Aboriginal and Treaty Rights:
A Survey of Case Law and Future Directions in Law and Policies

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INTRODUCTION
The rights of members of Canada’s First Nations are divided into two categories: aboriginal rights, which are derived from the practices of indigenous peoples before the European occupation, and treaty rights, which are rights formally agreed to by the Crown and Canada’s indigenous peoples. The focus of this paper is to illustrate the major themes in the law of aboriginal and treaty rights. The paper is structured around four components of constitutional analysis:

1) aboriginal rights;
2) treaty rights;
3) treaty rights in the context of the natural resource transfer agreements; and
4) the future treatment of aboriginal and treaty rights.

ABORIGINAL RIGHTS
Section 35, in conjunction with section 52, of the Constitution Act, 1982\(^1\) establishes aboriginal and treaty rights in Canadian jurisprudence. Being recognized and affirmed in the constitution, these rights are entrenched. Hence, they are protected against future erosion by federal and provincial legislation. Short of consent, only constitutional amendment can extinguish aboriginal or treaty rights. Section 35 reads as follows:

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 subsection (1) “treaty rights” includes rights that now exist by way of land claim 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.

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In delineating the content or type of aboriginal rights, scholars begin with the proposition that aboriginal rights include all rights that aboriginal peoples exercised before European contact:

- aboriginal self-government;
- customary aboriginal law;
- aboriginal land rights; and
- land-based rights, such as hunting, fishing, and trapping.

Before the enactment of section 35(1), federal legislation could extinguish aboriginal rights. Now, legislation that is inconsistent with or infringes a right recognized and affirmed by section 35 has no force or effect to the extent of the inconsistency. In practice, however, the matrix of rights adjudication is not so unidimensional, because no right or obligation is absolute. Just as the rights guaranteed in the Charter are not absolute insofar as they are limited by the balancing of the interest matrix in section 1, section 35 aboriginal and treaty rights are also subject to such a limitation. The Sparrow case refers to the necessity of balancing interests:

Those regulations which do not infringe the aboriginal food fishery, in the sense of reducing the available catch below that required for reasonable food and societal needs, will not be affected by the constitutional recognition of the right. Regulations which do bear upon the exercise of the right may nevertheless be valid, but only if they can be reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest. These purposes are not limited to the Indian food fishery.

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4 Re Katie’s Adoption Petition (1961), 38 WWR 100 (NWT Terr. Ct.). However, Family and Child Service Act of British Columbia, Re, [1990] 4 CNLR 14 (BC Prov. Ct.), has held that the power to implement child care remedies is not an aboriginal right under section 35.


6 R v. Arcand, [1989] 2 CNLR 110 (Alta. QB). See also R v. Adams, [1996] 4 CNLR 1 (SCC), where the court held that in a case involving aboriginal rights, both the relationship of aboriginal peoples to the land and distinctive aboriginal societies and cultures must be considered.


It should be emphasized that the limitation is not made by operation of section 1 of the
Case law also acknowledges the necessity of a reasonable standard in order to give weight to competing rights in the balancing process:

Where the Indian food fishery is in the exercise of an aboriginal right, it is constitutionally entitled to priority [over the interests of other interest groups] by reason of s. 35(1). . . . Regulations which do bear upon the exercise of the rights may nevertheless be valid, but only if they can be reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest.10

Sparrow also emphasizes that, in the case of gathering food, more weight is given to section 35 rights:

The essential limitation upon that power [the aboriginal right to fish] is that which is already recognized by government policy as it emerges from the evidence in this case. That is, in allocating the right to take fish, the Indian food fishery is given priority over the interest of other user groups. What is different is that, where the Indian food fishery is in the exercise of an aboriginal right, it is constitutionally entitled to such priority. Furthermore, by reason of s. 35(1) it is a constitutionally protected right and cannot be extinguished.11

With this discussion of section 35 as background, the structure of analysis that is required in defining aboriginal rights can be set out. The following is taken from the Supreme Court of Canada decision in Sparrow, which provides three stages of analysis:

1) The right must be proven to exist; there is no revival of extinguished rights. In three 1996 judgments, Gladstone, Van der Peet, and NTC Smokehouse,12 the Supreme Court provided a refinement to the first stage in the analysis formulated by Sparrow. The test for defining an aboriginal right turns on establishing that the right in question is integral to a distinctive culture. The activity must be “an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal people claiming the right.”13 The relevant factors are pre-contact, evolution of the rights, oral evidence, and specificity. In order for an aboriginal right to be extinguished, there must be a clear intention to extinguish it within legislation. The onus of proving extinguishment lies on those putting forward the proposition of extinguishment. As noted above, before the enactment of section 35 of the Constitution Act, 1982, federal legislation could extinguish aboriginal rights. Subsequent to section 35, government policy or

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11 Ibid., at 608.
regulation can control the exercise of a section 35 right only if it passes the test noted in the third stage of the Supreme Court’s analysis, discussed below.

The Supreme Court underscored the necessity of applying constitutional principles of interpretation when dealing with section 35 in respect of aboriginal rights:

a) Section 35 is to be interpreted in a purposive way; it is meant to entrench aboriginal rights.

b) A liberal interpretation of section 35 is required since the provision is meant to affirm aboriginal rights.

c) Section 35 is not subject to section 1 of the Charter. Rather, section 52 of the Constitution Act, 1982 entrenches the right in the constitution.

d) Notwithstanding (c), legislation that affects the exercise of an aboriginal right may still be valid if it passes the test for justifying any inconsistency with a right recognized under section 35. (Aboriginal rights are not absolute rights.)

e) “Recognized and affirmed” incorporates the government’s fiduciary responsibilities to aboriginal people. The federal government’s powers must be reconciled with its duties. The government must justify regulations that infringe an aboriginal right.

f) The right must not be viewed in a vacuum; Indian history and traditions must be examined to determine whether restriction is justifiable.

The next stage of the analysis determines whether the right has been infringed upon.

2) The test of establishing prima facie interference turns on determining unnecessary infringement or adverse restriction on the exercise of an aboriginal right. The following questions must be answered in the affirmative to establish prima facie interference with an aboriginal right:14

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14 See Gladstone, supra footnote 12, where, on the basis of the “integral to a distinctive culture” test, there was sufficient evidence to establish practices, customs, or traditions necessary for claiming an aboriginal right to commercial trade in herring spawn on kelp. Van der Peet and NTC Smokehouse, supra footnote 12, used the same test but lacked evidence to establish a commercial right to fish. See also Adams, supra footnote 6; R v. Côté, [1996] 4 CNLR 26 (SCC); Jack and Charlie v. The Queen, [1985] 2 SCR 332; R v. Alphonsine, [1993] 4 CNLR 19 (BC CA); R v. Dick, [1993] 4 CNLR 63 (BC CA); R v. Joseph, [1990] 4 CNLR 59 (BC SC); R v. John (1991), file no. 1566C (BC SC) [unreported]; R v. Sampson, [1992] 3 CNLR 146 (BC SC), regarding the question whether conservation is a reasonable limitation; R v. Ellsworth, [1992] 4 CNLR 89 (BC SC), where the court found that for a conservation scheme to be valid, it must take into account treaty rights; R v. Hopkins (1992), 37 ACWS (3d) 197 (BC SC), holding that public health is a sufficient reason for limiting fishing rights; R v. Cunningham, [1990] 2 CNLR 110 (BC Prov. Ct.), regarding hardship; R v. Bombay, [1993] 1 CNLR 92 (Ont. CA); R v. Jones and Nadjiwon, [1993] 3 CNLR 182 (Ont. Prov. Div.); R v. Little, [1996] 2 CNLR 136 (BC CA), as to the treaty right to fish under the Douglas Treaty; R v. Jackson,
a) Is limitation unreasonable?

b) Does the regulation impose an undue hardship?

c) Is the holder denied a preferred means of exercising the right?

The onus of showing prima facie infringement is on the holder of the right. Once a prima facie infringement has been established, the analysis is taken to stage three, “the test for justification.”

3) As no right is absolute, the control of the exercise of an aboriginal right by regulation may be valid if the Crown can demonstrate justification for infringement according to the test set out below. A heavy onus is on the Crown to show justification for infringement since the above-noted principles of constitutional interpretation demand that priority be given to section 35 rights. The test for justification incorporates a compromise between a “patchwork” of aboriginal rights (definition determined by regulation) and original unrestricted aboriginal rights. It involves two parts:

a) First, the Crown must establish a valid legislative objective. In the case of sustenance rights, a valid legislative objective is one that conserves and manages a natural resource. Public interest is not included as part of the test because it is considered too vague to provide meaningful guidance or a workable test.

b) If a valid legislative intent is found, the next part of the test turns on addressing interpretative principles noted above:


(2000), Vol. 48, No. 4 / n° 4
i) The legislation must be justified in light of the Crown’s fiduciary relationship with aboriginal peoples.

ii) The legislation must be viewed in light of the liberal principle of interpretation provided in *Nowegijick*.15

iii) The legislation must be viewed in terms of aboriginal history and tradition (*Taylor and Williams*).16 The Crown’s honour must be maintained.

When determining the question of justification, the overriding consideration is that the Crown must justify the infringement in a way that is consistent with the Crown’s fiduciary relationship with First Nations. Other questions in the justification analysis include the following:

A) Was the infringement made the least possible, given the legislative objective?

B) If expropriation was involved, was fair consideration given?

C) Was the First Nation consulted as to the measures implemented?

### The Crown’s Fiduciary Relationship with First Nations

The concept of a fiduciary relation is a fluid one; it is constantly expanding to meet the increasing complexity of social relationships. The obligation owed by the Crown to First Nations is *sui generis*, or unique.17

The source of the Crown-First Nations fiduciary relationship stems from aboriginal title and aboriginal and treaty rights.

The standard of care expected of a fiduciary is determined by the amount of power the fiduciary has, the extent of the undertaking, the reliance that the beneficiary places on the fiduciary, and the vulnerability of the beneficiary. The modulation of these variables in the fiduciary equation will determine the scope of the obligation. For example, in the case of trust, the Crown exercises a great deal of control and consequently has a great deal of responsibility. In the case of agency, the Crown exercises a precisely defined amount of control and consequently has limited responsibilities.

The fiduciary relationship can be broken down into the following components:18

1) The fiduciary undertakes to act in the interests of another person and hence unilaterally exercises a certain power in respect of that person. The beneficiary places trust and confidence in the fiduciary to act on his or her behalf.

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2) Equity imposes a duty of faith on the fiduciary. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

3) The fiduciary’s interests cannot conflict with those of the beneficiary.

4) Equity controls the discretion of the fiduciary. The power of the fiduciary must be exercised in the best interests of the beneficiary.

5) Accepted practice also determines the scope and nature of the fiduciary obligation—an avenue whereby morality and equity are manifested.

6) The understanding and intention of the First Nation (for example, in the context of surrender of reserve) is central to the scope and nature of the Crown’s fiduciary obligations.

The Crown’s Fiduciary Duty to First Nations
The Royal Proclamation is the first codification of the Crown-Indian relationship and necessitates treaty making. It states that Indians have an interest in land and that treaties with and surrenders to the Crown are necessary in order for non-Indians to get an interest in lands. (The Crown obtains a monopoly in exchange for the payment of Crown duties to Indians.)

The present judicial interpretation of the fiduciary duty turns on several legally identifiable categories of that duty:

- the Guerin type, arising on the surrender of reserve land, use of land by the Crown, and expropriation;
- the Sparrow type, arising on the justification for the infringement of an aboriginal or treaty right;
- duty based on the principle that the honour of the Crown must be upheld; and
- a combination of Guerin and Sparrow obligations, such as those arising in the case of expropriation (for example, when First Nation interests are taken without their consent).

In Guerin, the duty was limited to the administration of surrendered lands. In Sparrow, a general statement of intent was made with respect to the Crown’s obligations as to honouring aboriginal rights. The Bear Island case stands as

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19 The Royal Proclamation, 1763 (UK), October 7, 1763.
20 Semiahmoo Indian Band v. Canada, [1998] 1 CNLR 250 (FCA). Exploitative transactions, where there is no option but to surrender (for example, expropriation), could amount to equitable fraud, creating a constructive trust, which in turn requires the disgorgement of profits to the beneficiary so as to bring about full restitution.
21 Guerin, supra footnote 17.
22 Sparrow, supra footnote 9.
an extension of the concept of fiduciary duty originally formulated in Guerin. With Bear Island, the fiduciary concept was extended to include the Crown’s obligation to honour treaty rights.

Blueberry River\textsuperscript{24} dealt with a complicated series of surrenders and leases of reserve surface and mineral interests culminating in a determination of the appropriate limitation period. The Supreme Court of Canada held that the band was entitled to recover loss from 1949 since the action was brought within the 30-year limitation period. The court relied on the grounds that the Crown breached its fiduciary duty when it failed to reserve mineral rights in a 1945 surrender and that a reasonable person should have realized, by 1949, the value of the mineral rights and, via the powers under the Indian Act, should have reacquired the rights.

Delgauuuuuuw\textsuperscript{25} provides further clarification as to the Crown’s duties regarding its use of traditional lands.

\textbf{Delgauuuuuuw v. BC}

The claim in Delgauuuuuuw was based on Gitksan and Wet’suwet’en historical use and “ownership” of the territory. The trial judge did not accept the plaintiffs’ evidence of oral history of attachment to the land. He dismissed the action against Canada, dismissed the plaintiffs’ claims for ownership and jurisdiction of the lands in the territory, but granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land subject to the general law of the province. The judgment recognized rights similar to those under a natural resources transfer agreement (NRTA)—namely, hunting and fishing rights. The Crown’s sovereignty was affirmed, and jurisdiction over the lands was split between Canada and British Columbia.

At the British Columbia Court of Appeal, Macfarlane JA agreed that an exclusive right to occupy land is required to support a claim akin to ownership. He noted that the use of the term “ownership” (which was used by the appellants in their pleadings) was unfortunate, since Guerin specifically held that the aboriginal interest does not amount to a property interest. In his view, the trial judge properly applied the law to the plaintiffs’ claim of ownership. Similarly, Macfarlane JA found no merit in the appellants’ challenge to the trial judge’s findings of fact on a number of points. Although some areas of the evidence were cause for concern, he concluded that the issues required an interpretation of the evidence as a whole and that it would be inappropriate for the Court of Appeal to intervene and substitute its opinions for those of the trial judge. Hence, Macfarlane JA did not disturb the trial judge’s conclusion with regard to

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  \item \textsuperscript{24} \textit{Blueberry River}, supra footnote 17.
\end{itemize}
ownership of the territory or his conclusion that any interest that the appellants have in the land is not proprietary.

On appeal to the Supreme Court of Canada, the appellants, Gitksan and Wet’suwet’en hereditary chiefs, made a claim for aboriginal title over their traditional lands. British Columbia made a counterclaim for a declaration that the appellants have no right or interest in and to the territory, or, alternatively, that the appellants’ cause of action ought to be for compensation from the government of Canada. The Supreme Court allowed the appellants’ claim in part and dismissed British Columbia’s counterclaim; the issues as to aboriginal title were directed to trial at the British Columbia Supreme Court since the trial judge erred in not admitting as evidence oral history (regarding the use and occupation of the traditional territory), which could have supported the appellants’ claim of aboriginal title. In coming to this conclusion, the Supreme Court formulated several fundamental points of law to guide the lower courts in recognizing aboriginal title and applying remedies to protect it.

**Issues**

Delgamuukw addressed the following issues and arrived at the following findings:

1) Did the pleadings preclude the court from entertaining claims for aboriginal title and self-government? While the court held that such claims could be entertained because of the uncertainty surrounding the nature and content of aboriginal title, in this case, the defect in the pleadings (the use of the phrase “ownership to aboriginal title”) prevented the court from considering the merits of the appeal.

2) To what extent, if at all, could the court interfere with the factual findings made by the trial judge? Superior courts can intervene “where the courts below have misapprehended or overlooked material evidence.” As aboriginal rights are *sui generis*, the court must take an unique approach to evidence—for example, taking into account the aboriginal perspective. Oral histories are valid evidence in aboriginal rights cases. Oral histories are expressed in three different forms:

   a) for example, the adaawk of the Gitksan, and the kungax of the Wet’suwet’en;

   b) the personal recollections of members of the appellant nations; and

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26 Ibid., at paragraphs 73 to 77 (SCC).
27 Ibid., at paragraphs 78 to 108.
28 Ibid., at paragraph 80.
29 Ibid., at paragraph 82.
30 Ibid., at paragraph 85.
c) the territorial affidavits filed by the heads of the individual houses within each nation.31

3) What is the content of aboriginal title, how is it protected by section 35(1), and what is required for its proof?32 In its unique nature, aboriginal title falls somewhere between a personal and a property right.33

4) The test for aboriginal title is exclusive occupation or possession at the time of Crown sovereignty.34

5) Section 35 constitutionalizes aboriginal and treaty rights; it does not create them.

6) Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal (as in Sparrow)35 and provincial (as in Côté)36 governments if the infringement is justified.37

7) Did the appellants make out a claim to self-government?38 Owing to errors of the trial judge, the claims of self-government could not be made out.

8) Did the province have the power to extinguish aboriginal rights after 1871?39 Neither under its own jurisdiction nor through the operation of section 88 of the Indian Act can the province extinguish aboriginal rights.

The Definition of Aboriginal Land Title40

As noted above, aboriginal title is unique. It bestows the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes.

1) Aboriginal title is inalienable and cannot be transferred, sold, or surrendered to anyone other than the Crown. It is less than fee simple tenure in land.41

Perfect tenure exists where one person holds land in fee simple. Fee simple is the best interest an ordinary citizen can possess with respect to land. Fee simple interests can be encumbered (for example, mortgaged to finance the purchase of

31 Ibid., at paragraph 92.
32 Ibid., at paragraphs 109 to 139.
33 Ibid., at paragraph 112.
34 Ibid., at paragraphs 140 to 159.
35 Sparrow, supra footnote 9. See the earlier discussion in this paper of the Supreme Court’s three-fold test for the establishment of an aboriginal right.
36 Côté, supra footnote 14, and Gladue, supra footnote 14.
37 Delgamuukw, supra footnote 25, at paragraphs 160 to 169 (SCC).
38 Ibid., at paragraphs 170 to 171.
39 Ibid., at paragraphs 172 to 183.
40 Ibid., at paragraphs 109 to 139.
41 Ibid., at paragraph 113.
land), and lesser rights such as rights of way and leases can be carved out of fee simple interests.

2) Aboriginal title stems from exclusive occupation before contact with Europeans.42

3) Aboriginal title is held communally.43

4) Most reserve lands are held under some form of aboriginal title.44

5) Aboriginal rights exist on a spectrum: at one end is land; at the other end are practices (customs) not attaching to land; and in the middle are site-specific rights, such as hunting, fishing, and trapping (which are lesser rights than aboriginal title).45

6) Aboriginal title is a burden on the Crown’s underlying title. Aboriginal title crystallized at the time the Crown asserted sovereignty over traditional lands.46

Uncertainty regarding title, rights, and jurisdiction over traditional lands creates uncertainty as to the use of those lands. Treaties attempt to provide certainty by explicitly recognizing and defining aboriginal rights to and jurisdiction over traditional lands, and by providing a framework for the implementation and enforcement of those rights and that jurisdiction.

In the absence of a treaty addressing aboriginal title and providing certainty concerning Indian rights in respect of traditional lands, case law has held that the Crown has underlying ownership of and jurisdiction over those lands.

The Content of Aboriginal Title
Aboriginal title is not limited to aboriginal (traditional) practices. Conventional uses also are part of aboriginal title; for example, mining, oil and gas, forestry, and most likely water interests are included.47 The content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the aboriginal attachment to those lands.48

The Test for Aboriginal Title
Both the common law and aboriginal perspectives should be relied upon in establishing aboriginal title. At common law, the act of exclusive occupation or

42 Ibid., at paragraph 114.
43 Ibid., at paragraph 115.
44 Ibid., at paragraph 120.
45 Ibid., at paragraph 138; Adams, supra footnote 6, and Côté, supra footnote 14.
46 Delgamuukw, supra footnote 25, at paragraph 145 (SCC).
47 Ibid., at paragraphs 116 to 124.
48 Ibid., at paragraphs 125 to 132.
49 Ibid., at paragraphs 140 to 159.
possession before the time at which the Crown asserted sovereignty over the land subject to Crown title is sufficient to ground aboriginal title. The regular use or exploitation of lands for hunting, fishing, etc., constitutes such occupation or possession.

It is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans (the Van der Peet\textsuperscript{50} test for aboriginal rights, which involved commercial fishing).\textsuperscript{51} The test for an aboriginal right is its existence as an integral part of the aboriginal society before contact; the test for aboriginal title is exclusive occupation at the time the Crown asserted sovereignty.

If present occupation is relied on as proof of occupation at the time Crown sovereignty was asserted, there must be continuity between present and pre-sovereignty occupation. An unbroken chain of occupation is not necessary as long as a substantial connection between the people and the land is maintained. Such a connection may be broken by uses that are inconsistent with aboriginal occupation of the land, such as occupation by a third party. The common law should develop to recognize aboriginal rights as they were recognized either by de facto practice or by aboriginal systems of governance.

**Overlap**

The Supreme Court of Canada was concerned with overlaps because only the Gitksan and Wet’suwet’en were involved in the litigation, although other tribes also occupied the territory in question. The court clarified the issues of overlap\textsuperscript{52} by noting the following principles:

- Aboriginal title rests on exclusive possession at the time of sovereignty. Intention and capacity to retain the land in question are central to establishing exclusive possession.
- Trespass by other tribes does not undercut exclusive possession.
- Joint aboriginal title is permissible.

**Protection of Aboriginal Title Under Section 35(1)\textsuperscript{53}**

Section 35 constitutionalizes aboriginal and treaty rights; it does not create them. Laws inconsistent with aboriginal rights recognized and affirmed by section 35 are of no force and effect (subject to a justified infringement).

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\textsuperscript{50} Gladstone, supra footnote 12; Van der Peet, supra footnote 12; and NTC Smokehouse Ltd., supra footnote 12.

\textsuperscript{51} Delgamuukw, supra footnote 25, at paragraph 142 (SCC).

\textsuperscript{52} Ibid., at paragraphs 156 to 158. See also US v. Sante Fe Pacific R Co., 314 US 339 (1941).

\textsuperscript{53} Delgamuukw, supra footnote 25, at paragraphs 133 to 139 (SCC).
Infringement of Aboriginal Title: The Test for Justification\textsuperscript{54}

Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal (as in \textit{Sparrow})\textsuperscript{55} and provincial (as in \textit{Côté})\textsuperscript{56} governments in the following circumstances:\textsuperscript{57}

1) The infringement furthers a compelling and substantial legislative objective—for example, economic development and non-aboriginal settlement.\textsuperscript{58}

Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community.” In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.\textsuperscript{59}

In the context of the present case, I agree with the Chief Justice that the general economic development of the interior of British Columbia, through agriculture, mining, forestry, and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations are valid legislative objectives that, in principle, satisfy the first part of the justification analysis.\textsuperscript{60}

2) The infringement is consistent with the special fiduciary relationship between the Crown and First Nations.\textsuperscript{61} This is understood in the following terms:

\textbf{a}) the right to exclusive use and occupation of land is relevant to the degree of scrutiny of the infringing measure or action;  
\textbf{b}) the use of land for future generations requires consultation and probably consent to use of lands; and  
\textbf{c}) the Crown pays compensation for the use of the land.

Since \textit{Guerin}, the Supreme Court has adopted a sliding scale model of the Crown’s fiduciary duty to First Nations, which turns on the degree of dependence that a First Nation has on the Crown. There is a distinction between the

\textsuperscript{54} Ibid., at paragraphs 160 to 169.  
\textsuperscript{55} \textit{Sparrow}, supra footnote 9.  
\textsuperscript{56} \textit{Côté}, supra footnote 14.  
\textsuperscript{57} \textit{Delgamuukw}, supra footnote 25, at paragraph 160 (SCC).  
\textsuperscript{58} Ibid., at paragraph 161.  
\textsuperscript{59} Ibid., at paragraph 165.  
\textsuperscript{60} Ibid., at paragraph 202.  
\textsuperscript{61} Ibid., at paragraph 162.
Crown’s relationship and its duty to First Nations. In the context of the relationship, First Nation interests are primary. In the context of the Crown’s duty to First Nations, priority is not necessarily given to First Nation interests when they are balanced against the interests of other Canadians. When protecting aboriginal rights, the Crown’s fiduciary duty turns on the nature of the aboriginal rights (where these interests fall on a scale of attachment to land) and the severity of the infringement. In *Delgamuukw*, this fiduciary duty manifests itself in terms of the Crown’s consulting the First Nation, attempting to obtain First Nation consent to the use in question, and compensating the First Nation for the Crown’s activities.

**Fiduciary Equation in the Context of Aboriginal Rights**

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<td>Sustenance</td>
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<td>Non-aboriginals</td>
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<th>Consent</th>
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<th>Priority not given to aboriginals</th>
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Aboriginal rights, given fiduciary considerations, are balanced with other rights and policies.  

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62 Ibid., at paragraphs 161 to 169.

63 Ibid., at paragraphs 165 to 167 and 202. See British Columbia’s response to *Delgamuukw* in *Consultation Guidelines* (Victoria: Ministry of Aboriginal Affairs, September 1998). In the context of protecting aboriginal title, two other recent cases are of assistance to First Nations: *Haida Nation v. BC (Minister of Forests)*, [1998] 1 CNLR 98 (BC CA), can be used to prevent resource developers from using traditional lands since aboriginal title constitutes an encumbrance on Crown title under section 28 of the BC Forestry Act; and *Halfway River First Nation v. BC (Ministry of Forests)*, [1999] 4 CNLR 1 (BC CA), aff’g. [1997] 4 CNLR 45 (BC SC), addresses the Crown’s fiduciary duty to consult the First Nation (for example, provide information and time to respond) before approving a cutting permit that affects treaty or aboriginal rights.
### Extinguishment of Aboriginal Rights Under Provincial Law

The court examined the question whether British Columbia could extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of section 88 of the Indian Act (incorporating provincial laws of general application by reference).\(^6^4\) It found that a provincial law of general application cannot extinguish aboriginal rights. Aboriginal title is captured within the ambit of section 91(24) as falling under federal jurisdiction, notwithstanding section 109, which transfers to the province jurisdiction over lands within the province subject to trust (for example, aboriginal title). Only the federal government can accept a surrender of aboriginal rights (*St. Catherine’s Milling*).\(^6^5\)

- a) A law of general application cannot, by definition, meet the standard “of clear and plain intent” needed to extinguish aboriginal rights without being ultra vires the province.\(^6^6\)

- 2) “[S]ection 91(24) protects a core of federal jurisdiction even from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on ‘Indianness’ or the ‘core of Indianness.’ ”\(^6^7\)

Hence, the province can infringe upon, but it cannot extinguish, aboriginal rights. This results in an indirect watering down of aboriginal rights if there is a legitimate justification for infringement, such as economic development, settlement, conservation, infrastructure, etc.

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64 *Delgammukw*, supra footnote 25, at paragraphs 172 to 180 (SCC).

65 *St. Catherine’s Milling and Lumber Company v. The Queen* (1889), 14 App. Cas. 46, at 54 (PC), finding that upon surrender of reserve land, the federal government has no interest in that land.

66 *Delgammukw*, supra footnote 25, at paragraph 180 (SCC).

67 Ibid., at paragraph 181.
TREATY RIGHTS

Although Canadian Indian treaties are central to Canadian law, they have defied exhaustive judicial treatment and interpretation for nearly a quarter of a millennium. The Royal Proclamation of 1763 confirms the process for bringing post-Royal Proclamation treaties into existence. The linchpin of the Crown-Indian relationship is the concept of reciprocity that manifests itself in the recognition of the Indian interest in unceded land and the Crown monopoly over the acquisition of such land. By monopolizing the alienation of Indian land, the Crown undertook the responsibility of protecting and managing the Indian interest in such land.

There are two major theories that attempt to explain the legal status of treaties:

1) **Indian treaties as international agreements between sovereign states.** Although the Royal Proclamation of 1763 and the Royal Commission of 1749 refer to Indians as nations or tribes, case law has rejected this theory. *Francis*\(^{68}\) held that Indian treaties were treaties only for the purposes of section 88 of the Indian Act.

2) **Indian treaties as contracts.** The attempt to characterize treaties as contracts stems from the fact that Indian treaties and contracts share the following elements:

   a) Both are agreements.
   b) Both involve parties.
   c) Both involve consideration.
   d) Both involve an intention to create binding obligations.

Notwithstanding these similarities, case law rejects the equating of treaties and contracts (*Pawis*,\(^ {69}\) *Hay River*,\(^ {70}\) and *Tennisco*\(^ {71}\)). The contract analysis of Indian treaties is problematic. Because the members of a particular treaty district are constantly changing and the legal status of bands is uncertain, the question of the Indian party to contract is uncertain.\(^ {72}\) Indian treaties also have a far greater importance than do contracts. Indian treaties have a moral and political dimension that cannot be accounted for in terms of contract principles.


69 *Pawis v. The Queen*, [1979] 2 CNLR 52 (FCTD).


In *Simon*, the Supreme Court of Canada noted the special legal status that Indian treaties possess:

An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.\(^{73}\)

The unique nature of Indian treaties defies understanding and treatment by reference to conventional concepts such as contract and international treaties. The courts therefore operate in a vacuum when addressing Indian treaties and must create law by making analogies to conventional concepts such as international treaties and contract. What can be concluded from this approach is that the Supreme Court has acknowledged that the unique legal nature of Indian treaties requires special judicial treatment. For instance, by analogy, principles of contract law such as undue influence and unconscionability can be applied to the Indian treaty situation; upon a breach of a treaty term, remedies analogous to contract remedies may be applied (for example, damages, specific performance, etc.). In addition to these quasi-contractual remedies, the remedy of breach of fiduciary duty can be relied on.\(^{74}\)

The courts have provided the following tests in the context of treaty litigation:

1) The band has the onus of proving on a balance of probabilities the existence of its aboriginal title.\(^{75}\)

2) A valid treaty can extinguish aboriginal rights. The Crown has the onus of establishing that the aboriginal rights to land have been extinguished by treaty, statute, or other acts of the provinces of Canada or the Dominion of Canada.\(^{76}\)

In *Badger*, the Supreme Court was divided on the theory of whether the treaty food hunting rights were merged and consolidated in the NRTA. The majority held that they were not since the NRTA provisions were not in direct conflict with the treaty right. However, both theories required a *Sparrow*-like interpretation to determine whether regulation of this right was valid. The Crown has the onus of proving either express or implicit extinguishment of a treaty right.\(^{77}\)

3) In considering evidence when interpreting treaties, all factors are determined on the basis of a civil standard of proof or on a balance of probabilities.

4) Oral histories are admissible when written histories are not available; however, such evidence can be contradicted by the available factual record.

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\(^{73}\) *Simon v. The Queen*, [1985] 2 SCR 387, at 404, relying on *Regina v. White and Bob* (1964), 50 DLR (2d) 613 (BC CA); *Francis*, supra footnote 68; and *Pawis*, supra footnote 69.

\(^{74}\) *Bear Island Foundation*, supra footnote 23; see *Pawis*, supra footnote 69, at 63, on the trust responsibility.

\(^{75}\) *Bear Island Foundation*, supra footnote 23.


5) Indian treaties are unique agreements that are neither created nor terminated in accordance with international law. The onus is on the Crown to prove that a treaty has been terminated (for example, by subsequent hostilities).78

6) An impossible burden of proof cannot undermine a modern right to hunt.79

7) The courts are required to be flexible in determining the existence of a treaty. The historical context and perception of the parties must be taken into account.80

8) The factors that the courts examine in their determination of the existence of a treaty right are as follows: continuous, past, and present exercise of the right; the Crown’s reasons for entering into a treaty; circumstances at the time of signing; evidence of mutual respect between the parties; and subsequent conduct of the parties.81

9) Extrinsic evidence can be used to interpret a treaty in the absence of ambiguity.82

10) Where litigants appeal treaty matters to the Supreme Court of Canada, the court should not reverse the trial judge except where it finds a palpable and overriding error that affected the trial judge’s assessment of the facts.83

11) Questioning the validity of the treaty can be accomplished only by initiating an action against the federal Crown that would place a treaty, in its entirety, before the court. The arguments for initiating such action require proving that the treaty-making process was invalid (there was no intention to cede land by the Indian parties; no meeting of the minds; coercion; no meaningful consideration; and/or violation of the principles of equity) or that the terms of the treaty were breached by the Crown, so that there was a breach of the Crown’s fiduciary duty.84 The desired end of this action is to revive the aboriginal status that characterized the land and resources before the treaty. If successful, this action could place the First Nation parties in the position of claiming for aboriginal title.

78 Simon, supra footnote 73.
79 Ibid.
81 Ibid.
84 Re Paulette and Registrar of Titles (1973), 39 DLR (3d) 45 (NWT SC), rev’d on other grounds (1975), 63 DLR (3d) 1 (NWT CA), aff’d on other grounds (1976), 72 DLR (3d) 161 (SCC).
The Royal Proclamation of 1763

The Royal Proclamation has been referred to as the “Magna Carta of Indian rights.”\(^{85}\) The Royal Proclamation is not a source of Indian rights; rather, it enables the recognition of Indian rights by providing a framework for the making of treaties whereby reserve land and rights are exchanged for the ceding of land.

As noted above, with the enactment of the Royal Proclamation, the Crown undertook to protect and manage the Indian interest in Indian lands. This obligation is codified in section 18 of the Indian Act. The Crown’s assumption of this responsibility serves as a cornerstone of the existing federal-First Nation relationship and of treaty making with respect to First Nation lands in Canada. From this principle, the government is justified in overseeing whatever land transactions Indians have with respect to reserve land. (Sections 37 to 41 of the Indian Act require First Nations to surrender reserve lands to the Crown when they wish to transfer such lands to non-Indians.)

R v. Marshall

Marshall\(^{86}\) extends the concept of treaty rights from being mere sustenance rights to embracing quasi-commercial rights. In doing so, the Supreme Court of Canada unites the approaches that it has taken to aboriginal rights so as to provide a contemporary interpretation and application of treaty rights.

In Marshall, the accused, a Mi’kmaq Indian, appealed from the judgment of the Nova Scotia Court of Appeal, which affirmed a conviction of three offences under federal fisheries legislation: selling eels without a licence, fishing without a licence, and fishing during the closed season. The appeal turned on whether the accused had a treaty right to catch and sell fish under the Treaties of 1760-61 that would exempt him from compliance with federal legislation. The Treaties of 1760-61 are treaties of peace and friendship, central to which was a “trade clause” whereby the Mi’kmaq agreed to trade only with the British (to the exclusion of the French). Specifically, they agreed to

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85 According to The King v. Lady McMaster, [1926] Ex. CR 68, at 72, the Royal Proclamation was held to have the force of a statute. The rights under the Royal Proclamation, 1763 are noted in section 25 of the Constitution Act, 1982. The application of the Royal Proclamation, 1763 to Rupert’s Land has been questioned in Montana Band of Indians v. Canada (1988), 51 DLR (4th) 306 (FCTD), notwithstanding the Rupert’s Land and North-Western Territory Order, admitting Rupert’s Land and the North-West Territory into the union, June 23, 1870 (see term 3 of the schedule of the Constitution Act, 1982). Rupert’s Land was not under the Royal Proclamation, 1763 because it was land held at that time by the Hudson’s Bay Company (Sigeareak v. The Queen, [1966] SCR 645). The purpose of the Rupert’s Land Order was to have principles similar to those of the Royal Proclamation, 1763 apply to Rupert’s Land. Note that White and Bob, supra footnote 73, found that it applied at least to Vancouver Island. See BC (AG) v. Mount Currie Indian Band, [1992] 1 CNLR 70 (BC SC), on the unsuccessful use of the proclamation protecting Indian sovereignty on unceded lands.

86 Marshall, supra footnote 82.
traffick, barter or Exchange any Commodities in any manner but with such per-
sons or the manager of such Truck houses as shall be appointed or Established by
His Majesty’s Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.

The accused claimed that the truckhouse provision incorporated the right of
trade and the right to pursue traditional hunting, fishing, and gathering activities in
support of trade. The appeal was allowed and the accused acquitted on all charges
per Binnie J (Lamer CJ and L’Heureux-Dubé, Cory, and Iacobucci JJ concurring).

**Majority Judgment**

The Supreme Court found that when interpreting the treaties, the Nova Scotia
Court of Appeal erred in rejecting the use of extrinsic evidence in the absence of
ambiguity:

Even in a modern commercial context, extrinsic evidence is available to show
that a written document does not include all of the terms of an agreement. . . .

Even in the context of a treaty document that purports to contain all of the
terms . . . extrinsic evidence of the historical and cultural context of a treaty may
be received even absent any ambiguity on the face of the treaty. . . .

Where a treaty was concluded verbally and afterwards written up by repre-
sentatives of the Crown, it would be unconscionable for the Crown to ignore the
oral terms while relying on the written terms. 87

The treaties set out a “restrictive covenant” as to trade and say nothing
regarding a positive Mi’kmaq right to trade. The treaties do not contain all the
promises made and all the terms and conditions mutually agreed to. Effect must
therefore be given to the common intention of the parties in 1760.

The trade clause would not have advanced British objectives (peaceful relations
with a self-sufficient Mi’kmaq people) or Mi’kmaq objectives (access to the
European “necessaries” on which they had come to rely) unless the Mi’kmaq
were assured at the same time of continuing access, implicitly or explicitly, to
wildlife to trade. 88

The concept of “necessaries” is today equivalent to the concept of what Lambert
as a “moderate livelihood.” Bare subsistence has thankfully receded over the last
couple of centuries as an appropriate standard of life for Aboriginals and non-
Aboriginals alike. A moderate livelihood includes such basics as “food, clothing
and housing, supplemented by a few amenities,” but not the accumulation of
wealth. . . . It addresses day-to-day needs. This was the common intention in
1760. It is fair that it be given this interpretation today.

The distinction between a commercial right and a right to trade for necessaries
or sustenance was discussed in *Gladstone, supra*, where Lamer C.J., speaking for

87 Ibid., at paragraphs 10 to 12.
88 Ibid., at paragraph 35.
the majority, held that the Heiltsuk of British Columbia have an Aboriginal right to sell herring spawn on kelp to an extent best described as commercial (at para. 28). This finding was based on the evidence that “tons” of the herring spawn on kelp was traded and that such trade was a central and defining feature of Heiltsuk society. McLachlin J., however, took a different view of the evidence, which she concluded supported a finding that the Heiltsuk derived only sustenance from the trade of the herring spawn on kelp. “Sustenance” provided a manageable limitation on what would otherwise be a free-standing commercial right.89

The accused’s treaty rights were limited to securing “necessaries.” In contemporary terms, this equates to a moderate livelihood—not the promise of a truckhouse. These rights do not imply the unlimited generation of wealth. Such treaty rights turn on continuing to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to Crown restrictions that can be justified under the Badger test, such as a licensing scheme and catch limits that can reasonably be expected to produce a moderate livelihood for individual Mi’kmaq families at present-day standards. The court concluded that as such regulation and enforcement does not violate the treaty right, it would not constitute an infringement that would have to be justified under the Badger standard.

Dissenting Judgment

The dissenting judgment of Gonthier and McLachlin JJ focuses first on the core meaning of the right and then examines how to give the right a contemporary application. The Treaties of 1760-61 do not grant a general right to trade. The core of the trade clause is the obligation on the Mi’kmaq to trade only with the British. In return, the Crown promised that it would establish truckhouses where the Mi’kmaq could trade. The historical and cultural context in which the treaties were made does not establish a general right to trade. Rather, to achieve peace, both parties agreed to make certain concessions:

The Mi’kmaq agreed to forgo their trading autonomy . . . and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi’kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed.90

Both parties agreed that the trade was limited to a system of exclusive trade and truckhouses. This is evidenced by the post-treaty conduct of the parties. After the treaties, the British stopped insisting that the Mi’kmaq trade only with them. The British replaced the expensive truckhouses with licenced traders in 1762. The system of licensed traders, in turn, died out by the 1780s. . . . The exclusive trade and

89 Ibid., at paragraphs 59 to 60.
90 Ibid., at paragraph 96.
truckhouse system was a temporary mechanism to achieve peace in a troubled region between parties with a long history of hostilities.91

With the passing of a restriction on the Mi’kmaq trade, the need for compensation for the removal of their trading autonomy also passed. At this point, the Mi’kmaq were vested with the general non-treaty right to hunt, to fish, and to trade possessed by all other British subjects in the region.

To proceed from a right undefined in scope or modern counterpart to the question of justification would be to render treaty rights inchoate and the justification of limitations impossible. How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government, in the absence of such definition, to know how far it may justifiably trench on the right in the collective interest of Canadians? How are courts to judge whether the government that attempts to do so has drawn the line at the right point? Referring to the “right” in the generalized abstraction risks both circumventing the parties’ common intention at the time the treaty was signed, and functioning illegitimately to create, in effect, an unintended right of broad and undefined scope.

Instead of positing an undefined right and then requiring justification, a claim for breach of a treaty right should begin by defining the core of that right and seeking its modern counterpart. Then the question of whether the law at issue derogates from that right can be explored, and any justification for such derogation examined, in a meaningful way.92

**Judgment on Motion for Rehearing and Stay**93

This judgment re-emphasizes the court’s principal concern of regulating the exercise of treaty rights. Although conservation is the minister’s paramount regulatory objective owing to the need to balance aboriginal and non-aboriginal interests, the regulatory authority extends to other “compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.”94 In conclusion, the court emphasized the *Delgamuukw* principle that aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights.

**Summary**

The *Marshall* decisions have created a means of dealing with a new category of treaty rights—rights that are more than mere sustenance rights in that they have

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91 Ibid., at paragraphs 99 and 101.
92 Ibid., at paragraphs 112 to 113.
94 Ibid., at paragraph 42.
an intrinsic commercial component involving trade for cash. Notwithstanding restriction of these rights by the regulatory objectives of conservation and other public objectives, the Supreme Court has acknowledged the necessity of a contemporary interpretation of treaty rights as being in the commercial mainstream. As a consequence, the analysis of aboriginal and treaty rights must by implication become much more multidimensional. For such rights to be implemented correctly, their recognition must include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the industry by non-aboriginal groups. Just as it did in Delgamuukw where it balanced aboriginal interests in lands and jurisdictions, the Supreme Court in Marshall has set the stage for implementing a constitutional (section 35) right of First Nations to participate in the economic development of Canada by balancing the interests of First Nations and other Canadians.

NATURAL RESOURCES TRANSFER AGREEMENTS

The Rupert’s Land Order (1870), pursuant to section 146 Constitution Act, 1867, relinquished Hudson’s Bay Company Grant (1680) rights to Rupert’s Land, thereby admitting into Canada those lands (the prairies) on conditions that reiterated the principles of the Royal Proclamation and thus created similar fiduciary duties:

14. Any claim of Indians to compensation for land required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company (Hudson’s Bay) shall be relieved of all responsibility in respect of them.95

NRTAs and their implementing legislation, the Constitution Act, 1930,96 have the effect of transferring the beneficial interests in lands in the three prairie provinces to those respective provincial governments. In addition, prairie Indians

95 The Rupert’s Land and North-Western Territory Order, supra footnote 85, forms part of Canada’s Constitution; hence, rights created by the order have constitutional protection. See related comments and case references, supra footnote 85.

96 See the Constitution Act, 1930 (UK), 20-21 Geo. V, c. 26; the Alberta Natural Resources Act, SC 1930, c. 3; Saskatchewan Natural Resources Act, SC 1930, c. 41; and the Manitoba Natural Resources Act, SC 1930, c. 29. See Elk v. R, [1981] 2 CNLR 56 (SCC), where it was held that the NRTA does not prevent the application of federal legislation. See R v. Heathen, [1993] 2 CNLR 157 (Sask. Prov. Ct.), and R v. Wolfe, [1994] 1 CNLR 177 (Sask. QB), aff’g. [1993] 2 CNLR 180 (Sask. Prov. Ct.), on how the NRTA makes treaty rights subject to provincial legislation. R v. Ferguson, [1994] 1 CNLR 117 (Alta. QB), aff’g. [1993] 2 CNLR 148 (Alta. Prov. Ct.), held that section 12 of the NRTA contemplates that non-treaty Indians (Métis) have hunting rights. R v. Janvier, [1995] 4 CNLR 29 (Sask. Prov. Ct.), held that the term “unoccupied Crown lands” in section 12 of the NRTA is doubtful and must be interpreted by principles laid down by the courts; “unoccupied Crown lands” means land not actually or observably settled or in use—for example, devoid of signs of occupation such as crops, cattle, buildings, or fences.
(paragraph 12 for Saskatchewan and Alberta, and paragraph 13 for Manitoba) have a right to fish, trap, and hunt for food on unoccupied Crown land:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the law respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them of hunting, trapping and fishing game for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

The Supreme Court has held that the NRTA has had the following effect on Indian hunting, fishing, and trapping rights:

- In Manitoba, Saskatchewan, and Alberta, treaty rights to commercial hunting have been extinguished by the NRTA.\(^{97}\)

- The NRTA enlarged the area within the province in which Indians could hunt or fish for food to all unoccupied Crown lands and other lands to which Indians have a right of access. An Indian of a particular treaty district can hunt in that treaty district regardless of provincial residence.\(^{98}\)

- The NRTA affected Indian rights to hunt or fish for purposes other than to obtain food, by making those rights subject to provincial game laws.

- If hunting access is allowed to the general public at any time during the year, such land is open to Indians under the NRTA for hunting for food purposes at all times. Provincial legislation cannot limit Indian food hunting to particular seasons.\(^{99}\) A province may not attempt to circumvent the NRTA by deeming certain land “occupied Crown lands” if such lands are open to hunting at any time during the year.\(^{100}\)

- The geographic limitation on hunting rights (to unoccupied Crown lands) is based on visible compatible use. This approach is consistent with oral representations at the time the treaty relationship was made.\(^{101}\)

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Badger, supra footnote 76, limited Horseman to commercial hunting.

98 Badger, supra footnote 76; Frank v. The Queen, [1978] 1 SCR 95, at 101.


101 Badger, supra footnote 76, affects the following decisions: R v. Alexson (1990), 72 Alta. LR (2d) 99 (QB), rev’d. (1990), 73 Alta LR (2d) 151 (CA), where it was held that in Alberta, a grazing lease constitutes occupied land under the Public Lands Act; R v. Ominayak (1990), 75 Alta. LR (2d) 431 (CA), holding that Indians have no right to hunt on unposted private land; R v. Norm, [1991] 3 CNLR 135 (Alta. Prov. Ct.), dealing with Treaty 8 rights to hunt in national parks; Regina v. Michel and Johnson, [1983] 10 CCC (3d) 314 (YT CA), finding that
Residual First Nation Interests Under the NRTAs

Paragraph 1 of the NRTA

So as to put the prairie provinces on the same footing as other provinces, the intention of paragraph 1 of the NRTA is to transfer to the prairie provinces all interests in lands that were transferred to the original provinces by section 109 of the Constitution Act, 1867 (natural resources, royalties, and administration), subject to the exceptions noted in that paragraph:

In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the Constitution Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, mineral and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration.

“Interests protected by federal law in a federal system” form a category of interests that override the operation of provincial law, such as the Torrens system as found in the Land Titles Act. The rationale for this principle is twofold: the federal interests are presupposed by the operation of the provincial Torrens system; and as the existence of such interests is formed by the operation of federal law, which is always paramount, they override provincial law. Two categories of interests are contemplated: interests in land that is the property of the Crown in right of Canada, and interests in land whose administration is under federal law.

The phrase “subject as therein otherwise provided” limits the transfer of interest from the Crown to the province. For instance, lands reserved for Indians are retained by the Dominion, and it is provided that each of the provinces will set aside further Crown lands for reserves whenever necessary to enable Canada to fulfil its treaty obligations. The following line of cases illustrates the effect of section 91 interests in lands.

In *Prudential Trust Co. Ltd. v. Registrar, Humboldt*,102 the Supreme Court of Canada held that previously reserved interests cannot vest in the province, notwithstanding the general effect of paragraph 1 of the NRTA:

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102 *Prudential Trust Co. Ltd. v. Registrar, Humboldt*, [1957] SCR 658. Also see *Re Director of Soldier Settlement* (1960), 25 DLR (2d) 463 (Alta. SC), where it was held that paragraph 13 of the NRTA prevents the transfer of Soldier Settlement Act interests to the provinces; and

unoccupied land is a question of fact and scheduling for a game sanctuary is insufficient for occupation; and *Palmer v. Stora Koppbergs* (1983), 26 CCLT 1 (NS SC), holding that Indians do not have a right to hunt and fish on land owned by non-Indians.
The interests retained by the Dominion, whether in the form of reservations or exceptions in the grant or in escheat or forfeiture . . . were beyond the operation of provincial law; they were the property of Canada and under s. 91 of the British North America Act within the exclusive jurisdiction of the Parliament . . .

This remained the situation until October 1, 1930, when The Saskatchewan Natural Resources Act, 1930 (Can.) c. 41, came into force. By its provisions and those of the agreement which ratified it, all interests of the Dominion in and connected to lands within the Province other than which were continued to be administered by the Dominion under the various heads of s. 91 of the federation Act, were transferred to the Province [emphasis added]. 103

AG Canada v. Toth104 is a case that deals directly with the administration of interests in the context of paragraph 1. The land in question was originally set aside as an Indian reserve. It was surrendered and transferred to the federal Soldier Settlement Board, which in turn granted the land (reserving mines and minerals) to an individual. The question the Supreme Court had to address was whether the land was transferred to the province under paragraph 1 or was reserved by the Dominion under paragraph 19. The Dominion argued the latter position on the ground that public moneys were expended on a survey and on payments to Indians for the surrender of their interests. The court rejected both arguments. If the argument for surveys was correct, then paragraph 1, whose purpose is to effect a transfer to the provinces, would be meaningless. The court also rejected the argument that “payments to Indians was an expenditure on lands,” holding that “expenditure” means moneys for improvements to land, such as infrastructure (roads, bridges, and dams). However, the federal government won on another ground. The court, relying on St. Catherine’s Milling,105 held that since the land was transferred by the Soldier Settlement Board with a reservation of mines and minerals, it was still under the administration of the federal government.

Another way of invoking paragraph 1 is to question the validity of a treaty. This would require placing the treaty before the courts in order to obtain a declaration that interests in traditional lands are still being held in trust for the descendants of the signatories to the treaty. One approach is to formulate arguments that turn

Reference re Saskatchewan Natural Resources, [1931] SCR 263, aff’d. [1932] AC 28 (PC), where the court found that since, before 1905, the Crown in right of Canada was vested with the ownership and administration of all lands within the boundaries of Saskatchewan, the Dominion has no obligation to account to the province for any lands within its boundaries alienated by the Dominion before September 1, 1905.

103 Prudential Trust, supra footnote 102, at 660.

104 AG Canada v. Toth (1959), 17 DLR (2d) 273 (SCC). Also see Re Moir’s Estate and Will (1961), 36 WWR 83 (Man. QB), regarding exclusions as to mines and minerals created under section 198(2) of the Railway Act (Canada), RSC 1952, c. 234.

105 St. Catherine's Milling, supra footnote 65.
on establishing that the treaty-making process was invalid. The desired end here is to revive the aboriginal status that characterized the land and resources before the signing of the treaty. Obviously, this would place traditional lands within the NRTA paragraph 1 exceptions (the federal Crown would hold the Indian lands in trust), hence excluding such lands from transference to the province.

Another way of establishing a residual interest under paragraph 1 would be to argue that the treaties and the NRTA fail to address all the aspects of aboriginal title as defined by Delgamuukw (such as title to mines and minerals).

Finally, interests captured under paragraph 1 would also include those interests that arise as a result of a breach of the treaty or of fiduciary duties in respect of the NRTA (for example, the Crown failed to provide adequate consultation, consent, and compensation to the affected Indians).

Case law on paragraph 1 is clear as to interests in land that are reserved by the federal Crown. Such interests are exempt from provincial legislation, and the benefits from reserved lands do not accrue to the province. It follows from this proposition that outstanding obligations under treaties would also be excluded from the general operation of the NRTA. Furthermore, if a treaty were found to be invalid or to have been breached, the Indian interest in the relevant lands would be held in trust for Indians by the federal Crown and excluded from the general operation of the NRTA. At this juncture, it is necessary to address the arguments for the subsisting interests of Indians under a valid treaty.

The prevailing theory posited by the courts is that treaty rights have been merged and consolidated by the NRTAs. In practical terms, this means that NRTAs are taking the place of the operation of treaties. It is the NRTAs that govern the Crown’s relationship to and the special rights of Indians. For instance, hunting rights have a commercial element under Treaties 6 and 8, but the effect of the NRTA is to restrict them to sustenance hunting rights that can be exercised only on unoccupied Crown land (which is very difficult to find in the southern part of the prairie provinces).

Delgamuukw also underwrites the proposition that these supposed provincial lands are in fact section 91(24) lands held in trust for Indians and have fiduciary obligations attaching to them. The Indian interest is also expanded to cover both traditional and conventional uses (such as exploitation of natural resources).

Case law relying on Horseman has held that the NRTA has merged and consolidated treaty hunting rights; that section 35 of the Constitution Act, 1982, has no effect on their application; and that provincial wildlife legislation that

106 Paulette, supra footnote 84.
107 Delgamuukw, supra footnote 25, at paragraph 174 (SCC).
108 Horseman, supra footnote 97.
prohibits Indians from selling game is constitutional notwithstanding Treaty 6. According to the courts, the theory of merger and consolidation modifies treaty rights under the NRTA since they are not section 35 rights but constitutional rights, implying a quasi-\textit{Sparrow-Delgamuukw} type of fiduciary duty. However, any subsisting Indian interest in traditional lands would be excluded from modification by the NRTA because those lands would not have been transferred to the province. As a consequence, the Crown would have \textit{Sparrow-Delgamuukw}-type fiduciary obligations as to Indian rights attaching to such lands.

The theory of merger and consolidation makes the use of section 35 of the Constitution Act, 1982 problematic because treaty rights have been modified. The NRTA (in a strict legal sense) and the Indian Act and other legislation related to Indians (in a policy sense) serve as a proxy for treaties. In order to give the treaties the priority that they deserve, strategies must be devised that are based on treaty concerns. One line of strategy is to re-address Indian interests under the NRTA. According to \textit{Sparrow}, any aboriginal or treaty right that is infringed upon requires the consent of the affected First Nation.

In \textit{Horseman}, the Alberta Court of Appeal ruled on the NRTA and its effect on Treaty 8. Mr. Justice Kerans noted that the theory of merging and consolidating treaty rights under the NRTA is problematic because the NRTA was reached without the participation of First Nations in the negotiation process. This judicial consideration of the NRTA may be interpreted as promoting the brokerage of jurisdiction and rights over traditional land. First Nation negotiations regarding the resource agreements with the province could use this case as a weapon. Mr. Justice Kerans’ conclusion presupposes an argument from equity based on the principle of reciprocity as to compensation for the loss of use of and benefit from traditional lands. At the very least, a failure in the Crown’s fiduciary duty to treaty Indians can be generated.

In summary, there are several grounds for the argument that residual interests in traditional lands are held in trust for prairie Indians by the Crown in right of Canada. Such interests may be considered to include

• reservations to the federal Crown in trust for a beneficiary or reservations of interests that are still under the administration of the federal Crown;

• interests restored through the operation of invalid treaties or the breach of treaty obligations;

• interests related to the failure of the treaties, the Rupert’s Land Order, or the NRTAs to deal exhaustively with all aspects of aboriginal title (for example, resource rights); and


110 \textit{Horseman}, supra footnote 97.
• interests reverting to Indians as a result of a breach of fiduciary obligations in respect of aboriginal or treaty rights resulting from the operation of the Rupert’s Land Order (1870), treaties, or the NRTAs (1930).

SUMMARY: THE SUPREME COURT’S POSITION ON ABORIGINAL AND TREATY RIGHTS

The following comments consolidate the direction taken by the Supreme Court of Canada over the last decade in resolving disputes over aboriginal and treaty rights:

1) Aboriginal and treaty rights are not absolute; they must be understood in an historical, policy, and legal context. Sparrow provides a three-fold test for the recognition and exercise of an aboriginal right.

   a) The right must be proven to exist; there is no revival of extinguished rights.

   b) Prima facie interference must be established. This test turns on determining unnecessary infringement or adverse restriction on the exercise of an aboriginal right.

   c) As no right is absolute, the Crown must satisfy the test for justification of the infringement. The limitation imposed must be consistent with the Crown’s fiduciary relationship with First Nations.

2) Gladstone, Van der Peet, and NTC Smokehouse, dealing with commercial aboriginal harvesting rights, provide a refinement to the first stage in the analysis formulated by Sparrow. The test for defining an aboriginal right turns on establishing that the right in question was integral to a distinctive culture before European contact. This test sets a very high standard of proof since the exercise of the right must define the culture of the aboriginal people in question. The high onus set by this test severely restricts the number of commercial aboriginal rights.

3) Delgamuukw, via Adams, asserts that aboriginal rights exist on a spectrum from land-based rights to less tangible rights such as cultural practices and language. The Supreme Court modified the test for aboriginal title to require the evidence of exclusive occupation at the time the Crown asserted sovereignty. This test is far easier to meet than the test for aboriginal rights since it requires less evidence to establish occupation at the time of sovereignty.

4) Since Guerin, the Supreme Court has adopted a sliding-scale model of the Crown’s fiduciary duty to First Nations, which turns on the degree of dependence that a First Nation has on the Crown. There is a distinction between the Crown’s relationship and its duty to First Nations. In the context of the relationship, First Nation interests are primary. In the context of the Crown’s duty to First Nations, priority is not necessarily given to First Nation interests when they are balanced against the interests of other Canadians. In the context of protecting aboriginal rights, the Crown’s fiduciary duty turns on the nature of the aboriginal right (where these interests fall on a scale of attachment to land) and
the severity of the infringement. In Delgamuukw, this fiduciary duty manifests itself in terms of the Crown’s consulting the First Nation, attempting to obtain First Nation consent to the use in question, and compensating the First Nation for the Crown’s activities.

5) Delgamuukw attempts to balance aboriginal title and consequent jurisdiction with the interests of non-aboriginals. Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal (as in Sparrow) and provincial (as in Côté) governments if the infringement is justified (for example, for the settlement of foreign populations or economic development). The entire land base cannot be frozen in anticipation of the settlement of land claims. Aboriginal rights, given fiduciary considerations, are balanced with other rights and policies.

6) The Marshall decision has created a means of dealing with treaty and aboriginal rights that extend beyond mere sustenance-based rights because they have an intrinsic commercial component involving trade for cash. Marshall has set the stage for implementing a constitutional right of First Nations to participate in the economic development of Canada by balancing the interests of First Nations and other Canadians.

7) Treaty rights are relatively certain, whereas aboriginal rights are inherently uncertain. Certainty, in this case, is defined as agreement between the Crown and First Nations regarding the recognition, implementation, and protection of First Nation rights. A distinction must therefore be made between the treatment of aboriginal rights and title and the treatment of treaty rights. Sparrow, Delgamuukw, and subsequent aboriginal rights cases focus on the tests for the recognition and exercise of aboriginal rights. Marshall and other treaty cases concentrate on how to interpret antiquated treaty provisions in a contemporary manner.

8) There are only two means of achieving certainty as to aboriginal and treaty rights: litigation and negotiation. The Supreme Court in Delgamuukw concludes with the direction that aboriginal rights, because of their complexity, should be negotiated by the interested parties—First Nation and the provincial and federal governments. In the absence of a treaty addressing aboriginal title and providing certainty concerning Indian rights in respect of traditional lands, case law has held that the Crown has underlying ownership of and jurisdiction over those lands.

9) The Supreme Court has applied the following analytical mechanisms in resolving disputes over aboriginal and treaty rights:

   a) a balancing equation, taken from the experience of Charter litigation, where aboriginal and non-aboriginal interests are weighed in a framework of legal and policy principles so as to determine to what extent a right can be exercised;

   b) a sliding-scale matrix whereby the Crown’s fiduciary duty to a First Nation is modulated so as to capture the intricacies of the interests of the First Nation in question;

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c) a political theory of how communal rights can be accommodated in a legal system based on individual rights; and

d) a pragmatic and evolving approach to addressing First Nation rights.

10) Case law relying on Horseman has held that the NRTA has merged and consolidated treaty hunting rights; that section 35 of the Constitution Act, 1982, has no effect on their application; and that provincial wildlife legislation that prohibits Indians from selling game is constitutional notwithstanding Treaty 6. According to the courts, the theory of merger and consolidation modifies treaty rights under the NRTA since they are not section 35 rights but constitutional rights, implying a quasi-Sparrow-Delgamuukw type of fiduciary duty. However, any subsisting Indian interests in traditional lands would be excluded from modification by the NRTA since these lands would not have been transferred to the province. As a consequence, the Crown would have Sparrow-Delgamuukw-type fiduciary obligations as to Indian rights attaching to such lands.

11) Delgamuukw’s wider definition of aboriginal title, reservations of interests in lands under the administration of the federal Crown, interests associated with the operation of invalid treaties, the Rupert’s Land Order, or the NRTAs, or with a breach of the Crown’s fiduciary obligations, all raise the question whether aboriginal title has been fully extinguished by the operation of the numbered treaties. If any of these factors are established, those interests considered not to have been extinguished are held in trust by Canada as section 91(24) lands under paragraph 1 of the NRTA.

THE FUTURE TREATMENT OF ABORIGINAL AND TREATY RIGHTS

The following topics will be of central importance in the future treatment of aboriginal and treaty rights.

Alternative Models of Certainty Without Extinguishment

Recognition, implementation, and protection of treaty rights, and the forbearance of the exercise of aboriginal rights not agreed to in the treaty replace the extinguishment or modification of aboriginal rights. Upon breach or the need for replacement rights, remedies could be provided by accessing dormant aboriginal rights outside the treaty context. This would be done by a process clause that renovates the treaty.

Management of Traditional Lands

New models of management will be developed whereby First Nations are involved in the management of their traditional lands so as to protect First Nation rights.

111 See the appendix to this paper.
to and use of those lands. Stewardship models regarding fish, wildlife, forestry, etc., will be developed. The role of First Nations will go beyond the management of an entitlement to harvest, extending to the enhancement and restoration of species and habitats.

New Intergovernmental Relationships

Economies of scale, planning, and administration require that new partnerships be formed among First Nation, local, regional, and provincial governments. First Nations are responsible for their relationship with other governments. The following subject areas are contemplated in intergovernmental agreements:

- infrastructure planning, development, and management;
- the delivery of programs or services;
- training and capacity building;
- land and resource planning and management;
- financial administration;
- planning;
- sharing of expertise; and
- dispute resolution mechanisms.

Tax Treatment

Specific tax treatment of First Nations must be formulated to better suit their needs than do the municipality and non-profit organization provisions now available to First Nations under the Income Tax Act.

Treaties and governments created under them are unique. Treaties and governments under them are expected to last in perpetuity. Hence, the tax treatment of First Nations should be accorded the same importance. It should be incorporated into the treaty, with mechanisms custom-made for treaty governments.

Self-Government Models

Jurisdiction is linked to the degree of democratic input by residents. For example, the more non-treaty residents participate in First Nation government, the greater jurisdiction the government will have. For instance, if a First Nation allows non-treaty residents the right to vote and hold office in its government, it will be able to tax those residents. A modern treaty should not replicate the errors of the Indian Act—for example, by isolating Indians. A government that serves only treaty beneficiaries replicates the problems.

Of course, the problem with giving non-treaty residents these rights is that the treaty government and rights could be watered down as a result. This problem can be avoided by providing mechanisms in the government model that protect treaty rights. For example, public government non-treaty politicians or voters may be excluded from decisions that will affect treaty rights. Their
involvement will be limited to public government matters, such as taxation and the provision of services to them.

One suggested government model is a treaty core government, which is a hybrid of a reserve and a public government. The First Nation government is the local (public) government for all residents on treaty settlement lands. That is, the First Nation government’s jurisdiction extends to all residents regardless of citizenship. However, the First Nation’s constitution would prohibit a non-citizen from voting on treaty matters. Only treaty beneficiaries could vote on such matters (harvesting rights, sale or lease of land, royalties, use of settlement moneys, etc.). Other residents could have the usual democratic input on matters of a public government nature.

**Public Finance Models**

Public finance models must be developed that

• complement the jurisdictions and responsibilities that the First Nation government assumes;
• promote the socioeconomic objectives of the First Nation; and
• assist in providing for all the expenditure needs of the First Nation.

When negotiating financing agreements, the parties should take the following into account:

• costs necessary to establish and operate the First Nation government and agreed-upon First Nation public institutions;
• efficiency and effectiveness in the provision of public programs and services;
• location and accessibility of First Nation lands;
• population and demographic characteristics of persons receiving agreed-upon public programs and services;
• other funding or support in respect of agreed-upon public programs or services provided to the First Nation;
• the level, type, and condition of agreed-upon public works and utilities within First Nation lands;
• major maintenance and replacement of assets;
• necessary training requirements for agreed-upon public programs and services;
• the desirability of reasonably stable, predictable, and flexible funding arrangements;
• the jurisdictions, authorities, and obligations of the First Nation government;
• emergencies; and
• escalators to determine annual increases to base funding, which shall take into account factors including, but not limited to, a young fast-growing population, migration back to the land base, inflation, catchup, and cost of living.
Economic Development

All future treaties will have as their “backbone” a sound economic development chapter (for example, equity participation in the MacKenzie pipeline for Northwest Territories treaties).

Sharing

The sharing of resource royalties and the management of resources are central to the implementation of the numbered and modern treaties. In the prairies, this requires that the relevant parties re-address Indian interests under the NRTAs. Review and revision can be accomplished in one of two ways—through negotiation or litigation.

The above developments will radically change the Crown-First Nation relationship and will radically change Canada.

APPENDIX: ALTERNATIVE CERTAINTY MODEL

1. Full and Final Settlement

1. The Treaty will constitute the means for achieving full and final settlement of all the aboriginal rights, including aboriginal title, in Canada of the First Nation.

2. First Nation Section 35 Rights

2. The Treaty will exhaustively address all the First Nations s. 35 rights by setting out the First Nation’s treaty rights, the implementation of those rights, the geographic extent of those rights and the limitations to those rights, to which the Parties will have agreed. The Treaty will also address how the First Nation will access all of its s. 35 rights not set out in the Treaty.

The author formulated this model for the In-SHUCK-ch First Nation in British Columbia. The general effect of Nisga’a’s certainty model is that the final agreement is a full and final settlement of aboriginal and treaty rights. The final agreement exhaustively sets out all the rights; aboriginal rights are modified, and Canada/British Columbia is released from any matters beyond what is agreed to in the treaty.

The Nisga’a principles should be balanced (tempered) by adding other principles that, in addition to referring to Nisga’a wording, address the Crown-First Nation fiduciary relationship; make it clear that the parties merely implement, and do not create, rights; establish that nothing in the treaty extinguishes aboriginal rights; and provide for a process to renovate or remedy the treaty.

Nisga’a is a “modification” model of certainty. The alternative model turns on recognition, implementation, and protection of rights. Central to this model of certainty is the revival of dormant (suspended) rights not initially recognized in the treaty when there is a fundamental or material breach of the treaty or when the subject matter of the treaty is destroyed and replacement rights are necessary. This feature goes beyond a dispute resolution/amendment mechanism and addresses non-extinguishment head-on (for example, in the case of rights not initially captured by tripartite agreement).
3. Certainty Principles

3.1 The Treaty shall recognize, implement and protect the First Nation treaty rights to lands and resources and authorities over lands and resources and persons resident on First Nation lands.

3.2 The First Nation treaty rights to lands and resources and authorities over lands and resources and persons resident on First Nation lands shall be recognized, implemented and protected by Canada and British Columbia in accordance with the terms of the Treaty.

3.3 Nothing in the Treaty shall be construed as extinguishing any of the First Nation’s rights to lands and resources and authorities over lands and resources and persons resident on First Nation lands.

3.4 All the First Nation powers and authorities negotiated under the Treaty shall be referred to in terms of inherent powers and authorities.

3.5 To achieve certainty the Parties shall set out in as much detail as possible, the lands and resources rights and the authorities of each of the Parties to the Treaty.

3.6 This Treaty is a treaty for the purposes of s. 35 of the Constitution Act, 1982.

4. Suspension of Claims Outside of the Treaty

4.1 Subject to 4.2, the First Nation provides certainty to Canada and British Columbia by agreeing to suspend all legal claims to and enforcement of all its aboriginal rights, aboriginal title and authorities within and outside of the First Nation’s territory for the recognition, implementation and protection of the rights and authorities found within the Treaty.

4.2 Notwithstanding 5 and 6 this Treaty may be subject to re-negotiation, in whole or in part, upon:

a) a fundamental breach of one of the terms of the Treaty;
   i) a fundamental breach will be found in the violation of the obligations of the Crown under the Treaty which destroys an object or purpose of the Treaty. Without limiting the generality of the foregoing, the Parties agree that a fundamental breach occurs in the case of any one of the following:
   A. refusal or failure of any Party to make scheduled payments as required in the Treaty or any agreement under the Treaty;
   B. treaty settlement lands, moneys or jurisdictions are detrimentally affected by the acts of Canada or British Columbia or by an event extrinsic to the acts of Canada or British Columbia;

113 "Suspension of Claims outside of the Treaty" replaces "Modification" in the Nisga’a model. The substance of the First Nation’s rights is not modified; however, the means of accessing such rights is modified by the process clause of the treaty.
C. taking action over the objections of the First Nation where the consent of the First Nation is required.

b) a subject matter (a right or authority) of the Treaty ceasing to be.

i) Without limiting the generality of the foregoing, the Parties agree that a subject matter of the Treaty shall cease to be in the case of any one of the following:

A. the subject matter of a harvesting right cannot be harvested because of the absence of a species or commodity;

B. an authority of the First Nation cannot be asserted because of the absence of resources or capital;

C. settlement land ceases to be of use as a result of permanent flooding, erosion or other disaster;

D. replacement rights are required.

c) the Treaty ceases to be operational.

i) Without limiting the generality of the foregoing, the Parties agree that the Treaty ceases to be operational in the case of any one of the following:

A. a subject matter not addressed in the Treaty arises that requires that the Treaty be re-negotiated so as to provide for the efficient and effective operation of the Treaty;

B. resources in the form of transfer payments are not made available to the First Nation;

C. the Treaty cannot address matters that the Treaty relies on as the Parties have failed to address relevant subject matters of the Treaty or changes affecting the Treaty.

4.3 Process

4.3.1 Notwithstanding 5 and 6 the Parties agree that the Treaty may be subject to re-negotiation, in whole or in part, in order to remedy matters or events that arise in 4.2.

4.3.2 Upon notice to all the Parties by one of the Parties and upon consensus of the Parties whose rights or interests are affected the Parties will commence negotiations as per 4.3.3.

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114 A process clause is necessary because the implementation plan and dispute resolution and amendment chapters will not exhaustively cover the need to update the treaty to mirror remedial mechanisms/actions and events that are impossible to predict at the time the agreement was negotiated. The process clause provides a spectrum of remedies that corresponds to the degree of breach (for example, from rescission to specific performance). Substantial renovation will be necessary when there is a fundamental breach or force majeure that requires that replacement rights be provided; for example, if a treaty right disappears, a subject matter of
4.3.3 The Parties will negotiate the terms of the treaty in accordance with the Framework Agreement found in Appendix X. Without limiting the generality of the foregoing, the Parties agree that the Framework Agreement will address the following: time frames, costs, procedures, interim measures, and common law and equitable remedies.

4.3.4 For greater certainty this Process Clause may provide the First Nation with access to rights which may not have been recognized in the initial negotiation of the Treaty.

5. Release

5.1 Subject to ss. 4.2 and 4.3 if, despite the Treaty and the settlement legislation, the First Nation has an aboriginal right, including aboriginal title, in Canada, that is other than, or different in attributes or geographical extent from, the First Nation’s section 35 rights as set out in the Treaty, the First Nation will release, as of the Effective Date, that aboriginal right to Canada to the extent that the aboriginal right is other than, or different in attributes or geographical extent from, the First Nation’s section 35 rights as set out in the Treaty.

5.2 Subject to ss. 4.2 and 4.3 the First Nation will release Canada, British Columbia and all other persons from all claims, demands, actions or proceedings, of whatever kind, and whether known or unknown, that the First Nation ever had, now has or may have in the future, relating to or arising from any act or omission, before the Effective Date that may have affected or infringed any aboriginal rights, including aboriginal title, in Canada of the First Nation.

6. Indemnities

6.1 Subject to ss. 4.2 and 4.3 the First Nation will indemnify and save harmless Canada or British Columbia, as the case may be, from any:

a. costs, excluding fees and disbursements of solicitors and other professional advisors;

b. damages;

c. losses; or

d. liabilities

that Canada or British Columbia, respectively, may suffer or incur in connection with, or as a result of, any claims, demands, actions or proceedings relating to the treaty is effectively erased and the parties must renegotiate the relevant part of the treaty. The primary criterion for the process clause is certainty, which requires an exhaustive statement as to the details of when, what, where, and how to update the treaty. This alternative model of certainty without extinguishment presupposes a realistic concept of certainty that views treaties (like aboriginal rights) as not frozen in time, but still predictable enough to provide rules for the regulation of change.
to, or arising out of, any act or omission, before the Effective Date that may have affected or infringed any aboriginal rights, including aboriginal title, in Canada of the First Nation.

6.2 Subject to ss. 4.2 and 4.3 the First Nation will indemnify and save harmless Canada or British Columbia, as the case may be, from any:

a. costs, excluding fees and disbursements of solicitors and other professional advisors;

b. damages;

c. losses; or

d. liabilities

that Canada or British Columbia, respectively, may suffer or incur in connection with or as a result of any claims, demands, actions or proceedings relating to, or arising out of, the existence of an aboriginal right, including aboriginal title, in Canada of the First Nation, that is other than, or different in attributes or geographical extent from, the First Nation’s section 35 rights as set out in the Treaty.

6.3 Subject to ss. 4.2 and 4.3 a Party which is the subject of a claim, demand, action or proceeding that may give rise to a requirement to provide payment to that Party pursuant to an indemnity under the Treaty:

a. will vigorously defend the claim, demand, action or proceeding; and

b. will not settle or compromise the claim, demand, action or proceeding except with the consent of the Party which has granted that indemnity, which consent will not be arbitrarily or unreasonably withheld or delayed.

6.4 The First Nation will not be liable for any act or omission of Canada or British Columbia or any person authorized by Canada or British Columbia regarding any matter that was the responsibility of Canada or British Columbia before the Effective Date or remains the responsibility of Canada or British Columbia on or after the Effective Date. Canada or British Columbia will indemnify the First Nation for any loss arising from any act or omission by Canada or British Columbia or any person or entity acting on behalf of Canada or British Columbia, in relation to any matter that was the responsibility of Canada or British Columbia before the Effective Date or remains the responsibility of Canada or British Columbia on or after the Effective Date.

6.5 Canada or British Columbia will not be liable for any act or omission that become, according to the terms of the Treaty, the responsibility of the First Nation or any person authorized by the First Nation on or after the Effective Date. The First Nation will indemnify Canada or British Columbia for any loss arising from an act of omission by the First Nation, or any person or entity acting on behalf of the First Nation that become, according to the terms of the Treaty, the responsibility of the First Nation on or after the Effective Date.
7. **Fiduciary Relationship**

7.1 The terms of the Treaty pertaining to rights shall be interpreted in terms of the continuation of the Crown/First Nation fiduciary relationship.

7.2 The Crown’s fiduciary duty to the First Nation shall include a duty to maintain the First Nation Government, jurisdiction, lands, and resources and financial transfer payments in accordance with the terms of the Treaty.