retroactively annul prior extinguishments of aboriginal rights so as to restore the rights to their original unimpaired condition.

The Court in *Sparrow* refused to imply an extinguishment from the admittedly extensive regulatory control of the Fisheries Act. While an aboriginal right could be extinguished by federal statute before 1982,[5] a federal statute would have that effect only if the intention to extinguish

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[Section 28:33]

[1]*R. v. Sparrow*, [1990] 1 S.C.R. 1075. Dickson C.J. and La Forest J. wrote the opinion of the Court.

[2]*R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[3]*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1091.

[4]See also *R. v. Howard*, [1994] 2 S.C.R. 299 (s. 35 does not protect fishing right extinguished by treaty in 1923).

[5]*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1091, 1111. Folld. in *R. v. Gladstone*, [1996] 2 S.C.R. 723 (aboriginal right to sell herring spawn on kelp not extinguished by extensive

was "clear and plain". The Fisheries Act and its regulations (although they prohibited fishing, except under a statutory licence) did not demonstrate "a clear and plain intention to extinguish the Indian aboriginal right to fish".[6] Therefore, the right was an "existing" right within the meaning of s. 35.

The Court in *Sparrow* also refused to treat regulation as a partial extinguishment of the regulated right. Before *Sparrow*, it was arguable that an existing right was only that part of the right that was not regulated in 1982. On that approach, the scope of an existing right would be defined by the regulatory laws that limited the right in 1982. Those laws would, in effect, be frozen and constitutionalized by s. 35. Only the unregulated residue would be an "existing" right. The Court in *Sparrow* rejected this approach, pointing out that it would give constitutional status to a host of statutes and regulations, which might differ from place to place, and which would draw no distinction between the important and the trivial, the permanent and the temporary, or the reasonable and the unreasonable.[7] Instead, the Court held that an aboriginal right, provided it had not been extinguished before 1982 by clear and plain language, should be treated as existing in its unregulated form.

According to *Sparrow*, the effect of the word "existing" in s. 35 was to exclude from constitutional protection those rights that had been validly extinguished before 1982. This was a much less severe restriction of the scope of s. 35 than the incorporation-of-regulations interpretation that the Court rejected, but it was a restriction nonetheless. However, the Court also attributed an expansive or liberalizing effect to the word "existing". The Court held that the word "existing" meant that the guaranteed rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour".[8] This would mean that aboriginal rights to hunt and fish (for example) were not simply rights to hunt and fish by bow and arrow, bone hook, and other techniques available before European settlement, but were rights that would evolve to take advantage of the progress of technology. Similarly, a right to trade in the form of barter would in modern times extend to the use of currency, credit and the normal commercial facilities of distribution and exchange.

§ 28:34 "Recognized and affirmed"

Section 35 provides that existing aboriginal and treaty rights are "recognized and affirmed". What is the effect of this language?

The Court in *Sparrow* held that the phrase "recognized and affirmed"

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regulation, including at times prohibition, of the trade); *R. v. Adams*, [1996] 3 S.C.R. 101 (surrender of aboriginal title did not demonstrate clear and plain intention to extinguish the "free-standing" aboriginal right to fish in water adjacent to the surrendered lands).

[6] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1099.

[7] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1092, following B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727, 781–782.

[8] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1093, again following B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727, 782.

should be interpreted according to the principle that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians".[1] The phrase should also be read as incorporating the fiduciary obligation that government owes to the aboriginal peoples. From these two premises, the Court concluded that s. 35 should be interpreted as a constitutional guarantee of aboriginal and treaty rights. As a constitutional guarantee, s. 35 had the effect of nullifying legislation that purported to abridge the guaranteed rights.

Because s. 35 is not part of the Charter of Rights, it is not subject to s. 1 of the Charter of Rights, which makes clear that Charter rights are not absolute, but are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, the Court held that the rights protected by s. 35 were not absolute either. They were subject to regulation by federal laws, provided the laws met a standard of justification not unlike that erected by the Court for s. 1 of the Charter.[2] Any law that had the effect of impairing an existing aboriginal right would be subject to judicial review to determine whether it was a justified impairment. A justified impairment would have to pursue an objective that was "compelling and substantial".[3] The conservation and management of a limited resource would be a justified objective, but "the public interest" would be too vague to serve as a justification.[4] If a sufficient objective was found, then the law had to employ means that were consistent with "the special trust relationship" between government and the aboriginal peoples.[5] In the context of the fishery, this would require that the Indian claims be given priority over the claims of other interest groups who could not assert an aboriginal right.[6] In other contexts, other questions would have to be addressed:[7]

> These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

In the *Sparrow* case itself, the Court did not feel able to decide whether the net-length restriction would satisfy the standard of justification. The Court ordered a new trial to permit findings of fact that would enable the issue of justification to be resolved. If the net-

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[Section 28:34]

[1]*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 36 (statute); *Simon v. The Queen*, [1985] 2 S.C.R. 387, 402 (treaty); *R. v. Sioui*, [1990] 1 S.C.R. 1025, 1036 (treaty).

[2]Chapter 38, Limitation of Rights.

[3]*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1113.

[4]*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1113.

[5]*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1113.

[6]*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1113, 1116.

[7]*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1113, 1119.

length restriction were found to satisfy the standard of justification, then the restriction would be valid and Mr. Sparrow would be guilty as charged. If the net-length restriction were found not to satisfy the standard of justification, then the net-length restriction would be invalid as a violation of s. 35 and Mr. Sparrow would be entitled to an acquittal.

The *Sparrow* test of justification was applied in *R. v. Adams* (1996),[8] where the issue was whether an aboriginal right to fish for food had been validly limited by the federal Quebec Fishery Regulations, which provided for the issue of licences for sport and commercial fishing, but not for food fishing, although there was provision for a special permit to be issued by the minister to an Indian for food fishing. The Supreme Court of Canada held that the Regulations failed the *Sparrow* test of justification. The evidence showed that, after conservation, it was the promotion of sport fishing that was the major goal, and that did not qualify as a compelling and substantial objective. Even if the objective were sufficient, the scheme "fails to provide the requisite priority to the aboriginal right to fish for food, a requirement laid down by this Court in *Sparrow*".[9] The ministerial discretion to issue Indian fishing permits was unstructured, and did not include standards directing the minister to accord priority to the aboriginal right to fish for food.[10]

In *R. v. Gladstone* (1996),[11] the question was whether restrictions on the sale of herring spawn on kelp could be justified in their application to aboriginal people who had an aboriginal right to sell the spawn. In this case, the majority of the Supreme Court of Canada, speaking through Lamer C.J., qualified the Court's earlier ruling in *Sparrow* that the holders of aboriginal rights would have to be given priority in access to a resource such as the fishery. Now the Court said that priority was required only when the aboriginal right was limited by its own terms, as was the case of a right to fish *for food*, which is internally limited by the fact that the right-holders need only so many fish for food. Giving priority to an internally limited aboriginal right would still leave room for non-aboriginals to gain access to the resource (assuming conservation goals were not transgressed). The right to engage in *commercial* fishing,

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[8] *R. v. Adams*, [1996] 3 S.C.R. 101. The Court was unanimous. The opinion of eight judges was written by Lamer C.J.; L'Heureux-Dubé J. wrote a brief concurring opinion. A companion case, *R. v. Côté*, [1996] 3 S.C.R. 139, decided the same issue the same way.

[9] *R. v. Adams*, [1996] 3 S.C.R. 101, para. 59, per Lamer C.J.

[10] Folld. *R. v. Marshall*, [1999] 3 S.C.R. 456, para. 64; *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533, para. 33 (licensing regime failed to include standards to protect treaty right to fish). Compare *R. v. Nikal*, [1996] 1 S.C.R. 1013 (requirement of licence for conservation purpose not a breach of the aboriginal right to fish, but conditions of the licence were a breach that Crown had adduced no evidence to justify; held, entire licence invalid).

[11] *R. v. Gladstone*, [1996] 2 S.C.R. 723. The opinion of six judges was written by Lamer C.J. L'Heureux-Dubé J., who wrote a separate concurring opinion, agreed with Lamer C.J. on the issue of justification. Neither McLachlin J., who also wrote a separate concurring opinion, nor La Forest J., who dissented, discussed the issue of justification. However, in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, McLachlin J., in a dissenting opinion (at S.C.R. 507, paras. 301–315), strongly disagreed with Lamer C.J.'s *Gladstone* opinion on the issue of justification.

such as the right to harvest herring spawn for sale in the open market, has no internal limitation; it is limited only by external factors, namely, the availability of the resource and the demands of the market. To give priority to a right with no internal limitations would confer on the aboriginal right-holders the power to absorb the entire fishery, effectively eliminating all non-aboriginal access to the resource. The Court held that this was not an acceptable outcome, and held that, for a right without internal limitations, the *Sparrow* requirement of justification did not require aboriginal priority, but could be satisfied by "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".[12] The Court concluded that there was insufficient evidence to determine whether the regulatory scheme for the sale of herring spawn was justified, and remitted the issue to a new trial.

The *Gladstone* ruling on justification seems to be a departure from *Sparrow*'s insistence on "compelling and substantial" objectives. The reference to "the pursuit of economic and regional fairness" is almost as vague as the "public interest", which was rejected in *Sparrow* as an objective that would qualify as justification.[13] And the reference to "the historical reliance upon, and participation in, the fishery by non-aboriginal groups" comes close to saying that "the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act."[14] These phrases carry the risk that later courts will not impose strict standards of justification on regulatory schemes that derogate from those aboriginal or treaty rights that are not limited by their own terms.

In *Delgamuukw v. British Columbia* (1997),[15] Lamer C.J. for the majority of the Supreme Court of Canada discussed, obiter, the kind of justification that would be required for an infringement of aboriginal title. He pointed out that the Crown's fiduciary duty would normally involve a "duty of consultation" with aboriginal people before decisions were taken with respect to their lands.[16] He also pointed out that "fair compensation" would normally be required when aboriginal title was infringed.[17] "In the wake of *Gladstone*", he acknowledged that "the range

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[12]*R. v. Gladstone*, [1996] 2 S.C.R. 723, para. 75. Folld. *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533, para. 41 (treaty right to fish commercially can be limited to protect non-aboriginal fishers).

[13]Lamer C.J. (at para. 63) acknowledged the vagueness of his ruling, and tried to give some guidance, suggesting, for example, that justification might involve "something less than exclusivity but which nevertheless gives priority to the aboriginal right".

[14]*R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 315 per McLachlin J. dissenting, criticizing Lamer C.J.'s opinion on justification in *Gladstone*.

[15]*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[16]Consultation with the affected aboriginal people is a prerequisite to justification in most contexts: *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533, para. 43.

[17]*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 168–169.

of legislative objectives that can justify the infringement of aboriginal title is fairly broad", and he elaborated:[18]

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose [of reconciliation] and, in principle, can justify the infringement of aboriginal title.

This language offers some reassurance that the economic development of British Columbia will carry considerable weight in the process of reconciliation with the many aboriginal peoples who have claims of title over land in the province.

In *Tsilhqot'in Nation v. British Columbia* (2014),[19] McLachlin C.J. for the Court quoted the passage from *Delgamuukw* with evident approval, and she went on to comment on provincial laws and aboriginal title.[20] She explained that "general regulatory legislation such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires [on aboriginal-title land] will often pass the *Sparrow* test as it will be reasonable, not impose undue hardships, and not deny the holders of the right their preferred means of exercising it."[21] In such cases, "no infringement will result", and no justification would need to be established. The issue in this case, however, was the validity of logging licences issued under the authority of the province's Forest Act to a private company. The assignment of aboriginal property rights to a third party was an infringement that, if done without aboriginal consent (as in this case), would have to be justified. The justification asserted by the province for the licences was "the economic benefits" that would be realized from the licensed logging.[22] McLachlin

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[18]*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 165.

[19]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 83.

[20]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, paras. 123–127. The discussion was not necessary for the decision of the case which was resolved in favour of the aboriginal people by the failure of the province to consult with them and if necessary accommodate their interests before issuing logging licences over the land. At the time of the issue of the licences, no aboriginal title had been established. The Court decided that the aboriginal people had now established their title to the land, and went on to comment "for the benefit of all parties going forward" on the issue of licences over aboriginal-title land.

[21]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 123.

[22]A second objective that had been claimed at trial was to prevent the spread of a mountain beetle infestation. This would probably have been a compelling and substantial objective, and might indeed not have been an infringement of the right at all (reference to "pest invasions" in quotation supported by previous note). However, the trial judge found as a matter of fact that this was not one of the province's objectives, and on appeal the province abandoned the claim: *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, paras. 126–127.

C.J. had no difficulty in deciding that, on these facts, this was not a sufficiently "compelling and substantial" objective for *Sparrow* justification. The economic benefits were dubious in light of the trial judge's finding that the cutting sites were not economically viable; any benefits would in any case not be shared with the aboriginal title-holders; and any benefits were outweighed by the detrimental effects on the value of the aboriginal resource. The grant of the licences could not be justified.[23]

§ 28:35 Application to treaty rights

Sparrow was concerned with an aboriginal right, not a treaty right. In *R. v. Badger* (1996),[1] the Supreme Court of Canada held that, because s. 35 applied to treaty rights as well as aboriginal rights, the doctrine laid down in *Sparrow* applied to treaty rights as well as aboriginal rights. Before this decision, it was arguable that treaty rights ought to receive absolute protection from s. 35, on the basis that the Crown's fiduciary duty is to do exactly what it bargained to do in the treaty. Cory J., writing for the majority in *Badger*, acknowledged that the ruling meant that treaty rights that had been created by mutual agreement could be abridged unilaterally.[2] In *R. v. Côté* (1996),[3] the Supreme Court of Canada repeated that the *Sparrow* doctrine applied to treaty as well as aboriginal rights. We are left with the unsatisfactory position that treaty rights have to yield to any law[4] that can satisfy the *Sparrow* standard of justification.[5] In *Côté*, the impugned law (which imposed a fee on vehicles entering a fishing area) was held not to infringe a treaty right to fish, so that the issue of justification was never reached. In *Badger*, the impugned law (which established a hunting season) was held to infringe a treaty right to hunt for food, and so the issue of justification was

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[23]For an effort to synthesize the case law, see P.W. Hogg and D. Styler, "Statutory Limitation of Aboriginal or Treaty Rights: What Counts as Justification?" (2015) 1 Lakehead L.J. 3.

[Section 28:35]

[1]*R. v. Badger*, [1996] 1 S.C.R. 771. The Court was unanimous, but only the majority opinion of Cory J. addressed the application of *Sparrow* to treaty rights. Sopinka J.'s concurring opinion did not need to address this point.

[2]*R. v. Badger*, [1996] 1 S.C.R. 771, para. 77.

[3]*R. v. Côté*, [1996] 3 S.C.R. 139. The Court was unanimous on this issue.

[4]In both *Badger* and *Côté*, the law was a provincial law: for discussion, see § 28:37, "Application to provincial laws".

[5]Cory J. in *Badger* left a little gap in his ruling by saying (para. 75) that the *Sparrow* criteria would apply to infringements of treaty rights "in most cases". But Lamer C.J. in *Côté*, went further by saying (para. 33) "the *Sparrow* test for infringement and justification applies with the same force and the same considerations to both species of constitutional rights". With respect, this cannot be right. In the case of a modern land claims agreement, in which the rights and obligations of the Crown and the Indian nation are set out in great detail, and in which there is provision for amendments to be made (invariably by mutual agreement), it seems wrong to me to permit Parliament unilaterally to amend the treaty rights, however strong the justification. At the very least, a higher standard of justification should be demanded for the infringement of treaty rights than for the infringement of Aboriginal rights.

reached, but the Court held that there was not enough evidence to decide the issue. The Court ordered a new trial to determine whether the restrictions on hunting could be justified according to the *Sparrow* standard. In my view, the standard of justification for a law impairing a treaty right should be very high indeed.

In *R. v. Marshall* (1999),[6] the Supreme Court of Canada affirmed its earlier rulings that a treaty right could be regulated, provided the *Sparrow* test of justification was satisfied, and the Court did not say or imply that any higher standard of justification would be required for the regulation of a treaty right than for the regulation of an aboriginal right.[7] Moreover, the Court went a step further, holding that some kinds of laws limiting treaty rights would not need to satisfy any standard of justification. In that case, the treaty right was to fish "for a moderate livelihood", and the Court held that there was a difference between *defining* the treaty right and *regulating* the treaty right. Laws imposing catch limits or other restrictions on aboriginal fishing that had as their purpose limiting the aboriginal catch to a "moderate livelihood" were simply "defining" the treaty right, and such laws would not need to satisfy the *Sparrow* test of justification. Only those laws that would take the aboriginal catch below the quantities reasonably expected to produce a moderate livelihood should be regarded as "regulating" the treaty right, and only those laws would need to satisfy the *Sparrow* test of justification.

§ 28:36 Application to extinguishment

Before 1982, aboriginal and treaty rights could be extinguished by federal legislation, provided clear and plain words were used for the purpose.[1] It is implicit in *Sparrow* that s. 35 now protects aboriginal and treaty rights from extinguishment by federal legislation. The justificatory tests propounded in *Sparrow* would, if satisfied, save a federal law that purported to *regulate* an aboriginal or treaty right, but not a federal law that purported to *extinguish* the right.[2]

The effect of s. 35 is that aboriginal and treaty rights can only be extinguished in two ways: (1) by surrender and (2) by constitutional

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[6]*R. v. Marshall*, [1999] 3 S.C.R. 456, para. 60; for fuller discussion of this issue, see the decision on the application for a rehearing: *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533, paras. 36–39.

[7]Accord, *Grassy Narrows First Nation v. Ont.*, [2014] 2 S.C.R. 447, 2014 SCC 48, para. 53 per McLachlin C.J. for the Court.

[Section 28:36]

[1]§ 28:22, "Extinguishment of Aboriginal rights".

[2]Note, however, that Dickson C.J. and La Forest J, in the passage quoted at [1990] 1 S.C.R. 1075, 1119, referred to "a situation of expropriation". I assume that what is contemplated here is the expropriation of a parcel of Indian land which, if fully justified and fully paid for, would not be a violation of s. 35, although the aboriginal rights in that parcel of land would be extinguished. This example does, however, show the difficulty of distinguishing justified regulation (valid) from expropriation (invalid).

amendment.[3] The first involves the consent of the aboriginal right-holders. The second does not, but it would surely be contrary to the federal government's fiduciary duty to the aboriginal peoples to proceed with a constitutional amendment affecting aboriginal or treaty rights without at least the active participation of the aboriginal peoples.[4]

§ 28:37 Application to provincial laws

What effect does s. 35 have on provincial laws? The Court in *Sparrow* did not have to consider that question, because the only law at issue, the Fisheries Act, was a federal law. However, the Court said: "It [that is, s. 35] also affords aboriginal people constitutional protection against provincial legislative power".[1] It was not clear whether this meant that s. 35 imposed an absolute bar on any infringement of aboriginal or treaty rights by provincial law, or whether s. 35 would permit an infringement by provincial law if the law satisfied the justificatory standards of *Sparrow*.[2] The latter view was approved in *Tsilhqot'in Nation v. British Columbia* (2014).[3]

In *Tsilhqot'in*, the Supreme Court of Canada finally resolved the inconsistency between two lines of its own decisions. One line of decisions held that the justificatory standards of Sparrow were available to provincial laws impairing aboriginal or treaty rights on the same basis as federal laws.[4] That was the line that was accepted in *Tsilhqot'in*. The other line of decisions held that no province had any power to enact a law that impaired aboriginal or treaty rights, no matter how reasonable or justifiable the provincial law.[5] This line of decisions was based in the doctrine of interjurisdictional immunity, which precludes provincial laws that impair the "core" of a federal power, in this case the federal power over "Indians, and lands reserved for the Indians" in s. 91(24).[6] McLachlin C.J., who wrote for the Court in *Tsilhqot'in*, recognized that

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[3]In the case of treaty rights, a fundamental breach of the treaty may be a third mode of extinguishment: § 28:27, "Extinguishment of treaty rights".

[4]Section 35:1 probably does not apply to constitutional amendments that make no direct change to any of the identified constitutional provisions but which do impair aboriginal or treaty rights. However, the fiduciary duty of the Crown recognized in *Sparrow* would, in my view, preclude such action without aboriginal participation.

[Section 28:37]

[1]*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1105.

[2]In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 108–109, Dickson C.J. in a separate concurring judgment made clear, obiter, that the Crown's fiduciary obligation to the Indians was owed by provincial governments as well as the federal government. The other judges said nothing on this point.

[3]*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44. McLachlin C.J. wrote the opinion of the Court.

[4]*R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Côté*, [1996] 3 S.C.R. 139.

[5]*Simon v. The Queen*, [1985] 2 S.C.R. 387, 411; *R. v. Sundown*, [1999] 1 S.C.R. 393, para. 47; *R. v. Morris*, [2006] 2 S.C.R. 915, para. 43.

[6]The doctrine of interjurisdictional immunity creates an exception to the general rule that provincial laws apply to Indians and lands reserved for the Indians: § 28:9,

the two lines of decisions could not stand together and she gave two reasons why it was the doctrine of interjurisdictional immunity that should yield to the *Sparrow* doctrine of s. 35 justification. First, she held that, at least since the enactment of s. 35 in 1982, it was no longer appropriate to think of aboriginal and treaty rights as part of the "core" of federal power. Section 35, like the guarantees in the Charter of Rights, is not a grant of power, but a "limit" on governmental powers, both federal and provincial; s. 35 has the effect of prohibiting some laws respecting aboriginal and treaty rights that governments would otherwise be competent to enact. As in the case of the guarantees in the Charter, no different limit should be applied to provincial power than to federal power. Secondly, she pointed to the Court's decision in *Canadian Western Bank* (2007), which had insisted on restraint in the application of interjurisdictional immunity on the ground that "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government".[7] She concluded that the cases categorically barring provincial regulation of aboriginal and treaty rights "should no longer be followed".[8] The application of provincial laws to aboriginal and treaty rights should be determined by the same *Sparrow* framework as applies to federal laws.[9]

§ 28:38 Duty to consult Aboriginal people

Section 35 protects aboriginal and treaty rights, but, as we have seen, the proof of an aboriginal right (or title) can be a difficult and lengthy process, and the negotiation of a treaty (land claims agreement) can also be a difficult and lengthy process. Indeed, the two processes are closely related and are often going on at the same time. This is because the ability of a First Nation to negotiate a treaty will depend on persuading government that there is a credible claim to aboriginal title. During the period of proof and/or negotiation, which will certainly take years and may take decades, the First Nation is in an awkward situation. It is not yet able to invoke a proved aboriginal right or title, and it does not have a treaty. And yet logging or mining activities, or other forms of develop-

"Second exception: Indianness".

[7] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 149, quoting from *Canadian Western Bank v. Alta.*, [2007] 2 S.C.R. 3, para. 37.

[8] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, para. 150, mentioning only *R. v. Morris*, [2006] 2 S.C.R. 915, the most recent of that line of cases.

[9] The Chief Justice made no reference to s. 88 of the Indian Act, which provides that provincial laws of general application are applicable to and in respect of Indians in the province. By virtue of s. 88, provincial laws of general application that impair *aboriginal* rights are adopted as federal law in which case the s. 35 framework would apply even if interjurisdictional immunity continued to apply. However, provincial laws of general application that impair *treaty* rights are not adopted by s. 88, so that the s. 35 framework would not apply to those laws if the doctrine of interjurisdictional immunity continued to apply. Section 88 adds some complexity to the issues, but it probably makes no difference to the law as now declared by the Chief Justice, which may be why she did not discuss it. Section 88 is analyzed in §§ 28:13 to 28:16, "Section 88 of the Indian Act".

ment, on land claimed by the First Nation, may diminish the value of the resource. Does s. 35 provide any interim protection for aboriginal interests that are still unproved or under negotiation? The Supreme Court of Canada has answered this question yes. Section 35 not only guarantees existing aboriginal and treaty rights, it also imposes on government the duty to engage in various processes even before an aboriginal or treaty right is established. Section 35 gives constitutional protection to a special relationship between the Crown and aboriginal peoples under which the honour of the Crown must govern all dealings. The honour of the Crown entails a duty to negotiate aboriginal claims with First Nations.[1] And, while aboriginal claims are unresolved, the honour of the Crown entails a duty to consult, and if necessary accommodate the interests of, the aboriginal people, before authorizing action that could diminish the value of the land or resources that they claim.[2]

The duty to consult and accommodate was established in *Haida Nation v. British Columbia* (2004).[3] In that case, the government of British Columbia had issued a licence to the Weyerhaeuser Company authorizing the company to cut trees on provincial Crown land in the Queen Charlotte Islands. The Queen Charlotte Islands were the traditional homeland of the Haida people. The Islands were the subject of a land claim by the Haida Nation which had been accepted for negotiation, but had not been resolved at the time of the issue of the licence. The cutting of trees on the claimed land would have the effect of depriving the Haida people of some of the benefit of their land if and when their title was established. The Supreme Court of Canada held that, in these circumstances, s. 35 obliged the Crown to consult with the Haida people, and, if necessary, accommodate their concerns. The extent of consultation and accommodation "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed".[4] In this case, a preliminary assessment indicated that there was a prima facie case for aboriginal title and a strong prima facie case for an aboriginal right to harvest the red cedar growing on the Islands. The logging contemplated by the company's licence, which included old-growth red cedar, would have an adverse effect on the claimed right. Since the province was aware of the Haida claim at the time of issuing the licence, it was under a duty to consult with the Haida before issuing

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[Section 28:38]

[1]*Haida Nation v. B.C.*, [2004] 3 S.C.R. 511, para. 20. McLachlin C.J. wrote the opinion of the Court.

[2]See B. Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 Supreme Court L.R. (2d) 433; Newman, The Duty to Consult: New Relationships with Aboriginal Peoples (2009).

[3]*Haida Nation v. B.C.*, [2004] 3 S.C.R. 511.

[4]*Haida Nation v. B.C.*, [2004] 3 S.C.R. 511, para. 39.

the licence. Not having done so, the Crown was in breach of s. 35, and the licence was invalid.[5]

The duty to consult will lead to a duty to accommodate where the consultations indicate that the Crown should modify its proposed action in order to accommodate aboriginal concerns. In *Haida Nation*, since the required consultation never took place, the Court did not have to decide whether consultation would have given rise to a duty to accommodate. But the Court suggested that the circumstances of the case "may well require significant accommodation to preserve the Haida interest pending resolution of their claims".[6]

Does the duty to consult extend to a private party like the Weyerhaeuser Company? The Court answered no to this question. The honour of the Crown imposed obligations only on the Crown. The Court accordingly rejected the argument that the Weyerhaeuser Company was under a constitutional duty to consult (although the terms of its licence imposed a contractual obligation to engage in some consultations with the Haida). Although a private party cannot satisfy the constitutional duty to consult, it is foolish for a private party contemplating development of land that might be subject to aboriginal claims not to engage in discussions with the First Nation and learn about any objections or concerns. In one case, where a provincial logging licence had been granted to a private company over provincial Crown land within a First Nation traditional territory, aboriginal people blockaded the logging site, stopping all access by loggers, and causing the abandonment of the project. When the company sued the provincial Crown for breach of contract and negligent misrepresentation, it was held that the logging licence did not impliedly guarantee access to the site licensed by the Crown for the logging, that the Crown was under no duty to convey to the company an early warning received from members of the First Nation of their intention to stop any future logging, and that in any case an exclusion clause in the (non-negotiable) terms of the licence protected the Crown from any liability for disruptive actions by third parties.[7]

Can the Crown's duty to consult be exercised by a federal statutory regulatory body? This question arose in *Clyde River v. Petroleum Geo-Services* (2017)[8] and the answer that was provided was yes. The Inuit of the hamlet of Clyde River (on the northeast coast of Baffin Island) sought judicial review of a decision of the National Energy Board (NEB)

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[5]See also *Musqueam Indian Band v. B.C.* (2005), 251 D.L.R. (4th) 717 (B.C.C.A.) (Crown under duty to consult before selling land to which aboriginal title was claimed); *Tsilhqot'in Nation v. B.C.*, [2014] 2 S.C.R. 257, 2014 SCC 44, paras. 95–96 (Crown under duty to consult before issuing logging licences on land to which aboriginal title was claimed).

[6]*Haida Nation v. B.C.*, [2004] 3 S.C.R. 511, para. 77.

[7]*Moulton Contracting v. B.C.* (2015), 381 D.L.R. (4th) 263, 2015 BCCA 89, leave to appeal denied October 22, 2015. Levine J.A. wrote the opinion of the three-judge Court. This case is a sequel to *Behn v. Moulton Contracting*, [2013] 2 S.C.R. 227, discussed below.

[8]*Clyde River v. Petroleum Geo-Services*, [2017] 1 S.C.R. 1069, 2017 SCC 40. Karakatsanis and Brown JJ. wrote the opinion of the Court.

authorizing offshore seismic testing for oil and gas resources in water over which the Inuit had a treaty right to hunt for the marine mammals (whale, narwhal, seal, polar bear) that they relied upon for food and for their economic, cultural and spiritual well-being. It was undisputed that the testing could impair their hunting rights. The Crown was not a party to the NEB process and did not participate in it. The Inuit complained that they had not been consulted by the Crown at any time before the NEB decision was made, although they had attended a meeting in Clyde River organized by the NEB (where the proponents of the project had been unable to answer the Inuit's questions about the effect of the testing on the marine mammals of the region).[9] The Supreme Court held that: "While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty."[10] The Court acknowledged that "the NEB is not, strictly speaking, 'the Crown' ". "Nor is it, strictly speaking, an agent of the Crown, since—as the NEB operates independently of the Crown's ministers—no relationship of control exists between them."[11] The conclusion that may seem to follow from these premises may seem to be that the NEB could not exercise the Crown's duty to consult, but the Court's conclusion was otherwise: "In this context, the NEB is the vehicle through which the Crown acts."[12] The NEB had "a significant array of powers", which included "the procedural powers necessary to implement consultation" and "the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights".[13] It followed that the NEB could exercise the Crown's duty to consult the Inuit before reaching a final decision. In this case, however, the NEB's consultation was insufficient for the "deep consultation" that was required, and, tellingly, the NEB report permitting the testing made no mention of the Inuit hunting rights or that consultation was required. The Court quashed the NEB's authorization in this case, but the Court's opinion made clear that, when the NEB is seized of an issue affecting aboriginal rights, the task of consultation may be carried out by the NEB: no independent Crown process of consultation is needed if the NEB does the work properly.

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[9]The proponents later provided a 3,926-page document to the NEB which the NEB forwarded to the Inuit applicants. The Court was not impressed (para. 49): "furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation."

[10]*Clyde River v. Petroleum Geo-Services*, [2017] 1 S.C.R. 1069, 2017 SCC 40, para. 1 (emphasis added). See also para. 22 ("while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate").

[11]*Clyde River v. Petroleum Geo-Services*, [2017] 1 S.C.R. 1069, 2017 SCC 40, para. 29, citing Hogg, Monahan and Wright, Liability of the Crown (4th ed., 2011), 465.

[12]*Clyde River v. Petroleum Geo-Services*, [2017] 1 S.C.R. 1069, 2017 SCC 40, para. 29.

[13]*Clyde River v. Petroleum Geo-Services*, [2017] 1 S.C.R. 1069, 2017 SCC 40, para. 34.

That was the Court's conclusion in the companion case of *Chippewas of the Thames First Nation v. Enbridge Pipelines* (2017).[14] The Chippewas of the Thames First Nation, who live near the Thames River in southwestern Ontario, have an Enbridge oil pipeline crossing their traditional territory. Enbridge applied to the NEB for approval of a modification of the pipeline that would reverse the flow of part of the pipeline and increase its capacity. These changes would increase the risk of oil spills. The Chippewas requested federal ministers to engage in Crown consultation before NEB approval, but no response was received until after an NEB public hearing on the proposal when the federal Minister of Natural Resources finally replied that the government would be relying on the NEB's public-hearing process to satisfy the Crown's duty to consult. The Chippewas had been granted funding by the NEB to participate in the hearing and they had filed evidence and delivered oral argument explaining their concerns that the project would increase the risk of oil spills on their territory which would impair their use of their land for traditional purposes. The NEB approved the project, finding that any impacts on Aboriginal groups "are likely to be minimal and will be appropriately mitigated", the scope of the project was limited, no new land was needed by Enbridge, and most of the work would take place in Enbridge's facilities or on Enbridge's existing right of way. The NEB decision also required Enbridge to file an environmental protection plan, to prepare a report providing details of its present and future discussions with aboriginal groups, and to include aboriginal groups in the company's continuing education program which included emergency preparedness and response. The Chippewas argued that there had been inadequate Crown consultation, and brought review proceedings that went on up to the Supreme Court of Canada. The Court followed *Clyde River*, decided at the same time, to hold that the Crown was entitled to rely on a regulatory agency to fulfill its duty to consult. And, in this case, unlike *Clyde River*, the NEB process, which included the hearing at which the Chippewas were a fully funded, active participant, was sufficient to satisfy the Crown's duties of consultation and accommodation. The NEB decision was upheld.

Does the duty to consult extend to the Crown in right of a province (the provincial government)? It is the Crown in right of Canada (the federal government) that has the primary responsibility for aboriginal affairs, matching the federal legislative grant over "Indians, and lands reserved for the Indians" in s. 91(24). Obviously, in the appropriate case, the federal government would be under a duty to consult. But in this case it was provincial Crown land that was the subject of the aboriginal claim, and it was the action of the provincial government in licensing the cutting of trees that potentially impaired the value of the claim. The Court held that the public lands of the province were subject to

[14] *Chippewas of the Thames First Nation v. Enbridge Pipelines*, [2017] 1 S.C.R. 1099, 2017 SCC 41. Katakatsanis and Brown JJ. wrote the opinion of the Court.

aboriginal interests, and the duty to consult extended to the Crown in right of the province.[15]

Does the duty to consult extend to a municipality? A municipality is created by provincial law under the province's legislative power over "municipal institutions in the province" (s. 91(8) of the Constitution Act, 1867). Every province has a municipal statute, and in the case of larger cities, sometimes a special statute relating to that city alone. The municipal legislation invariably establishes an elected council and delegates to the council the power to levy taxes and enact by-laws under a long list of heads of power over matters of local concern. The municipality is not an agent of the provincial Crown, because it is not controlled by the provincial government: the council, having been elected by residents of the municipality, acts independently of the provincial government. Does it follow that the municipality is under no duty to consult with aboriginal peoples when municipal actions could have an adverse impact on existing or claimed aboriginal or treaty rights? "Yes" was the answer of the British Columbia Court of Appeal in *Neskonlith Indian Band v. Salmon Arm* (2012).[16] In that case, the province's Local Government Act had delegated much of the province's responsibility for flood management to municipalities; the Act required a permit from the municipality for any development of land in the municipality that was vulnerable to flooding. The City of Salmon Arm issued a permit for the construction of a shopping centre on private land that was vulnerable to flooding. Adjacent to (and downstream from) the shopping-centre site was a block of land which the Neskonlith First Nation claimed as part of its traditional territory. The First Nation took the view that the shopping centre should be built at an elevation 1.5 metres higher than the elevation allowed by the terms of the permit, and that their land would be adversely affected by flooding if the development were not elevated. They challenged the validity of the permit on the ground that they had not been adequately consulted by the City before the permit was issued. The Court rejected the challenge on the ground that a municipality is under no duty to consult with First Nations when municipal action could have an adverse effect on aboriginal or treaty rights.[17] Newbury J.A., writing for the Court, held that, in principle, "the honour of the Crown cannot be delegated", and that, in practice, no "remedial powers" had been

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[15]*Chippewas of the Thames First Nation v. Enbridge Pipelines*, [2017] 1 S.C.R. 1099, 2017 SCC 41, para. 59. Folld. *Musqueam Indian Band v. B.C.* (2005), 251 D.L.R. (4th) 717 (B.C.C.A.); *Grassy Narrows First Nation v. Ont.*, [2014] 2 S.C.R. 447, 2014 SCC 48, paras. 50–53.

[16]*Neskonlith Indian Band v. Salmon Arm*, 2012 BCCA 379. Newbury J.A. wrote the opinion of the three-judge Court.

[17]This was the main ground of decision, but the Court also held that, if there had been a duty to consult, the Court would have found that the City had in fact adequately consulted the First Nation, and that in any event the adverse effect of the development on the First Nation land was too "hypothetical" and "speculative" to trigger a duty to consult.

delegated to municipalities to enable them to accommodate First Nation's concerns.[18]

The reasons given in *Neskonlith* for refusing to impose a duty to consult on municipalities are not persuasive. It is one thing to deny that the honour of the Crown can be delegated to a private person, as *Haida Nation* decided, but quite another to deny that the honour of the Crown can be delegated to a local *government*.[19] Just as Charter obligations flow down to any statutory bodies to which statutory powers are granted, so the honour-of-the-Crown obligations should also flow down to municipalities exercising statutory powers. A Legislature cannot grant broader powers to statutory bodies than the Legislature itself possesses. Otherwise, the Crown, simply by delegating its responsibilities to a municipality (over flood management for example), could evade the honour-of-the-Crown duties that are supposed to protect aboriginal and treaty rights. As for remedial powers, surely it is the municipality and not the province that has the remedial power by virtue of its power to make the decision to issue the permit. If, after consultation, the municipality were to decide that the First Nation's solution was the best answer, the municipality would have the legal power to do exactly what the First Nation had urged, namely, issue the permit for a development with a 1.5 metre higher elevation. As the legislation now stands, the province lacks the power to do this, having delegated the power to the municipality. The province would need to enact new legislation to recover the power.[20] But there seems no point to such an elaborate effort to restructure decision-making over flood management, since the municipality is likely to be a better judge of the impact of its decisions on aboriginal land in the municipality.[21]

Does the Crown's duty to consult extend to the legislative process? That was the issue before the Supreme Court in *Mikisew Cree (No. 2)* (2018),[22] where the Mikisew Cree First Nation argued that the Crown in right of Canada was under a duty to consult the First Nation before Par-

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[18]*Neskonlith Indian Band v. Salmon Arm*, 2012 BCCA 379, paras. 66, 68.

[19]*Rio Tinto*, discussed at § 28:38 note 52, below, made clear that the duty to consult could be delegated to a statutory tribunal, provided the tribunal were also given "remedial powers". This conclusion was affirmed, and expanded upon, several years later in the *Clyde River* and *Chippewas of the Thames* decisions, which are discussed above at note § 28:38 note 8 and § 28:38 note 14 respectively.

[20]Oddly, Newbury J.A. did not suggest that as a solution. Citing *Rio Tinto*, para. 63, she suggested (para. 69) that the only remedy for the First Nation would be in the courts, although she acknowledged (para. 70) that "First Nations may experience difficulty in seeking appropriate remedies in the courts in cases like this one". Why ignore the simple solution of imposing the duty to consult on the municipality?

[21]Newbury J.A. said (para. 72) that it would be "completely impractical" for municipalities to consult with First Nations, but she then went on to find (para. 90) that, if the City of Salmon Arm were under a duty to consult in this case (contrary to her decision), the City had in fact consulted adequately, causing "material modifications of the planned development". In other words, consultation (and accommodation) was not impractical at all.

[22]*Mikisew Cree First Nation v. Can.*, [2018] 2 S.C.R. 765. There were four opinions on the duty to consult issue: one by Karakatsanis J. (with Wagner C.J. and Gascon J.);

liament enacted environmental legislation that had the potential to adversely affect the First Nation's treaty rights to hunt, trap and fish. Abella J. agreed with the First Nation: she reasoned that the honour of the Crown required that the duty to consult apply to "all contemplated government conduct with the potential to adversely impact asserted or established Aboriginal and treaty rights, including . . . legislative action"; the duty to consult arose from "the effect, not the source, of the government action".[23] However, this was the dissenting view. The majority of the Court—in three separate opinions by Karakatsanis, Brown and Rowe JJ.—held that the duty to consult is not engaged by any stage of the legislative process, including the ministerial and cabinet activities related to the development of legislation. In their separate opinions, the reasons that Karakatsanis, Brown and Rowe JJ. offered for this conclusion varied to some extent, but they each said that extending the duty to consult to the legislative process would result in improper interferences by the judicial branch with the workings of the legislative branch, contrary to the principles of parliamentary sovereignty, parliamentary privilege and the separation of powers.[24] However, Karakatsanis, Brown and Rowe JJ. divided as to whether other obligations arising from the honour of the Crown might be engaged in this context. Karakatsanis J., writing for three judges, said that, even though the duty to consult is not engaged in the legislative process,[25] the honour of the Crown *is* engaged in this context. And she expressly left the door open for the courts to develop "other forms of recourse" to ensure that the honour of the Crown is respected where "legislation may adversely affect—but does not necessarily infringe—Aboriginal or treaty rights".[26] Brown J. rejected and strongly criticized this suggestion by Karakatsanis J. The honour of the

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one by Brown J.; one by Rowe J. (with Moldaver and Côté JJ.), who expressly agreed with the opinion of Brown J. (para. 148); and a dissenting opinion by Abella J. (with Martin J.). This case is called *Mikisew Cree No. 2* in order to distinguish it from *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, discussed at § 28:38 note 39, below, which is called *Mikisew Cree*.

[23]*Mikisew Cree First Nation v. Can.*, [2018] 2 S.C.R. 765, [2017] 2 S.C.R. 576, para. 55.

[24]*Mikisew Cree First Nation v. Can.*, [2018] 2 S.C.R. 765, [2017] 2 S.C.R. 576, paras. 35-37 per Karakatsanis J. (invoking all three); paras. 115-126 per Brown J. (invoking only parliamentary privilege and the separation of powers); and paras. 148, 153, 160-171 per Rowe J. (invoking all three).

[25]Brown J. reads Karakatsanis J.'s refusal to extend the duty to consult to the legislative process to be "less than categorical": *Mikisew Cree First Nation v. Can.*, [2018] 2 S.C.R. 765, para. 103. However, her refusal to extend the duty seems clear enough: see e.g. *Mikisew Cree First Nation v. Can.*, [2018] 2 S.C.R. 765, paras. 1-2, 32. Karakatsanis J. did say that her conclusion that the duty to consult does not extend to the legislative process does not include "the process by which subordinate legislation (such as regulations or rules) is adopted", or "treaty provisions, implemented through legislation, that explicitly require pre-legislative consultation": *Mikisew Cree First Nation v. Can.*, [2018] 2 S.C.R. 765, para. 51.

[26]*Mikisew Cree First Nation v. Can.*, [2018] 2 S.C.R. 765, [2017] 2 S.C.R. 576, paras. 3, 25, 43-49, 52.

Crown, he said, "does not bind Parliament".[27] Rowe J., writing for three judges, agreed expressly with the opinion of Brown J., and wrote separately to offer three additional reasons that the duty to consult should not be extended to the legislative process.[28]

Taking the various opinions together, seven judges therefore refused to extend the duty to consult to the legislative process, but three (and possibly as many as five) judges seemed prepared to accept that judicial recourse may still be available where legislation adversely affects, but does not infringe, s. 35 rights in order to ensure that the honour of the Crown is respected in the legislative process.[29] (And of course, if legislation did infringe s. 35 rights, it could be challenged on that basis.) Even though the duty to consult is not engaged by the legislative process, it would be a prudent precaution, but also in keeping with the spirit of mutual respect and reconciliation, for governments to engage in consultation with Indigenous communities as part of any legislative process that seems to be heading in the direction of s. 35 Aboriginal and treaty rights.

On the Aboriginal side, the duty to consult is owed to "the Aboriginal group that holds the s. 35 rights, which are collective in nature".[30] Individual members of the entitled group do not have a right to be consulted, although "an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights".[31] This issue was raised by *Behn v. Moulton Contracting* (2013),[32] where the government of British Columbia had issued licences to a logging company to harvest timber on sites on provincial Crown land within the territory of the Fort Nelson First Nation. Consultations had taken place with the First Nation. The Behn family, who were members of the First Nation, erected a camp that blocked the company's access to the logging sites. The company sued the Behns for interference with contractual relations; the Behns defended the action on the basis that they had not been consulted before the licences were issued, which, they argued, rendered the licences invalid. The Supreme Court of Canada rejected the defence, holding that the right to be consulted was not possessed by

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[27] *Mikisew Cree First Nation v. Can.*, [2018] 2 S.C.R. 765, [2017] 2 S.C.R. 576, 135.

[28] *Mikisew Cree First Nation v. Can.*, [2018] 2 S.C.R. 765, [2017] 2 S.C.R. 576, para. 148.

[29] Karakatsanis J., and the two judges that joined her opinion (Wagner C.J. and Gascon J.), were clearly prepared to contemplate this result. The qualification "possibly as many as five" is added because Abella J. (with Martin J. concurring) did not explicitly reject her colleague's alternative approach—although she did express doubts about whether such an alternative approach made sense (para. 78), which may reflect her view that the duty to consult should extend to the legislative process, and not so much a complete rejection of the alternative proposed by Karakatsanis J.

[30] *Benn v. Moulton Contracting*, [2013] 2 S.C.R. 227, 2013 SCC 26, para. 30 per LeBel J., who wrote for the Court.

[31] *Benn v. Moulton Contracting*, [2013] 2 S.C.R. 227, 2013 SCC 26, para. 30.

[32] *Behn v. Moulton Contracting*, [2013] 2 S.C.R. 227. For more discussion of the case, see § 28:40, "Remedies for breach of s. 35".

the Behns, but by the First Nation, who had not authorized the Behns to represent it.

Who is to be the judge of whether the Crown's consultation and accommodation were sufficient in the unique circumstances of any given case? The Court in *Haida Nation* said that the Crown's actions were reviewable by the courts under general principles of judicial review. While pure questions of law were reviewable on a standard of correctness, the existence and extent of a duty to consult or accommodate would typically be inextricably entwined with assessments of fact. In such a case, reasonableness would be the standard of review. "Reasonable efforts" on the part of government to inform itself, to consult, and to accommodate, were all that were called for.[33]

In *Haida Nation*, the Supreme Court of Canada, while indicating that the precise nature of the consultation and accommodation that was required would depend on the circumstances of the case, emphasized that the duties of consultation and accommodation did not involve a duty to *agree* with the aboriginal people.[34] In the absence of a proved aboriginal right, or a treaty right, the aboriginal people did not have a veto over the development of land in which they claimed an interest. In the companion case of *Taku River Tlingit First Nation v. British Columbia* (2004),[35] a mining company applied to the British Columbia government for permission to reopen an old mine in an area that was the subject of an unresolved land claim by the Taku River Tlingit First Nation. This application triggered a statutory environmental assessment process, which ended with approval of the application to reopen the mine. The First Nation objected to the outcome. The Supreme Court of Canada held that this was a case where there were duties to consult and accommodate: there was a prima facie case for the aboriginal claim, and the reopening of the mine was potentially harmful to the claim. However, the Crown's duty had been discharged in this case. The environmental assessment took three and a half years. The First Nation was included in the process. Its concerns were fully explained and were listened to in good faith, and the ultimate approval contained measures to address the concerns. Although those measures did not satisfy the First Nation, the process fulfilled the province's duties of consultation and accommodation. Meaningful consultation did not require agreement, and accommodation required only a reasonable balance between the aboriginal concerns and competing considerations.[36]

The *Haida Nation* duty to consult was an interim protection measure, designed to safeguard aboriginal interests while rights were in dispute or a treaty was under negotiation. One might assume that the duty would fall away once a treaty had been entered into, and the rights of

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[33]*Haida Nation v. B.C.*, [2004] 3 S.C.R. 511, para. 62.

[34]*Haida Nation v. B.C.*, [2004] 3 S.C.R. 511, paras. 10, 42, 48, 49.

[35]*Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550. McLachlin C.J. wrote the opinion of the Court.

[36]*Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550, para. 2.

the parties were spelled out in writing. But the Supreme Court of Canada has held otherwise. In *Mikisew Cree First Nation v. Canada* (2005),[37] the federal government proposed to build a road in a national park on federal Crown land in northern Alberta. The route of the road was through the traditional hunting grounds of the Mikisew Cree First Nation, which objected to the project for that reason. The road proposal was all within the Treaty 8 area of northern Alberta. Under Treaty 8, entered into 1899, the aboriginal people who lived in the territory had surrendered the entire area to the federal Crown. In return, the aboriginal people were promised reserves and some other benefits.

Treaty 8 gave to the aboriginal signatories (which included the ancestors of the Mikisew Cree) the right to hunt, trap and fish throughout the surrendered territory "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The proposed road involved an exercise of the Crown's right to take up land under this clause. Was taking up land under the Treaty subject to a constitutional duty of consultation? It was true, of course, that land taken up for development would have the effect of diminishing the area available to aboriginal people for hunting, trapping and fishing, but that was what was agreed to in 1899. The Supreme Court of Canada held, however, that "treaty making is an important stage in the long process of reconciliation [of aboriginal and non-aboriginal peoples], but it is only a stage"; and Treaty 8 was "not the complete discharge of the duty arising from the honour of the Crown".[38] Where the exercise of treaty rights by the Crown could have an "adverse impact" on aboriginal people, the honour of the Crown required consultation with the affected people.[39] In "appropriate" cases (not defined), the duty of consultation would lead to a duty to accommodate the aboriginal interests, although it did not require that aboriginal consent be obtained. In this case, the diminution of the Mikisew Cree's hunting and trapping rights in their traditional territory was a clear consequence of the proposed road. That adverse impact triggered the duties of consultation and accommodation. The discussions that had taken place between park officials and the Mikisew Cree were not sufficient to satisfy those duties. The Court quashed the minister's decision to approve the road project and sent the project back for reconsideration in accordance with the Court's reasons.[40]

Mikisew Cree is a striking example of interpreting treaties in favour of

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[37]*Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388. Binnie J. wrote the opinion of the Court.

[38]*Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, para. 54. Binnie J. added (para. 56) that "the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon".

[39]An adverse impact did not include one that was "remote or unsubstantial": *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, para. 55.

[40]*Mikisew Cree* was followed in *Grassy Narrows First Nation v. Ont.*, [2014] 2 S.C.R. 447, 2014 SCC 48, where the Court held that Ontario had a duty to consult before taking up land covered by Treaty 3 (1873), which included a taking-up power very similar in its terms to that of Treaty 8.

aboriginal peoples.[41] The purpose of the numbered treaties was to provide certainty in the rights of the Crown and the aboriginal peoples so as to open up land for settlement and development. Obviously, the new duties to consult and accommodate are important unwritten qualifications to the treaty language, and they are sufficiently vague and open-ended to make compliance difficult. Since non-compliance will invalidate a decision by the Crown, the certainty that is the goal of treaty-making is diminished by the *Mikisew Cree* decision. The Court did not discuss the value of certainty, but it obviously preferred to view treaties as a stage in a long process of reconciliation rather than the final step in that process. And the Court did make clear that "any administrative inconvenience incidental to managing the process" is irrelevant.[42] Modern comprehensive treaties (land claims agreements) tend to emphasize the goal of certainty. Unlike the historical treaties, the modern comprehensive treaties are the product of lengthy negotiations in which the aboriginal side (as well as the government side) is represented by sophisticated negotiators who have access to the resources needed to retain lawyers and other experts. The modern treaties are vastly more detailed than the historical treaties, running into the hundreds of pages, and they make express provision for consultation and dispute resolution processes to manage the continuing relationships between First Nations and government. Do the modern treaties leave room for some residue of the honour of the Crown to impose additional unwritten obligations of consultation on the Crown?

Mikisew Cree suggested that the answer to that question would be "yes", and this was confirmed in *Beckman v. Little Salmon/Carmacks First Nation* (2010).[43] At issue was the effect of the Little Salmon/Carmacks First Nation Final Agreement, which was ratified by members of the First Nation in 1997. The treaty was one of eleven that implemented an umbrella agreement signed in 1993 after 20 years of negotiations between representatives of all of the Yukon First Nations and the federal and territorial governments, well described by Binnie J. as a "monumental achievement".[44] The treaty conferred on the First Nation a right of access to Crown land forming part of its traditional territory (although outside its "settlement land") for hunting and fishing for subsistence. The treaty also contemplated (as in *Mikisew Cree)* that Crown land could be taken up for other purposes, including agriculture, with a consequent diminution of the hunting and fishing rights. The treaty included a definition of consultation and required or made reference to consultation in 60 places, but the taking up of land for grants to

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[41]See § 28:26, "Interpretation of treaty rights".

[42]*Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, para. 50.

[43]*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103. Binnie J. wrote the opinion of the seven-judge majority. Deschamps J., with the agreement of Lebel J., wrote a concurring opinion.

[44]*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, para. 2. I disclose that I played a minor, part-time role in the representation of the Yukon First Nations for ten of those years.

private persons was not one of them. An official of the Yukon government was authorized by statute, subject to the treaty provisions, to issue land grants of non-settlement land for agricultural purposes and he approved a grant of 65 hectares to a Yukon farmer. The granted land was within the First Nation's traditional territory. The First Nation applied for judicial review of the land-grant decision on the ground that the First Nation had not been adequately consulted by the territorial government. The territorial government responded that the treaty was a "complete code" of its responsibilities to the First Nation, and, since the treaty imposed no obligation of consultation on the take-up power, no consultation was required. The Supreme Court of Canada unanimously rejected this argument. For Binnie J., who wrote for the majority, *Mikisew Cree* continued to govern the action of government whenever its decisions would adversely affect the rights of aboriginal people, including rights recognized by a modern treaty. The duty to consult flowed from the honour of the Crown which was independent of any treaty, and, while it could be "shaped" by agreement of the parties, "the Crown cannot contract out of its duty of honourable dealing with Aboriginal people".[45] Nevertheless, in deference to the existence of the treaty,[46] the consultation requirement for the take-up power was at "the lower end of the spectrum",[47] and was satisfied on the facts of this case, where the First Nation had received "ample notice" of the application for the land grant and had successfully made its views known to the territorial decision-maker. Binnie J. therefore concluded that there was a common law duty of consultation and that it had been adequately discharged. Deschamps J., who concurred in the result, did not agree that the common law duty to consult was superimposed on all government decision-making on matters covered by the treaty. That was inconsistent with the "legal certainty" that was "the primary objective of all parties to a comprehensive land claim agreement."[48] She accepted that the treaty was not a complete code, but she held that the duty to consult would only apply to gaps in the provisions of the treaty, and she did not agree that the power to take up land for agricultural purposes was a gap of the kind that would leave room for the duty to consult.[49]

What kind of "adverse impact" on aboriginal claims or rights will trig-

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[45]*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, para. 61.

[46]It is not entirely clear what weight Binnie J. placed on the treaty. As well as describing the treaty as a "monumental achievement": *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, para. 2, he quoted from the preamble of the treaty, which recited that the parties intended "to achieve certainty with respect to their relationships with each other": *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, para. 68; but, in an obscure passage of faint praise, he also said that "their efforts [the work of the successful treaty negotiators] should be encouraged", and "the Court should strive to respect their handiwork": *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, para. 54.

[47]*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, para. 57.

[48]*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, para. 109.

[49]While the tone of Deschamps J.'s opinion, with its emphasis on certainty, was certainly different from that of Binnie J.'s opinion, the two positions are not very far

ger the duty to consult? This was the question in *Rio Tinto Alcan v. Carrier Sekani Tribal Council* (2010).[50] In the 1950s, the government of British Columbia had authorized Alcan to build a dam for the production of hydro electricity for the smelting of aluminum. The dam changed the water flows into the Nechako River, which the Carrier Sekani First Nations had traditionally used for fishing, and which flowed through lands that were now the subject of a land claim by the First Nations. This was done without consulting (let alone compensating) the First Nations. Alcan needed the power for the production of aluminum, but its plant generated a surplus which for many years Alcan sold to BC Hydro for use as part of the province's general power supply. Contracts for the sale of power required the approval of the British Columbia Utilities Commission, which was charged with determining whether a contract was in the public interest. The Commission approved a 2007 contract under which Alcan's surplus power would continue to be sold to BC Hydro until 2034. The Commission decided that the contract would not introduce any new adverse effects to the interests of the First Nations, and there was no duty to consult with them. The First Nations applied for judicial review on the basis that they had a constitutional right to be consulted before the Commission declared the contract to be in the public interest. The First Nations' argument was based on the premises that their rights had been infringed when the dam was built in the 1950s, that the infringement was a continuing one, and that the contract was part of the project that continued to infringe their rights. The Supreme Court of Canada did not doubt that these premises were correct, but the Court held that "prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right".[51] The issue for decision, therefore, was the narrow one of whether the approval of the 2007 power-sale contract would have any fresh adverse impact on aboriginal claims or rights. Alcan owned the power and the evidence showed that it would continue to produce power at the same rate regardless of whether the sales to BC Hydro were approved; Alcan would sell its surplus elsewhere if necessary. On this evidence, it was not unreasonable for the Commission to conclude that the 2007 contract would have no new effect on water levels in the Nechako River, and would therefore have no adverse ef-

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apart, as Deschamps J. acknowledges at para. 124. She said (para. 94) that the duty to consult applies only if the parties to the treaty "have said nothing about consultation in respect of the right the Crown seeks to exercise under the treaty". It is not clear whether Binnie J. disagreed with this formulation since he did not comment on it and he interpreted the treaty as saying nothing about consultation in respect of the Crown's right to take up land for agricultural purposes. But Deschamps J. interpreted chapter 12 of the treaty (not mentioned by Binnie J.) as applying duties of consultation (which had been discharged) to the Crown's take-up power, thereby filling the gap and negating the common law duty to consult: *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, para. 124.

[50]*Rio Tinto Alcan v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650. McLachlin C.J. wrote the opinion of the Court.

[51]*Rio Tinto Alcan v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, para. 49.

fect on the claims or rights of the First Nations. The Commission's approval of the contract, including its determination that there was no constitutional duty to consult with the First Nations,[52] was therefore confirmed.

§ 28:39 Jurisdiction of the provincial courts

An earlier chapter of this book addresses the issues that arise when the provincial courts are asked to consider cases that raise extraterritorial elements, including the jurisdiction of the provincial courts to decide cases in which the facts or the parties are outside of the province.[1] Indigenous peoples occupied what is now called Canada long before the arrival of European settlers, and the imposition of colonial provincial borders. As a result, when Indigenous peoples assert claims for Aboriginal and treaty rights under s. 35 of the Constitution Act, 1982, it is inevitable that situations will arise in which the territorial scope of claims will straddle provincial borders. This raises an important question: how should the jurisdiction of provincial courts be determined when a s. 35 claim straddles provincial borders? Should the ordinary approach that is used to determine the jurisdiction of a provincial court to decide a case with extraterritorial elements be applied, or should some sort of different approach be applied—and if so, what is it?

The Supreme Court of Canada considered this question in *Newfoundland and Labrador v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* (2020).[2] This case involved two Innu First Nations, whose traditional territory (which they call Nitassinan) straddles the border of Quebec and Newfoundland and Labrador. The First Nations, and several Innu Chiefs and councillors, filed suit against two Quebec-based mining companies who were responsible for a large mining project on their traditional territory. The project, which consisted of pit mines, a railway and other industrial facilities, also straddled the border of Quebec and Newfoundland and Labrador. The Innu sought, among other things, a permanent injunction ordering the mining companies to stop all work related to the project, damages and a declaration that the project violates their Aboriginal title to their traditional territory and vari-

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[52] *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, paras. 55–94, holding that the Commission, which had the statutory power to decide questions of law, had the authority to make this determination, and would, if the determination had been otherwise, have had the authority to decide whether adequate consultation had taken place, but would not have had the authority to engage in the actual consultation (which presumably would have to be done by the province itself). This aspect of the case is discussed in ch. 40, Enforcement of Rights, under heading § 40:26, "With power to decide questions of law".

[Section 28:39]

[1] Chapter 13, Extraterritorial Competence, under heading §§ 13:9 to 13:14, "Courts".

[2] *Newfoundland and Labrador v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4. Wagner C.J. and Abella and Karakatsanis JJ wrote a joint opinion for the majority of the Court, which was joined by Gascon and Martin JJ. Brown and Rowe JJ. wrote a joint dissenting opinion, which was joined by Moldaver and Côté JJ.