Justified Infringement — A Minimal Impairment Approach

Senwung Luk[*]

Notwithstanding historical antecedents and contemporary international law instruments establishing free, prior, and informed consent as a standard to be met before a state infringes on an indigenous right, Canadian law has set out a way to legalize infringements of these rights that took place without consent. It has laid out a doctrine of "justified infringement" of such rights, most notably in the Supreme Court of Canada's Sparrow decision.

This article focuses on the doctrine of Aboriginal title as a kind of Aboriginal right, as it has been developed in the Delgamuukw decision. In one important part of Delgamuukw, the Court interpreted the Sparrow requirements for the Aboriginal title context. The article considers the ways in which the case law has laid out circumstances in which this title can be infringed, and identifies some puzzling elements about this body of law.

It suggests that one direction for this doctrine to take that would be consistent with the Crown's fiduciary obligations to Aboriginal communities would be to hold the Crown to a standard of minimal impairment of Aboriginal title. This is compared with the doctrine of the Crown's fiduciary accountability, especially as it has been applied in the Osoyoos case.

This standard is then applied to a hypothetical example of a proposal for a major resource development project on unsurrendered Aboriginal title lands.

Malgré les précédents historiques et l'existence d'instruments de droit international contemporains établissant le consentement préalable, libre et éclairé comme le critère à satisfaire avant que l'État ne contrevienne à un droit autochtone, le droit canadien a établi une façon de légaliser les atteintes unilatérales à ces droits. Il a établi la notion d'« atteinte justifiée », notamment dans l'arrêt Sparrow rendu par la Cour suprême du Canada.

Dans cet article, l'auteur considère la notion de titre aborigène comme une

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[*] Senwung Luk, BA (Yale), JD (Osgoode), BCL (Oxford), is an Associate at Olthuis Kleer Townshend LLP in Toronto. The opinions expressed herein do not necessarily reflect the views of the firm or its clients. The paper was first presented at the JELP conference in 2012, whose generous participants provided invaluable advice on a variety of matters. I am also deeply indebted to support and illuminating insights from the Journal's meticulous anonymous reviewer, and from Margaret Herrick, Oliver MacLaren, Matt McPherson and Roger Townshend.

sorte de droit ancestral, telle que cette notion a été expliquée dans l'arrêt Delgamuukw. Dans un passage important de cet arrêt, la Cour a interprété les exigences énumérées dans l'arrêt Sparrow dans le contexte d'un titre aborigène. L'auteur étudie ici les circonstances établies par la jurisprudence permettant de porter atteinte à ce titre et en extrait quelques éléments étonnants.

L'auteur propose une façon de rendre cette notion conforme avec le devoir fiduciaire de l'État à l'égard des collectivités autochtones, soit de soumettre l'État à la norme de l'atteinte minimale au titre aborigène. L'auteur compare ceci à la notion de responsabilité fiduciaire, particulièrement de la façon dont elle a été interprétée dans l'arrêt Osoyoos. L'auteur applique enfin cette norme à un exemple théorique de proposition pour un important projet de développement de ressources sur des terres protégées par un titre aborigène non abandonné.

One of the remarkable features of Canadian law and jurisprudence in relation to Aboriginal rights, including Aboriginal title, is the doctrine of justified infringement.[1] Infringement, loosely put, is any violation of Aboriginal rights, usually by the actions of the Crown.[2] This paper will focus on justified infringement of Aboriginal title as a central arena of conflict between Aboriginal rights and resource development in Canada. The courts have laid out tests for when such violations may be "justified." These tests will be the subject of the analysis of this paper, viewed through the lens of law and jurisprudence on the Crown's fiduciary obligations toward Aboriginal communities. It argues that the best way to elaborate the as yet undeveloped doctrine on justified infringement is to ensure a minimal impairment of Aboriginal title. Using the applications of the minimal impairment standard from the case law on fiduciary obligations, this paper suggests some ways that justified infringement might be applied to Aboriginal title in cases involving major resource developments such as the Northern Gateway Pipeline. This paper does not directly address the application of this argument to Aboriginal rights other than Aboriginal title.

1. INFRINGEMENT WITHOUT CONSENT?

Perhaps the most remarkable feature of the doctrine of justified infringement is that it exists at all. Recent conventions on the standard to meet for the infringement of indigenous rights, such as the *United Nations Declaration on the Rights of*

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1 *R. v. Sparrow*, 1990 CarswellBC 105, 1990 CarswellBC 756, [1990] 1 S.C.R. 1075 at pp. 1109–1111 [S.C.R.] ("*Sparrow*"); *Delgamuukw v. British Columbia*, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1997] 3 S.C.R. 1010 at paras. 160–169 ("*Delgamuukw*").

2 See e.g., *Sparrow*, *ibid*, and *Delgamuukw*, *ibid.* At times, a private party may also be thought to infringe on Aboriginal rights: see e.g., *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 2004 CarswellBC 2656, 2004 CarswellBC 2657, para. 13; *Tolko Industries Ltd. v. Okanagan Indian Band*, 2010 BCSC 24, 2010 CarswellBC 30; *Canadian Forest Products Ltd. v. Sam*, 2011 BCSC 676, 2011 CarswellBC 1261; leave to appeal allowed 2011 CarswellBC 3119 (C.A. [In Chambers]); *Wahgoshig First Nation v. Ontario* (2012), 2011 ONSC 7708, 2012 CarswellOnt 489 (S.C.J.); leave to appeal allowed 2012 CarswellOnt 11203 (Div. Ct.).

Indigenous Peoples, require the "free, prior, and informed consent" of the indigenous community ("FPIC").[3] Instruments as old as the Royal Proclamation of 1763 prohibited the infringement of Aboriginal title unless "the Said Indians should be inclined to dispose of the said Lands."[4] Obtaining that "inclination", or consent, has been the customary way for the Crown to deal with Aboriginal land rights in most of Canada since the Royal Proclamation, with the notable exception of parts of British Columbia, the Yukon, Quebec, and the Maritimes.[5] The infringement or extinguishment of Aboriginal rights, including Aboriginal title, by clearly and plainly intended legislative fiat has also been understood to be possible through the theory of Parliamentary supremacy,[6] as has, exceptionally, the more exotic process of executive extinguishment,[7] and the rather dubious species of judicial extinguishment.[8]

Since the coming in to force of the *Constitution Act, 1982*, which at s. 35(1) "recognize[s] and affirm[s]" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada",[9] the picture of extinguishment of Aboriginal rights has changed. In *R. v. Sparrow*, the Supreme Court seemed to suggest that Aboriginal rights could no longer be legislatively extinguished.[10] However, in its place, it in-

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3 UNDRIP, esp arts 19, 28, 29, 32. FPIC has also been adopted by certain investors to evaluate whether to put capital in development projects: Madhavi Acharya and Tom Yew, "RBC unveils stronger environmental, social risk policy" *Toronto Star*, 23 December 2010, <http://www.thestar.com/business/bank/article/911588 — rbc-unveils-stronger-environmental-social-risk-policy>.

4 *Royal Proclamation of 1763*, reproduced in RSC 1985, App II.

5 See, generally, Richard H Bartlett, *Indian Reserves and Aboriginal Lands in Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1990), esp. chs. 1–3. In these lands, the Crown's occupation and alienation of lands has been without the consent of the Aboriginal community whose traditional lands they are. For litigation seeking recognition of Aboriginal title in the Maritimes, see *R. v. Marshall*, 2005 SCC 43, 2005 CarswellNS 317, 2005 CarswellNS 318.

6 See e.g., Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 *Ottawa L Rev* 301 at 308–311.

7 *Ibid.* at 311–316.

8 *Ibid.* at 327–344, commenting on *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 2000 CarswellOnt 4836, 51 O.R. (3d) 641, [2001] 1 C.N.L.R. 56 (C.A.); additional reasons 2001 CarswellOnt 2998 (C.A.); leave to appeal refused 2001 CarswellOnt 3952, 2001 CarswellOnt 3953 (S.C.C.); reconsideration / rehearing refused 2002 CarswellOnt 1903, 2002 CarswellOnt 1904 (S.C.C.), in which the Court of Appeal for Ontario decided not to give legal effect to the fact that a certain piece of land had never been surrendered by the plaintiff First Nation, because they had not brought their lawsuit in time. It may be that the recent decision of the BC Court of Appeal in *William v. BC* is also an example that fits into this category. The First Nations involved have already announced their intention to appeal this decision: see e.g., <http://www.cbc.ca/news/canada/british-columbia/story/2012/06/27/bc-appeal-court-tsilhqotin-rights.html>.

9 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 35(1).

10 *Sparrow*, *supra* note 1 at 1111.

troduced the concept of the "justified infringement", in which the law permitted interference with Aboriginal rights in a manner that took into account their new status as constitutionally enshrined rights.[11] It seems reasonable to query whether this distinction is viable, since serious infringement will be, in effect, extinguishment. Moreover, the reading-in by the Court of a systematic limit to Aboriginal rights when the text of the *Constitution Act, 1982*, excluded Aboriginal rights from the s. 1 "limiting clause", seemed to explicitly immunize s. 35(1) rights from such "reasonable limits."[12] It is somewhat incongruous that the case that held that the new *Constitution Act, 1982* prohibited the legislative extinguishment of Aboriginal rights also established a framework for the justified infringement of those rights. As suggested above, the very concept of justified infringement stands outside of the long and recently reinvigorated tradition of consent as a precondition for infringing Aboriginal lands and rights. While the departure from the standard of consent may well be a legitimate ground for criticism of Canadian law, stepping back from that approach would require a change of some magnitude in Canadian legal doctrine.[13] Somewhat less ambitiously, this paper suggests a way of interpreting "justified infringement" in a way that is faithful to the Crown's fiduciary obligations to Aboriginal peoples. At the same time the approach suggested here attempts to recognize the extraordinary impact of infringement without consent on Aboriginal communities, and the remarkable departure from historical and international authorities on the acceptable treatment of indigenous interests such infringement demands.

2. THE DOCTRINE OF JUSTIFIED INFRINGEMENT

The Supreme Court of Canada established a framework in *Sparrow* to determine if an infringement of Aboriginal rights is justified. This was, of course, the first Supreme Court case to consider the recently entrenched s. 35(1) of the *Constitution Act, 1982*, which states that:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.[14]

The Court, speaking through Chief Justice Dickson and Justice LaForest, took on the task of giving an authoritative definition to s. 35(1). They took note of the fact that unlike the rights guaranteed in the Canadian Charter of Rights and Freedoms, there was no limiting clause that applied to s. 35(1) rights, since s. 1 did not

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11 *Ibid.* at 1101–19.

12 Critical discussion of this position can be found in: Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8 Const Forum 33; Lisa Dufraimont, "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 *U T Fac L Rev* 1.

13 As Gordon Christie has pointed out, in spite of the use of the language of "reconciliation" in the jurisprudence, the case law remains one that is written from the perspective of the Crown, to which Aboriginal worldviews are expected to adjust: "Developing Case Law: The Future of Consultation and Accommodation" (2006), 39 *UBC L Rev* 139 at 153–57.

14 *Constitution Act, 1982*, *supra* note 8, s. 35(1).

apply to Aboriginal or treaty rights.[15] However, they rejected as "extreme" the position that "any law or regulation affecting aboriginal rights will automatically be of no force or effect."[16] After all, the Court accepted the imperialist orthodoxy that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [traditional lands of Aboriginal peoples] vested in the Crown."[17]

However, the Supreme Court also found that s. 35(1) was to be read in light of the fiduciary obligation that the same Court had recently articulated, in the case of *Guerin v. R.*, to characterize the relationship between the Crown and Aboriginal peoples.[18] A fiduciary obligation is generally found where one party has the

> (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.[19]

In these circumstances, the party in the position of power has, generally, the fiduciary obligation to act in the best interests of the beneficiary.

The Court in *Guerin* had found that the Crown and Aboriginal peoples had just this kind of fiduciary relationship, and that the Crown therefore had an obligation to act in the best interests of Aboriginal peoples.[20] In *Sparrow*, the Court held that this kind of relationship governed the interpretation of s. 35(1) of the *Constitution Act, 1982* as well, stating:

> [W]e find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. [. . .] In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[21]

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

16 *Ibid.*

17 *Ibid.* at 1103. See also Christie, *supra* note 13, for criticism of this stance.

18 *Guerin v. R.*, 1984 CarswellNat 693, 1984 CarswellNat 813, *(*sub nom. *Guerin v. Canada)* [1984] 2 S.C.R. 335 ("*Guerin*").

19 *Hodgkinson v. Simms*, 1994 CarswellBC 438, 1994 CarswellBC 1245, [1994] 3 S.C.R. 377 at p. 408 [S.C.R.].

20 For the development of this doctrine since it was first propounded, see, among others, *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, 2001 CarswellBC 2703, 2001 CarswellBC 2704, [2001] 3 S.C.R. 746 ("*Osoyoos*"); *Roberts v. R.*, 2002 CarswellNat 3438, 2002 CarswellNat 3439, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2002] 4 S.C.R. 245 ("*Wewaykum*"); *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9, 2009 CarswellNat 203, 2009 CarswellNat 204, [2009] 1 S.C.R. 222 ("*Ermineskin*").

21 *Sparrow*, *supra* note 1 at 1108. John Borrows has remarked on the incongruence of the application of fiduciary theory here: "Nevertheless, it is somewhat ironic that a doctrine which has been used to protect Aboriginal peoples from the arbitrary power of government (the fiduciary obligation) was turned on its head and used as a justification for infringing constitutionally protected Aboriginal rights." in "Uncertain Citizens: Aboriginal Peoples and the Supreme Court", (2001) 80 *Can Bar Rev* 15 at 28.

In short, while *Sparrow* asserted that underlying title and sovereignty were vested in the Crown, the Crown's exercise of this power was subject to (and perhaps the foundation of) the supervision of fiduciary accountability, to be applied by the courts.[22] This process of supervision meant that infringements or denials of Aboriginal rights must be justified before the courts.

The *Sparrow* Court then outlined what it meant by a process of justification. First, the Crown must show that the legislation in question has been enacted according to a valid objective.[23] Second, the Crown must show that "[t]he way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples."[24]

The Court then elaborated on what it meant by the first stage of the analysis: of ensuring that the legislation has a valid legislative objective:

> 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.[25]

In juxtaposition, the Supreme Court criticized the invocation of "public interest" as a valid legislative objective "to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."[26]

With respect to the second stage, that of ensuring that the infringement is proceeding in accordance with the honour of the Crown, the Court illustrated what it meant with reference to the facts of the *Sparrow* case. The factual question at issue in *Sparrow* was whether the net length restriction in federal fishery regulations was inconsistent with s. 35(1) of the *Constitution Act, 1982*. The Supreme Court found that "conservation and resource management" was potentially a "surely uncontroversial" legislative objective.[27] However, the Court found that "[t]he constitutional nature of the Musqueam 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, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equaled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right."[28] This meant, according to the Court, that the Aboriginal fishing right must

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22 For an argument that the assertion of sovereignty is itself the justification for fiduciary accountability, see Evan Fox-Decent, *Sovereignty's Promise* (Oxford: OUP, 2011) ch. 2.

23 *Sparrow*, *supra* note 1 at 1110.

24 *Ibid.*

25 *Ibid.* at 1113.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.* at 1116.

be placed ahead of non-Aboriginal fishing rights.[29] Yet the Court was careful to leave room for the case-by-case development of the doctrine of justification:

> 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.[30]

This second-stage analysis in *Sparrow* is crucial to the argument of this paper and should be noted for subsequent discussion here, in light of *Delgamuukw*'s gloss on it.

While *Sparrow* established a doctrine of justified infringement of Aboriginal rights, the doctrine of justified infringement of Aboriginal title, developed in *Delgamuukw*, would take a slightly different approach. The Supreme Court had been clear that Aboriginal title is also an Aboriginal right protected by s. 35(1) of the *Constitution Act, 1982*, but that Aboriginal title was "a distinct species of aboriginal right"[31] that necessitated a different analysis.[32] As such, it would be reasonable to infer that everything said in *Sparrow* about the nature of Aboriginal rights and the burden the Crown must meet to justify its infringement of those rights would apply in equal measure to Aboriginal title, except insofar as *Delgamuukw* highlights differences in nature between the two species of rights.

Delgamuukw maintained the basic two-step structure of the *Sparrow* analysis. First, the infringement must have a valid objective. Second, the infringement must be "consistent with the special fiduciary relationship between the Crown and aboriginal peoples."[33] However, there are certain important differences between the approaches in the two cases. Most importantly, *Delgamuukw* held that:

> [T]the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. 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" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the

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29 *Ibid.*

30 *Ibid.* at 1119.

31 *Delgamuukw*, *supra* note 1 at paras. 1-2, 133–39.

32 *Ibid.* at paras. 160–169. For more on the difference between Aboriginal rights and Aboriginal title, see Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can Bar Rev* 727.

33 *Ibid.* at para. 162. Although *Sparrow* states that the second stage of the analysis must ensure that the infringement is consistent with the honour of the Crown, which is a broader concept than the fiduciary obligations on the Crown, this elision did not seem to make a material difference to the *Delgamuukw* Court's analysis.

> kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.[34]

While the *Sparrow* characterization of conservation as a legislative objective justifying the infringement of Aboriginal rights as "surely uncontroversial" is problematic for its own reasons,[35] the massive expansion of justifiable legislative objectives for the infringement of Aboriginal title in *Delgamuukw* suggests that if Aboriginal title is going to have any bite, it will be through the mouth of the second, fiduciary obligation stage of the analysis. (Indeed, it is not easy to come up with hypothetical legislative activities that do not fit within the list of justifiable objectives in *Delgamuukw*.)[36] It is incumbent upon us, therefore, to take a closer look at how *Delgamuukw* elaborates upon the fiduciary obligation stage of the analysis.

Delgamuukw begins by throwing cold water on the proposition that a synthesis of the fiduciary obligation stage is possible at all. Said the Chief Justice: "What has become clear is that the requirements of the fiduciary duty are a function of the 'legal and factual context' of each appeal."[37] Nevertheless, a synthetic, systematic approach is indeed possible, and desirable in laying out a predictable framework for the resolution of settler-indigenous resource conflicts in Canada.

Indeed, *Delgamuukw* itself made certain definite moves toward systematizing the justification analysis. It laid out three axes of variation in the way the fiduciary obligation is articulated: (1) in the "form which the fiduciary duty takes";[38] (2) in the "degree of scrutiny required by the fiduciary duty";[39] and (3) in the "nature of aboriginal title."[40]

To explain the first axis, that of the form of the fiduciary duty, *Delgamuukw* cited from *Sparrow*, to a previously cited passage: whether a particular infringement is justified. According to *Sparrow*, this depends on circumstances, such as:

> [. . .] 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

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34 *Ibid.* at para. 165. Emphasis in original.

35 André Goldenberg, "'Surely Uncontroversial': The Problems and Politics of Environmental Conservation as Justification for the Infringement of Aboriginal Rights in Canada", (2002) 1 *J L & Eq* 278, criticizing the Supreme Court for, among other things, reasoning as if Aboriginal communities could not be trusted to practice conservation measures.

36 For other criticism of the expansion of the list of justifiable objectives, see Gordon Christie, "*Delgamuukw* and the Protection of Aboriginal Land Interests" (2000-2001) 32 *Ottawa L Rev* 85; Dufraimont, *supra* note 12; Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999) 62 *Sask L Rev* 543.

37 *Delgamuukw*, *supra* note 1 at para 162.

38 *Ibid.* at para. 162.

39 *Ibid.* at para. 163.

40 *Ibid.* at 166.

> question has been consulted with respect to the conservation measures being implemented.[41]

Delgamuukw then explained that there will also be variations on the second axis, in the degree of scrutiny required by the fiduciary duty, but that this variation is "a function of the nature of the aboriginal right at issue."[42] To illustrate his point, the Chief Justice explained the matter with reference to the distinction between *Sparrow* and *Gladstone*. In *Sparrow*, according to him, the Aboriginal community was claiming a right to fish for food, ceremonial and social purposes. As such, the right was "internally limited."[43] In *Gladstone*, the claim was to a right to fish for commercial purposes, and hence had no "internal limit". *Delgamuukw* thus worried that the prioritizing of the Aboriginal right that had taken place in *Sparrow* would mean the total exclusion of non-Aboriginal harvesters if applied to the *Gladstone* situation.[44]

This articulation of the axes of variation on the scrutiny to be applied to claims of justification of infringements of Aboriginal title has attracted much commentary and many have found it confusing.[45] In particular, it would seem that the first two axes seem to collapse upon themselves. Consider, for instance, axis (1), "the form which the fiduciary duty takes", is an inquiry into the nature of the action that the fiduciary duty requires of the Crown. It seems, however, that in the way that the Court has articulated the matter, the form which the fiduciary duty takes is really a question as to whether the actions taken to mitigate the infringement are appropriate. In the passage from *Sparrow* cited by *Delgamuukw*, the examples given are inquiries about whether the infringement is minimized, whether compensation is available to First Nations who have been subject to expropriation, and whether infringing measures have been the subject of consultation. To determine whether such mitigations are appropriate seems really to be a product of the question in axis (2), of what kind of scrutiny the Crown should face. But then the kind of scrutiny that the Crown should face, as a fiduciary, for an attempt to justify an infringement of Aboriginal title depends on the nature of the fiduciary duty in question. Both axes (1) and (2), then, seem merely to have restated the question of whether the mitigation of the infringing measures are appropriate, without really deepening the analysis.

Axis (3), the "nature of aboriginal title", offers more promise at first glance. It is clear that Aboriginal title is a right to exclusive use and occupation of a piece of land.[46] In what way, then, does an exclusive right admit of variation in terms of the nature of the right or the fiduciary duty to protect that right? Lisa Dufraimont, for instance, has argued that "[g]iven that Aboriginal title is an exclusive right, there is

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41 *Sparrow*, *supra* note 1 at 1119.

42 *Delgamuukw*, *supra* note 1 at para. 163.

43 *Ibid.*

44 *Ibid.* at para. 164.

45 See e.g., Dufraimont, *supra* note 11; Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right" in Owen Lippert, ed, *Beyond the Nass Valley: National Implications of the Supreme Court's* Delgamuukw *Decision* (Vancouver: The Fraser Institute, 2000) 55–75.

46 *Delgamuukw*, *supra* note 1 at para. 118.

no justification for according Aboriginal title anything less than full priority."[47] A right to title is, in its nature, either a right to exclusive possession, or it is not. (If it is not, then it is dubious whether the right can be called title at all.) This is not incompatible with the theory that constitutional rights are not meant to be absolute: that is, after all, the purpose of the doctrine of justified infringement. It accepts the idea that Aboriginal title is not inviolable. It merely establishes that such violations — such infringements, are to be justified before they are to be permitted to stand. In the way that *Delgamuukw* understands title, this violability subject to justification does not seem to change its underlying conception as a right to exclusive possession.

How should we look at whether such infringements are justified? That was the question that the portion of *Delgamuukw* on justified infringement, which articulated the three axes of variation, was meant to answer. Yet given that Aboriginal title is a right that by its very nature does not admit of variation, but rather either exists or does not, it is difficult to make heads or tails of what was said on this matter in *Delgamuukw*. Dwight Newman, for example, has worriedly mused that *Delgamuukw* "describe[s] the fiduciary duty requirement as expressed through consultation and compensation. The notion of minimal impairment of the Aboriginal right that had been present in *Sparrow* is nowhere to be found."[48]

Arguably this pessimism, though justified at the time, ought to be reconsidered in light of subsequent jurisprudence from the Supreme Court on the issue of the Crown's fiduciary obligations to Aboriginal peoples.

3. THE ARTICULATION OF THE FIDUCIARY OBLIGATION AS MINIMAL INFRINGEMENT IN OSOYOOS

In *Osoyoos Indian Band v. Oliver (Town)*, the Supreme Court of Canada articulated the Crown's fiduciary obligations toward Aboriginal peoples in a way that has important implications for the doctrine of justified infringement of Aboriginal title. The articulation in *Osoyoos* suggests a helpful way of understanding the somewhat confusing picture of justified infringement that arises out of *Sparrow* and *Delgamuukw*. Specifically, *Osoyoos* provides the analytical framework of a "two-step" approach, in which the Crown at the first step considers whether an infringement is in the public interest, followed by a second step, in which the actual infringement must be undertaken in a manner that minimizes the infringement of Aboriginal interests.

A short recitation of the facts will be helpful in understanding how the *Osoyoos* court arrived at this formulation. The Osoyoos Reserve is located in the Okanagan Valley. As the Court found, some time prior to 1925, a concrete-lined irrigation canal was constructed on a strip of land that bisects the reserve, "to aid in the agricultural development of the South Okanagan region of British Columbia."[49] However, the taking of the land for the canal was not formalized until 32 years later, in 1957, when the British Columbia Minister of Agriculture applied to the

47 Dufraimont, *supra* note 12 at 20.

48 Newman, *supra* note 36 at 560.

49 *Osoyoos*, *supra* note 20 at para. 5.

federal Crown, who obliged with an order-in-council authorizing the taking pursuant to s. 35 of the *Indian Act*. Section 35(3) of the *Indian Act* authorizes the federal Crown to approve of the taking of reserve lands by the provincial Crown. (Absent this provision, such an action would have been outside the jurisdiction of the provincial official, since legislative authority over "lands reserved for Indians" is within the exclusive jurisdiction of the federal legislature, by virtue of s. 91(24) of the *Constitution Act, 1867*.)

The underlying question in *Osoyoos* which attracted the litigation was whether the lands of which the canal was a part were lands within the reserve, such that the Osoyoos Band had the power to impose property tax upon them. To answer this question, the courts had to resolve the question of what interest in land exactly was taken out of the reserve by the 1957 order-in-council. To answer this question, Justice Iacobucci, writing for a majority of the Supreme Court of Canada just four years after *Delgamuukw*, began by putting the question of the Crown's dealings with Indian reserve land in a wider doctrinal context:

> . . . when describing the features of the aboriginal interest in reserve land it is useful to refer to this Court's recent jurisprudence on the nature of aboriginal title. Although the two interests are not identical, they are fundamentally similar.[50]

According to the Court, what governs both Aboriginal title and reserve land is the Crown's fiduciary obligation to Aboriginal peoples. The Court adhered to this position in spite of the federal Crown's strong argument against the application of fiduciary obligations to the expropriation context.[51] The very nature of an expropriation, argued the Crown, meant that fiduciary obligations did not govern Crown conduct in this context. After all, it would be difficult to imagine Equity countenancing any other private law trustee forcibly taking a part of the property held in trust away from the beneficiary, only because it thought such a taking would benefit some other person, who though not a beneficiary of the trustee, nonetheless found the property useful. The Supreme Court forcefully rejected the view urged upon it by the Attorney General of Canada:

> . . . once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.
>
> This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has

50 *Ibid.* at para. 41.

51 *Ibid.* at para. 51.

> been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.[52]

Applied to the facts of the case, the Court found that the minimal interest required to fulfill the Crown's purpose in this case, that of constructing an irrigation canal, was a statutory easement, contrary to the Crown's argument that it had extinguished the Band's title and created a fee simple interest for the canal.[53] As such, the Court held that the canal was subject to taxation by the Band.

The structure of the *Osoyoos* analysis is interesting in that it unreservedly recognizes the potential conflict that arises out of the power that the Crown claims for itself to infringe upon the rights of Aboriginal communities to their lands, but proposes a way to deal with it, through a minimal infringement approach. Such an approach recognizes the pragmatics of the relationship between a Crown that usually sees itself as representing the interests of the settler state and settler society, and subject to the majoritarian (settler) electoral pressures that any democratically elected legislature would be subjected to. It seeks to reconcile that with the Crown's legal duties, animated by its fiduciary obligations, to act in the best interests of Aboriginal communities.[54]

For the purposes of the doctrine of justified infringement of Aboriginal title, the analysis of the *Osoyoos* approach shares the same two-step structure of the *Sparrow* approach. The first step is to consider the Crown's objective in implementing the infringement. In *Osoyoos*, this step is subsumed by the Court's recognition that the Crown action here was one of effective expropriation. The Court, in requiring that the purpose of the expropriation be for the public interest, is in effect applying a valid objective test to the expropriation. In the specific facts of the *Osoyoos* case, the Court seemed to accept that the construction of the irrigation canal was indeed a valid objective.[55]

However, that was not the end of the analysis. The inquiry then moved on to the question of whether the infringement impaired the Aboriginal right only to the minimum extent necessary to accomplish the objective. As the Court found that the order-in-council giving effect to the expropriation was ambiguous, it held that the ambiguity obliged the Court to read the document in a way that minimized the infringement. If the document had not been ambiguous or unclear in some other way, but had instead clearly taken more than the minimum interest, it would seem that the exercise of Crown power to effect this taking would be invalid by virtue of the Crown's fiduciary obligations, at least where the Aboriginal interest in question was constitutionally protected: a situation undoubtedly the case in Aboriginal title lands.[56] More than merely an interpretive lens through which to construct ambigu-

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52 *Ibid.* at paras. 52-53.

53 *Ibid.* at para. 89.

54 For an elaboration of this argument, see Senwung Luk, "Not so many hats? The Crown's Fiduciary Obligations to Aboriginal Communities since *Guerin*", forthcoming in *Sask L Rev*.

55 *Osoyoos*, *supra* note 20 at para. 52.

56 *Ermineskin*, *supra* note 20. For Aboriginal title as a constitutional right protected under s. 35(1) of the *Constitution Act, 1982*, see *Delgamuukw*, *supra* note 1 at paras. 133–39.

ous wording, the Crown's fiduciary obligations also perform a regulative function, to restrict the Crown's actions where those actions would violate those obligations.

Osoyoos is a crucial waypoint in the development of the doctrine of justified infringement. While *Sparrow* and *Delgamuukw* spoke in generalities and abstractions, *Osoyoos* concerned a specific infringement that the Crown sought to justify with reference to specific arguments. Notably, the *Osoyoos* Court quite self-consciously states that it was considering an interest in land similar to Aboriginal title, and was also modeling itself on the fiduciary analysis that arose out of *Delgamuukw*;[57] and that this is precisely the kind of analysis endorsed by both *Sparrow* and *Delgamuukw*. Recall that *Sparrow* instructed future courts to consider under the rubric of the Crown's fiduciary duty:

> (1) whether there has been as little infringement as possible in order to effect the desired result;
>
> (2) whether, in a situation of expropriation, fair compensation is available; and
>
> (3) whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.[58]

The *Osoyoos* approach is really just an application of the approach enunciated in (1). Parenthetically, the approach in (2) is provided for by *Guerin v. R.*, in which it was held that such compensation is to be calculated according to equitable principles.[59] The approach in (3) has been expanded upon by the Supreme Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*[60] and other subsequent case law.[61] Given the importance of approaches (2) and (3) in the development of the doctrine, it would be remarkable if approach (1) was not accorded the same acceptance.

The *Osoyoos* approach is also an eminently sensible application of the *Delgamuukw* axes of variation on the degree of scrutiny of the Crown action and the nature of Aboriginal title. In cases of taking of Aboriginal title lands, the nature of Aboriginal title really applies quite simply to the situation: Aboriginal title recognizes the right to exclusive possession of the land — the right to exclude all others, including the Crown and resource development proponents. An infringement is a breach of that right to exclusive possession and calls for the courts to review the validity of that infringement. As stated in *Delgamuukw*, the variation in the degree

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57 *Osoyoos*, *supra* note 20 at para. 51.

58 *Sparrow*, *supra* note 1 at 1119. Numbering and formatting added.

59 *Guerin*, *supra* note 18.

60 *Haida Nation*, *supra* note 2.

61 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 2004 CarswellBC 2654, 2004 CarswellBC 2655; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757; *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, 2010 CarswellYukon 140, 2010 CarswellYukon 141; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, 2010 CarswellBC 2867, 2010 CarswellBC 2868.

of scrutiny "is a function of the nature of the aboriginal right at issue."[62] Where the right is to exclusive possession, the scrutiny should in turn be strict. The clear doctrinal device for implementing this kind of strict scrutiny is the minimal infringement condition. Seen in the light of *Osoyoos*, *Delgamuukw* can be a robust protection for Aboriginal title, rather than the worrisome sweeping justification of state power that it might seem to be.[63]

4. JUSTIFIED INFRINGEMENT AND MAJOR RESOURCE DEVELOPMENTS

Major resource developments are likely to have impacts on Aboriginal rights and Aboriginal title. In British Columbia, the nineteenth century colonial government asserted Crown sovereignty over most of the lands constituting the province with the assumption that Aboriginal peoples had no rights over the land; Aboriginal title claims in the province are therefore still the subject of major disputes.[64] In British Columbia, as well as the rest of Canada, resource developments and the infrastructure supporting those development projects are therefore likely to result in infringements on Aboriginal rights.[65] Even where Aboriginal rights and title have yet to be proven, the Aboriginal community is owed a duty of consultation and accommodation by the Crown.[66] The spectre of major resource developments in Canada suggests that justified infringement will have significant implications for the relationship between the law and resource development projects; though two caveats must be articulated at this stage.

First, it is important to recall that from the perspective of the Crown, lands that have not been the subject of treaties between the Crown and Aboriginal communities are considered to be lands in which Aboriginal title is not yet "proven". (From the perspective of most Aboriginal communities, of course, the extent of a community's traditional lands is a matter of traditional knowledge, and thus "proven" by the epistemological standards of that system of knowledge.) In *Delgamuukw*, the Supreme Court of Canada established an analytical framework by which courts could recognize, through litigation, that the Aboriginal title of an Aboriginal community has been "proven."[67] In brief, the Court held that the Aboriginal community must show that it occupied the lands in question at the time of the assertion of

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62 *Delgamuukw*, *supra* note 1 at para. 163.

63 See e.g., Christie, *supra* note 36 at 106.

64 See e.g., *Delgamuukw*, *supra* note 1; *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700, 2007 CarswellBC 2741; affirmed 2012 BCCA 285, 2012 CarswellBC 1860 ("*Tsilhqot'in Nation*"); *Ahousaht Indian Band v. Canada (Attorney General)*, 2007 BCSC 1162, 2007 CarswellBC 1787.

65 See e.g., *Mikisew*, *supra* note 61; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, 2010 CarswellBC 2867, 2010 CarswellBC 2868, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)* [2010] 2 S.C.R. 650; *Wahgoshig First Nation v. Ontario* (2012), 2011 ONSC 7708, 2012 CarswellOnt 489 (S.C.J.); leave to appeal allowed 2012 CarswellOnt 11203 (Div. Ct.).

66 *Haida Nation*, *supra* note 2; *Taku River*, *supra* note 61.

67 *Delgamuukw*, *supra* note 1 at paras. 140–159.

British sovereignty,[68] and that this occupation was exclusive.[69] Showing that an Aboriginal community's claim meets this standard is a high bar and requires well-resourced litigation, which explains the relative paucity of judicial decisions on proving Aboriginal title.[70] Recent case law from the B.C. Court of Appeal has also cast aspersions on whether Aboriginal title in *Delgamuukw* was meant to include large tracts of land, preferring instead the Crown's theory of Aboriginal title consisting only of "postage stamp" pieces of land, such as "salt licks, narrow defiles between mountains and cliffs, particular promontories used for netting salmon, or, in other areas of the country, buffalo jumps."[71] If this vision of Aboriginal title wins the day, it may be that the conflict between Aboriginal title and major resource developments, at least in a litigation setting, will be significantly reduced (though conflicts outside of the courtroom may conversely be significantly increased). The Court of Appeal decision, at the time of writing, is being appealed to the Supreme Court of Canada.

Second, it will be important to distinguish at this stage between the infringements that are the product of federal legislative competence versus those that arise out of provincial legislative competence. It has long been a Canadian constitutional orthodoxy that "Indians and lands reserved for Indians" is an exclusive federal legislative competence in which provincial intrusions are invalid for being *ultra vires*,[72] which has led commentators to remark upon the puzzling discussion in *Delgamuukw* of provincial infringements of Aboriginal title land rights.[73] This debate is important and interesting, and unfortunately beyond the scope of this paper; but it is important to bear it in mind here since it may very well be found that only federal projects can validly infringe on Aboriginal title in the way contemplated here. Indeed, it may be that a pro-exploitation federal government could invoke its jurisdiction over Aboriginal title lands to ride roughshod over provincial opposition to major resource developments.[74] But such speculative digressions aside, the justi-

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68 *Ibid.* at para. 144.

69 *Ibid.* at para. 155.

70 Since *Delgamuukw*, the major decisions on proving Aboriginal title have been *Marshall/Bernard*, *supra* note 5, and *Xeni Gwet'in First Nations v. British Columbia*, 2012 BCCA 285, 2012 CarswellBC 1860, and the trial and appellate decisions that led to those respective decisions. So far, litigation has not yet led to a judicial declaration of Aboriginal title.

71 *William*, *supra* note 8 at para. 221.

72 *Constitution Act, 1867*, s. 91(24); see also *R. v. Morris*, 2006 SCC 59, 2006 CarswellBC 3120, 2006 CarswellBC 3121, paras. 42-43; *Tsilhqot'in Nation*, *supra* note 61 at para. 1001ff, aff'd in *William*, *supra* note 8; Kent McNeil, "Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v British Columbia*" (2010) 8 Indigenous L J 7 at 14–20.

73 *Delgamuukw*, *supra* note 1 at para. 164; but see paras. 179–181 for a view quite at odds with the power of the provinces to infringe Aboriginal title. For commentary, see e.g., McNeil, *supra* note 45 at 62-63.

74 For instance, consider the differing positions of Alberta, British Columbia, and the federal government with respect to the Northern Gateway Pipeline. At the time of writing, British Columbia is still of the position that it will impose its own conditions before it consents to such a development: Christy Clark, "Premier Christy Clark's letter to Al-

fied infringement approach is crucial for considering the legality of federally sanctioned development projects, and, depending on how one interprets *Delgamuukw*, may be important for provincial project as well.

These two caveats aside, we return to the main question of how justified infringement would apply to potential major resource developments. There is no question that compared to *Sparrow*, *Delgamuukw* broadly expanded the scope of valid objectives available to the Crown to justify infringements of Aboriginal title. Where *Sparrow* only permitted infringements such as those intended to conserve the resource in question, *Delgamuukw* permits infringements aimed at "general economic development", and seems to shade quite a ways in to the concept of "public interest" infringement that the *Sparrow* Court had criticized as unworkably vague. There seems to be little question that the massive economic benefits to all of Canada touted by proponents of major resource development projects are meant not only as rhetorical deployments in political debate, but as legal justifications for the infringement of Aboriginal rights and title as well. As it stands, the valid objectives portion of the doctrine of justified infringement in *Delgamuukw* is more of a fig leaf than a shield for the defence of Aboriginal title. This really only leaves the second step of the justification analysis — the honour of the Crown and its fiduciary obligations to Aboriginal peoples — as a serious alternative for the protection of Aboriginal title.

As this paper has argued, the Crown's fiduciary obligations to Aboriginal peoples leads logically to the conclusion that the Crown's infringement of Aboriginal title can only be justified where it infringes only minimally in order to accomplish the Crown's legislative objectives. In the next section, the paper considers how minimal infringement might look when applied to resource developments that infringe on Aboriginal title.

5. IMPLEMENTING MINIMAL INFRINGEMENT

It will be instructive to consider how minimal infringement could be applied in the context of a concrete example. Consider the construction of a pipeline for petroleum products through British Columbia. As currently proposed, the Northern Gateway Pipeline travels through its own right-of-way, for about 1200 km, linking the oil refineries in the Edmonton area to the Pacific, through new port facilities at Kitimat.[75] Such construction will certainly involve the transfer of "Crown land" to the project proponent to assemble the right-of-way. Yet, caveats elaborated on in the previous section aside, this Crown land is almost certain to involve Aboriginal title land: Aboriginal title to the part of British Columbia through which the pipeline is slated to travel has never been the subject of any treaty with First Nations.

At the very least, minimal infringement would suggest that the routing of the pipeline be designed so as to avoid Aboriginal title land, and that any right-of-way transferred to a proponent be only of the minimum width needed to construct and

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berta Premier Alison Redford", available at: <http://www.newsroom.gov.bc.ca/2012/09/premier-christy-clarks-letter-to-alberta-premier-alison-redford.html>.

75 Enbridge, "Project Details — Northern Gateway", available at: <http://www.northerngateway.ca/project-details/>.

operate the pipeline. If an interest in land less than a fee simple is compatible with the construction of such a pipeline, then that is the most that the proponent can hope for: an easement might do the trick. The pipeline would only need an interest confined to a certain depth of land; it would be imperative on the Crown to reserve subsurface rights from the transfer.[76] Minimal infringement seems to require that the exclusive occupation of Aboriginal title lands by an Aboriginal community suffer as little impairment as possible.

But the obligation does not seem to end there. It is helpful to remember that other infringements of the land in the proposed corridor have already occurred. Highways, railways, and hydro corridors have been constructed. It would seem that the Crown's fiduciary obligations would oblige it to consider whether these other infringed parcels might be sufficient to construct a pipeline under these corridors. Would it not be possible to slow down traffic on the Skeena Highway for a few years so that the shoulder lane could house a subsurface pipeline? It would seem that justified infringement would oblige the Crown to at least consider this option, and if it decides that the option is not viable, the onus is on the Crown to justify why such is the case.

In considering these hypothetical scenarios, it may be that the minimal infringement of Aboriginal title and the opinions of environmentalists may not coincide. For example, routing a pipeline to avoid an ancient burial ground may involve increasing its length, and increasing the risk of a leak. In such an instance, orthodoxy suggests that Aboriginal rights, being constitutional rights, would trump the concerns of environmentalists. Such a scenario points to potential points of conflict between communities who might otherwise be allied in their positions on resource developments.

6. THE DUTY TO CONSULT AND ACCOMMODATE

Doctrinal developments aside, the problem of the Crown's unilateral assertion of sovereignty over Canada, and especially over British Columbia remains: much of Aboriginal rights and title, especially in BC, is not subject to treaty, and open to litigation. Resource developments are not meant to ride roughshod over Aboriginal rights while the process for reaching a settlement goes on. For this reason, the Supreme Court of Canada has established the doctrine of the duty to consult and accommodate Aboriginal communities, in the *Haida Nation* case. The scope and strength of this duty is set out as follows:

> Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any

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76 See e.g., *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, 1995 CarswellNat 1279, 1995 CarswellNat 1278, *(*sub nom. *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)* [1995] 4 S.C.R. 344.

> issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding"[. . .].
>
> At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.[77]

The scope of the Crown's duty to consult and accommodate is therefore directly proportional to the seriousness of the infringement of the Aboriginal right. This is exactly the position that the application of the principle of minimal impairment to justified infringement would arrive at when applied to Aboriginal title prior to it being proven in court. In this fashion the conflict between Aboriginal and settler interests is minimized. The thrust of this paper's argument suggests that this symmetry is no accident: the parallels between the doctrine of the scope and strength of the duty to consult and accommodate and the doctrine of justified infringement suggests that the minimal impairment approach is a doctrinally sensible way of articulating the main problem addressed in this article.

7. CONCLUSION

At the heart of the question of the relationship between Aboriginal communities and major resource developments like the Northern Gateway Pipeline, it seems, is this tension between the standard of justified infringement and the standard of free, prior, and informed consent. There should be no tiptoeing around the honest acknowledgement that justified infringement means imposing legislation and policy on Aboriginal communities *against their will*. That this is a feature of the constitutional law of this country is in and of itself a remarkable fact, and one that

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77 *Haida Nation*, *supra* note 2 at paras. 43–45.

should always be at the forefront in considering how the settler state and Aboriginal communities relate to each other. The Supreme Court has recently stated that:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.[78]

The existence of a doctrine of justified infringement begs the question of how good this reconciliation can possibly be if non-consensual state action is to be one of the acceptable approaches for the exercise of state power.

But since justified infringement is an accepted part of Canadian law, the best option for those interested in this kind of reconciliation is to examine the conditions under which infringements can be said to be justified. This paper has tried to show that a doctrinally orthodox approach to this question is a standard of minimal impairment. This approach has the additional advantage of minimizing the impact of these non-consensual impositions. As such, it seems to be the best doctrinal option for the law, if we are to be serious about the reconciliation of the Canadian state's claim to sovereignty and the avowed desire for an honourable relationship with Aboriginal communities.

Considering this, many aspects of major resource developments must be subject to question. With a putative development project (like a pipeline) the routing, the method of construction, and the interest in land to be granted are all open to question. That this may mean higher costs for project proponents should not be alarming or even surprising: the existence of a constitutional right means that the right-holder's interest takes priority over the rights of non-right-holders. To expect this of the Canadian state is neither unreasonable nor unimaginable and is the least that we can do.

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78 *Mikisew*, *supra* note 61 at para. 1.

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