STATUTORY LIMITATION OF ABORIGINAL OR TREATY RIGHTS: WHAT COUNTS AS JUSTIFICATION?*

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I SECTION 35 OF THE *CONSTITUTION ACT, 1982*

Section 35(1) of the *Constitution Act, 1982*, provides that:

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

Before 1982, Aboriginal and treaty rights were recognized by Canadian law, but they were not immune from the doctrine of parliamentary sovereignty: they could be extinguished or altered by the competent legislative body, which was the Parliament of Canada, acting under its power over "Indians and lands reserved for the Indians" (*Constitution Act, 1867*, section 91(24)). Immediately after the enactment of section 35, it was not perfectly clear that this

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situation had changed because section 35 was outside the *Charter* (which ends at section 34 of the *Constitution Act, 1982*), and the words "recognized and affirmed" seemed to fall short of the language of section 1 of the *Charter* which "guarantees" the rights and freedoms set out in the *Charter*. However, in 1990 in *R v Sparrow*,[1] the Supreme Court of Canada held unanimously that section 35 should be interpreted as a constitutional guarantee of Aboriginal and treaty rights. As a constitutional guarantee, section 35 had the effect of nullifying legislation that purported to extinguish or alter the guaranteed rights.

The *Sparrow* ruling that section 35 was a constitutional guarantee led to another question. Because section 35 was outside the *Charter*, it was not subject to the section 1 qualification that rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Did that mean that no limits to Aboriginal or treaty rights could be enacted? The *Sparrow* Court answered no: like *Charter* rights, the section 35 rights were not absolute. The words "recognized and affirmed" impliedly authorized federal laws (later expanded to include provincial laws as well)[2] that could be justified as reasonable limits on Aboriginal and treaty rights.

There have been no cases actually applying section 35 justification by holding a right-infringing law to be justified as a reasonable limit, and only a few cases have said anything useful about the standards of section 35 justification. The purpose of this paper is to explain what the courts have said and, based primarily on those *dicta*, to suggest a tentative framework for section 35 justification.

II *SPARROW*

In *Sparrow*, a member of the Musqueam Indian band was charged under the federal *Fisheries Act* with fishing using a net longer than was permitted by the terms of his band's licence, which had been issued under regulations made under the *Act*. The Supreme Court held that the defendant was exercising an Aboriginal right to fish that was guaranteed by section 35(1). Could the right be regulated by the *Fisheries Act* and its regulations? Writing for a unanimous Court, Dickson C.J. and LaForest J. answered yes:

> In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the *Charter*, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).[3]

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1. *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR].

2. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 151-52, [2014] 2 SCR 257 [*Tsilhqot'in*]. The Court held that the doctrine of interjurisdictional immunity did not apply to block provincial laws otherwise within provincial competence (for example, laws over provincial forests) that applied to Aboriginal and treaty rights, and that the application of provincial laws to Aboriginal and treaty rights was governed by the same s 35 framework established in *Sparrow* for federal laws.

3. *Sparrow*, *supra* note 1 at 1109.

And they went on to say:

> Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty [the honour of the Crown] and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[4]

They also outlined the standards that would have to be met for right-infringing legislation to be upheld as a justified limit on the section 35 right:

> [1] First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.
>
> [2] …the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government *vis*-à-*vis* aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.[5]

The Court went on to say that this special trust relationship will require a consideration of how limited resources will be allocated:

> The constitutional nature of [Aboriginal] food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established.
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> [3] …Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least,

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4. *Ibid*.

5. *Ibid* at 1113, 1114.

> to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.[6]

This test looks quite a bit like the *Oakes* test that governs infringements of the *Charter* pursuant to section 1, but its distinguishing feature is the recognition of the "special relationship" between the government and Aboriginal people. That relationship is variously described in terms of "honour of the Crown," "trust" and "fiduciary". In light of later developments that have broadened the concept of honour of the Crown and narrowed the application of a "trust" or "fiduciary duty" to Aboriginal-title situations,[7] it is best to think of the special relationship between the government and Aboriginal people in a case like *Sparrow*, where Aboriginal title is not being asserted, in terms of honour of the Crown—a duty on government always to act honourably in its dealings with Aboriginal people. And the goal of honourable conduct, of the special relationship, is "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown".[8]

The actual outcome of *Sparrow* was inconclusive. The Court held that it did not have enough facts to decide whether the net-length restriction would satisfy the standard of justification, and it ordered a new trial to permit the making of findings of fact that would enable the issue of justification to be resolved. There is no record of any new trial, and we do not know what happened to the charge against Mr. Sparrow.

III FROM *SPARROW* TO *TSILHQOT'IN*

The Supreme Court of Canada has commented on and considered the *Sparrow dicta* on a number of occasions over the past 24 years.[9] An important development was the ruling in *R v Badger*[10] that the justificatory regime applied to treaty rights as well as to Aboriginal rights. However, the discussion of the content of the justificatory standards has all been *dicta*, and it has mainly focused on the requirement of a valid legislative objective. Indeed, all Supreme Court cases discussing the *Sparrow* test have been resolved in one of three ways:

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6. *Ibid* at 1116, 1119.

7. See especially *Manitoba Métis Federation Inc v* Canada (Attorney General), 2013 SCC 14 at para 59, [2013] 1 SCR 623. For a general discussion, see PW Hogg and L Dougan, "The Honour of the Crown: Reshaping Canada's Constitutional Law", Sup Ct L Rev [forthcoming].

8. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 17, [2004] 3 SCR 511 (not a s 35 justification case).

9. See e.g. *R v Badger,* [1996] 1 SCR 771, 133 DLR (4th) 324; [*Badger* cited to SCR] (treaty rights); *R v Nikal,* [1996] 1 SCR 1013, 133 DLR (4th) 658; [*Nikal* cited to SCR] (fishing rights); *R v Gladstone,* [1996] 2 SCR 723, 137 DLR (4th) 648; [*Gladstone* cited to SCR] (right to sell fish); *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; [*Van der Peet* cited to SCR] (right to sell fish); *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672, 137 DLR (4th) 528 [*NTC Smokehouse* cited to SCR] (right to sell fish); *R v Côté*, [1996] 3 SCR 139, 138 DLR (4th) 385 [*Côté* cited to SCR] (fishing rights); *R v Adams*, [1996] 3 SCR 101, 138 DLR (4th) 657; [*Adams* cited to SCR] (fishing rights); *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; [*Delgamuukw* cited to SCR] (title); *R v Powley*, [2003] 2 SCR 207, 230 DLR (4th) 1 [*Powley* cited to SCR] (hunting rights).

10. *Badger*, *supra* note 9 at para 97.

1. as in *Sparrow* itself, a new trial was required because of insufficient evidence of justification;[11]
2. the Court did not find an infringement of a section 35 right, and so there was no need to make a finding of justification;[12] or
3. the Court was not satisfied that the legislative objective pursued was a valid one, so that there was no need to take the justification analysis any further.[13]

The outcome of these cases has left a significant gap in our understanding of the secondary stages of the *Sparrow* test requiring that government action be consistent with the Crown's special relationship with Aboriginal peoples. However, there has certainly been some useful discussion of the primary requirement of a valid legislative objective.

In *Sparrow*, the Court had stated that valid legislative objectives might include conserving and managing a natural resource, and preventing the exercise of section 35 rights in a way that would cause harm to Aboriginal people or the general population. However, the Court was clear that the "public interest" was too vague to qualify as a valid legislative objective.[14]

The rationale behind these valid legislative objectives was well-articulated by a dissenting McLachlin J. (as she was then) in *R v Van der Peet* in 1996:

> [Conservation and prevention of harm to others] are indeed compelling objectives, relating to the fundamental conditions of the responsible exercise of the right. As such, it may safely be said that right-thinking persons would agree that these limits may properly be applied to the exercise of even constitutionally entrenched rights. Conservation, for example, is the condition upon which the right to use the resource is itself based; without conservation, there can be no right. The prevention of harm to others is equally compelling. No one can be permitted to exercise rights in a way that will harm others. For example, in the domain of property, the common law has long provided remedies against those who pollute streams or use their land in ways that detrimentally affect others….Viewed thus, the compelling objectives foreseen in *Sparrow* may be seen as united by a common characteristic; they constitute the essential pre-conditions of any civilized exercise of the right.[15]

Lamer C.J., writing for the majority in *R v Gladstone,* added some other potentially valid legislative objectives.[16] The issue in that case was whether legislative restrictions on the sale of herring spawn on kelp could be justified in their application to Aboriginal people who had

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11. See e.g. *Badger*, *supra* note 9 (no evidence); *Gladstone*, *supra* note 9 (no evidence).

12. See e.g. *Van der Peet*, *supra* note 9 (no Aboriginal right infringed); *NTC Smokehouse*, *supra* note 9 (no Aboriginal right infringed).

13. See e.g. *Nikal*, *supra* note 9 (no evidence led by government, therefore infringement not justified); *Adams*, *supra* note 9 (sport fishing not valid legislative objective); *Côté*, *supra* note 9 (sport fishing not valid legislative objective; note that the Court also briefly stated that because no priority was granted to the Aboriginal right to fish, the Crown's fiduciary duty had not been met either); *Powley*, *supra* note 9 (conservation very important concern, but evidence did not support justification).

14. *Sparrow*, *supra* note 1 at 1113.

15. *Van der Peet*, *supra* note 9 at paras 305–306.

16. *Gladstone*, *supra* note 9.

an Aboriginal right to harvest and sell the spawn. In *Sparrow*, the Court had said that the holders of Aboriginal rights had to be given priority in access to a resource such as the fishery. In *Gladstone*, Lamer C.J. qualified this ruling, saying that priority was only required when the Aboriginal right was internally limited, as was the case with a right to fish *for food*, which is internally limited by the fact that the right-holders will need only so many fish for food. Giving priority to an internally limited Aboriginal right would leave room for non-Aboriginal people to gain access to the resource (assuming conservation goals were not transgressed). But the right to engage in *commercial* fishing, such as the right to harvest herring spawn for sale on the open market, has no internal limitation, and granting priority to the Aboriginal right would confer on the Aboriginal right-holders the power to absorb the entire fishery, eliminating all non-Aboriginal access to the resource. Lamer C.J. held that this was not an acceptable outcome, and held that, for an Aboriginal right without internal limits, section 35 justification would not require Aboriginal priority, but, after taking the Aboriginal right into account, could be satisfied by more general societal objectives:

> … objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.[17]

In *Gladstone*, the Court concluded that there was insufficient evidence to determine whether the regulatory scheme of the sale of herring spawn was justified, and remitted the issue to a new trial.

In 1997 in *Delgamuukw v British Columbia*, which was an Aboriginal-title claim, Lamer C.J. for the majority of the Court expanded upon the type of legislative objectives that could potentially justify a section 35 infringement.[18] He pointed out that the Crown's fiduciary duty would normally involve a "duty of consultation" with Aboriginal people before decisions were taken with respect to their lands. He also pointed out that "fair compensation" would normally be required when Aboriginal title was infringed.[19] "In the wake of *Gladstone,*" he acknowledged that "the range of legislative objectives that can justify an infringement of aboriginal title is fairly broad," and he elaborated:

> Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community'. In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations

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17. *Ibid* at para 75.

18. *Delgamuukw*, *supra* note 9.

19. *Ibid* at paras 168–169.

> to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. [20]

The suggested objectives are indeed broad, and the Chief Justice did not explain how they could be related to the reconciliation with which the quotation starts. However, as we shall explain in the next section of this paper, the quotation was picked up, approved and elaborated on in the *Tsilhqot'in* case in a helpful way.

IV *TSILHQOT'IN*

At the time of writing, the latest Supreme Court case discussing section 35 justification is *Tsilhqot'in Nation v British Columbia*,[21] released in 2014. In this case, the Court considered a claim of Aboriginal title to land by the Tsilhqot'in Nation. The First Nation had originally challenged licences issued under the province's *Forest Act* authorizing a private company to engage in commercial logging on provincial Crown land that the First Nation considered to be part of its traditional territory. The First Nation later amended its original claim to include the claim of Aboriginal title. The Court held that the logging licence was invalid because there had been no consultation by the province with the First Nation before the licence was issued. At that time, Aboriginal title had not been established, but the duty of consultation applied because there was a credible claim of Aboriginal title. The Court went on to hold that the claim of Aboriginal title was also established. Because the logging licence was invalid for lack of consultation during the period before any Aboriginal right was established, there was no breach of a section 35 right, the *Sparrow* test was not applicable, and it was not necessary to decide whether the licence could be justified under section 35. Nonetheless, McLachlin C.J., who wrote for the unanimous Court, wanted to provide some guidance for the future and discussed in some detail the issue of section 35 justification of a law infringing Aboriginal title:

> To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.[22]

The first *Tsilhqot'in* requirement of justification is that the government show that it "discharged its procedural duty to consult and accommodate." Since this requirement is ranked first, it seems clear that a court would not need to assess the government's proposed objective if the government did not discharge its duty to consult and accommodate. This is a new element of the justification framework. Consultation was referred to briefly in *Sparrow*, but as one of the secondary tests following a finding of a valid legal objective.[23] *Tsilhqot'in* built on the Court's statement in *Delgamuukw* that "[t]here is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified."[24] Of course, to say that consultation is "relevant" to section 35

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20. *Ibid* at para 165.

21. *Tsilhqot'in*, *supra* note 2.

22. *Ibid* at para 77.

23. *Sparrow, supra* note 1 at para 82.

24. *Delgamuukw*, *supra* note 9 at para 168.

justification is not nearly as strong as McLachlin C.J.'s ruling that consultation is an absolute requirement of section 35 justification.

McLachlin C.J. pointed out that there is no single standard for consultation and accommodation. The required degree of consultation and accommodation lies on a spectrum:

> The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.
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> Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of section 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.[25]

This spectrum is incomplete in that it says nothing about the level of consultation in a case where an Aboriginal or treaty right less than title, such as a right to fish or hunt, is affected by government action, although it is clear that the duty of consultation applies in that case.[26]

The second *Tsilhqot'in* requirement of section 35 justification is a "compelling and substantial" legislative objective. McLachlin C.J. in *Tsilhqot'in* talked about the meaning of a "compelling and substantial" legislative objective:

> As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.[27]

The Court left no doubt that the types of objectives that could justify an infringement of a section 35 right have expanded far beyond the types of objectives contemplated in *Sparrow*. McLachlin C.J. for the Court quoted with evident approval the following passage referred to earlier from *Delgamuukw*:

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support

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25. *Tsilhqot'in*, *supra* note 2 at paras 79–80.

26. See *R v Marshall (No 2)*, [1999] 3 SCR 533 at para 43, 179 DLR (4th) 193 [*Marshall (No 2)*].

27. *Tsilhqot'in, supra* note 2 at para 82.

> those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.[28]

The objective claimed by the government for the logging licences in *Tsilhqot'in* was "the economic benefits" that would be realized from the licensed logging. McLachlin C.J. had no difficulty in finding that this was not a sufficiently "compelling and substantial" objective to satisfy the *Sparrow* justification. The economic benefits were dubious in light of the trial judge's finding that the cutting sites were not economically viable; and, even more important, any economic benefits would not be shared with the Aboriginal title-holders. Moreover, the focus of the objective should be on the "economic value of logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder."[29] On these facts, the economic benefits (if any) were outweighed by the obvious detrimental effects of the logging on the value of the Aboriginal resource.

The third *Tsilhqot'in* requirement of section 35 justification is consistency with the Crown's fiduciary obligation to Aboriginal people:

> [T]he Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.[30]

This statement of "fiduciary duty" is framed in a way that is uniquely applicable to Aboriginal-title cases. However, the honour of the Crown would impose similar obligations on government for justification of infringements on non-title Aboriginal or treaty rights, such as rights to fish and hunt. The Court elaborated this branch of section 35 justification in terms that borrowed from the *Oakes* framework for section 1 justification:

> Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).[31]

This is very helpful because it suggests that the section 1 jurisprudence on justification of *Charter* infringements (stemming from *Oakes*) will also be applicable to justification of section 35 infringements (stemming from *Sparrow*).

These dicta in *Tsilhqot'in*, combined with the dicta in *Sparrow* and the other cases that preceded *Tsilhqot'in*, provide us with enough information to suggest a five-step

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28. *Ibid* at para 83.

29. *Ibid* at para 127.

30. *Ibid* at para 86.

31. *Ibid* at para 87.

framework of section 35 justification along the lines of the four-step *Oakes* framework of section 1 justification.

V THE FRAMEWORK OF SECTION 35 JUSTIFICATION

Step One: Consultation and Accommodation

Consultation and accommodation is step 1. An infringement of an Aboriginal or treaty right cannot be justified if no attempt has been made by government to consult the Aboriginal right-holders and, if necessary, make a reasonable accommodation of their interests. The idea that a right-holder should be consulted before his or her rights are infringed accords with common sense, and is reinforced in the Aboriginal context by the obligation to reconcile Aboriginal interests with the broader interests of society as a whole. It will not always be easy to achieve, since some projects (pipelines, for example) may affect land involving several Aboriginal groups with a variety of governance structures.

Consultation and accommodation are not clearly defined terms in either common parlance or in the jurisprudence. For example, a scenario contemplated by the Supreme Court in *R v Nikal* (a fishing-rights case) was one where a request for consultation was simply denied by the Aboriginal right-holders.[32] Obviously, that could not be treated as a failure to consult by government. Consultation assumes a good-faith attitude on the part of the Aboriginal right-holder as well as on the government side. It is likely that courts will find that a government has satisfied its duty to consult so long as evidence is provided demonstrating a reasonable effort to inform, consult, and accommodate the Aboriginal group(s) in question.

It is arguable that this portion of the justification framework would only be *required* in *title* cases, although consultation and accommodation would be *relevant* in *all* section 35 infringement justification cases. Before the ruling in *Tsilhqot'in*, all the cases, with one possible exception,[33] followed the lead of *Sparrow* in assuming that the inquiry into consultation and accommodation would come after the finding of a compelling and substantial government objective. *Tsilhqot'in* is the first case to put consultation and accommodation first in the framework of justification, and McLachlin C.J. in doing so spoke only in terms of an Aboriginal-*title* case (which was the case before her). The issue is one on which reasonable people can differ, but we lean to the view that the *Tsilhqot'in* framework was intended to apply to infringements of non-title rights as well as title rights. This avoids the complication of different frameworks depending on the kind of right in issue, which in our opinion is unlikely to have been the Chief Justice's intention. Just as a single *Oakes* framework is applicable to infringements of all *Charter* rights, we believe a single framework should be applicable to infringements of all Aboriginal and treaty rights, non-title as well as title. However, to say (as we do) that consultation and accommodation comes first in every case, is not to say that identical standards of consultation and accommodation would be applied in every case. On the

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32. *Nikal*, *supra* note 9 at para 110.

33. *Marshall (No 2)*, *supra* note 26 at para 44 ("If the Crown establishes that the limitations on the treaty right [to fish] are imposed for a pressing and substantial public purpose, *after appropriate consultation with the aboriginal community*, and go no further than is required, the same techniques of resource conservation and management as are used to control the non-native fishery may be held to be justified" [emphasis added]).

contrary, as we have already explained,[34] McLachlin C.J. emphasized that the required degree of consultation and accommodation lies on a spectrum with the highest level required where Aboriginal title has been established.

Step Two: A "Compelling and Substantial" Government Objective

Since *Sparrow*, the range of "compelling and substantial" objectives has significantly expanded from conservation and prevention of harm, which was all that was explicitly contemplated in *Sparrow*, to include things like the pursuit of economic and regional fairness and the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups,[35] as well as the many objectives suggested in *Delgamuukw* and approved in *Tsilhqot'in*, including the development of agriculture, forestry, mining, and hydroelectric power, the protection of the environment or endangered species, and the building of infrastructure.[36] Many of these objectives have no direct relationship to Aboriginal people.

Any analysis undertaken by a court to determine whether a legislative objective is a valid one would require government evidence demonstrating that the infringing legislation or action reconciles the Aboriginal group's interests with society's broader interests. For example, a government could argue that a hydroelectric project furthers the development of hydroelectric power, which is—according to the Court in *Tsilhqot'in*—a valid legislative objective. To demonstrate that this project would contribute to the reconciliation of Aboriginal and societal interests, the government might have to do no more than demonstrate that the project is beneficial to the Aboriginal right-holders because they would gain access to electric power, along with the other people living in the distribution area. More likely, however, is that a court would look for some additional advantages that are particular to the Aboriginal right-holders; for example, it could look for financial compensation of some kind such as a portion of the revenue from the project, or for credible assurances that the project will create employment opportunities for the Aboriginal right-holders.

A Diversion on Fiduciary Duty

Once the step-two requirement of a "compelling and substantial" legislative objective has been satisfied, the Court in *Tsilhqot'in* said that the government action must still be consistent with the Crown's "fiduciary duty" (and we would add honour of the Crown for non-title cases which would be outside the Crown's fiduciary duty). This is the least-developed part of the section 35 justification framework. The Court has not undertaken a complete fiduciary duty analysis in the section 35 context because, as previously mentioned, governments have never gotten past the "compelling and substantial objective" step of the *Sparrow* test. For this reason, it is very difficult to know what the fiduciary duty analysis will look like in practice.

But, as we have noted, the Court in *Tsilhqot'in* said that it was "implicit" in the Crown's fiduciary duty that steps two to four of the *Oakes* test be satisfied, namely, rational connection, minimal impact, and proportionality of impact. It seems to us that these three *Oakes* tests, especially the last two, would capture all considerations that could be relevant under either

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34. *Tsilhqot'in*, *supra* note 2 at paras 79–80.

35. *Gladstone*, *supra* note 9 at para 75.

36. *Tsilhqot'in*, *supra* note 2 at para 83.

fiduciary duty or honour of the Crown, and that at this point in the section 35 justification analysis it makes sense to move over to the safe and sure pathway marked by *Oakes*. That is why our steps three, four, and five are simply the *Oakes* steps two, three, and four. Our further assumption is that the *Oakes* jurisprudence would also be helpful in understanding the framework, even in the different context of section 35, and would therefore provide guidance to courts drawn into this uncharted part of the territory of section 35 justification. As with section 1 cases, predictability—as the result of a defined, structured framework—should be emphasized in section 35 cases.

This does not displace the importance of the Crown's fiduciary duty (or honour of the Crown duty) to Aboriginal peoples. The fiduciary duty owed by the Crown is already reflected in step one, as the Crown's duty to consult and accommodate is unique to Aboriginal title cases and arises from the honour of the Crown. The fiduciary duty is also reflected in step two, as a valid legislative objective requires the government to reconcile Aboriginal interests. And the fiduciary duty step would be infused into the minimum-impairment part of the *Oakes* test. For example, the priority aspect of the fiduciary duty (as discussed in the context of *Gladstone*[37]) would easily plug into the minimum-impairment portion of an *Oakes*-style test. While the Court in *Gladstone* did not analyze Aboriginal priority to natural resources in this manner, the analysis would be very similar under an *Oakes*-style minimum-impairment analysis.

The suggested steps that follow are simply adaptations of the *Oakes* steps two (rational connection), three (minimum impairment), and four (proportionality of impact).

Step Three: A Rational Connection to the Governmental Objective

The rational-connection test of *Oakes* step two (and therefore our section 35 step three) plays only a minor role in the justification framework, simply weeding out those cases in which the government action has plainly not been driven by the claimed objective because the actual law or other government project bears no rational connection to the claimed objective.[38] Obviously this inquiry would also be essential under section 35 justification.

Step Four: Minimum Impairment of Aboriginal Interests

The minimum-impairment step of the *Oakes* analysis has proved to be the heart and soul of section 1 justification. It is not actually accurate to describe the test as "minimal" impairment (as the Court persists in doing) because "minimal" implies trivial or slight and significant limitations on *Charter* rights have been upheld under section 1. The idea captured by this branch is better described as "minimum" or "least drastic means": the law or other government project should impair the interests of Aboriginal right-holders no further than is reasonably necessary to carry out the governmental objective; that would involve a minimum (but not necessarily a minimal) impairment of the Aboriginal right – the least drastic means of accomplishing the government objective. This idea has been very useful in

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37. *Gladstone*, *supra* note 9 at paras 58–59.

38. See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 2014 supplement), ch 38 at 32ff (for an account of the jurisprudence on the rational connection requirement).

assessing justification under section 1 of the *Charter*[39] and should be equally useful in assessing justification under section 35 as well.

Step Five: Proportionality of Impact on Aboriginal Interests

The proportionality-of-impact step of the *Oakes* analysis calls for a weighing of the adverse (and salutary) effects on the right-holders of the governmental law or other action against the governmental objective. This provides a kind of second check on whether the impact on the right-holders is too severe to be justified. Like rational connection, proportionality of impact has rarely affected the outcome of a case, but the Court likes to follow this step before concluding that a law is justified under section 1.[40]

VI CONCLUSION

This paper has attempted to construct a framework for section 35 justification, consisting of five steps:

1. consultation and accommodation;

2. a "compelling and substantial" government objective;

3. a rational connection to the government objective;

4. minimum impairment of Aboriginal interests; and

5. proportionality of impact on Aboriginal interests.

We have extracted these five steps from the decisions of the Supreme Court of Canada, and especially *Sparrow* and *Tsilhqot'in*. Our goal is to inject some predictability into the section 35 justification analysis by picking up the suggestion in *Tsilhqot'in* that the three secondary steps in the *Oakes* framework of section 1 justification could and should also serve in the section 35 justification framework without losing sight of the Crown's fiduciary duty or honour of the Crown obligations to Aboriginal peoples.

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39. See *ibid*, ch 38 at 36ff (for an account of the jurisprudence on the least drastic means requirement).

40. See *ibid*, ch 38 at 43ff (for an account of the jurisprudence proportionate effect requirement).