ORIGINAL RESEARCH ARTICLE

Threatening Reconciliation: The Supreme Court of Canada's Foundational Jurisprudence on Aboriginal Rights and Title, 1990-1997

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Abstract: In this article, I *enthreaten* the Supreme Court of Canada's foundational jurisprudence on Aboriginal rights and title under section 35 of the *Constitution Act, 1982* by reading it through a lens of threat. I argue that the majority's reasons in *Van der Peet*, *Nikal*, *Lewis*, *Gladstone*, *NTC Smokehouse*, *Pamajewon*, and *Delgamuukw* are a juridical response to the threat that Indigenous peoples' inherent rights pose to the preferential allocation of resources to settlers and the settler state. When viewed through the lens of threat, "reconciliation" takes on an additional – and, I argue, a more accurate – meaning: "reconciliation" as a response to a perceived or actual threat to settler supremacy. Through "reconciliation", the Court resolves the threat of Indigenous peoples' inherent rights, in particular rights to self-government, in favour of the future of the settler state. At the same time, this vision of "reconciliation" threatens Indigenous futures by constraining the terms under which Indigenous peoples' political difference is recognized and respected. In its jurisprudence, the Court must also deny or obfuscate reconciliation as a response to this threat. The settler state cannot cleanly admit either its prioritization of its claims over Indigenous resources nor its fear of Indigenous peoples and their corresponding inherent rights. "Reconciliation" must project balance, a return to equilibrium and stability, an assured and healthy ethic for the settler state, one in which we are "all here to stay" – and preferably for settlers in much the same way. *Threatening* this jurisprudence also menaces it. By making settler supremacy and futurity visible in this jurisprudence, it challenges courts and legal actors to imagine a different vision of reconciliation, one in which settlers are here to stay *in a different way*.

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Introduction

In *Delgamuukw*, Chief Justice Lamer proclaimed "let us face it, we are all here to stay."[1] In this "memetic closing line", the Chief Justice flattened and distanced the challenge that Indigenous peoples' inherent rights poses to the future of the settler state.[2] Coordinated with his vision of "reconciliation" in *Van der Peet* and *Gladstone*, the Chief Justice's framework mitigated the threat that Indigenous peoples' futurities pose to the preferential allocation of resources to settlers and the settler state. This article contextualizes and re-evaluates the Supreme Court of Canada's (SCC) foundational jurisprudence on Aboriginal rights and title during the period of 1990 to 1997. I argue that the reasons of the Court in *R v Sparrow*, *R v Nikal*, *R v Lewis*, *R v NTC Smokehouse*, *R v Van der Peet*, *R v Gladstone*, *R v Pamajewon* and *Delgammukw v British Columbia* may be understood as a juridical response to the threat posed by Indigenous peoples' inherent rights to settler supremacy

1 *Delgamuukw v British Columbia*, 1997 CanLII 302 at para 186 (SCC) [*Delgamuukw*].

2 Scott Franks, "Some Reflections of a Métis Law Student and Assistant Professor on Indigenous Legal Education in Canada" (2022) 48:3 Mitchell Hamline L Rev 745 at 755.

and futurity.[3] To do so, I place this jurisprudence in its social, political and economic context through a critical reading of the jurisprudence, the arguments of parties, and contemporary media during that period.

I argue that the state experiences Indigenous peoples' inherent rights as a threat to its supremacy, a supremacy grounded in a form of sovereignty that is more "alchemical" than legal.[4] Eve Tuck and K Wayne Yang define settler colonialism as "a form of colonization in which outsiders come to land inhabited by Indigenous peoples and claim it as their own new home."[5] All forms of legal authorization other than an intersocietal treaty – that is, conquest, *terra nullius*, and the doctrine of discovery –

3 *R v Sparrow*, 1990 CanLII 104 (SCC) [*Sparrow*]; *R v Nikal*, 1996 CanLII 245 (SCC) [*Nikal*]; *R v Lewis*, 1996 CanLII 243 (SCC) [*Lewis*]; *R v NTC Smokehouse* Ltd, 1996 CanLII 159 (SCC) [*NTC Smokehouse*]; *R v Van der Peet*, 1996 CanLII 216 (SCC) [*Van der Peet*]; *R v Gladstone*, 1996 CanLII 160 (SCC) [*Gladstone*]; *R v Pamajewon*, 1996 CanLII 161 (SCC) [*Pamajewon*]; *Delgamuukw*, *supra* note 1.

4 John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall LJ 537at 558–63 [Borrows, "Sovereignty's Alchemy"].

5 Eve Tuck & K Wayne Yang, "Series Editors' Introduction" in Linda Tuhiwai Smith, Eve Tuck & K Wayne Yang, eds, *Indigenous and Decolonizing Studies in Education: Mapping the Long View* (New York: Routledge, 2018) x at xii. Peter Russell characterises Canadian sovereignty claims as a form of "settler sovereignty", one grounded more on a policy of assimilation than legal authorisation for settlement: see Peter H Russell, *Sovereignty: The Biography of a Claim* (Toronto: University of Toronto Press, 2021) at 74. Lorenzo Veracini describes "settler colonial phenomena" as "circumstances where colonisers 'come to stay' and to establish new political orders for themselves, rather than to exploit native labour", as was the case when colonial metropoles exercized power over colonial hinterlands for the purposes of resource extraction: see Lorenzo Veracini, "'Settler Colonialism': Career of a Concept" (2013) 41:2 J Imp Commonwealth Hist 313 at 313. These definitions of settler colonialism are descriptive, though they may also carry normative connotations when articulated within a political programme of decolonization. For an example of the normative implications of settler colonialism, see Daniel Rück's articulation of his argument in Daniel Rück, *The Laws and the Land: the Settler Colonial Invasion of Kahnawà:ke in Nineteenth-Century Canada* (Vancouver: UBC Press, 2021) at 17.

are justifications that uphold settler colonialism.[6] Settler supremacy describes the prioritization of the interests of settlers "over the interests of Indigenous persons and peoples, insofar as those interests derive from [Indigenous peoples'] indigeneity."[7] These "interests" are both tangible and intangible. They include material, immaterial and corporeal "resources", political, social, spiritual, economic, symbolic, and ideological commitments, and positions expressed as values, norms, morals, beliefs, and worldviews.[8] It is within this context that Canadian society experiences Indigenous peoples'

6 See generally Michael Asch, "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17:2 CJLS 23 at 23–24 [Asch, "From *Terra Nullius* to Affirmation"] (referring to Brian Slattery's history of the Crown's acquisition of Indigenous peoples' territories). In North America, European powers relied on the legal doctrines of conquest and cession to authorize settlement in Indigenous peoples' territories. The SCC has recognized that Indigenous peoples in Canada were never conquered and that the "doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada": *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 69 [*Tsilhqot'in*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 25 [*Haida*]. In *Thomas and Saik'uz*, Kent J asked, "If the doctrines of discovery and *terra nullius* are indeed 'legally invalid' or simply inapplicable in Canadian law, what then is the legal justification validating the assertion of Crown sovereignty over Indigenous peoples and Indigenous lands?": *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at para 194. Cession by way of agreement is one possible legal authorization for settlement in Canada. However, treaty, when enacted within an Indigenous legal order, offers an intersocietal legal authorisation for non-Indigenous peoples' presence as relatives in Indigenous territories and for their shared access to the gifts found in these territories: Aimée Craft, "Living Treaties, Breathing Research" (2014) 26:1 CJWL 1 at 12. Canada's jurisprudence on Aboriginal treaties, however, stops short of embracing these treaties as truly intersocietal agreements, instead characterizing them as "sui generis" agreements to the extent that the Indigenous perspective is cognizable within Canadian law. For a summary of the treatment of Indigenous-settler treaties as domestic and *sui generis*, see: *Canada v Jim Shot Both Sides*, 2022 FCA 20 at paras 66–69. On alternatives to the settler colonial and liberal constitutional legal order, see: Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together – One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished].

7 Mills, *supra* note 6 at 3.

8 A language of "resources" is likely more cognizable to a non-Indigenous audience and is, I argue in this article, the primary lens through which the land, Indigenous legalities, and Indigenous peoples and persons are understood by the Canadian state. This language, however, comes at the risk of flattening the truth of all the things found within it as a definition: it flattens the ontological meaning of the land as spirited, of animals as spirited beings, of human beings as more than "social capital" or demographic data, of the epistemological, cosmological and ontological "rootedness" and lifeworld of Indigenous legal orders (Mills, *supra* note 6). The use of "resources" here, then, also reflects a *claim* made by the Canadian state to all of *this* world as a resource.

inherent rights as a threat, actual or perceived.[9]

On one level, Indigenous peoples' ways of being, that is their epistemologies, cosmologies, and ontologies, are *actual* threats to *settler supremacy*, in the sense that these ways of being challenge the philosophical and ideological commitments that support the prioritization of the interests of settlers and the future of the settler state.[10] In some cases, Indigenous peoples also physically resisted and continue to resist the unauthorized actions and violence of settlers and the historical colonial

9 Here, my argument is influenced by insights drawn from integrated threat theory, a variant of social identity theory. According to social identity theory, individuals receive psychological benefits from identifying with a group or groups: Henri Tajfel & John Turner, "The Social Identity Theory of Intergroup Behaviour" in Stephen Worchel & William G Austin, eds, *Psychology of Intergroup Relations* (Chicago: Nelson-Hall, 1986) at 7. The social identity theory of integrated or intergroup threat proposes that the perception of intergroup threats predict expressions of prejudice. Walter Stephan, Oscar Ybarra and Kimberly Rios explain that "an intergroup threat is experienced when members of one group perceive that another group wishes to, or is in a position to, cause them harm": Walter G Stephan, Oscar Ybarra & Kimberly Rios, "Intergroup Threat Theory" in Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination* (New York: Psychology Press, 2009) at 256. Threats may be "symbolic", for example, as a threat to a group or individual's values, morals, norms, beliefs, status, worldview, or legal order, or they may be "realistic", as corporeal, political, or economic threats to an individual or group. According to integrated threat theory, a range of individual and group-level behaviours may follow from the perception of threat ranging from avoidance to aggression: *ibid* at 256–57. In an unfortunate move, intergroup threat is circular; the perception of threat may lead to negative affective responses and behaviours, which in turn may predict the perception of threat where there is none: *ibid* at 258–59. In borrowing from integrated threat theory, I am not subscribing to a pathological account of the Court's jurisprudence. Rather, I adopt the general framework found within integrated threat theory because it is useful as a heuristic for reading the Court's jurisprudence. To be clear, I do not see my argument as dependent on the validity or accuracy of integrated threat theory in the Canadian context, though there is some empirical support for its conclusions. For a review of this literature, see Bernard E Whitley Jr & Mary E Kite, *The Psychology of Prejudice and Discrimination*, 3d ed (New York: Routledge, 2016) at 311–25. In the Canadian context, see Jeffrey S Denis, "Contact Theory in a Small-Town Settler-Colonial Context: The Reproduction of Laissez-Faire Racism in Indigenous-White Canadian Relations" (2015) 80:1 Am Sociol Rev 218 [Denis, "Small Town Settler Colonialism"]; Jeffrey S Denis, "Transforming Meanings and Group Positions: Tactics and Framing in Anishinaabe–White Relations in Northwestern Ontario, Canada" (2012) 35:3 Ethn Racial Stud 453; *cf.* Erin Lashta, Loleen Berdahl & Ryan Walker, "Interpersonal Contact and Attitudes Towards Indigenous Peoples in Canada's Prairie Cities" (2016) 39:7 Ethn Racial Stud 1242.

10 On the incommensurability between liberal and rooted (Indigenous) constitutionalisms, see Mills, *supra* note 6 at 13–15. Gina Starblanket & Dallas Hunt argue that "the obstruction that Indigenous people present to the development of settler society is no longer physical, but remains present in the set of alternative sovereignties that Indigenous people represent and assert": Gina Starblanket & Dallas Hunt, *Storying Violence: Unravelling Colonial Narratives in the Stanley Trial* (Toronto: ARP Books, 2020) at 78.

and present settler-colonial state.[11] Indigenous peoples are also perceived as inherently threatening;[12] this prejudice facilitates the dehumanization of Indigenous peoples and, correspondingly, the humanization and legitimization of settler supremacy.[13]

On another level, activities that ameliorate or reduce the harmful effects of settler colonialism on Indigenous persons or that afford constitutional protection to Indigenous peoples' rights may be perceived as a threat to the preferential allocation of resources to settlers.[14] Melanie A Morrison et al identify several stereotypes of Indigenous persons that may be associated with the perception of threat.[15] These include stereotypes that "Aboriginal Canadians seem to use their cultural traditions to secure special rights denied to non-Aboriginal Canadians", that "many of the requests made by Aboriginal people to the Canadian government are excessive", that "Aboriginal people should be satisfied with what the government has given them", that "it is now unnecessary to honour treaties established with Aboriginal people", and that "Aboriginal people should pay taxes just like everyone else."[16] In *Williams*, McLachlin CJ recognized this when she noted that "the potential of racist jurors siding with the Crown as the perceived representative of the majority's interests" may increase as "tensions between Aboriginals and non-Aboriginals" rise over resources.[17] To put it in the language of threat, some of these stereotypes or beliefs are rooted in the perception that Indigenous peoples' rights, or activities that may ameliorate inequality, are a threat to the social dominance of settlers

11 By "authorization", I mean authorized pursuant to Indigenous and intersocietal legal orders. For example, in the early 19th century, the Tsilhqot'in resisted the encroachment of the Hudson's Bay Company onto their lands: Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) at 50–51. Pondiac's resistance in the 1760s against Britain in the Great Lakes is another example, described in John Borrows, "Wampum at Niagara: The Royal Proclamation, Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) at 170. Historically, the British colonial and settler colonial state responded to the threat of Indigenous militarization by entering into intersocietal treaties and agreements with Indigenous governments.

12 Melanie A Morrison et al, "Old-Fashioned and Modern Prejudice Toward Aboriginals in Canada" in Melanie A Morrison & Todd G Morrison, eds, *The Psychology of Modern Prejudice* (Hauppauge, New York: Nova Science Publishers, 2008) 277; Todd G Morrison, Melanie A Morrison & Tomas Borsa, "A Legacy of Derogation: Prejudice toward Aboriginal Persons in Canada" (2014) 5:9 Psychol 1001 [Morrison, Morrison & Borsa, "A Legacy of Derogation"].

13 Leslie Thielen-Wilson, "Feeling Property: Settler Violence in the Time of Reconciliation" (2018) 30:3 CJWL 494 at 517–18; Starblanket & Hunt, *supra* note 10 at 97–98.

14 See, for example, the *Kapp* case, which was brought by non-Aboriginal fishermen challenging the province's ameliorative program for Aboriginal fisheries on the basis that the Aboriginal fishery discriminated against the non-Aboriginal fishermen on the basis of race: *R v Kapp*, 2008 SCC 41 [*Kapp*]. *Kapp* is discussed later in this article.

15 Morrison et al, *supra* note 12; Morrison, Morrison & Borsa, "A Legacy of Derogation", *supra* note 12.

16 Morrison et al, *supra* note 12 at 24.

17 *R v Williams*, 1998 CanLII 782 at para 58 (SCC) [*Williams*].

and of their access to important social, political, economic, and cultural resources.[18] In the context of settler colonialism, the perception of threat may also be structural and ideological.[19] Whether cast as fear, threat, anxiety, or the perception of risk, these experiences and perspectives carry both affective and intellectual dimensions.[20] The perception of threat conditions responses that have material and affective consequences for Indigenous peoples – and settlers.[21]

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18 Denis, "Small Town Settler Colonialism", supra note 9 at 220–22, 236–37. B Corenblum and Walter G Stephan found that White Canadians perceived Indigenous peoples' advocacy for Indigenous rights and title and Indigenous students access to affirmative action programming as a symbolic (political power and status) and material (economic, land) threat to White people's dominance: B Corenblum & Walter G Stephan, "White Fears and Native Apprehensions: An Integrated Threat Theory Approach to Intergroup Attitudes" (2001) 33:4 Can J Behav Sci 251 at 255, 258. See also Darrell W Donakowski & Victoria M Esses, "Native Canadians, First Nations, or Aboriginals: The Effect of Labels on Attitudes Toward Native Peoples" (1996) 28:2 Can J Behav Sci 86 at 90 (describing how the term "First Nations" evokes perceptions of political threat, as identified in the example of the Assembly of First Nations).

19 In her thematic guide to Canadian literature, Margaret Atwood argues that "every country or culture has a single unifying and informing symbol at its core. [...] The symbol, then – be it word, phrase, idea or image, or all of these – functions like a system of beliefs (it *is* a system of beliefs, though not always a formal one) which holds the country together and helps the people in it to co-operate for common ends." Atwood identifies survival as the unifying theme of Canadian literature. In contrast to the theme of the fort and frontier in American literature, Atwood describes *survival* as not only "a preoccupation with one's survival" but also "a preoccupation with the obstacles to that survival." Survival is an "intolerable anxiety." In early Canadian literature, survival meant "bare survival in the face of 'hostile' elements and/or natives: carving out a place and a way of keeping alive." Margaret Atwood, *Survival: A Thematic Guide to Canadian Literature* (Toronto: Anansi, 1972) at 31–33. Settler survival in the face of Indigenous criminality and illegality recurs as a theme in settler property law: Bhandar, *supra* note 11 at 101.

20 In *Canada's Indigenous Constitution*, John Borrows describes the affective or emotional responses to Indigenous legal orders in a chapter titled "Legitimacy". He relates both the emotional and intellectual responses of those who would reject the recognition of Indigenous legal orders: "we must pay attention to both its emotional and intellectual developments. This is not to suggest for one moment that people discard reason when they make a choice." John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 165. It is noteworthy that Borrows' discussion of the problem of "legitimacy" has little to do with the rationality or authority of Indigenous legal orders, but rather, the affective and cognitive bias against Indigenous legal orders as illegitimate. For a discussion of the connection between the affective terror and cognitive structures underlying settler colonialism in the prairies, see Starblanket & Hunt, *supra* note 10 at 79–80.

21 Starblanket & Hunt describe the affective and material consequences for Indigenous peoples in the prairies, where settler and state violence is asymmetrically legitimized through law: Starblanket & Hunt, *supra* note 10 at 22, 81–83, 93–118. Settler perceptions of Indigenous persons, peoples, their legal orders, and inherent rights as threats also has affective consequences for settlers. Eva Mackey argues that settler "'structures of feeling' pivot on axiomatic assumptions about settler entitlement and certainty in land, property, and settler futures" and that Indigenous peoples' claims to land unsettle these expectations, making them uncertain: Eva Mackey, "Unsettling Expectations: (Un)certainty, Settler States of Feeling, Law, and Decolonization" (2014) 29:2 CJLS 235 at 237. Mackey identified several affective expressions in her interviews with settlers, including anger, resentment, endangerment, and anxiety. The state's response is to naturalize these "fantasies of entitlement", making these expectations into *material certainties*: *ibid* at 243.

In this article, I *enthreaten* the SCC's foundational jurisprudence on section 35 of the *Constitution Act, 1982*[22] by reading it through a lens of threat. I argue that this jurisprudence is a response to the threat that Indigenous peoples' inherent rights poses to the preferential allocation of resources to settlers and the settler state.[23] When viewed through the lens of threat, "reconciliation" takes on an additional – and, I argue, a more accurate – meaning: "reconciliation" as a response to a perceived or actual threat to settler supremacy. Through "reconciliation", the Court resolves the threat of Indigenous peoples' inherent rights, in particular rights to self-government, in favour of the future of the settler state.[24] At the same time, this vision of "reconciliation" *threatens* Indigenous futures by constraining the terms under which Indigenous peoples' political difference is recognized and respected. In its jurisprudence, the Court must also deny or obfuscate *reconciliation as a response*

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

23 Other scholars, discussed in this article, have critiqued the Court's jurisprudence as responsive to the societal, economic and political interests of settlers and the settler state. Contemporaneously with the writing of this article, Bruce McIvor argues that "[t]o ensure the stability and legitimacy of the dominant, colonizer society, the Court" constructed legal tests, including those identified in this article, that could answer the threat of Indigenous peoples rights to "non-Indigenous dominance and entitlement": Bruce McIvor, "Aboriginal Rights as a Tool of Colonialism", *First Peoples Law* (29 September 2023), online (blog): <firstpeopleslaw.com/public-education/blog/aboriginal-rights-as-a-tool-of-colonialism>. In a different turn, Kenji Tokawa argues that the Court's jurisprudence frames Aboriginal rights not as a threat to the state's interest over a right (it must avoid such an appearance), but rather as a search for Aboriginal culture: Kenji Tokawa, "*Van der Peet* Turns 20: Revisiting the Rights Equation and Building a New Test for Aboriginal Rights" (2016) 49:2 UBC L Rev 817 at 831 [Tokawa, "*Van der Peet* Turns 20"]. Brian Slattery argues that the Court's "principles of reconciliation" are a response to the assumed interests of the state, its citizens and other third parties: Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85:2 Can Bar Rev 255at 260. In response to the Court's decision in *Sparrow*, Kerry Wilkins argues that Indigenous claimants must be cognizant of the Court's fear that Aboriginal constitutional rights, in particular the right to self-government or rights with commercial dimensions or impacts, may "pose uncontainable threats to basic mainstream institutions or fundamental mainstream values": Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" (2000) 27:2 Man LJ 241 at 266 [Wilkins, "Take Your Time and Do It Right"].

24 Eve Tuck & KW Yang, "Decolonization is not a Metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1 at 36. Describing "futurism" in settler colonial thought, Patricia Wood and David Rossiter describe how "futuristic thinking ... is also ontological: political entities like states emerge from themselves; they are not products of history. In this place, the future is unfettered by and unaccountable to the past. It is believed that anything is possible, that the future can be invented as one wishes. Moreover, the promise of the future is what is meaningful or gratifying, not the present or the past. This is a mindset that fetishizes the future ...": Patricia Wood & David A Rossiter, *Unstable Properties: Aboriginal Title and the Claim of British Columbia* (Vancouver: UBC Press, 2022) at 10.

to this threat.[25] The settler state cannot cleanly admit either its prioritization of its claims over Indigenous resources nor its fear of Indigenous peoples and their corresponding inherent rights. "Reconciliation" must project balance, a return to equilibrium and stability, an assured and healthy ethic for the settler state, one in which we are "all here to stay" – and preferably for settlers in much the same way.[26] *Threatening* this jurisprudence also menaces it. By making settler supremacy and futurity visible in this jurisprudence, it challenges courts and legal actors to imagine a different vision of reconciliation, one in which settlers are here to stay *in a different way*.

My argument proceeds in two parts. In the first part, I revisit the context surrounding the SCC's foundational jurisprudence on Aboriginal rights within the period between 1990 and 1997, namely *Sparrow*, *Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet*, *Gladstone*, *Pamajewon*, and *Delgammukw*.[27] I argue that the claimants' inherent rights – their capacity to sustain themselves into the future through commercial and governance activities on their traditional territories – challenged the future of the settler state and the allocation of resources to settlers. In the second part, I argue that a majority of the justices of the SCC responded to this threat by creating a jurisprudence that asymmetrically preferred the future of the settler state and its control over Indigenous peoples' territories and societies and the preferential allocation of resources to settlers. To this end, the Court marshalled and redeployed a new juridical concept: reconciliation. I argue that "reconciliation" functions as a normative and strategic claim that sustains and legitimizes settler futurity and supremacy and obfuscates the subordination of Indigenous peoples' inherent rights to this settler-centric vision. To accomplish this, a majority of the Court carried out four tactical and asymmetrical moves: its cultural definition of Aboriginal rights as material activities in geographically and temporally defined space; its subordination of the Indigenous perspective to the common law and constitutional legal order; its distinction between inherent or internally limited and non-inherent or non-internally limited Aboriginal rights in the context of the Crown's fiduciary duty; and its expansion of the Crown's arsenal of valid legislative objectives for infringing Aboriginal rights.

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25 Alexandre Kedar argues that settler law creates "[i]ntricate legal tools and conventions [that] serve as central instruments in defining and altering laws concerning natives' rights. These rules, saturated with a heavy dose of professional, technical, and seemingly scientific language and methods, conceal the violent restructuring with an image of inevitability and neutrality. Procedural rules and obstacles, such as time limits, and questions of jurisdiction and standing; rules of evidence, such as admissibility and weight, presumptions and burdens of proof; the manipulation of past precedents and of legal categories, have the effect of dispossessing indigenous populations without even admitting the dispossession": Alexandre (Sandy) Kedar, "On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda" in Jane Holder & Carolyn Harrison, eds, *Law and Geography* (Oxford: Oxford University Press, 2003) 401 at 416.

26 Here, I draw from the comments of Harry LaForme and Chief Felix Thomas of the Saskatoon Tribal Council at the Canadian Institute for the Administration of Justice's conference, "We Are All Here to Stay", reported in Franks, *supra* note 2 at 755.

27 *Sparrow*, *supra* note 3; *Nikal*, *supra* note 3; *Lewis*, *supra* note 3; *NTC Smokehouse*, *supra* note 3; *Van der Peet*, *supra* note 3; *Gladstone*, supra note 3; *Pamajewon*, *supra* note 3; *Delgamuukw*, *supra* note 1.

I. Threatening Reconciliation

In this part, I revisit the context surrounding the SCC's foundational jurisprudence on Aboriginal rights and title under section 35 of the *Constitution Act, 1982*.[28] I argue that, within this context, the claimants' inherent rights – their capacity to sustain themselves into the future through commercial and governance activities on their traditional territories – challenged the future of the settler state and the preferential allocation of resources to settlers. Rather than separate these cases based on the date of the Court's decision (as in the case of what is called the "*Van der Peet* trilogy"),[29] by their focus on Aboriginal title or Aboriginal rights (which may be further defined by the right to fish or the right to self-government), or by treating each individually, I revisit and contextualize these cases based on their shared history and relationships. These cases have shared procedural and substantive histories, including that: five of them (*Van der Peet*, *Gladstone*, *Nikal*, *Lewis*, and *NTC Smokehouse*) share a common lineage as same-day decisions of the British Columbia Court of Appeal (BCCA) (having been decided by the same panel of judges on June 25, 1993) and as coordinated applications for leave to appeal to the SCC (October 1993, with leave granted on March 10, 1994); two of them share a related rights-holder (namely, the Witset First Nation and Wet'suwet'en in *Nikal* and *Delgamuukw*); four share a relationship to commercial fisheries in British Columbia after the SCC's decision in *Sparrow* (*Van der Peet*, *Gladstone*, *Nikal* and *Lewis*); five of them were heard together over two days in late November, 1995 (*Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet* and *Gladstone*); six of them would be decided within months of each other (*Nikal* and *Lewis* were decided in April 1996, and *NTC Smokehouse*, *Van der Peet*, *Gladstone* and *Pamajewon* were decided on between August 21 and 22, 1996);[30] and, in each of them, the claimants articulated a theory of reconciliation and section 35 that centred on their capacity to access and use their lands to continue themselves into the future. Together, these cases – all appealed, heard and decided within a few years of each other, many at the same time, and with the same parties intervening across cases – challenged the preferential allocation of resources to the settler state, in particular, the capacity for provincial and

28 *Sparrow*, *supra* note 3; *Nikal*, *supra* note 3; *Lewis*, *supra* note 3; *NTC Smokehouse*, *supra* note 3; *Van der Peet*, *supra* note 3; *Gladstone*, *supra* note 3; *Pamajewon*, *supra* note 3; *Delgamuukw*, *supra* note 1. Two additional cases involving Aboriginal fishing rights, *R v Adams*, 1995 CanLII 56 (SCC) [*Adams*] and *R v Côté* 1996 CanLII 170 (SCC) [*Côté*], would be decided on October 3, 1996. Leave to appeal in *Côté* was granted on March 3, 1994, and the case was heard by the SCC on June 17, 1996. Leave to appeal in *Adams* was granted on December 9, 1993, and the case was heard by the SCC on December 5, 1995. Additionally, the Court heard a case on Aboriginal treaty rights, *R v Badger*, 1996 CanLII 236 (SCC) [*Badger*], in this period. Leave to appeal in *Badger* was granted on December 15, 1993, and the case was heard by the SCC on May 1 and 2, 1995. The Court released its decision in *Badger* on April 3, 1996, just before it released its decisions in *Nikal* and *Lewis*. Although *Adams*, *Côté* and *Badger* are contextually relevant, in particular for the Court's approach to the separation between Aboriginal rights and Aboriginal title, I have limited my analysis of these cases for reasons of length.

29 Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993.

30 *Delgamuukw* would follow in December 1997. However, as noted above, the Court was aware of the relationship between *Delgamuukw* and these other cases, both because almost all of them originated in same-day decisions of BCCA and because the claimants in *Delgamuukw* intervened in the related appeals to the SCC.

federal governments to access resources and exercise governance powers over Indigenous peoples' territories.

In contrast to the usual, incremental development of a jurisprudence, the Court constructed this jurisprudence on Aboriginal rights and title within a short period of time. These cases also occurred within a broader social and political context, of which the Court was almost certainly aware. This period was one of intense conflict and uncertainty over the meaning of section 35 of the *Constitution Act, 1982*. By 1992, constitutional discussions and negotiations over the meaning of section 35 had broken down between First Nations, Inuit and Métis peoples and the federal and provincial governments. The risk of physical conflicts between Indigenous peoples and settlers over access to lands and resources was real. At the heart of these conflicts were two competing visions of section 35, one that envisioned the development of Indigenous societies into the future and one that restricted its purpose to the protection of those practices that make Indigenous societies distinctive compared to Europeans. As I will argue, the latter vision is responsive to the threat that Indigenous peoples' futurity – their capacity to access and use their lands to continue themselves into the future, however they desire – poses to settler futurity. In 1996 and 1997, a majority of the Court entrenched this latter vision. To understand this response, we must place the Court's decisions within their historical context.

As a brief note on method, the review in this part is limited. First, for reasons of focus and length, it is limited to the cases noted above and does not include the Court's treaty jurisprudence nor *R v Adams* and *R v Côté*.[31] Second, I consider the doctrinal arguments of the parties and reasons of the Court only insofar as they relate to my research question, which focuses on competing visions about the meaning, scope and purpose of section 35 of the *Constitution Act, 1982*. Third, I use court records, including hearing transcripts, reported decisions, and written submissions; government reports; media; and secondary literature, to contextualize the cases under review. Due to the temporal scope chosen in this article, I am interested in events at a general level, in contrast to a more focused inquiry into specific events or cases. The purpose of this contextualization is to re-examine the Court's reasons in light of the underlying factual record and surrounding circumstances of the cases that were before the Court. As Leonard Rotman notes, the Court in *Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet*, *Gladstone*, *Pamajewon* and *Delgammukw* decontextualized its consideration of the scope and content and Aboriginal rights and title from the surrounding historical context, including the contemporary entrenchment of section 35 and the constitutional conferences that followed.[32] This section attempts, to some degree, to contextualize the Court's reasons.

31 *Adams*; *Côté*, *supra* note 28.

32 Leornard I Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada Symposium on Aboriginal Legal Issues" (1997) 36:1 Alta L Rev 1 at 2.

1. *Sparrow*'s "Halfway House"[33]

The facts in *Sparrow* establish an important historical context related to fisheries in British Columbia, one shared with several of the cases on appeal to the Court in 1994 through 1996, notably *Nikal*, *Lewis*, *Van der Peet*, and *Gladstone*.[34] In *Sparrow*, Dickson CJ and La Forest J, writing for the Court, set out a framework for determining whether the Crown's conduct has infringed an Aboriginal right and, if so, whether that infringing conduct is justified.[35] The Court left for another day the question of the scope, content and meaning of Aboriginal rights under section 35. Thus, *Sparrow* is important for our understanding of the Justices' decisions in 1996 and 1997.

In the spring of 1984, Ronald Sparrow, a member of the Musqueam Nation and a licensed commercial fisherman, was charged with fishing with a drift net longer than 25 fathoms in Canoe Pass, a narrow channel located on the southern arm of the Fraser River. At the time of the offence, the Musqueam Nation held an Indian Food Fishing License, issued in March 1983 under section 27 of the *British Columbia Fisheries Regulations*, which permitted its members to fish for food in the Fraser River.[36] However, the 1983 license restricted the length of drift nets used for fishing to 25 fathoms.

Although the Crown charged Sparrow with fishing for food with a drift net longer than 25 fathoms, the commercial dimensions of fishing form part of the surrounding context of the case. In 1982, the Department of Fisheries and Oceans recorded a substantial increase in the catch attributed to the Musqueam Nation under its food fishing license. At trial, the Crown argued that the net length restriction imposed in the 1983 license was intended to conserve the fish stock for other Aboriginal food fisheries and other non-Aboriginal users of the food fishery, and that the drift net length restriction was sufficient to meet the estimated food needs of the Musqueam Nation.[37] On appeal to the BCCA, the Musqueam Nation argued that the net length restriction was a "vindictive" response of the Crown to its failed criminal prosecution of a group of Musqueam fishers who were charged with unlawfully selling fish harvested pursuant to its previous Indian Food Fishing License in 1982.[38] Although the trial judge found that the Crown was not "improperly motivated" by

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33 Robert J Sharpe and Kent Roach describe *Sparrow* as one example of the Chief Justice's tendency to accommodate multiple perspectives within a "halfway house" decision: Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2018) at 178, 451–52.

34 The regulatory offences at issue in *Lewis*, *Nikal*, *NTC Smokehouse*, and *Van der Peet* originated as charges during the 1986 and 1987 summer and fall fishing seasons in British Columbia.

35 Although the Chief Justice and La Forest J wrote together, Wilson J believed the decision should have been written only by the Chief Justice. Both Wilson J and La Forest J contributed significantly to internal discussions, issuing memoranda and comments, but the final decision, according to Wilson J, hewed closer to the Chief Justice's initial position. It is possible that La Forest J joined the Chief Justice in writing for the Court because La Forest J was initially assigned to write the judgement after the hearing. However, as internal deliberations progressed, the Court shifted further from La Forest J's initial draft. See Sharpe & Roach, *supra* note 33 at 448–51.

36 *British Columbia Fishery* (*General*) *Regulations*, SOR/84-248, as repealed by *Pacific Fishery Regulations, 1993*, SOR 93-54.

37 See *R v Sparrow*, 1986 CanLII 172 at 17–18 (BCCA) [*Sparrow* (BCCA)].

38 *Ibid* at 11–12.

its failed prosecutions, the Court of Appeal accepted an inference that some of the increased catch might be attributable to an unlawful commercial harvest.[39] This implication of a connection between Indigenous food fisheries and unlawful commercial fisheries and their impacts on fish stocks would repeat in the historical context surrounding *Van der Peet* and *Gladstone*.

On appeal to the SCC, the issue in *Sparrow* was limited to whether Parliament may regulate activities that are protected under section 35(1) of the *Constitution Act, 1982*. Because of the nature of the trial judge's findings of fact and law, the Court did not decide whether the restriction was constitutionally valid, but rather, set out a framework for the justified infringement of Aboriginal rights under section 35 that could inform a new trial of the offence. Writing for the Court, Dickson CJ and La Forest J explained that the Aboriginal group asserting the right must first demonstrate a *prima facie* infringement of the right. In doing so, trial judges may consider whether the Crown conduct imposes an unreasonable limitation, undue hardship, or denial of preferred means on the exercise of the right.[40] If the Aboriginal group establishes infringement, the onus shifts to the Crown to justify its infringement of the right. In turn, the Crown must demonstrate that its legislative objective is valid and that its conduct is consistent with its fiduciary duties to the group.[41] The Court identified conservation or management of a resource, or the protection of the public or Aboriginal group from harm as valid legislative objectives, but left open the possibility that other "compelling and substantial" objectives might also be found.[42] Furthermore, the Court reasoned that the Crown must demonstrate that its conduct is consistent with its fiduciary duties; to do so, the Crown must demonstrate that its conduct is minimally infringing, that it has provided compensation in a situation of expropriation, that it has consulted with respect to the potential infringement on the right, and that it has allocated priority to the Aboriginal group's right to fish for food.[43]

The Justices largely avoided the commercial dimensions underlying Indigenous and non-Indigenous fishing within the province.[44] At trial, the Judge reasoned that the SCC's judgement in *Calder* held that Aboriginal rights in British Columbia were extinguished.[45] For this reason, the trial judge found that Sparrow could not claim an Aboriginal right to fish as a defence to the regulatory

39 *Ibid* at 12–13.

40 *Sparrow*, *supra* note 3 at 1078. Chief Justice Dickson describes the regulatory infringement at issue as an "adverse" and "unnecessary" restriction on the right.

41 *Ibid* at 1113.

42 *Ibid*.

43 *Ibid* at 1119.

44 Ian Binnie argues that "[t]he fisheries regulation in issue in that case was apparently intended by the government to curtail the commercial dimension of the Musqueam fishery, and counsel for Mr. Sparrow had asked the Supreme Court specifically to address the commercial fishery as an aspect of the Aboriginal right. The Court not only declined the invitation but, it will be suggested [that][...] its reasoning in *Sparrow* and in the important recent treaty rights case of *R. v. Horseman* makes unlikely the future recognition of a significant commercial component to the Aboriginal food fishery": W I C Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning" (1990) 15:2 Queen's LJ 217at 218.

45 *Calder et al v Attorney-General of British Columbia*, 1973 CanLII 4 at 328 (SCC) [*Calder*].

charge. The BCCA overturned the trial judge's application of *Calder* and found, based on the evidence and findings of the trial judge, that the Musqueam enjoyed an Aboriginal right to fish for food.[46] The Court assumed this framing of the right, further reasoning that the right should be defined based on the nature of the activity impugned by the fishing regulations – in this case, a net length restriction on a *food* fishing license.[47] However, on appeal to the SCC, counsel for Sparrow submitted that the Musqueam have an Aboriginal right "to fish for any purpose, including the purpose of catching fish to sell."[48] Counsel also submitted that "the Musqueam view their aboriginal rights to fish as critical to their *future*. They are far more than just nostalgic relics of their past."[49] In its reasons, the SCC limited its holding to an Aboriginal right to fish for food, while noting that "no commercial fishery existed prior to the arrival of European settlers."[50] In its reasons, the Court was attentive to the "possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon."[51] This *obiter* suggests that the Court's decision may have been responsive to this potential conflict.

Although *Sparrow* was a unanimous decision, correspondence between the Justices illustrates anxiety with respect to the scope and content of Aboriginal rights under section 35 and of the Crown's capacity to legislate. In their biography of Dickson CJ, Robert J Sharpe and Kent Roach describe how the Chief Justice "mediat[ed] between the strongest poles of his Court."[52] La Forest J, who was assigned to write the first draft, initially intended to uphold Sparrow's conviction and to defer to the government's regulation of the fisheries. La Forest J also expressed concerns that Aboriginal rights with commercial dimensions could have a disruptive effect on non-Indigenous peoples' participation in the underlying resource economy and that Indigenous peoples may not be capable of managing the fisheries themselves.[53] Wilson J, in contrast, would have overturned Sparrow's conviction. In addition, Wilson J would have placed a stronger burden on the Crown to justify its infringement of any Aboriginal right.[54] Sharpe and Roach write that Wilson also "feared that La Forest had interpreted

46 *Sparrow* (BCCA), *supra* note 37 at 19–25, 41.

47 *Sparrow*, *supra* note 3 at 1101.

48 *R v Sparrow*, 1990 CanLII 104 (SCC), (Factum, Appellant at para 67) [Factum of the Appellant (*Sparrow*)].

49 *Ibid* at para 66 (emphasis added).

50 *Sparrow*, *supra* note 3 at 1100. It is likely that the Court's reference to the non-existence of a historical "commercial fishery" is based on the modern form of commercial fisheries. Thus, the Court is only noting that no commercial fishery, in its modern form, existed historically. The Court does not resolve whether "the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes": *ibid* at 1102.

51 *Ibid* at 1101.

52 Sharpe & Roach, *supra* note 33 at 450.

53 *Ibid*.

54 *Ibid* at 449. See also Ellen Anderson, *Judging Bertha Wilson: Law As Large As Life* (Toronto: University of Toronto Press, 2001) at 192–93.

the aboriginal right to fish in a way that did not account for the 'changed lifestyle for Indians in the 20th Century."[55] In the end, La Forest J joined Dickson CJ in writing the Court's judgement in *Sparrow*, though the judgement owed much to Wilson J's memoranda. Although Dickson CJ was able to secure consensus, La Forest J noted in internal correspondence to Dickson CJ that "[although] [t]his time we can avoid our specific views of the nature of aboriginal rights themselves... [w]e should fight that in another context where we do not have an even Court."[56]

Shortly after *Sparrow*, Ian Binnie noted that the Court's decision to permit, yet strictly limit, the Crown's capacity to justifiably infringe Aboriginal rights may have left it with less room to define the scope, content and meaning of Aboriginal rights, particularly to rights with commercial dimensions.[57] If commercial activities were protected under section 35, the *Sparrow* framework could restrict the Crown's regulation of those activities unless it was necessary for the purposes of conservation or the protection of the public from harm. In short, the *Sparrow* framework, on its own, would be generous to Aboriginal peoples' constitutionally protected rights and could limit not only the Crown's *de facto* control over resources but the commercial interests of settlers. Given *Sparrow*'s relatively straightforward test for *prima facie* infringement and onerous test for justified infringement, the Court's role in balancing any "overlapping or conflicting interests" would be limited.[58] In short, *Sparrow* established a framework that was, in retrospect, generously oriented towards the claims of Aboriginal peoples.[59] Thus, having left the specific content of Aboriginal rights open to commercial dimensions, the *Sparrow* framework motivated the Crown to negotiate with First Nations on the scope and content of Aboriginal rights.[60]

55 Sharpe & Roach, *supra* note 33 at 449.

56 *Ibid* at 451.

57 On this point, Binnie suggests that "having erected something of a legal fortress around s. 35 rights, [the Court] will now be cautious and somewhat circumspect in identifying the specific activities that belong within the fortress:" Binnie, *supra* note 44 at 218.

58 *Ibid* at 225.

59 One might respond that it is anything but generous to permit the Crown's infringement of Aboriginal rights, absent any explicit language in section 35.

60 This appears to have been Dickson CJ's intent, see Sharpe & Roach, *supra* note 33 at 453. Stuart Gilby, in his argument for an Aboriginal right to a commercial fishery, shares this assessment of *Sparrow*'s impact: Stuart Gilby, "The Aboriginal Rights to a Commercial Fishery Notes & Comments" (1995) 4 Dal J Leg Stud 231 at 233.

2. Conflict and Competition in British Columbia's Commercial Fisheries in *Van der Peet*, *Gladstone*, *Nikal*, *Lewis*, and *NTC Smokehouse*

Two years after the Musqueam successfully challenged Canada's *British Columbia Fisheries Regulations* in *Sparrow* (1990), Canada responded by establishing an Aboriginal Fisheries Strategy (AFS). The purpose of the AFS was to "expand Aboriginal peoples['] role in the fisheries while at the same time conserving fish stocks and maintaining a stable environment, predictable resource-sharing and profitable fisheries for all parties concerned"[61] as well as to "establish a social contract among the government, aboriginal peoples, and non-aboriginal fishing groups."[62] However, as Allain and Fréchette note in their postmortem of the 1992 fishing season under the AFS, this "social contract... acted more to form a rift between the parties concerned than to bring them closer together."[63] Non-Indigenous commercial fishermen resented the Department of Fisheries and Oceans' (DFO) decision to delegate the management of fisheries to some First Nations and to pilot Indigenous commercial fishing in the Fraser river.[64] The loss of approximately 500,000 salmon from the fishery in 1992, which non-Indigenous commercial fishermen perceived as a consequence of the AFS, stoked this resentment.[65] Speaking to the Standing Committee on Forestry and Fisheries on May 6, 1993, John Crosbie, the Minister of Fisheries and Oceans, expressed concern that without the AFS, "confrontation and possible bloodshed" might occur.[66]

The AFS faced opposition from non-Indigenous commercial fishermen and provincial politicians. In April 1993, Phil Eidsvik, the Executive Director of the BC Fisheries Survival Coalition, solicited support from municipalities to petition the Minister of the Department of Fisheries and Oceans, John Crosbie, to repeal the DFO's AFS on the basis that the strategy would severely impact the viability of the commercial salmon fishery.[67] In 1994, Mike Hunter, head of the Fisheries Council of

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61 Jane Allain & Jean-Denis Fréchette, *The Aboriginal Fisheries and the Sparrow Decision*, BP-341E (Ottawa: Library of Parliament, 1993) at 13.

62 *Ibid*.

63 *Ibid*.

64 *Ibid*. Gilby writes that "[t]he Government's response to Sparrow has resulted in greater open discord between Natives and other fishers on the west coast": Gilby, *supra* note 60 at 239. Gilby also connects this "open discord" on the west coast to non-Indigenous fishermen's opposition to Mi'kmaq fisheries on the east coast: *ibid* at 239–41.

65 Peter H Pearse, *Managing Salmon in the Fraser: Report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation* (Vancouver: Department of Fisheries and Oceans, 1992), online (pdf): <waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/140527.pdf>.

66 Cited in *R v Kapp*, 2003 BCPC 279 at para 47 [*Kapp* (*BCPC*)]. In 1991, David Secord, chairman of the Fishermen's Alliance Direct Action, "threatened retaliation" if the federal government permitted First Nations "to legally sell salmon while land claims are being negotiated": "Plan for Native Fishing Meets Stiff Opposition", *Globe & Mail* (15 July 1991), online: <proquest.com/historical-newspapers/plan-native-fishing-meets-stiff-opposition/docview/1148955339/se-2".

67 Scott Simpson, "Fear-Mongering Cited As Fishers Launch Campaign", *The Vancouver Sun* (24 April 1993) B9, online: <vancouversun.newspapers.com/image/495141061/?match=1&terms=Fear-mongering%20cited%20as%20fishers%20launch%20campaign>.

British Columbia, alleged that the AFS "increased the opportunity and incentives for illegal fishing to continue and expand in areas beyond the realm of the pilot sales project."[68] In 1995, Robert Alford initiated a class action on behalf of approximately 280 fishermen against the Ministry of Fisheries and Oceans on the basis that Canada owed the plaintiffs a duty of care and fiduciary duty with respect to the management of fisheries, in particular, the Ministry's AFS.[69] At the heart of the *Alford* case was a challenge to the Minister's "authority to create exclusive or private commercial fishing rights or privileges the licenses for which are not open to and accessible to all Canadians."[70] Speaking on the action in 1995, Robert Alford stated that the plaintiffs "want some accountability. About 10 fisheries around the coast are absolutely out of control and are being plundered. I really think we will lose the salmon because of political correctness."[71] Commercial fishermen Phil Eidsvik, Robert

68 "Federal Plan Helps Sale of Illegal Fish Processors' Head Says (Fisheries Council of BC Says Aboriginal Fishing Strategy Launders Illegally Caught Fish)", *Canadian Press NewsWire* (29 November 1994).

69 The plaintiffs' statement of claim in the class action was filed on June 6, 1995. The plaintiffs also alleged tortious conduct including breach of the constitution, conspiracy, misfeasance of public office, and willful interference with economic relations: *Alford v Canada* (*Attorney General*), 1997 CarswellBC 74 at paras 1–2 (BCSC) [*Alford* 1997]; *Alford v Canada* (*Attorney General*), 1999 CarswellBC 1893 at para 26 (BCSC).

70 *Alford* 1997, *supra* note 69 at para 12.

71 Judith Lavoie, "Fishermen Allege DFO Bungling - Aboriginal Fishing Strategy", *Times - Colonist* (7 June 1995) 1.

Alford and Member of Parliament John Cummins would continue to challenge Canada's jurisdiction to implement the AFS after the SCC's decisions in its 1996 fisheries cases.[72] Phil Eidsvik's advocacy, in which he characterized the AFS as a "race based fishery" and asserted a common law right to access

72 Although these cases may not have informed the SCC's reasoning in its fisheries cases, they illustrate existing opposition among BC commercial fishermen to Canada's decision to regulate Aboriginal commercial fisheries after *Sparrow*. If anything, the SCC's decision in *Gladstone* heightened these concerns. Though these applicants and defendants could not attack Aboriginal fishing rights directly, they could – and did – argue that these cases applied narrowly to the specific First Nations and that the Minister's decision to more broadly permit Aboriginal commercial fisheries was invalid. On June 19, 1996, John Cummins filed a motion for a *quia timet* injunction against the Minister of Fisheries and Oceans. The applicants sought an order limiting the Minister's authority to permit Aboriginal commercial fishing of sockeye salmon in the Fraser River: *Cummins v Canada* (Minister of Fisheries and Oceans) (TD), 1996 CanLII 4075 (FC). On August 25, 1996, John Cummins and twenty-two other fishermen were charged with fishing during a "closed time". In response to the charge, the defendants challenged the Minister's authority to "award fishing rights 'based on residence or ethnic affiliation" and that the Minister has the constitutional authority and duty to manage the fishery for all Canadians: *Cummins v R*, 1997 CanLII 1659 at paras 1–3, 44 (BCSC). Cummins was also charged with similar offences related to fishing during a closed season on or about October 26 and 27, 1996. Thomas J noted that: "The accused has, for some time, held a firmly established view that the opening of the fishery for an aboriginal commercial purpose is an unlawful exercise of the authority of the DFO or the Minister of Fisheries to regulate the Pacific Coast Salmon Fishery. He therefore notified the DFO of his intention to fish contrary to its rules applicable to this limited opening of the fishery on both October 26, 1996 and October 27, 1996 and did so. The DFO has accordingly laid the four charges before me." *R v Cummins*, 1998 CarswellBC 2588, [1998] BCJ No 125 at para 13 (BCPC) [*Cummins (BCPC)*]. Although Thomas J convicted Cummins on the substance of the charges, he also concluded that the Minister's permitting of the Aboriginal commercial fishery was invalid because the First Nations had not established an Aboriginal right to a commercial fishery: *ibid* at paras 14–15, 20. In 1998, Phil Eidsvik and others were charged with fishing during a closed season. Thomas J, based on his decision in *Cummins (BCPC)*, entered a judicial stay of proceedings against the defendants: *R v Houvinen*, [1998] BCJ No 2064 at para 7 [*Houvinen*, 1998]. On appeal to the British Columbia Supreme Court, Curtis JA overturned the reasoning of Thomas J in *Cummins* (1998) and *Houvinen* 1998: *R v Huovinen*, 1999 CanLII 6409 at para 18 (BCSC); *R v Huovinen*, 2000 BCCA 427 (dismissing the defendants' application for leave to appeal the decision of Curtis JA). In 2001, Cummins and others engaged in another protest fishery: *R v Cummins et al*, 2010 BCPC 433. Although Wingham J convicted the defendants, he was "mindful" of the severity of the fines because the offences "occurred during the aboriginal fisheries and created a situation where there was a potential for conflict": *ibid* at para 39. For a summary and analysis of this litigation, as well as *Kapp*, *supra* note 14, see Andre Goldenberg, "Salmon for Peanut Butter: Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights" (2004) 3 Indigenous LJ 61 at 69–70, et passim [Goldenberg, "Salmon for Peanut Butter"].

the fisheries, would become central to the non-Indigenous commercial fishermen-plaintiffs' challenge of the AFS as discriminatory under section 15 of the *Charter of Rights and Freedoms*[73] in *Kapp*.

It is within this context that we might understand the SCC's responses in 1996 and 1997. *Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet*, and *Gladstone* each implicitly challenged the Crown's control over fisheries and the status quo allocation of those fisheries to, in most cases, non-Indigenous commercial fishermen.[74] In *Van der Peet*, *NTC Smokehouse*, and *Gladstone*, the plaintiffs claimed either the right to sell fish or to fish commercially.[75] In *Nikal*, the Witset First Nation (then Moricetown) claimed an Aboriginal right to regulate fisheries on waters within the reserve while, in *Lewis*, the Squamish Nation asserted the authority to regulate fisheries on waters within and adjacent to the reserve under the *Indian Act*.[76] The Aboriginal right to fish or to regulate or engage in their fisheries appeared to challenge the livelihoods of non-Indigenous commercial fishermen and the viability of the fishery. For the claimants, Aboriginal rights related to the fisheries were essential to their survival as a people. On appeal, Louis Mandell, counsel for Dorothy Van der Peet, argued that "the only possible basis on which the relationship to their land can survive and [sic] cultural continuity is if they

73 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15. Some of the plaintiffs in *Kapp* were also applicants in the *Alford* case and all acted "under the auspices" of Eidsvik's BC Fisheries Survival Coalition (I compared the writ of summons in the *Alford* file, VLC-S-L-A951927 to the parties in *Kapp*; see also *Kapp*, *supra* note 14 at para 9). The plaintiffs in *Kapp* were successful at trial: *Kapp (BCPC)*, *supra* note 66. Kitchen J's judgement is notable for its extensive quoting of the plaintiffs. Broadly, the plaintiffs' arguments reflect a fear that the AFS would upset their access to the commercial fishery. In 2008, the SCC held that the AFS was an ameliorative program under section 15(2) of the *Charter* and dismissed the plaintiff's action: *Kapp*, *supra* note 14. For a review of media responses before and after *Kapp*, see Diana Majury, "Equality Kapped; Media Unleashed" (2009) 27:1 Windsor YB Access Just 1. Majury reports how "editorials, commentaries and letters in response to the Kapp arguments and decision are almost all extremely negative, some even vitriolic." *Ibid* at 13. These media responses are generally supportive of the plaintiffs' position in *Kapp* that the AFS was racially discriminatory towards non-Indigenous commercial fishermen. For an analysis of the construction of gender and race in *Kapp*, see Caroline Hodes, "Colonial Legacies and Competing Masculinities: The Supreme Court of Canada's Return to Reason in *R. v. Kapp*" (2017) 34:2 Windsor YB Access Just 129. See also Goldenberg, "Salmon for Peanut Butter", *supra* note 72.

74 Developments in Ontario may have also been relevant to the fisheries litigation in British Columbia. In 1993, the Ontario Superior Court held in *Jones*; *Nadjiwon* that the Saugeen Ojibway Nation, which included the Chippewas of Nawash Unceded First Nation, held an Aboriginal right to a commercial fishery in the Georgian Bay and Lake Huron: *R v Jones*, 1993 CanLII 8684 (ONSC) [*Jones; Nadjiwon*]. The *Jones*; *Nadjiwon* case established a precedent for the existence of commercial rights under section 35 of the *Constitution Act, 1982*. See Gilby, *supra* note 60 at 247–48.

75 *Van der Peet*, *supra* note 3 at para 6; *NTC Smokehouse*, *supra* note 3 at para 7; *Gladstone*, *supra* note 3 at para 22. For a procedural history of *Van der Peet*, see David W Elliott, "Fifty Dollars of Fish: A Comment on *R. v. Van Der Peet*" (1996) 35:3 Alta L Rev 759 at 761, n 11.

76 *Regina v Nikal*, 1993 CanLII 4523 at paras 19–20 (BCCA); *Regina v Lewis*, 1993 CanLII 4522 at paras 7, 23–24 (BCCA).

are able to use the land for the sake of their own development and for their own survival and for their own economy, that they are marginalized and there has to be a way for them to escape that."[77]

The framing of this conflict, of Aboriginal rights impeding on non-Indigenous commercial fisheries, obfuscated the nature of the status quo up until *Sparrow*: the preferential allocation of commercial fisheries by the Crown to, in most cases, non-Indigenous fishermen. The DFO's response to *Sparrow* had upset this status quo. Thus, the SCC would have to resolve the tension between *Sparrow*'s limitation of the Crown's conduct and its protection of Aboriginal peoples' rights with the reality that settlers and the settler colonial state had benefited, up to that point, from almost unlimited access to resources in Indigenous peoples' territories, resources that were important for the future of the settler state. As David Elliott describes, these competing claims occurred within a "larger drama", of "international quota disputes, habitat degradation, complaints of government mismanagement, federal provincial bickering, high unemployment, and declining fish stocks."[78] However, the importance of the First Nations' claims extended beyond the fisheries, to the exercise of the inherent right of self-government and to their relationship with their traditional territories.

3. Indigenous Self-Government and the Threat to Settler Governance in *Pamajewon*

The existence of a First Nations commercial fishery also engaged questions related to the exercise of self-government. If section 35 protected Aboriginal rights with commercial dimensions, then British Columbia would have been strongly incentivized to negotiate commercial fisheries under modern treaties.[79] Moreover, if section 35 constitutionally protected an Aboriginal right to self-government, exercised either through the bylaw-making powers set out under the *Indian Act*,[80] (as in *Nikal* and *Lewis*), or law making powers under a modern treaty, or through First Nations' own legal orders, provincial and federal jurisdiction over the fisheries – and other aspects of Crown jurisdiction – might

77 *R v Van der Peet*, 1996 CanLII 216 (SCC) (Transcript of Hearing, at 49—50) [*Van der Peet* transcript].

78 Elliott, *supra* note 75 at 760.

79 Although news editorials are not representative of public opinion, they do disclose the circulation of ideas within the public forum. On November 15, 1995, Brian Kieran quoted Phil Eidsvik for the opinion that British Columbia and Canada should not enter into a modern treaty with the Nisga'a Nation before the SCC's decisions in its upcoming fisheries docket. Kieran and Eidsvik suggest that if s 35 does not protect an Aboriginal right to commercial fishing, then neither the province nor Canada should negotiate commercial fishing rights under the Nisga'a Agreement. See Brian Kieran, "Wait for Supreme Court ruling: [Final Edition]", *The Province* (15 November 1995) A14.

80 RSC 1985, s I-5.

be limited under the *Sparrow* framework.[81] These issues arose in the context of fisheries but were especially pronounced in the context of criminal prosecutions for illegal gaming under the *Criminal Code*,[82] in particular in *Pamajewon*. Although *Pamajewon* might appear as a red herring in a sea of fisheries cases, it shares with those cases an argument for First Nations' capacity and jurisdiction to regulate, manage, control, or govern their territories or the resources located within their territories for the benefit and continuance of their societies.

In 1985 Canada entered into an agreement with the provinces to amend, and then subsequently amended, the *Criminal Code* to permit the provincial regulation of gaming. In *Furtney*, the SCC upheld the constitutionality of this scheme, reasoning that Parliament had the jurisdiction to define the criminal prohibition on gaming in such a way as to exclude activities carried out under a validly enacted provincial licensing scheme.[83] In this way, the scheme enabled provinces to generate substantial revenue from licensed gaming activities. Although the Agreement between Canada and the provinces was entered into after the enactment of section 35 of the *Constitution Act, 1982*, First Nations were not consulted on how this Agreement or Canada's amendments to the *Criminal Code* might impact their Aboriginal rights.

81 About four months after the SCC's decision in *Delgamuukw*, Gordon Campbell, then leader of the opposition Liberal party in the British Columbia provincial legislature, argued against a "third order of government" under modern treaties in a series of public editorials. Campbell proposed that First Nations must surrender their rights and title under a modern treaty. First Nations, for their part, argued against such a surrender. In response, Campbell proposed that the province hold a provincial referendum on any proposed agreement, thus, all but ensuring the rejection of any agreement that did not include a surrender. Campbell's editorial discloses a concern that modern treaties may limit the authority or capacity of the legislature to regulate lands within the province by establishing a third order of government. See Gordon Campbell, "Indians Must 'Surrender' Rights in Treaties, Liberal Leader Writes: Gordon Campbell Believes that Certainty and Equality Will Be Attained in the Settlements Through Extinguishment and the Exclusion of 'Third-order-of-government' Arrangements. [Final Edition]", *The Vancouver Sun* (9 April 1998) A23. In 2000, Campbell, Michael de Jong, and P Geoffrey Plant unsuccessfully challenged the constitutionality of the settlement legislation enacting the Nisga'a Treaty: *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123.

82 RSC 1985, c C-46, s 45 [*Code*].

83 *R v Furtney*, 1991 CanLII 30 (SCC).

In the 1990s, First Nations in Ontario and British Columbia attempted to regulate gaming activities on reserve to generate revenue for public services.[84] In Ontario, the Shawanaga and Eagle Lake First Nations asserted an Aboriginal right to self-government in the trials of Howard Pamajewon, Roger

84 In British Columbia, the Kamloops Indian Band and the Moricetown (Witset) First Nation also claimed Aboriginal rights related to gaming activities on reserve (if we recall that the Witset First Nation in *Victor Jim* was also the claimant in *Nikal*, we can better observe the connection between the right to self-government in *Pamajewon* and the fisheries cases: *R v Jim*, 1995 CanLII 1522 (BCCA) [*Victor Jim*]). In both cases, the defendants were convicted at trial. In *Gottfriedson*, Shane Willey Gottfriedson, a Councillor and member of the Kamloops Indian Band, was charged with illegal gaming activities on December 4, 1993. On November 23, 1993, the Kamloops Indian Band purported to enact a bylaw regulating bingo on the reserve. On December 4, 1993, the Band purported to license Gottfriendson's bingo on reserve. However, on December 15, 1993, the Minister disallowed the Band's bylaw. At trial, the defendant and Band asserted an Aboriginal right to self-government. As in *Pamajewon*, the Band regulated gaming to earn revenue that could be expended on public services. The trial judge rejected the band's assertion of an Aboriginal right to self-government as "amorphous", "nebulous", "vague and unspecific" and convicted the defendant: *R v Gottfriedson*, 1995 CarswellBC 2570 (BCPC), [1995] BCJ No 1791 at para 57. The defendant in *Victor Jim*, a member of Moricetown (Witset) First Nation and a translator for Chief John(ny) David in the *Delgamuukw* case, was charged on July 30, 1988 with conducting illegal gaming activities on reserve. He was convicted at trial on July 6, 1993. On appeal to the BCCA, the defendant and the Wet'suwet'en Chiefs of Hagwilget and Moricetown asserted an Aboriginal right to engage in and regulate gaming under s 35 of the *Constitution Act, 1982*. Applying the "integral to" test of the majority of the BCCA in *Van der Peet* (*BCCA*), the trial judge found that the practice of gaming was not integral to the distinctive culture of the Wet'suwet'en. The trial judge and Court of Appeal found that it was unnecessary to determine whether there was an Aboriginal right to regulate gaming since the underlying practice of engaging in gaming was not an Aboriginal right. As a result, the Court of Appeal upheld Jim's conviction on March 17, 1995, a few months before the SCC's hearings in *Van der Peet*, *Nikal*, *Lewis*, *Gladstone*, and *NTC Smokehouse*: *Victor Jim*, *supra* note 84. For more on First Nations gaming in Canada, see generally Yale Deron Belanger, ed, *First Nations Gaming in Canada* (Winnipeg: University of Manitoba Press, 2011). First Nations gaming activities were not limited to Ontario and British Columbia. In Manitoba, First Nations proposed to the Manitoba legislature the striking of a commission to investigate gaming opportunities on reserve, in part responsive to raids undertaken by the RCMP at on-reserve gaming establishments: David Roberts, "Five Manitoba Reserves Raided Police Seize Gaming Devices", *The Globe and Mail* (20 January 1993) A5. In Quebec, the Mohawk Council of Kahnawake asserted its jurisdiction to regulate and manage gaming in 1996, later extending its on-reserve activities to online gaming in 1999: Yale D Belanger, "Legislating and Regulating First Nations Internet Gaming: The Mohawk Council of Kahnawá:ke's Experience, 1999-2013" (2014) 18:4 Gaming L Rev Econs 369.

Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner.[85] In response to chronic underfunding of services on reserve, the Shawanaga and Eagle Lake First Nations attempted to exercise their inherent right to self-government to generate revenues through the regulation of gaming on lands set aside as reserve.[86] The Shawanaga and Eagle Lake First Nations referred to the Royal Proclamation of 1763 in support of their position that the Crown had always recognized the Aboriginal right to self-government and the relationship between governance and the capacity for Indigenous societies to sustain themselves economically.[87] In this way, the arguments of the Shawanaga and Eagle Lake First Nations resonated with the positions of other Indigenous peoples in Canada, namely, that Indigenous jurisdiction and self-government, including over economic activities, was essential to the continued survival of Indigenous societies into the future in ways that were not necessarily or always tied to traditional activities before European contact or the Crown's assertion of sovereignty. The First Nations' claims in *Pamajewon*, however, threatened the province's monopoly over gaming revenue[88] and, it was alleged, Parliament's criminal law powers. The *Pamajewon* case would wind its way through the courts alongside the fisheries litigation and the Gitxsan and Wet'suwet'en's claims to Aboriginal title in British Columbia.

85 Pamajewon, Jones, Pitchenese, and the Gardners were charged with unlawfully keeping a common gaming house contrary to s 201(1) of the *Code*, *supra* note 82. The SCC was likely aware that First Nations in Ontario and British Columbia were asserting Aboriginal rights to self-government in the context of gaming on reserve. The charges at issue in Pamajewon were the subject of a previous appeal to the SCC, on whether the defendants Roger Jones and Howard Pamajewon could raise a defence of mistake of fact or colour of right: *R v Jones*, 1991 CanLII 31 (SCC). Furthermore, at the SCC, counsel for Canada also referred the Court to litigation related to gaming in British Columbia: *Van der Peet* transcript, *supra* note 77 at paras 82–84. For a history of the *Pamajewon* case and the surrounding context, see Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1996) 42:4 McGill LJ 1011 at 1018–24.

86 *R v Pamajewon*, 1996 CanLII 161 (SCC) (Factum, Appellant at para 5) [Factum of the Appellant (*Pamajewon*)]. In 1993, Howard Pamajewon stated that "we want our own future", connecting gaming on reserve with self-determination and self-governance": Stewart Brown, "Native bands, province after same pot of gold", *Northern Ontario Business* (1 August 1993) 1.

87 Factum of the Appellant (*Pamajewon*), *supra* note 86 at paras 13–17, 81–90.

88 In response to budget deficits and revenue shortfalls, several provinces turned to the regulation of gaming as a means to generate revenue: Anne Swardson, "Canada's Provinces Gamble on Casinos", *The Washington Post* (22 July 1993) A28.

4. Aboriginal Title and the Threat to Settler Interests in Land in *Delgamuukw*

The existence of Aboriginal title also formed part of the background context in the fisheries litigation in British Columbia and self-government litigation in Ontario.[89] In *Nikal* and *Lewis*, the First Nations asserted jurisdiction over the waters on and adjacent to the reserve.[90] The Musqueam (*Sparrow*), Sto:lo (*Van der Peet*) and Heiltsuk (*Gladstone*) each asserted, but did not claim in the courts, Aboriginal title, having not surrendered their title to the Crown by way of any historical or modern treaty.[91] In *Pamajewon*, the Eagle Lake and Shawanaga First Nations asserted their rights based on their interests in reserve land. Aboriginal title promised a potentially broader scope and content than Aboriginal rights under section 35 or Aboriginal interests in lands set aside as reserves under the *Indian Act*, and thus offered the strongest protection for the use, management, development and regulation of lands. It also offered the potential for a land base that might sustain these Indigenous societies into the future. Commercial rights and self-government rights were aspects of this vision; their full expression, however, was contingent on the existence and protection of a land base that was greater than the territory and jurisdiction afforded to Indian Bands on reserve under the *Indian Act*.

The perceived threat of Aboriginal title was strongest in British Columbia, where the colonial and provincial governments opposed First Nations territorial and jurisdictional claims. After an early period of land purchases and treaties under the governorship of Sir James Douglas, the colony of British Columbia shifted its policies towards a rejection of First Nations' territoriality, including First Nations jurisdiction over their lands. As Patricia Wood and David Rossiter note, the province of British Columbia continued this position even after a majority of the SCC acknowledged the existence of Aboriginal title in *Calder*. In response, First Nations turned to legal and extra-legal means to assert their territorial claims. After *Calder*, First Nations in British Columbia used blockades, protests and other forms of political action to oppose development in their territories, particularly in the hinterlands where the province sought to develop its resource industries.[92] These strategies were responsive to the province's refusal to engage meaningfully in political negotiations on Aboriginal

89 *Jones*; *Nadjiwon*, *supra* note 74. In *Jones*; *Nadjiwon*, the defendants asserted Aboriginal title to the waters surrounding Georgian Bay and Lake Huron, a claim that would be advanced almost two decades later in *Saugeen First Nation v The Attorney General of Canada*, 2021 ONSC 4181.

90 The *Nikal*, *Victor Jim* and *Delgamuukw* cases were related by the fact that the defendants and claimants in those cases were either members or councillors of the Moricetown First Nation, which was organized as a band under the *Indian Act*, or they were associated with the hereditary governance of the Gitxan and Wet'su'weten, which claimed title to lands that were inclusive of Moricetown.

91 Factum of the Appellant (*Sparrow*), *supra* note 48 at para 2. For an overview of the history of the Sto:lo Nation's assertions of Aboriginal title, see Sto:lo Nation, "Our History" (last visited 18 August 2024), online: <stolonation.bc.ca/history>. On April 2, 1997, the Heiltsuk Nation signed a treaty negotiation framework with Canada and British Columbia that asserted its Aboriginal title: *Heiltsuk Nation Treaty Negotiation Framework Agreement*, Heiltsuk Nation, Her Majesty the Queen in Right of Canada, and Her Majesty the Queen in Right of British Columbia, 2 April 1997.

92 Wood & Rossiter, *supra* note 24 at 71, 73–74, 78–81.

title and self-government. British Columbia did not engage in negotiations on modern treaties until 1990, and even then, expressed a reluctance to concede its jurisdiction.[93]

This brief history helps to us to better understand the stakes in *Delgamuukw*. Although British Columbia pivoted towards global financial integration,[94] the province's hinterland economy, in particular forestry and the commercial fisheries, remained economically and socially important.[95] Aboriginal title presented a threat to the province's preferential allocation of and control over these resources. As noted in the case of the AFS in British Columbia, the perceived threat of Indigenous violence loomed in the background for some settlers. Leslie Hall Pinder, counsel for the plaintiffs in *Delgamuukw*, recalls warning a community member, who had come to hear about McEachern CJ's trial decision in *Delgamuukw*, to step back from the courthouse because a sniper had been placed on the roof.[96] Pinder's story suggests that the Court perceived there to be a risk that Indigenous peoples would respond negatively to McEachern CJ's decision, which rejected the Wet'su'weten and Gitxsan Houses claims to Aboriginal title in their traditional territories. It also discloses the true stakes underlying claims to Aboriginal title: the state's access to Indigenous peoples' territories and its capacity to secure this access through force.[97]

93 *Ibid* at 113.

94 *Ibid* at 72.

95 *Ibid* at 94–97.

96 Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver, BC: Lazara Press, 1991) at 3, online (pdf): <lazarapress.ca/wp-content/uploads/2010/05/The-Carriers-of-No-After-the-Lands-Claims-Trial.pdf.pdf>. Conduct during the *Delgamuukw* trial discloses a general animosity towards Indigenous peoples. At trial in *Delgamuukw*, McEachern CJ dismissed Antugulilibix's (Mary Johnston) presentation of Gitxsan *adaawk* (law) through song, reportedly opining, "It's not going to do any good to sing to me ... I have a tin ear." Reported in Karen Drake, "Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom" (2017) 95:1 Can Bar Rev 9 at 16.

97 For the Wet'su'weten and Gitxsan Houses, the state's use of force to secure access to Indigenous territories continues to be a reality. In 2010, the Wet'su'weten and Gitxsan Houses established camps within their territories to oppose the Enbridge Northern Gateway pipeline project, and later, the Coastal GasLink pipeline project. From 2019 to the time of writing, the Royal Canadian Mounted Police have enforced injunctions against and arrested Wet'su'weten and Gitxsan land defenders.

5. From Constitutional Negotiation to Litigation

The responses of the Court must also be placed within the context of Indigenous political advocacy and negotiations with the federal and provincial governments. In 1969, the Trudeau Government's *White Paper*, which "proposed the termination of special status for Indians and the devolution of services and programs to the provinces", catalyzed Indigenous peoples' political and legal advocacy towards the protection of their inherent rights, including self-government.[98] After the *Calder* decision in 1973, Canada initiated negotiations with First Nations in the Yukon and Northwest Territories towards comprehensive claims.[99] In 1977, Berger J's Final Report into the MacKenzie Valley Pipeline project expanded public awareness of First Nations' aspirations to self-government and self-determination in the Northwest Territories.[100] When the Trudeau Government contemplated repatriating the *British North America Act, 1867*[101] from Great Britain to Canada, Indigenous political organizations and advocates advanced their claims to Aboriginal self-government in Ottawa and London, England.[102] Canada's response was the constitutionalization of the "existing aboriginal and treaty rights of the aboriginal peoples in Canada" in section 35 of the *Constitution Act, 1982*. Although section 35 "recognized and affirmed" these rights, provincial and federal governments took the position that it was unclear whether section 35 included the inherent right to self-government and how these rights were to be made effectual. First Ministers' Conferences in 1983, 1984, 1985 and 1987 failed to provide any further clarity on whether section 35 included the inherent right to self-government.[103]

98 Jill Wherrett, *Aboriginal Self-Government*, Political and Social Affairs Division, 96–2E (Ottawa: Library of Parliament, 1999). See Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1999).

99 Wood & Rossiter, *supra* note 24 at 98–100.

100 Thomas Berger, *Northern Frontier, Northern Homeland: the Report of the Mackenzie Valley Pipeline Inquiry, Volume One*, CP32-25/1977-1E-PDF (Ottawa: Supply and Services Canada, 1977). For a history of the Mackenzie Valley Pipeline Inquiry and Thomas Berger, see Kim Stanton, *Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies* (SJD Thesis, University of Toronto, 2010) [unpublished] at 127–208, online (pdf): <tspace.library.utoronto.ca/bitstream/1807/24886/1/Stanton_Kim_P_201006_SJD_thesis.pdf>.

101 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (renamed the *Constitution Act, 1982*, *supra* note 22, s 53(2)) [*BNA Act*].

102 For a history of the Constitution Express, see the edited collection, Emma Feltes & Glen S Coulthard, eds, "Introduction: The Constitution Express Revisited" (2021) 212 BC Stud 13.

Shortly after the failed First Ministers' Conference in 1987, the Mulroney Government entered into an accord with Quebec, known as the Meech Lake Accord, to recognize Quebec as a distinct society. However, in June 1990, the Meech Lake Accord failed when Elijah Harper, a member of the Manitoba Legislature, withheld his vote, which was required for the Legislature to consider a resolution for the Accord. Harper's refusal reflected the opposition of First Nations to the Accord, based on the Accord's exclusion of any consideration of Indigenous self-government.[104] One month later, in July 1990, Kanehsatà:ke resisted the town of Oka's proposal to expand its golf course and develop condominiums on Kanehsatà:ke's burial site, the Pines. Although Berger J had called attention to the potential for Indigenous peoples' resistance to the developmental aspirations of non-Indigenous Canadians in 1977, Kanehsatà:ke's resistance in 1990 to Oka's development made this a reality for southern Canadians.

In 1991, the Mulroney Government, learning from its mistakes with the Meech Lake Accord in 1990, initiated discussions with Indigenous political organizations to gain consensus on constitutional amendments, known as the Charlottetown Accord, and struck a Royal Commission on Aboriginal Peoples. Prime Minister Mulroney appointed then-retired Dickson CJ to consult with Indigenous peoples on the Commission's mandate and composition.[105] Dickson "sent letters to 1,682 aboriginal people" and "met with the leaders of six different aboriginal groups and all seven aboriginal parliamentarians" before creating his mandate.[106] Sharpe and Roach explain that "[b]y the end of the

103 For an overview of the history of s 35 of the *Constitution Act, 1982* and the constitutional conferences, see Kent McNeil, "Has Constitutionalizing Aboriginal and Treaty Rights Made a Difference?" (2021) 212 BC Stud 137 at 137–38. Although the Conference was successful in securing an accord for amendments to the *BNA Act*, those amendments did not include the right to self-government. In his opening statement on March 8, 1984 to the Conference of First Ministers on Aboriginal Constitutional Matters, Prime Minister Pierre Elliott Trudeau connected the right to self-government with socio-economic capacity and the continuation of Indigenous peoples distinct societies. See Pierre Elliott Trudeau, "Statement by the Prime Minister of Canada to the Conference of First Ministers on Aboriginal Constitutional Matters" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 154–55. Similarly, at the Conference of First Ministers on Aboriginal Constitutional Matters in 1984, Prime Minister Brian Mulroney expressed that "[c]onstitutional protection for the principle of self-government is an overriding objective because it is the constitutional manifestation of a relationship, an unbreakable social contract between aboriginal peoples and their governments". See Brian Mulroney, "Notes for an Opening Statement to the Conference of First Ministers on Aboriginal Constitutional Matters" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *supra* note 103 at 161.

104 Ian Peach notes that First Nations leaders were particularly aggrieved at their exclusion from the Meech Lake Accord, which Quebec's National Assembly approved on June 23, 1987 only three months after the First Ministers Conference on Aboriginal Constitutional Matters had failed: Ian Peach, "The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada" (2011) 16:1 Rev Const Stud at 16–18.

105 Sharpe & Roach, *supra* note 33 at 454.

106 *Ibid* at 456.

summer Dickson had proposed a massive mandate for the royal commission", including a focus on Indigenous self-government, an issue that had come to significantly inform Dickson's understanding of the relationship between Indigenous peoples and the Crown.[107] Then-retired Wilson J was among one of three women appointed as commissioners; the other two were Indigenous women. In total, four of the seven commissioners were Indigenous persons.[108] Although Indigenous leaders were initially skeptical of Mulroney's decision to strike a Commission, the appointment of the former Chief Justice, and his efforts to consult, helped to ensure strong support and participation from Indigenous peoples. The Final Report, released three months after the SCC's decision in *Gladstone*, would ultimately emphasize a progressive approach to the implementation of Indigenous self-government in Canada through multiparty negotiations.[109]

While the former Chief Justice established the terms of the Commission, consultations on the Charlottetown Accord proceeded apace. In response to the Government of Canada's pamphlet on a constitutional accord, *Shaping Canada's Future Together*, Georges Erasmus and René Dussault, co-chairs of the Royal Commission on Aboriginal Peoples, released their own statement on the source, scope and status of the Aboriginal right to self-government.[110] The Charlottetown Accord showed, in principle, that an Aboriginal right to self-government could be harmonized with the existing division of powers.[111] When the Charlottetown Accord failed, Indigenous claimants turned to the courts to litigate what they understood to be central to Indigenous self-determination: self-government, jurisdiction, and a land base.[112]

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107 *Ibid* at 457. For a description of the mandate by the Rt Hon Brian Dickson, see Brian Dickson & Royal Commission on Aboriginal Peoples, *Remarks of the Rt. Hon Brian Dickson on the Royal Commission of Aboriginal Peoples, Transcriptions of Public Hearings and Round Table Discussions, 1992-1993, Part of Volume 1* (Royal Commission on Aboriginal Peoples, 1992).

108 Sharpe & Roach, *supra* note 33 at 457–58.

109 *Ibid* at 460.

110 *Shaping Canada's Future Together* (Ottawa: Minister of Supply and Services Canada, 1990); René Dussault & Georges Erasmus, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: Minister of Supply and Services Canada, 1992) at 16–17.

111 For commentary, see Thomas Isaac, "The 1992 Charlottetown Accord and First Nations Peoples: Guiding the Future" (1993) 8:2 Native Stud Rev 109–14.

112 Former Prime Minister Pierre Trudeau famously opposed the Charlottetown Accord, including on its consensus related to the Aboriginal right to self-government: Pierre Elliott Trudeau, *"A Mess that Deserves a Big NO!": Pierre Elliott Trudeau's Historic Speech at the Eleventh Cité Libre Dinner* (Toronto: Robert Davies, 1992) at 15, 18, 23, 72. In response to the failure of the Charlottetown Accord, the Royal Commission on Aboriginal Peoples released a report arguing for the existence of the Aboriginal right to self-government under s 35 of the *Constitution Act, 1982*, a right that courts could recognize without a constitutional amendment: René Dussault & Georges Erasmus, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) at v–vi, 31–36.

6. Conclusion

In this context, we can imagine the claimants in *Nikal* and *Lewis*, *Van der Peet*, *Gladstone*, *NTC Smokehouse*, *Pamajewon*, and *Delgamuukw* as pursuing different strategies for a similar objective: the continuation and survival of their societies into the future through litigation. In *Nikal*, the Witset First Nation asserted jurisdiction over waters on and adjacent to reserve under and outside the *Indian Act*, whereas in *Sparrow*, *Van der Peet*, *Gladstone*, and *NTC Smokehouse*, the Musqueam, Sto:lo, Heiltsuk, and Sheshaht and Opetchesaht First Nations, respectively, asserted Aboriginal rights to fish, sell or trade fish, or engage in commercial fisheries. In *Delgamuukw*, the Gitxsan and Wet'suwet'en asserted an Aboriginal right to self-government and Aboriginal title over their territories. In *Pamajewon*, the Eagle Lake and Shawanaga First Nations asserted an Aboriginal right to self-government or a right to regulate economic activities. In each case, claimants asserted these rights to ensure the continued survival of their societies. The problem was that settlers were already here to stay; these claims challenged the ability for settlers to stay in the same way. Although comprehensive claims negotiations were proceeding in the Northwest Territories, the Yukon territory, and British Columbia during this period, both settlers and First Nations parties looked to the Court to set the field for these negotiations.

This placed the Court in a difficult position. *Sparrow* retained the Crown's jurisdiction to act, reasoning that "rights that are 'recognized and affirmed' are not absolute",[113] but the decision also limited the scope of the Crown's authority to conduct that is consistent with its fiduciary relationship to Aboriginal peoples. Leaving the scope, meaning and content of Aboriginal rights unanswered, but with a restrained field of justified movement for the Crown, *Sparrow* could have strongly motivated the Crown to come to some agreement with Aboriginal groups on the meaning of section 35, as Canada had unilaterally done with the AFS for commercial fishing licenses in 1992. But rather than maintain this pressure, a majority of the Court in *Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet*, *Gladstone*, *Pamajewon*, and *Delgamuukw* not only relieved it but also fundamentally and asymmetrically restructured the field of negotiation in favour of the preferential allocation of resources to settlers and the settler state.[114] To this end, the Court marshalled a new concept in its

113 *Sparrow*, *supra* note 3 at 1109.

114 For example, Jonathan Rudin suggests that "*Van der Peet* is best understood as a reaction to the federal government's rejection of the Court's invitation to enter into substantive negotiations with Aboriginal people contained in *Sparrow*": Jonathan Rudin, "One Step Forward, Two Steps Back: The Political and Institutional Dynamics behind the Supreme Court of Canada's Decisions in *R. v. Sparrow*, *R v. Van der Peet* and *Delgamuukw v. British Columbia*" (1998) 13 JL Soc Pol'y 67 at 68. Rudin explains the logic of the interaction between court judgements and negotiation for First Nations and the Crown in the following terms:

> From the perspective of Aboriginal litigants [...] the role of the Supreme Court is to provide them with some better cards to take to the table, not to determine who wins or loses the particular game. At the same time, if the Court sees that the government will not even come to the table after they have managed to deal the Aboriginal players a bigger hand, then the pressure rises on the Court to retrench when the Aboriginal litigants return for even better cards. An understanding of this process helps explain the Court's decisions in both *Sparrow* and *Van der Peet*. *Ibid* at 85-86

Aboriginal law jurisprudence: reconciliation. It also did four things that fortified asymmetries in this constitutional framework: it developed a cultural definition of Aboriginal rights as material activities in geographically and temporally defined space; it subordinated the Indigenous perspective to the common law and constitutional legal order; it distinguished between inherent or internally limited and non-inherent or non-internally limited Aboriginal rights in the context of the Crown's fiduciary duty; and it expanded the Crown's arsenal of valid legislative objectives for infringing those rights.[115] These aspects of the Court's jurisprudence are well-considered by other scholars, so I limit my analysis to the asymmetrical dimensions of these moves.[116]

115 I identify only these four, but there are other asymmetries within the legal framework, including the Court's requirement that the practices, customs and traditions be present prior to contact; the test for Aboriginal rights is more restrictive than the test for many *Charter* rights; and the test for Aboriginal rights cannot readily accommodate modern exercises of governance rights or rights with commercial dimensions: see *R v White and Montour*, 2023 QCCS 4154 at paras 1246–69 [*White and Montour*]. In addition, others have argued that the *Van der Peet* test freezes Aboriginal *rights*, even if it permits *practices* to evolve in method: Anna Zalewski, "From *Sparrow* to *Van der Peet*: The Evolution of a Definition of Aboriginal Rights" (1997) 55:2 UT Fac L Rev 435 at 449. On this point, see also John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian L Rev 37 [Borrows, "Frozen Rights in Canada"]. Michael Asch and Patrick Macklem, as well as John Borrows, have identified an asymmetry in the Court's assumption of the Crown sovereignty vis-à-vis Aboriginal rights such as self-government and Aboriginal title: Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29:2 Alta L Rev 498 at 507 [Asch & Macklem, "Aboriginal Rights"]; Borrows, "Sovereignty's Alchemy", *supra* note 4 at 544. Borrows also argues that court procedures related to proceedings ("centralizing control of access to justice"), judicial deference to findings of fact at trial, the inherent subjectivity in the fact-finding process itself, and onus and burdens of proof on Aboriginal claimants places the Crown in a "superordinate position relative to Aboriginal peoples": *ibid* at 549, 551.

116 For a summary of the SCC's decision in *Van der Peet*, see Elliott, *supra* note 75. For a summary of the contrasting approaches at the Court of Appeal in *Van der Peet*, *Gladstone*, *NTC Smokehouse*, *Nikal* and *Lewis* see Gilby, *supra* note 60 at 241–46. For a summary of the SCC's decision in *Pamajewon*, see Morse, *supra* note 85. For a commentary on the SCC's reasons in *Van der Peet*, *Gladstone* and *NTC Smokehouse*, see Rosanne Kyle, "Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-*Sparrow* Era" (1997) 31:2 UBC L Rev 293. For commentary on the cases of *Nikal* and *Lewis*, see Peggy J Blair, "Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's Decisions in *R. v. NIKAL* and *LEWIS*" (2001) 31:1 Rev Gen 87–172; Peggy J Blair, "No Middle Ground: *Ad Medium Filum Aquae*, Aboriginal Fishing Rights, and the Supreme Court of Canada's Decisions in *Nikal* and *Lewis*" (2001) 31:3 Rev Gen 87 [Blair, "No Middle Ground"]. For a history and commentary of *Delgamuukw*, see Borrows, "Sovereignty's Alchemy", *supra* note 4. For a comparison of the treatment of Aboriginal title by the Royal Commission on Aboriginal Peoples and the Court in *Delgamuukw*, see John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2000) 46:3 McGill LJ 615.

II. Resolving Threat in Favour of the Settler Colonial State

1. Reconciliation in *Sparrow* and *Van der Peet*

Sparrow's framework for the justified infringement of Aboriginal rights was intended to provide a "solid constitutional base upon which subsequent negotiations can take place."[117] As noted above, the Court did so by affirming the Crown's legislative authority, while also limiting this authority to conduct that could be justified. Within this framework, "reconciliation" meant reconciling the Crown's federal power or jurisdiction with its fiduciary duty to Aboriginal peoples and their constitutionally protected rights under section 35.[118] With the scope, content and meaning of Aboriginal rights and title still uncertain and the Crown's field of movement constrained, *Sparrow* motivated the Crown to negotiate its constitutional relationship with Aboriginal peoples.[119]

In *Van der Peet*, Lamer CJ redeployed *Sparrow*'s language of "reconciliation".[120] In doing so, he identified the political challenge underlying the constitutionalization of Aboriginal rights in section 35: the pre-existing interests of the Crown and Canadian society.[121] Section 35, the Chief Justice explained, offers a constitutional framework "through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, *is acknowledged and reconciled with the sovereignty of the Crown*."[122] Whereas, in *Sparrow*, federal power is reconciled with federal *duty* at the stage of justification, in *Van der Peet* the directionality of that reconciliation is reversed and its subjects redefined and exchanged: the distinctive *cultures* of Aboriginal peoples

117 *Sparrow*, *supra* note 3 at 1077.

118 *Ibid*.

119 This is not to say that *Sparrow* was universally positive in its characterisation of the Crown's constitutional relationship with Indigenous peoples. For their part, Asch & Macklem argue that the Court accepted a contingent, rather than inherent, rights approach to s 35, grounded in the Court's acceptance of the "settlement thesis": Asch & Macklem, "Aboriginal Rights", *supra* note 115 at 507.

120 Kim Stanton, "Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission" (2017) 26:1 J L & Soc Pol'y 21 at 25, 29 [Stanton, "Reconciling Reconciliation"].

121 Brian Slattery describes how the Court's principles of "reconciliation" eclipsed its earlier jurisprudence, which was based on "principles of recognition". The constitutionalization of Aboriginal peoples' rights, title and treaty rights continued this *recognition* but also introduced an important limit in s 35's language of *affirmation*: Slattery, *supra* note 23 at 260. This affirmation functioned as an adaption of the common law to the fact that settlement had proceeded without legal authorization. In short, private interests – particularly in land – were assumed and acted upon as if permitted by law. As Slattery argues, "this gave rise to common law Principles of Reconciliation", which "take into account a range of other factors", including "third party and public interests": *ibid* at 260, 262. Slattery's distinction between the historical Principles of Recognition and the contemporary Principles of Reconciliation helps us to better understand the dilemma that the s 35 jurisprudence must resolve – the fact that settlement occurred in some cases without legal authorization and that Indigenous peoples' rights continued within those same territories. Simply put, the Court's "principles of reconciliation" are an expression of settler pragmatism.

122 *Van der Peet*, *supra* note 3 at para 31 [emphasis added].

are to be reconciled with the *sovereignty* of the Crown.[123] Further reversing the directionality of reconciliation in *Sparrow*, in *Gladstone*, Lamer CJ describes how limitations placed on Aboriginal rights, when they are "of sufficient importance to the broader community as a whole, [are] *equally* a necessary part of that reconciliation."[124] It is not the federal *power* that is to be reconciled with federal *duty*, but rather Aboriginal rights that must be reconciled with the interests of "the broader community as a whole." Anna Zalewski suggests that "[w]hat drives the Court's enunciation of the principle of reconciliation is not only the marriage of two conflicting systems of law, but the foreclosure of the possibility that the granting of Aboriginal rights will eliminate the rights of other Canadians."[125] Gordon Christie argues that Lamer CJ "re-packaged [reconciliation in *Sparrow*] as a matter of working out the appropriate place of Aboriginal peoples within the Canadian state."[126] Thus, "reconciliation" became a means to relieve the conflict between the fact that "when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries,"[127] with the reality that settlers are "*here to stay*,"[128] arguably in much the same way.[129] Lamer CJ's vision of "reconciliation" is central to understanding the four moves and how they are coordinated to resolve the tensions between the constitutionalization of the relationship between Aboriginal peoples and the Crown with the status quo of settler supremacy.

123 Although McLachlin CJ's reasons in *Haida*, *supra* note 6, and *Taku River Tlingit First Nation v British Columbia* (*Project Assessment Director*), 2004 SCC 74 describe "reconciliation" as a process, Kim Stanton notes that the Court's jurisprudence nevertheless maintains the inherent legitimacy of Crown sovereignty: Stanton, "Reconciling Reconciliation", *supra* note 120.

124 *Gladstone*, *supra* note 3 at para 73. Kent McNeil argues that "[i]n this context, reconciliation appears to relate more to the maintenance of established economic interests than to the protection of constitutional rights": Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLaughlin" (2003) 2:1 Indigenous LJ at 9 [McNeil, "Reconciliation and the Supreme Court"].

125 Zalewski, *supra* note 115 at 442.

126 Gordon Christie, "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17:2 Can JL & Soc 4 at 56 [Christie, "Judicial Justification"].

127 *Van der Peet*, *supra* note 3 at para 30 [emphasis added].

128 *Delgamuukw*, *supra* note 1 at para 186 [emphasis added]. The Court's use of "we" in the phrase "we are all here to stay" is a rhetorical move that situates Indigenous peoples as partners or co-actors within this process of reconciliation and establishes, incorrectly, the legal claims of Indigenous peoples and settlers to the land as mutual and symmetrical.

129 Lamer CJ's definition of reconciliation hews closer to what Mark Walters has identified as "reconciliation as resignation": Mark Walters, "The Jurisprudence of Reconciliation" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165 at 168. What is notable about "reconciliation as resignation" is its inherent asymmetry, and with that asymmetry, the supremacy or hierarchy of the state.

2. The First Move: Restricting the Content, Scope and Meaning of Aboriginal Rights

In its first move towards "reconciliation", the majority in *Van der Peet* limited the scope, content and meaning of Aboriginal rights under section 35. Aboriginal rights, the majority reasoned, are limited to those practices, customs, or traditions that are integral to the distinctive culture of the Aboriginal group in question before contact.[130] In doing so, the majority identified a tension between Aboriginal peoples' rights and the interests of non-Aboriginal persons in Canada. Thus, the majority's framing of Aboriginal rights as *cultural* establishes both the terms of the apparent conflict between those rights and the non-constitutionally protected interests of Canadian society and an asymmetrical framework through which this conflict can be resolved in favour of settler society.

Starting from "first principles", Lamer CJ locates the source of Aboriginal rights in the fact that "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in *distinctive cultures*, as they had done for centuries."[131] He further explains that Aboriginal rights "arise from the fact that aboriginal people are aboriginal."[132] Although the Chief Justice does not define or explain what he means by "aboriginality," his reasons disclose a focus on *cultural* difference.[133] Aboriginal rights, the Chief Justice reasons, cannot encompass those practices, customs or traditions that are "true of every human society." Nor can practices, customs or traditions that are "primarily the result of European influences" form the basis for Aboriginal rights.[134] Elevating *Sparrow*'s oblique reference to "integrality" to the status of legal principle, the

130 In *R v Powley*, 2003 SCC 43, the Court would clarify that the benchmark date for Métis peoples is the date of the imposition of "effective European control", not contact: at paras 17-18. For an examination of the "distinctive" test in *Van der Peet*, see Elliott, *supra* note 75 at 769–75.

131 *Van der Peet*, *supra* note 3 at para 30 [emphasis added]. Although the Chief Justice also refers to Aboriginal peoples' societies, the relevance of Indigenous peoples' legal orders and societal organization is less pronounced or significant in his articulation and application of the test for Aboriginal rights. His reliance on a cultural framing becomes clear when contrasted with the dissenting reasons of L'Heureux Dubé and McLachlin JJ.

132 *Ibid* at 19 [emphasis in original].

133 The Chief Justice further distinguishes Aboriginal rights from a liberal conception of rights arising from the Enlightenment period: *ibid* at paras 18–19. Christie argues that the *cultural* framing of Aboriginal rights assists in relieving the tension between individual interests as understood within liberalism and the political dimensions of collective rights: Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 83. As Christie argues, the framing of these rights as specific *cultural activities*, rather than "the autonomy of the community whose culture grounds the activity", means that the exercise of the right "does not directly threaten the ability of non-Aboriginals to exercise their ability to choose to engage in projects they deem valuable": *ibid* at 8384.

134 In her dissent, L'Heureux Dubé J critiques this approach for its overstatement of the impact of European encounters on the practices, customs and traditions of Indigenous peoples: *Van der Peet*, *supra* note 3 at para 186.

Chief Justice explains that Aboriginal rights are those practices, customs or traditions that are "integral to the distinctive culture" of the group in question.[135]

Although the Chief Justice purports to start from a "historical fact", his representation of this fact is laden in a Eurocentric perspective, one that essentializes Indigenous peoples' difference as primarily cultural rather than political or legal (in the sense of Indigenous peoples' governance and legal orders, or the simple fact of their prior occupation of land as organized societies).[136] These distinctions are illustrated by the different ways in which this historical fact has been represented by the Court in its past jurisprudence. In *Calder*, Judson J, writing for Martland and Ritchie JJ, recognized the fact that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[137] Unlike Judson J, who confined his reasons to whether Aboriginal title had been extinguished in British Columbia, Hall J, dissenting and writing for Spence and Laskin JJ, considered whether the Nisga'a held title to the claimed territories.[138] For this reason, Hall cites American and British colonial jurisprudence for the principle that Aboriginal title is grounded in Aboriginal peoples' prior occupation of their territories *in accordance with their own customs and legal orders*.[139] It is within this context that Hall J reviews the testimony of Frank Calder (then-president of the Nisga'a Tribal Council), James Gosnell (then-Chief Councillor of the Gitlakdamix band), and Wilson Duff, an anthropologist, on how the Nisga'a

135 In her dissent, McLachlin J argues that "[t]he governing concept of integrality comes from a description in the *Sparrow* case where the extent of the aboriginal right (to fish for food) was not seriously in issue. It was never intended to serve as a test for determining the extent of disputed exercises of aboriginal rights." *Ibid* at para 255. At the hearing in *Van der Peet*, LaForest J expresses a similar observation: *Van der Peet* transcript, *supra* note 77 at 86–87.

136 As Michael Asch argues, Indigenous peoples' political difference – that is, their prior legal claims to their territories and their political status as self-determining and self-governing societies – is ignored and instead read through a lens of *cultural* difference: Michael Asch, "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*" (1999) 5:2 Rev Const Stud 119. Asch suggests that the Court "has moved to rely on culture to determine the content of Aboriginal rights in order to avoid exploration in another area: political relations. The Court is determined not to confront the issue of how legitimate sovereignty was acquired by the Crown": *ibid* at 133.

137 *Calder*, *supra* note 45.

138 When Judson J refers to the fact of Aboriginal peoples' prior occupation of their territories, he does so to relate Aboriginal title to the Crown's underlying title and to define the Crown's capacity to lawfully extinguish Aboriginal title: *ibid*.

139 *Ibid* at 383–84, 387. At 3083–84, Hall J quotes Marshall J in *Worcester v State of Georgia*, 31 US 515 (1832) for the proposition that "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws*" [emphasis added]. On a similar point at 387, Hall J quotes Lord Sumner in *Re Southern Rhodesia*, [1919] AC 211 at 234 that "there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law."

understood their possession and occupation of their territories.[140] In *Van der Peet*, the reasons of the majority and dissenting justices similarly illustrate two very different interpretations of the fact of Aboriginal peoples' prior occupation of their territories. For the Chief Justice, Aboriginal peoples' prior occupation of their territories is read through their *cultural distinctiveness*, relying on Judson J's statement for support. In contrast, McLachlin J locates the source of Aboriginal peoples' rights "in the traditional laws and customs of the aboriginal people in question."[141] In short, the Chief Justice's representation of this "historical fact" is far from self-evident. Although the Court has generally recognized *something* before European colonization and settlement, it has alternatively represented this *something* as Indigenous peoples' prior occupation, land-based activities, societal organization, governance, culture, or Indigenous legal orders. The Chief Justice's characterization of this *something* focuses on culture.[142]

Kenji Tokawa argues that the Court in *Van der Peet* substituted a framework that defined rights based on their (threatening) relationship to state power (an approach evident in *Sparrow*'s focus on the Crown's fiduciary relationship) with a framework that defined rights based on cultural difference.[143] In this way, the majority's focus on cultural difference distances its theory of Aboriginal rights from the historical circumstances that give rise to the fundamental conflict between Indigenous peoples' inherent rights and the interests of the settler state: the Crown's unilateral assertion of sovereignty and the prior existence of Indigenous peoples' societies, including their legal orders. By substituting a framework that defines rights vis-à-vis their threat to state interests with one focused on culture, the Court obfuscates the reality of that threat. Along a similar stream, John Borrows argues that the Chief Justice's "capture" of the *Aboriginality* of Aboriginal rights is an attempt to stem the flood presaged by his recognition of Indigenous peoples' prior occupation of their territories.[144] The majority's reliance on "centrality" and "integrality" are problematic for their inherent subjectivity and for the underlying assumption that a practice can be separated from its broader cultural, political and legal context.[145] These moves avoid any necessity for the Court – or the federal or provincial

140 *Ibid* at 354–75. For a recent biography of Wilson Duff, in which his evidence in *Calder* is discussed, see Robin Fisher, *Wilson Duff: Coming Back, A Life* (Madeira Park, BC: Harbour Publishing, 2022) at 184.

141 *Van der Peet*, *supra* note 3 at para 247. McLachlin J's interpretation of this essential fact in *Calder* leads her to a very different understanding of the purpose of s 35: to provide the "basis for a just and lasting settlement of aboriginal claims": *ibid* at para 230. Such a settlement must reconcile "the different legal cultures of aboriginal and non-aboriginal peoples": *ibid* at para 310.

142 At times, the Chief Justice refers to Aboriginal peoples' societal organization, and at one point, their legal orders. He does so, however, inconsistently. See, for example, *Van der Peet*, *supra* note 3 at para 74 [emphasis added]. The Chief Justice, for example, explicitly rejects the "societal" approach of L'Heureux Dubé J, dissenting, as well as a focus on Indigenous legal orders as proposed by McLachlin J, dissenting. When the Chief Justice refers to Indigenous peoples' legal orders, he does so in reference to the "Aboriginal perspective", discussed below.

143 Tokawa, "*Van der Peet* Turns 20", *supra* note 23 at 827. Tokawa's argument is notable for his theory of Aboriginal rights, which he defines as the protection of Aboriginal interests from the threat of the state's exercise of its powers: *ibid* at 821–22.

144 Borrows, "Frozen Rights in Canada", *supra* note 115 at 44.

145 Barsh & Henderson, *supra* note 29 at 1000–02.

governments or Canadian society – to resolve the uncertainty underlying the Crown's assertion of sovereignty over Indigenous peoples' territories and its *de facto* control over Indigenous peoples and their distinct societies.[146] Nor does the Court have to trace the evolution of the common law doctrine of Aboriginal rights through to its constitutionalization in section 35 of the *Constitution Act, 1982*.[147] Aboriginal rights are rendered through a "museum-diorama" of the past, restricting the recognition of rights that make sense within modern society.[148] The Court's language of "practices, customs and traditions" restricts claims of self-government to sufficiently particular – and material – manifestations.[149] Rather than resolve any these challenges, the Chief Justice elevates a "historical fact", one interpreted through a distinctly Eurocentric perspective, to the status of first principle.

With respect to Aboriginal title, the majority's definition of Aboriginal title similarly constrains its scope, content and meaning. In *Delgamuukw*, Lamer CJ defined the content of Aboriginal title as "the right to use land for a variety of activities, not all of which need be aspects of practices, customs, and traditions which are integral to the distinctive cultures of aboriginal societies."[150] Aboriginal title includes the rights "to exclusive use and occupation of land" and "to choose to what uses land can be put", as well as an "inescapable economic component."[151] However, having delinked its definition

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146 Christie argues the Court's approach to s 35 assumes Indigenous peoples' status as a special type of minority group within the public law of Canada, with the Crown's sovereignty uncontested. Thus, at the structural level, Indigenous peoples are assumed to be part of the public; this assumption forecloses questions about the assertion of Crown sovereignty or Indigenous peoples' inherent rights. See Christie, "Judicial Justification", *supra* note 126 at 64–67.

147 At the hearing in *Van der Peet*, counsel for the appellant argued that the majority's approach at the Court of Appeal, which adopted an "integral to the distinctive culture test" and focused on specific practices, was inconsistent with the common law doctrine of Aboriginal rights: *Van der Peet* transcript, *supra* note 77 at 29–30, 36–37. A majority of the Court in *Van der Peet* affirmed the "integral to the distinctive culture test." In response to the argument that s 35 is a constitutional entrenchment of the common law doctrine of Aboriginal rights, the Chief Justice stated:

> The fact that aboriginal rights pre-date the enactment of s. 35(1) could lead to the suggestion that the purposive analysis of s. 35(1) should be limited to an analysis of why a pre-existing legal doctrine was elevated to constitutional status. This suggestion must be resisted. The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights; however, the interests protected by s. 35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that legal doctrine now has constitutional status. *Van der Peet*, *supra* note 3 at para 29.

148 Bradford Morse argues that *Pamajewon* "articulated legal standards replete with subjective elements for judges to weigh, lacking in clear enduring principles to guide the effort, and based upon a museum-diorama vision of Aboriginal rights, if not Aboriginal peoples as well": Morse, *supra* note 85 at 1030.

149 *Pamajewon*, *supra* note 3 at para 27. See also Zalewski, *supra* note 115 at 446–47.

150 *Delgamuukw*, *supra* note 1 at para 111.

151 *Ibid* at para 166 [emphasis in original].

of Aboriginal title from the constraints of *Van der Peet*'s "integral to the distinctive culture" test, the majority in *Delgamuukw* turns to the concept of "inherent" or "internal" limits to restrain the economic impact of the right on the settler state and settlers' access to the resources underlying that right. Aboriginal title, the Chief Justice explains, cannot be used in a manner that is "irreconcilable with the nature of the [group's] attachment to the land".[152] In a roundabout way, the content of a specific group's Aboriginal title becomes constrained or restricted by the practices, customs or traditions on that land that the Aboriginal group relies on to establish exclusive and sufficient occupation.[153] In this way, the majority imports *Van der Peet*'s cultural definition of Aboriginal rights as an inherent or internal limit on the content of Aboriginal title, thus potentially limiting the economic scope of title.[154]

The tests for Aboriginal rights in *Van der Peet* and Aboriginal title in *Delgamuukw* set up definitional – and in the case of *Delgamuukw*, inherent or internal – limits on what is protected under section 35. These are *substantive* moves, which force Indigenous peoples to articulate their inherent rights within a *cultural* framing of Aboriginal rights and title. The Court also has certain procedural moves available to it, which work in tandem with its substantive moves. In *Pamajewon*, the Court recharacterized the defendants' claim from a broad Aboriginal right to self-government to an Aboriginal right to regulate high-stakes gambling on reserve, and, once recharacterized, found that the evidence was insufficient.[155] The Court's reliance on *Van der Peet* to recharacterize the right concealed its response to the perceived threat of a broad right of Aboriginal self-government to the provincial Crown's monopoly over gaming revenue and the federal Crown's monopoly over the criminalization of unregulated gaming activities. Had the Court accepted both the characterisation of and evidence for non-inherently limited Aboriginal rights, such as those with commercial dimensions, it would have had to justify the government's infringement of those rights under the framework set out in *Sparrow*. Although the test in *Sparrow* is also advantageous for justifying infringements of

152 *Ibid* at para 111.

153 Borrows, "Sovereignty's Alchemy", *supra* note 4 at 570–72.

154 Other alternatives were open to the Court. In *Pamajewon*, counsel for the defendants argued that an Aboriginal group must justify its exercise of its Aboriginal right of self-government: *R v Pamajewon*, 1996 CanLII 161 (SCC) (Transcript of Hearing, Appellant at 15, 59). To do so, the group must show a valid purpose, in that case, revenue generation for social benefit, and a rational connection between the regulation of the activity, in that case gaming, and the objective. Although this might appear to inquire into the "societal importance" of the activity in question, an approach rejected by the majority in *Van der Peet*, it is more properly described as the type of analysis that courts are familiar with when reviewing the constitutionality of legislation. In *Van der Peet*, McLachlin J, dissenting, appeared to accept the premise that an Aboriginal group's legal order can act as an inherent limit on the exercise of the right. However, there is a key difference between what the defendants' counsel are advancing in *Pamajewon* and what McLachlin J suggests in *Van der Peet*: in the former, the Aboriginal group would have the *onus* of justifying its exercise of the right, whereas in the latter, the Court would determine, based on the evidence, whether the exercise of the right is consistent with the Indigenous legal order. What is particularly interesting in the defendants' counsel's submissions in *Pamajewon* is the premise that the First Nation must justify its exercise of its right, implying that Aboriginal groups also engage in a process of reconciliation with the activities of provincial and federal governments.

155 *Pamajewon*, *supra* note 3 at 29.

non-inherently limited rights, in the sense that the fiduciary relationship does not require the Crown to prioritize the Aboriginal right, it would still require the Court to *justify* the actions of the state. I suggest that the Court is reluctant, for pragmatic reasons owing to the perception this would create, to justify infringements of Aboriginal rights with non-inherent, specifically commercial, dimensions. Instead, by both recharacterizing the right and finding insufficient evidence for that recharacterized right, the Court feints.

3. The Second Move: The Indigenous Perspective and Cognizability within Canada's Constitutional and Legal Order

Indigenous peoples' *political* difference, their inherent rights to self-determination, self-government, and sovereignty, challenges the supremacy of Crown sovereignty. One way in which the Court resolves this threat in favour of the state is to ensure that Indigenous peoples' perspectives on their rights are compatible or commensurable with existing common law and constitutional legal principles and the Crown's assertion of sovereignty. In *Sparrow*, the Court explained that it is "crucial... to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake."[156] However, in *Van der Peet*, the majority qualified that the Aboriginal perspective "must be framed in terms cognizable to the Canadian legal and constitutional structure."[157] In *Delgamuukw*, a majority of the Court put the task more strictly: the Indigenous perspective must be "accommodated", but such an accommodation "must be done in a manner that does not strain 'the Canadian legal and constitutional structure'".[158] Although Indigenous peoples' perspectives on their legal rights must be considered in determining the meaning of those rights and in adjudicating their specific content based on the evidence, the common law and constitutional law of Canada structures the Court's reception and interpretation of those perspectives.[159] In her comment on *Van der Peet*, Anna Zalewski argues that the majority of the Court failed to consider the Indigenous perspective in the definition of Aboriginal rights.[160] Instead, the majority set out a three-part framework for the characterization of the right that emphasizes the interaction between the contemporary activity and the impugned legislation.[161] In short, the majority establishes an asymmetrical framework for the inclusion of Indigenous perspectives, one that assumes the superordinate position of Crown sovereignty.[162]

156 *Sparrow*, *supra* note 3 at 1112.

157 *Van der Peet*, *supra* note 3 at para 49.

158 *Delgamuukw*, *supra* note 1 at para 82.

159 As do the rules of evidence related to oral history. See generally Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011).

160 Zalewski, *supra* note 115 at 446. Peggy Blair argues similarly that the Court considered only the common law in its reasons in *Nikal* and *Lewis*: Blair, "No Middle Ground", *supra* note 116 at 592.

161 Zalewski, *supra* note 115 at 446.

162 Borrows, "Sovereignty's Alchemy", *supra* note 4 at 556–58.

As an example of how far this asymmetry extends, in *Delgamuukw*, Lamer CJ quotes Mark Walters, a settler legal scholar, for the principle that "true reconciliation will, equally, place weight on" both the Indigenous and common law perspective.[163] Ironically, however, the Court failed to attribute this proposition accurately, as Walters had to Patricia Monture, a Mohawk legal scholar. Writing shortly after *Sparrow*, Monture critiqued the Eurocentric views embedded in education and law, arguing that "a fair, just and peaceable" relationship was contingent on mutual respect between Aboriginal and Canadian perspectives:

> A doctrinal framework which holds these two valid theoretical perspectives, the First Nations view and the established Canadian view, on Aboriginal Rights must be constructed. This new legal doctrine which will enhance the validity of both perspectives, is essential to establishing fair, just, and peaceable relations in this country. Both of the equally valid legal traditions of this country must be willing to participate to each others mutual satisfaction and agreement. This agreement cannot be reached by negotiation, it can be developed only through processes of mutual respect. The current state of affairs is that one view trumps the other by default; that is, the collective memory loss. Nothing is gained by or for First Nations, or Canadians for that matter, in this adversarial, "my way wins," dichotomy to which our legal rights have been reduced. The only result of the "my way wins" process will be a stand-off.[164]

In his article on the BCCA decision in *Delgamuukw*, Mark Walters suggested that "[t]he challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently, there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined."[165] Rather than adopt a Eurocentric perspective, as McEachern CJ had at the Court of Appeal in *Delgamuukw*, Walters pointed to Monture's position, quoted above, as offering an alternative view. Applying Monture's argument, Walters reasoned that a "morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives."[166] In *Delgamuukw*, a majority of the Court quoted Walters at length on the importance of the Indigenous perspective on Aboriginal rights without citing Monture, a Mohawk woman and legal scholar, for that proposition.

Other scholars have critiqued the Court's approach to the Indigenous perspective as restricting the value and relevance of Indigenous legal orders to evidence of practices, customs and traditions;[167] and as forcing Indigenous perspectives – in particular, Indigenous legal orders – to be rendered in terms that are commensurable with liberal constitutionalism.[168] The restriction of Indigenous peoples' claims, interests, and ambitions to those that are cognizable with a liberal, constitutional legal order

163 *Delgamuukw*, *supra* note 1 at para 81; Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17:2 Queen's LJ 350.

164 Patricia A Monture, "Now That the Door Is Open: First Nations and the Law School Experience" (1990) 15:2 Queen's LJ 179 at 191.

165 Walters, *supra* note 163 at 412.

166 *Ibid* at 413.

167 Fraser Harland, "Taking the Aboriginal Perspective Seriously" (2018) 16 Indigenous LJ 21.

168 Mills, *supra* note 6.

neutralizes the perceived threat of Indigenous self-determination. John Borrows suggests that "[s]ome people may fear for their safety if Indigenous peoples exercise greater law making power" because they "worry that [interpersonal violence in Indigenous communities] will spill over into other communities if Indigenous peoples are unable to properly administer the law."[169] I would add that some may fear that Indigenous legal orders and self-government might be articulated in ways that are incommensurable with a liberal legal order that focuses on the inherent dignity and human rights of the individual.[170] In this way, illiberalism, actual or perceived, within Indigenous law and governance poses a threat and challenge to the moral legitimacy of Canada's liberal legal order.[171] Ultimately, to the extent that the Court's recognition of the Indigenous perspective asymmetrically favours the existing constitutional and legal order, as understood from a European perspective, this may limit the transformative potential of an intersocietal interpretation of the *Constitution Act, 1982*.

4. The Third Move: Distinguishing Between Inherent and non-Inherently Limited Rights

In its third move towards "reconciliation", the majority of the Court in *Van der Peet*, *Gladstone* and *NTC Smokehouse* distinguished between inherent or internally limited and non-inherent or non-internally limited Aboriginal rights in the context of the Crown's fiduciary duty. In *Sparrow*, the Court set out a two-stage test for the Crown's justified infringement of an Aboriginal right. At the first stage of the test, the Crown must demonstrate that its conduct is consistent with the Crown's fiduciary relationship to Aboriginal peoples. As part of this fiduciary relationship, the Crown must prioritize the Aboriginal right in its allocation of the underlying resource. In *Gladstone*, the Chief Justice cautioned that "where the aboriginal right has no internal limitation, the notion of priority, as articulated in *Sparrow*, would mean that where an aboriginal right is recognized and affirmed that right would become an exclusive one."[172]

Distinguishing the right asserted in *Sparrow*, "the right to fish for food, social and ceremonial purposes", from the right "to sell herring spawn on kelp commercially" in *Gladstone*,[173] the Chief Justice held that the doctrine of priority set out in *Sparrow* requires "that the government demonstrate that, in allocating the resource, it has *taken account* of the existence of aboriginal rights and allocated the resource *in a manner respectful of the fact* that those rights have priority over the exploitation of the fishery by other users."[174] Drawing an analogy with the minimal impairment test in

169 Borrows, *Canada's Indigenous Constitution*, *supra* note 21 at 166.

170 Wilkins, "Take your Time and Do It Right", *supra* note 23 at 254–58.

171 On the topic of illiberalism in Indigenous membership law and governance, see Kirsty Gover, "When Tribalism Meets Liberalism: Human Rights and Indigenous Boundary Problems in Canada" (2014) 64:2 UTLJ 206. The limits of Indigenous self-government in the context of the *Charter* have recently been considered by the SCC in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*]. See also *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220.

172 *Gladstone*, *supra* note 3 at para 59.

173 *Ibid* at para 57.

174 *Ibid* at para 62.

Oakes[175] under section 1 of the *Charter*, the Chief Justice further explained that courts should "assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and important of such rights."[176] In doing so, courts may consider several factors, including:

> ...whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food *versus* commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.[177]

In *Delgamuukw*, the Chief Justice extended his reasoning in *Gladstone* to the test for the justified infringement of Aboriginal title. Drawing an analogy with commercial Aboriginal rights, the Chief Justice reasoned that the Crown is not required to absolutely prioritize Aboriginal title in its allocation of any underlying resource. Rather, a court must consider whether the Crown has accommodated "the participation of aboriginal peoples in the development" of the resource, whether the "conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of Aboriginal title lands" or whether "economic barriers to aboriginal uses of their lands (e.g., licensing fees)" are "somewhat reduced."[178]

The majority's decisions in *Gladstone* and *Delgamuukw* import into *Sparrow*'s justified infringement framework the consideration of non-constitutionally protected proprietary interests in the context of the Crown's fiduciary relationship to Aboriginal peoples.[179] Moreover, the majority, perhaps drawing from concerns similar to those shared by La Forest J in his memoranda in *Sparrow*, imports the deferential standard towards Crown conduct in the context of the *Charter* into the section 35 context. The effect of this distinction has been to reduce the likelihood that any recognized Aboriginal right with commercial dimensions might impact the existing allocation of a resource to non-Indigenous rights holders. In her assessment of *Gladstone*, Roseanne Kyle concludes that "[c]ourts continue to be reluctant to overly threaten non-Aboriginal interests"; she suggests that "by modifying the priority requirement the Court was at least able to recognize a commercial right, however unclear its parameters might be. If it had been unable to make those modifications, it is likely that it would not have recognized the right at all."[180] At the same time, the cumulative effect

175 *R v Oakes*, 1986 CanLII 46 (SCC) [*Oakes*].

176 *Gladstone*, *supra* note 3 at para 63.

177 *Ibid* at para 64.

178 *Delgamuukw*, *supra* note 1 at para 167.

179 See, generally, McNeil, "Reconciliation and the Supreme Court", *supra* note 124 at 17–19.

180 Kyle, *supra* note 116 at 309.

of these "modifications" has been to restrict the recognition of Indigenous peoples' inherent rights, in particular the right to self-government and the exercise of rights with commercial dimensions or impacts. As Russel Lawrence Barsh and James Youngblood Henderson argue, "[i]f all the hurdles announced by *Sparrow*, *Van der Peet*, and *Gladstone* are assembled, they form a formidable and intimidating barrier" to the recognition of Aboriginal rights with commercial dimensions.[181]

5. The Fourth Move: Expanding the Crown's Arsenal of Valid Legislative Objectives

In its fourth move towards "reconciliation", the majority of the Court in *Gladstone* and *Delgamuukw* expanded the Crown's arsenal of valid legislative objectives. In *Sparrow*, the Court reasoned that the Crown could justifiably infringe Aboriginal rights if it was in furtherance of a valid legislative objective. The Court identified two such objectives, conservation and the protection of the public from harm, while leaving it open as to whether other compelling and substantial objectives may be found. In *Gladstone*, Lamer CJ , for the Court, expanded the list of compelling and substantial objectives to include not only limits that were "fundamental conditions of the responsible exercise of the right",[182] but also those that reflected the broader constitutional and non-constitutional, including private, interests of Canadian society as a whole, such as "the pursuit of economic and regional fairness,... the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups."[183] In *Delgamuukw*, Lamer CJ identified additional legislative objectives that could justify the Crown's infringement of Aboriginal title, including "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of [the province], protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations."[184] As Christie argues, these two moves help to ensure that Aboriginal rights or title that "threatens the continued use of a resource by others with deemed-legitimate interests" can be justifiably infringed in furtherance of those other interests.[185] Borrows succinctly explains how "[w]ords, as bare assertions, are pulled out of the air to justify a basic tenet of colonialism: the settlement of foreign populations to support the expansion of non-Indigenous societies."[186] These objectives, and the means taken to achieve them, the Chief Justice explained in *Gladstone*, were to be reviewed on a standard of reasonableness, akin to the Court's approach in *Oakes* to the review of governmental action under section 1 of the *Charter*, and consistent with the position expressed by La Forest J in his correspondence with Dickson during the Court's deliberations in *Sparrow*.[187]

181 Barsh & Henderson, *supra* note 29 at 1004.

182 *Van der Peet*, *supra* note 3 at para 305, McLachlin J, dissenting.

183 *Gladstone*, *supra* note 3 at para 75.

184 *Delgamuukw*, *supra* note 1 at para 165.

185 Christie, "Law, Theory and Aboriginal Peoples", *supra* note 133 at 87–88.

186 Borrows, "Sovereignty's Alchemy", *supra* note 4 at 568.

187 *Gladstone*, *supra* note 3 at para 63.

The majority's expansion of the list of valid legislative objectives in *Gladstone* went some way towards relieving the threat of Aboriginal rights, particularly commercial and self-government rights, and Aboriginal title, to the status quo allocation of resources to the Crown and settlers. Indeed, in her dissent, McLachlin J critiques the Chief Justice's expansion of the list of justified objectives as an "unconstitutional" and "political" attempt at achieving "social harmony."[188] As Kyle argues, the expansion of the list of valid legislative objectives "effectively neutralizes the entrenchment of Aboriginal rights in the Constitution by elevating other interests in Canada to the same level as constitutional Aboriginal rights."[189] In *Gladstone*, the claimant's proven right to a commercial fishery in herring spawn on kelp challenged the existing allocation of the herring fishery to Indigenous and non-Indigenous fishermen. In *Delgamuukw*, the claimant's assertion of Aboriginal title challenged the legislative and administrative jurisdiction of the province and its control over resources located within the province as well as the private property interests of settlers. Along with *Pamajewon*, which challenged Canada's criminal law jurisdiction and the province's jurisdiction over property and civil rights, as well the province's ability to generate revenues from gaming, these cases illustrate the unresolved promise of section 35, a promise that the *Constitution Act, 1982* intended, in part, to be resolved through political negotiation, and the threat that this promise posed to settler supremacy.

In *Van der Peet*, *Gladstone*, *Pamajewon*, and *Delgamuukw*, a majority of the Court established a vision of reconciliation that could reconcile Aboriginal peoples' rights with the interests of Canadian society as a whole. In a riposte to *Sparrow*'s approach to reconciliation as the reconciliation of federal power and federal duty, the Chief Justice set out a framework that could account for the broader interests of Canadian society through a constrained definition of Aboriginal rights as *cultural* rights; through the subordination of the Indigenous perspective to Canada's constitutional and legal order; through a distinction between inherent or internally limited and non-inherent or non-internally limited Aboriginal rights in the context of the Crown's prioritization of the right in relation to other interests; and through an expansion of the kinds of compelling and substantial objectives that the Crown can rely on to justifiably infringe Aboriginal rights and title. These four moves limited the potential for Indigenous peoples to sustain their societies into the future and alleviated the threat of Indigenous peoples' inherent rights to the preferential allocation of resources to settlers and the settler state. That is not to say that this foundational jurisprudence did not result in *some* transfer of resources – including political legitimacy – to Indigenous peoples; however, it maintained an overarching structure of settler supremacy, one in which settler futurity is prioritized over alternative relationships.

The effects of this framework can be seen in the holdings of this jurisprudence. In *Van der Peet*, the majority accepted the trial judge's findings that the claimant's impugned sale of salmon was incidental and not integral to the distinctive culture of the Sto:lo.[190] In *Gladstone*, although the majority accepted that the claimant enjoyed an Aboriginal right to commercial trade in herring-spawn-on-kelp, they also explained that the Crown could justifiably infringe that right without prioritizing the exercise of that right vis-à-vis others.[191] In *Pamajewon*, a majority of the Court recharacterized the

188 *Van der Peet*, *supra* note 3 at paras 302, 314.

189 Kyle, *supra* note 116 at 310.

190 *Van der Peet*, *supra* note 3 at paras 85–91.

191 *Gladstone*, *supra* note 3 at paras 28–19, 57–75.

claimants' assertion of a right to self-government to a right to regulate high-stakes gambling on reserve, and found that the evidence did not support the practice of modern commercial lotteries.[192] The effects of this framework can also be found in subsequent jurisprudence. In *Mitchell v MNR*, the Court found that there was insufficient evidence to demonstrate an Aboriginal right to engage in North-South trade, a finding that also implicitly recharacterized the plaintiff's claim to include an inherent spatial limit.[193] In *Sappier*; *Gray*, the Court recharacterized the right from an Aboriginal right to harvest timber for personal use, which could have engaged small-scale commercial uses, to a right to harvest timber for domestic uses, where domestic uses are understood to be inherently limited.[194] Even in *Tsilhqot'in*, the Court retained principles set out in *Delgamuukw* that could limit the exercise of Aboriginal title to uses that are consistent with the evidence of pre-sovereignty occupation and use.[195]

192 *Pamajewon*, *supra* note 3 at para 30.

193 *Mitchell v MNR*, 2001 SCC 33 at paras 25, 54–60 [*Mitchell*].

194 *R v Sappier*; *R v Gray*, 2006 SCC 54 at paras 2, 24–25 [*Sappier; Gray*].

195 *Supra* note 6 at para 67.

Conclusion

One might respond that the allocation of resources between Indigenous and non-Indigenous peoples is not a response to threat but rather a practical response to a material conflict that must be resolved through some sort of legal framework. This is also true,[196] however, this framing obfuscates both the nature of *how* this conflict is resolved in favour of the non-constitutional, private interests of settlers or the wide-ranging objectives of the state,[197] as well as alternative visions grounded in Indigenous thought and law.[198] The assumption or assertion of Cown sovereignty goes unquestioned within this vision of "reconciliation". This tends to place the onus on Indigenous peoples to reassure the state and settlers, in some cases by taking primary responsibility for countering anti-Indigenous prejudice, that these alternative visions are achievable.[199] Nor does this framing offer any reason why these practical concerns play such a significant role in the Court's jurisprudence, except to say, more or less, "[l]et us face it, we are all here to stay."[200] The Court appears to be responding to a practical and material, as much as a theoretical or philosophical, conflict, between Indigenous peoples' constitutional and political difference – their inherent rights – and the fact that settlers are here to stay.[201] Even if we cannot locate an affect of threat in the written reasons of the Court or the behaviours of parties, counsel, and the justices, I have demonstrated how we can *read* the Court's jurisprudence through the lens of threat, just like any of the other framings of reconciliation, to better understand how this jurisprudence sustains settler supremacy into the future.

196 See, for example, Slattery's characterisation of the post-s. 35 jurisprudence as emanating from "principles of reconciliation": Slattery, *supra* note 23 at 260, 262. With respect to the inherent right to self-government, it may be that the Court is reluctant to find such a right absent sufficient assurance that Indigenous peoples have the current capacity to exercise it, and that their exercise of that right will respect the rights of vulnerable persons and accommodate provincial and federal jurisdiction: Wilkins, "Take your Time and Do It Right", *supra* note 23 at 252–59. Christie argues that the Court was motivated to avoid the introduction of "absolute rights" for Aboriginal peoples: Christie, "Judicial Justification", *supra* note 126 at 60.

197 Christie suggests that "[i]n conceptualizing the problem as one about the fair allocation of resources, so that parties may get on with the business of pursuing value-generating projects, the law has attempted to envelop the situation in liberal garb": Christie, "Law, Theory and Aboriginal Peoples" *supra* note 133 at 90.

198 See, generally, John Borrows' argument for Indigenous legal orders and self-government as part of the rule of law and governance in Canada in Borrows, *Canada's Indigenous Constitution*, *supra* note 21.

199 See, for example, Wilkins' recommendation to "dispel mainstream perception—and the predisposition to believe—that power in Aboriginal communities is being used arbitrarily and irresponsibly": Wilkins, "Take your Time and Do It Right", *supra* note 23 at 268. Recall earlier commentary on anti-Indigenous prejudice and the perception that Indigenous peoples receive undue advantage or are inherently lazy: Morrison et al, *supra* note 13. See also Borrows, *Canada's Indigenous Constitution*, *supra* note 21 at 166.

200 *Delgamuukw*, *supra* note 1 at para 186.

201 Christie, however, argues that liberalism both establishes the problem and its resolution by framing s 35 as a process of accommodating Aboriginal rights alongside other interests: Christie, "Law, Theory and Aboriginal Peoples", *supra* note 133 at 89.

While the state benefits from the constitutionalization of Indigenous peoples' rights as "Aboriginal rights," gaining moral legitimacy and, from it, state authority, it cannot admit or recognize the full scope of those rights without threatening its prioritization of resources to settlers and of the interests of the settler state. The Court's Aboriginal law jurisprudence responds to this threat through the creation of an asymmetrical constitutional framework, one in which Indigenous peoples' rights are translated into a set of "Aboriginal rights" that do not challenge the fundamental prioritization of resources to settlers and the settler state. At the same time, the Court cannot cleanly admit this asymmetry without also undermining the moral legitimacy that is claimed through its processes of reconciliation. The Court's vision of reconciliation cannot *appear* as a response to *threat*, it cannot appear asymmetrical or unprincipled, because even the looming acknowledgement of threat discloses the underlying challenge that Indigenous peoples' rights present to the future of the settler state (as it currently constitutes itself). I argue that the management, or de-escalation, of this threat, finding a way for us all to be "here to stay" in much the same way, is the objective of the Court's reconciliation jurisprudence.[202]

As I have argued, the Aboriginal law jurisprudence, as it is employed by the Court, functions to obscure the perceived threat of non-inherently limited rights to the allocation of resources to settlers. There is a sense, found within the Court's more recent jurisprudence, that the balance struck in 1996 and 1997 was just and appropriate. The Court's foundational jurisprudence has become fortified through the recursive practices of litigation and precedent. A jurisprudence functionally created in a discrete historical moment has become the nearly uncontested framework through which Aboriginal rights and title are litigated and negotiated.

My argument in this article is not one-sided: the Court has explained at length the philosophical and legal basis for its vision of reconciliation. For example, the Court in *Gladstone* reasons that the prioritization of non-inherently limited rights over non-Indigenous users of a resource would be akin to creating an exclusive right for the Aboriginal group vis-à-vis those who do not have a constitutionally-protected right but who may have a private interest in the underlying resource; this, the Court explains, is not the purpose of the constitutional protection of section 35. But by *threatening* reconciliation – by making threat visible – we can observe how this jurisprudence minimizes the perceived or actual threat of Indigenous peoples' political and legal differences and secures the continued access of resources – material and symbolic – for the settler state.

The Court's foundational jurisprudence has significantly muted the perceived threat of Indigenous peoples' inherent rights to the preferential allocation of resources to settlers and the state. Without ever having to go so far as to apply a sovereign incompatibility analysis,[203] the SCC has effectively

202 *Delgamuukw*, *supra* note 1 at para 186. As I argue elsewhere, "no more apt statement of settler futurity may ever be spoken": Franks, *supra* note 2 at 755.

203 In his dissenting reasons in *Mitchell v MNR*, Binnie J reasoned that Akwesasn'e's right to international trade or mobility across borders was incompatible with the Crown's sovereign jurisdiction over international borders: *Mitchell*, *supra* note 193 at paras 155–64.

limited Indigenous rights and title from encroaching on key state and private property interests through a series of internal or inherent limits; an essentialist interpretation of Indigenous culture;[204] a framework for justified infringement; an interpretation of Canada's legislative and executive branches that excludes Indigenous peoples from being consulted on legislation that may affect their Indigenous rights;[205] the principle that the Indigenous perspective "must be framed in terms cognizable to the Canadian legal and constitutional structure";[206] through framing the observance of Indigenous protocols as an "abuse of process";[207] and in one case, "clarifying" its reasons after settler violence in Atlantic Canada.[208] Canadian law's adversarial stance – not necessarily lost within a duty to consult and accommodate framework that privileges the Crown as decision-maker[209] – further structures the perception of threat in legal issues related to Indigenous peoples and their rights and laws. In each of these cases, "reconciliation" is deployed to resolve the threat of Indigenous self-government and sovereignty to the settler state and its interests. In the end, what is legally cognizable is limited to what is tolerable to settler futurity.

In *Sparrow*, Dickson CJ established a vision for reconciliation that motivated the Crown to negotiate the content of section 35 outside of the courts. In *Van der Peet*, *Gladstone*, *Pamajewon* and *Delgamuukw*, a majority of the Court set out a framework that asymmetrically preferred the allocation of resources

204 The SCC's harvesting decisions seem to place an inherent limit on the ability of First Nations to exercise Aboriginal rights in ways that would appear to be commercial, or in short, that would compete with non-Aboriginal commercial interests. The Court's reasoning in these cases is often based on its interpretation of the anthropological and historical evidence of the First Nations' harvesting practices, and an implicit comparison with European market economies. In *Sappier*, a majority of the SCC found that the Woodstock First Nation had an Aboriginal right to harvest logs for "domestic use"; the majority explains, "[t]he word 'domestic' qualifies the uses to which the harvested timber can be put. The right so characterized has no commercial dimension": *Sappier*; *Gray*, *supra* note 194 at para 25. In *Marshall*; *Bernard*, the SCC explicitly rejected the Mi'kmaq's asserted right to harvest logs for commercial purposes: *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 6. Furthermore, in *Lax'Kwallams*, the SCC reasoned that the First Nation's trade in eulachon grease was historically limited by their seasonal harvesting and that such a practice could not establish either a commercial right to trade in eulachon grease or other fisheries products. In this way, the Court imposed an inherent limit on the nature of the Aboriginal right, limiting it to its historical form: *Lax Kw'alaams Indian Band v Canada* (*Attorney General*), 2011 SCC 56 at paras 48–59.

205 *Mikisew Cree First Nation v Canada* (*Governor General in Council*), 2018 SCC 40 at paras 50–53.

206 *Van der Peet*, *supra* note 3 at para 49.

207 *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 36.

208 *R v Marshall*, 1999 CanLII 665 (SCC); *R v Marshall*, 1999 CanLII 666 (SCC). McNeil wonders "whether the Supreme Court was spooked by the sometimes violent reaction to Marshall [No. 1] in the Maritime Provinces and so made concessions to elements of the non-Aboriginal populace." McNeil, "Reconciliation and the Supreme Court", *supra* note 124 at 22.

209 *Haida*, *supra* note 6 at paras 60–63.

to settlers and the settler state. Combined with the costs of Aboriginal rights and title litigation, the majority's asymmetrical framework motivated Indigenous peoples to negotiate with the Crown – on uneven terms. As Bradford Morse predicted, the majority's framework has become "thoroughly unattractive" as a means to secure a judicial resolution for Indigenous claimants, particularly as it relates to claims to self-government.[210] The framework established by the majority in 1996 and 1997 is now beginning to buckle under its own restrictiveness, as Parliament turns to legislation[211] and the courts turn to the *United Nations Declaration on the Rights of Indigenous Peoples*[212] as an alternative vision for the future.[213] Much like how the Court encountered a set of cases that challenged the existing status quo in 1994 through to 1997, the SCC is now similarly having to grapple with cases that go to the heart of the perceived threat of Indigenous self-government to Canada's existing constitutional and legal order.[214] Time will tell whether we will remain here to stay in much the same way.[215]

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210 Morse, *supra* note 85 at 1011.

211 See *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, SC 2019, c 24; *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants*, QCCA 2022 185, affirmed in large part in *Reference re An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, 2024 SCC 5 [*C-92 Reference*].

212 UNGA, 61st Sess, UN Doc A/61 (2007) GA Res 295 (II).

213 *White and Montour*, *supra* note 115 at paras 1233–37, 1291–339; Brenda Gunn, "Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law" in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo: Centre for International Governance Innovation, 2017) at 29, online (pdf): <https://www.cigionline.org/static/documents/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf>.

214 *Dickson*, *supra* note 171; *C-92 Reference*, *supra* note 211.

215 Two months after this article was finalized and accepted, the SCC released its judgements in the *C-92 Reference*, *supra* note 211, and *Dickson*, *supra* note 171. Although these cases have been represented as upholding the inherent right to Indigenous self-government, I would argue that these cases do not fundamentally alter the analysis presented in this article. The *C-92 Reference* affirms federal jurisdiction over "Indians, and lands reserved for the Indians" without delving into the controversies surrounding *Pamajewon*, *supra* note 3. The Court split, quite strongly, in *Dickson* on the relationship between Indigenous self-government, the federal and provincial governments, and the application of the *Charter*. The majority, written by Kasirer and Jamal JJ, offers a "halfway house", to borrow Sharpe and Roach's (*supra* note 33) characterization of Dickson CJ's approach, that extends the *Charter* to some exercises of Indigenous self-government, while inviting a potentially greater and welcomed recognition of "Indigenous difference" as more than cultural difference. Rowe J, dissenting in part, and Martin and O'Bonsawin JJ, dissenting jointly in part, represent the two alternative poles, with Rowe J holding that the *Charter* does not apply to exercises of Indigenous self-government where the Indigenous government is not an emanation or delegate of a federal or provincial government, and Martin and O'Bonsawin JJ writing to ensure that there are not "*Charter*-free" zones in Canada. I would hesitate, however, to apply my thesis to the reasons of O'Bonsawin J and I intend to explore this hesitation further in future work.