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The Allocation of Burdens in Litigation Between First Nations and the Crown

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The Allocation of Burdens in Litigation Between
First Nations and the Crown

Michael Posluns

A THESIS SUBMITTED TO
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"This thesis is about two inter-related matters: first, the allocation of burdens of proof in litigation between First Nations and the Crown; and, secondly, the reaction or response of the Crown to the Court's allocations of burdens, as evidenced in the subsequent cases. Since "burdens of proof" refers to matters of fact and evidence, I refer simply to "burdens", emphasizing that, I mean *all the burdens allocated by a Court and which the Court expects the parties to discharge in order for their case to succeed*. My initial interest was in the response of the Crown to the allocation of burdens by the Court and related admonitions. In pursuing this matter it became evident that I needed to establish what allocations the Court had set out and what admonitions it had made as regards previous arguments of the Crown.

There are two sets of viewpoints that I examine in this paper: The first is the jurisprudential view as to the allocation of burdens in the Aboriginal and treaty rights cases that I discuss here. The second is the more political and policy-based view of the Crown, federal or provincial, as to its burdens of proof and related burdens, such as the duty to consult and to accommodate, previously set out by the Court. This divergence between the Court's view and the Crown's and the recurring indications that the Crown does not intend to accept the Court's view is my primary interest. I will, at times, refer to the Crown's attitude, exemplified by this divergence as "recalcitrant" and its behaviour as "recidivism". It is this divergence between the Court's interpretations and the Crown's actions and arguments which is my primary interest throughout this discussion.

As a lens through which to examine this divergence I review two bodies of literature on theoretical constructs useful in understanding how the Government seeks to shift certain proof burdens onto First Nations parties. The first is the idea of "purposive interpretation" as it is discussed by Chief Justice Dickson and Justice La Forest in *Sparrow*, and by other leading jurists as well as academic writers who consider this kind of interpretation as one most appropriate for understanding constitutionally entrenched rights. The second is the idea of the "empty box" versus "full box theory" as held by advocates for First Nations and other Aboriginal communities, among others.

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I avoided a major illness for just long enough to be enriched by Professor Dayna Scott's thoughts about the honour of the crown. Unfortunately, I was unable to include this significant new line of thought in the final draft of this thesis. I leave this work to another time in the future.

The Allocation of Burdens in Litigation between First Nations and the Crown

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I. Introduction and Overview

“We cannot recount with much pride the treatment accorded to the native people of this country.”

MacDonald J.,
*Pasco v. Canadian National Railway Co.*¹

(i) Introduction

This thesis is about two inter-related matters: first, the allocation of burdens of proof in litigation between First Nations² and the Crown; and, secondly, the reaction or response of the Crown to the Court’s allocations of burdens, as evidenced in the later cases.

Since the concept of “burdens of proof” has been a matter of both confusion and controversy, I propose to follow a leading Canadian authority, Sopinka, Lederman & Bryant, *Evidence Law in Canada*³, in their choice of terms and assignment of meanings. Since “burdens

¹ MacDonald J. in *Pasco v. Canadian National Railway Co.* [1986] 1 C.N.L.R. 35 (B.C.S.C.) at 37, cited by Dickson C.J. and La Forest J. in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103. References are to page numbers. The Court began to number the paragraphs of reasons for judgment between *R. v. Van der Peet*, [1996] 2 S.C.R. 507 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. Early in my writing HeinOnline published a complete collection of Supreme Court Reports up until 2010 in a format that appears to be a photocopy of the printed Reports. All page numbers cited are taken from the S.C.R. as reproduced and published by Hein Online. I use the paragraph numbering in each case in which it is available (generally, after 1997), and, in those cases I draw on the LEXUM and CanLII websites.

² Some friends and colleagues take exception to the use of the word “nation” by Indigenous communities. I don’t share that discomfort. King George III, in the Royal Proclamation described these peoples by the term “nation” as did John Marshall, the Chief Justice of the U.S. Supreme Court in the 1820s-1830s. The Supreme Court of Canada has extended the courtesy of using the names chosen by First Nations parties in styles of cause and in judgments. I find that I am in very good company on this point.

³ Sopinka, Lederman & Bryant (& Fuerst), *Evidence Law in Canada*, 3rd edn. 2009 (Toronto: LexisNexis Canada Inc.).

of proof” refers to matters of fact and evidence, I have thought it better to refer simply to “burdens”, emphasizing that, I mean *all the burdens allocated by a Court and which the Court expects the parties to discharge in order for their case to succeed.*⁴ My initial interest was in the response of the Crown to the allocation of burdens by the Court and related admonitions. In pursuing this matter it became evident that I needed to establish what allocations the Court had set out and what admonitions it had made as regards previous arguments of the Crown. Hence, the dual and inter-related subject matter. This is most evident in my review of cases, in Part III, in which, while I examine the Court’s main findings and decisions, I focus largely on (1) what the Court has said related to allocation of burdens and (2) the Court’s admonitions of the Crown as regards the kinds of arguments it has made.

A look at the list of cases in Part III (set out in the Table of Contents) will suggest that some of this litigation is regulatory or quasi-criminal, hereinafter “criminal” as in Don Stuart’s usage⁵, usually cases arising from prosecutions of First Nations people for harvesting practices alleged, by the Crown, to be contrary to law. Other cases in which the same questions of proof

⁴ I had originally entitled this thesis *Allocation of burdens of proof...* Since “burdens of proof” refers to matters of fact and evidence, I have thought it preferable to entitle this work simply *Allocations of burdens*. If there were any doubt that I am referring to burdens allocated by courts of law, I should refer to these burdens as “legal burdens”. However, since I am about to quote from the leading text on evidence law in Canada, in which “legal burdens” has a specialized meaning, I think simple “burdens” to be preferable. This allows me to reserve “legal burden” for the meaning given to it by Sopinka et al.

⁵ Don Stuart, *Charter Justice in Canadian Criminal Law* (Toronto: Carswell, 1991) who says he will use “criminal” in the widest possible sense. In Ontario, matters under s. 48(4), “Onus”, of the *Provincial Offences Act*, R.S.O. 1990, ch. P.33, require “proof beyond a reasonable doubt”, the criminal standard of proof, as it is commonly called. In the discussion of these cases I cite the Ontario *Provincial Offences Act* provision requiring a criminal standard of proof. I avoid the term “regulatory” because I’m not sure that all such charges are made pursuant to regulation, as distinct from provisions directly in statutes. At any rate, my interest is how the legal burdens attached to such s. 35(1) defences and, particularly, the Court’s suggestion that the s. 35(1) issues be heard prior to and apart from any prosecutorial proceeding, a suggestion that, as far as I am aware, Governments have yet to take up.

burdens arise are suits brought by a First Nation seeking recognition of a right or of Aboriginal title, or to oblige a government party to fulfill a duty, such as the duty to consult and accommodate, already elaborated by the Court in previous jurisprudence.

There are two sets of viewpoints that I want to examine in this paper: The first is the jurisprudential view as to the allocation of burdens in the Aboriginal and treaty rights cases that I discuss here. The second is the more political and policy-based view of the Crown, federal or provincial, as to its burdens of proof and related burdens, such as the duty to consult and to accommodate, previously set out by the Court. This divergence between the Court's view and the Crown's⁶ and the recurring indications that the Crown does not intend to accept the Court's view is my primary interest. I will, at times, refer to the Crown's attitude, exemplified by this divergence as "recalcitrant" and its behaviour as "recidivism". It is this divergence between the Court's interpretations and the Crown's actions and arguments which is my primary interest throughout this discussion.

As a lens through which to examine this divergence I review two bodies of literature on theoretical constructs useful in understanding how the Government seeks to shift certain proof burdens onto First Nations parties. The first is the idea of "purposive interpretation" as it is discussed by Chief Justice Dickson and Justice La Forest in *Sparrow*⁷, and by other leading

⁶ I will generally use "Governments" in the plural. I do that simply because the arguments I describe and the corresponding attitudes appear to be common ground shared by the federal Crown and several provincial Crowns. Custom suggests that I continue to use Crown in the singular, even when I mean both provincial and federal representatives of the Crown.

⁷ *Sparrow*, *supra*, fn. 1. *Sparrow* is frequently attributed to Chief Justice Dickson alone, as in the S.C.R. header. The text, however, indicates the co-authorship of Dickson C.J. and La Forest J.

jurists as well as academic writers who consider this kind of interpretation as one most appropriate for understanding constitutionally entrenched rights. I think purposive interpretation is a useful key to understanding Governments' recalcitrance and their corresponding disregard for the existing Aboriginal and treaty rights identified by the Court. Throughout the line of section 35 cases, from *Sparrow* down, the Court has said that "[s]ection 35(1) is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights."⁸ In his early *Charter* decisions, Dickson C.J. had similarly called for purposive interpretation as central to the interpretation of rights and of the Constitution more generally. He pointed to decisions long before the *Charter* in which this purposive interpretation, albeit sometimes under a different name, was brought to bear on Constitutional interpretation, of which the "Persons case" with Lord Sankey's discussion of the Constitution as "a living tree"⁹ is the most noteworthy. Purposive interpretation and the cases and texts discussing it are important to my thesis regarding the Court's allocations and admonitions and the Governments' avoidance of the kind of interpretation that the Court believes to be essential to section 35, to the interpretation of rights, and to the Constitution more generally.

The second lens I employ is a social-political construct much discussed among activists, academics and some legal scholars, known as the "open box" versus "closed box" theory of interpretation. Box theory can, I will suggest, be seen as having a close relationship with

⁸ *Sparrow, ibid.*, 1077e. "Generous" and "liberal" are not the whole of purposive interpretation but they are essential ingredients.

⁹ *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 116; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at 146; *Edwards v. A.G. of Canada*, [1930] A.C. 124, cited in *Hunter* at 155.

purposive interpretation in the context of disagreements on the meaning of section 35(1)¹⁰. The value of these ideas for this thesis is that they help to understand and explain Governments' recalcitrance as regards the application of section 35(1) in the face of a growing line of cases in which the Supreme Court of Canada has, in interpreting section 35(1) of the *Constitution Act, 1982*, set out the burdens and standards for establishing an existing Aboriginal or treaty right of Aboriginal peoples of Canada.¹¹ Section 35(1) itself provides little guidance. It specifies only that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Purposive interpretation is a theory of interpretation, a methodological theory that the Court has said it favours in section 35 issues, in *Charter* issues and, by and large, in constitutional issues. Box theory is a theory of section 35 rights held by advocates for First Nations and other Aboriginal communities, among others.

How do these two theories converge in this thesis? First, I will argue that, while the Court interprets rights issues by purposive interpretation, the Crown assiduously avoids purposive interpretation in its arguments on these issues, and thereby puts itself at odds with the Court. Secondly, full box theory argues that the bundle of Aboriginal and treaty rights, as

¹⁰ When I am discussing both Aboriginal and treaty rights I often refer to them jointly as "s.35 rights". This is even more pertinent when I note that many writers list "Aboriginal title" as a third category rather than as a particular kind of Aboriginal rights, e.g., Mark Stevenson, in "Section 35 and Aboriginal Rights: Promises Must be Kept", in *Box of Treasures or Empty Box? Twenty Years of Section 35*, ed., Ardith Walkem & Halie Bruce (Penticton: Theytus Books Ltd., 2003).

¹¹ Paraphrasing s. 35(1), Part II of Constitution Act 1982, (Schedule B to the *Canada Act, 1982*, (U.K.) 1982, c. 11. See, Peter W. Hogg, *Canada Act, 1982 Annotated* (Toronto: Carswell, 1982) at 84. (Hereinafter *Constitution Act, 1982*.)

Dickson J. said of the Aboriginal right at issue in *Guerin*¹², have their origin in the pre-existing societies before any executive or legislative act of Britain or Canada. The Court, in *Guerin* and subsequently, recognized the “pre-existing” and *sui generis* nature of Aboriginal rights while the Crown, in effect, continues to deny the pre-existence of these rights and holds that the box holds only those rights assigned to it by ministers or by Parliament. Purposive interpretation serves both to explain the decisions of the Court and to illustrate the gap between the Court and the Crown. Likewise, box theory looks at the practical contemporary consequences of pre-existing Aboriginal rights continuing to govern the contents of section 35(1) which the Court largely accepts, but which the Crown continues to deny.

(ii) A Note on Methods

“The words ‘treaty’ and ‘nation’ are words of our own language, selected in our own diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense.”

**John Marshall, C.J., U.S. Supreme Court,
Worcester v. Georgia, 1832¹³**

This literature review will proceed in three parts: first, a meditation on the purpose of constitutionally entrenched rights in general; and, secondly, a discussion of the two bodies of theory: (1) purposive interpretation and (2) box theory. The most important discussions of purposive interpretation, for this thesis, are by distinguished jurists, particularly Chief Justice Dickson of the Supreme Court of Canada and President Aharon Barak, former head of the

¹² *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

¹³ *Worcester v. Georgia* (1832), 31 US 515, 8 L. Ed. 483, 18 S. Ct. 620.

Supreme Court of Israel, and author of *Purposive Interpretation in Law*¹⁴. Dickson C.J. and certain other Canadian and English jurists before him discussed purposive interpretation in earlier judgments. From a Canadian perspective two of the most notable Privy Council decisions in which the key ingredients of purposive interpretation, though not the term, were used are *St. Catherine's Milling and Lumber*¹⁵ and "The Persons Case"¹⁶. For the notions of purposive interpretation held by Chief Justice Dickson and other jurists who explored this idea, I necessarily review those particular discussions of the decisions in which these explorations occur.¹⁷ I begin the review of purposive interpretation with works of Chief Justice Dickson because of his central role in developing both *Charter* and section 35 interpretations of the *Constitution Act, 1982*; I then consider several other contributions to the discussion of purposive interpretation.¹⁸

¹⁴ Barak, Aharon, *Purposive interpretation in law*, translated from the Hebrew by Sari Bashi, (Princeton : Princeton University Press, 2005).

¹⁵ *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46 (JCPC) (also reported: 58 L.J.P.C. 54, 60 L.T. 197, 5 T.L.R. 125, 4 Cart. B.N.A. 107). (Differences in the spelling of "Catherines" occur in the originals and are noted by the JCPC.) "Catherines" is used in the plural in each of the Courts, and in the name of the city. See, also, discussion in the text at fns. 377-78, *infra*.

¹⁶ *Edwards v. A.G. of Canada*, ("Person's Case), *supra*, fn.9.
Link: http://www.bailii.org/uk/cases/UKPC/1929/1929_86.pdf.

¹⁷ I will keep this review of their judgments separate from those in Part III in which I examine the same judgments, amongst others, for their role in the development of Aboriginal and treaty rights law, and, particularly the allocation of proof burdens. I will begin the review of purposive interpretation with works of Chief Justice Dickson because of his central role in interpreting the *Charter* and s.35 of the *Constitution Act, 1982*; I will then focus my review of other writers to their contributions beyond the discussions of purposive interpretation by Dickson C.J.

¹⁸ Aharon Barak, *supra*, fn.14; Ruth Sullivan's *Statutory Interpretation*, 2nd edn. (Irwin Law: Toronto, 2007); and Francis Bennion, *Bennion on Statute Law*, 3rd edn. (London Longman) 1990.

Box theory is an idea that was born in a political forum. I have had the privilege of following box theory discussions in these political fora – including First Ministers’ Conferences (FMC ‘83) and Chiefs in Assembly¹⁹ – where the idea was introduced. Occasionally, I refer to discussions in which I took part. These are a part of the oral history of box theory which enhance my other sources.²⁰ I have now accumulated a considerable list of articles and books on box theory. The oral and written sources all agree on the meaning and usage of box theory.

Unless otherwise indicated, “allocation of proof burdens” in this thesis includes both “legal burdens” and “evidential burdens”. To avoid confusion, in this thesis, I follow the terms preferred by Sopinka, Lederman & Bryant in *Evidence Law in Canada*²¹: “legal burdens” and “evidential burdens”. In Chapter 3, “Evidential Burden and Burden of Proof”, Sopinka et al. say that

“the term ‘burden of proof’ is used to describe two distinct concepts.... In its first sense, the term refers to *the obligation imposed on a party to prove or disprove a fact or issue*. In the second sense, it refers to *a party’s obligation to adduce evidence satisfactorily to the judge, in order to raise an issue*.”

Various labels have been used to describe the burden of proof *in its first sense*, including the legal, ultimate or fixed burden, the persuasive burden (or the risk of non-persuasion) and the burden on the pleadings. ... In this regard [the first sense described above], the

¹⁹ There is one cross-Canada organization with the name “Assembly of First Nations” (and several regional organizations also named “Assemblies of First Nations”). Its semi-annual meetings of all the chiefs in Canada, which is the legislative branch of the AFN, could also be called Assemblies of First Nations, but, in fact, have become generally known as “the chiefs in assemblies”.

²⁰ These were all public discussions or assembly proceedings. There is no question of any breach of confidentiality or of disclosing something previously private.

²¹ *The Law of Evidence in Canada*, *supra*, at fn. 3, ch. 3, “Evidential Burden and Burden of Proof”. Granted that some sources regard “evidential burden” and “burden of persuasion” as competing concepts, Sopinka et al. appear to treat them as more alike than distinguishable.

term “*legal burden*”, a term apparently initiated by Lord Denning, is most frequently used to describe the first kind of burden of proof.

To differentiate between the two senses ... the other burden may be called the “evidential burden.”²² [emphases added.]

I will simply use “burdens” when there is no need to distinguish between the various types of burden.

(iii) Burdens in Litigation between First Nations and the Crown

“We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. ... The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament’s ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat Aboriginal peoples in a way ensuring that their rights are taken seriously.”²³

**Dickson C.J. and La Forest J.
in *R. v. Sparrow*²⁴**

A suit between a First Nation and the Crown is not a matter of private law; it is, in the words of Dickson J. (as he then was), *sui generis*²⁵ – a unique category of law, and, so far as it is

²² Sopinka et al, *supra*, fn. 3, at 85-86.

²³ The burden on the Crown is, as Dickson C.J. says, a justificatory burden, a kind of “legal burden”, as defined by Sopinka et al. that arises primarily within rights litigation. Although it is different from a burden to prove infringement of a right, if the Crown succeeds in justifying an infringement then the right, although acknowledged, is also curtailed. What is being established is the Crown’s right to infringe.

²⁴ *Supra*, fn.1 at 1.

²⁵ *Guerin v. The Queen*, *supra*, fn. 12 at 336, 382 and 385. Some distinguished scholars of private law have been confused by Dickson J.’s use of terminology from their field to discuss a matter that is both public law and private law. A careful reading, however, shows that Dickson J. went to some lengths to establish that he was borrowing terms from the field of torts for use in a field of public law that is “unique”. In elaborating the term “*sui generis*” (at 385) Dickson J. says, “It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a

between a First Nation and a Government, it is much closer to public rather than to private law.²⁶ The point of my analysis of the cases discussed below is that, although it has long been taken for granted, perhaps since the earliest efforts of First Nations leaders to have discussions about their “claims,” that the burden of proof, in both senses, lies entirely on the First Nation claimants, the Court no longer regards this as an unqualified truth. Correspondingly it has also been taken for granted that there is little or no burden on the Crown to refute the facts and their legal significance. At times, Canada has offered to send a First Nations claim for adjudication on condition that the First Nation party accept the outcome in advance.²⁷ The decisions discussed here make it clear that the burden of proving an Aboriginal or treaty right and of justifying an infringement of such a right must be more equitably and fairly distributed under section 35(1). The Court no longer accepts the position of the Judicial Committee of the Privy Council that “[t]he original Aboriginal inhabitants who had been living on the land from time immemorial were found to have no real property interest in the land at all.”²⁸

fiduciary relationship. At p.382, Dickson J. uses both “unique” and “*sui generis*” to describe the special fiduciary relationship between the Crown and First Nations.

²⁶ *Fontaine v. Canada (AG)*, [2014] OR (3d) 263 (Ont. S. Ct, per Goudge J.A. *ad hoc*); 2013 ONSC 684 (CanLII). The Court held that the settlement agreement providing for the Truth & Reconciliation Commission should not be interpreted like a commercial agreement. Affidavits that provide context are admissible, and archival material must be disclosed.

²⁷ *Royal Commission on Aboriginal Peoples (RCAP)*. See, in particular, claims of the Interior Tribes of B.C. and of the Six Nations at Ohsweken, 1923-1927.

²⁸ *Report of the Royal Commission on Aboriginal Peoples on CD-ROM*. Record 1219/29351, “PART ONE, The Relationship in Historical Perspective, Stage Four: Negotiation and Renewal, 2. The Role of the Courts.” The statement clearly refers to Lord Watson’s characterization of Indigenous land rights in *St Catherine’s Milling*, *supra*, fn. 15. The CD-ROM of the *RCAP Report* numbers the paragraphs and sub-titles continuously so that a reader can search for that number. There is also a complex of headings and sub-headings that are common to the CD-ROM and the hard copy.

Historically, proof burdens in matters between First Nations and the Crown were very much one-sided matters.²⁹ This imbalance began to shift even before the *Constitution Act, 1982* with *Calder*³⁰ and particularly with *Guerin*³¹. However, several areas remain seriously unbalanced. Imposing the burden of proof regarding Aboriginal title on First Nations regarding land that they presently occupy is seriously out-of-keeping with ordinary standards.³² Likewise, the effort “to reconcile the common law and Aboriginal perspectives”³³, notwithstanding its frequently being urged, continues to favour the system with which Canadian judges are more familiar.³⁴

One may well make the case (particularly in regards to specific claims) that much of the burden properly belongs on the Government. Specific claims arise from allegations of non-fulfilment of treaty promises and since the Crown owes a fiduciary duty to First Nations, particularly as regards treaty provisions or other specific undertakings, some part of the burden of proof needs to be placed on the fiduciary, if only that the fiduciary submit his (or her) records to the would-be beneficiary and, when asked to do so, to the Court. Under these circumstances,

²⁹ “Indians” were prohibited from owning property off-reserve; hence, title deeds were not helpful. “Squatter’s rights” or proof of long term occupancy was not accepted unless, as in *Delgamuukw*, *supra*, fn.1, occupancy can be traced back before British assertion (or exercise) of sovereignty.

³⁰ *Calder v. A.G. (B.C.)*, [1973] S.C.R. 313; (also reported: (1973), 34 D.L.R. (3d) 145; [1973] 4 W.W.R. 1); Canadian Native Law Cases (CNLC) Vol. 07, 091.

³¹ *Guerin*, *supra*, fn. 12.

³² Kent McNeil, “Onus of Proof of Aboriginal Title” (1999), 37 *Osgoode Hall L.J.* 775.

³³ *Van der Peet*, *supra*, fn.1 at paras. 11 & 14.

³⁴ Peter Hutchins, et al., “When Do Fiduciary Obligations to Aboriginal People Arise?” (1995), 59 *Sask. L. Rev.* 97.

although the plaintiff would normally be expected to make out the case for a breach of fiduciary duty, there would also be an obligation, on the fiduciary, to provide an accounting. The fiduciary duty arises from the relationship itself rather than from the law of trusts, but its impact is the same. As Dickson J. held in *Guerin*,

“The obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty, it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.”³⁵

The effect of a fiduciary duty was described, by Sopinka and McLachlin JJ., dissenting on other grounds, in *Hodgkinson v. Simms* as follows:

“In order to protect the interests of the beneficiary, the express trustee is held to a stringent standard; the trustee is under a duty to act in a completely selfless manner for the sole benefit of the trust and its beneficiaries.”³⁶

One such “stringent standard” is the requirement of the trustee to maintain thorough written records,³⁷ “strict accounting”³⁸, to be disclosed to the beneficiary upon demand.³⁹ One

³⁵ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

³⁶ *Ibid.* See, also, Law Commission of Canada and Association of Iroquois and Allied Indians, *In Whom We Trust: a forum on fiduciary relationships* (Irwin Law: Toronto, 2001) at 1. [Hereinafter “*Fiduciary Forum*”].

³⁷ In the context of the litigation under examination here – where the admissibility of oral history and oral tradition have been continuing issues -- I do not think “written record” is redundant.

³⁸ “Trust”, *Oxford Companion to Law*, (Clarendon Press: Oxford, 1980) (Hereinafter *Ox.Comp.*) at 1241.

³⁹ The keeping of thorough written records might readily be seen to be to the advantage of both parties. Such records fulfill an obligation to the beneficiaries while also serving as evidence of the care and thoroughness of the trustee or fiduciary. The lack of competent records runs throughout the history of the Crown’s fiduciary relationship to First Nations. (See Nahwegahbow, Posluns *et al.* *The First Nations and the Crown: A Study of Trust Relationships* for the Committee on Indian Self-Government (Ottawa: House of Commons, 1983) (“*Trust Study*”). A lack of good record keeping in regard to matters within its

consequence of an expectation of proper written records is that, although the burden of proof rests substantially with the claimant, there is also a burden on the fiduciary to demonstrate, through the records, that he or she acted according to the stringent standards described in *Hodgkinson v. Simms*.⁴⁰

Several of the numbered treaties promised a certain amount of land per family of four. The onus for demonstrating that the quantum of land promised was, in fact, provided should not lie with the First Nation "claimant" but with the Crown who claims to have delivered or provided the promised acreage. The refusal to provide records, as was found to be the case in *Guerin*, served to support Wilson J.'s finding of "equitable fraud".⁴¹

Guerin, the first major case dealing with Aboriginal rights after 1982, does not refer to section 35(1) but the Supreme Court's decision appears to have been heavily influenced by the

fiduciary obligations remains a feature of DIAND (Dept. of Indian Affairs and Northern Development, Government of Canada) operations. (See discussion of "protocols", *infra* at fn. 40.) The failure to keep proper records of land transactions, and to make the records available to the ostensible beneficiaries gave rise, in *Guerin* to the characterization of the conduct of the implicated Indian Affairs officials as "equitable fraud". (*Guerin, supra* fn 12 at 356a.)

⁴⁰ The requirement for written records on the part of a fiduciary runs through the duties not only of the senior professions, e.g. law and medicine but also the captain, senior officers and helmspersons on ships (Richard Snow, *A Measureless Peril*, "Set the Watch" (Scribner: New York, 2010) provides a vivid and personal account of the duties of an officer of the watch in the U.S. Navy in WWII) and truck drivers operating tractor-trailer rigs. (Section 7, *Transportation of Goods Regulations*, SOR/86-1064.) Anything less would fail to meet the high standard described in *Hodgkinson v. Simm, supra* at fn.35. Physicians and naval officers are each required to follow established protocols in both procedures and record keeping (Ontario College of Physicians and Surgeons at <http://www.cpso.on.ca/search/?searchtext=protocols>). In her 2005 audit of Indian Affairs, the Auditor General (OAG) recommended that DIAND develop protocols for addressing obligations acknowledged under the Treaty Land Entitlement. In a follow-up audit in 2009 the OAG "found that neither office had a protocol for file management." *2009 Status Report of the Auditor General of Canada*, Chapter 4, Treaty Land Entitlement Obligations, para 4.46 at 15. (<http://www.cpso.on.ca/search/?searchtext=protocols>).

⁴¹ *Guerin, supra*, fn. 12 at 337.

constitutional recognition and affirmation of existing Aboriginal rights. Chief Justice Dickson and Justice La Forest begin their reasons by speaking of the “promise” of section 35(1).⁴² Their reasons for judgment, concurred in by the whole Court, adopts the reasoning regarding proof burdens in a rights context established earlier as regards the *Canadian Charter of Rights and Freedoms*⁴³.

(iv) A Note on “The Honour of the Crown”

There is one other crucial constitutional point that I need to introduce before proceeding to my explorations of purposive interpretation and box theory. The Court has repeatedly made reference to “the honour of the Crown.” This legal principle needs to be discussed briefly before I proceed to a more in-depth examination of purposive interpretation and box theory. I have been asked whether, perhaps, Crown counsel “aren’t simply doing what lawyers do” in vigorously challenging Aboriginal rights. At the risk of simplification, I would respectfully respond in the negative.⁴⁴

⁴² *Sparrow*, *supra*, fn. 1 at 1082-3.

⁴³ *Charter of Rights & Freedoms*, Part I, *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11.

⁴⁴ In addition to the “honour of the Crown” argument I set out here, there is also a significant legal literature that argues that government lawyers have a different set of obligations than private lawyers. Their primary duty, according to this literature, is to serve the public interest, so that not all tactics or stratagems appropriate to a private lawyer are appropriate to a government lawyer. Allan C. Hutchinson, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers”, *German Law Journal*, Special Issue, Vol. 10, No. 07, at 981-1000. John Ll. J. Edwards was among the most prolific writers on this question; see, *The Attorney-General, Politics and the Public Interest*, London: Sweet & Maxwell, 1984.

The Court has repeatedly stressed the importance of “the honour of the Crown” to the point that I would submit that it subsumes the duty of professional conduct⁴⁵ of Crown counsel in matters regarding Aboriginal or treaty rights.⁴⁶ What the Court means by “the honour of the Crown” can be gleaned from the terms with which successive judges have surrounded the phrase. In *Sparrow*, the Court affirmed two principles for interpreting Aboriginal legal issues, which it had recognized even before the Court began to interpret section 35.⁴⁷ First, the Court stated that “... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.” The Court continued:

“The second principle was enunciated by the late Associate Chief Justice MacKinnon in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:

‘The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned.’ ”⁴⁸

⁴⁵ *Rules of Professional Conduct*, (Toronto: Law Society of Upper Canada, “Current to Jan. 2013”. I have also considered the Model Rules of Professional Conduct of the American Bar Association and *The Lawyer’s Code of Professional Responsibility* (Cornell Univ. LS: Ithaca, NY).

⁴⁶ Some of these cases pre-date the *Constitution Act, 1982*. More important, in *Guerin*, the Court characterized the Aboriginal title at issue as follows: “Their interest in the land is a pre-existing right not created by the Royal Proclamation, by s.18(1) of the *Indian Act* or by any other executive order or legislative provision.” Quoted in Senwung Luk, “Not So Many Hats: The Crown’s Fiduciary Obligations to Aboriginal Communities since *Guerin*,” 76 *Sask. L. Rev.* 34 (2013).

⁴⁷ See *Nowegijick*, [1983] 1 S.C.R. 29, quoting Blair J.A. in *R. v. Agawa* (1988), 28 O.A.C. 201, cited in *Sparrow supra*, fn. 1 at 34-35.

⁴⁸ *Sparrow, supra*, fn 1, at 1107f.

Even before the adoption of *the Constitution Act, 1982*, including section 35, the Courts were saying that ambiguities not only in treaties but also in statutes are to be resolved “in favour of the Indians” and that “no sharp dealing should be sanctioned” because “the honour of the Crown is involved, and fairness to the Indians is a governing consideration.” It is all the more noteworthy that these words were drawn, in *Sparrow*, from *Nowegijick*⁴⁹ a taxation case in which a tax exemption provision of the *Indian Act* had been interpreted.

In *Sparrow*, the Court introduced several other requirements that became essential to the honour of the Crown. The Court required consultation by Governments with First Nations before proceeding with any project that might affect their interests⁵⁰ and put the burden on the Crown to show (a) that a project is for an important public purpose; and, (b) that the course of a project represented the least possible infringement on Aboriginal rights consistent with achieving the significant public purpose. In *Haida Nation*⁵¹ the Court expanded the compensation requirement in *Sparrow* to the wider concept of “accommodation.”⁵² In addition, the Court established that the honour of the Crown, and these more specific principles, apply equally to the Crown in right of a province and in right of Canada; and, that the duty to consult and to accommodate is not delegable to a body other than a Crown agency.⁵³

⁴⁹ *Nowegijick, supra*, fn. 47.

⁵⁰ *Sparrow, supra*, fn. 1.

⁵¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

⁵² *Ibid.*, at para. 49 ff.

⁵³ *Ibid.*, at para. 52 ff.

This, in a nutshell, is how the Court has described the honour of the Crown. With the adoption of section 35, the honour of the Crown became a constitutional principle, but even before the *Constitution Act, 1982* the Court regarded it as “a governing consideration.” I think it is clear that these are standards that the Court has long expected to govern the conduct of the Crown acting through its counsel in all Aboriginal matters, as regards the *Indian Act* and, as regards both Aboriginal rights and treaty rights protected in section 35.

II. Purposive Interpretation and Box Theory in Section 35(1) Cases: Literature Review

(i) The Purpose of Entrenching Rights in a Constitution, especially Aboriginal and Treaty Rights

I offer the following discussion on the purpose of entrenching rights as essential background to two discussions which follow (1) on purposive interpretation; and, (2) on box theory as an explanation of the Governments’ determined efforts to resist the guidance and admonitions of the Court. I suggest that it is neither pedantic nor merely academic to ask “What is the purpose of entrenching rights in a Constitution, especially Aboriginal and treaty rights?” On the contrary, the purpose of entrenching rights is essential to understanding the purpose of the Court in applying a purposive interpretation and treating the elaboration of section 35(1) in “a large”, “liberal”, “generous” manner.⁵⁴ ”The question borrowed from *Heydon’s Case*⁵⁵ of 1584 – “What is the mischief Parliament intended to address?” -- applies no less to constitutional

⁵⁴ These three words (“large”, “liberal” and “generous” occur frequently throughout *Sparrow*, sometimes but not always in conjunction with one another. Some of the uses of the term “generous and liberal” cite *Nowegijick, supra*, fn.47, as the source for this kind of interpretation of Aboriginal and treaty rights, e.g., 1078e. The terms are used in *Sparrow, supra*, fn. 1, at 1086, 1106h, 1107a, and 1109f.

⁵⁵ [1584] EWHC Exch. J. 36.

provisions than to statutes. In the *Constitution Act, 1982*, Parliament and the legislatures chose to curtail their own supremacy.

This is not the place to explore this question in great detail. I can however say that the campaign to entrench rights, in Canada and in the British tradition from which our Constitution and legal system are taken, is a very long one. We could go back to *Magna Carta of 1215*⁵⁶ and the *Bill of Rights of 1689*⁵⁷ and be mindful that the *Royal Proclamation of 1763* was widely described, even in the 19th Century, as “the Indians' bill of rights.”⁵⁸ The campaign for a Canadian Charter goes back well before Mr. Trudeau introduced his patriation resolution in the House of Commons in September of 1980.⁵⁹ In 1947, a joint committee considered a UN recommendation that would have led to an entrenched charter of rights.⁶⁰ The following year, Sen. Arthur Roebuck (Liberal, Toronto Trinity) introduced a motion calling on the Prime Minister to present a draft of such a Charter to an upcoming Dominion-Provincial Conference.⁶¹ In 1950, Roebuck chaired a Senate Committee on a charter of rights.⁶²

⁵⁶ *Oxford Companion to Law, supra*, fn. 38, at 795.

⁵⁷ *Ibid*, at 131.

⁵⁸ Lord Watson, *St. Catherine's Milling, supra*, fn. 15.

⁵⁹ *House of Commons Debates*, 1980. “Legislative Scrutiny and the Charter of Rights: A Review of Senate Practices and Procedures”, Gary O'Brien, www.revparl.ca/28/1/28n1_05e_O'Brien.pdf. *Debates of the Senate*, Sen. Roebuck's early campaign for an entrenched Bill of Rights coincides with the years in which Pierre Elliott Trudeau worked in the Privy Council. (Christina McCall & Stephen Clarkson, McCall, *Trudeau and Our Times, Vol. 1: The Magnificent Obsession*, 1990: McClelland & Stewart, Toronto.

⁶⁰ Chaired by Senator L. Mercier Gouin. Committee's mandate and its final report debated at *Senate Debates*, 1947, (Ottawa: Queen's Printer, 1949) at 390, 407, 619, 669, 670

⁶¹ *Debates of the Senate*, 1949, (Ottawa: Queen's Printer, 1949). Motion introduced in the

I offer this brief tour of English and Anglo-Canadian Charter history simply to suggest that they all have a common purpose: to limit the power of Parliament and the Executive Government⁶³, i.e., the Crown-in-Council, in order to protect those rights that are fundamental either to individuals or to minority communities within Canada (or Britain in earlier instances).⁶⁴ As different as the rights recognized and affirmed in section 35 may be from Charter rights, both sets of rights have the purpose and the effect of limiting the power of parliaments and legislatures, and of protecting both minority groups⁶⁵ and individual persons against arbitrary governance. This is why it is commonly observed that, by the *Constitution Act, 1982*, Canada moved from being a parliamentary democracy to being a constitutional democracy.⁶⁶ This is particularly pertinent to the safety and security of First Nations communities and their citizens who have been subject to more arbitrary decisions and civil disabilities than any other

Senate Nov. 3, 1949 at 215; withdrawn December 3, 1949 at 464.

⁶² “Order of Reference”, Debates of the Senate, 1950 and Committee Proceedings.

⁶³ Section 9 of the *Constitution Act, 1867* provides that “The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.”

⁶⁴ Whether the campaign for any particular set of rights is intended to limit the power of Parliament or of the Crown (or the Executive Government in other states) may vary. Both *Magna Carta* and the *Bill of Rights, 1679* were intended to advance the privileges of Parliament and limit the royal prerogatives. In Canada, today, with all money bills and with almost all other major legislation controlled by the Cabinet and with so many statutes delegating authority to the Governor-in-Council or to ministers, I would view this as a distinction without a difference. The provision in section 52 of the *Constitution Act, 1982* regarding “any law that is inconsistent with the provisions of the Constitution” clearly encompasses statutes and statutory instruments, as well as common law and pre-Confederation statutes. Hogg, *Canada Act, 1982, Annotated*, *supra*, fn. 11, at 104-105.

⁶⁵ I use the term “minority group” not so much to refer to groups with small populations but to groups with only an inequitably small share in the exercise of power, influence and authority. David V.J. Bell, “Power and Influence”, *Power, Influence and Authority: An Essay in Political Linguistics*, Toronto: Oxford University Press, 1975, at 15-33.

⁶⁶ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, per Iacobucci J.. Centre for Constitutional Studies, “Constitutional Key Words”, <http://www.law.ualberta.ca/centres/ccs/keywords/?id=20>.

identifiable group in Canada.⁶⁷ Federally imposed civil disabilities can be gathered largely by reviewing *Indian Act* amendments after 1876. Most but not all of these were repealed in the 1951 re-write of the *Indian Act*⁶⁸. Some remained into the 1960s. Others were repealed only in the 1980s; and some have not yet been repealed.⁶⁹

The benefit to a large, well-endowed Government from forcing First Nations to litigate seemingly every claim arising between them is readily apparent, but it does not add lustre to the honour of the Crown. It is less expensive for the Government to litigate than to settle in a great

⁶⁷ I generally avoid superlatives. This exception is justified first and foremost because of the long line of disabilities imposed by Parliament, most of which were enacted as amendments to the *Indian Act*. Some could be found in provincial statutes, e.g., the British Columbia *Evidence Act* ss. 12-14 (R.S.B.C. 1960) that described an Indian as a person “destitute of the knowledge of God” and allowed a judge to admonish an Indian on the meaning of truth. In addition to statutory disabilities there is the history of the “Indian administration” from its inception to the present. The extent of the imposition can be established only in part by counting the statutory provisions, ministerial orders, orders-in-council and local directives entailing disabilities. Many of the disabilities were the result of the exercise of delegated authority by Indian agents or other local authorities, e.g., prohibiting Indians from developing businesses seen to compete with non-Indian owned businesses.

⁶⁸ *Indian Act*, R.S.C. 1985, c I-5.

⁶⁹ I prepared a history of *Indian Act* membership rules with special regard for discrimination against women and against “illegitimate” children for Aboriginal Legal Services of Toronto. In *Speaking with Authority*, I devoted the second chapter, “Chapter II. Assimilation, Enfranchisement and the White Paper: An Overview of First Nations’ Relations Before 1970” to the disabilities which the First Nations leaders who testified before parliamentary committees in the 1970s experienced earlier in their lives. The 1985 *Indian Act Amendment* regarding membership, while ostensibly intended to repeal certain disabilities was found, in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2009] BCCA 153, to have created new disabilities declared by the B.C. Court. to be contrary to the Charter. A bill to rectify the objectionable provisions, The *Gender Equity in Indian Registration Act* Bill C-3, 40th Parliament, 3d Session, received royal assent Dec. 15, 2010, LEGISINFO, <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4901865&Mode=1&Language=E&File=14>.

(LEGISINFO is a part of the parliamentary web site that provides the history and current status of bills. The name appears to be consistently spelled entirely in upper case.) Parliamentary papers (*Debates, Journals, Committee Proceedings* are often referenced by an abbreviation consisting of the number of the Parliament + the number of the session + the number of the Issue (the publication for a day or a group of days) + the page number.)

many cases. The tremendous cost of litigating probably discourages many First Nations' claims. If each claim were dealt with on its merits, all parties imagining what an ideal mediator might find, the costs to Government would be prohibitive and might well arouse a greater anti-Indigenous backlash of the kind promoted by the Reform party in its fight against the ratification of the Nisga'a agreement.

The purpose in recognizing and affirming Aboriginal and treaty rights, although they are rights held by communities rather than by individuals, is not fundamentally different from the need to entrench and protect other rights. I do not mean to suggest that Aboriginal and treaty rights are similar to Charter rights in their nature, but merely to suggest that Charter and section 35 rights share the purpose of limiting the powers of Parliament to infringe the rights protected in the two separate parts of the *Constitution Act, 1982*. On the contrary, it is readily apparent that many of the deprivations of civil rights formerly imposed on Indians -- from the prohibition of potlatches and other giveaways⁷⁰, to the prohibition against owning land off reserve and the pass system⁷¹, to the prohibition against raising money for the purpose of pressing land claims⁷² --

⁷⁰ Report of the *Royal Commission on Aboriginal People*, *supra*, fn. 28. *Final 7 Part One: The Relationship in Historical Perspective*, 6. Stage Three: Displacement and Assimilation, 6. Extending Measures of Control and Assimilation.

⁷¹ *Ibid.*

⁷² S. 149A, *An Act to Amend the Indian Act*, 1927, S.C. Chapter 32, 1926-27, c.37. Third Reading, *House of Commons Debates*, March 8, 1927, at p. 987. Manuel & Posluns, *The Fourth World*, chapter 10, provides a detailed précis of the *Proceedings of the Bostock Committee of 1926*.

were, each in their time, intimately bound up with a desire and intention to deprive various First Nations of their Aboriginal or treaty rights.⁷³

It is an open question whether First Nations could safely pursue their Aboriginal and treaty rights today without the benefit of the protections provided by the Charter. I am inclined to see Charter rights and Aboriginal and treaty rights as intimately bound up together as a basis for challenging laws that discriminate against Aboriginal people and interests.⁷⁴ In cases within the modern period discussed here the Crown argued that it did not need to prove that it had acted in the best interests of an Aboriginal group because its determinations were protected under section 18 of the *Indian Act* or that its actions could not be challenged because of delay

⁷³ Another underexplored field of civil disabilities are those related to First Nations communities' efforts to control persons having a "Windigo" or "Wetiko" experience, sometimes considered a kind of psychotic event. Hadley Louise Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns*, LL.M. thesis, University of Alberta. (Friedland). When such episodes happened to a member of a hunting party at a great distance from the party's home community it was, on occasion, necessary to take drastic action to protect the other members of the party. Friedland also cites instances of cannibalism amongst a family in extreme isolated conditions. The disability was the unwillingness of the Canadian Courts, or the JCPC to take into consideration the circumstances in deciding whether to convict and in determining punishment. Friedland cites only one instance in which a person convicted of killing and eating family members under extreme conditions was hanged. *Friedland* at 32. Friedland cites a number of authors amongst whom there is a debate as to whether a Wetiko (Friedland's northern Cree spelling) can be properly identified as a psychotic condition. The other major work to which I would look for purposes of identifying civil disabilities in the conduct of Canadian and provincial authorities as regards Wetiko events or persons is Sidney L. Harring, Chapter 10. "The Enforcement of the Extreme Penalty: Canadian Law and the Ojibwa-Cree Spiritual World", *White Man's Law: Native People in Nineteenth Century Canadian Jurisprudence*, Osgoode Society for Canadian Legal History and University of Toronto Press: Toronto, 1998 (*Harring*). Harring's other chapters explore different aspects of the criminal law and its application to First Nations in ways that each could be seen to contain a further civil disability. My point is simply to establish a surfeit of disabilities, far in excess of those imposed on any other identifiable group in Canada, and for which little or no recognition has been offered other than the cluster of disabilities associated with the residential schools.

⁷⁴ Wendy Moss, Elaine Garner-O'Toole, Law and Government Division, *Aboriginal People: History of Discriminatory Laws*, (Ottawa: DIAND, 1991 <http://publications.gc.ca/Collections-R/LoPBdP/BP/bp175-e.htm>). Manuel & Posluns, *The Fourth World: An Indian Reality*.

(“laches”) or the Statute of Limitations. Such defences were asserted in *Guerin* even where the Crown had physically prevented the Musqueam Band Council from accessing documents vital to the proper administration of their beneficial interests. To my mind this approach perpetuates disabilities imposed by discriminatory laws referred to above.

(ii) Purposive Interpretation

“We must, I think, in these cases have regard to substance and to the plain and ordinary meaning of the language used rather than to forensic dialectics.”

Dickson J., *Nowegijick v. Regina*⁷⁵

There is not a “real” debate amongst the writers on purposive interpretation, at least not in the sense of opposing sides or several viewpoints differing from one another in important ways. On the contrary, each writer emphasizes certain facets more than others. As a result, I propose to begin this review of the purposive interpretation literature with Chief Justice Brian Dickson and Justice Gérard La Forest’s discussion in *Sparrow*⁷⁶ and then look at what the other writers add to the Dickson-La Forest discussion.

Dickson C.J. and La Forest J. introduced the idea and practice of purposive interpretation⁷⁷ into section 35(1) in *Sparrow*, the case which they described as “requir[ing] this Court to explore for the first time the scope of section 35(1) of the *Constitution Act, 1982*, and to

⁷⁵ *Nowegijick, supra*, fn. 47.

⁷⁶ *Sparrow, supra*, fn. 1 at 1082-3.

⁷⁷ Peter W. Hogg has a brief but helpful discussion of purposive interpretation in an article entitled “Interpreting the Charter of Rights: Generosity and Justification” (1990), 28 Osgoode Hall L.J. 817 (1990) at 820.

indicate its strength as a promise to the Aboriginal peoples of Canada.”⁷⁸ Their description of section 35(1) as “a promise” is a helpful prelude to their description of purposive interpretation a few pages later. Dickson C.J. had earlier spoken of the need for purposive interpretation in Charter cases in *R. v. Oakes*⁷⁹, and in *R. v. Big M Drug Mart Ltd*⁸⁰, which was the first of a number of steps towards parallel analysis of section 35(1) rights and Charter rights.

We can gather what Dickson C.J. and La Forest J. had in mind in *Sparrow* by looking at the terminology with which they describe purposive interpretation.⁸¹ Purposive interpretation, as it is used by Dickson C.J. and La Forest J. (and their predecessors) has two chief characteristics. First, there is an intention of resolving ambiguities by recourse to the purpose of the legislation. This purpose, however, does not depend solely, perhaps not even primarily, on the intention of the legislators who actually passed the legislation, or who adopted constitutional provisions. Purposive interpretation is quite different from what American constitutional scholars refer to as “originalism”⁸². As we will find in the later discussion of Barak’s *Purposive Interpretation in Law*, the purpose sought is that of “a reasonable legislator”⁸³ and can, then, be described as

⁷⁸ *Ibid.*

⁷⁹ *Oakes*, [1986] 1 S.C.R. 103.

⁸⁰ *Big M. Drug Mart*, *supra*, fn. 9.

⁸¹ Various authors refer to “purposive interpretation” “purposive analysis” and, as in one reference by Dickson C.J. and La Forest J. in *Sparrow*, “construing in a purposive way.” I treat the various phrases in which “purposive” modifies different nouns as amounting to much the same thing for this discussion.

⁸² In reading all the testimony dealing in any way with Aboriginal peoples before the Joint Committee on the Constitution of 1970-72 (MacGuigan-Molgat) I found only one witness who referred to the original intention of the “Fathers of Confederation”.

⁸³ There are a number of antecedents to a rule of reasonableness. It has long been said that a statutory provision cannot be considered to be without meaning. The notions that “the Queen can do no wrong”

having a “subjective” aspect. Many of the commentators on this novel form of interpretation, following *Bennion*⁸⁴, look back to *Heydon’s Case*⁸⁵ of 1584 in which, as mentioned above, the English Exchequer Court identified three questions to be answered in an interpretation, of which the second question was “What was the mischief and defect for which the common law did not provide?” In a more contemporary context, and particularly in constitutionally entrenched rights, the defect is as likely to be with earlier legislation as with the common law.

One statement in *Oakes*⁸⁶ provides the essence of what Dickson C.J. had in mind by “purposive interpretation” in each of *Oakes* and *Big M Drug Mart*⁸⁷:

“To interpret the meaning of s. 11(d), it is important to adopt a purposive approach. As this Court stated in *R. v. Big M Drug Mart Ltd.*⁸⁸: The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.”⁸⁹

This statement is particularly helpful. It lends Canadian authority to Barak’s notion, *infra*⁹⁰, when he describes purpose as the purpose discernible to a judge or to a reasonable contemporary

and “The Queen always intends to fulfill her promises” must apply to her role in Parliament as much as anywhere else. The “test has provoked no lack of wit probably since the day it was first uttered. The idea of a *reasonable legislator* may excite whole new rounds of the same dubious wit. For Barak the phrase is a mere heuristic device in the mind of the judges, who are, of course quite reasonable persons.

⁸⁴ *Bennion on Statute Law*, *supra*, fn. 18.

⁸⁵ *Heydon’s Case*, *supra*, fn. 55.

⁸⁶ *Oakes*, *supra*, fn.79.

⁸⁷ *Big M Drug Mart Ltd.*, *supra*, fn. 9.

⁸⁸ *Ibid.*, at 344.

⁸⁹ *Oakes*, *supra*, fn. 79 at 38.

⁹⁰ See text at fn. 101 *infra*.

legislator, that the provision has today.⁹¹ A sitting judge is not obliged to render an interpretation of what might have been meant by legislators in the distant past, in the Confederation Debates⁹² for example. She or he is required to interpret the contemporary meaning of the words used in a Charter right or a section 35 right no less than in interpreting the division of powers set out in the *Constitution Act, 1867*.

It is also noteworthy in this regard that Lord Sankey, in the now famous *Persons* case⁹³ used much the same qualitative terms – “to give it a large and liberal interpretation”⁹⁴ -- as Dickson C.J. would use much later. If we draw on *Edwards*, the practice of interpreting for the present and future more than for the past makes particularly good sense. Lord Sankey had no doubt that in 1867 section 24 of the *Constitution Act, 1867*, providing that only “qualified persons” were eligible for appointment to the Senate, would not have included women, much the same as women were excluded from elected legislative chambers, and from voting at that time. But he takes notice of the soil in which the Canadian Constitution, as a “living tree”⁹⁵, was deepening its roots at the time of his writing. In effect, he asks, “Should women be considered to

⁹¹ Barak, *supra*, fn.14, at 87.

⁹² *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3d Session 8th Provincial Parliament of Canada*. Quebec: Hunter, Rose & Co., Parliamentary Printers 1895. Photographic reproduction.

⁹³ *Edwards, supra*, fn. 9.

⁹⁴ *Ibid* at 9. The complete clause provides, “Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.” This statement follows immediately after Lord Sankey’s description of the *BNA Act*, as it then was, as “a living tree capable of growth and expansion within its natural limits.” Lord Sankey refers to the Privy Council decision in *St. Catherine’s Milling, supra*, fn.15, as a source for this manner of interpretation.

⁹⁵ *Edwards, supra*, fn. 9.

be “qualified persons” who are now eligible to be appointed to the Senate, given the present state of constitutional and civil rights in Canada?” Likewise, it is both fair and equitable as well as analogous to that question for the *Sparrow* Court to ask, once Ronald Sparrow’s ancestral connection to the fishery in question is established, “How is that existing right to be applied and how is it to be recognized and affirmed today?”⁹⁶

As we will see in our examination of cases, the Court repeatedly notes that an Aboriginal or treaty right to hunt or otherwise harvest relates to the area of land in question and not to particular types of animals. If one species faded out in a certain treaty area and another came in to the void, although this may be a great sadness for those accustomed to hunting or to eating the diminished species, the hunting rights guaranteed by the treaty and by section 35(1) would be undiminished.⁹⁷ The test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's Aboriginal peoples.⁹⁸

⁹⁶ The question is not altogether novel. It is worth recalling that Treaty 7, signed in 1877 with the various Blackfoot tribes, was at that time and since popularly known as “the Ammunition Treaty” because it provided for supplies of ammunition to be delivered to the treating First Nations communities., i.e., both the Canadian authorities and the Blackfoot authorities were largely concerned about the tools and supplies which were in use at that time and not long before.

⁹⁷ Franz Koehneke, in his thesis/dissertation on the history of Wasauksing, records that the Anishinakek community on Parry Island on the eastern shore of Georgian Bay and Parry Island, supported a population of wood caribou until sometime in the 19th century. Their pasture and browse have since been occupied by both moose and deer. There are no doubt numerous other examples of areas where one animal population has declined and another moved in, none of which affect the hunting rights of First Nations communities or their members.

⁹⁸ *Sparrow, supra*, fn. 1 at 1077.

In *Sparrow*, Dickson C.J. and La Forest J. adopt the statement on purposive interpretation in *Oakes*⁹⁹ and introduce a number of key terms that will flow down the line of cases that follow from *Sparrow*. Taken as a whole, their analysis, together with Dickson C.J.’s earlier adoption of purposive interpretation in *Big M Drug Mart* and *Oakes*, provide a thorough and vivid picture of what purposive interpretation meant to the Dickson Court.

We can now go on to look at some other sources to see what they might add to this account. Aharon Barak is a convenient transition in my list of authors from judges to academics. When he retired, Barak moved from presidency of the Supreme Court of Israel to professorial duties at Princeton University and the University of Toronto. His book, *Purposive Interpretation in Law* (Barak) draws on his own lifetime as a jurist and cites works on purposive interpretation from around the common law world.¹⁰⁰ Barak equates reasonableness with good faith:

“First, the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and, second, the interpreter should accept the non-rebuttable presumption that members of the legislature acted in good faith.”¹⁰¹

Good faith (*bona fides*) comes from the same root as “fiduciary” and, in this context is a corollary of the key terms, relating to standards of conduct for the Crown developed by the

⁹⁹ See text, *supra*, at fn. 86.

¹⁰⁰ It is a significant contribution simply to have a senior jurist who can identify differences and commonalities amongst the many common law jurisdictions.

¹⁰¹ *Barak, supra*, fn.14 at 87. Note the frequent appeals to “good faith” in the judgments under discussion together with terms that necessarily include *bona fides* as an essential element, e.g., “the honour of the Crown”, “no sharp dealing”. “Fiduciary” comes from the same root as “*fides*”, the noun in the Latin term, *bona fides*, corresponding to “good faith.” These ethical-legal terms run throughout the judgments in this line of cases and tie the cases both to other fields of law and to certain braches of philosophy.

Courts in this line of cases -- “honour of the Crown”, “duty to consult”, accommodation and reconciliation; and, the most important, though perhaps the least discussed, corollary being the prohibition against “sharp dealing”.¹⁰² The category of good faith, in this context, necessarily depends upon the presence of those factors. As far back as *Guerin*, when the Crown wanted to say that the trust relationship it had with First Nations was “a mere political trust”, Dickson J., as he then was, declared that, while the relationship did not have all the elements of a trust, it was, a fiduciary relationship.¹⁰³ A fiduciary relationship is the epitome of a demonstration of good faith both in detail -- the ways in which one conducts business – and conceptually – the big picture.¹⁰⁴

¹⁰² *Sparrow, supra*, fn. 1 at 1107, quoting MacKinnon A.C.J. in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360. It would be nice to think that the prohibition against sharp dealing by the Crown need hardly be stated. Sadly, however, many of these cases arise precisely because of sharp dealing by the Crown.

¹⁰³ In fairness, this argument had been accepted in previous English cases. See André Lajoie, “With Friends Like These”, *Fiduciary Forum, supra*, fn. 36 at 63.

¹⁰⁴ A fiduciary is, for example, expected to provide a full accounting at the end of his or her role. In *Guerin, supra*, fn. 12, the Crown refused to provide documentation to the band council after having signed a lease at half the fair market value. In 1980, the House of Commons adopted a resolution authorizing the Auditor General to audit the accounts of any band council requesting such an audit. Robert Holmes, MP and Hon. Warren Allmand, MP, *House of Commons Debates*, 1980. (Cited in Posluns, *Speaking with Authority: The Vocabulary of First Nations Self-Government* (Routledge: New York, 2006) at 208. Indian Affairs Committee, *Proceedings*, 32:2:25.) The Deputy Minister, a year later, told the Commons Indian Affairs Committee that the accounts could not be audited because there was no opening balance in many of them. (Indian Affairs Committee, *Proceedings* at 30 3:7:8–12. See the lengthy excerpt from Tellier’s testimony in *Speaking with Authority* at 230.) In the U.S. a case named *Elouise Pepion COBELL, et al., v. Kenneth Lee SALAZAR (sic)*, Secretary of the Interior, U.S. Court of Appeals, District of Columbia, No. 11–5205 (previously *Cobell v. Kempthorne* and *Cobell v. Norton* and *Cobell v. Babbitt*) led to a Secretary of the Interior Gale Norton being cited for contempt when she could not provide records to the Court. *Cobell* was eventually settled after Congress passed a bill that included \$10 billion for the parties to the suit. Mrs. Cobell was present when Pres. Obama signed the bill. The president specifically expressed admiration for her determination. Rob Capriccioso, “Obama signs historic *Cobell* settlement, *Today*, Dec. 9, 2010. I give these examples to demonstrate the sorry state of Indian trust accounts both in Canada and the U.S. Mismanaged trusts may be among the leading causes of Indian poverty. See further references to *Cobell*, *infra*, at fn.211, 212, 405.

Good faith comes to this *sui generis* field from the law of contracts. Equating reasonableness with good faith is consistent with both legal thinkers and philosophers. Considering good faith as the primary ingredient in reasonableness is consistent with the sources for the legal idea of good faith in the law of contracts.¹⁰⁵ In *Guerin*, Dickson J. quotes a much cited article on “The Fiduciary Obligation”: “the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion.”¹⁰⁶ I would regard good faith as a legal counterpart to Jean-Paul Sartre’s “authenticity”¹⁰⁷ and Martin Buber’s “genuineness”¹⁰⁸, the more so when the learned former Chief Justice Barak equates good faith with reasonableness. The most helpful point in Barak’s work was his assertion, quoted above¹⁰⁹ that the interpreter of legislation should assume that the legislators are reasonable people acting in good faith.

¹⁰⁵ Jacob S. Ziegel, “Good Faith in the Law of Contracts,” Memorandum by Joint Research Director, LCA Project, Ontario Law Reform Commission, Sept. 10, 1982. And see, *infra*, at fn. 142.

¹⁰⁶ Dickson J., *Guerin*, *supra*, fn. 12. No ostensible beneficiary would enter into a voluntary relationship with a fiduciary without having faith in the fiduciary. Beneficiaries in a less voluntary relationship, e.g., children, disabled persons and some First Nations communities are even more reliant upon the good faith of the fiduciary. Ernest Weinrib, “The Fiduciary Obligation” (1975), 25 *U.T.L.J.* 1, at p. 7. See *infra*, at fn. 240.

¹⁰⁷ Jean-Paul Sartre, *Being and Nothingness: a Phenomenological Essay on Ontology*; translated and with an introduction by Hazel E. Barnes, (New York : Washington Square Press, 1992). See Barak’s equation of good faith with reasonableness *supra* in the text at fn. 101.

¹⁰⁸ Martin Buber, *For the Sake of Heaven*, Philadelphia, The Jewish Publication Society of America, 1946; Martin Buber, *Tales of the Hasidim*, New York: Schocken Books, 1975; Maurice S. Friedman, *Martin Buber’s Life and Work: The Middle Years, 1923-1945*, New York: E.P. Dutton, 1981. <http://archive.org/details/IAndThou>. The *Merriam-Webster Dictionary* offers “genuine” as a synonym for “bona fides”, “the fact of being genuine”.

¹⁰⁹ Barak, *supra*, fn. 14, at 87, quoted *supra*, at fn. 101. Barak makes this observation after noting that several distinguished earlier commentators equated “purposive” with the intent of the legislature, but that Hart and Sachs, after emphasizing the legislature's intent, go on to discuss reasonableness and good faith. Note the frequent appeals to “good faith” in several of the judgments under discussion together with terms

After fifty years monitoring the Canadian Parliament, if I were to classify the debates that I have read for their reasonableness, only a fraction would be sustained in Barak's assumption of "reasonable people ... reasonable goals ... reasonable manner." The "reasons" I have heard backbenchers offer for bowing to ministerial pressure, to assume that a legislative measure is consistent with the Constitution, would rank with the weakest excuses regarding homework. I can only think that the learned justice meant that one interprets the Act as though these qualities were validly present. It is heartening that in rendering a reasonable and good faith interpretation the judge may reconstruct the legislation into something better than was passed by Parliament.

Ruth Sullivan is the other academic whose work makes a distinct contribution. I think her work is of special value in two respects. First, her challenge to "plain meaning"¹¹⁰ is, I think, of special value even though I am not fully persuaded by it. Plainly put, I am not persuaded by her disparaging account of "plain meaning" because there is a series of cases, two of which¹¹¹ I discuss below, in which the Supreme Court of Canada uses "plain meaning" (and "plain and ordinary meaning") to mean the same thing as Sullivan means by "ordinary meaning." I suspect that the term occurs in the common law frequently prior to these two aboriginal cases. In her

that necessarily include *bona fides* as an essential element, e.g., "the honour of the Crown", "no sharp dealing". These ethical-legal terms run throughout the judgments in this line of cases and tie the cases both to other fields of law and to certain branches of philosophy.

¹¹⁰ Ruth Sullivan, Legal Drafting Website: Statutory Interpretation Resources at Faculty of Law, University of Ottawa.

¹¹¹ *Nowigijick, supra*, fn. 47; *Will-Kare Paving & Contracting Ltd.*, [2000] 1 S.C.R. 915. See text *infra*, at fns. 115 & 116. Ruth Sullivan, Chapter 3, "Ordinary Meaning", *Statutory Interpretation*, 2nd edn., Toronto: Irwin Law, 2007. <http://site.ebrary.com/lib/oculyork/Doc?id=10200634&ppg>

essay, “The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation”¹¹², Sullivan portrays judges' use of the category of “plain meaning” as a way to rationalize whatever conclusion they wish to arrive at. On the other hand, she devotes a chapter of her book, *Statutory Interpretation*, to the unimpeachable uses of “ordinary meaning”¹¹³. The matter of plain meaning is important here because I see purposive interpretation as an extension of plain meaning when both terms are given their due. In her essay, Sullivan presents an array of anecdotes in each of which a judge hides behind the term “plain meaning” to arrive at a conclusion while needing to give only a limited explanation. I don't doubt the historicity of Sullivan's anecdotes. Perhaps her distinction between “ordinary meaning” and “plain meaning” adequately distinguishes between what she likes and what she does not like. I need to note, however, that the term “plain meaning” has been in use for a very long time, often meaning much the same thing as Sullivan and her sources mean by “ordinary meaning”.¹¹⁴ It is noteworthy, if only because Sullivan tries to distinguish them, that Dickson J., as he then was, in *Nowegijick v. Regina*, in the quotation at the beginning of this section, treats "plain" and "ordinary" as meaning the same thing: "We must,

¹¹² Legal Drafting webpage of the Faculty of Law, University of Ottawa, undated.
<abc1.uottawa.ca/rsulliv/legd/index.htm>

¹¹³ Sullivan, *Statutory Interpretation*, *supra*, fn.111, ch. 3.

¹¹⁴ The use of “plain meaning” by the S.C.C., in both *Nowigijick*, and *Will-Kare*, *supra*, fn. 111, is consistent with the Talmudic usage. The recording of the Jewish Oral Law, i.e., the *Babylonian Talmud* discusses what has generally been translated as “plain meaning” in the *Mishna*, published by Judah the Prince (Yehuda ha-Nasi) in 214 C.E. David Weiss Halivni, a leading contemporary scholar of Jewish law translates *Peshat* (pronounced “*P'shat*”) “plain meaning” the author of a book in which this translation occurs in his book, *Peshat and Derash: Plain Meaning and Applied Meaning in Rabbinic Exegesis*, (New York, Oxford: Oxford University Press, 1991.

I think, in these cases have regard to substance and to plain and ordinary meaning of the language used rather than to forensic dialectics."¹¹⁵

In *Will-Kare*¹¹⁶, a tax appeal to the S.C.C., Justice Major, writing for the majority, wrote approvingly of plain meaning but seemed to mean by it basically what Sullivan, Dreiger and others mean by “ordinary meaning.” Major J., in *Will-Kare*, did just what Sullivan would have us do with “ordinary meaning”, viz., begin our interpretation with the most basic meaning, the meaning that the words have in their ordinary use, or their use in the milieu in which the issue arose. *Will-Kare* centred on the meaning of the noun “sale” and the corresponding verb, “to sell”. The Court concluded that the appellant had used the term as it is commonly used in the market place, i.e., where a large amount of selling is carried on by people in the business of selling. The Court further concluded that the discussion of the word when the Income Tax amendment was before the Commons was consistent with the use in the market place while the interpretation given by the Minister of National Revenue was what might be called “esoteric”¹¹⁷.

¹¹⁵ *Nowigijick, supra*, fn.47 at 41.

¹¹⁶ *Will-Kare, supra*, fn. 111.

¹¹⁷ Merriam-Webster Dictionary Online <http://www.merriam-webster.com/dictionary/esoteric> defines “esoteric” as “1. a: designed for or understood by the specially initiated alone <a body of esoteric legal doctrine — B. N. Cardozo> b : requiring or exhibiting knowledge that is restricted to a small group <esoteric terminology>; broadly : difficult to understand. <esoteric subjects> esoteric, a. and n. O.E.D. 1. Of philosophical doctrines, treatises, modes of speech, etc.: Designed for, or appropriate to, an inner circle of advanced or privileged disciples; communicated to, or intelligible by, the initiated exclusively. Hence of disciples: Belonging to the inner circle, admitted to the esoteric teaching. Opposed to exoteric.” Some legal discourse is justifiably esoteric, but income tax provisions which, like the Criminal Code, require compliance from the entire population to whom they may apply cannot be esoteric. I think this is the essence of the approach taken to interpretation in *Will-Kare*.

Major J. takes note of the history of the term “plain meaning” and of the difficulties it may have faced, but concludes that those difficulties are remedied by the “modern meaning” of the term.¹¹⁸

What I would conclude, for the limited purposes of this thesis, is as follows: (1) the behaviour exhibited in the anecdotes in Sullivan’s essay are to be avoided; (2) likewise, esoteric meanings not likely to be meant by people whose livelihood entails the word in question are also to be avoided in legal interpretations; (3) many distinguished writers over a very long period have used “plain meaning” to mean much the same as “ordinary meaning”; (4) as long as we are clear on the use being made of “plain meaning” in any given work this need not be a problem; (5) Sullivan appears to agree with the idea “that the ordinary meaning of a text is an essential, albeit only one, element in the modern” approach to the construction of statutes. Accordingly, it may become apparent in working through the text that the ordinary or plain meaning of the words is not what is intended.

Lastly, on the matter of plain meaning, Barak elaborates the notion that plain meaning requires interpretation, and is, indeed, a form of interpretation. I think that this is consistent with Sullivan’s observation that the ordinary meaning is the starting point for statutory and constitutional interpretation and one goes to some other mode of interpretation, e.g., purposive interpretation only when the ordinary does not suffice. The judgment as to whether or not the

¹¹⁸ *Will-Kare, supra*, fn. 111, at 918. See also the dissenting reasons of Binnie, Gonthier and McLachlin JJ. (as they then were) at 39. Although Major and Binnie JJ. disagreed on the outcome they appear to agree on the meaning of “plain meaning.” I follow the Court in seeing the term in a more positive light than does Sullivan. The “Authors Cited” in *Will-Kare* lists a number of works that deal with the history of plain meaning. Binnie J. sets out a list of earlier S.C.C. decisions that deal with “plain meaning” at 49.

plain or ordinary meaning suffices in a given context is, as Barak emphasizes, an act of interpretation.

Sullivan has two chapters pertinent to purposive interpretation. The first, her Chapter 10, is entitled “Purposive Analysis”, which I consider to be interchangeable with “purposive interpretation”. The other, her Chapter 12, is entitled “Policy Analysis”. I relate policy analysis to purposive analysis because if one is inquiring about the purpose of the Government, a particular minister or the Legislature, consideration of their stated policies, even if it is not definitive, can nonetheless be very helpful. Perhaps Sullivan’s greatest contribution, for purposes of this study, is that she makes purposive analysis seem rather routine, even ordinary:

“To achieve a sound interpretation of a legislative text, interpreters must identify and take into account the purpose of the legislation. ... Purposive analysis has become a staple of modern interpretation. It is used not only when the language of a text is found to be ambiguous but in every case and at every stage of interpretation.”¹¹⁹

The other much more remarkable point Sullivan offers is that there is a provision in every Canadian Interpretation Act directing interpreters to give to every enactment under the jurisdiction of Parliament or the legislatures such large and liberal construction and interpretation as best ensures the attainment of its objects.”¹²⁰ In light of these provisions, one might be

¹¹⁹ Sullivan, *supra*, fn. 111, at 194. If Barak would differ it would be because, in many cases, the plain meaning reveals the purpose. This would include instances, such as the Ontario *Child and Family Services Act*, R.S.O. 1990 c. C-11, e-laws, in which section 1 recites five purposes, each in its own subsection.

¹²⁰ Sullivan, *supra*, fn. 111, at. 194-195.

inclined to ask “What is all the fuss about?”¹²¹ To my mind, the fuss arises from the Crown’s efforts, in every case discussed here and many others, to steadfastly avoid the kind of interpretation stipulated both in statutes and by the Court. When Chief Justice Dickson made repeated reference to purposive interpretation in Charter cases pursuant to Part I of the *Constitution Act 1982* and in Part II, Rights of the Aboriginal Peoples, he must have felt that the statement was noteworthy. He was not “just blowing smoke.” Likewise, when Chief Justice Barak undertook to write an entire work on the subject early in his retirement, he too must have thought it noteworthy. One likely explanation lies in a quotation, in *Sparrow*, from the reasons of the Court of Appeal below:

“This submission [the Crown’s interpretation of s. 35 as regards Mr. Sparrow’s fishing rights] gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to Aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.* ...”¹²²

It is worth asking whether purposive interpretation deserves so much attention. “The promise” — as Dickson C.J. and La Forest J. described section 35(1) -- equipped the Court with both the tools and the opportunity to move the country from a time when “the rights of the

¹²¹ It may be noted that the *Interpretation Acts* apply to ordinary legislation, rather than constitutional provisions, but an even stronger case can be made for taking a purposive approach to constitutional provisions, which establish long-lasting fundamental structures and values which are difficult to amend.

¹²² *Sparrow*, *supra*, fn. 1 at 1107.

Indians were often honoured in the breach”¹²³ to a point at which the rights subsumed in section 35(1) would be taken “seriously”¹²⁴. Such an explanation of the importance of purposive interpretation in a constitutional context, and particularly an Aboriginal context, ties the line of decisions at hand back to the long line of civil disabilities imposed in an earlier time.

I close this discussion of purposive interpretation in theory with a gleaning from a House of Lords decision on the admissibility of Hansard for purposes of clarifying the purpose entertained by the legislators. Like the *Will-Kare* case discussed above, *Pepper v. Hart* involved the interpretation of a tax statute. Lord Griffiths advocated the expansion of purposive interpretation to include reference to clear statements of legislative intention:

“My Lords, I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. ... The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view ... The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?”¹²⁵

¹²³ *Ibid.*, at 1103, citing *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654.

¹²⁴ *Ibid.* (*Sparrow*) at 1119d.

¹²⁵ *Pepper (Inspector of Taxes) v Hart*, [1992] UKHL 3, [1993] AC 593. Note that the SCC has admitted statements of legislative intention for the purpose of characterizing the constitutionality of legislation, but not, generally, for the purpose of interpreting its specific provisions: *Ref. re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *R. v. Morgentaler (No. 3)*, [1993] 3 S.C.R. 463.

(iii) The Full Box Theory v. the Empty Box Theory of Aboriginal and Treaty Rights

I deal first with three kinds of sources in my discussion of box theory. First, I begin with my own observations of oral sources which are where, I believe, the theory and the terminology originated.¹²⁶ Secondly, I deal with two primary written sources: first, the one judgment which explicates both theories and, secondly, a public inquiry report that also addresses the theories.¹²⁷ Thirdly, I turn to secondary sources, some of which are scholarly and some of which are works prepared by First Nations political organizations. I hope that this wide range of sources will reaffirm the consistency of viewpoints in a variety of contexts. From this, I present questions and criteria arising from the interactions between purposive interpretation and box theory that guide my discussion of proof burdens and the responses of the Crown.

In the *Constitution Act, 1982*¹²⁸ the original section 37 called for a First Ministers' Conference, to which representatives of the Aboriginal¹²⁹ Peoples of Canada as defined in s

¹²⁶ There is one trial court decision in which box theory is discussed in some detail, *Canada (Minister of National Revenue) v. Ochapowace Ski Resort Inc.* (2002), 225 Sask. R. 225. That is the one case I will discuss in my review of box theory. Notice is also taken of "Box theory" in the *Sparrow* decision when Dickson C.J. and La Forest J. make reference to works on box theory at 1108 which are also listed in "Authors Cited" at 1081. They refer to an article by Bryan Schwartz, "Unstarted Business: Two Approaches to Defining s. 35—'What's in the Box?' and 'What Kind of Box?'"¹²⁶ Chapter 24, in *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft*, (Montreal: Institute for Research on Public Policy, 1986) (*First Principles*) Box theory is explicated in Paul L.A.H. Chartrand & Wendy Whitecloud, commissioners, *Aboriginal Justice Implementation Commission Final Report (Justice Implementation Report)*. (Manitoba Statutory Publications Office: Winnipeg, June 29, 2001.

¹²⁷ *Justice Implementation Report, supra*, fn. 126.

¹²⁸ *Constitution Act, 1982, supra*, fn. 11.

¹²⁹ Throughout this thesis I will follow the 1994 recommendation of the Government of Canada Terminology and Language Standardization Board (quoted in the *Guide to Canadian English Usage*, Toronto: Oxford University Press, 1997 at 5 and capitalize "Aboriginal" and such synonyms as "Native" and "Indigenous".

35(2)¹³⁰ were to be invited. The purpose of the conference, set out in section 37, was to include in its agenda “the identification and definition of the rights of those peoples to be included in the Constitution of Canada.” This conference, the First Ministers’ Conference 1983 (FMC 83), became the first of several.

Hallway discussions at that conference gave rise to an account of the difference between the view of First Nations and other Aboriginal peoples of Aboriginal rights and the Governments’ views. The difference, observed and remarked by lawyers and technicians¹³¹ at the Conference, was the difference between “a full box theory” and an “empty box theory.” Empty box theory, as heard in conversations with Crown lawyers, would require that any section 35 rights claimed have no force or effect until the First Nation making such claims has proven them. Full box theory holds that a First Nation is entitled, pursuant to section 35(1) to all the rights that it held the day before Britain asserted (or acquired) sovereignty¹³² other than those that have been specifically surrendered or otherwise extinguished.

Although the conflicting box theories were first articulated (at least in these terms) in the hallways of a conference, there are several factors which make them noteworthy and even important. First, the theories illuminate the conflict between First Nations and the Crown in right

¹³⁰ *Constitution Act, 1982, supra*, fn.11.

¹³¹ “Technician”, in the context of First Nations organizations, refers to staff of First Nations organizations whose job is to advise leaders on technical matters, without emphasizing their own opinions. When the Conference adjourned for the day, AFN had a gathering of leaders, lawyers and staff at which I was present and heard the box terminology for the first time.

¹³² Kent McNeil, in “Onus of Proof of Aboriginal Title”, *supra*, fn. 32, at 776: refers to “assertion of sovereignty”. In my view he must have meant ‘acquisition’ as only upon acquisition of sovereignty would the Crown have obtained underlying title to lands occupied by Aboriginal peoples.

of Canada from Confederation to the present, and, particularly the post-1982 litigation. The Nisga'a began to petition the federal government and the B.C. Government for recognition of their title shortly after B.C. joined Confederation, in 1871.¹³³ There is abundant evidence that the First Nations that signed the numbered treaties on the prairies did not think that they were giving up their land and expected to be free to hunt and to travel as they had before.¹³⁴ The disabilities discussed earlier were intended, among other purposes, to convince Indians of their powerlessness¹³⁵. Their continued resistance, even in the face of Parliament criminalizing ceremonies, travel, matrilineal clan structures and attempts to pursue land claims is, itself, a testimony to their cultures.¹³⁶

Finally, and most important for the purposes of this thesis, box theory can be seen as fundamental to the debate about proof burdens. From the perspective of the Crown's empty box theory, the rights "identified and defined" would be written into a constitutional amendment and the "evidential burden" or "burden of persuasion" would fall on an Aboriginal person or community to prove that the right claimed falls within the definition set out.¹³⁷ The full box

¹³³ *Harring, supra*, fn. 73, at 275.

¹³⁴ *Fiduciary Forum, supra*, fn.36.

¹³⁵ *Harring, supra*, fn. 73, at 250. See disabilities discussed, *supra*, in fns, 73 and 74 and related text.

¹³⁶ George Manuel and Michael Posluns, *Fourth World*.

¹³⁷ *Hogg, Constitutional Law of Canada (student edn.) (Toronto: Thomson, Carswell)*, section 27.5 notes that the proposition that rights of the Aboriginal peoples in land pre-dated European settlement and were only extinguished by explicit legislative action was established in *Calder, supra*, fn. 30, nine years before the *Constitution Act, 1982*. At section 27.8 *Hogg* explains the nature of the protection provided by s.35(1). *Hogg* states, at section 27.5(e, d) that after 1982 a treaty could only be amended by mutual agreement of the First Nation and the Crown or by constitutional amendment. Prior to 1982, treaties could also be amended by statute providing that the amendment was in clear and plain language. Once

theory, with its presumption that an Aboriginal community holds all the rights it held before British sovereignty other than those that have been explicitly extinguished, puts the burden on the Crown.¹³⁸ This is the significance that establishes the relevance of box theory to a discussion of the allocation of proof burdens, the more so as the Court comes to take a position much closer to the full box than to the empty box. I think we will find that "the battle of the boxes" -- the full box and the empty box -- runs throughout the line of cases discussed below. The Crown often submits arguments that fit within the four corners of the empty box theory even after the Court has established a series of tests each with its own allocation of proof burden. It appears that the Crown aims to fashion an ideologically grounded policy position into a legal argument at great cost to all parties, but particularly to the First Nations parties to these actions.¹³⁹ The Aboriginal party, whether appearing as a defendant in a quasi-criminal case or as a plaintiff in a civil action, is expected, particularly by the Crown, to justify his or her position, as though the box were empty. They do this, of course, by drawing on the rights believed to be already in the box. There have been times when the Crown has chosen to bring charges against one individual First Nations person after another where the first person charged succeeded in a section 35 defence and where the Court has suggested a settlement process rather than pursuing criminal

the undefined rights were entrenched in s. 35(1) they could only be amended or defined by a constitutional amendment, not by a statute .

¹³⁸ Dickson C.J. and La Forest J., in *Sparrow*, *supra*, fn. 1, at 1119.

¹³⁹ I describe the Crown's arguments as "ideologically grounded" because of the frequency with which the Court not only rejects these arguments but admonishes the Crown, as for instance, in *Sparrow* when the Court observed that the Crown's argument would make s.35(1) meaningless. There is an ideological element in the motives and the political discourse of First Nations, but their legal arguments seem to be more in line with the Court's previous decisions, and with the purposive interpretation required by the Court. Indeed, one might say that the first principle of the First Nations' ideology is their own survival and resurgence and that this principle has been read into s. 35(1) in the Court's purposive interpretations.

prosecutions.¹⁴⁰ Likewise, there are instances, such as *Haida Nation*¹⁴¹ where a province has claimed that it is entitled to dispose of assets claimed by a First Nation as part of its Aboriginal title patrimony even while negotiating recognition of Aboriginal title with that First Nation. The Court has repeatedly observed, judiciously and diplomatically, that the Crown is hardly acting in good faith¹⁴² if it disposes of assets that are part-and-parcel of an ongoing Aboriginal title negotiation.

Once the First Nation party has established the ancestral roots of the right in dispute, under the *Sparrow*¹⁴³ tests, the burden of justifying the infringement of those rights falls on the Crown. Even when an infringement can be justified, pursuant to the *Sparrow* tests, the Crown

¹⁴⁰ I appreciate that this characterization runs counter to the conventional idea that the Attorney General, as the chief law officer of the Crown, is thought to act in the public interest and not as though the Crown were a private person. My thesis challenges that idea, at least in the context of s.35(1) litigation. For a thorough discussion of the role of the Attorney General see the works of Prof. John L. Edwards, especially *loc. cit. supra*, fn. 44. I think it is not as contrary to Edwards' ideal as it may appear at first blush. Through much of his writing, Edwards comes back, time and again, to the need, in criminal law, for a Director of Public Prosecutions independent of both the Attorney General and the Solicitor General. He revisits this theme most tellingly in his work for the public inquiry into the wrongful conviction of Donald Marshall, Jr., *Walking The Tightrope Of Justice : An Examination Of The Office Of Attorney General In Canada With Particular Regard To Its Relationships With The Police And Prosecutors And The Arguments For Establishing A Statutorily Independent Director Of Public Prosecutions*, published by the Royal Commission: Halifax, N.S., 1989.

¹⁴¹ *Haida Nation*, *supra*, fn. 51.

¹⁴² See, *supra*, fn. 105. I borrow the term "good faith" from Contracts. That said, *bona fides*, particularly in Crown-First Nation consultation, is a legal variation of Jean-Paul Sartre's idea of "authenticity" or Martin Buber's idea of "genuineness." Good faith negotiations would require a senior official, able to speak for the Government, and who is then "wholly present" at the meeting, listening as much to the sub-text as to the text, and keeping in mind the standards set out by Dickson C.J. in *Sparrow*. Jacob S. Ziegel, *supra*, fn. 105. *Bona fides* is also a corollary for a number of terms used by the Court (failure to fulfill these requirements or work by these standards would be a breach of good faith), e.g., "Honour of the Crown", "Duty to consult", accommodation and reconciliation; and, the most important corollary being the prohibition against "sharp dealing" quoted in *Sparrow*, *supra*, fn. 1 at 1107 citing MacKinnon A.C.J. in *R. v. Taylor and Williams*, *supra*, fn. 102.

¹⁴³ *Sparrow*, *supra*, fn. 1.

also has the burden of proving several other essential elements including: (1) discharge of its duty to consult¹⁴⁴; (2) efforts at accommodation¹⁴⁵; and, (3) compensation at fair market value¹⁴⁶, so far as possible; (4) the avoidance of “any sharp dealing”¹⁴⁷; and, its maintenance of the objective of reconciliation as the vital key to the honour of the Crown¹⁴⁸. It is worth noting that several of these are both substantive and procedural standards. This is also consistent with the duty to bargain in good faith.

The cumulative result of this reallocation of proof burdens, in *Sparrow*, is the Court’s own observation about proof burdens.

“We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament’s ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat Aboriginal peoples in a way ensuring that their rights are taken seriously.”¹⁴⁹

The Court does not accept the Crown’s empty box submissions. Although the Court’s view of the scope of section 35 rights widens and narrows down the line of cases, it does so largely on the

¹⁴⁴ *Ibid.* at 1118g.

¹⁴⁵ *Van der Peet, supra*, fn. 1.

¹⁴⁶ *Ibid.*, at 169.

¹⁴⁷ *Sparrow, supra*, fn.1, at 1119g.

¹⁴⁸ *Ibid.*, at 1107i.

¹⁴⁹ *Ibid.*, at 1078-99b.

basis of (a) matters of fact, e.g., pre-contact practices¹⁵⁰; and, (b) justifications for infringement¹⁵¹. The Court consistently holds that Aboriginal communities have an Aboriginal right or title to practices or property that they can demonstrate they held before British occupation, that their right or title exists independent of any executive or legislative act of Britain or Canada¹⁵² and that, when prior practices or occupation are demonstrated, the burden lies upon the Crown to demonstrate extinguishment.¹⁵³ These requirements, substantive and procedural, are very critical re-allocations of proof burdens from pre-1982. If the full box and the empty box are the opposite ends of a spectrum, the Court's view is much closer to the full box.

No less important than the quantum of rights signified by a full box or a nearly full box is the procedural fairness that the Court introduced, in contrast to the pre-patriation procedures that were used by the Government both in the Courts and in Parliament and that were present in many of the key terms just listed, e.g., duty to consult; accommodation.¹⁵⁴ (Some of these standards

¹⁵⁰ *Van der Peet, supra*, fn. 1.

¹⁵¹ *Delgamuukw, supra*, fn. 1 at 1020-1021.

¹⁵² *Guerin, supra*, fn. 12, at 336.

¹⁵³ The justificatory standard, discussed above by Dickson C.J. and La Forest J., requires the Crown to justify an infringement of a s.35(1) right. Although the right may still exist in principle, if the infringement is justified the exercise of the right will, to that extent, be impaired.

¹⁵⁴ Cases in which the Crown pursued procedures that might be regarded as "sharp practices" include but are by no means limited to, *Guerin supra*, fn. 12, *Sparrow, supra* fn 1, *Haida Nation, supra*, fn. 51, *Mikisew Cree First Nation v. Can.*, [2005] 3 S.C.R. 388, each of which will be discussed in the next section. Pre-patriation procedurally sharp practices run throughout the discussion of civil disabilities above. The most egregious example occurred in 1927 when the Government referred the petition of the Interior Tribes of B.C. to a Joint Senate-Commons Committee chaired by the then Speaker of the Senate. The Minister was invited to speak first. Andrew Paull, the leader of the Interior Tribes and his lawyer, O'Meara, were not allowed to call witnesses or make submissions. The Committee's Report culminated in an amendment to the *Indian Act*, (*supra*, fn.72) prohibiting the raising of funds for the purpose of pressing Indian claims. The proceedings of the Joint Committee of the Senate and House of Commons mandated to consider their claim are summarized in detail in *The Fourth World: An Indian Reality*,

and requirements are both substantive and procedural.) Many of these would fall, I think, in the category of “sharp dealing”¹⁵⁵ of which Dickson, C.J. and La Forest J. said, quoting the following, in *Sparrow*:

"The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."¹⁵⁶

Dickson C.J. and La Forest J. quoted decisions of the Ontario Court of Appeal which had enunciated these principles and established “sharp dealing” as the antithesis of “the honour of the Crown” as early as 1981, the year before *The Rights of the Aboriginal Peoples*¹⁵⁷ and the Canadian Charter of Rights and Freedoms were entrenched in the Constitution. So far as the lack of procedural fairness is inseparable from the Crown's denial of substantive rights of Aboriginal communities, I would include procedural fairness as an essential part of the full box.

The literature drawing upon the “the empty box” and “the full box” metaphors in the context of section 35(1) is substantial. Much of the literature that has served to keep the metaphor alive has been the study of policy developments in response (or reaction) to various

supra, fn.74. A biographical sketch of Mr. Speaker Hewitt Bostock can be found online at the *Dictionary of Canadian Biography*.

¹⁵⁵ *Nowegijick, supra*, fn. 47.

¹⁵⁶ Dickson C.J. and La Forest J. quoted from Blair J.A. in *R. v. Agawa*, (1988), 28 O.A.C. 201 at pp. 215-16, who cited the late MacKinnon A.C.J. in *R. v. Taylor and Williams, supra*, fn.102. The history of the terms “honour of the Crown” and “no sharp dealing” is particularly significant because it establishes that the principles which they enunciate had been established as far back as 1981, the year before the proclamation of the *Constitution Act, 1982*.

¹⁵⁷ This is the title of Part II of the *Constitution Act, 1982*. I put it in italics to recognize the same stature as that recognized when the *Charter* is put into italics.

Court decisions, including two important books: *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs*, by Richard Daly¹⁵⁸ and *Box of Treasures or Empty Box*, edited by Ardith Walkem & Halie Bruce.¹⁵⁹ *Box of Treasures*, in particular, draws upon box theory both in legal analysis and in policy analysis.

This conflict over the interpretation of section 35(1) is less surprising when we keep in mind that the greater part of the litigation is about allegations of non-fulfilment, if not of treaty obligations, then of the fiduciary duties arising from the “pre-existing” rights recognized by The *Royal Proclamation of 1763*.¹⁶⁰ Just as the Court has had an influence on the development of both policy and non-litigation procedure – consultation, accommodation, compensation – so the gulf between First Nations and Government often explained and described by the box theory and metaphor is also a gap the Court has filled from time to time. At least some of this literature might be more helpfully classified as “mixed policy history and law”. I will begin my survey with the most decidedly legal material and proceed to commentaries by legal scholars using the box metaphor and then consider the policy and advocacy literatures.

¹⁵⁸ Daly, *Our Box was Full ...* (Vancouver: UBC Press, 2005)

¹⁵⁹ Walkem & Bruce, *supra*, fn. 10.

¹⁶⁰ *Royal Proclamation, 1763*, (U.K.), R.S.C. 985, Appendix II, No. 1. L. Rotman, “Conceptualizing Crown-Aboriginal Fiduciary Relations”, *In Whom We Trust* says that the *Royal Proclamation* “consolidated” policy that had been developed piecemeal over the preceding century. B. Slattery, in “Understanding Aboriginal Rights,” [1983] *Can. Bar Rev.* 66 describes the *Royal Proclamation* as consolidating “administrative common law.” A significant part of the lobby effort of the AFN and its affiliates when the *Patriation Resolution* was before the Joint Committee, was devoted to ensuring that the provision of s.25 in the *Charter* would refer to “rights recognized by the *Royal Proclamation of October 7, 1863*”. “Recognition” has been a key word in the discourse of Aboriginal and treaty rights at least since George Manuel introduced it in his writing and his public speaking about 1973. Recognition stands in opposition to delegation.

I have found only one explicit use of box theory in a judgment, and that one comes from a lower trial Court: *Canada v. Ochawapace*¹⁶¹ decided by Judge R.A. Rathgeber. As the style of cause suggests, *Ochawapace* is a tax case. However, it is not about the payment of taxes but about the obligation under section 282 of the Excise Tax Act to file Goods and Services tax returns.¹⁶² In setting out the defence position Judge Rathgeber said,

“Evidence was heard from elders and experts to substantiate that position and that evidence will be commented on later in this judgment. As sovereign nations they claim the right to conduct business on the reserve without interference from the Canadian government. Non interference is given an extended meaning such that it includes the right to govern in an unfettered manner. Under this "full box" theory, the right to self-government carries with it all the necessary ancillary rights.”¹⁶³

Later, he summarizes the provinces’ “empty box” view of section 35 rights and contrasts it with the view of “[t]he Indian representatives” at the First Ministers’ Conferences held to define section 35 rights.

The provinces were not prepared to endorse a broad undefined right as the First Ministers wanted a definition of self-government and other Aboriginal rights. The First Ministers’ view was that the rights box is presently empty, and enquired what was to be put into it. This became known as the "empty box" theory. The Indian representatives pushed for a "full box" theory, i.e., the Aboriginal and treaty rights boxes already contain all necessary rights including a right to

¹⁶¹ *Ochawapace, supra*, fn. 126.

¹⁶² *Ibid.*, at 1.

¹⁶³ *Ibid.*, at 17.

self-government and these rights only require recognition so that they might be exercised without hindrance.¹⁶⁴

Provincial Court Judge Rathgeber's use of the terms "empty box" and "full box" and even "full box theory" is entirely consistent with my reading of the literature before and after his judgment in *Ochapowace*. It is noteworthy that he refers to "elders and experts" who testified before him and to the "Indian representative" at the conferences, all of whom shared the "full box theory" while "the provinces", without distinction, all adhered to "the empty box". There was, apparently, no need to calibrate a series of distinctions along the spectrum between full and empty.

Following the report of the Aboriginal Justice Inquiry, co-chaired by Murray Sinclair, then Chief Judge of the Provincial Court of Manitoba and Justice Alvin Hamilton, Associate Chief Justice of Manitoba, the Province of Manitoba established an Aboriginal Justice Implementation Commission¹⁶⁵ "to develop an action plan based on the original Aboriginal Justice Inquiry recommendations."¹⁶⁶ The Implementation Commission consisted of two

¹⁶⁴ *Ibid.* at 64. In the section of his reasons, including this paragraph, Judge Rathgeber summarizes the positions of the parties at the First Ministers Conference (FMC) 83 and the series of conferences which followed pursuant to s. 37.1, added to the *Constitution Act, 1982* in the amendments of 1983. (The unhyphenated spelling is in the original.)

¹⁶⁵ In my many years of following public inquiries I have never before seen a second inquiry set up to consider implementation of the report of the prior inquiry. Despite the lines in F.R. Scott's poem, "W.L.M.K": "The height of his ambition/ Was to pile a Parliamentary Committee on a Royal Commission", I have thus far resisted the temptation to inquire how this turn of events came about. Nothing better depicts the gap between the Crown lawyers' view and the Aboriginal lawyers' view than the notion that rights might still be extinguished by statute. *Hogg* goes to some lengths to disabuse his readers of this notion, *loc. cit.*, fn. 137 (section 57e,f,g.)

¹⁶⁶ *Justice Implementation Commission Report, supra*, fn. 126, at 110.

commissioners, Paul L. A. H. Chartrand and Wendy Whitecloud, and two Elder Advisers, Eva McKay and Doris Young. In “Chapter Five: Aboriginal and Treaty Rights” of a report entitled *The Justice System and Aboriginal People*, the Commission describes the conflicting views of Aboriginal people and Government officials:

“Most government lawyers ... argued that Aboriginal and treaty rights could still be extinguished or regulated by either explicit or general legislation. They thought that any significant legal change in the status quo required more explicit language through further constitutional amendments. In other words, section 35 was largely an "empty box" that could be filled, if that was seen as politically appropriate, through amendments negotiated via the First Ministers' Conference ... The initial court decisions on section 35 tended to adopt this view. A few even asserted that section 35 had no legal effect at all.”¹⁶⁷

At the opposite end of the spectrum were Aboriginal leaders and many others who argued that section 35 was specifically intended to transform the status quo. They viewed the First Ministers' Conference process as a means through which the Constitution could be amended so as to be worded more clearly and precisely to eliminate the likelihood of extensive and expensive litigation, and to enable greater public comprehension. They considered section 35 to imply a "full box" of rights, including the right of self-government. Under this theory, all Aboriginal and treaty rights were restored to full flower, free from any federal or provincial restraints. Apart from a few exceptional lower court decisions, the courts have either ignored this position or rejected it.¹⁶⁸ Hamilton A.C.J. and Sinclair J.'s use of the box metaphor seems entirely consistent with that of Rathgeber, Prov. Ct. J and with my own earlier definition.

¹⁶⁷ *Ibid.*, *supra*, fn. 126, ch. 5 at fn. 45. (HTML document, no pagination).

¹⁶⁸ Hon. Alvin Hamilton Associate Chief Justice of Manitoba (Queen's Bench) and Hon. Justice Murray Sinclair, Assoc. Chief Justice Provincial Court of Manitoba, *Report of the Manitoba Aboriginal Justice*

Kent McNeil's essay, "The Jurisdiction of Inherent Right Aboriginal Governments"¹⁶⁹, largely devoted to an analysis of *R. v. Pamajewon*¹⁷⁰, makes extensive use of the box metaphor: "The *Pamajewon* approach means that Aboriginal nations start with an empty box insofar as jurisdiction is concerned."¹⁷¹ He also notes the earlier use of the box metaphor and specifically cites Ardith Walkem & Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35*¹⁷². It is noteworthy but not surprising that both Judge Rathgeber and Prof. McNeil use the box imagery largely in the context of self-government. It is not surprising because First Nations' governments were forcibly suppressed for many years. The idea of First Nations' jurisdiction is much less well-defined than the various kinds of harvesting -- hunting, fishing, gathering "wild" (uncultivated) fruit and lumbering -- which are the major sources of prosecutions contested on the grounds of section 35(1) rights. McNeil's "Jurisdiction" paper was also commissioned by an institution dedicated to cultivating Indigenous governments. Prof. McNeil's use of the term in question is entirely consistent with the previous quotations and with the original context as I reported hearing it.

Inquiry, [ajic.mb.ca/volume/chapter 5.html](http://ajic.mb.ca/volume/chapter%205.html) (emphasis added.) I had earlier attributed this description of box theory to the later *Implementation Commission Report*. Checking further, I found that I had tripped on the link from the *Implementation Report* to the *Report of the Aboriginal Justice Inquiry*. These are two separate inquiries.

¹⁶⁹ Research Paper for the National Centre for First Nations Governance, (Ottawa: National Centre for First Nations Governance, 2007) (Hereinafter "Jurisdiction") <http://www.fngovernance.org/research/kent_mcneil.pdf>.

¹⁷⁰ *Pamajewon*, [1996] 2 S.C.R. 821.

¹⁷¹ *Ibid.* "Jurisdiction" at 14.

¹⁷² Walkem & Bruce (ed), *supra*, fns. 10 and 159.

Two notable advocates of Aboriginal and treaty rights, Doug Cuthand and Walter Rudnicki, made use of the empty box/full box idea in 1987. Cuthand used it in an article for the *Saskatchewan Indian*, a newspaper of that time, when he wrote a series of articles explaining what was at issue when another constitutional conference was coming up.¹⁷³ Rudnicki, a longtime consultant to various First Nations political organizations and previously a public servant in Indian Affairs and in a program for Indian housing in Central Mortgage and Housing Corporation, wrote a paper about the FMC process, "Reveille For First Nations", in 1987¹⁷⁴ in which he said that the conference broke down "over the question of the 'full-box' or the 'empty-box' process for the definition and identification of the rights which were to be recognized and affirmed." This is much the same use as Judge Rathgeber would make of the terms five years later.

There are two books, referred to above, which use the box terminology in their titles: *Box of Treasures or Empty Box? Twenty Years of Section 35* and a work closely connected to one particular legal proceeding, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs*, by Richard Daly.¹⁷⁵ These two books tell very different stories. Their use of the metaphor or theory behind the metaphor is, to my mind, consistent with one another and with the articles,

¹⁷³ *Saskatchewan Indian Newspaper* (1987).

¹⁷⁴ Reprinted by <e-notes> from fourarrows@rogers.com, an Indigenous publishing house, in May 2010.

¹⁷⁵ Walkem & Bruce (eds.), *supra*, fn. 10 (also referred to at fns. 159 and 172). Daly, *supra*, fn. 158.

judgment and commission report discussed earlier. Several of these works will be helpful in my examination of particular cases and in developing my own analysis.¹⁷⁶

In closing this section I feel that I should answer one question that has arisen because I have referred to the full box/empty box both as a theory and as a metaphor. Which is it? I think it is both. Clearly, the reference to boxes is a figure of speech, a metaphor.¹⁷⁷ Many a theory is named with a figure of speech; whether or not it has any value as a theory. Its value as a theory, however, will be considerably enhanced if we add to the works discussed above the idea that (1) the two boxes might be seen as the ends of a continuum or spectrum, and (2) cases, policies and attitudes might be ranked in comparison to one another, along the continuum from empty box to full box. This continuum might be named "The Box Spectrum". I also think it helps to establish a common ground between the positions taken by the Crown in litigation and the view of Governments in policy discussions. There is certainly evidence that Government policies and ministerial attitudes can and do influence both the decision to go to Court and the kinds of arguments presented at Court.¹⁷⁸ It is useful in describing and explaining the differences between First Nations litigants and the Crown both in right of Canada and in right of several, perhaps most, of the provinces.

(iv) Questions Emerging From the Literature Review

Purposive Interpretation

¹⁷⁶ Also, see Rotman, *supra*, fn. 160.

¹⁷⁷ Metaphor, at least until recently, has been a particular type of figure of speech. I have written about figures of speech in political discourse elsewhere and am happy to bypass that discussion here.

¹⁷⁸ Very negative ministerial statements about the duty to consult are cited in *Mikisew, supra*, fn.154.

1. Is there a recurring tendency of Crown counsel to avoid purposive interpretation? What are the benefits to their clients when they do so?
2. If purposive interpretation is both a common law and a statutory obligation, how does Crown counsel rationalize evading the duty to interpret constitutional protections in this manner?
3. What are the most significant – positive and negative -- re-allocations of burdens, evidential, legal or persuasive by the Court in the line of cases from *Calder* or *Guerin* in contrast to pre-patriation proof burdens? What would be a more equitable allocation of proof burdens?

Box Theory

4. Where would I place the Court on a full <-> empty box spectrum and what is the value of a box theory spectrum?
5. How does the Court's description of the Crown's submissions regarding section 35(1) square with the Court's own view?
6. What is gained by such an exercise either for particular cases or for the overall historical pattern represented in the line of cases?

These questions will be born in mind in analyzing an important series of cases in Part IV of the paper and they will be addressed more directly and specifically in the final section of Part IV below.

III. The Data: Burden of Proof Issues in Leading Cases on Aboriginal and Treaty Rights

In this section I examine a series of cases fundamental to the preceding analysis about the allocation of proof burdens and the Court's view of the Crown's arguments: *Guerin*, *Sioui*,

Sparrow, *Van der Peet*, *Haida Nation*, and *Mikisew*.¹⁷⁹ I will discuss new concepts related to allocation of burdens of proof and standards of proof that are introduced in these key cases and then become cornerstones of subsequent decisions. Some examples of such concepts are: fiduciary obligations first set out in an Aboriginal context in *Guerin*¹⁸⁰; the connections with an ancient community as a basis for Aboriginal rights, in *Sparrow*¹⁸¹ as well as the idea that rights should be allowed to take “a contemporary form”¹⁸². I look at the later cases in a more summary fashion and focus only on the elements that add to this analysis of proof burdens and Crown attitudes.

Certain cases, *Sioui*¹⁸³, and *Haida Nation*¹⁸⁴, for instance, are important to a discussion of proof burdens primarily for one or two important points while others, such as *Sparrow*¹⁸⁵, *Van der Peet*¹⁸⁶ and *Haida Nation*¹⁸⁷ set out an entire analytical framework for proving certain kinds

¹⁷⁹ *Guerin v. The Queen*, *supra*, fn. 12; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Sparrow*, *supra*, fn 1; *Haida Nation*, *supra*, fn. 51; and *Mikisew v. Min. of Heritage*, *supra*, fn. 154. I have not separately addressed *Delgamuukw v. British Columbia*, *supra*, fn.1. However, references to *Delgamuukw* run throughout this section and cover, I believe, the salient features of the decision for purposes of a study of proof burdens. In addition, further discussion of *Delgamuukw* can be found in the footnotes.

¹⁸⁰ *Guerin v. The Queen*, *supra*, fn. 12.

¹⁸¹ *Sparrow*, *supra*, fn 1.

¹⁸² *Ibid.*

¹⁸³ *Sioui*, *supra*, fn. 180.

¹⁸⁴ *Mikisew*, *supra*, fn. 154.

¹⁸⁵ *Sparrow*, *supra*, fn 1.

¹⁸⁶ *Van der Peet*, *supra*, fn. 1.

¹⁸⁷ *Haida Nation*, *supra*, fn. 51

of rights. Some, such as *Delgamuukw*¹⁸⁸, are best known for one major evidentiary feature – allowing the admissibility of oral histories -- but on closer examination also have additional features, clues to the Court's view of the Government's attitude as much as to its own view of the proper allocation of burdens.

Four features on which I wish to focus in reviewing these decisions are: (1) decisions by the Court as to the allocation of burdens of proof and standards of proof; (2) the accompanying discussion of reasons for these allocations; (3) how the allocations made by the Court, in section 35(1) cases of both the evidential burden and the legal burden shift back and forth between the parties, eg, the burden of establishing a right is on the one who claims the right but the usual next stage, of justifying an infringement, then falls to the Crown to justify any infringement; and, (4) discussion by the Court of legal burdens as distinct from evidential burdens¹⁸⁹. While the burden of proving a claim is on the party who makes the claim, a fiduciary has a duty to keep records and to disclose the records to the beneficiaries upon demand. At the very least, the failure to maintain and to disclose records has, on occasion, cast a dark shadow over the Crown; attempts to exempt itself from these duties have not impressed the Court. In the next and concluding section, I will return to an overview of the cases that will serve to respond to the questions I presented at the end of the previous section. We need to look first at what each case

¹⁸⁸ *Supra*, fn.1.

¹⁸⁹ This distinction is not explicitly made by the Court in any of the decisions discussed below. It is, however, discussed in both Sopinka *et al*, *Evidence Law in Canada* (ch. 3), *supra*, fn. 3 and in the *U.S. Rules of Evidence*. Art. 28 USC Appendix - Rules of Evidence Rule 301, Article III. “Presumptions in Civil Actions and Proceedings”, <http://lawresearch-registry.org/rule301.htm>. Sopinka *et al* use the terms “legal burdens” and “evidential burdens” as alternatives to the terms “burdens of proof” and “burdens of persuasion” used in the U.S. Rules of Evidence. I have drawn the inference, from these and other sources, that evidential burdens relate to matters of fact, and legal burdens to matters of law.

contributed to the allocation of proof burdens and the Crown's response to directions from the bench.

Guerin v. The Queen, [1984] 2 S.C.R. 335

When the Musqueam surrendered lands to the Crown, it appeared that the band had given broad authority to the Government to lease the land to others and had agreed to ratify whatever the Government did in leasing the land. The surrender provided as follows:

“AND WE, the said Chief and Councillors of the said Musqueam Band of Indians do ... hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof.”¹⁹⁰. (emphasis added)

The Crown argued that “if there were a legally enforceable trust its terms were those set out in the surrender document, permitting it to lease the 162 acres to anyone, for any purpose, and upon any terms which the Crown deemed most conducive to the welfare of the band.”¹⁹¹

Although section 35(1) is not referred to in the reasons, it was something of an “elephant in the courtroom.” Slattery, in “Understanding Aboriginal Rights”, observed that “[W]hile not dealing directly with the new constitutional provisions the judgment provides the stimulus and

¹⁹⁰ *Supra*, fn. 12, quoted by Dickson J., at 372. The requirement that the band council ratify in advance any decisions that the Government may later take is, itself, a kind of disability. The Court's reading down the provision in s.18 of the *Indian Act*, (*supra*, fn.68, discussed *infra*), based on the principles of equity, may also apply to this contractual provision.

¹⁹¹ *Ibid.*, per Dickson J.

much essential material, for reflection on the fundamental nature and origins of Aboriginal rights.”¹⁹²

Two key words sum up what *Guerin* is about and what makes it critically important in a study of proof burdens. The first word is “justiciable”: the Crown sought to argue that the trust or fiduciary duties that are the foundation of *Guerin* were “a mere political trust” and were not justiciable. Clearly, if this argument had prevailed not only would *Guerin* have failed but all the Aboriginal rights cases founded on the Crown’s “trust-like” fiduciary duty would also fail. Only when the Court rejected the “mere political trust” argument and accepted the justiciability of the Musqueam claim did the breach of fiduciary duties become open for arguments about proof burdens.¹⁹³ Had the political trust argument succeeded, *Guerin* could have been non-suited and all the subsequent cases based on the Crown’s fiduciary duty may not even have gotten into Court.

The second key word is the Latin term “*sui generis*”, translated as “of its own kind”, i.e., “unique”. Dickson J, as he then was, defines both Aboriginal rights and title and the fiduciary duties flowing from them as “*sui generis*”. This is critically important because, although, in *Guerin*, Dickson J. and Wilson J. both borrow heavily from the vocabulary of the private law field of trusts, they are using that vocabulary in a field of law that is more public than private, and more *sui generis* than either public or private as those legal categories are normally

¹⁹² Brian Slattery, “Understanding Aboriginal Rights”, *supra*, fn. 160.

¹⁹³ The Crown’s earlier refusal to disclose the pertinent documents and its claim of delay (laches) when the matter got to Court are fine examples of what Hon. John Fraser described as the kind of argument that can cast the administration of justice into disrepute.

understood. If we are to divide the whole legal universe into only the two categories of public and private, then, of course, section 35(1) decisions are in the public realm.¹⁹⁴ To the extent that private law concepts of property rights, trusts and fiduciary relationships are involved, they are *sui generis* and not necessarily defined by private law requirements. It would, I believe, be preferable to regard the field of Aboriginal and treaty rights as a *sui generis* field of its own that is not completely at home within the two classic categories of public law and private law, and distinguished from the common law. Given that section 35 rights are both *sui generis* and newly constitutionalized, the Court may well set out an allocation of burdens corresponding to the nature of this category of law.

*Guerin*¹⁹⁵ establishes a number of key points relating not only to the fundamental nature and origins of Aboriginal rights¹⁹⁶, and Aboriginal title in particular, but also, as to the justiciability and enforceability of these rights. In setting limits on the arbitrary use of power by the Crown, it puts the Crown on notice that, in acting on behalf of a First Nation, it cannot merely declare whatever it considers, or chooses, to be in the interest of that First Nation. The Court imposed a proof burden on the Crown: the beneficial nature of an action, actual or proposed, is not within the discretion of the Crown, but can be challenged by the First Nation and subject to the assessment of the Court. This effectively reads down the last clause in section 18(1) of the

¹⁹⁴ It is, of course, public law so far as most litigation initiated by Aboriginal claimants is against the Crown, a minister or a senior official (or some combination thereof). But it is a realm of public law with many of its own procedures and, particularly, its own proof burden allocations and standards.

¹⁹⁵ *Guerin*, *supra*, fn. 12.

¹⁹⁶ Although title is a form of right, albeit a special form of right, it has become customary, in recent years, to specify both "Aboriginal rights and title". In this review of cases, if I overlook this custom, I will have in mind the right that is at issue in the case under discussion.

Indian Act, under which the Governor in Council determines whether any purpose for which lands in a reserve are used or are to be used is for the benefit of the band. (This requirement, perhaps more than any other finding in *Guerin*, demonstrates people’s need for the kind of protection against both the Government and Parliament that is provided in the *Charter of Rights and Freedoms* and in section 35(1).¹⁹⁷ Section 18 had, in effect, imposed a serious disability upon communities administered under the *Indian Act*, by declaring the Governor-in-Council the sole decider of what constitutes a benefit to the band. This provision, like the 1927 amendment¹⁹⁸ prohibiting the raising of funds for the purpose of pressing land claims, deprived Indians, individually and as communities, from seeking relief from the Courts.

“The Mere Political Trust” Argument

Most important, from the perspective of the questions addressed by this thesis, *Guerin* repudiated a certain kind of argument that had the potential to render constitutional protection of Aboriginal title (and other Aboriginal rights) meaningless (as would a different argument submitted by the Crown several years later in *Sparrow*). The Crown relied on section 91(24) of the *Constitution Act, 1867*, and section 18 of the *Indian Act* to claim unlimited power over “Indians and lands reserved ...:” and to assert that its obligation to act in the band’s best interest is a “mere political trust”¹⁹⁹ rather than a legally enforceable fiduciary responsibility. In other words, it claimed that it could act with impunity in carrying out its mandate to act on behalf of

¹⁹⁷ *Indian Act*, *supra*, fn. 68. See, per Lamer C.J., in *Delgamuukw*, *supra*, fn.1 at 1085, para. 121.

¹⁹⁸ Section 149A, An Act to Amend the *Indian Act*, *supra*, fn. 72.

¹⁹⁹ *Guerin*, *supra*, fn. 12, per Wilson J. at 340(f) and 337(e). The term appears to have originated with 19th century British cases dealing with promises to British soldiers of a share in booty won in war discussed by Dickson J. in *Guerin*, *supra*, fn. 12, at 378-379.

the Musqueam -- the same obligations the Court described as “trust-like”²⁰⁰ -- and be subject to no accountability either to the Band or to the Court. The argument would have the Government accountable to no one other than a Parliament that, given a Government majority, is substantially controlled by the Government. This argument had four sources: (1) cases on similar trust issues discussed below; (2) section 18 of the *Indian Act*; and, (3) the terms inserted into the Musqueam mandate for the Indian agent to lease a portion of their land (presumably these terms were repeated in other such mandates), and (4) an interpretation of section 91(24) of the *Constitution Act, 1867*, based on the supremacy of Parliament and permitting Parliament to make whatever laws it wishes respecting Indians and their lands.

The Crown argued that, if there were a trust, it would be a “mere political obligation”²⁰¹ unenforceable by First Nations in the Courts. The Crown could act, and had often acted in complete disregard of what might reasonably be considered the benefit of the Band, by any stretch of the imagination.²⁰² (In contrast, the reasons of both Wilson J. and Dickson J. (as he then was) established a requirement that the Crown demonstrate that the decisions it takes, as a fiduciary, purportedly acting on behalf of a First Nation community, are beneficial, if not to a

²⁰⁰ *Guerin, supra*, fn. 12, at 386j.

²⁰¹ *Ibid*, per Wilson J. at 337. Ironically, the “mere political obligation” has also been termed “a higher trust”.

²⁰² The argument to the contrary, i.e., holding that the Government might determine what does or does not benefit a First Nations community is a classic DIAND (and colonial) argument, that allows the word “benefit”, frequently used in discussion of trusts and other fiduciary situations, in other areas of law and in ordinary conversation, a new and different meaning unlike its meaning in other legal, business or personal discussion. For a discussion of this phenomenon, see my discussion of “plain sense” and the decision of Major J. in *Will-Kare, supra*, fn. 116 at p. 25 and the remark of Dickson J., in *Nowegijick supra*, fn.47, about “plain and ordinary meaning” at p. 16. If it were necessary to look for a definition of “benefit”, I would begin with *the expectations of a beneficiary* as discussed in *Nowegijick*.

“reasonable person” then to the Court.) Wilson J.²⁰³ remarked that the Crown had chosen not to pursue the “political trust” defence at trial but was, nonetheless, allowed to introduce it in the Federal Court of Appeal. In the fall of 1983, I interviewed John Fraser MP, (PC, Vancouver South, in which Musqueam territory is located and formerly Minister of the Environment and Minister of Fisheries and Oceans in the Clark Government)²⁰⁴ on behalf of a group commissioned by the Commons Committee on Indian Self-Government, in regard to the Crown’s trust relationship.²⁰⁵ Mr. Fraser told me, in the interview, repeated later in a letter with an offer to swear an affidavit, that he had regarded the “mere political trust” argument, at the time, as such an abuse as “to bring the administration of justice into disrepute.” While he was Joe Clark’s Minister of the Environment, Mr. Fraser told me, he approached Sen. Jacques Flynn, the Attorney General, to discuss this matter. Following their discussion Sen. Flynn contacted the Crown lawyers in Vancouver and instructed them not to use the “political trust” argument. Following the defeat of the Clark Government, the Crown lawyers reintroduced this argument.

Fiduciary Duty to Keep Records

The duty of a fiduciary to keep proper records and to disclose them to the would-be beneficiary significantly eases the plaintiff’s burden of proof. The decision that the Crown’s obligation to Musqueam is a real “trust-like”²⁰⁶ fiduciary obligation has the effect of creating the expectation that the Crown has maintained records which it is required to disclose. If a proper

²⁰³ *Guerin, supra*, fn. 12, per Wilson J. at 340.

²⁰⁴ Subsequently, John Fraser was the first Speaker of the House of Commons elected on a free vote, 1986 to 1994. Later, he served as Prime Minister Chrétien’s Ambassador for the Environment.

²⁰⁵ *Trust Study, supra*, fn. 39.

²⁰⁶ Dickson J., in *Guerin, supra*, fn.12 at 386-387.

record has been kept, all the pertinent facts are available; even if the record is contested, there are, in the record, a set of statements that are subject to a forensic audit or other investigation. If a proper record has not been kept, that in itself would constitute a breach of the rules governing fiduciaries (such as the various trades and professions in which record keeping is required). It may also be taken as evidence of some sort of greater wrongdoing, leaving the fiduciary open to a suit by the beneficiary and a possible prosecution either by the Crown or by some licensing or regulatory body. Related to the requirement for record-keeping is the requirement in a number of the trades and professions to follow certain protocols²⁰⁷. If a physician or an accountant fails to follow the specified protocols in a given case, the burden falls on them to justify the procedure that they followed in place of the protocol. While the burden remains with the plaintiff to a civil standard, the doctor's duty to make, keep, maintain and disclose proper records greatly facilitates making out such a case.

The failure to keep proper records has haunted Indian Affairs, both in Canada and the United States through much of their histories.²⁰⁸ In 1979, the House of Commons adopted a motion by Warren Allmand (a Liberal representing Notre Dame de Grace in Montreal) and Robert Holmes (a Progressive Conservative from Southwestern Ontario) mandating the Auditor General to audit the trust accounts of any band presenting a Band Council Resolution seeking such an audit. The following year, the Assistant Deputy Minister of Indian Affairs told the Commons Committee on Indian Affairs that the trust accounts could not be audited because, by

²⁰⁷ The following definition of "protocol" is taken from the *OED on CD-ROM*, (Ox., London: OUP, 2009). "protocol, n. 5. c. In extended and general uses, any code of conventional or proper conduct; formally correct behaviour." *OED on CD-ROM*, (Ox., London: OUP, 2009).

²⁰⁸ *Trust Study, supra*, fn. 205.

and large, they lacked opening balances.²⁰⁹ One needs to ask why this was accepted as a defence against the need to do the work required by the Allmand-Holmes motion, rather than as proof of culpability in some kind of scandal.²¹⁰

A similar problem arose in the United States when Dorothy Cobell and others sued in a class action against the Secretary of the Interior for an accounting of funds held for individual Indians. The struggle to gather all the records in one room under the care and control of the Court could become an interesting if not suspense-filled saga. When it was finally recognized that those records were incomplete and had been mismanaged over many years, the U.S. Administration negotiated a settlement with the class action plaintiffs.²¹¹

²⁰⁹ On December 13, 2011, two Assistant Auditors General, Ronnie Campbell and Jerome Berthelette and Frank Barrett, Principal testified before the Senate Committee on Aboriginal Peoples, (41st Parliament, 1st Session, Issue 9). The Chair, in introducing the witnesses said that in their then most recent report, the most recent of a number of audits on Aboriginal matters over the past ten years, “the OAG noted that conditions are generally not improved for First Nations reserves in the areas examined”, i.e., fields of government activity audited. The report to which the Chair was referring and on which the Assistant Auditors General were testifying is Chapter 4 of its June 2011 report. http://www.oagbvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html. According to his 2011 testimony, Mr. Berthelette had told the Committee in March 2009, that “The audit in our November 2005 Report specifically examined the Department’s progress in converting land selected under these agreements ... [and] whether the Department was managing the conversion process in a way that was consistent with its legal obligations to First Nations... In our November 2005 audit, we found a number of deficiencies in the Department’s management practices for meeting its obligations, such as inadequate planning and an absence of targets for land conversions. We found that these deficiencies limited the Department’s progress in converting lands to reserve status, particularly in Manitoba.” These are the same deficiencies that short changed First Nations communities in their land bases at the time their reserves were first established.

²¹⁰ Elouise Pepion Cobell, et al., Appellees Kimberly Craven, Appellant v. Kenneth Lee Salazar, Secretary of the Interior, et al., Appellees, U.S. Court of Appeals. Rob Capriccioso, “Obama signs historic Cobell settlement, *Today*, Dec. 9, 2010. District of Columbia, No. 11–5205. [http://www.cadc.uscourts.gov/internet/opinions.nsf/449A027FB1374ACE85257A06004DB086/\\$file/11-5205-1374906.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/449A027FB1374ACE85257A06004DB086/$file/11-5205-1374906.pdf). See, also, *supra*, fn. 104.

²¹¹ See, *supra*, fn. 104.

To sum up this discussion, the Court's requirement for keeping and disclosing records, although it does not alter the burdens of proof, it greatly facilitates the work of a First Nations party in making out a case. This is particularly pertinent with a fiduciary that has a long record of failing to keep proper records. Indeed, it was the failure of the Crown to keep proper records and to disclose them to the First Nations communities whose affairs are discussed in those records that first led me to suggest that the Crown's behaviour was characterized by recidivism.

The Court's Response

Both Wilson J. and Dickson J. strongly rejected the "political trust" argument. Wilson J. quoted from the appellant's factum:

"The Federal Court of Appeal should not have allowed the Crown to put forward the concept of "political trust" as a defence to the Band's claim since, as the learned trial judge pointed out, it was not specifically pleaded as required by Rule 409 of the Federal Court Rules."²¹²

Both sets of reasons offer some politely scathing remarks on the substantive merits of the argument. Wilson J., while agreeing with Le Dain J.'s Federal Court of Appeal finding that section 18 of the *Indian Act* does not create a trust of reserve land, went on to say, "I believe it is clear from section 18 that that interest is to be respected and this is enough to make the so-called "political trust" cases inapplicable."

Wilson J. distinguished *Guerin* from the cases in which the Judicial Committee of the Privy Council had accepted a political trust argument, with two considerations: (1) Indian title

²¹² *Guerin, supra*, fn. 12 at 340n.

has an existence apart altogether from section 18(1) of the *Indian Act*;²¹³ and (2) it would fly in the face of the clear wording of the section to treat that interest as terminable at will by the Crown without recourse by the Band or First Nation.²¹⁴ Wilson J. characterized the conduct of the officers of the Crown principally involved in the lease as “equitable fraud”²¹⁵ and considered finding “the tort of deceit”²¹⁶. See her references to “Offending the Conscience of the King,”²¹⁷ *Equitable Fraud and the Tort of Deceit*.²¹⁸

Both Justice Wilson and Justice Dickson, as he then was, writing for himself and three other judges, were quite clear that the arguments offered in defence of the Crown’s conduct were unacceptable. Had the “political trust” argument, as Wilson J. termed it, been accepted by the Court, a complaint about the Crown’s administration of its fiduciary obligations to First Nations would not have been justiciable. This could very likely have allowed the federal Indian administration to continue in the same manner as it had since the passing of the first Indian Act in 1876²¹⁹.

²¹³ *Ibid.*, at 352e.

²¹⁴ *Ibid.*, at 352. In Wilson J.’s reasons, these two points occur in consecutive sentences. I have separated them and numbered them for this discussion because one distinguishes this case from *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619 (H.L.) and others through the common law of Aboriginal title while the second distinguishes *Guerin* by the statutory interpretation of s. 18 of the *Indian Act*.

²¹⁵ *Ibid.*, at 356.

²¹⁶ *Ibid.*, at 356.

²¹⁷ See St. Germain, *The Doctor and the Student*, 1518, a theoretical work on equity explaining the role of the Lord Chancellor.

²¹⁸ Wilson J., *Guerin*, *supra*, fn.12, at 356e.

²¹⁹ *Indian Act*, 1876, S.C. 1876, c. 18.

Dickson J. held that, although it was not a full trust obligation, the Crown did have a “trust-like” and justiciable fiduciary duty.²²⁰ Wilson J., who largely concurred with Dickson J., found that there was “a concealment amounting to equitable fraud.”²²¹ It was “conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.”²²² Quoting from *Kitchen v. Royal Air Force Association*, Wilson J. described equitable fraud as “conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other”²²³ Wilson J. continued,

“A trustee cannot be exonerated from liability for breach of trust under that section [of the *Trustee Act*, R.S.B.C. 1960, c. 390, now R.S.B.C. 1979, c. 414] unless he has acted ‘honestly and reasonably’.”²²⁴

Dickson J. examined the difference in styles of interpretation between Collier J. of the Federal Court Trial Division, as it then was, and Le Dain J. of the Federal Court Appeal Division.²²⁵ Even if he had been able to find a “true trust”, Le Dain J. would have refused to follow Collier J. in concluding that the terms of such a trust were defined by the Indians’

²²⁰ Dickson J., in *Guerin*, *supra*, fn. 12, at 190.

²²¹ Wilson J., in *Guerin*, *supra*, fn. 12, at 356e.

²²² *Ibid.*, at 356.

²²³ *Ibid.*, at 337.

²²⁴ *Ibid.*, at 356e. The use of “unconscionable” occurs in St. Germain’s *The Doctor and the Student*, *supra*, fn. 217, a 16th century theoretical work in which he describes inequitable as “offending the conscience of the King.” “Equity”, *Ox Comp Law*. <http://www.lonang.com/exlibris/stgermain/>

²²⁵ The Federal Court’s two divisions became two separate courts, The Federal Court (Canada), and the Federal Court of Appeal under amendments to their Act in 2003. http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Index.

understanding of conditions the Crown was to secure in the lease.²²⁶ Dickson J. went on to establish that, even if elements of a “true trust” are lacking, there may, nonetheless, be a fiduciary duty to act in the best interests of the would-be beneficiaries, particularly to account to them. The awards and penalties would follow those established for breach of trust.

The issue of the Crown’s liability was dealt with in the courts below on the basis of the existence or non-existence of a trust. In dealing with the different consequences of a “true” trust, as opposed to a “political” trust, Le Dain J., in the FCA, had noted that the Crown could be liable only if it were subject to an “equitable obligation enforceable in a court of law”. Dickson J. commented:

“I have some doubt as to the cogency of the terminology of “higher” and “lower” trusts, but I do agree that the existence of an equitable obligation is *the sine qua non* for liability. Such an obligation is not, however, limited to relationships which can be strictly defined as “trusts”. As will presently appear, it is my view that the Crown’s obligations vis-à-vis the Indians cannot be defined as a trust. That does not, however, mean that the Crown owes no enforceable duty to the Indians in the way in which it deals with Indian land.”²²⁷

This statement, to my mind, is the first of three statements that make Dickson J.’s judgment in *Guerin* so very significant. Second, in order of significance, is his discussion of Aboriginal title and his finding that the same rules apply on a reserve as on unsurrendered land:

“It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized Aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney-*

²²⁶ *Guerin*, *supra*, fn.12, at 374.

²²⁷ *Ibid.*, at 375n.

General for Quebec v. Attorney- General for Canada, [1921] 1 A.C. 401, at pp. 410-11 (the *Star Chrome case*).²²⁸

A corollary of his view of Aboriginal title arises from his citing with approval statements of Judson and Hall JJ. in *Calder*²²⁹. Judson J. stated expressly that the *Proclamation of 1763* was not the “exclusive” source of Indian title.²³⁰ Hall J. said that “Aboriginal Indian title does not depend on treaty, executive order or legislative enactment.”²³¹ Dickson J. elaborates on this in a section of his reasons entitled “The Nature of Indian Title” in which he reviews the *Star Chrome* case and *Amodu Tijani* in which Viscount Haldane “adverted to *St. Catherine’s Milling and Star Chrome* to distinguish between the Crown’s title and Aboriginal title.”²³²

Dickson J.’s third significant statement in *Guerin* concerns the nature of the fiduciary obligation of the Crown in its management of Aboriginal (or First Nations) lands:

“As the “political trust” cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians’ behalf does not of itself remove the Crown’s obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians’ interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown’s obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.”²³³ [emphases added.]

²²⁸ *Ibid.*, at 379.

²²⁹ *Calder*, *supra*, fn. 30.

²³⁰ *Guerin*, *supra*, fn. 12, at 322-23, 328.

²³¹ *Ibid.*, at 377.

²³² *Ibid.*, at 380.

²³³ *Ibid.*, at 385.

Dickson J.'s introduction of the term *sui generis* to describe the relationship that is neither public law nor private law in a strict sense has an element of the surprise ending in a "who dunnit," except that the surprise is not about who did the deed, but what kind of law applies in a field of law that the Crown had claimed was not justiciable.

Burden Issues in *Guerin*

The first point about burdens of proof in *Guerin* is that, if the Court had accepted the Crown's argument that the Crown's duty to First Nations is a "mere political trust", no amount of evidence would have saved the Musqueam First Nation's case: *Guerin* and all the subsequent suits against the Crown for breach of fiduciary duties would have become non-justiciable. Only once the Court decided that First Nations' fiduciary issues with the Crown were justiciable could they begin to set standards both for evidential burdens and for legal burdens.

The Crown's arguments outlined above are, however, consistent with the view that the Governments have taken from the earliest complaints of First Nations, whether to a Court, the Crown, the Canadian Parliament or Westminster.²³⁴ The Government's attitude is much the same regardless of the forum in which an issue is considered: Parliament or its committees, the Courts, Tribunals or the media.²³⁵ Both sets of reasons do touch on a number of points about which proof would be expected, some of which were, in this case, either stipulated or otherwise agreed

²³⁴ The history of this attitude is recounted in some detail in Chapter 3 of Michael Posluns, *Speaking with Authority*, *supra*, fn.104.

²³⁵ *Ibid.* The attitudes evident in these Court cases, on examination, will be seen to be all of a piece with the earlier history in *Speaking with Authority* and the grievances discussed before the Standing Senate Committee on Aboriginal Peoples in the last decade.

upon. Wilson J. observed that “The Musqueam are the descendants of the original inhabitants.”²³⁶ This becomes the proof of their Aboriginal title. As a fiduciary in its relation with the Musqueam, the Crown’s conduct can be held to a standard similar to that of a trustee, first, as to the requirement to disclose important information to the beneficiary; and, secondly, to provide a full accounting when it is sought.²³⁷ Contrary to section 18(1) of the *Indian Act*²³⁸, it is not enough for the Crown to claim to have acted in the best interests of a First Nation community; the Crown owes a duty to demonstrate that its actions as a fiduciary are to the objective benefit of the First Nation.²³⁹ The terms governing a surrender of land are subject to fiduciary obligation and cannot confer unlimited power to the Crown to deal with the land as it pleases. Dickson J. stipulates that the Crown’s obligation is similar to that of a fiduciary in private law and quotes Prof. Ernest Weinrib’s article “The Fiduciary Obligation”,²⁴⁰ thereby demonstrating that the same kinds of evidence and, so far as applicable, the same standard of

²³⁶ *Guerin, supra*, fn. 12, at 339.

²³⁷ *Ibid.*, at per Dickson J. at 384 ff and see, per Estey J. at 394. Although Wilson J. finds that the Indian agent was not acting out of dishonest motives, and did not commit the tort of deceit, she nonetheless characterizes his conduct as “equitable fraud”, at 356.

²³⁸ *Indian Act, supra*, fn. 68.

²³⁹ *Ibid.* Section 18(1) provides that the Governor-in-Council is the sole determiner as to whether a government action is to the objective benefit of a First Nations community, i.e., a benefit that an outside party can see. This provision remains from the pre-1951 *Act*. So far as it disallows consideration of the band’s view and ostensibly places the question outside the jurisdiction of the Courts, it represents a continuing civil disability. Although all the actions giving rise to *Guerin* took place before patriation, there is no indication of an interest in bringing s. 18 on the governance of reserves in line with either the *Charter* or s. 35(1), as there was with the membership rules. This interpretation of s. 18(1) also demonstrates that the fiduciary duty of the Crown and principles of equity as applied in *Guerin* apply not only to the Crown’s Royal Prerogative but also to its role as one of the three elements of Parliament. [*Constitution Act, 1867* 30 & 31 Victoria, c. 3. (U.K.), s. 17.]

²⁴⁰ *Guerin, supra*, fn.12, per Dickson J., at 384, citing Ernest Weinrib, “The Fiduciary Obligation”, *supra*, fn. 106, at 7.

proof would apply in this sui generis area of law as in private law: the plaintiff is required to make out a case on the balance of probabilities; and, the defendant may, if it can, rebut that case.

Two corollaries follow from, so far as applicable, the standards of proof in private law for proving a breach of a fiduciary duty by the Crown: (1) the burden of proving the basic facts and of proving that the conduct proven constitutes a breach of a fiduciary duty is on the plaintiff First Nation; (2) The Crown, in its fiduciary capacity, is obliged to provide the First Nation with as full an accounting as any other fiduciary.²⁴¹ Since their earliest days managing assets on behalf of First Nation communities and individuals, the IAB in Canada (and the BIA in the United States) have been unable to muster even minimum standards of record keeping; accordingly, in some instances it will be difficult for the Crown to rebut complaints of mismanagement of First Nation assets.

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

Sioui is important to this discussion of proof burdens because the Supreme Court of Canada addresses the question of what kind of agreement constitutes a treaty. Although the Court does not address the “big questions” that characterize its decision in *Sparrow*, it does address the vital point of whether a letter signed by General Murray in 1760, while he was acting governor in the absence of both the Governor and the Commanding Officer, guaranteeing the Hurons “free exercise of their customs and religion” could constitute a treaty. The question was specifically framed as to whether the letter constituted a treaty within the meaning of section 88

²⁴¹ Some years later, in *Haida Nation*, *supra*, fn.51, this will be termed “the duty to disclose”. It is a corollary of both (1) the duty to provide a full accounting and (2) the duty to consult.

of the *Indian Act*²⁴². It does not refer to the use of “treaty” in section 35(1) of the *Constitution Act, 1982*. However, as a general rule, the constitutional use of a word would be given a broader meaning;²⁴³ if the letter qualifies as a treaty within the meaning of the statutory provision, we can expect that it will also qualify under section 35(1).

The Crown argued that (a) the letter was not a treaty; and, (b) if it was, then it had expired; or, in the alternative (c) it does not specify the territory it was to cover. The Court looked at the historical context in which Quebec had been newly occupied by the English. When the historical context is given its full effect, it is evident that the parties contemplated that the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons in 1760, so long as the carrying on of the customs and rites was not incompatible with the particular use made by the Crown of this territory. This interpretation reconciles the Hurons’ need to protect the exercise of their customs and the desire of the British conquerors to expand.

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

Chief Justice Dickson and Justice La Forest began their co-authored reasons in *Sparrow* by noting that this case presented the Court with its first opportunity to consider the meaning of section 35 of the *Constitution Act 1982* “as a promise.”²⁴⁴ *Sparrow* is of particular importance to

²⁴² R.S.C., 1985, c. 1-5, s. 88.

²⁴³ A statutory meaning cannot be wider than the meaning in a constitutional context, and remain *intra vires*, particularly in either a list of powers or a provision enabling an institution to do certain things. See, for example, *Re: Eskimos*, [1939 CANLII 22](#), [1939] S.C.R. 104 (5 April 1939) and *Daniels v. Canada* 2013 FC 6.

²⁴⁴ *Sparrow*, *supra* fn. 1, at p.9.

a study of burdens in that it sets out the tests²⁴⁵ and standards for establishing an Aboriginal right protected by section 35(1)^{246 247}. A measure that infringes the right is invalid to the extent of the inconsistency pursuant to section 52 of the *Constitution Act, 1982*, unless the Crown can justify the infringement by some objective standard; and then only to the extent of the justification (to which I shall return shortly). By corollary to the justification of an infringement of a right guaranteed in the *Charter of Rights and Freedoms*, by the *Oakes*²⁴⁸ test, the Court in *Sparrow* held that the Crown is required to state and justify the public purpose the infringement is expected to accomplish.²⁴⁹

²⁴⁵ Dickson C.J. and La Forest J. characterized the measures for assessing an Aboriginal right as an "analysis"; some later judges applying their analysis referred to it as a "test". See Lamer C.J. in *Van der Peet*, *supra*, fn. 1, heading between paras. 91 and 92 and in paras. 134 and 139.

²⁴⁶ The term "section 35(1) right" necessarily includes "existing Aboriginal rights and treaty rights." Where I am discussing only one or the other type of s.35(1) right I will use the term "Aboriginal right", "Aboriginal title", or "treaty right".

²⁴⁷ Following *Haida Nation*, *supra*, fn. 51, in some cases Aboriginal title may be protected, at least as far as the duty to consult, before it is established in Court, particularly in cases where a resource project threatens that title. It is entirely possible that harvesting rights, outside of Aboriginal title areas, would receive similar consideration from the Courts.

²⁴⁸ *Oakes*, *supra*, fn. 79. See Brian Slattery, "Understanding Aboriginal Rights", *supra*, fn. 160.

²⁴⁹ In contrast, as late as 1961, when I began to read *Hansard*, a number of matters that are now accomplished by statutory instrument still required passage of a bill to enable a project to proceed. If it was contended that the matter came under provincial jurisdiction, the Government reply would almost invariably be that the project was, pursuant to s. 92 (10) (c) of the *Constitution Act, 1867*, "for the general advantage of Canada" That claim was considered to answer the matter in full. It was a constitutional equivalent for federal-provincial relations of s. 18(1) of the *Indian Act*. Following passage of the 1982 *Constitution Act*, such an uninformative answer would not suffice. In *Guerin*, the Court similarly read down the meaning of the last clause of s. 18(1) of the *Indian Act* under which the Governor-in-Council was empowered to decide whether any given measure was beneficial to an "Indian band". Although this reading down occurred in 1984, the events to which it was applied all took place well before 1982. The Court read down the meaning on the basis of equity, rather than on consistency with a constitutional provision. See *Guerin*, *supra*, fn. 12, per Wilson J. at 350e and per Dickson J. at 379b.

One of the most far-reaching but little noticed changes brought by the *Constitution Act, 1982* is the limits it places on section 18(1) of the *Indian Act*²⁵⁰ and on section 92(10)(c) of the *Constitution Act, 1867*. The last clause of section 18(1) of the *Indian Act* delegates to the Governor-in-Council the authority to determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of an “Indian band”. Section 92(10)(c) of the *Constitution Act, 1867* allows Parliament to declare that a given project is for the general advantage of Canada, and hocus pocus²⁵¹, the project becomes federal. In *Guerin*, drawing on the principles of equity, the Supreme Court effectively nullified the dictatorial power implicit in section 18(1). Section 92(10)(c) has largely fallen into disuse with the growth of provincial authority; it would, nonetheless, be interesting to see whether the Court would tolerate its arbitrary use. Up to the point of justification it would appear that the standards that the Court applies, in *Sparrow*, as regards section 35(1) rights, are strikingly similar to the tests that the Court had previously set out as regards guaranteed in the *Charter of Rights & Freedoms*, in *Big M Drug Mart*, *Hunter* and *Oakes*.²⁵² After the infringement of a *Charter* right is established, the *Oakes* test establishes the framework for assessing whether the infringement is justified within the meaning of section 1 of the *Charter*. Section 1 does not authorize justification of an infringement of rights protected under section 35(1), nor is there any comparable provision for

²⁵⁰ *Supra*, fn. 68.

²⁵¹ “The appellation of a juggler or conjuror or an expression he might use in sham Latin.” *OED*. This is the only one of the several magical features in the Canadian Constitution that I will examine in this thesis.

²⁵² *Big M Drug Mart* and *Hunter v. Southam* cited, *supra*, fn. 9; *Oakes*, *supra*, fn.79.

justification. The Court in *Sparrow*, adopting the analysis of Prof. Brian Slattery,²⁵³ filled the gap. In the absence of a provision similar to that in section 1 of the *Charter*, the Court decided that an infringement of rights protected by section 35(1) could be justified (a) if the public purpose to be achieved is of sufficient importance as to justify the loss of rights by the claimant First Nations; and, (b) if the infringement of rights is the smallest possible infringement that will, or is likely to, accomplish the stated public purpose.

One test of whether the proposed measure represents the least possible infringement is the duty to consult²⁵⁴ first set out in *Sparrow*²⁵⁵. If the Government claims that the proposal represents the least possible infringement, it should be able to explain the need for it to directly affected First Nations. It should also be willing, as part of a consultation process, to allow the First Nations to suggest alternatives that either infringe less or are somehow more palatable. The discussion of alternatives, including, for example, making adjustments in the route of a transportation corridor to avoid interfering with hunting, is known as “making accommodation”.²⁵⁶ If no adequate accommodation is feasible, compensation is to be paid, at a fair level, i.e., the rate that would likely be paid to a non-Aboriginal community.²⁵⁷ The duty to

²⁵³ Slattery, "Understanding Aboriginal Rights", *supra*, fn. 160. See *Sparrow*, *supra*, fn. 1, per Dickson C.J. and La Forest J. at 1077 ff.

²⁵⁴ *Sparrow*, *supra*, fn. 1, at 1119g.

²⁵⁵ *Ibid.*, at 1119g.

²⁵⁶ Accommodation is not discussed in *Sparrow*. Earlier in 1990, “accommodation” had been mentioned in a treaty rights case from Quebec, *R. v. Sioui*, *supra*, fn. 179. Surely, one purpose of consultation is to enable the parties to reach an accommodation. The first case in which it is stated as a corollary, or a necessary consequence of good faith consultation is *Haida Nation*, *supra*, fn. 51.

²⁵⁷ These tests not only protect the Aboriginal rights of a First Nation community, they also protect the *Charter* rights of the community and its members, rights on which Canada trampled regularly from

consult is another factor arising from section 35(1) that re-aligns some proof burdens. While a First Nation has a duty to support its contention that proper consultation did not occur, the Crown should be able to prove that consultations were held and that they were thorough, or whatever standard is required in a given case, simply because it is the Crown that will have the more exhaustive records. If it is alleged that the proposed project does not follow the least possible infringement, the Crown is in a position to show that it received suggestions from the First Nation and elsewhere and considered them all carefully and thoroughly.

In later actions brought by First Nations against the Crown, the failure to fulfil the duty to consult has been the single most recurring complaint. Through the succession of such complaints — *Haida Nation*²⁵⁸ and *Mikisew*²⁵⁹ -- for example, and cases that did not go to appeal *Pikangikum*²⁶⁰ -- the Court gradually elaborated what the justices would consider good faith consultation. Had the Governments, federal and provincial consulted and otherwise acted in the

Confederation to sometime very recently. The overall effect of the *Constitution Act, 1982* for First Nations and other Aboriginal peoples is to impose some restraint on the arbitrary conduct of governments. However, it is, at best, an open question whether Canada has yet made a thorough-going policy of accommodating First Nations in light of the many instances in recent years when it has disregarded both *Charter* rights and Aboriginal rights. (*Schmidt v. A.G. (Canada)* Factum in Federal Court FC-T-2225-12. Schmidt, a former senior counsel in the Justice Department., alleges that there has been an instruction to departmental lawyers that, if a bill has a five per cent chance of surviving a challenge it should go ahead; similarly, if a defence on a *Charter* challenge has a remote chance of winning, it should be pursued.) He refers to the *Department of Justice Act*, R.S.C., 1985, c. J-2, s. 4.1, which requires the Minister to examine every Bill presented by a Minister to the House of Commons and report as to whether any of its provisions are inconsistent with the purposes and provisions of the *Charter of Rights and Freedom*, and the failure of the Minister to comply with this statutory duty.

²⁵⁸ *Haida Nation*, *supra*, fn. 51.

²⁵⁹ *Mikisew*, *supra*, fn. 154.

²⁶⁰ *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)*, 2002 FCT 1246 (CanLII). *Pikangikum* was the first case in which a First Nation put into Third Party Management by the Minister of Indian Affairs succeeded in convincing the Court that the Minister's actions were unreasonable and the order should be quashed.

good faith of a proper fiduciary, as defined by the Court, although there may still have been some disagreements, it is likely that the Court would have had significantly fewer opportunities and much less need to elaborate on the definitions they had previously given.²⁶¹

Burden Issues in *Sparrow*

Part of what Chief Justice Dickson and Justice La Forest do in the course of their reasons in *Sparrow* is to set out a series of tests or standards by which an Aboriginal right might be established and by which an infringement may be established and, under limited circumstances, justified. Unsurprisingly, but crucially important, each of these tests (or steps in the test) carries its own allocation of proof. Dickson C.J. and La Forest J. expressed their concern to establish an analysis or tests on which proof burdens in Aboriginal rights litigation could be allocated in the following terms:

“We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament’s ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery.”²⁶²

²⁶¹ The Court’s term “the honour of the Crown” requires, I suggest, a virtual elimination of the jousting for private advantage that characterizes much civil litigation and that, contrary to all that John Edwards says of the role of the Attorney General, places the Attorney General in the position of acting for a private litigator rather than serving a public interest (*supra*, fn. 140).

²⁶² *Sparrow*, *supra*, fn. 1, at 1079g.

It is noteworthy that this paragraph is about both the allocation of the fishery²⁶³ and the Crown's "justificatory standard" under section 35(1), a standard that places on the Crown a burden of proof²⁶⁴: once the First Nations party establishes an infringement, the Crown is obliged to justify the infringement or to cast the allegation of infringement into doubt on the balance of probabilities. This does not abrogate or dissolve the burdens on the First Nations party except so far as it places a corresponding burden on the Crown, at each stage of the *Sparrow* tests. The Crown cannot simply say that a project is for the general benefit of Canada.²⁶⁵ Neither can the Crown hide any longer behind section 18 of the *Indian Act* under which "the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band."²⁶⁶ Dickson C.J. and La Forest J. are aware of the pressure on government from other interests to allocate priorities without giving the First Nations fishery priority. The last sentence, in the quotation immediately above, emphasizes both the Government's obligation regarding the Aboriginal Fishery and the Court's healthy scepticism:²⁶⁷ "The purpose, identified by the Court, is to guarantee that the allocations amongst the various fisheries – the Aboriginal food and ceremonial fishery, the commercial fishery and the sport fishery -- treat Aboriginal peoples in a way that takes their rights

²⁶³ The fishery is generally allocated among (1) the Indian Food and ceremonial fishery, (2) the commercial fishery and (3) the sports fishery. The legal authority for fishery regulations is the federal *Fisheries Act*, R.S.C. 1970 (cited in *Sparrow*). Fisheries law is within federal jurisdiction under the *Constitution Act, 1867*, s. 91(12) even where fishing is local.

²⁶⁴ *Sparrow, supra*, fn. 1 at 1079g.

²⁶⁵ See the discussion of s. 92(10)(c) of the *Constitution Act, 1867*, above in the text at fn. 251.

²⁶⁶ *Indian Act, supra*, fn. 68. This provision, at least in its more authoritarian interpretations, is largely nullified in light of the SCC decision in *Guerin, supra*, fn.12. See discussion in the text, *supra*, at fn. 200.

²⁶⁷ *Van der Peet, supra*, fn. 1 at 1119e.

seriously,”²⁶⁸ as opposed to the Crown’s view that section 35(1) can only have the meaning not yet attributed to it by Cabinet or by a federal-provincial conference. This is also the antithesis of the Empty Box Theory²⁶⁹ as it was epitomized in the pronouncement of a former assistant deputy minister of Justice who, when asked whether there were any specific rights included in section.35(1) replied, “Yes, the right to give up land.”²⁷⁰

Each step (or test) in establishing infringement of a section 35(1) right and its justification has its own burdens of proof (and persuasion) assigned by the Court: (1) establishing the individual claimant’s membership in an Aboriginal community; and, (2) the contemporary community’s connection to a community pre-existing British sovereignty; (3) demonstrating that a project, regulation or statute infringes on an Aboriginal right; (4) the Sparrow justification test (a) whether the infringing project, regulation or statutory provision serves a “valid legislative objective”, i.e., an objective consistent with section 35(1), such as resource conservation and (b) whether it infringes as little as possible; (5) whether adequate and good faith consultation took place; (6) challenging a claim of consultation either (a) on the basis that the acts supposedly constituting the consultation do not meet the necessary standards or that, (b) in some other way, the consultation does not reflect good faith²⁷¹; and, demonstrating that there are alternative

²⁶⁸ *Ibid.*, 1119a.

²⁶⁹ For sources on box theory see, *supra*, fn. 126 ff.

²⁷⁰ The ADM was W.I.C. Binnie. When he was subsequently appointed to the SCC, and no longer representing Government, his views on Aboriginal rights transformed. See discussion in the text, *infra*, at fn. 397.

²⁷¹ A pre-*Charter* example of non good-faith consultation, of particular interest, is the *White Paper on Indian Policy*, presented in June, 1969 by Jean Chrétien, then Minister of Indian Affairs in Pierre Trudeau’s Government. Hearings had been held by Robert Andras, a junior minister on behalf of the Minister of Indian Affairs, to hear what “Indians” wanted in the forthcoming *White Paper on Indian*

measures that would infringe significantly less upon the Aboriginal rights in question.²⁷² In that case, having discussed the steps or tests, it will be convenient to summarize them and the burdens attached to each of them, in *Sparrow*, the decision in which the steps are first laid out; and then to summarize any changes in later cases.

Dickson C.J. and La Forest J. expressed their concern in *Sparrow* to establish an analysis or tests on which proof burdens in Aboriginal rights litigation could be allocated in the following terms:

“We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority.”²⁷³

Policy (Queen’s Printer: Ottawa, 1969). George Manuel, who sat through most of the hearings, said, in his memoir *The Fourth World, An Indian Reality* that “not one Indian witness” asked for repeal of the *Indian Act* and dissolution of reserves. See George Manuel and Michael Posluns, *The Fourth World*, *supra*, fn.74. This example of “sharp dealing” (*Sparrow*, *supra*, fn. 1 at 1107) fostered the degree of unity among “Indian” organizations that enabled the formation of the National Indian Brotherhood.

²⁷² These standards or tests can all be found in *Sparrow*, *supra*, fn. 1 with one exception. Compensation had been mentioned in *Sparrow* but not the wider concept of “accommodation”. Accommodation, after being mentioned in *Sioui* (*supra*, fn. 256) and *Van der Peet*, *supra*, fn. 1, was explored substantially in *Delgamuukw*, *supra*, fn.1. “Accommodation” is mentioned several times in *Van der Peet* by Lamer C.J. (see, for example, paragraphs 248, 313) My reading of those references is that they refer primarily to “accommodating” or harmonizing “Aboriginal rights that can be legally accommodated within the framework of non-Aboriginal law.” McLachlin J., as she then was, in her dissent, introduces the usage of “accommodation” to the Aboriginal rights discourse (at para. 254). Accommodation is available in human rights legislation, including a variety of non-monetary measures, a feature that makes it particularly suitable to address the outcome of consultations.

²⁷³ *Sparrow*, *supra*, fn. 1 at 1119a.

Having set out the burden allocations it is appropriate to say something about the standards to which each of these burdens must be met. It is noteworthy that the quotation immediately above is about both the allocation of the fishery and the “justificatory standard” allocated by the Court to the Crown, a standard that places on the Crown the burden of justifying an infringement once the infringement has been established by the First Nations party. Establishing guilt in these, as in other criminal and quasi-criminal matters, requires proof “beyond a reasonable doubt.”²⁷⁴ One of the difficulties of using a criminal proceeding to establish an Aboriginal right is that the defence in a criminal proceeding should need only to create a reasonable doubt.²⁷⁵ It would be quite appropriate to acquit a person on the basis of a reasonable doubt but the Court would want some higher standard for recognizing an Aboriginal or treaty right. Where the Court sets out to resolve an ambiguity in a treaty, e.g., the “truck store” provision in the Maritime Treaty under which Donald Marshall defended his right to fish, something close to the civil standard – the balance of probabilities – would likely be applied. In addition, the phrase quoted by Dickson C.J. and La Forest J. from *Nowegijick* that “doubtful

²⁷⁴ See discussion of standards in Part II and references at fn 17. The Aboriginal rights defence illustrates the difference between “absolute liability” and “strict liability”. Strict liability occurs when, although the facts point toward a guilty verdict, there are extenuating circumstances; typically, if a person can demonstrate that he took all reasonable precautions or had a reasonable belief that he was entitled to do what was normally prohibited. It is the latter exception which relates the *Sparrow* circumstances to strict liability.

²⁷⁵ The burden of proof of the elements of an offence is on the Crown, but the defence has the opportunity to raise a reasonable doubt. The SCC has provided direction for trial judges who instruct triers of fact on the standard of proof: *R. v. Lifchus*, [1997] 3 S.C.R. 320. The trier of fact takes instruction from the trial judge on the legal principles and tests to be applied, and applies the standard of proof to the facts and evidence. In Aboriginal rights cases, the adjudicative facts relating to the offence are frequently not in dispute, but the interpretation and proof relating to the establishment of an Aboriginal right, its infringement and whether the infringement is justified, is likely to be complex and in dispute. These issues, which are decided on a balance of probabilities are determined by judges, and subject to review on appeal.

expressions should be resolved in favour of the Indians”²⁷⁶ is, to my mind, particularly applicable when the balance of probabilities does not quite resolve the matter. (Where the right claimed is a treaty right, it is not necessary to establish the practice prior to the date of colonization; it is sufficient to establish that the practice is included in the terms of a treaty provision.²⁷⁷) The burden of establishing an infringement would be on the plaintiff First Nation to the standard of a balance of probabilities. The burden of establishing justification would also be on the balance of probabilities but would fall to the Crown with the additional burden of establishing that the infringement is the least possible infringement compatible with meeting the other public need, and that there have been good faith consultations and, where warranted, accommodation. If minimal infringement and consultation are advanced in good faith, it should be possible to establish them as matters of substantial fact, particularly consultation.²⁷⁸ The Crown is obliged to justify the infringement or to cast the allegation of infringement into doubt on the balance of probabilities. This does not abrogate or dissolve the burdens on the First Nation party except so

²⁷⁶ Quoted from *Nowigijick in Sparrow, supra*, fn. 1 at 1107. Note that the phrase “doubtful expression” is translated into French as “ambiguïté”, a term that would be more widely understood in English than “doubtful expression.”

²⁷⁷ *R. v. Marshall*, [1999] 3 S.C.R. 533. In *Marshall* the Court accepted the argument that the “truck store” provision in the treaty of 1752 required that the Mi’kmaq be able to harvest items with which they could trade. Likewise, Treaty 7 in southern Alberta is known as the “Ammunition Treaty” because the Crown undertook to provide ammunition for hunting. Indeed, the reasoning of the Court in *Marshall*, that the guarantee of a truck store implied a treaty right to gather materials for trade and that the replacement of government truck stores by private shops did not abrogate the treaty commitment presents strong examples of what are described in *Charter* equality cases as “analogous grounds”. A number of promises occurring in one or more of the numbered treaties were specifically for goods and services that were not available on the prairies before contact: ammunition; farming equipment; European medicine chests; European education, to name a few.

²⁷⁸ Minutes of such meetings should be available, preferably approved by both sides. The minutes would usually indicate that certain senior officials met with certain chiefs, councillors and their advisors to discuss specified subjects, and the result of those discussions.

far as it places a somewhat greater burden, on the Crown as regards justification, valid public purpose and consultation.

If the existence of an Aboriginal right is established, then the provision prohibiting the activity will be presumed to infringe on that constitutionally protected right; the burden is then on the Crown to justify that infringement. It is not sufficient for the Crown to claim that the prohibition is in “the public interest”; the Court indicates that it will be most disposed to a justification based on conservation that preserves the priority of the Aboriginal food and ceremonial fishery.²⁷⁹ The justification for conservation does not give Parliament or its delegate the authority to indicate the method by which the food and ceremonial quota might be fulfilled. Rather the test involves, for example, asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If the Musqueam were forced to spend undue time and money per fish caught, or if the net length reduction resulted in a hardship to the fishers, their right to fish for food and ceremonial purposes would be infringed upon.²⁸⁰

R. v. Van der Peet, [1996] 2 S.C.R. 507

Van der Peet is best known in both scholarly and Aboriginal political circles²⁸¹ for the very restrictive view of Aboriginal rights set out by Chief Justice Lamer, writing for the majority

²⁷⁹ *Sparrow*, *supra*, fn.1, at 1112h.

²⁸⁰ *Van der Peet*, *supra*, fn 1, paras, 194 & 224.

²⁸¹ The generalization about legal scholars will be justified by the list of scholars on whom I draw, including Kent McNeil, Russel Barsh, James Sakej, James Youngblood Henderson, Mark Stevenson and

on the question of whether casual sales of fish in one's own or a neighbouring village can constitute an Aboriginal right.²⁸² Taken as a whole Barsh and Henderson²⁸³, to whom I shall return in the discussion of “Academic Criticism of *Van der Peet*” below, do not consider the *Van der Peet* trilogy²⁸⁴ to be either good law or an advance in the struggle for Aboriginal and treaty rights. The dissents in *Van der Peet* and later academic criticism are also important here because they are more consistent with both earlier judgments by the Dickson Court and later judgments by the McLachlin Court. Quite possibly, and without engaging in counter-history, Mrs. Van der Peet and others – Marshall, Bernard, Polchies and Sappier, to name only a few — would not have been dragged into Court, at least if another forum had succeeded in addressing some of these issues. A government concerned about the honour of the Crown and the fulfilment of its fiduciary duties would, at least conceivably, have acted on the gracious and diplomatic suggestions of the Court to consider the development of other means for addressing the variety of

Peter Hutchins. There are in Aboriginal circles leaders and advisors (or technicians) who make best efforts to keep up with legal judgments and parliamentary materials pertinent to their issues.

²⁸² There are three decisions that were handed down concurrently and that are commonly referred to as “the *Van der Peet* trilogy”. The other two decisions in the trilogy are *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723.

²⁸³ Russel L. Barsh and James Youngblood Henderson, “The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand”, 42 *McGill L. J.* 993 1996-1997 (Hereafter “Ropes of Sand”).

²⁸⁴ Counter-history most often refers to unanswerable historical speculation such as “What would have happened if ...” There are, however, some instances in which it is possible to establish that at least certain events would likely not have happened. I think the speculation that, given a different prosecutorial policy, some or all of the cases mentioned might not have gone to trial is an example of such a reasonable speculation, particularly where the Aboriginal or treaty right was upheld by the Court. Indeed, it is totally safe to say that if both the Government and the First Nations entered into *bona fides* negotiations, or some other alternative dispute resolution, there would be fewer prosecutions. See *Delgamuukw*, *supra*, fn.1 in which the Court encourages the parties to seek a negotiated solution.

questions surrounding various kinds of Aboriginal harvesting rights, e.g., negotiations and reference questions.

Dorothy Van der Peet was charged with selling fish “on a non-commercial basis”. The fish had been caught by her husband and another man “under a Native food fish licence.”²⁸⁵ Mrs. Van der Peet did not dispute the facts. She entered a plea based on a claim that non-commercial sale of salmon was a pre-colonial practice and, therefore, an Aboriginal right according to the *Sparrow* tests.²⁸⁶ The trial court judge adopted anthropological evidence submitted by the Crown and rejected this plea. He found that any sale of fish by the Sto:lo community, pre-colonial, consisted of “opportunistic exchanges taking place on a casual basis”.²⁸⁷ After Selbie J. of the Supreme Court of British Columbia (BCSC) allowed Mrs. Van der Peet’s appeal, her conviction was reinstated in the B.C. Court of Appeal (BCCA) on grounds very similar to those later elaborated in this case by Lamer C.J., in the Supreme Court of Canada.

In addition to justifying the infringement on the ground of “conservation and resource management,”²⁸⁸ several other standards must be met: (1) “[a]ny allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing;”²⁸⁹ (2) “there has been as little infringement as possible in order to effect the desired

²⁸⁵ See the Index headings in the SCC reasons for decision for an outline of the issues..

²⁸⁶ *Van der Peet supra*, at fn.1, 1112i. This interpretation also dovetails with Dickson C.J.’s emphasis on having Aboriginal rights “be in keeping with the unique contemporary relationship”.

²⁸⁷ *Van der Peet, supra*, fn. 1 at para.7.

²⁸⁸ *Ibid.*, at 1079b.

²⁸⁹ *Sparrow, supra*, fn 1.

result;” (3) in a situation of expropriation, fair compensation is available; and (4) the Aboriginal group in question has been consulted with respect to the conservation measures being implemented. This list is not exhaustive.²⁹⁰

Of these requirements, with their corresponding burdens of proof, the one that would prove most contentious in this line of cases is what would later be characterized as “the duty to consult”. One reason why the duty to consult has been the most contentious requirement is that several of the other standards depend upon consultation, e.g., the claim that the chosen method is the least infringing method available supposes that the affected Aboriginal parties did not name a less infringing approach; compensation, likewise, requires consultation and negotiation; accommodation, when it did become a major factor can be seen as a non-pecuniary kind of compensation, and likewise requires consultation.

If there are two key words by which we might characterize *Van der Peet*, I would nominate “integral” and “reconcile”. Much of Lamer C.J.’s decision hangs on requiring an Aboriginal right to be “integral” to qualify for section 35(1) protection and on the meaning he attributes to “integral”. His use of “integral” is bound up with his idea of “What is to be reconciled” between First Nations and the Crown, the Government or the general population.²⁹¹ Although Lamer C.J., refers to *Sparrow* at the outset of his reasons in *Van der Peet*, I think he does not follow *Sparrow* but, rather, has borrowed the terms “integral” and “reconcile” (which were not key terms in *Sparrow*) and invested them with meanings that they do not have in

²⁹⁰ Lamer C.J. in *Van der Peet*, *supra* at fn. 1, quoting *Sparrow*.

²⁹¹ “Ropes of Sand”, *supra*, fn. 283.

Sparrow. The two dissents elicited by his reasons—one from L’Heureux-Dubé J. and the other from McLachlin J. (as she then was) -- are much closer to the *Sparrow* standard. Likewise, even the academic critics who are critical of *Sparrow* identify that decision as much more open and receptive to Indigenous thought than is *Van der Peet*.²⁹²

The big question that Lamer C.J. raises – What does it mean to say that something is “integral” to a culture? -- is a question that was widely canvassed by the trial judge, Scarlett Prov. Ct. J., when he described the sale of fish by the Sto:lo as “opportunistic”. Several schools of European history would say that most mercantile activity in Europe, before the Renaissance or the concurrent rise of towns, was opportunistic. This does not appear to have diminished the rights held either by individuals, e.g., noble land owners, or farmers (as the term was then used) or the peasantry.²⁹³

Lamer C.J. formulated the proposition that, in order for a practice to qualify as an Aboriginal right, it must not only descend from pre-colonial practice, but must also be recognized as “integral” by the Court. His discussion of integral does not appear to grasp either that the term is highly subjective and difficult, if not impossible, to judge from outside. Both dissents and the academic writing on *Van der Peet* highlight the various difficulties in defining or setting an

²⁹² An example of an academic critique of *Sparrow* but far more critical of *Van der Peet* is John Borrows in “Frozen Rights in Canada: Constitutional Interpretation and the Trickster”, 22 *Am. Indian L. Rev.* 37 (1997-1998).

²⁹³ W.R. Cornish and G. de N. Clarg, *Law and Society in England 1750-1950* (London: Sweet & Maxwell, 1989). The rights of each of these classes had a strong collective element. This is most evident in the rights of peasants and others living in small villages to gather wood in the forest between the villages up to a certain point but not past where another village had “rights of lops and tops.”

objective scale of “integrality”²⁹⁴. The first part of the critique below merges these various criticisms after which I look at features more specifically attached to one or another dissent or academic criticism.

“Integral” is interesting both legally and philosophically. (1) Was the use of “integral” by Dickson C.J. and La Forest J. itself essential to their view of section 35? (2) What does Lamer C.J. mean by “integral”? (3) Was Lamer C.J. following Dickson C.J. and La Forest J.’s reasons in *Sparrow*? First, while the term “integral” was used in passing in the *Sparrow* decision, in my opinion, Dickson C.J. and La Forest J. used the word to describe the role of salmon in Musqueam and Salish culture, without particularly setting it up as a standard for establishing an Aboriginal right. They said that “the taking of salmon was an integral part of their lives and remains so to this day.”²⁹⁵ They characterize a practice as “integral”, but do not attempt to establish it as a legal standard. The *Van der Peet* judgment ratchets the standard of “integrality” up several notches. If we had to re-state or paraphrase that statement from *Sparrow* we might say, “The taking of salmon was a central part ...” They do not say that for a practice to qualify as an Aboriginal right under section 35(1) it must be central or integral. Lamer C.J. uses “integral”, precisely to establish a legal standard. The OED describes this usage as “archaic”:

“1. Of or pertaining to a whole. Said of a part or parts: Belonging to or making up an integral whole; constituent, component; spec. necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage. (Cf. integrant.) (Formerly distinguished from essential: see quotes. 1697, 1727.)

²⁹⁴ “Integrality” is a term introduced by McLachlin J. in her dissent at para. 255.

²⁹⁵ *Sparrow, supra*, fn. 1 at 1094.

2. Made up of component parts which together constitute a unity; in Logic, said of a whole consisting of or divisible into parts external to each other, and therefore actually (not merely mentally) separable. Now rare or Obs. exc. in technical use.”²⁹⁶

Lamer C.J. uses “integral” to mean “essential” in the philosophical sense.

“ ‘Essentialists’ maintain that an object’s properties are not all on an equal footing: some are ‘essential’ to it and the rest only ‘accidental’. The hard part is to explain what ‘essential’ means.”²⁹⁷

The *Sparrow* usage, in contrast, is philosophically more nominal and, so far as it might be a legal category, a much less formal one.²⁹⁸

“... [A] practice will be protected as an Aboriginal right under s. 35(1) of the *Constitution Act, 1982* where the evidence establishes that it had “been exercised, at the time sovereignty was asserted, for a sufficient length of time to become integral to the Aboriginal society”. To be protected as an Aboriginal right, however, the practice cannot have become “prevalent merely as a result of European influences” (para. 21) but must rather arise from the Aboriginal society itself. On the basis of this test Macfarlane J.A. held that the Sto:lo did not have an Aboriginal right to sell fish.”²⁹⁹ [emphases added]

²⁹⁶ “Integral”, *OED* on CD-ROM, 2d ed., (OUP: Oxford, Toronto &c., 1989). The *OED* offers three definitions each with a substantial number of examples. The latter part of the first definition places “integral” one step short of “essential”, but that strict usage does not seem to be required in earlier parts of the definition 1 or in at all in definition 2. “Integral”, *OED* on CD-ROM, 2d ed., (OUP: Oxford, Toronto &c., 1989).

²⁹⁷ *Concise Routledge Encyclopedia of Philosophy*, (London: Routledge, 2000). Distinguishing the essential from the accidental properties is of much greater significance when establishing what rights are essential to a particular human community rather than distinguishing one fruit from another, or even the elements of communion.

²⁹⁸ By “legal category”, here, I mean one created by the Court or by Parliament, for the Courts’ use in classifying matters of fact. Realism, following Aquinas, treated the elements of communion as “real substance” while Duns Scotus, in the next century, treated these elements as nominal. Frederick Copleston, S.J., *A History of Philosophy*, Vol. II, Part II, (Garden City, NY, Doubleday & Co. 1965). A biographer might helpfully address the question whether each of these three chief justices leaned, in their other interpretive writing, more toward realism or more toward nominalism.

²⁹⁹ *Van der Peet*, *supra*, fn.1, at para. 9. Lamer C.J. is paraphrasing the judgment of the BCCA. The *Sparrow* definition of “integral” quoted in this paragraph does not require pre-contact integrality but only the passage of time during which it became increasingly integrated into a culture.

There is a second issue about the use of “integral” as a standard required to establish an Aboriginal right. This standard also stands over against the *Sparrow* Court’s emphasis on Aboriginal rights being expressed in contemporary forms.

“The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s Aboriginal peoples.³⁰⁰ [emphasis added.]

To use Professor Slattery’s expression, in “Understanding Aboriginal Rights”,³⁰¹, paraphrased in *Sparrow*, the word “existing” in section 35(1) of the *Constitution Act, 1982*, suggests that those rights are “affirmed in a contemporary form rather than in their primeval simplicity and vigour”.³⁰²

In short, Lamer C.J. for the majority of the Court, in *Van der Peet*, proposes to limit the protection of section 35(1) to those practices that can be demonstrated to be integral to the culture seeking their protection. The *Sparrow* standards are further diminished by the requirement that

³⁰⁰ *Sparrow*, *supra*, fn.1, at 1110d.

³⁰¹ Slattery, “Understanding Aboriginal Rights”, *supra*, fn. 160.

³⁰² *Sparrow*, *supra*, fn.1 at 1093i. The SCC later upheld a number of related rights “in their contemporary vigour.” In *R. v. Marshall*, *supra*, fn. 277, the Court held that the treaty guaranteed a “truck store” at which Mi’kmaq in Nova Scotia might trade, and, therefore, the Mi’kmaq had a treaty right to fish for the purpose of having the means with which to trade. That truck stores were replaced by other kinds of retailing did not undermine the treaty right. Likewise, in *R. v. Sappier*, [2006] 2 S.C.R. 686 and in *Polchies*, Maliseet men were allowed to cut timber on Crown land to construct their houses and to build furniture even though the method of harvesting trees, and the methods of building and furniture making had all changed.

an Aboriginal right “be compatible with Anglo-Canadian law as a whole.”³⁰³ “As a whole”, I take it, would include common law, statute law, statutory instruments and, perhaps, even ministerial directives. If the purpose of entrenching rights in a Constitution is to limit the powers of the executive and legislative branches such a limitation would primarily be prescribed—by Parliament—when it is seen that the law makers have a history of infringing upon those rights. Hence, those rights are in need of protection. Judging by the treatment of Aboriginal rights before 1982 both by Governments and the Courts, the chance that a now protected Aboriginal right will be compatible with Anglo-Canadian law as a whole hovers around the zero mark. If Aboriginal rights had already been compatible with “Anglo-Canadian law as a whole” there would be no need for reconciliation. Accommodation would already be an established practice and proper consultation would be the norm.

The “integral” standard raises two major difficulties: first, as I will show shortly, the term “integral” is highly subjective and, in the opinion of some distinguished scholars, lies beyond the competence of someone outside the culture to determine; and, secondly, if it were possible to establish in a Court governed by another culture what is and what is not integral, it would call upon the Court to judge a particular practice in isolation from other practices and the culture as a whole.³⁰⁴ Barsh and Henderson equate “integral” with “central”. They then argue that it is, at best, unlikely that a person outside the culture can say what is central to it.³⁰⁵ If

³⁰³ “Ropes of Sand”, *supra*, fn. 283.

³⁰⁴ None of the judicial statements on reconciliation refer to “equity” along with “the common law”.

³⁰⁵ “Ropes of Sand”, *supra*, fn. 283. Earlier in the 20th century anthropologists might have attempted to identify practices that are central. The idea of presenting a typical member of a given nation or tribe has largely fallen by the wayside with the demise of phrenology. Attempting to identify the central features of

“central” means that without that element the culture would not be what it is, then they have provided us with a definition that is at least capable of being tested. Is “central” tantamount to “essential” as suggested in the OED? Barsh and Henderson comment that centrality is a judicial fiction, an especially slippery slope, and undermines Aboriginal societies by exposing their purportedly “incidental” elements to judicial excision notwithstanding section 35 of the *Constitution Act, 1982*.³⁰⁶

The idea that some practices are central or integral begs the question of classifying those that are not integral. First Nations who take their rights claims to the Courts risk exposing their purportedly “incidental” elements to judicial excision, notwithstanding section 35 of the *Constitution Act, 1982*. Historically, ministers, parliamentarians and officials who have interfered with and infringed upon Aboriginal rights, did so for the purpose of effecting a fundamental change.³⁰⁷ Would they judge a practice to be integral in the same way as a contemporary judge or a distinguished elder from the community in question?³⁰⁸

a culture, in earlier 20th century writing, is often indicated by the use of the “zero plural”, the use of the singular form of a noun in a plural context. David Crystal, in *The Cambridge Encyclopedia of the English Language* at 302 (Cambridge & NYC: Cambridge UP, 1996), identifies this usage with discussion of animals, especially those that are hunted, e.g., deer, fish. The zero plural has carried over to the present primarily in reference to Indigenous cultures in ways that suggest (a) the condescension is not as unacceptable in reference to Indigenous peoples; or, (b) they continue to be likened to animals, or “savages”.

³⁰⁶ “Ropes of Sand”, *supra* fn. 283 at 1001.

³⁰⁷ See, in particular, the speech of Hon. David Laird, Secretary of the Interior and the minister then responsible for Indian Affairs on introducing the 1876 bill rewriting the membership rules in the *Indian Act* of 1869. (*House of Commons Debates*, Ottawa: The Queen’s Printer, 1869) See also the statement reputedly made by Duncan Campbell Scott that his ambition was to interfere with and re-direct “Indian” cultures until there is not an Indian left. Olive Dickason, *Canada’s First Nations*, and Vol. 1 of the *RCAP Report*. It is the thesis of the 1996 *RCAP Report* that assimilation, separating Indian persons from the traditional and historic cultures of their communities, has been the overriding and continuing policy of the

The Dissents of Justices L'Heureux-Dubé and McLachlin

L'Heureux-Dubé J. identifies the central issue in *Van der Peet* by saying that, in addition to the “narrow issue” there is another, “broader issue ... the interpretation of the nature and extent of constitutionally protected Aboriginal rights.”³⁰⁹ L'Heureux-Dubé J. says that she diverges from Lamer C.J. “specifically as to his approach to defining Aboriginal rights ...”³¹⁰ She makes the case in favour of recognizing Sto:lo Aboriginal right to sell their fish: “that the best description of the Aboriginal practices, traditions and customs of the Sto:lo was one which included the sale, trade and barter of fish [and] that by 1846, the date of British sovereignty, trade in salmon was taking place in the Sto:lo community.”³¹¹ Her first step in reaching a conclusion opposite to the Chief Justice is “a review of the legal evolution of [the] Aboriginal history [of that region] followed by “an analysis of [the] Aboriginal rights protected.”³¹²

In the historical ledger, L'Heureux-Dubé J. finds that, prior to first contact with Europeans, “the Native peoples were independent nations, occupying and controlling their own

Canadian Government. *RCAP, supra*, fn. 20 , Vol. 1, PART ONE: Relationships in Historical Perspective, 6. Stage 3: Displacement and Assimilation, Record 1014/2935.

³⁰⁸ I have thought about the question of “integrality” as applied to the Kiowa, a Native American people, and to the Jewish people, or Jewry. N. Scott Momaday, a widely acclaimed Kiowa writer says that his people came down from the mountains and became plains people when they discovered horses. It is thought that the horses migrated into Kiowa country after escaping from some place in Mexico. Clearly, this was after Spanish assertion of sovereignty but not necessarily after Spanish control became effective. Yet they have been horse people for the last 300 years or so.

³⁰⁹ *Van der Peet, supra*, fn 1, per L'Heureux-Dube J. at 96.

³¹⁰ *Ibid.*, at 97.

³¹¹ *Ibid.*, at 103.

³¹² *Ibid.*, at 105.

territories with a distinctive culture, and their own practices, traditions and customs.”³¹³ This judicial view of history which runs throughout the decisions on which L’Heureux-Dubé J. drew, recognized³¹⁴ a degree of organization, sophistication and civilization that is sadly absent in the decisions that follow the account of USSC Chief Justice John Marshall.³¹⁵ Her brief historical review of British-First Nations relations leads her to conclude that “Aboriginal title and Aboriginal rights in general, derive from historic occupation and use of ancestral lands by the Natives.”³¹⁶ L’Heureux-Dubé J. cites Slattery³¹⁷ and others³¹⁸, in concluding that rights based on “historic occupation” are “inherent rights”. “Inherent rights”, I think, carries with it a

³¹³ This follows Hall and Judson JJ. in *Calder, supra*, fn. 30., and Dickson C.J. and La Forest J. in *Sparrow* at fn. 1 and, on this point, John Marshall, U.S.CJ in his “trilogy”, but particularly in *Worcester v. Georgia, supra*, fn. 13.

³¹⁴ A judge’s view of history can strongly influence her perception of matters such as Aboriginal rights and appropriate proof burdens. Burdens, in this field, often grow out of the most basic assumptions. Consider, for example, the 17th century debate in Valladolid between Sepulveda and Las Casas on the question of whether “Indians have souls.” If they had no souls then, in the Spanish mind, they could not own property. So the soul argument is the Spanish equivalent of the repeated Lockian statement about “living in a state of nature.” But the burden of proving that they had souls was imposed by the Spanish Court on Las Casas, their advocate, much as Aboriginal rights advocates are expected, today, to prove that Indigenous peoples had complex social organizations including legal systems. (Thomas R. Berger, *A Long And Terrible Shadow : White Values and Native Rights in The Americas Since 1492*. Vancouver; Toronto: Douglas & McIntyre.) Marshall’s statement that “their chief occupation was war” was part of a piece that also denied that they had agriculture. The founding fathers of the U.S., following Locke, argued that a people without agriculture was also without law or civilization, a presumption that, like the Spanish question about souls, rendered them incapable of owning property.

³¹⁵ In *Calder, supra*, fn. 30 at 116, Hall J. made a point of quoting a famous characterization of Indians in Marshall’s judgment in *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) and concluding, “We now know that that assessment was ill-founded” thereby putting both counsel and lower court judges on notice that the quotation from Marshall C.J. would no longer be cited with approval.

³¹⁶ *Van der Peet, supra*, fn. 1, para 112 (underlining in the original).

³¹⁷ Brian Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991), 29 *Osgoode Hall L.J.* 681, cited by L’Heureux-Dubé J., in *Van der Peet, supra*, fn.1, para. 109.

³¹⁸ Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984), cited at in *Van der Peet, supra*, fn. 1, by L’Heureux-Dubé J., at para. 109.

presumption of rights for which no further proof is needed, and the authority for which pre-exists any claim of British sovereignty and any executive or legislative act of Britain or Canada.³¹⁹ If the Crown claims to have extinguished title, by any of the enumerated means, again citing Slattery³²⁰, the burden of establishing extinguishment falls on the Crown claimant.³²¹ There is a presumption that the Crown would have records of its acquisitions and, therefore, be in a position to establish that the inherent Aboriginal right had ceased at the date indicated in its records. Treaty records, especially the numbered treaties, are particularly noteworthy because they are, among other things, instruments of cession and annexation permitting settlement in exchange for valuable consideration.³²² The observation that L’Heureux-Dubé J. borrows from Judson J. in *Calder*³²³ that “the Native people were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs”³²⁴ imposes on the claimant Crown the burden of proving how it came into possession of these same lands.³²⁵ In short, L’Heureux-Dubé J., in contrast to Lamer C.J., places a burden of proof on the Crown as to its claims of extinguishment and acquisition both of Aboriginal title and of any other

³¹⁹ *Van der Peet, supra*, fn.1, L’Heureux-Dube J., at para 108, citing Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (1979).

³²⁰ *Van der Peet, supra*, fn.1, L’Heureux-Dube J., at para. 112, citing Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1983), 8 *Queen's L.J.* 232, at p. 242.

³²¹ *Ibid.*, (1) conquest; (2) cession; (3) annexation; and, (4) settlement.

³²² By Confederation, this had become the general purpose and content of “Indian treaties.” First Nations elders often offer a different understanding of the treaties.

³²³ *Calder, supra*, fn. 30, quoted by L’Heureux-Dube J. in *Van der Peet, supra*, fn. 1, at para. 107.

³²⁴ *Van der Peet, supra*. fn.1, at para. 106.

³²⁵ This point is discussed by Kent McNeil in his essay on “Onus of Proof of Aboriginal Title”, *supra*, fn. 32, at 777-94.

Aboriginal right. She also takes note that a treaty does not necessarily extinguish an Aboriginal right; rights neither extinguished by the treaty nor converted into treaty rights continue as Aboriginal rights.³²⁶ From that I would infer that the burden is on the Crown to show that a right at issue has been extinguished. L’Heureux-Dubé J. dissolves the line imagined by Lamer C.J. between occasional or “opportunistic” sales and an established practice of commercial sales. It is only this very arbitrary line which allows the majority to say that there was no “existing right” to sell or trade in April 1982.³²⁷ She also points to the Sparrow finding that the manner in which a right was regulated prior to 1982 “is irrelevant to the definition of Aboriginal rights and that Aboriginal rights ‘are not frozen in time.’”³²⁸ She specifically states, that “[t]he burden is on the claimant to prove that he or she benefits from an existing Aboriginal right”. However, while the Crown could extinguish such a right prior to 1982,

‘its intention to do so had to be clear and plain ... and legislation necessarily inconsistent with the continued enjoyment of Aboriginal rights is not sufficient to meet the test. The burden of proving extinguishment is on the party alleging it, that is, the Crown.”³²⁹ (emphasis in original)

L’Heureux-Dubé J. defines the question in *Van der Peet* as “whether the right to fish ... includes the right to sell, trade and barter fish for livelihood, support and sustenance

³²⁶ *Van der Peet, supra*, fn. 1, para 120.

³²⁷ Not very long ago, farmers with smaller acreages engaged in “mixed farming” would sell as much as possible “at the farm gate.” Would this qualify as opportunistic while the crops they took to a wholesaler in town were commercial transactions?

³²⁸ *Van der Peet, supra*, fn. 1, at para. 132, citing *Sparrow, supra*, fn.1 at 1093.

³²⁹ *Ibid.*, at para. 133. Emphasis added.

purposes.”³³⁰ The answer to this question, she says, depends upon “the appropriate approach to interpreting the nature and extent of Aboriginal rights in general.”³³¹ L’Heureux-Dubé J. argues that the Chief Justice’s definition of Aboriginal rights does not sufficiently reflect “the fundamental interpretative canons relating to Aboriginal law.”³³² She argues that all constitutional provisions require “a generous, large and liberal interpretation,” and particularly matters relating to “Aboriginal records, such as treaties, agreements with the Crown and other documentary evidence.”³³³ Presumably, saying that this is essential is a gentle way of saying that the Chief Justice did not “resolve ambiguities in favour of the Indians.”³³⁴ Secondly, she says that “Aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown vis-à-vis Aboriginal people.”³³⁵ Thirdly and lastly, L’Heureux-Dubé J. argues that rights under section 35(1) must be interpreted “in a manner that gives the rights meaning to the Natives” and is (quoting from *Sparrow*) “sensitive to the Aboriginal perspective on the meaning of the rights at stake.”³³⁶ She disagrees with Lamer C.J. as to whether it is “appropriate to qualify this proposition by saying that the common law matters as much as the

³³⁰ *Ibid.*, at para. 139. The ceremonial sharing of food has been likened to a barter in the sense that the recipient is indebted to the host to repay the “gift”. George Manuel interviews.

³³¹ *Ibid.*, at para 140.

³³² *Ibid.*, at para 141.

³³³ *Ibid.*, at para 143.

³³⁴ *Ibid.*, at para 142 – 143.

³³⁵ *Ibid.*, at para 144.

³³⁶ *Ibid.*, at para 145.

perspective of the Natives when defining Aboriginal rights.”³³⁷ L’Heureux-Dubé J. returns to the standards set out in *Sparrow* which put a greater burden of proof on the Crown, than does Lamer C.J. in *Van der Peet*. One result is that to secure a conviction the Crown must establish its case beyond a reasonable doubt while the defendant need only establish her right on a balance of probabilities.³³⁸

McLachlin J., as she then was, begins to address that question, “Do the Sto:lo possess an Aboriginal right under s. (35) 1 ... which entitles them to sell fish?”³³⁹ by summarizing her view of “What constitutes an Aboriginal right?”. She follows Wilson J. who found, in *Moosehunter* “that the treaty right to hunt ‘for food’ amounted to a right to hunt for support and sustenance.”³⁴⁰ McLachlin J. begins to define Aboriginal rights “by looking at what the law has historically accepted as fundamental Aboriginal rights.”³⁴¹ This she answers by saying that Aboriginal rights encompass the right to be sustained from the land or waters upon which an Aboriginal people have traditionally relied for sustenance. Trade in the resource to the extent necessary to maintain

³³⁷ *Ibid.*, at para 147. In terms of legal principles this is the epitome of L’Heureux-Dubé J.’s disagreement with Lamer C.J. and the majority in the BCCA. She says so explicitly in para. 148.

³³⁸ It might be enough for the defendant to create a reasonable doubt in order to gain an acquittal; however, if the acquittal rests on an Aboriginal right as in *Van der Peet* she needs to establish that the right she claims more likely exists than not.

³³⁹ *Ibid.*, at para. 226. Surprisingly, McLachlin J., in para. 225, defined “Aboriginal rights” so as to include treaty rights. Not all treaty rights are pre-treaty Aboriginal rights. And a number of treaties required a complete surrender of land, and then the return of a portion of that land pursuant to the treaty. This is sufficiently on the fringe of this thesis that I do not explore it further.

³⁴⁰ *Ibid.*, at para. 188, citing *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282.

³⁴¹ *Ibid.*, at para 227.

traditional levels of sustenance is a permitted exercise of this right.³⁴² This approach does not require an answer to the question of whether the Sto:lo sold or traded fish historically. It does not require proof of pre-contact practices; and, it certainly does not require proof of a practice being integral. Indeed, although there is no treaty at issue, McLachlin J.’s definition comes very close to the treaty of 1760-61 that promised “truck stores” to the Mi’kmaq³⁴³, an institution that could only come into being after sovereignty (since the truck stores were institutions maintained by the colonial government), but for which the Mi’kmaq would need something with which they could trade. She says of Lamer C.J.’s discussion of the purpose of section 35(1) that

“It may not be wrong to assert as the Chief Justice does, that the dual purposes of s. 35(1) are to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior occupation. But it is incomplete.³⁴⁴

Federal power (under section 91 of the *Constitution Act, 1867*) is to be reconciled with the Aboriginal rights recognized and affirmed in section 35(1), by means of the doctrine of justification.³⁴⁵ In short, McLachlin J., like L’Heureux-Dubé J., reinvigorates the *Sparrow* decision and the criteria laid out there by Dickson C.J. and La Forest J., but with a significantly different emphasis. She reiterates an observation by Mark Walters in an article about *Delgamuukw* that “a morally and politically defensible conception of Aboriginal rights will

³⁴² *Ibid.* Emphasis added to highlight the specific definition.

³⁴³ Binnie J., in *R. v. Marshall, supra*, fn. 277, at para. 5, in a lengthy quotation from the treaty introduced in para 5 and running over pp. 14 and 15 of the reasons.

³⁴⁴ *Ibid.*, at para. 230.

³⁴⁵ *Ibid.*, at para. 231.

incorporate both [the] legal perspectives” of two vastly dissimilar cultures, “European and Aboriginal societies.”³⁴⁶

McLachlin J. observed that the three sets of reasons all agree that “the case was defended on the ground that the fish sold by Mrs. Van der Peet were sold for purposes of sustenance.” She agrees with L’Heureux-Dubé J. that a large scale operation “might not be constitutionally protected”; however, she sees little point in labelling small scale sales as something other than commerce. McLachlin J.’s over-riding question is not whether small sales constitute commerce but “whether the sale can be defended as the exercise of a more basic right to continue the Aboriginal people’s historic use of the resource.”³⁴⁷ McLachlin J. distinguishes between the rule that “Aboriginal rights must be ancestral rights” and “the uncompromising insistence of this Court that Aboriginal rights not be frozen.” The rights are ancestral. The exercise of those rights, however, takes modern forms.³⁴⁸ She holds that Lamer C.J. failed to recognize this distinction between the right and its modern, contemporary expression. She shares “the concern of L’Heureux-Dubé J. that the Chief Justice defines the rights at issue with too much particularity.”³⁴⁹ She disagrees with the Chief Justice that a practice must be traceable to pre-

³⁴⁶ *Ibid.*, para. 232, citing Mark Walters, “British Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992), 17 *Queen’s L.J.* 350, at pp. 413 and 412 respectively. Lamer C.J. spoke of “the common law and the Aboriginal perspective.” McLachlin J., following Walters, speaks of “Aboriginal law”.

³⁴⁷ *Ibid.*, para. 236. (The question ends with a period in the original.)

³⁴⁸ *Ibid.*, para. 240. “Frozen rights” has been used to describe the interpretation of rights that limits the mode of exercise to those that were prevalent in the 19th, 18th or even the 17th century for many years. I think the term was used during George Manuel’s presidency of the National Indian Brotherhood (NIB). John Borrows uses it, in the title of an essay analyzing the majority decisions in the *Van der Peet* trilogy, “Frozen Rights”, *supra*, fn. 292.

³⁴⁹ *Ibid.*, para 241.

contact times, to qualify as a constitutional right. Aboriginal rights do not find their source in “a magical moment of European contact.”³⁵⁰ What must be established, she says, “is continuity between the modern practice at issue and a traditional law or custom” of that particular Native people.³⁵¹

Academic Criticism of *Van der Peet*

I have cited academic criticism of *Van der Peet* several times in this discussion. Indigenous academic critics – John Borrows,³⁵² Russel Barsh, James Sakej and Youngblood Henderson³⁵³ – offer views of *Van der Peet* “written from the inside.”

John Borrows relates the Supreme Court’s decisions in the *Van der Peet* trilogy³⁵⁴ to the Trickster, a character found in the traditional tales of a great many First Nations. The trickster offers insights through encounters which are simultaneously altruistic and self-interested. In her adventures the trickster roams from place to place and fulfils her goals by using ostensibly contradictory behaviours such as charm and cunning, honesty and deception, kindness and mean tricks.

³⁵⁰ *Ibid.*, para 247.

³⁵¹ *Ibid.* I have closed the quotation and then, in my paraphrase, added the word “particular” to better highlight what I think McLachlin J. meant, rather than maintaining the ambiguity “of the Native people.”

³⁵² *Supra*, fn. 292.

³⁵³ *Supra*, fn. 283, and 412.

³⁵⁴ *Supra*, fn. 282.

What are the double-edged qualities exhibited in these decisions by the Supreme Court?

(1) Allowing that there is an Aboriginal right to fish for food and ceremonial purposes but then limiting how far afield a person can distribute her catch, notwithstanding that sharing food and other gifts is basic to the ceremonies of many west coast cultures.³⁵⁵ (2) Justifying an infringement of an Aboriginal right – and thereby limiting its ambit – supposedly in the interest of reconciling Aboriginal peoples to the dominant culture while requiring little or no reconciliation on the other side of the equation. (3) Speaking of reconciling “the common law” with “Aboriginal perspectives” in contrast to McLachlin J.’s reference to “Aboriginal law”.³⁵⁶ (4) Adopting words from *Sparrow*, e.g., “reconcile” and “integral” and investing them with new and different meanings and upgraded significance. (5) Affirming Aboriginal rights while making their protection dependent upon their compatibility with the interests of the dominant culture, a move that largely defeats the purpose of constitutionally protecting rights.

Barsh and Henderson, both of whom are widely-published Indigenous legal scholars, have collaborated on a number of papers. In “Ropes of Sand”³⁵⁷ they challenge Lamer C.J.’s description of Aboriginal rights as “those Aboriginal customs, traditions and practices which are an integral part of a distinctive Aboriginal culture.”³⁵⁸ They also challenge Lamer C.J.’s further

³⁵⁵ George Manuel said that in the Sepwemec (formerly in English “Shuswap”) the parts of a moose were assigned by kinship, e.g., the most favoured part, the ribs went to the hunter’s brother-in-law. This assignment of parts gave each hunter both a way of gaining glory and a reason to hope for the good fortune of persons with whom he might otherwise compete; i.e. my brother-in-law’s good fortune puts ribs on my table.

³⁵⁶ *Van der Peek, supra*, fn1, per McLachlin J. at 106. And see the text *supra*, at fn 288.

³⁵⁷ “Ropes of Sand”, *supra*, fn. 283, at 995.

³⁵⁸ *Ibid.*

proviso that to determine whether a practice is integral it is necessary first to describe it correctly.³⁵⁹

Barsh and Henderson emphasize the distinction between “distinct” and “distinctive”. Like Borrows, they call upon the Trickster to illustrate their departure from the *Van der Peet* decision. Their Trickster is Chief Justice Cypher, in the mythical case called Hockey Night to which they satirize Lamer C.J.’s decision in *Van der Peet*. In Hockey Night, Barsh and Henderson suppose that it was necessary to take into account the Quebec perspective which Cypher C.J. accomplished, in part, by distinguishing “distinct” from “distinctive”. They highlight the disparity of treatment between Quebec rights (and Francophone rights more broadly) and Aboriginal and treaty rights. Barsh and Henderson doubt that Lamer C.J. gave serious consideration to the Sto:lo perspective or even to a more generalized First Nations or Aboriginal perspective.³⁶⁰ Cypher C.J. had ruled on the meaning of “integral” in Hockey Night. He held that hockey was integral to the contemporary culture of Quebec but, he found, the Province had failed to demonstrate that hockey was established in Quebec by 1763, the date at which England asserted sovereignty. Clearly, Barsh and Henderson are illustrating the inconsistencies in the usage of these terms by the Courts. In Hockey Night, Douteux J. dissents on the main question and also argues that the use of 1763 as a reference point for Quebec was

³⁵⁹ *Ibid.*, at 998.

³⁶⁰ *Ibid.*, at 996.

“arbitrary, restrictive and a denial of the natural right of cultures to evolve and change,”³⁶¹ all of which Barsh and Henderson would apply to defining or identifying an Aboriginal right.

Barsh and Henderson also question whether the *Van der Peet* trilogy³⁶² is, in fact, “Law”.³⁶³ They hark back to Ronald Dworkin’s essay, “The Model of Rules”,³⁶⁴ to say that Western legal systems are characterized by a combination of rules (black-letter law) and principles (custom or convention). “*Van der Peet* they say, ‘jettisons’ principles in favour of an evidence-based approach to reconciling differences between the Crown and Aboriginal parties.” But the Court has also been uneven and inconsistent in its use of evidence. Barsh and Henderson are of the view that both *Sparrow* and the *Van der Peet* trilogy create a succession of hurdles which, together, “form a formidable and intimidating barrier.”³⁶⁵

From the perspective of proof allocations, both Borrows and Barsh and Henderson question the consistency of the Court and, particularly, challenge the Court on its use of key terms in different cases regarding Aboriginal rights. RCAP³⁶⁶, they remind us, had called, in 1996, for “co-existence” and “partnership”, features which are clearly lacking in the Government’s willingness to prosecute rather than to negotiate issues such as Aboriginal fishing

³⁶¹ *Ibid.*, at 996.

³⁶² *Van der Peet* Trilogy, *supra*, fn. 282.

³⁶³ Barsh & Henderson, *supra*, fn.283, at 1005.

³⁶⁴ Ronald M. Dworkin, “The Model of Rules” (New Haven: Yale Law School Legal Scholarship Repository, 1967.)

³⁶⁵ Barsh & Henderson, *supra*, fn. 283, at 1004.

³⁶⁶ Report of the Royal Commission on Aboriginal Peoples, *supra*, fn. 28.

rights, and on which the Court, under the guidance of Lamer C.J., seems to have backtracked. In *R. v. Adams*³⁶⁷, according to Barsh and Henderson, the Court allowed that a Mohawk man fishing in Lake St. Francis, downstream from Akwesasne, was exercising an Aboriginal right. The Court dealt with the fact that he was teaching Algonquin young men to fish by saying that teaching was a necessary adjunct of fishing. They did not apply the “integral” test but simply observed that fishing was historically “important” to the Mohawk people. At the very least, there is a considerable inconsistency.

Barsh and Henderson also find that Lamer C.J. “concluded that the particularity of Aboriginal practices dictates a case-by-case approach to determining the contents of the constitutional box of existing Aboriginal rights,” i.e., each nation’s box of rights may be different from those of its neighbours; and, at the very least, each nation’s box of rights needs its own consideration. This leads Barsh and Henderson to question whether the *Van der Peet* trilogy is, in fact, “Law”.³⁶⁸

***Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511**

Several factors make *Haida Nation v. British Columbia (Minister of Forests)*³⁶⁹, important to an examination of proof allocations: The Court specifically rejected BC’s defence that it was not obliged to consult with the Haida Nation until after its claim to Aboriginal title had been proven. Most important, the Court expanded upon its previous decisions about “the duty to

³⁶⁷ *Adams*, [1996] 3 S.C.R. 101 at 128, 4 C.N.L.R. 1, cited at *Van der Peet*, *supra*, fn.1, at 1004.

³⁶⁸ Barsh & Henderson, *supra*, fn. 283, at 1005.

³⁶⁹ *Haida Nation*, *supra*, fn.51.

consult” and set out a scale or continuum along which the strength of an Aboriginal rights claim could be ranked. The Court held that the Crown’s duty to consult applied equally to the Crown in right of a province and the Crown in right of Canada but it did not extend to a non-governmental corporation, such as Weyerhaeuser, which had purchased or is purchasing a timber permit. The duty to consult has been a component requiring proof since *Sparrow*³⁷⁰ was decided in 1990. A First Nation objecting to a project is likely to allege that there was no consultation, or no adequate consultation. As the plaintiff, the First Nation has the initial burden of proof. On the other hand, a large measure of the burden of proof rests with the Crown because the duty to consult is the Crown’s and the only way to prove that such a duty was fulfilled is through thorough record keeping in regard to each consultation. The First Nation, of course, has access to the Government records related to a claimed consultation so far as they are able to demand them.

The Court has enlarged significantly upon the Crown’s duty to accommodate, including an obligation to disclose information that the Crown had acquired either by its own research or from an applicant seeking a permit, in this case a lumber permit.

I will now discuss the significance of each of the major points in *Haida Nation* to the continuing allocation of proof burdens by the Court and to a review of Crown arguments as regards proof burdens in section 35(1) litigation.

For those who lend credence to the Court’s longstanding view that in its dealings with First Nations and other Aboriginal peoples “the honour of the Crown is always involved and no

³⁷⁰ *Sparrow, supra*, fn. 1.

appearance of ‘sharp dealing’ should be sanctioned,”³⁷¹ the B.C. Crown’s argument in *Haida Nation* that there is no obligation to consult until a First Nation community’s Aboriginal title has been established is disingenuous at best. Taken seriously, that argument would, like the federal Crown’s argument in *Sparrow*, render section 35(1) meaningless. The B.C. Minister of Forests had issued a tree farm license allowing Weyerhaeuser to cut trees in an old forest growth area to which the Haida Nation had long made claim. Although there had been negotiations between the provincial government and Haida Nation, the Province had taken advantage of many opportunities to draw out these negotiations and those with First Nations throughout B.C. and thus to postpone reaching a point at which the Aboriginal title to some lands and Aboriginal rights to engage in various gathering activities on other lands would be recognized. To allow the cutting of old forest growth in areas claimed by the Haida Nation raised the spectre that some property most highly prized by the Haida would be gone before any conclusion was reached as to their claim.

The risk of delay is not explicitly pointed out in *Haida Nation*. However, the Court does go to some lengths to establish that there is a duty on the Crown to consult wherever there is knowledge, real or constructive, of the existence of a claim. Where the Court does allow the Crown some discretion is in the extent or thoroughness of the required consultations. The Court constructs a continuum of the substantial nature of claims and says that there is always a duty to consult but the extent of consultation is indicated by gauging how substantial a claim may be.³⁷² The difficulty with this principle or test is that it supposes that the Crown will make the required

³⁷¹ *Sparrow, supra*, fn. 1.

³⁷² *Haida Nation, supra*, at fn. 51.

assessment within the bounds appropriate to the honour of the Crown and with no sharp dealing. In that sense, it is a bit circuitous; and, perhaps disingenuous. In fairness, the complexity of evaluating the quality of the evidence and the jeopardy of the rights at stake may extend beyond the need to avoid sharp dealing. When Mr. Justice Harry Slade, the Chair of the Specific Claims Tribunal, appeared before the Commons Aboriginal Affairs Committee, he was asked about the limit placed on the Tribunal's awards by the Specific Claims Tribunal Act. Among the difficulties he raised in his reply was the question, "How can you be sure of the value of the claim until the Tribunal makes its decision?"³⁷³ If that is a difficult assessment for a distinguished jurist, how much more difficult will it be for a party to a prospective proceeding?

In short, any proposed project that may impinge on lands in which an Aboriginal community claims an interest – as an Aboriginal title, an Aboriginal harvesting right or a treaty right³⁷⁴ -- must give rise to some consultation and the extent of the consultation should be proportionate to the seriousness of the infringement and the quality of the supporting evidence. The Court's suggestion that the infringement be assessed to determine the extent of required consultations would make the extent of the infringement the first item of a consultation; both parties are obliged to be reasonable in both their demands and their assessments.³⁷⁵

The Court's decision that the duty to consult applies both to the Crown in right of Canada and the Crown in right of any province resolves issues that had been outstanding since the JCPC

³⁷³ *Proceedings*, Commons Standing Committee on Aboriginal Affairs and Northern Development (AANO), 40:3:51, March 3, 2011.

³⁷⁴ The treaty right aspect is discussed in *Mikisew*, *supra*, fn. 154, considered *infra*.

³⁷⁵ I am aware of only one judgment in which an Aboriginal community has been challenged by the Court about its reasonableness.

decision in *R. v. St. Catherine's Milling and Lumber Co.*³⁷⁶ in 1887. The JCPC held, in *St. Catherine's Milling* that, although land is surrendered by a First Nation to the federal government, upon surrender the underlying title to that land falls to the province pursuant to section 109 of the *Constitution Act, 1867*. Given that decision, and bearing in mind that the Crown is indivisible, it is not surprising that the Court would hold that the duty to consult applies equally to the provinces and to the federal government.³⁷⁷ The Court concluded that “the Crown’s appeal should be dismissed, and Weyerhaeuser Co.’s appeal should be allowed.”³⁷⁸

***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388]**

*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*³⁷⁹, can be read as a sequel to *Haida Nation*, addressing the duty to consult where the right affected is subject to a treaty. Its importance lies in the Court making explicit that the duty to consult applies no less and no differently in instances in which treaty rights rather than Aboriginal rights are facing infringement. Once again, there is a shared burden of proof, the plaintiff having an initial burden

³⁷⁶ *St. Catherine's*, *supra*, fn. 15. The SCC decision is interesting mainly for the dissent of Mr. Justice Samuel Strong. Strong J.’s view in *St. Catherine's Milling* reads like a precursor to Hall J. in *Calder*, *supra*, fn. 30, and Dickson J. in *Guerin*, *supra*, fn.12. In brief, he asks how the federal Government can be expected to uphold its treaty promises if the royalties from Treaty 3 lands do not flow to them. (Differences in the spelling of “Catherines” occur in the originals and are noted by the JCPC.) Catherine’s is used in the possessive in each of the Courts, and in the name of the city.

³⁷⁷ The federal Government had placed obligations on the provinces as a condition of receiving further lands as they were surrendered. Ontario and Quebec, for example, under the Northern Boundaries Extension Acts, 1905 were required to negotiate treaties in the lands they received pursuant to those Acts. *St. Catherine's Milling*, *supra*, fn. 15.

³⁷⁸ *Haida Nation*, *supra*, fn. 51, at 7.

³⁷⁹ *Mikisew*, *supra*, fn.154.

to establish the impact of a proposed development on their rights and the Crown having a burden to establish justification and effective consultation.³⁸⁰ The Minister discounted the need, pursuant to the treaty, to hold specific consultations with the Mikisew Cree First Nation.³⁸¹

The Crown and the Thebecha Road Society proposed to build a winter road through the Mikisew reserve, without specifically consulting with the Mikisew. After the Mikisew had protested, the road alignment was modified (again without consultation) to track around the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road went beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious effect it would have on their traditional lifestyle which was central to their culture. The Federal Court Trial Division, set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult adequately with the Mikisew, and granted an interlocutory injunction against constructing the winter road. The Federal Court of Appeal set aside the ruling and held, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the Treaty rather than an interference with rights under the Treaty. This judgment was delivered before the release of the Supreme Court of Canada's decisions in *Haida Nation*³⁸² and in *Taku River Tlingit First Nation*³⁸³.

³⁸⁰ See discussion of consultation and burdens of proof in *Haida Nation*, in the text, *supra*, at p. 105.

³⁸¹ *Mikisew*, *supra*, fn. 154, at para. 4.

³⁸² *Haida Nation*, *supra*, fn. 51.

³⁸³ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.

Although the land at issue in Mikisew had been surrendered pursuant to Treaty 8, the Crees' hunting and trapping rights were continued by the Treaty and, except where land had been "taken up", were "existing ... treaty rights" when section 35(1) came into force in April, 1982.³⁸⁴ The road construction might well be under one or more of the categories Lamer C.J. had identified in *Delgamuukw*³⁸⁵ as justifying interference with Aboriginal or treaty rights; however, the possibility of justification does not exempt the Crown from its duty to consult with affected First Nations. It is still open to the First Nations parties under the Treaty to suggest a less intrusive route for the road and to seek compensation.

Binnie J., writing for the Court, observed that

"The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between Aboriginal and non-Aboriginal peoples. It

³⁸⁴ *Mikisew, supra*, fn.154, at para. 3

³⁸⁵ *Delgamuukw, supra*, fn. 1. per Lamer C.J. for the majority Quoting from the headnote: "Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal and provincial governments if the infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples. 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, and the building of infrastructure and the settlement of foreign populations to support those aims, are objectives consistent with this purpose. Three aspects of aboriginal title are relevant to the second part of the test. First, the right to exclusive use and occupation of land is relevant to the degree of scrutiny of the infringing measure or action. Second, the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples, suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation. And third, lands held pursuant to aboriginal title have an inescapable economic component which suggests that compensation is relevant to the question of justification as well. Fair compensation will ordinarily be required when aboriginal title is infringed." See the test of the reasons at para. 160 ff.

goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.”³⁸⁶ [emphasis added.]

Binnie J. was highly critical of the Minister for not consulting explicitly with the Mikisew Cree First Nation, and thereby undermining the objective of reconciliation between the Crown and First Nations:

“In this case, the relationship was not properly managed. Adequate consultation in advance of the Minister’s approval did not take place. The government’s approach did not advance the process of reconciliation but undermined it. The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of Aboriginal peoples (now entrenched in s. 35 of the Constitution Act, 1982), was breached.”³⁸⁷

I would have thought that previous judgments had made it clear that information sessions for the general public were not sufficient to meet the constitutional requirement of consultation with Aboriginal people pursuant to section 35.

Parks Canada, acting for the Minister, had provided the Mikisew with the Terms of Reference for an environmental assessment on January 19, 2000, and advised them that open house sessions would take place over the summer of 2000. The first formal response from the Mikisew did not come until October 10, 2000, some two months after the Minister’s deadline for receiving “public” comment. Chief Poitras stated that the Mikisew did not participate in the open houses, because “. . . an open house is not a forum for us to be consulted adequately”.³⁸⁸

³⁸⁶ *Mikisew*, *supra*, fn. 154, at para. 3.

³⁸⁷ *Ibid.*, para. 4.

³⁸⁸ *Ibid.*, para. 9.

The Significance of the Cases

I close this discussion of the allocation of burdens with some comments on the impacts of the Court's decisions. First, with respect to the burden on Aboriginal claimants to prove current and continuous occupation in order to establish an Aboriginal right, I adopt the conclusion of Kent McNeil that “[i]f this analysis is correct, with all due respect to Lamer C.J.C., Aboriginal claimants who are currently in possession [of certain lands] should not have to prove continuity with occupation pre-dating the Crown's assertion of sovereignty.”³⁸⁹ There are, I suspect, many situations that raise complex considerations: (1) Many Aboriginal nations in B.C. were forced off their lands, much of which were then developed without benefit to them; (2) There are other places, such as the Mackenzie Valley and Eeyou Istchee—the territory of the James Bay Crees of the Ungava Peninsula—where the government might deny that the original inhabitants remain in possession today or at some recent time chosen as a bench mark. Nonetheless, if being “currently in possession” was not a rigid requirement, and if the honour of the Crown were a serious and significant concern of governments, I think a way would become open to work out the many variations on current possession

Second, the Court's decision that the duty to consult applies equally to the Crown in right of Canada and the Crown in right of a Province [hereinafter “the provincial Crown”] takes into account the complexity of Confederation and the effect of that complexity on Aboriginal claims from the earliest post-Confederation period. Since surrendered lands on which a First Nation has continuing harvesting rights are lands falling to the provinces, under section 109 of the

³⁸⁹ McNeil, *supra*, fn. 32.

Constitution Act, 1867.³⁹⁰ It is not surprising then that the duty to consult, once established, falls to the Crown in right of either or both jurisdictions so far as that jurisdiction has authority.

Third, the duty to consult and accommodate is essential, wise, and enforced by the Court, but the cases demonstrate that it has not been appropriately implemented by the Crown. The defences offered by the B.C. Minister of Forests, in *Haida Nation* and by the federal Minister of Heritage in *Mikisew* led me to consider titling this thesis, “What part of ‘No’ don’t you understand?” The parallel with the ballad of that name, to my mind, is that these two ministers and a good number of other ministers and officials did not seem to grasp the requirements of proper consultation, and its importance to the rights recognized in section 35(1) of the *Constitution Act, 1982*. Consultation usually is necessary when the less powerful party is specially affected by a proposal put forward by the other. The Court has tried, over a period of 15 years from *Sparrow* to *Mikisew*,³⁹¹ to redress the imbalance of power between the Governments, federal and provincial, and the First Nations by elaborating the meaning of the duty to consult a little bit more in each instance so that it would become increasingly difficult to claim that some more rough shod process could qualify as consultation. In the later cases the Court attached the obligation of “accommodation” to consultation. These elaborations would have been largely unnecessary if the Crown in right of Canada and of various provinces had acted with good will and a concern for the honour of the Crown without having to be goaded into good (or at least better) behaviour, case-by-case-by-case.

³⁹⁰ *St. Catherine’s Milling, supra*, fn. 15 and discussion in the text, *supra*, at fn.182.

³⁹¹ *Sparrow, supra*, fn 1; *Mikisew, supra*, fn. 154; (1990 to 2005).

In the next Part, I return to the four questions with which I closed the theoretical discussion to answer those questions in light of the review of cases now ending and to consider some of the recommendations offered by scholars and by practitioners that might help to reduce the Crown's recidivism.

III. (iv) Responses to Questions Emerging From the Literature Review (Part II (iv) above)

At the end of Part II, the theory section, I posed four questions by which I might consider the continuing conflict between the Government's view of section 35(1) and the Court's, to what extent purposive interpretation might explain or illustrate the gap, and whether box theory might be useful for gauging the gap either between the Court and Governments, federal and provincial, and other parties. I now wish to conclude Part III, my review of cases, by returning and responding to those questions.

Purposive Interpretation

1. Is there a recurring tendency of Crown counsel to avoid purposive interpretation?

What are the benefits to their clients when they do so?

Throughout the line of cases reviewed in this chapter, the Crown repeatedly avoids dealing with the need for purposive interpretation. Perhaps the clearest example is one of the earliest. In *Sparrow*, Dickson C.J., points out that the Crown's interpretation of section 35(1) renders the recognition and affirmation of Aboriginal and treaty rights "meaningless." This runs contrary to the requirement that every provision of a statute, and all the more so the Constitution, must be given meaning. This same practice runs throughout the successive cases reviewed above.

I have heard it said that many – perhaps all – of the lawyers working on the Indigenous side of Aboriginal rights law have at one time or another expressed the view that the Department of Justice advises its clients to fight every claim by every possible means because the cost of settling would be beyond the capacity of the government.³⁹² Toned-down versions of this view have been expressed by legal counsel and technical advisors of Indigenous organizations before the Standing Senate Committee on Aboriginal Peoples (Aboriginal Peoples Committee), several of which are quoted in Part II, above. These allegations have been expressed as concerns by the Aboriginal Peoples Committee in a number of their reports to the Senate over the past 12 years also cited above.³⁹³ Chief Justice Dickson, in the opening sentence of his reasons in *Sparrow*³⁹⁴ refers to section 35(1) as “a promise”, a characterization that has been widely taken to mean that, under the revised Constitution, Canada will conduct its relations with First Nations and other Indigenous peoples in a different way than it has in the past. In *Sparrow*, Dickson C.J. and La Forest J. move quickly from the opening statement about “a promise” to discussions of the need for “purposive interpretation”. These two ideas are intertwined. We need only recall that the origin of purposive interpretation lies with the second of three questions posed by the English

³⁹² It may be noted that courts’ willingness to award interim (or advance) costs to Aboriginal claimants addresses an important barrier to Aboriginal litigation which may counterbalance concern about the costs of settlement. See *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371.

³⁹³ All of the proceedings of this committee have been conducted in a notably non-partisan manner. This non-partisan approach is also reflected in its reports. I offer this assessment based on my readings of a large sample of the proceedings and most of the reports (and having followed the work of Senate Committees and the Commons Indian Affairs Committee since about 1958). This question does suggest the value of a policy study sequel to this thesis that would examine the conduct both of Crown counsel and Crown officers before parliamentary policy committees and in departmental statements.

³⁹⁴ *Sparrow, supra.*, fn. 1.

Exchequer Court in *Heydon's Case*³⁹⁵, in 1584, which I would paraphrase in a contemporary context as “What part of the [existing] law does this measure intend to remedy?”³⁹⁶ The quotation from W.I.C. Binnie, when he was Associate Deputy Minister of Justice, that the only right guaranteed in section 35(1) is the right to surrender land stands in total opposition to Dickson C.J.’s reading of the subsection as a promise and is at odds with positions subsequently taken by Binnie J. in his capacity as a Justice of the Supreme Court of Canada.³⁹⁷

2. If purposive interpretation is both a common law and a statutory obligation, how does Crown counsel rationalize evading the duty to interpret constitutional protections in this manner?

The Crown does not, of course, explicitly state that it ignores or intends to ignore purposive interpretation. It simply does not pursue purposive interpretations, by and large. When it does do so, it tends to read down the force of both statutory provisions and prior judicial decisions. The Crown’s argument in *Guerin*³⁹⁸, that the trust obligation of the Crown was “a mere political trust”³⁹⁹, is an early example of the Crown seeking to minimize its new constitutional obligations under section 35(1) of the *Constitution Act, 1982*. Moreover, the

³⁹⁵ *Heydon's Case*, *supra*, fn. 55.

³⁹⁶ See discussion in the text, *supra*, at fn. 55. The original statement assumed that Parliament was seeking to remedy a flaw in the common law. In a contemporary context the statement appears to operate just as often the other way around.

³⁹⁷ In his reasons for judgment in the Supreme Court of Canada, Binnie J. took a much more affirming view than he had as Associate Deputy Minister. Indeed, his reasons represent the gap between the Crown’s view and the Court’s view. See, also, *supra*, fn.270.

³⁹⁸ *Guerin*, *supra*, fn. 12.

³⁹⁹ Discussed, *supra*, in the text at fn. 199ff.

Crown has relied on (1) exclusive federal jurisdiction over Indians and land reserved for Indians (section 91(24) of the *Constitution Act, 1867*) and (2) section 18(1) of the *Indian Act* which purported to authorize the Governor-in-Council to determine unilaterally what constitutes the best interests⁴⁰⁰ of an Indian community. The Crown did not embrace the fact that these provisions are subject to the new promise made in section 35 of the *Constitution Act 1982*. The provisions may appear to have given the Crown a licence to ignore the wishes and priorities of the Aboriginal community, but no more.

A variation of the Crown's reading down legal obligations occurs in its attitude to the duty to consult with Aboriginal people whose interests are affected by new developments, to accommodate their interests and to compensate them for negative impacts. I have cited earlier the large and growing literature on the ways in which the Crown, federal and provincial, seeks, with more or less success, to short circuit the duty to consult.⁴⁰¹ Typically, it will hold a few meetings, declare that it has consulted on a proposed project and then proceed with the project with little or no revision to the original plan. This would appear to put the onus on the plaintiff who claims that the consultation was inadequate.

3. What are the most significant – positive and negative -- re-allocations of proof burdens by the Court in the line of cases from *Calder* or *Guerin* in contrast to pre-patriation proof burdens?

⁴⁰⁰ Discussed *supra* in the text at fn. 196ff.

⁴⁰¹ Peter Hutchins, Proceedings and Reports of the Standing Senate Committee on Aboriginal Peoples, and the cases cited above in which the Court finds Crown arguments less than plausible and at odds with the *Constitution*, e.g., *Sparrow*, fn.1; *Haida Nation*, fn.51; *Mikisew*, fn.154.

Even taking note of the Crown's repeated attempts to read down the duty to consult, I would still offer the opinion that the most significant re-allocation by the Court has been the duty to consult and the corollary duties growing out of it, e.g., the duty to accommodate. Granted that the onus to prove a complaint that the consultation taken was inadequate (often farcical), the duty to consult establishes a standard which highlights the Crown's deviation from the standard, from due process and from equity.

The second most significant re-allocation has been the development of protocols, standards and procedures which are to be followed in properly fulfilling Crown obligations. Although the onus of proving that the Crown failed in a duty remains with the plaintiffs, the failure of the Crown to follow proper protocols greatly simplifies the task of establishing a failure on the part of the Crown within the balance of probabilities. Failure to follow a protocol, in various professions, puts a burden onto the defendant to justify the failure. The failure to conduct adequate consultation or to negotiate proper accommodation, monetary and otherwise, can similarly be established by the failure of the Crown to follow protocols.

The third change to which I would point may not readily be seen as a re-allocation but has, I suggest, a similar effect: the keeping of proper records as an obligation on the Crown and a duty to disclose those records to First Nations governments or other Indigenous parties whose welfare is discussed in those records. The breach of fiduciary duties giving rise to *Guerin*⁴⁰² could only have happened by the Crown's refusal to disclose its records to the band council when the lease was first signed and on later occasions when the band council asked to see the records.

⁴⁰² *Guerin, supra*, fn.12.

The Crown's failure to keep proper records has been a subject of discussion before the former Commons Indian Affairs Committee.⁴⁰³ No other fiduciary would be allowed the latitude of poor record keeping enjoyed by the Crown at the expense of First Nations communities and their members. The requirement for proper record keeping while it does not relieve the plaintiff First Nations of the duty to prove a breach of fiduciary duties, lends great credence to their case when the Crown has failed to keep records or to disclose them in a timely fashion⁴⁰⁴, as in *Guerin* and in *Blueberry River*.

The next part of this question discusses how proof burdens might be re-allocated more equitably.⁴⁰⁵ For each of several suggestions I follow the argument of one or more distinguished scholars.

Kent McNeil, in his essay on "Onus of Proof of Aboriginal Title"⁴⁰⁶, states that, in common law, possession of land is proof of title unless a better title can be offered to supplant the proof by possession. Denying proof by possession to Indigenous peoples has been a device by which to justify depriving First Nations of their lands, impoverishing them and driving them from lands guaranteed to them by treaty.⁴⁰⁷ Denying First Nations proof by possession is one of the major remaining civil disabilities imposed on First Nations communities and individuals.

⁴⁰³ Discussed in the text, *supra*, at fn. 206 ff.

⁴⁰⁴ See also the discussion above of the *Cobell case* in the U.S. and its eventual settlement by an Act of Congress, *supra*, in the text at fns. 104, 211, 212.

⁴⁰⁵ I do not explore here the arguments in favour of these re-allocations or other moves toward a more equitable system, nor the problems I intend them to ameliorate.

⁴⁰⁶ McNeil, *supra*, fn. 32, at fn. 289.

⁴⁰⁷

Allowing proof by possession, including historical possession, would be a major step toward the elimination of the civil disabilities imposed on First Nations and toward endowing those communities with the same rights as other communities and persons in Canada.

The “integral test” established by Chief Justice Lamer in *Van der Peet*⁴⁰⁸ needs to be set aside. For the reasons discussed earlier⁴⁰⁹, it is both unreasonable and incapable of even handed application.

Likewise, the Indigenous legal systems under which communities and their members have held lands since time immemorial need to be integrated into a multi-juridical Canadian legal system.⁴¹⁰ Elders and other students of these legal systems need to be given proper respect and not badgered by opposing counsel.⁴¹¹

In their essay, "Aboriginal Attorney General"⁴¹² Sakej and Henderson observe that this proposal would have the value of creating an office whose primary preoccupation would be to improve the legal relations between Canada and First Nations. At present the Attorney General of Canada faces a continuing conflict of interest between his duty to act as a fiduciary on behalf of First Nations and his duty to uphold the interests of the Crown. Likewise, an Aboriginal

⁴⁰⁸ *Van der Peet, supra*, fn. 1.

⁴⁰⁹ Discussed in the text, *supra*, at fn. 290ff.

⁴¹⁰ John Borrows, John Tait Memorial Lecture (2005), 50 McGill L.J. 153.

⁴¹¹ Peter Hutchins, “Mixed Messages, Double Standards, Eurocentrism and High Hurdles: Evidentiary Challenges in Aboriginal Litigation”, Continuing Legal Education Society of British Columbia in October 2004.

⁴¹² James Sakej and Youngblood Henderson, "Aboriginal Attorney General", *Windsor Yearbook of Access to Justice*, Vol. 22 (2003).

Attorney of General should be seen to be above partisan considerations. Such an office might give more serious consideration to the recommendations made by the Courts to Governments such as separating litigation to define section 35(1) right from prosecutorial settings.⁴¹³

Box Theory

4. Where would I place the Court on a full <-> empty box spectrum and what is the value of a box theory spectrum?

On a scale of 0 to 100%, where 100 is a full box of Aboriginal rights, I would think that the Court has fluctuated between 60 and 75%. I make this estimate based on my assessment of the Court's decisions reviewed above and, in particular, the degree and vigour of its disagreement with the Crown's empty box arguments. I limit the Court on this spectrum to 60% to 75% because of the limitations that it places on Aboriginal and treaty rights, particularly the "integral to the culture" argument, which I discussed at some length⁴¹⁴, and the requirement that Aboriginal land use must be compatible with traditional usage without similar restrictions on surrendered lands.

The Court consistently asserts that section 35(1) rights took on real force and meaning upon the proclamation of the *Constitution Act, 1982*, in contrast to successive Governments which have argued that the section has no meaning at present and will have meaning only when meaning is given to it by ministers or legislatures. On the other hand, the Court has often fallen

⁴¹³ Related to Sakej & Henderson's proposal, *supra*, fn. 412, is a recommendation in the *Penner Report* for a Minister of State for First Nations relations who would be a member of the inner cabinet and be charged with renewing relations and changing policy rather than administering the Department of Indian Affairs and Northern Development.

⁴¹⁴ See the text, *supra*, at fn. 290ff.

far short of positions argued by First Nations plaintiffs and defendants. In short, the Court has not subscribed either to an empty glass or to a full glass, but their view of section 35(1) has fluctuated between a glass that is three-quarters full, e.g., *Sparrow*⁴¹⁵ or *Haida Nation*⁴¹⁶ and three-fifths full, e.g., *Van der Peet*⁴¹⁷. One could, I believe, rank the various decisions along such a spectrum though not all scholars would agree on where to put each case.

I think it is helpful to visualize box theory as occurring on a spectrum on which the views of political actors and jurists can both be represented for the attitudes they manifest toward Indigenous peoples and Aboriginal and treaty rights under section 35(1). It is worth recalling, for instance, that the Crown dropped the “mere political trust” argument in *Guerin*, at the insistence of the then Attorney General, and tried to re-institute it under a later Government. I think it is clear that, on these constitutional questions, Crown counsel and ministers do interact.

5. (a) How does the characterization of Government’s view of section 35(1) square with the Court’s description of the Crown’s submissions?

Senior officials in the federal Ministry of Justice advise both their own minister and client ministers on available courses of legal action and the costs and benefits of each of them. Client ministers and the Attorney General (often with input from other “inner cabinet” ministers) give direction. Many of the positions taken by the Crown in these cases – *Guerin*, *Sparrow* and

⁴¹⁵ *Sparrow*, *supra*, fn. 1. See discussion in the text, *supra*, at fn. 244 ff.

⁴¹⁶ *Haida Nation*, *supra*, fn.51. See discussion in the text, *supra*, at fn. 369 ff.

⁴¹⁷ *Van der Peet*, *supra*, fn. 1. See discussion in the text, *supra*, at fn. 281 ff.

Van der Peet all serve as good examples – are political in nature, and counsel is expected to develop legal arguments to support the Government’s political position.

(b) What is gained by such an exercise (opposing claims) either for particular cases or for the overall historical pattern represented in the line of cases?

If my earlier⁴¹⁸ speculation, that Justice has advised successive Governments to oppose (and not negotiate) all or almost all Aboriginal rights litigation because of the enormous costs that would ensue from opening the dam, those Governments have postponed the day of reckoning, whether or not it can be put off indefinitely. The attitude reflected in Crown arguments serves to make litigation a maximally punitive experience for First Nations. Previous Governments, from the late Trudeau period and later refused to negotiate on the basis of rights but only on the basis of needs. The Harper Conservative Government has been steadfastly hostile in its dealings with First Nations, following in the “needs-not-rights” policy perspective without using those words. Making litigation maximally punitive is likely seen both by Ministers and by Justice Officials as serving to make needs-based negotiations appear more palatable. I think that the less plausible arguments of the Crown may be explained in part by decisions to use the Courts to advance this kind of political agenda, and not for exploring the meaning of section 35(1). Charting the arguments serves to illustrate their erratic nature and thus to raise the question of what the purpose of such arguments may be. I appreciate that this conclusion takes the discussion beyond a legal discussion into a peculiar policy arena. I think that this discussion has served to demonstrate the implausible nature of many Crown arguments; the decision to

⁴¹⁸ See the text, *supra*, at fn. 392.

advance implausible arguments necessarily arises in a policy arena and not as a matter of law. Having established the Crown's practice of implausible arguments as a tool to postpone more constructive action, I hope to explore the policy arena in a later study.

This strategy of forcing First Nations and other Indigenous bodies to sue and then responding with implausible arguments, however, falls apart when the Government refuses to negotiate support for First Nations in child welfare and education, for instance, on a par with support given to non-Indigenous institutions by the surrounding province. On a recently litigated complaint arising before the Canadian Human Rights Commission⁴¹⁹ reviewed by the Federal Court, and appealed to the Federal Court of Appeal, the Government argued, as it has elsewhere before and after, that since it does not provide child welfare off-reserve there can be no comparator group against which adverse treatment for First Nations children might be established. It also argued that, since it contracts for the provision of services variously with provinces and with Native and First Nations child welfare services, it does not provide a service. Mactavish J., in the Federal Court, held that the Crown's arguments, accepted by the CHRT, were unreasonable and therefore subject to judicial review. Her decision was upheld in the Federal Court of Appeal. Based on her reasons, I would classify the Crown's arguments on the same level as those rejected by the Supreme Court of Canada in *Guerin* and *Sparrow*.

Mactavish J. noted that the three federal government policy statements governing child welfare services for on-reserve children stress the need to move services to parity with the

⁴¹⁹ *Canadian Human Rights Commission et al. v. Attorney General of Canada*, 2012 FC 455, <<http://canlii.ca/t/fr018>> and, in the Federal Court of Appeal, 2013 FCA 75, <<http://canlii.ca/t/fwgkq>>. Mactavish J.'s decision in the Federal Court reviews the history of this case in great detail including both the complaints and the findings of the Tribunal.

surrounding province. Advancing an argument in Court that abandons its own stated policy hardly advances the honour of the Crown. The Government's arguments, in these recent cases, carries on an empty box position no less than their arguments in *Sparrow*, 23 years earlier, while Mactavish J. adopts a view very much closer to a full box theory, much as the Supreme Court has more or less throughout those 23 years.

IV. Conclusion

I began this thesis with a dual purpose: First, to establish the allocation of burdens set out by the Court for establishing rights under section 35(1) of the *Constitution Act, 1982*; secondly, to consider the arguments put forth by Governments, federal and provincial, in resisting those rights, and, particularly the extent to which they have continued to be at variance from the principles, burdens and standards set out by the Court.

It became clear that the difference between the Court's view of section 35 rights and the Crown's was not only a difference as to the content but also as to how claims and fact situations were to be understood. The Court, although its position has varied over the 23 years since *Sparrow* has, by and large, allowed that section 35 is not an empty box. The Court has, to a greater or lesser degree, adhered to the positions established in *Guerin*, by Dickson and Wilson JJ., beginning with the notion that Aboriginal title derives from the possession of territory by Indigenous communities before any legislative or executive act by Britain or by Canada. That principle has then been applied to more specific rights, e.g., fishing rights in *Sparrow*. The Court has also held that regulating rights, such as regulating the salmon fishery, is distinguishable from extinguishing the right at issue. Beginning with the interpretation of section 35(1) in *Sparrow*, an Aboriginal right that still existed in April 1982 could be limited only if the limit were justified by

an important public purpose, and then only to the extent that the limit was the least infringing means of accomplishing the public purpose.

In contrast, the Crown has argued that section 35(1) is an empty box, that the fishing right of the Musqueam, for example, was extinguished by regulation, and that section 35(1) could only consist of those rights assigned by ministers or by legislative action and might, therefore, also be open to repeal.

Perhaps more important than the difference as to content of section 35 rights between the Court and the Crown is the difference of reasoning to be applied to section 35 rights. The Court has repeatedly emphasized the need for purposive interpretation of section 35. In applying purposive interpretation to section 35, the Court has pointed to its own earlier Charter interpretations in which it also used purposive interpretation. In the Charter cases cited in section 35 decisions, the Court also pointed to much earlier constitutional decisions, e.g., *Edwards*⁴²⁰ and Lord Sankey's dictum that "the constitution is a living tree."

In contrast to the Court's use of purposive interpretation, the Crown argued for a narrow interpretation of Aboriginal rights, and even a fairly strict interpretation of treaty rights (as in *Sioui*, *Marshall*, and *Mikisew*)⁴²¹. On the other hand, the Crown has tried to rely on statutory authority, such as section 18(1) of the *Indian Act* to justify unreviewable and sometimes even abusive authority of Crown officers. On the other hand, the Court has read that section down by imposing fiduciary responsibilities and concomitant duties of record-keeping and disclosure on

⁴²⁰ *Edwards*, *supra*, fn. 9.

⁴²¹ *Sioui*, *supra*, fn. 179; *Marshall*, *supra*, fn. 277; *Mikisew*, *supra*, fn. 154.

the Crown when dealing with Aboriginal property.⁴²² The Crown has sought to ignore or undermine the Court's strictures requiring consultation, minimal infringement and accommodation both in Aboriginal rights territory (*Haida Nation*) and in treaty areas (*Mikisew*).

Recently, this difference in interpretation has extended beyond section 35 issues when the federal Government argued, on a judicial review of a Canadian Human Rights Tribunal decision, subsequently reviewed by the Federal Courts⁴²³, that the federal Government does not provide a child welfare service to First Nations communities and, therefore, is not bound by the prohibition of discrimination in the provision of substandard services. Moreover, the Government argued that discrimination cannot be established in the absence of a comparator group (in that the federal government does not provide such services elsewhere in the province. The CHRT accepted the arguments, and the Federal Court reviewed them on the grounds that the CHRT decision was unreasonable. The fact that the adoption of these Government arguments produced an unreasonable decision, indicates that the Government's arguments were unreasonable. Indeed, Mactavish J. pointed to the need for the same kind of purposive interpretation in the protection of rights protected by the CHRA as in constitutional rights.

This divergence between the Court and the Crown in their reasoning and in the conclusions regarding section 35(1) rights and Indigenous rights more broadly raises both legal questions and policy questions of a deeply ethical nature. These ethical questions, legal and political, call out for further study. This thesis will have served its purpose if it has documented

⁴²² See *Guerin, supra*, fn. 12.

⁴²³ *CHRC v. Canada, supra*, fn. 419.

the divergence between the Crown and the Court which I have quickly canvassed in this conclusion. Since Aboriginal peoples are dependent on the protection provided by the “honour of the Crown” it is disquieting to confront the manner in which the Crown exercises its responsibilities.

One conclusion that can safely be drawn might well serve as the starting point for further work: having noted that the purpose of entrenching rights in constitutional documents has, throughout the history of the common law and British parliamentary institutions, been to limit the powers variously of the Executive and of Parliament, what is apparent is that recent Governments and the parliamentarians who sustain them have not fully accepted the limitations imposed by section 35(1).